

**CITATION:** Vester v. Boston Scientific Ltd., 2020 ONSC 3564  
**COURT FILE NO.:** CV-15-527310 CP  
**DATE:** 2020/06/12

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
SUSAN VESTER and DARIN VESTER	)	<i>Charles M. Wright, and Daniel E.H. Bach,</i>
Plaintiffs	)	for the Plaintiffs
	)	
– and –	)	
	)	
BOSTON SCIENTIFIC LTD. and	)	<i>David Morritt, Sonia Bjorkquist, and Karin</i>
BOSTON SCIENTIFIC CORPORATION	)	<i>Sachar</i> for the Defendants
Defendants	)	
	)	
	)	
	)	<b>HEARD:</b> June 12, 2020

2020 ONSC 3564 (CanLII)

**PERELL J.**

**REASONS FOR DECISION**

**A. Introduction**

[1] This is a motion for approval of a \$21.5 Settlement Agreement in a transvaginal mesh class action and for approval of the associated distribution plan (the “Compensation Protocol”) and the associated notices of the settlement. Class Counsel seek approval for payment of the fees and disbursements and of an honorarium for the Representative Plaintiffs.

**B. Factual Background to the Settlement**

[2] The Defendants Boston Scientific Ltd. and Boston Scientific Corporation (collectively “Boston Scientific”) designed, manufactured, and sold transvaginal mesh medical devices that were implanted for the treatment of Stress Urinary Incontinence (“SUI”) or Pelvic Organ Prolapse (“POP”).

[3] The Plaintiff, Susan Vester, who suffered from SUI, had a Lynx transvaginal mesh device implanted, and she suffered painful complications. On August 28, 2012, Mrs. Vester, along with her husband Darin Vester, commenced a proposed class action under the *Class Proceedings Act, 1992*.<sup>1</sup> The action was brought on behalf of women (and their spouses) who were implanted with

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<sup>1</sup>, S.O. 1992, c. 6. 1.

devices that were designed to treat SUI and POP. The Plaintiffs allege that the devices were unsafe and caused harm. The Defendants denied the allegations.

[4] The action was vigorously contested. The certification motion was heard on November 23, 2015, and I released my decision on December 17, 2015.<sup>2</sup> For the 2015 certification motion, I concluded that: the pleadings disclosed a cause of action for a negligent design claim and a failure to warn claim; there was an identifiable class; and Mrs. Vester and Mr. Vester might qualify as representative plaintiffs. However, the claims of the Class Members did not raise common issues and given the absence of any common issues, a class proceeding was not the preferable procedure. In the result, I adjourned the certification motion to permit Mrs. Vester and Mr. Vester (a) to provide evidence to establish some-basis-in-fact for common issues for the negligent design claim or for the failure to warn claim; (b) to establish some-basis-in-fact that a class action would be the preferable procedure for the determination of those common issues; and (c) to revise their litigation plan accordingly.

[5] In 2017, the certification motion resumed, and I certified the action as a class proceeding.<sup>3</sup>

[6] While the action was proceeding to examinations for discovery, the parties concurrently had extensive and intensive settlement negotiations and in August 2019, the parties reached a settlement agreement in principle.

[7] The formal settlement agreement was signed on December 20, 2019.

### **C. The Settlement**

[8] On February 28, 2020, the action class definition was amended and the action was certified for settlement purposes.<sup>4</sup> Notice of the proposed settlement was provided to the Class Members, Additional Notices were distributed in March 28, 2020 providing the Expanded Class an opportunity to opt-out. To date, seven opt-outs have been received.

[9] Under the Settlement Agreement, the class definition is:

(a) All persons resident in Canada who have been implanted with a BSC Transvaginal Mesh Device at any time on or before the date of this Order (the “Primary Class”);

(b) All persons resident in Canada who by virtue of a personal relationship to one or more such persons described in (a) above, having standing in this action pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 or analogous provincial legislation or at common law (the “Family Class”).

[10] Settlement will see \$21,500,000 paid to the Class Members, less payments to Provincial Health Insurers (“PHIs”), settlement administration costs, including Notice costs, and Class Counsel’s legal fees, disbursements (the “Net Settlement Proceeds”) will be paid pursuant to the proposed Compensation Protocol.

<sup>2</sup> *Vester v. Boston Scientific Ltd.*, 2015 ONSC 7950.

<sup>3</sup> *Vester v. Boston Scientific Ltd.*, 2017 ONSC 1095.

<sup>4</sup> *Vester v. Boston Scientific Ltd.*, 2020 ONSC 1308.

