No. S-150767
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

SHALINI DEVI SARUP

PLAINTIFF

AND

JOHNSON & JOHNSON INC., JOHNSON & JOHNSON, ETHICON, INC., GODWIN EBERE OBIOHA and FRASER HEALTH AUTHORITY coba RIDGE MEADOWS HOSPITAL

DEFENDANTS

APPLICATION RESPONSE

Application response of: Johnson & Johnson Inc., Johnson & Johnson, and Ethicon Inc., (the "**Ethicon Defendants**")

THIS IS A RESPONSE TO the notice of application of the Plaintiff Shalini Devi Sarup filed August 28, 2020.

Part 1: ORDER CONSENTED TO

The Ethicon Defendants consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: None.

Part 2: ORDERS OPPOSED

The Ethicon Defendants oppose the granting of the orders set out in paragraphs 1 and 2 of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Ethicon Defendants take no position on the granting of the orders set out in no paragraphs of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

Overview

1. The Plaintiff seeks an order permitting her to selectively admit "findings of fact" from an Australian class action and Californian regulatory action as evidence in this action. The

circumstances of those foreign decisions and this case do not warrant the extreme relief of finding that it would be an abuse of process to require the Plaintiff to prove her case. None of the proposed findings are final; both the Australia and California judgements are under appeal. Furthermore, each of these two foreign proceedings involve different devices, different time periods, different causes of action, different law and different parties than the Plaintiff's action. Neither case involved the trial of an individual plaintiff's claim for negligence in the design or the warnings provided for the specific TVT Secur device implanted in the Plaintiff.

2. Admitting any findings from vastly different foreign proceedings as evidence in this individual action is not in the interests of justice. The judgments in the Australia and California proceedings were rendered in litigation between different parties, in a different regulatory context with different specific factual and legal issues to be determined by those courts. Evidence was collected and presented to the foreign courts for the particular context of those proceedings. Given the nature and breadth of those proceedings, it is patently obvious that strategic decisions around what evidence to lead regarding one specific device (among many) across many years at issue would be different than the strategic decisions that will be made about the evidence to lead in a trial involving one specific device implanted in a specific plaintiff at a single point in time. The Plaintiff in this case wishes to cherry-pick selected "findings" from the resulting judgments, while ignoring the fundamentally different context of the overall proceedings, and the lack of finality of those decisions. Additionally, some of the "findings" that the Plaintiff wishes to have admitted into evidence are not "findings" or conclusions of the foreign court at all. Moreover, the Plaintiff has ignored that when individual cases specific to the TVT Secur have been tried in the U.S. (before juries), they have sometimes resulted in defense verdicts—albeit still applying different law and procedures.

3. Admitting any "findings" from foreign proceedings as evidence in this action would not be efficient nor practical. As this Court held in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, when considering the *very same relief as is sought by the Plaintiff here*: "[t]he admitting of facts on the massive and wholesale basis sought here will undoubtedly be fraught with unanticipated difficulties. It will not make for a fair or efficient trial." This is highlighted by the fact that the Plaintiff has not clearly indicated in her application whether she seeks an order that the findings are binding, or rebuttable evidence, or simply tendered as some evidence of the fact that such finding was made by a foreign court. If the decisions are only offered as some evidence of the contents, then they are inadmissible hearsay and there would be no efficiency gained from the admission of the evidence in any event. If the Plaintiff asserts that it would be an abuse of process to permit the Ethicon Defendants to re-litigate these "findings", then the potential prejudice is substantial and this Court ought not to preclude these defendants from defending the Plaintiff's claims, particularly where the foreign decisions are not final and one of the defendants (Johnson & Johnson Inc.) was not a party to those foreign proceedings.

Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2014 BCSC 1281, para. 48

4. The Plaintiff also seeks an order on this application requiring the Ethicon Defendants to list affidavits and transcripts from the Australia class action proceedings and from U.S. multi-district litigation ("**MDL**"). There is no basis to require the Ethicon Defendants to list irrelevant documents nor list documents that it does not possess or control. Much of this evidence concerns devices, time periods, and injuries that are not at issue in this action and the inclusion of voluminous affidavits and transcripts on irrelevant facts is disproportionate.

