

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

KEVAN DRADY and KATHRYN ANNE TAYLOR

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the MINISTER OF HEALTH,
THE ATTORNEY GENERAL FOR CANADA

Defendant

Proceeding under the *Class Proceedings Act, 1992*

PARTICULARS

The Plaintiffs respond to the Defendants' Demand for Particulars dated the 6th day of August, 2004, without prejudice to their right to maintain their objection that this Demand for Particulars is barred by the Defendants' motion to dismiss heard the 11th day of February, 2003, by the Honourable Mr. Justice Winkler, and Appeal (these Defendants's) heard the 12th day of November, 2003, in the Ontario Court of Appeal, which fresh steps preclude this Demand for Particulars. The Plaintiffs further protest that:

1. the particulars demanded are evidence, and not material facts upon which the Plaintiffs rely;
2. all particulars demanded are known or ought to be known to the Defendants;
3. the Plaintiffs' claims of operational negligence encompass the Defendants' failure to know, record and preserve this very knowledge;
4. the Defendants had a duty to know and record the particulars demanded;

5. the Defendants have generally refused to disclose the information now demanded of the Plaintiffs;
6. the Defendants' refusals of Production and as to relevance on Discovery in other litigation as to their conduct with regard to implantable bio-medical devices estopps them from demanding these particulars from the Plaintiffs; and
7. the Defendants have given Plaintiffs' counsel Access to Information documents which ought to contain particulars of the information now demanded by the Defendants of the Plaintiffs, but which do not.

Without waiver of the foregoing protests, the Plaintiffs further respond to the Demand for Particulars as set forth below, which answers follow the paragraph enumeration pattern of the Defendants's Demand for Particulars dated the 6th day of August, 2004.

1. With respect to paragraphs 18 and 19 of the Fresh as Amended Statement of Claim:
 - a. the name of the manufacturer of the device that was placed in the right temporomandibular joint of Kevan Drady is unknown. No doctor nor hospital has been able to advise who made any implant;
 - b. the Plaintiff was under general anaesthesia at the time of the operation and has no personal knowledge of the procedures followed or the materials used by the surgeon. The Operative Record states that the surgeon placed ". . . a anchovie [sic] of silastic in the joint to gain vertical height." With regard to the Christensen operation, the Plaintiff knows only that the Operative Note states that a ". . . silastic sheet was placed on the left";
 - c. the model, lot, batch, serial number or other detail of the device is

unknown; and

- d. the name of the surgeon who performed the surgery is believed to have been Dr. A.K. Wyllie. The last known address for Dr. A.K. Wyllie, (according to the CPSO website) is 295 Avenue Road, Kingston, Ontario, K7M 1C8.
2. With respect to paragraph 19b of the Fresh as Amended Statement of Claim:
 - a. the name of the manufacturer of the bilateral Christensen TMJ prosthesis is believed to have been TMJ Implants Inc.;
 - b. a copy of the operation sheet reporting the type, model, and serial number of the bilateral Christensen TMJ prosthesis is attached; and
 - c. the surgeon who performed the surgery is believed to have been Dr. Gerald Baker. His contact information is Mount Sinai Hospital, Division of Oral and Maxillofacial Surgery, Department of Dentistry, Suite 412, 600 University Avenue, Toronto, Ontario, M5G 1X5.
 3. With respect to paragraph 22b of the Fresh as Amended Statement of Claim:
 - a. the model, lot, batch, serial number or other detail of the device is unknown. The Operative Note states that a Luhr condylar head and proplast fossa implant were used. These are believed to have been of the Vitek Proplast type;
 - b. the name of the surgeon who performed the surgery is Dr. W. Dobrovolsky. His address is unknown and is not listed in the records of the CPSO nor of the RCDSO available to the Plaintiffs.
 4. With respect to paragraph 24 (i) of the Fresh as Amended Statement of Claim,

the names and/or positions of the individual public servants of the HPB who are referred to therein are within the knowledge of these Defendants.