[11] The framework of the proposed settlement is similar to the settlement approved on November 8, 2019 in *Harper v. American Medical Systems Canada Inc.*,<sup>5</sup> another class action regarding mesh devices manufactured and distributed to treat SUI and POP.

[12] *Harper* was prosecuted by the same Class Counsel as in the immediate case. In *Harper*, a settlement of \$20.9 million was approved for a class size estimated at 450-500 claimants. In the immediate case, the proposed settlement is larger than in *Harper* by more than \$600,000 and the class size is estimated at 125-175 fewer claimants.<sup>6</sup>

[13] The Compensation Protocol provides for \$18.0 million less Class Counsel Legal Fees and Claims Administration Costs, to be paid into the Initial Compensation Pool with the remaining \$3.5 million, less any Class Counsel Legal Fees and Claims Administration Costs to be reserved for a second round of claims (the “Future Injury and Late Implant Compensation Pool”). Under the settlement, the *Family Law Act* Claimants release their claims, which will reduce administration costs and allow for greater benefits to be payable to women who have received the implants.

[14] The timing of the Supplemental Claim Deadline and the size of the Future Injury and Late Implant Compensation Pool were informed by a review of the available literature. Studies indicate that, for women implanted with a transvaginal mesh product, revision surgeries, where required, are typically performed within the first five years of implantation.

[15] The Initial Compensation Pool will be allocated to eligible Settling Claimants who were implanted before April 1, 2016 on a *pro-rata* basis based on the severity of injury, such that funds will not remain in the Initial Compensation Pool after all claims have been adjudicated and paid.

[16] The Initial Claim Deadline will expire 120 days from the date of Notice of Approval. This will permit individuals to obtain any medical records required to support their claim. Once claims are evaluated, a 60 day “deficiency period” will permit Settling Claimants a further opportunity to obtain evidence in support of their claims. The Supplemental Claim Deadline will expire 2 years from the expiry of the Initial Claim Deadline, providing an opportunity for individuals to evaluate worsening injuries and obtain records.

[17] Compensation will be determined based on a total of points awarded to a claimant. Points will be determined by the individual circumstances of the claimant, however, all claimants implanted with a Transvaginal Mesh Device will be awarded points and eligible for compensation.

[18] Class Members will be entitled to compensation if they were implanted with a Transvaginal Mesh Device with or without a revision or removal surgery, with certain other factors such as chronic infection, fistula, abscess and age at implant factoring into the points allocation. The Compensation Protocol contains a chart that outlines the number of points to be

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<sup>5</sup> *Harper v American Medical Systems Canada Inc*, 2019 ONSC 5723.

<sup>6</sup> To date, the only other transvaginal mesh class proceeding that has proceeded to a settlement approval hearing is *O’Brien v. Bard*, 2016 ONSC 3076. The average settlement value was approximately \$30,000 per claimant. It is anticipated that the average award in the immediate case will exceed that value.

allocated in respect of a claimed injury or mitigating circumstance (such as young age at implant, for example). Point values will be equal as between the Initial Compensation Pool and the Future Injury and Late Implant Compensation Pool to ensure fairness among Settling Claimants implanted before April 1, 2016, regardless of the timing of their injuries or related claim. If more claimants come forward than anticipated in the second round, point values will be decreased on a *pro-rata* basis.

[19] Women who were implanted with the Defendants' Mesh Devices on or after April 1, 2016 will also be able to claim by the Supplemental Claim Deadline. The April 1, 2016 date has been set according to the Defendants' device update for their products in March 2016, and women who were implanted on or after April 1, 2016 will experience a 50% point-deduction due to having a weaker liability case.

[20] To claim compensation, a Settling Claimant must provide implant evidence and, if claiming compensation for surgeries or treatment, evidence in a manner satisfactory to the Claims Administrator. The Claims Administrator is afforded discretion to ensure that Class Members who are able to provide evidence that their mesh implant is more likely than not to be manufactured by the Defendants will still be entitled to compensation in the absence of perfect evidence of product identification.

[21] If additional funds remain after the first claim deadline as a result of uncashed or stale dated cheques, those funds will be added to the funds payable in the second round. Depending on the amount of any funds not claimed following the Supplemental Claim Deadline, residual funds will be prorated across all approved claimants and cheques will be reissued. If insufficient funds remain to make a further payment to approved claimants economical (for example, where administration costs would exceed the value of the cheques), residual funds will be paid *cy-près*.

[22] Class Counsel recommend BC Women's Health Foundation ("Foundation") as a suitable *cy-près* recipient of any residual funds. The Foundation proposes to apportion any money to a current annual grant program jointly offered between it and the Women's Health Research Institute, which awards funding to research focused on integrated gynecology. BC Women's Health Foundation was approved as a *cy-près* recipient of residual funds in *Harper*.