This Action

5. The Plaintiff's action concerns damages sought in respect of her surgical treatment of stress urinary incontinence ("**SUI**"), which involved the implant of a polypropylene tension-free vaginal tape (sometimes referred to generally as pelvic mesh devices) known as TVT Secur. The Plaintiff was implanted with a TVT Secur device in April 2012. The Plaintiff alleges that her TVT Secur device was negligently designed and manufactured and that the Ethicon Defendants breached their duty of care by failing to warn the Plaintiff of risks arising from the implant of a TVT Secur device.

Third Amended Notice of Civil Claim, Part 1, para. 20; Part 3, para. 1

6. The Plaintiff also asserts claims in negligence as against Dr. Godwin Obioha ("**Dr. Obioha**"), the surgeon who implanted the TVT Secur device, and Fraser Health Authority coba Ridge Meadows (the "**Hospital**"), where Dr. Obioha performed the surgery.

Third Amended Notice of Civil Claim, Part 1, para. 20

TVT-Secur Device

7. The TVT Secur is one of a number of pelvic mesh devices that have been developed by the Ethicon Defendants. Some of the pelvic mesh devices intended to treat SUI include TVT Secur, TVT, TVT Obturator, TVT Exact and TVT Abbrevo. Pelvic mesh devices intended to treat pelvic organ prolapse ("**POP**"), which is an entirely different condition from SUI, include Gynemesh PS, Prolift, Prolift+M, and Prosima. There are significant differences between each of the pelvic mesh devices in terms of the dimensions, construction, accompanying implant guides (trocars), implant technique, and instructions for use.

Affidavit #2 of Shalini Sarup made August 27, 2020 ("**Sarup Affidavit #2**"), Exhibit E at pp. 30 and 33, Summary of the Australia Decision at pp. 1 and 4; *Gill v. Ethicon Sarl (No 5)* [2019] FCA 1905, paras. 71-106 and 131-182

The Australia Proceeding: *Gill v. Ethicon Sarl*

8. On November 21, 2019, Katzmann J. of the Federal Court of Australia released her reasons in *Gill v. Ethicon Sarl (No 5)* [2019] FCA 1905 (the "**Australia Decision**"). The Plaintiff seeks to have certain findings from the Australia Decision admitted into evidence in this action despite the many differences between this action and the Australian class action.

9. The Australia Decision:

(a) is not a final decision and is under appeal;

(b) relates to a class action regarding nine different pelvic mesh devices, including the TVT Secur, TVT, TVT Obturator, TVT Exact and TVT Abbrevo, which are intended to treat SUI, as well as Gynemesh PS, Prolift, Prolift+M, and Prosima, which are intended to treat POP;

(c) involves the claims of all Australians implanted with nine different pelvic mesh devices from 1999 to 2017;

(d) is predicated on interrelated statutory causes of action not available nor pleaded in this action;

(e) applies standards drawn from a different regulatory regime governing the sale, safety and testing of medical products, which informs the applicable standard of care;

(f) involved three representative plaintiffs who have very different personal circumstances from this Plaintiff and none of whom were implanted with a TVT Secur device; and

(g) did not involve all the same defendants as this action, including the Canadian defendant Johnson & Johnson Inc.

Affidavit #2 of Sandra Brown-John made October 22, 2020 ("**Brown-John Affidavit #2**"), Exhibit E, Amended Notice of Appeal and Exhibit B at pp. 59-63, Fifth Further Amended Statement of Claim at pp. 2-6

Sarup Affidavit #2, para. 11 and Exhibit E at pp. 30-36, Summary of the Australia Decision at pp. 1-7; *Gill v. Ethicon Sarl (No 5)* [2019] FCA 1905, paras. 13-17, 71-106, 131-182, 1337-1547 and 3113-3607

10. The errors raised in the notice of appeal of the Australia Decision relate to the findings the Plaintiff seeks to admit in this action. The grounds for appeal include that the judge erred by failing to give weight to the evidence of pelvic surgeons, wrongly preferred evidence of non-clinical experts and did not consider the differences between different devices.