5. With respect to paragraph 24 (j) of the Fresh as Amended Statement of Claim, the request for names and/or positions of the persons who discarded or removed information from public records is evidence which is or ought to be within the knowledge or possession of Her Majesty's servants.
6. With respect to paragraph 24.1 of the Fresh as Amended Statement of Claim,
 - a. the "evidentiary particulars" have been provided to these Defendants to the best of the Plaintiffs' knowledge, information, and belief in the Statement of Particulars, attached as Appendix 'A' to the Fresh as Amended Statement of Claim;
 - b. the "evidentiary particulars" does not refer to something beyond the Plaintiffs' pleadings; and
 - c. the "evidentiary particulars" have been provided to the best of the Plaintiffs' knowledge with the original Statement of Claim when issued in December 1999 and were served on counsel for these Defendants in December 1999.
7. With respect to paragraph 25 (e) of the Fresh as Amended Statement of Claim,
 - a. particulars of deaths alleged to have occurred as a result of the implantation of a TMJ device are known or ought to be known to these Defendants;
 - b. one Canadian who is believed to have died as a result of her implant in Canada is Anita McCulloch. Her last place of residence was in Winnipeg, Manitoba; and

- c. the type and manufacturer of the device alleged to have caused the death is not known to the Plaintiffs and is subject of an action, *McCulloch v. Orpana et al.*, Court File No. 98 0988 [Thunder Bay], to which HMQ is a Third Party.
8. With respect to paragraph 32.2 of the Fresh as Amended Statement of Claim, as stated in the Fresh as Amended Statement of Claim at paragraph 32.2:
 - a. these Defendants have full knowledge of the details of the documents alleged to have been destroyed or not delivered, and these Defendants have obstructed or unreasonably delayed production and discovery in this regard in related actions thereby estopping these Defendants from demanding such;
 - b. these Defendants have full knowledge of the identity of the individual or department alleged to have been the original creator or caretaker of the documents;
 - c. these Defendants have full knowledge of the type of documents said to have been destroyed;
 - d. these Defendants have full knowledge of the particulars of the time frame in which these documents are said to have been created and destroyed; and
 - e. the “other pending actions” referred to include, but are not limited to, the Breast Implant Class Action, Court File No. 00-CV-184729 CM [Toronto], and the TMJ Implant actions bound by the Rule 37.15 Order of Justice Campbell made in September 2001 for which regulatory negligence is alleged.

9. With respect to paragraph 32.5 of the Fresh as Amended Statement of Claim,
 - a. the name and/or position of the staff in the Bureau of Medical Devices who made the recommendations includes Dr. Pierre Blais, believed to have been a senior scientist, variously on the staff of the National Research Council and Health Canada. Dr. Blais was been cross-examined by counsel for Health Canada on February the 14th, 2003, as to some of the very issues raised in this Demand for Particulars;
 - b. the details as to the context in which the recommendations were made include the result of Dr. Blais's attendance at a Gordon Conference in or about 1978 from which Dr. Blais learned of the dangers of Proplast. Further particulars have already provided to these Defendants in Dr. Blais's Affidavit sworn the 16th of January, 2000, which was provided as part of the Plaintiffs' certification record at the time in May 2000; and
 - c. the persons to whom the recommendations include Drs. R. Campbell, Ajit Das Gupta, and Emmanuel Somers.

10. With respect to paragraph 32.16 of the Fresh as Amended Statement of Claim,
 - a. the identity of the persons within the Bureau who received information from the United States governmental authorities that the devices of the Proplast and Vitek proprietary type may have caused or contributed to a death or serious injury, or may have malfunctioned with the likelihood of causing serious death or injury is not known to the Plaintiffs and is within the knowledge of these Defendants. These Defendants refuse to disclose this information;
 - b. the identity of the United States governmental department or agency believed to have provided this information is within the knowledge of these Defendants. These Defendants refuse to disclose this information; and