[23] A Provincial Health Insurer Fund will be established for compensation of the provincial and territorial health insurers. The Compensation Protocol provides that for each Approved Claimant, the Claims Administrator shall apportion a payment to the Fund, as follows: (a) \$6,306.34 for each Claimant with a device implanted prior to April 1, 2016; and (b) \$3,153.17 for each Claimant with a device implanted on or after April 1, 2016. The agreed upon amounts were determined with reference to previous mesh settlements with similar injuries, together with a review and analysis of the actual expenses paid by health insurers in respect of Class Members' mesh related health care costs.

[24] The Defendants stopped manufacturing its Uphold Vaginal Support System<sup>2</sup> and Pinnacle Pelvic Floor Repair Kit POP medical devices in 2016. To date, Class Counsel is aware of approximately 311 Class Members who are eligible to claim under the proposed settlement. For the purposes of the settlement Class Counsel estimated that 325 women will be eligible to make claims. Class Counsel are confident in this estimate because: (a) there has already been a

significant number of notices published in Canada related to transvaginal mesh litigation and responses have consistently diminished; (b) there has been significant media attention related to transvaginal mesh injuries and litigation; and (c) studies indicate that the rates of reoperation for mesh complications are in the 3.29% to 4.8% range.

[25] Class Counsel are of the opinion that the settlement is fair and reasonable, taking into account: (a) the nature and severity of the injuries suffered; (b) the liability and causation risks that existed for each Class Member and the class as a whole; (c) the benefit of an early, certain recovery; and (d) settlements achieved in similar cases.

[26] There are no objectors to the proposed settlement.

[27] There were three parallel class actions filed in relation to the same allegations in this action: one in Alberta (the “*Boshman*” action), one in Saskatchewan (the “*Maximovich*” action), and one in Québec (the “*Boucher*” action). The Settlement aims to resolve all currently unresolved class action claims in Canada relating to BSC Transvaginal Mesh Devices. The parallel actions were discontinued by the Québec Superior Court of Justice pursuant to the Order issued on January 12, 2018, and by the Court of Queen’s Bench of Alberta, pursuant to the Order issued on November 29, 2019, and by the Court of Queen’s Bench of Saskatchewan pursuant to the notice of discontinuance filed December 6, 2019.

[28] The Notice Plan for distributing the Approval Notice was previously approved in the context of distributing the Hearing Notice. The Notice Plan was designed in a manner to achieve maximum reach across Canada. It provides that the Approval Notice will be disseminated on a national basis, through a number of channels, including direct mailings and both French and English newspapers, as well as web postings, e-mails, and bilingual press releases.

[29] In addition to the Notices that will be distributed through print and digital media, Notice of Settlement Approval will be sent directly by email or mail to all known Class Members, including the 311 Class Members already identified by Class Counsel, and any new Class Members who contact the Claims Administrator or Class Counsel to receive updates.

[30] RicePoint was provisionally appointed as Claims Administrator in accordance with the Settlement Hearing Notice Order granted on February 28, 2020. RicePoint was previously approved by this court as the Claim Administrator for the settlement in *Harper*. RicePoint will establish an online claims portal in both English and French that Class Members can use to file a claim. Class Members will also have the option to file a paper claim. Claims assistance will also be available to claimants in both languages.

#### **D. Settlement Approval**

[31] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

*Discontinuance, abandonment and settlement*

29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such

terms as the court considers appropriate.

*Settlement without court approval not binding*

(2) A settlement of a class proceeding is not binding unless approved by the court.

*Effect of settlement*

(3) A settlement of a class proceeding that is approved by the court binds all class members.

*Notice: dismissal, discontinuance, abandonment or settlement*

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

[32] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.<sup>7</sup>

[33] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with Class Members during the litigation.<sup>8</sup>

[34] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.<sup>9</sup> An objective and rational assessment of the pros and cons of the settlement is required.<sup>10</sup>

[35] The case law establishes that a settlement must fall within a zone of reasonableness.

<sup>7</sup> *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

<sup>8</sup> *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.); *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69; *Fakhri v. Alfalfa's Canada, Inc.*, 2005 BCSC 1123.

<sup>9</sup> *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

<sup>10</sup> *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.<sup>11</sup> A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.<sup>12</sup>

[36] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.<sup>13</sup>

[37] In my opinion, the settlement in the immediate case is good, fair, reasonable, and in the best interests of the Class Members. The Settlement Agreement is the product of intensive, protracted and arm's length negotiations by reputable counsel with extensive experience in class actions and mesh litigation in particular. It offers good monetary compensation to individual Class Members in light of the particular claims advanced and compares favorably to prior mesh settlements. I approve the Settlement Agreement.