Brown-John Affidavit #2, Exhibit E at pp. 160, 163 and 169-170, Amended Notice of Appeal at pp. 3, 6 and 12-13

The California Proceeding: *California v. Johnson and Johnson*

11. On January 30, 2020, Sturgeon J. of the California County Court of San Diego released his Statement of Decision in *The People of the State of California v. Johnson and Johnson, Ethicon Inc.* (the **"California Decision"**). The Plaintiff seeks to have certain findings from the California Decision admitted into evidence in this action despite the many differences between this action and the California consumer protection proceeding by the Attorney General.

12. The California Decision:

(a) is not a final decision and is under appeal;

(b) relates to nine different pelvic mesh devices, including the TVT Secur, TVT, TVT Obturator, TVT Exact and TVT Abbrevo, which are intended to treat SUI, as well as Gynemesh, Prolift, Prolift+M, and Prosima devices intended to treat POP;

(c) involves claims regarding marketing practices in California from 1998 to 2019;

(d) is a form of regulatory action brought by the State of California for breach of California's *Unfair Competition Law* and *False Advertising Law*, consumer protection legislation that are not at issue in this action;

(e) applied statutory legal standards that differ substantially from common law tort doctrines, and that allow for findings of liability in the absence of causation, reliance, or damages;

(f) concerned marketing practices and disclosure specific to California doctors and consumers;

(g) involved a state-party plaintiff, the People of the State of California, and no individual claimant; and

(h) did not involve all the same defendants as this action, including the Canadian defendant Johnson & Johnson Inc.

Brown-John Affidavit #2, Exhibit H, Defendants' Notice of Appeal and Exhibit F at pp. 168-169, 181 and 189-190, Complaint for Permanent Injunction, Civil Penalties, and Other Equitable Relief, paras. 6-8, 23, 46, and 51

California Decision at pp. 2-4, 10, 62, and 87

U.S. Multi-District Litigation Deposition Transcripts

13. U.S. MDL proceedings are a procedural vehicle available in the United States that are designed to handle large volumes of civil actions involving one or more common questions of fact. Unlike class actions, U.S. MDL proceedings are a vehicle to coordinate common discovery for individual actions of individual claimants, which are then returned to their original of "home" court for trial of the action.

14. The U.S. MDL transcripts sought by the Plaintiff were made in the context of U.S. Federal rules and procedures for the collection of evidence. U.S. MDL depositions are not bound by the same restrictions on the number of witnesses and the length of the examination as discovery in B.C. An employee that is examined in the U.S. is not the corporate representative of the party in the same manner as he or she would be if the employee were examined under the B.C. *Supreme Court Civil Rules* and usually does not have any obligation to inform him or herself prior to attendance.

15. Further, the *Federal Rules of Civil Procedure* in the U.S. require that a person examined must answer on the record all questions that are posed during an examination, irrespective of whether counsel has stated an objection to the question on the record and regardless of whether that objection is proper or not (except for objections made pursuant to the terms of a court order or made on the basis of privilege, bad faith, unreasonable annoyance, or abuse). Essentially, questions that would be properly refused on discovery under the B.C. *Supreme Court Civil Rules* must be answered and therefore U.S. MDL transcripts will include answers to improper questions.

USCS Fed. R. Civ. P. Rules 30 (c) (2), 32(a)(1)(C) and 32(d)(3)

16. The transcripts the Plaintiff seeks to have listed are from MDL proceedings that involve various mesh devices—not just the TVT Secur. There are hundreds of deposition transcripts that have been taken in the U.S. pelvic mesh MDL. Many of the U.S. MDL transcripts are from expert witnesses, treating physicians, or other third parties. It would be burdensome and disproportionate to the matters at issue in this specific action by Ms. Sarup regarding the implant of a single device

(TVT Secur) to require the Ethicon Defendants to list and produce all the transcripts in the U.S. MDL proceedings.

17. There have been jury trials of in the U.S. of actions by individuals implanted with the TVT Secur device, three of which resulted in jury verdicts in favour of Ethicon.