- c. the method of communication is within the knowledge of these Defendants. These Defendants refuse to disclose this information.
11. With respect to paragraph 33 of the Fresh as Amended Statement of Claim,
- a. the name and/or position of the individual who made the announcement are within the knowledge of these Defendants; and
 - b. the date and place of the announcement was are within the knowledge of these Defendants.
12. With respect to paragraph 35 of the Fresh as Amended Statement of Claim,
- a. the name and address of the solicitor who was in charge of the professional liability program at the Royal College of Dental Surgeons of Ontario who advised Her Majesty that the United States governmental authorities had issued warnings about devices and that a general recall and warning was necessary is James MacMillan, a Solicitor of this Court practicing at Toronto (1669 Bayview Avenue, Toronto, Ontario, M4G 4E1);
 - b. Mr. MacMillan advises that he does not recall the name of the public servant with whom he communicated; and
 - c. Mr. MacMillan advises that the method of communication was by telephone.
13. With respect to paragraph 43 of the Fresh as Amended Statement of Claim,
- a. the public inquiries referred to therein include, but are not limited to the inquiries made by individual Canadians including Judith Logan, and Judy Brescacin. Details of other public inquiries are within the knowledge of

these Defendants; and

- b. details of the information received are within the knowledge of these Defendants, and have not been disclosed.
14. With respect to paragraph 55 of the Fresh as Amended Statement of Claim,
- a. the details of the policies referred to therein are within the knowledge of these Defendants and include, but are not limited to, those based on the *Food and Drugs Act*, R.S.C. 1985, F-27, the *Canada Health Act*, R.S.C. 1985, c. C-6, and the *Medical Devices Regulations*; and
 - b. the dates and places of the advertisements referred to are within the knowledge of these Defendants.
15. With respect to paragraph 60.1 of the Fresh as Amended Statement of Claim,
- a. as stated in the Fresh as Amended Statement of Claim at paragraph 32.2, these Defendants have full knowledge of the identities of the Assistant Deputy Ministers and Crown officials referred to;
 - b. as stated in the Fresh as Amended Statement of Claim at paragraph 32.2, these Defendants have full knowledge of the time frame during which the alleged culling, altering, or destroying of records or documents said to have occurred;
 - c. as stated in the Fresh as Amended Statement of Claim at paragraph 32.2, these Defendants have full knowledge of the files, records, and documents referred to; and
 - d. as stated in the Fresh as Amended Statement of Claim at paragraph 32.2, these Defendants have full knowledge of these documents which were

reclassified, culled, altered, or destroyed and their relevance to this action.

16. With respect to paragraph 60.2 of the Fresh as Amended Statement of Claim,
 - a. the type of information alleged to have been received by these Defendants is the information concerning these actions and such other similar actions to which these Defendants are or may be a party;
 - b. the time frame during which the information is alleged to have been received is from 1994 to the present; and
 - c. the time frame during which the information is alleged to have been suppressed is from 1994 to the present.

17. With respect to paragraph 92 of the Fresh as Amended Statement of Claim,
 - a. the particulars of the suicides in Canada alleged to have occurred wholly or partially as a result of the failure of an alloplastic TMJ implant include an attempted (and nearly successful) suicide in an apparent pain - prescription drug adverse reaction psychosis;
 - b. since the individual did not die, the name and address of this person is being withheld; and
 - c. the type of device alleged to have cause or contributed to the suicide was a Christensen TMJ implant.

18. With respect to paragraph 44 of Appendix 'A',
 - a. the name(s) and/or position(s) of the person(s) who ordered the destruction of the documents referred to are within the knowledge of these Defendants;

- b. the documents alleged to have been destroyed are within the knowledge of these Defendants;
- c. the date(s) and place(s) of destruction are within the knowledge of these Defendants; and
- d. the details of how these documents relate to this action are within the knowledge of these Defendants.

18 August 2004

FROM: LEGGE & LEGGE
Barristers and Solicitors
800 - 65 St. Clair Avenue East
Toronto, Ontario M4T 2Y3
(John Legge, LSUC # 23777W)
Telephone: (416) 923-1776
Facsimile: (416) 925-5344
Solicitors for the Plaintiffs

TO: Department of Justice Canada
Senior General Counsel
(Christopher A. Amerasinghe, Q.C.)
2 First Canadian Place, Suite 3400
Toronto, Ontario M5K 1K6
Telephone: (416) 973-2271
Facsimile: (416) 973-3004
Solicitors for the Defendants, HMQ

