

# NO MERIT: SCOPE OF PRE-CERTIFICATION DISCLOSURE REMAINS LIMITED

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The tension between limits on pre-certification document disclosure and access to a proper evidentiary record to ensure a fair certification hearing was once again before the court in *Mentor Worldwide LLC v Bosco*, 2023 BCCA 127, a medical negligence class action. The B.C. Court of Appeal rejected a defence application for disclosure of the representative plaintiffs' medical records in advance of certification, determining that pre-certification disclosure of the medical records was not necessary to the certification process.

## Background

The proposed class action underlying this case is an action on behalf of Canadians who received Mentor silicone or cohesive gel breast implants. The plaintiffs in this action allege that there are defects in the breast implants that the defendant failed to warn about, including anaplastic large cell lymphoma, connective tissue disease and autoimmune/inflammatory syndrome induced by adjuvants or breast implant illness.

## Procedural History

As part of the class action certification process, the three representative plaintiffs each affirmed affidavits attesting to having received the defendants' breast implants and subsequently developed the aforementioned health conditions.

The defendants retained an expert to assist with determining:

1. Whether the plaintiffs were implanted with the defendants' breast implants and have any of the alleged health conditions;
2. Whether the plaintiffs' symptoms are caused by the same medical condition and whether that condition has a common cause; and
3. What the possible causes of the plaintiffs' symptoms could be.

The defendants' expert stated that he was unable to answer these questions based on the information provided in the plaintiffs' affidavits and would need access to their medical records to provide his expert opinion.

The defendants then applied for production of various types of medical records from the plaintiffs on the basis that they were necessary to ensure adequate evidence at the certification hearing.

The chambers judge (who was also the assigned case management judge) rejected the defendants' application on the basis that the medical records were not necessary to inform the certification process as they were relevant only to the merits of individual claims and not the class as a whole.

## **The Court of Appeal Decision**

### *The role of pre-certification document discovery*

On appeal, the court stated that in class proceedings, parties do not have an automatic right to document discovery prior to certification, and the court will only order pre-certification document production where "it is necessary in order to inform the certification process."

The court reiterated that the certification stage of a class action is concerned only with the form of the action and whether it can properly proceed as a class action. The certification stage is not concerned with the merits of the action.

The test for certification of a class action is contained in section 4(1) of the *Class Proceedings Act*, which requires that:

- a. the pleadings disclose a cause of action;
- b. there is an identifiable class of 2 or more persons;
- c. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- d. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- e. there is a representative plaintiff who
  - i. would fairly and adequately represent the interests of the class,
  - ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - iii. does not have, on the common issues, an interest that is in conflict with the interests of other class members.

The analysis under the above factors requires determining whether:

1. Assuming the pleaded facts are true, it is plain and obvious that the claim has no reasonable chance of success (per s 4(1)(a)); and

2. There is sufficient evidence to show some basis in fact that the certification requirements are met (per s 4(1)(a)-(e)).

As a result, the certification test does not involve an assessment of the merits and the evidentiary threshold the plaintiff must meet is very low. Further, while the defendant may tender its own evidence in response to the plaintiff, the court will not engage in a detailed weighing of evidence.

*The court's responses to the defendants' arguments in favour of disclosure of the plaintiffs' medical records*

The court rejected a number of arguments put forward by the defendants in support of the need for disclosure of the plaintiff's medical records. The key arguments put forth by the defendants included:

1. The medical records were necessary to challenge the plaintiffs' claims regarding their conditions, diagnoses and treatment.

The court rejected this argument on basis that individual claims are not in issue at the certification hearing and the requirement to determine common issues is concerned only with general causation.

Further, the plaintiffs' proposed class definition would include any person who received the defendants' breast implants and does not require a class member to establish that they developed a particular condition.

Ultimately, the court held that medical records for the representative plaintiffs would not assist in determining whether there was an identifiable class and a representative plaintiff who would adequately represent the interests of the class as a whole.

2. The defendants planned to argue that the proposed class definition is overbroad and should be narrowed to include only class members who also developed the conditions listed in the common issues. As such, medical records were necessary to determine whether the representative plaintiffs would be in the narrowed class.

The court rejected this argument on the basis that it was premature. The appropriateness of the class definition was to be addressed at the certification hearing, and having the plaintiffs' medical records would not assist the court in determining the scope of the class definition.

3. The trial judge erred by stating that there was no evidentiary requirement prior to certification.

The court found that this was not what the trial judge found. What the trial judge did do was make a distinction between evidence tending to prove the *allegation* of a fact and evidence tending to prove a fact. The court found that the trial judge correctly determined that evidence establishing "some basis in fact" for the certification requirements was needed, but not evidence going to the merits of the claims.

4. The defendants' expert needed the plaintiffs' medical records to determine whether their symptoms were

due to common issues and had a common cause.

The court found that the defendants were unable to particularize how their expert's opinion would assist the court with the issues to be considered at the certification stage. The court accepted that the expert evidence would likely be needed at the merits stage to determine whether the plaintiffs' symptoms have multiple common causes, but it was not relevant at the certification stage. Further, the defendants could advance this argument at the certification stage without the need for a merits-based assessment.

5. The chambers judge was obliged to order production of the plaintiffs' medical records because a description of their medical history was contained in the certification application material.

The court rejected this on the basis that the test for pre-certification production of records is not that the records are referenced in the certification application, but that the documents would be necessary to inform the certification process. As discussed above, the court found that the medical records were not necessary for the purposes of the certification hearing.

In sum, the court of appeal found that the scope of disclosure in a class action prior to certification was limited to material that would be necessary for the purposes of the certification hearing. In other words, pre-certification disclosure is limited to disclosure that would be necessary to adjudicate each component of the test for certification laid out in section 4(1) of the *Class Proceedings Act*.

## Takeaways

1. Pre-certification disclosure remains limited to documents that the court considers *necessary* to determine whether the certification test is met.
2. The court will not order production of documents that are not strictly necessary for the certification hearing, even if eventually the requested documents are required to assess the merits of the claims *after certification*.
3. The court is more concerned with whether the proposed class action is properly formed, rather than looking into the veracity or substantive merit of the claims. As such, it will be difficult to defeat certification of a class action through attacking its evidentiary foundation unless it goes to the question of whether there is some "basis in fact" demonstrated on the record.
4. Expert evidence can be beneficial in a certification hearing but generally only to the extent that the expert can comment on the matters pertaining to the certification requirements, as opposed to the underlying merits of the action.
5. Only limited evidence will be necessary in a contested certification hearing to support a defendant's argument that the proposed class definition is too broad.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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