### **E. Distribution Plan**

[38] The Court's authority to approve Distribution Plan or Compensation Protocols is grounded in its jurisdiction to approve settlements.<sup>14</sup> Subject to court approval, Class Counsel are required to develop a distribution scheme that is in the best interests of the class.<sup>15</sup> A Plan will be appropriate if it is fair, reasonable, and in the best interests of the class.<sup>16</sup> Deciding what is fair and reasonable can involve considerations of what is economical and practical on the facts of a particular case.<sup>17</sup>

[39] The test for approving a Distribution Plan is analogous to the test that the Court applies when deciding whether to approve a settlement.<sup>18</sup> A settlement must fall within a zone of reasonableness to be approved.<sup>19</sup> The zone of reasonableness assessment allows for variation between settlements depending upon the subject matter of the litigation and the nature of the

<sup>11</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.); *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).

<sup>12</sup> *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 at para. 13 (S.C.J.).

<sup>13</sup> *Welsh v. Ontario*, 2018 ONSC 3217.

<sup>14</sup> *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493.

<sup>15</sup> *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para. 108.

<sup>16</sup> *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59.

<sup>17</sup> *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936 at para 34; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891.

<sup>18</sup> *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59; *Eidoo v Infineon Technologies AG*, 2014 ONSC 6082; *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para 74.

<sup>19</sup> *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 at para 12; *Leslie v. Agnico-Eagle Mines*, 2016 ONSC 532 at para. 8.

damages for which settlement provides compensation.<sup>20</sup> A settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory settlement.<sup>21</sup>

[40] In my opinion, the Compensation Protocol in the immediate case is within the zone of reasonableness, and is fair, reasonable, and in the best interests of the class. It should be approved, and I approve it.

### **F. Cy-près Awards**

[41] Where a *cy-près* award is an aspect of a settlement, the principles that underlie the approval of a settlement apply.<sup>22</sup> From a policy perspective, *cy-près* awards fulfill the compensatory and access to justice purposes of the *Class Proceedings Act, 1992*, and they also fulfill the behaviour modification policy goals of the *Act*.<sup>23</sup>

[42] A *cy-près* distribution should be justified within the context of the particular class action for which settlement approval is being sought, and there should be some rational connection between the subject matter of a particular case, the interests of class members, and the recipient or recipients of the *cy-près* distribution.<sup>24</sup>

[43] In the immediate case, the design of the Compensation Protocol makes a *cy-près* distribution somewhat remote but should the need for a *cy-près* arise, I agree with the recommendation made by Class Counsel that the recipient be BC Women's Health Foundation.

### **G. Factual Background to Fee Approval**

[44] The Representative Plaintiffs entered into contingency fee retainer agreements which provided that Class Counsel would seek this Court's approval for fees in an amount up to 30% of the recovery achieved for the Class, plus disbursements and applicable taxes.

[45] No application for financial assistance from the Class Proceedings Fund was made by Class Counsel, no other third-party source of funding has been received to finance this litigation, and the Representative Plaintiffs entered into indemnity agreements with Class Counsel against adverse cost awards.

[46] Class Counsel seek approval of legal fees in the amount of \$5,375,000, plus applicable taxes. Net of taxes, this represents 25% of the Settlement Amount. Class Counsel also seek approval of payment for disbursements incurred up to May 29, 2020 in the amount of \$224,965.51, plus applicable taxes. Of the fee amount, \$4,500,000 (plus applicable taxes) will be paid from the initial \$18 million received in the Trust Account and a further \$875,000 from a \$3.5 million payment due in 2022.

<sup>20</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

<sup>21</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 80 (S.C.J.).

<sup>22</sup> *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 at para. 141.

<sup>23</sup> *Domage v. Ontario*, 2017 ONSC 4178; *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 at para. 123; *Alfresh Beverages Canada Corp. v. Hoescht AG*, [2002] O.J. No. 79 at para. 16 (S.C.J.).

<sup>24</sup> *O'Neil v. Sunopta, Inc.*, 2015 ONSC 6213 at para. 16; *Sorenson v. Easyhome Ltd.*, 2013 ONSC 4017; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at para. 43; *Serhan Estate v. Johnson & Johnson*, 2011 ONSC 128 at para. 59.