> Brown-John Affidavit #2, Exhibit J, Trial Work Sheet in *Adkins v. Johnson & Johnson et al.*; Exhibit K, Verdict Form in *Cheryl Lankston v. Ethicon, Inc./Johnson & Johnson*; and Exhibit L Trial Work Sheet in *Krolikowski v. Ethicon*

Australian Affidavits and Transcripts

18. The Plaintiff has requested an order requiring the Ethicon Defendants to list the affidavits, which are provided in lieu of direct examination, and cross-examination transcripts of seven witnesses who provided evidence in the Australia *Gill* class action. The Plaintiff erroneously asserts in her application that the affidavits and transcripts involve testimony by "past or present servants and agents of J&J", but in fact, six out of the seven witnesses for which the Plaintiff seeks affidavits and transcripts from the Australia proceedings are for expert witnesses, all of whom were tendered by the plaintiffs/applicants. The lone non-expert witness is Piet Hinoul, whom is a former employee of Ethicon Inc. Dr. Hinoul is also included on the list of U.S. MDL deposition transcripts that the Plaintiff has requested that the Ethicon Defendants list and produce. There is nothing that indicates that Mr. Hinoul's testimony in the Australia proceeding provides any information relevant to this claim by this specific plaintiff regarding her implant of a TVT Secur device which is not already provided in his depositions in the U.S. MDL proceeding.

19. The cross-examination transcripts requested by the Plaintiff are covered by copyright law in Australia. Copies cannot be made and disclosed to the Plaintiff (or anyone else) by Ethicon Inc. without paying the required fee for the rights for that use.

> Brown-John Affidavit #2, Exhibit I, FAQ from Auscript's website

Part 5: LEGAL BASIS

Issue 1: Admissibility of Foreign Decisions

20. The statements from the Australia Decision and California Decision listed in Schedule A of the Plaintiff's Notice of Application (the "**Foreign Findings**") are not admissible as evidence in this action for the following reasons:

(a) the Foreign Findings are not final, as the decisions are under appeal;

(b) this action is not a re-litigation of the proceedings in Australia and California, as the issues, applicable law, and parties are different, among other things;

(c) the administration of justice would not be brought into disrepute if the Foreign Findings are not admitted as evidence in this action; and

(d) admission of the Foreign Findings would not be practical nor efficient, rather it would complicate the trial of this Plaintiff's action.

21. The onus is on the Plaintiff to show that the Foreign Findings should be admitted and adopted as evidence at trial on the basis of the abuse of process doctrine. The onus to establish an abuse of process is "heavy" and the abuse must be "plain and obvious". The Plaintiff has not and cannot meet that heavy burden here.

Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2014 BCSC 1281, paras. 11 and 33

Hare v. Lit, 2013 BCSC 33, paras. 22-25

a) The Foreign Findings are not Final

22. The decision that is allegedly being re-litigated by a party must be final in order for re-litigation to amount to an abuse of process.

Skender v. Farley, 2007 BCCA 629, para. 41 (concurrence of Smith, J.A.)

The Catalyst Capital Group Inc. v. VimpelCom Ltd, 2019 ONCA 354, para. 62, leave to appeal ref'd [2019] S.C.C.A. No. 284

23. The finality requirement for abuse of process is rooted in the well-established and related doctrine of issue estoppel. It is a precondition to the application of issue estoppel that the first proceeding be a final decision. Abuse of process is a more flexible doctrine than issue estoppel. However, there is no reason to relax the general requirement of finality in this case.

Sanofi-Aventis Canada Inc. v. Canada (Minister of Health), 2007 FC 545, paras. 75-80

Toronto (City) v. CUPE, Local 79, 2003 SCC 63, para. 53

24. The importance of ensuring that the finality of a foreign decision is secured before it has domestic effect in Canada is underscored by the fact that finality is a pre-condition for registration and enforcement of a foreign judgment under the *Court Order Enforcement Act*.

