CITATION: Logan v. Stryker Canada Corp., 2024 ONSC 6171
COURT FILE NO.: CV-18-00602204-0000
DATE: 20241106

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: EVELYN PESCANO LOGAN, by her Litigation Guardian DAVID COLIN LOGAN and DAVID COLIN LOGAN**,** Plaintiffs

AND:

STRYKER CANADA CORP., SUNNYBROOK HEALTH SCIENCES CENTRE, ERIN ELIZABETH DYER and LEODANTE DA COSTA, Defendants

BEFORE: Jane Dietrich J.

COUNSEL: *Meaghan Coker*, for the Plaintiffs

Robin D. Linley, Leah Kelley, for the Defendant Stryker Canada Corp.

Katelyn Leonard, for the Defendants Erin Elizabeth Dyer and Leodante Da Costa

HEARD: November 5, 2024

ENDORSEMENT

Introduction

[1] The plaintiffs bring a motion for an order under rule 32 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 (the "Rules") approving a protocol for destructive testing of a medical device which mistakenly fractured during a procedure on April 17, 2017.

Overview

[2] During an emergency procedure to remove a blood clot from the brain of Evelyn Logan, a Stryker Trevo Stent Retriever (the "Device") was being used. Unfortunately, the Device broke into two pieces and one part has remained in Mrs. Logan's brain. The other portion of the Device was preserved for testing and is the subject of this motion.

[3] The plaintiffs, Mrs. and Mr. Logan and the defendant Stryker Canada Corp. ("Stryker") both take the position on the motion that the plaintiffs should be permitted to perform certain testing on the Device, but the method, scope and costs of the testing are in dispute.

[4] Although counsel for the defendants Erin Elizabeth Dyer and Leodante Da Costa appeared on the motion, they did not take any position.

[5] Since the filing of this motion in June of 2024, the plaintiffs, with the consent of Stryker, have performed certain testing on the Device. The plaintiffs say that all non-destructive testing that can be done on the Device has now been done. As noted below, the plaintiffs do wish to perform certain non-destructive testing on an exemplar Device.

[6] A 3 cm portion of the Device's wire, which contains the fracture site, has been preserved (the "Critical Portion"). The parties agree that the Critical Portion is very small and is the crucial piece of the Device. Unfortunately, given its size, it is likely that once certain optical microscopy tests and hardness and strength tests are performed on the Critical Portion it will be destroyed and repeat testing will not be possible. In part, this is because the Critical Portion must be cross sectioned prior to such testing.

[7] There also exists another length of wire from the Device which was located farther away from the site of the failure (the "Extra Wire"). It is unclear how much of this Extra Wire remains. On August 19, 2024, an attempt was made at cross sectioning a portion of this Extra Wire, however the attempt was unsuccessful and a portion of the Extra Wire was destroyed. It may be that only enough Extra Wire exists for one further attempt at cross-sectioning.

[8] The plaintiffs' expert has indicated that another Device (an "Exemplar Device") is also requested (i) so that additional attempts to perfect the cross-sectioning and destructive testing can be performed prior to commencing the destructive testing on the Critical Portion; and (ii) so that non-destructive testing for comparative purposes can be performed.

[9] During the motion, Strkyer's counsel advised that, provided the plaintiffs pay Stryker the normal cost of an Exemplar Device, one will be provided to the plaintiffs for such testing. Stryker's counsel indicated that the Device and Exemplar Device may not be identical given the passage of time since the incident occurred in 2017, however, arguments about the comparative nature of any test results may made at a later time.

Issues

[10] The issues to be determined at this time are:

a. should the Court grant an order under Rule 32 authorizing the plaintiffs to inspect and test the Device; and

b. if so, under what terms should the order be granted.

Analysis

[11] Rule 32 provides:

> **Order for Inspection**
>
> **32.01 (1)** The court may make an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in a proceeding.

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> **(2)** For the purpose of the inspection, the court may,
>
> > (a) authorize entry on or into and the taking of temporary possession of any property in the possession of a party or of a person not a party;
> >
> > (b) permit the measuring, surveying or photographing of the property in question, or of any particular object or operation on the property; and
> >
> > (c) permit the taking of samples, the making of observations or the conducting of tests or experiments. R.R.O. 1990, Reg. 194, r. 32.01 (2).

[12] If an such an order is granted, it may impose terms on the testing as are just (see Rule 32.01(3)).

[13] Where the testing is destructive, the Court in *Donko v Sleepy Hollow Country Club Ltd.* 2021 ONSC 192 summarized the applicable law as follows:

> [13] In *Peel District School Board 19 v. 553518 Ontario Ltd*. (2000), 49 C.P.C. (4th) 384 (S.C.J.), the court was considering making such an order where the inspection and testing could result in the destruction of the integrity of the physical evidence. The court stated:
>
> > [16] As I have said, Clayton wishes to cut out a section of the cable, temporarily take possession and subject it to examination under an electron microscope. Essentially, this is a test. "Tests" are specifically allowed under rule 32.01(2)(c); and "temporary possession" is permitted by rule 32.01(2)(a). In deciding to exercise my discretion in favour of the defendant, I have taken the following approach:
> >
> > (a) The proposed test must be one which, in the words of rule 32.01(1), "appears to be necessary for the proper determination of an issue in a proceeding."
> >
> > (b) "Necessary" has been held to mean "useful" or "probative of an issue": see *Bennett et al. v. D.C. Jones Circle V. Ranches Ltd. et al.* (1987), 1987 CanLII 3374 (AB KB), 20 C.P.C. (2d) 213 (Alta. Q.B.). Therefore, in my view, to establish "necessity" the moving party must show that there is a reasonable possibility the proposed test will reveal something useful for the trier of fact (that is, something which will assist the trier of fact in determining an issue in the proceeding).
> >
> > (c) Even if "necessity" is established, the court is not bound to authorize the test, since the opening words of rule 32.01(1) bespeak a discretion in this regard.

