CITATION: Pedersen v. Advanced Bionics LLC, 2025 ONSC 5124
COURT FILE NO.: CV-23-00698642-00CP
DATE: 20250916

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PAUL PEDERSEN, Plaintiff

– and –

ADVANCED BIONICS LLC, NATIONAL HEARING SERVICES INC. c.o.b. as CONNECT HEARING CANADA, ADVANCD BIONICS AG, and SONOVA CANADA INC., Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Jordan Assaraf and David Stein*, for the Plaintiffs

Paul Martin and Adam Gilani, for the Defendants

HEARD: September 9, 2025

MOTION FOR PRODUCTION

[1] This proposed class action alleges that certain medical devices used by hearing impaired persons and produced by the Defendants are defective. The devices – cochlear implants – permit persons who are deaf or experiencing profound hearing loss to perceive sound.

[2] In their Notice of Motion, counsel for the Defendants seek production of medical records referenced but not fully produced by the Plaintiff and another deponent and putative class member, Patric Boon, as follows:

1. an Order for the production of the medical records of Paul Pedersen, the proposed representative plaintiff, as set out below, and for the medical records of Patric G. Boon, a member of the proposed class who has filed an affidavit in support of the motion for certification:

    (a) all medical records related to the cochlear implants and implant procedures relating to Mr. Boon's 2017 implant and Mr. Pedersen's 2019 implant, to the present day, from all treating physicians and surgeons in all clinical settings including, but not limited to, general practitioners/family doctors,

surgeons, otolaryngologists/ENT specialists, audiologists, and their respective clinics, as well as hospital records including emergency room records, any medical imaging clinics or laboratories, and without limiting the foregoing:

(i) complete cochlear implant candidacy records including any audiologist records and doctor's referral to the cochlear implant program, CT scan, ENG (balance) test, surgeon's assessment, audiological assessment, counselling, and any other pre-surgery medical records;

(ii) results from any testing including medical/clinical imaging that was done in connection with the implant at any time before, during, or after the implant procedure;

(iii) any report from the surgeon to the referring physician; and,

(iv) records of all post-surgery appointments following the implant surgeries, including all audiologist reports and visits to audiology clinics.

(b) all medical records related to all pre-existing medical conditions as of five years prior to the cochlear implant procedures relating to Mr. Boon's 2017 implant and Mr. Pedersen's 2019 implant (being 2014 for Mr. Pedersen and 2012 for Mr. Boon) to the present day, from all treating physicians and surgeons in all clinical settings including, but not limited to, general practitioners/family doctors, surgeons, otolaryngologists/ENT specialists, audiologists, and their respective clinics, as well as hospital records including emergency room records, any medical imaging clinics or laboratories;…

[3] In his Statement of Claim, the Plaintiff claims that the implants are defective because they permit bodily fluids to leak into the implanted portion of the device. The Plaintiff pleads that this introduction of fluids produces harmful results:

> … [the] interruption of stimulation that negatively affects device performance, loud noises inside the inner ear, complete device failure, intermittent functioning, cracking or popping noises, pain throughout the face or subtle shocks to the face, reduced hearing in patients, vertigo, dizziness, convulsions, and ultimately the need for surgery to remove and replace the device.

[4] It is the Defendants' view that the changes in the *Class Proceedings Act, 1992*, SO 1992, c. 6 ("CPA") that now require the common issues to predominate over individual issues demand this more extensive medical disclosure. Otherwise, they contend, it will not be possible to distinguish between the issues that predominate and those that are of more minor importance in the claim.

[5] The Plaintiff's certification record contains an affidavit from the Plaintiff himself and from Patric Boon, both of whom allege that their cochlear implants were defective and have had them surgically replaced. Both affiants depose as to symptoms they experienced after having the Defendant's devices surgically implanted. In support of these statements, they have each produced a limited portion of their personal medical records.

[6] Each of the affiants for the Plaintiff have included in their affidavits an identical statement about the partial production of their medical records. At paragraph 25 of the Plaintiff's affidavit and paragraph 26 of Mr. Boon's affidavit, they each depose:

> In addition to what I describe above, I experienced some other health issues at the relevant time. I do not discuss these matters in my affidavit, as I believe they are not relevant to the performance, malfunctioning, or failure of my Cochlear implant, and so are not relevant to the motion for certification.