Court Order Enforcement Act, R.S.B.C. 1996, c. 78, s. 29 (6)(e)

25. There is no justification for dispensing with the requirement of finality on the facts of this case. No reason or argument has been provided by the Plaintiff to justify the admission of non-final findings from a foreign court as evidence in this case. The comments in *British Columbia (Director of Civil Forfeiture) v. Sanghera* that finality may not be required for an abuse of process by re-litigation, which are relied upon by the Plaintiff, are *obiter*. In fact, Voith J. ultimately held that the absence of finality was one of three reasons not to apply the abuse of process doctrine in that case, stating: "I am not satisfied that the re-litigation of CRA Determination amounts to an abuse of process given that [...] (c) the CRA Determination is not final". The purposes of the abuse of process doctrine, prior judicial decisions, and principles of fairness require that a foreign decision be final and the appeal process concluded or exhausted before its findings be admitted in a BC court via the doctrine of abuse of process.

British Columbia (Director of Civil Forfeiture) v Sanghera, 2017 BCSC 1519, paras. 86-87

b) This Action Does Not Constitute "Re-litigation"

26. A precondition to finding an abuse of process by re-litigation is that the *same issues* are re-litigated. Two proceedings involving *similar issues* do not necessarily give rise to abusive re-litigation. As outlined in the Factual Basis section, above, there are substantial differences

between the legal proceedings that led to the Australia Decision and the California Decision and this case: there are different medical devices, different time periods, different legal claims, different regulatory contexts, and different parties at issue in the proceedings. Perhaps most significantly, both the Australian class action and California regulatory action by the state Attorney General involve statutory claims that are legally distinct from the tort claims advanced by the Plaintiff in this action, which informed the evidence led, arguments made, and findings of the foreign courts.

> *British Columbia (Director of Civil Forfeiture) v. Sanghera*, 2017 BCSC 1519, para. 77
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> *The Catalyst Capital Group Inc. v. VimpelCom Ltd*, 2019 ONCA 354, para. 65, leave to appeal ref'd [2019] S.C.C.A. No. 284
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> *Tzeachten First Nation v. Canada Lands Co.*, 2011 BCSC 1031, paras. 9, 32 and 37
>
> *Fraser v. Westminer Canada Ltd.*, [1996] N.S.J. No. 268 (NS SC), para. 26, rev'd in part, [1996] N.S.J. No. 540 (C.A.)
>
> See also for the causation standard in negligence: *Wise v. Abbott*, 2016 ONSC 7275

27. Re-litigation occurs when findings that were "fundamental" to the decision arrived at in the earlier proceeding are put in issue in a second proceeding. Re-litigation does not occur if the finding arose collaterally or incidentally in earlier proceedings.

> *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, para. 24 (in the context of issue estoppel)

28. Further, Johnson & Johnson Inc., the Canadian corporate defendant in this case, was not a party to either the Australia class action proceedings or California proceedings. A party should not be bound by a proceeding in which it had no opportunity to participate.

> *International Fiduciary Corp. S.A. (Receiver of) v. Bryson*, 2014 BCSC 522, paras. 4 and 26 var'd on other grounds, 2014 BCCA 433
>
> See also: *Chiang (Trustee of) v. Chiang*, 2011 ONSC 1989

29. Even if the foreign decisions were final, this Court should follow the decision of Myers J. in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*. In *Pro-Sys,* the plaintiffs sought to admit the findings of fact from U.S. and European proceedings as evidence in a BC class action on the basis of abuse of process. Justice Myers refused to admit the findings as evidence, concluding, on among other things:

(a) the legal issues in the U.S. and European proceedings were different than in the BC class action, which was significant because factual conclusions "are not made in a vacuum" but are made with the underlying legal issues in mind; and

(b) the regulatory regimes in Canada, the U.S. and Europe are different.