[47] Class Counsel proposes to pay from its legal fees \$250,000 to Motley Rice LLC in recognition of its contributions to the resolution and/or advancement of the litigation. Motley Rice LLC was counsel in similar litigation in the United States. Although the proposed payment could be considered an agency fee, Class Counsel propose to pay it from the requested legal fees.

[48] Class Counsel's disbursements up to May 29, 2020 (exclusive of taxes) are \$589,510.86. Following the Certification Motion in 2017, Class Counsel were awarded costs of \$425,000.00. Pursuant to a Court Order, Class Counsel applied the amount to disbursements incurred in respect of the Certification Motion. Class Counsel now seek approval for the remaining \$224,965.51 incurred in disbursements since the Certification Motion (exclusive of taxes).

[49] In addition, Class Counsel seek leave to bring future applications for disbursements incurred subsequent to May 29, 2020. Any further request for the approval of disbursements will be made upon receipt of the Second Settlement Payment in the Trust Account. Approval is also sought for the payment of honoraria for the Representative Plaintiffs.

[50] Counsel's docketed time (exclusive of applicable taxes, as of May 29, 2020) is \$2,253,679.89. This figure does not include the time and expense incurred in working up individual Class Members' claims. The docketed time is 5,876.64 hours of lawyer and legal support staff time over the course of close to eight years. The total fee requested in this case represents a multiplier of less than 2.4 on the base time incurred by Class Counsel as of May 29, 2020.

[51] In addition to the work done in advancing the litigation and securing the benefits contained in the Settlement Agreement, Class Counsel will be responsible for significant future work upon approval of the Settlement Agreement, including coordinating with the Claims Administrator, responding to Class Member inquiries, formalizing all Settlement Approval Orders, updating Class Counsel's websites, implementing the Notice Plan, monitoring the implementation of the Settlement Agreement and addressing any questions or issues raised by the Claims Administrator and attending before this Court to report on the administration of the Settlement Agreement as it progresses.

[52] No objections have been made about the counsel fee.

## **H. Fee Approval**

[53] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.<sup>25</sup>

[54] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the

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<sup>25</sup> *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).

class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.<sup>26</sup>

[55] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.<sup>27</sup>

[56] In my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request in the immediate case should be approved.

### **I. Honoraria for Representative Plaintiffs**

[57] Class Counsel are requesting honoraria of \$10,000 each for the Vesters.

[58] Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by an honorarium.<sup>28</sup> However, the court should only rarely approve this award of compensation to the representative plaintiff.<sup>29</sup> Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.<sup>30</sup>

[59] Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. In determining whether the circumstances are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.<sup>31</sup>

[60] In my opinion, the honorarium requests in the immediate case should be granted.

### **J. Conclusion**

[61] For the above reasons, the Orders attached as Schedules "A", "B" and "C" are granted.

[62] In the circumstances of the Covid-19 emergency, these Reasons for Decision are deemed to be an Order of the court that is operative and enforceable without any need for a signed or entered, formal, typed order.

<sup>26</sup> *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233.

<sup>27</sup> *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (B.C.C.A.).

<sup>28</sup> *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 at para. 28 (Gen. Div.).

<sup>29</sup> *Sutherland v. Boots Pharmaceutical plc*, *supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71. (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.).

<sup>30</sup> *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.

<sup>31</sup> *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

[63] The parties may submit formal orders for signing and entry once the court re-opens; however, these Reasons for Decision are an effective and binding Order from the time of release.

Perell, J.

Released: June 12, 2020

**Schedule “A”**

Court File No. CV-15-527310-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE )  
 ) \_\_\_\_\_ DAY, THE  
JUSTICE P. PERELL ) DAY OF \_\_\_\_\_, 2020

B E T W E E N:

*(Court Seal)*

SUSAN VESTER and DARIN VESTER

Plaintiffs

and

BOSTON SCIENTIFIC LTD. and BOSTON SCIENTIFIC CORPORATION

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**ORDER  
(SETTLEMENT APPROVAL)**

**THIS MOTION**, made by the Plaintiffs for an Order approving the Settlement Agreement entered between the Plaintiffs and the Defendants, was heard this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

**ON READING** the materials filed, including the Settlement Agreement dated [December 20, 2019](#), and on hearing the submissions of counsel for the Plaintiffs and counsel for the Defendants;