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> (d) Rather than be concerned with whether the proposed test will "destroy" the property, I think the better question is: Will the proposed test impair the integrity of the property such that the party in possession of the property will be prejudiced at trial?
>
> (e) If the party in possession will be so prejudiced, this fact must be balanced with the benefit to be derived from the test by the trier of fact.

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[14] The evidence before me indicates that destructive testing of the Critical Portion is necessary as interpreted by the Court in the quote above to mean 'useful' or 'probative of an issue'.

[15] Olivia Yalnizyan, a material science engineer specializing in material and product failure swore an affidavit for the plaintiffs wherein she stated that the results of proposed destructive testing are highly likely to indicate the cause of the Device's failure. She stated that the without the destructive testing, the Court will not have the benefit of knowing the actual composition and morphology of the device at the point of fracture and that destructive testing is the only method to determine whether the device failure occurred due to an inconsistency, defect, or weakness at the specific fracture location. She expressed this same view in her cross-examination.

[16] No evidence was provided by Stryker to suggest that destructive testing of the Critical Portion would not be useful or probative. Rather counsel repeatedly expressed concern that once the testing was done by the plaintiffs, none of the Critical Portion would remain viable for the defendants to further test should the plaintiffs testing not be reliable.

[17] I do have concerns with approving the proposed protocol put forward by the plaintiffs. That protocol, which is dated July 16, 2024, is 17 pages long and contains much background, general information and vague descriptions of required tests (many of which have already been performed).

[18] Importantly, it does not address the specific concern raised by Stryker as a result of the failed August 19, 2024 test. Stryker's concern is that if a repeat of the August 19, 2024 test failure were to occur on the Critical Portion, the ability of Stryker to rebut any findings by the plaintiff's experts would be made impossible. No details are provided in the plaintiffs proposed protocol about how the cross-sectioning would take place. Rather the evidence is that the specifics are still in flux and additional trials on sections of Extra Wire or of an Exemplar Device are necessary to establish a reliable method of cross-sectioning to move forward with the destructive testing of the Critical Portion.

[19] Stryker proposes, rather than a blanket approval of the plaintiffs' proposed protocol that a more specific protocol be ordered. With a few notable exceptions and certain modifications as outlined below, Stryker's proposal appears to be practical. I also find that, with the modifications outlined below, it balances the prejudice to Stryker with the benefit to be obtained from the testing as noted above.

[20] The most notable exception is that Stryker's counsel proposes that Stryker be permitted to return to the Court to make arguments regarding whether or not the destructive testing is necessary.

As noted above, based on the evidence before me, I have found it to be necessary within the meaning of the relevant caselaw.

[21] Further, Stryker's proposal provides for sharing of the raw data of all testing with Stryker. At the same time, Stryker takes issue with sharing any of the expense of the testing. I do agree with Stryker that the usual practice is for the moving party to pay for the testing (see John A Olah, Art and Science of Advocacy, s5:68. Testing of Property).

[22] If Stryker declines to pay for the testing, and the plaintiff's decline to provide the raw test results immediately upon completion of the testing, Stryker is not left without a remedy. Stryker will have recourse in the normal course, following delivery of an expert report to obtain relevant work papers. That is not something I need to decide now.

Disposition

[23] Accordingly, I find the following terms are appropriate and just to govern the remaining testing:

a. Stryker will provide an Exemplar Device to the plaintiffs at the plaintiffs' cost;

b. The plaintiffs are to complete all destructive testing desired on any Extra Wire (not the Critical Portion) and all non-destructive and destructive testing desired on the Exemplar Device. Representatives of any defendants shall be entitled to attend and observe such testing and reasonable efforts shall be made to coordinate the timing of such testing.

c. Following completion of the testing outlined in (b), plaintiffs shall provide to Stryker an updated protocol setting out the specific proposed plan for destructive testing on the Critical Portion and shall provide Stryker with evidence from the previous testing to demonstrate that the proposed method of destructive testing on the Critical Portion will achieve the desired outcome.

d. Following receipt by Stryker from the plaintiffs of the information required in (c), Stryker shall have 30 days to object to the method of destructive testing proposed on the Critical Portion. This time period may be extended by the agreement of the plaintiffs.

e. If no objection as contemplated by (d) is received by the plaintiffs within the relevant time period, the plaintiffs may complete the destructive testing as proposed in (c). Representatives of any defendants shall be entitled to attend and observe such testing, and reasonable efforts shall be made to coordinate the timing of such testing.

f. If an objection as contemplated by (d) is received by the plaintiffs within the relevant time period, Stryker and the plaintiffs shall attempt in good faith to resolve any differences and come to an agreed destructive testing protocol. Failing such agreement, the parties may return to Court for further directions.

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g. All testing proposed by the plaintiffs’ expert shall be at the expense of the plaintiffs. Any testing proposed by any other party’s expert shall be done at the respective party’s expense.

[24] As success on this motion was divided, no costs will be ordered.

[25] Counsel may prepare a form of order and email same to my assistant for my review and signature.

Jane Dietrich J.

Date: November 6, 2024

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