30. As in *Pro-Sys,* the findings in the Australia Decision and California Decision were made in a different legal and factual context than are applicable in this action. They are also not final decisions and did not involve the Canadian defendant in this action. Among the differences between this action and the Foreign Findings drawn from the Australia and California proceedings are the following:

(a) the Foreign Findings involve many pelvic mesh devices that are not at issue in this Plaintiff's action, which only concerns the TVT Secur device;

(b) the Foreign Findings involve a longer time period than is at issue in this action;

(c) the Foreign Findings involve different causes of action and both involve statutory causes of action not applicable to this action;

(d) the Foreign Findings were made with reference to standards set out by different regulatory regimes;

(e) the Foreign Findings involve different plaintiffs in different circumstances, one of which was a governmental plaintiff; and

(f) the Foreign Findings involve different defendants and the Canadian defendant in this action was not a party to either proceeding giving rise to the Foreign Findings.

c) The Administration of Justice is not Brought into Disrepute

31. Abuse of process by way of re-litigation is an extraordinary remedy. As stated by McLachlin C.J. in *R. v. Mahalingan*, "successful reliance on the doctrine will be extremely rare". The circumstances giving rise to the abuse of process must be plain and obvious or beyond doubt.

R. v. Mahalingan, 2008 SCC 63, para. 42

British Columbia (Director of Civil Forfeiture) v. Sanghera, 2017 BCSC 1519, para. 76

32. Further, re-litigation alone is not an abuse of process. There must be re-litigation and "something more" in order for an abuse of process to arise that would bring the administration of justice into disrepute. In some cases, re-litigation actually enhances the integrity of the adjudicative process.

British Columbia (Director of Civil Forfeiture) v. Sanghera, 2017 BCSC 1519, para. 78

Toronto (City) v. CUPE, Local 79, 2003 SCC 63, para. 52

33. The Plaintiff's application relies on case law regarding the admission of prior criminal convictions to prevent an abuse of process. Both *Toronto (City) v. CUPE, Local 79* and *Bank of China v. Fan* involve prior criminal acts by individuals who later sought to argue that their criminal acts did not occur in subsequent proceedings. In those cases, the subsequent proceedings called into question the authority and finality of the underlying criminal conviction against an individual, where the criminal conviction related to the very same acts at issue in the civil proceeding. Further, many provinces have statutory provisions providing for the proof of prior criminal convictions in subsequent proceedings. Section 15 of the B.C. *Evidence* Act, for example, provides such a process for proving prior criminal convictions.

Evidence Act, RSBC 1996, c 124, s. 15

Toronto (City) v. C.U.P.E., Local 79, [2001] O.J. No. 3239 (C.A.), para. 82, aff'd 2003 SCC 63

Bank of China v. Fan, 2014 BCSC 2043, paras. 6, 8, 31-34

Bank of China v. Fan, 2015 BCSC 590

34. Criminal convictions or verdicts are also of an entirely different character than the "findings of fact" that the Plaintiff seeks to have admitted into evidence in this case, many of which are not "findings" by the foreign court at all. The Plaintiff's application argues that verdicts are opinions that "are the considered result of informed deliberations and, as a result, carry a high degree of reliability." But in the Australia Decision—which is approximately 1500 pages—many of the statements are mere recitations of the evidence presented at trial or observations that were not necessary to the outcome of the action and do not have the reliability of a verdict. Many of the excerpts from the foreign decisions included in the Plaintiff's Schedule A are clearly, on their face, not "findings" in the sense of carefully considered and deliberated conclusions of the foreign court, while the reliability of other statements is put into question by other aspects of the decision.

Notice of Application, Part 3, para. 8

35. Further, the Plaintiff seeks to admit statements from the Australia Decision and California Decision but the TVT Secur was only one of many devices at issue in those proceedings. The only individual trials regarding the TVT Secur device have occurred in the United States, and in three of those trials the jury returned verdicts in favour of the defendants. In these circumstances, where Ethicon Inc. has been successful in defending individual cases by plaintiffs who received a TVT Secur device, the abuse of process doctrine ought not to be applied to admit statements from two foreign decisions, that were not specific to the TVT Secur device, which are under appeal.