**AND ON BEING ADVISED** that the Plaintiffs and the Defendants consent to this Order;

1. **THIS COURT ORDERS** that, for the purposes of this Order, except to the extent that they are modified in this Order, the definitions set out in the Settlement Agreement apply to and are incorporated into this Order.
2. **THIS COURT ORDERS** that, in the event of a conflict between the terms of this Order and the Settlement Agreement, the terms of this Order shall prevail.
3. **THIS COURT ORDERS** that the Settlement Agreement is fair, reasonable, and in the best interests of the Class.
4. **THIS COURT ORDERS** that the Settlement Agreement is hereby approved pursuant to section 12, 19, 20, 29(2), and 29(3) of the *Class Proceedings Act, 1992* S.O. 1992, c. 6 and shall be implemented and enforced in accordance with its terms.
5. **THIS COURT ORDERS** that all provisions of the Settlement Agreement (including its Recitals and Definitions) form part of this Order and are binding upon Class Members who did not opt out of this action in accordance with the order issued on February 17, 2017, approving the notice and opt out procedures following certification of the Ontario Proceeding as a national class action or in accordance with the Settlement Hearing Notice Order of this Court dated February 28, 2020 (the “Hearing Notice Order”), including those persons who are mentally incapable, Class Counsel, the Provincial Health Insurers and the Defendants.
6. **THIS COURT ORDERS** that the releases as provided at section 8.1 of the Settlement Agreement is approved and will take effect upon the Effective Date.

7. **THIS COURT ORDERS** that the form and content of the Settlement Approval Notice, substantially in the full and abridged forms attached as Schedule “A”, is approved.

8. **THIS COURT ORDERS** that the Notice Plan, substantially in the form attached as Schedule “B” is approved.

9. **THIS COURT ORDERS** that this proceeding be and is hereby dismissed against the Defendants, without costs and with prejudice, and that such dismissal shall be a defence to any subsequent action in respect of the subject matter hereof.

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The Honourable Justice Perell

Schedule “A”

**BOSTON SCIENTIFIC**

**CANADIAN TRANSVAGINAL MESH CLASS ACTION**

**NOTICE OF SETTLEMENT APPROVAL**

**PLEASE READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR RIGHTS**

**NOTICE**

This is a notice alerting Class Members in a Canadian class action involving mesh devices manufactured by Boston Scientific to treat Stress Urinary Incontinence (“SUI”) and Pelvic Organ Prolapse (“POP”) (“BSC Transvaginal Mesh Devices”). A settlement in this action has been approved by the Court.

The class action sought compensation for injuries that were allegedly related to the BSC Transvaginal Mesh Devices. The defendants deny the allegations made in the lawsuits and make no admission as to the truth of the allegations.

The Settlement Agreement that has been approved provides for the payment of \$21,500,000.00 (Canadian dollars) which will be used to pay claimant compensation, the administration of the settlement, health care expenses incurred by the Provincial Health Insurers, and Class Counsel’s legal fees, disbursements, and applicable taxes.

**SUMMARY  
OF THE  
SETTLEMENT**

The defendants will pay \$21,500,000.00 to settle the claims of all Class Members, the related claims of the Provincial Health Insurers, the costs of administering the settlement, and Class Counsel legal fees, disbursements, and applicable taxes.

The defendants deny all allegations and deny any wrongdoing or liability. The Court has not taken any position on the merits of the arguments of either the plaintiffs or the defendants, but has determined that the Settlement Agreement is fair, reasonable, and in the best interests of the Class Members. A term of the settlement is that the Canadian class action relating to BSC Transvaginal Mesh Devices will be dismissed, which means that the lawsuit has come to an end, and there will be no trial.

Class Members who satisfy the eligibility criteria set out in the

Compensation Protocol may be entitled to benefits that will be based on a points system.

**Until all claims have been adjudicated it will not be possible to determine the exact value of the compensation that may be paid to eligible claimants.**

The Settlement Agreement, Compensation Protocol, related exhibits and other documents are available at the settlement website [www.canadabscmeshclassaction.com](http://www.canadabscmeshclassaction.com), and copies can be requested from the Claims Administrator and/or Class Counsel as listed below.

**WHO IS INCLUDED?**

The settlement applies to:

- a) All persons resident in Canada who have been implanted with a BSC Transvaginal Mesh Device at any time on or before February 28, 2020 (the “Primary Class”); and
- b) All persons resident in Canada who, by virtue of a personal relationship to one or more of those persons identified in (a) above, have standing in this action pursuant to section 61(1) of the *Family Law Act* RSO 1990, c F 3 or analogous provincial legislation or at common law (the “Family Class”).

If you are included in this Class and did not opt out of the class action, you are bound by the terms of the Settlement Agreement and may qualify for compensation.

**MAKING A CLAIM**

Pursuant to the Compensation Protocol, there are two claims periods.