AND TO: Lerners LLP
Barristers and Solicitors
Suite 2400 - 130 Adelaide Street West
Toronto, Ontario M5H 5P3
(James Newland, Esq.)
Telephone: (416) 601-2640
Facsimile: (416) 601-2743
Solicitors for the Ontario Health Insurance Plan

LOG IN ID:

DATE 14-9-99

CAI CE 0344
STERILE R
TYP
MUL

Attach to Patient's Chart
QIMT IMPLANTS INC.
Universal Metal Condylar Prosthesis - 55mm Length
REF R/L-MCP-55
LOT 7255 Qty: 1
2004-03

ADRESSOGRAPHE

DR Baker
80 -324-390 2000-151487
DR DY, KEVAN
H

PROCEDURE Bilateral Tms
w/ Christensen Appliance

THERABITE 4/1

REF AMPLABLES

GROET NUMMERS

Attach to Patient's Chart
QIMT IMPLANTS INC.
Condylar Sizers Universal
REF SCPR/L-001
LOT 7259 Qty: 1
2004-06

CE 0344
STERILE R
QIMT IMPLANTS INC.
Condylar Bone Screws
(2) 2.7x08mm, (5) 2.7x10mm
REF CS027-08/10
LOT 7420 Qty: 1
2004-03

CE 0344
STERILE R
QIMT IMPLANTS INC.
Fossa Drill - Diamond
1.6mm/10mm
REF FDD016-10
LOT 7719 Qty: 1
2004-03

Attach to Patient's Chart
Sterile
Fossa-Eminence Prosthesis-Right
Part Number: FER-08
Lot Number: 5628
Qty: 1 Exp Date: 02/03

CE 0344
STERILE R
QIMT IMPLANTS INC.
Condylar Drill - Diamond
2.0mm/12mm
REF CDD020-12
LOT 7795 Qty: 1
2004-07

CE 0344
STERILE R
QIMT IMPLANTS INC.
Fossa Bone Screws
(1) 2.0x06mm, (4) 2.0x08mm
REF FS020-06/08
LOT 7362 Qty: 1
2004-01

Attach to Patient's Chart
QIMT IMPLANTS INC.
Fossa Bone Screws
(1) 2.0x06mm, (4) 2.0x08mm
REF FS020-06/08
LOT 7362 Qty: 1
2004-01

CE 0344
STERILE R
QIMT IMPLANTS INC.
Fossa Drill - Diamond
1.6mm/10mm
REF FDD016-10
LOT 7719 Qty: 1
2004-03

CE 0344
STERILE R
QIMT IMPLANTS INC.
Condylar Bone Screws
(2) 2.7x08mm, (5) 2.7x10mm
REF CS027-08/10
LOT 7420 Qty: 1
2004-03

Attach to Patient's Chart
QIMT IMPLANTS INC.
Emergency Fossa Bone Screw
2.3x10mm
REF FS023-10
LOT 7079 Qty: 1
2004-04

CE 0344
STERILE R
QIMT IMPLANTS INC.
Condylar Drill - Diamond
2.0mm/12mm
REF CDD020-12
LOT 7795 Qty: 1
2004-07

Attach to Patient's Chart
Sterile
Fossa-Eminence Prosthesis-Left
Part Number: FEL-15
Lot Number: 0636
Qty: 1 Exp Date: 12/99

Attach to Patient's Chart
QIMT IMPLANTS INC.
Universal Metal Condylar Prosthesis - 55mm Length
REF R/L-MCP-55
LOT 7255 Qty: 1
2004-03

DRADY and TAYLOR

- and - HER MAJESTY THE QUEEN I.R.O. CANADA, as represented by the
MINISTER OF HEALTH, THE ATTORNEY GENERAL FOR CANADA

Plaintiffs

Defendant

Court file no. 99 CV 181819 [TORONTO]

Ontario
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

PARTICULARS

LEGGE & LEGGE
Barristers and Solicitors
800 -65 St. Clair Ave. East
Toronto, Ontario M4T 2Y3
(John Legge, LSUC #23777W)
Telephone: (416) 923-1776
Facsimile: (416) 925-5344
Solicitors for the plaintiffs