Brown-John Affidavit #2, Exhibit J, Trial Work Sheet in *Adkins v. Johnson & Johnson et al.*; Exhibit K, Verdict Form in *Cheryl Lankston v. Ethicon, Inc./Johnson & Johnson*; and Exhibit L Trial Work Sheet in *Krolikowski v. Ethicon*

36. In this case, there is no unfairness to the Plaintiff if she is required to call evidence to prove her allegations that the Ethicon Defendants were negligent in the design or manufacture of the TVT Secur device, or that there were inadequate warnings provided, all of which will be considered from the date of the implant of her device (i.e. April 2012) and not at any other point in time. Plaintiffs have the burden of proving their claims in the normal course; no additional requirement of proof is imposed on the Plaintiff if the Foreign Findings are not admitted into evidence. On other hand, there is significant unfairness to the Ethicon Defendants who will be potentially bound by findings that were made in the context of proceedings involving many devices, many claimants, lengthier time periods and different causes of action, and, in the case of Johnson & Johnson Inc., did not participate in the foreign proceedings.

d) Admission of the Foreign Findings is not Efficient

37. There will be no efficiency or judicial economy gained in the conduct of the trial if the Foreign Findings are admitted. As Myers J. found in *Pro-Sys,* the admission of "facts" from foreign decisions will make the trial less efficient and more complicated:

> [...] **I do not think that the adoption of the foreign facts will make this trial more efficient. Rather, it will generate perpetual debates about the legal context in which the facts were found and how they should be interpreted**, which in turn will involve comparisons of the competition law regimes in the various jurisdictions. Furthermore, one can easily foresee debates over the boundaries and effects of the admitted facts given that they only deal with part of the time frame involved in this litigation.

> **Those are only the "known unknowns". The admitting of facts on the massive and wholesale basis sought here will undoubtedly be fraught with unanticipated difficulties. It will not make for a fair or efficient trial.** This case and the facts sought to be admitted are not analogous to a car-crash case, as argued by Pro-Sys.
>
> *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2014 BCSC 1281, paras. 47-48 (emphasis added)

38. Rather, as Justice Myers acknowledged, there are significant difficulties entailed in trying to rely on excerpts from decisions of foreign courts where the underlying facts and legal issues do not correlate exactly with the case being litigated in this Court. The potential implications of the different regulatory context (which is just as relevant, if not more relevant, for medical devices as for computer software) in which the foreign court's findings are made do not stop when the trial starts. Disputes regarding the interpretation and application of the excerpts from the Australia Decision and California Decision would continue at trial because the statements are taken out of context—out of the context of the totality of the Australia Decision (~1500 pages) and the California Decision (128 pages) and out of the very particular, different legal and regulatory context in which those cases were litigated and the decisions rendered.

39. The Plaintiff's Application does not identify any particular efficiencies from the admission of the Foreign Findings, in terms of specific witnesses (whether foreign or not) that would not need to attend trial or any substantial issues in the case on which evidence would not be required to be led at trial. To the contrary, if the Foreign Findings set out at Schedule A to the Plaintiff's Application are admitted, the Ethicon Defendants will be required to adduce evidence and/or make argument to put those isolated excerpts into context for this Court and to explain how they fit with the witness testimony, expert opinions, regulatory scheme, and legal claims relevant to this case.

40. Finally, if this Court is prepared to admit some of the findings from the foreign decisions that the Plaintiff seeks to admit, an issue will arise regarding what findings or conclusions from those same decisions Ethicon Inc. may be entitled to rely on at trial. The Plaintiff here has cherry-picked just a few excerpts from each decision that favour her case, but there are findings in the Australia Decision and California Decision that are favourable to Ethicon Inc. in this specific case and detrimental to the Plaintiff's case. For example, the Plaintiff has served an expert report from Dr. Michael Thomas Margolis. Dr. Margolis testified in the *Gill* class action, and in the Australia Decision Katzmann J. made findings that are adverse to Dr. Margolis's credibility and the admissibility of his opinions, including that he was "an unsatisfactory witness", "given to overstatement", "quoted selectively from references and, at times, wrongly", he "obstinately stood his ground" when questioned, and no weight was ultimately placed on his opinions unless they were supported by other evidence.

> Sarup Affidavit #2, Exhibit E, *Gill v. Ethicon Sarl (No 5)* [2019] FCA 1905, para. 3445

Issue 2: Listing of Foreign Transcripts & Affidavits

41. The Plaintiff seeks an order requiring the Ethicon Defendants to list the transcripts from U.S. MDL Proceedings identified in Schedule B of the Plaintiff's Notice of Application (the "**MDL Transcripts**") as well as the affidavits (in lieu of direct examination) and cross-examination

transcripts from seven witnesses who testified in the Australian class action proceedings that resulted in the Australia Decision (the "**Australian Evidence**").