The Initial Claim Period is designed to compensate Class Members for injuries they have suffered to date. To claim as part of the Initial Claim Period, you must complete and submit a claim form (including the necessary supporting documentation) to the Claims Administrator before **[date, 2020]**. **If you do NOT submit your Claim on time, you will not be eligible for any benefits under the Settlement Agreement unless you submit a claim in the Supplemental Claim Period.**

The Supplemental Claim Period is designed to compensate Class Members for injuries sustained or worsening after [date, 2020], Class Members who missed the Initial Claim Period deadline and Class Members who were implanted on or after April 1, 2016. To claim as part of the Supplemental Claim Period, you must complete and submit a claim form (including the necessary supporting documentation) to the Claims Administrator before **[DATE, 2022]**. **If you do NOT submit your Claim by [date, 2022], you**

**will not be eligible for any benefits under the Settlement Agreement.**

**Class Members are encouraged to contact the Claims Administrator or Class Counsel to receive important updates and a reminder of the deadline for the Supplemental Claim Period.**

For further details on how claims will be evaluated, you should refer to the Compensation Protocol available at [www.canadabscmeshclassaction.com](http://www.canadabscmeshclassaction.com).

The claim form requires that you provide medical records which can be time consuming to retrieve. **It is very important that you start this process as soon as possible, if you or your counsel have not already done so.** You may wish to retain a lawyer to assist you in this process. You can retain Class Counsel or a lawyer of your choice. Class Counsel will not charge more than 15% of your individual recovery (plus disbursements and applicable taxes) for assisting in this process.

### **IMPORTANT DEADLINES**

**It is important that you contact the Claims Administrator or Class Counsel to receive direct notice of pending deadlines.**

**DATE, 2020 [120 days after the last day on which the Settlement Approval Notice is published] - Deadline to Submit your claim in the Initial Claim Period**

**DATE, 2022 [2 years after the Initial Claims Deadline] - Deadline to Submit your claim in the Supplemental Claim Period**

### **LEGAL FEES**

The Ontario Superior Court of Justice approved Class Counsel's legal fees, disbursements, and applicable taxes in the amount of \$XX. Class Counsel were retained on a contingency basis and were responsible for funding all expenses incurred in pursuing this litigation.

### **FURTHER INFORMATION**

If you have questions about the Settlement Agreement, Compensation Protocol and/or would like to obtain more information and/or copies of the settlement documents, please visit the settlement website at [www.canadabscmeshclassaction.com](http://www.canadabscmeshclassaction.com) or contact the Claims Administrator at 1-866-571-7804 or:

#### **BSC TVM Class Action**

c/o RicePoint Administration Inc.  
PO Box 4454, Toronto Station A  
25 The Esplanade  
Toronto, ON M5W 4B1

[email address]

You can also contact Class Counsel at any of the firms listed below. There is **no charge** to speak with Class Counsel to discuss the class action.

**Siskinds LLP**

680 Waterloo St.  
London, ON N6A 3V8  
Elizabeth deBoer  
Tel: 1-800-461-6166 x2367

**Siskinds, Desmeules sncrl**

Les Promenades du Vieux-Québec  
43, rue Buade, bur 320  
Québec, QC G1R 4A2  
Erika Provencher  
Tel: 418-694-2009

This Notice contains a summary of some of the terms of the Settlement Agreement. If there is a conflict between this Notice and the Settlement Agreement, the terms of the Settlement Agreement shall prevail.

*This Notice was authorized by the Ontario Superior Court of Justice*

**NOTICE OF SETTLEMENT APPROVAL****CANADIAN BOSTON SCIENTIFIC TRANSVAGINAL MESH LITIGATION**

**Please read carefully. Ignoring this notice will affect your legal rights**

**WHAT IS THE SETTLEMENT AND WHO IS INCLUDED?**

A Canada-wide settlement has been reached to resolve litigation against Boston Scientific Ltd. and Boston Scientific Corporation (“BSC”). If you were implanted prior to [date of the certification amendment order] with a BSC Transvaginal Mesh Device(s) for treatment of Stress Urinary Incontinence (SUI) and/or for treatment of Pelvic Organ Prolapse (POP), you may be entitled to compensation. The settlement provides for the payment of \$21,500,000.00 (Canadian dollars) which will be used to pay approved claims, the administration of the settlement, Provincial Health Insurers’ health care expenses and Class Counsel legal fees.

The Court has approved a Compensation Protocol that determines which Class Members are eligible for compensation and in what amount. For more information about how compensation is determined, you should review the long-form Notice, Compensation Protocol, Settlement Agreement and related documents at [www.canadabscmeshclassaction.com](http://www.canadabscmeshclassaction.com), or contact the Claims Administrator or Class Counsel at the addresses below.