[7] Defendants' counsel submit that it is for the court, and not the affiants, to determine the question of relevance. While that may be an overstatement in some contexts, when it comes to medical records I would have to agree. And while I do understand the affiants' desire to protect the privacy of any sensitive medical information, they allege a series of symptoms which, given their acknowledgement of other health issues, could be the result of co-morbidities or of maladies entirely unrelated to the cochlear implants at issue here.

[8] Furthermore, the Plaintiff's claim alleges not only harms related to the implants themselves, but a failure to warn about the risks of harm. Without the full medical records being produced, the issue of any warnings they and other class members may have received from their physicians will be impossible to analyze. As an example, at paragraph 23 of the Plaintiff's affidavit, he states that he disagreed with his doctor as to whether certain of his symptoms – in particular dizziness and vertigo – were a result of his implants, and that the doctor thought the symptoms were unrelated to the implants.

[9] In general, a claim of failure to warn necessitates the disclosure of the doctor's full advice as set out in the patient's medical records. This becomes all the more important with a witness who relates that he disagrees with this doctor's assessment.

[10] It is noteworthy that the Plaintiff's admission records from Sunnybrook Hospital, where the implant surgery was performed, identify a number of co-morbidities along with hearing loss. The chart appears to have checkmarks next to matters that one could surmise might contribute to symptoms such as dizziness or vertigo, specifically: alcohol use, smoking history, asthma, hypertension, seizures.

[11] The Plaintiff appears to have a complex history, which may or may not be relevant at this stage but cannot be kept from the Defendants. As for Mr. Boon, he does not provide his hospital admittance record and so we know even less about him. But his statement that he has other health issues but that those records have not been disclosed suggests that the same reasoning applies to his evidence.

[12] In fact, the Plaintiff's own expert witness, Dr. Richard Gurgel, deposes that there must be a personal medical assessment of each individual in respect of the need and effectiveness of the subject implants. At this stage of the action a full medical assessment would not be called for; I agree with Plaintiff's counsel that only those medical records that are "relevant and necessary" should form part of the certification motion record. However, I do not agree that the Plaintiff or Mr. Boon get the last word on relevance.

[13] The court needs to have the information before it in order to make a considered and objective determination of the relevance of that information. Otherwise, the crucial issue of negligence – i.e. whether the implants were faulty or whether the patients' own co-morbidities took over – will be impossible to assess. A subjective assessment by the patients/affiants themselves cannot be the certification record's sole source of information about their own medical situation – especially where one of the affiants has already deposed that he disagrees with his own doctor as to the source of his symptoms.

[14] Although proposed representative plaintiffs and other deponents in certification motions are not to be excessively examined on the claim's merits at this stage, courts typically have ordered medical records produced where they are needed to evaluate issues of commonality and preferability. In *Roveredo v. Bard Canada Inc.*, 2010 ONSC 5240, Strathy J. explained that certification cannot proceed on a limited record that prevents the court from engaging in appropriate due process and in determining whether a class proceeding will actually advance the putative class members' claims.

[15] As Justice Strathy put it, at para. 9:

> [T]he court cannot address certification in a vacuum. The apparent commonality of the issues and preferability of the procedure may appear obvious when looking at the pleadings or a limited record, but may become less obvious when a full and balanced record is available.

[16] I understand that the Plaintiff is not putting causation of his own symptoms in issue at this stage. As his counsel explain it, he is seeking to extrapolate from his own and Mr. Boon's experience that there is a more general or pervasive problem with the Defendant's cochlear implants.

[17] That said, the Defendants are entitled to explore this challenge, and one way of doing so is to demonstrate that the implants are not harmful but that, rather, the deponents were harmed by their co-morbidities. All of this goes to the analysis of whether there is "some basis in fact which establishes each of the certification criteria: *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718, at para. 87.

[18] Certification is not intended to fully analyze the merits of a Plaintiff's claim. But it *is* meant to be a "meaningful screening device": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477, at para. 103. Without the medical records sought by the Defendants, the court will not be in a position to do the requisite screening at the certification stage.

Disposition

[19] The Plaintiff shall produce his own and Mr. Boon's medical records as set out in paragraph 2 above.

[20] The parties may make written submissions on costs.

[21] I would ask Defendants' counsel to email my assistant with brief cost submissions within two weeks of today, and Plaintiff's counsel to email my assistant with brief cost submissions within two weeks of receiving the Defendants' submissions.

Morgan J.

Date: September 16, 2025