42. No rulings on the admissibility of the foreign transcripts are sought and none should be made on this application. It would be premature to make any orders in respect to the admissibility and use of foreign affidavits and transcripts at trial. There are strong arguments that the U.S. MDL Transcripts and Australian Evidence will not be admissible at trial. In *Stanway v. Wyeth Canada Inc.*, a product liability class action where the plaintiff sought to admit certain deposition and trial transcripts from U.S. proceedings, Gropper J. refused to admit the transcripts into evidence at trial because:

(a) the transcripts were presumptively hearsay;

(b) the parties to the U.S. proceedings and the Canadian proceedings were different;

(c) the issues in the U.S. proceedings and the Canadian proceedings were "not identical";

(d) "the bridge to the Canadian regulatory scheme, the Canadian experience, the Canadian marketing were not aspects of any of the witnesses' evidence as recorded on the U.S. transcripts"; and

(e) the Canadian corporate entity did not have an opportunity to cross-examine any of the witnesses from whom the transcripts related.

Stanway v. Wyeth Canada Inc., 2013 BCSC 2250, paras. 36, 40-42

British Columbia v. Tekavec, 2012 BCSC 1348, para. 33

See also in respect to expert witnesses: *Bank of China v. Fan*, 2015 BCSC 590, paras. 57-58 and 77

43. An order requiring the Ethicon Defendants to list and disclose transcripts from U.S. MDL proceedings regarding various different pelvic mesh devices would be disproportionate and unduly burdensome given the lack of evidence that their contents are relevant or material to the issues in this action by this Plaintiff regarding her TVT Secur implanted by Dr. Obioha in British Columbia. Proportionality ought to be taken into account by the court when exercising its discretion under Rule 7-1(14) to require that documents be listed. The Plaintiff herself acknowledges that proportionality is relevant.

Edwards v. Ganzer, 2012 BCSC 138, para. 41

Notice of Application, Part 3, para. 4

44. The Australian Evidence that the Plaintiff seeks to require the Ethicon Defendants to list and disclose is similarly not relevant nor material to the issues in this action by this specific Plaintiff regarding her TVT Secur implanted by Dr. Obioha in British Columbia.

45. Contrary to the Plaintiff's statement that the affidavits and transcripts are from employees of the Ethicon Defendants, six of the seven witnesses for whom affidavits and cross-examination transcripts are sought are the plaintiffs' expert witnesses. The evidence of these experts, whether by way of affidavit or cross-examination, is not admissible at trial in a BC court proceeding unless and until they provide a report for this action that complies with the *Rules* in respect of expert

evidence. The Plaintiff has not provided any authority that the evidence of plaintiff expert witnesses in a foreign proceeding must be listed in a party's list of documents.

46. With respect to the affidavit and transcript of Dr. Piet Hinoul, his affidavit in the Australian class proceeding is in excess of 360 pages. His affidavit and the transcript of his trial testimony are extensive, but relate to multiple different devices that are not at issue in this action (some of which are not even used to treat SUI), for a much more extensive time period, a different regulatory context regarding the approval of medical devices, and addresses events that are specific to Australia. There is no indication that his affidavits or transcripts contain any information that is relevant to Ms. Sarup's claim regarding her implant of a TVT-Secur device in 2012 that is not already disclosed in the U.S. MDL transcripts that the Plaintiff has requested. The Plaintiff's request that the Ethicon Defendants list and produce Dr. Hinoul's evidence from an Australian class action is not material and disproportionate.

47. The Australian Transcripts are protected by copyright law. Ethicon Inc. does not have the rights to make and provide copies to the Plaintiff without payment of the required fee to acquire right for such use from the owner of the copyright.

Brown-John Affidavit #2, Exhibit I, FAQ from Auscript's website

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #2 of Sandra Brown-John, made 22/Oct/2020;

The application respondents estimate that the application will take three days.

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: 26/October/2020

Signature of Robin L. Reinertson
Lawyer for the application respondents