Pursuant to the Compensation Protocol, there will be an Initial Claims Period, which will end on **DATE**, 2020 and a Supplemental Claim Period ending on **DATE**, 2022. Women who sustained injuries (or worsening injuries) after [Initial Claim Deadline Date], women who missed the Initial Claim Deadline and women who were implanted on or after April 1, 2016 will be eligible to claim during the Supplemental Claim Period.

**PARTICIPATING IN THE SETTLEMENT**

If you were implanted with a BSC Transvaginal Mesh Device, you must file a claim with the Claims Administrator on or before **DATE**, 2020 or [date, 2022] at the latest to seek compensation under the Settlement Agreement. If this deadline is extended, any such extension and new deadline will be posted at [www.canadabscmeshclassaction.com](http://www.canadabscmeshclassaction.com).

Individuals are encouraged to contact the Claims Administrator or Class Counsel to receive notice of pending deadlines or important updates. Information on how to file a claim is available at [www.canadabscmeshclassaction.com](http://www.canadabscmeshclassaction.com). **Filing a claim is complex and requires your medical records.**

You can retain Class Counsel or a lawyer of your choice to assist you. Class Counsel will limit fees to 15% of your individual recovery (plus disbursements and taxes) for assisting in this process.

**FOR MORE INFORMATION:**

If you have questions about the settlement and/or would like to obtain more information, please visit [www.canadabscmeshclassaction.com](http://www.canadabscmeshclassaction.com) or contact the Claims Administrator at 1-866-571-7804, [email address], or:

**BSC TVM Class Action**

c/o RicePoint Administration Inc.  
PO Box 4454, Toronto Station A  
25 The Esplanade  
Toronto, ON M5W 4B1

**Siskinds LLP**

680 Waterloo Street  
London, ON N6A 3V8  
Elizabeth deBoer  
Tel: 1-800-461-6166 ext. 2367

**Siskinds, Desmeules sencl**

Les Promenades du Vieux- Québec  
43, rue Buade, bur 320  
Québec, QC G1R 4A2  
Erika Provencher  
Tel: 418-694-2009

This Notice contains a summary of some of the terms of the Settlement Agreement. If there is a conflict between this Notice and the Settlement Agreement, the terms of the Settlement Agreement shall prevail.

*This Notice was authorized by the Ontario Superior Court of Justice*

## Schedule “B”

**BSC Transvaginal Mesh Class Action Notice Plan**

Capitalized terms used in this Notice Plan have the meanings assigned in the Settlement Agreement.

The Hearing Notice and the Settlement Approval Notice (the “Notices”) shall be distributed in the following manner:

Direct Notice

1. Class Counsel will send the Notices directly to all Class Members or possible Class Members known to them. Where the person is located in Quebec (or otherwise specifically requests), the Notices will be sent in French and English.
2. The Notices (full form) and/or the Opt Out Form will be provided by Class Counsel to any person who requests it.
3. Class Counsel will post the Notices (full form) and Opt Out Forms, in English and French, on their website.
4. The Defendants will send the Notices (full form) directly to counsel for all plaintiffs involved in any individual actions against the Defendants regarding the same or similar allegations who have not previously opted-out of the Class.

Printed News Notice

5. The Notices will be published in short form once in the following newspapers, in either English or French, as is appropriate for each newspaper, subject to each having reasonable publication deadlines and costs:

- (a) The Globe and Mail, national edition;
- (b) National Post, national edition;
- (c) The Vancouver Sun (BC);
- (d) Times Colonist (Victoria, BC);
- (e) Courier (Kelowna, BC);
- (f) The Edmonton Journal (AB);
- (g) The Calgary Herald (AB);
- (h) The Lethbridge Herald (AB);
- (i) The Red Deer Advocate (AB);
- (j) The Leader-Post (Regina, SK);
- (k) The StarPhoenix (Saskatoon, SK);
- (l) Winnipeg Free Press (MB);
- (m) Toronto Star (ON);
- (n) The Spectator (Hamilton, ON);
- (o) Ottawa Citizen (ON);
- (p) Waterloo Region Record (ON);
- (q) The Windsor Star (ON);
- (r) The London Free Press (ON);
- (s) Le Journal de Montreal (QC);
- (t) The Gazette (Montreal, QC);

- (u) Le Journal de Québec (QC);
- (v) Le Nouvelliste (Trois-Rivieres, QC);
- (w) Le Quotidien (QC);
- (x) The Chronicle-Herald (Halifax, NS);
- (y) The Guardian (Charlottetown, PEI);
- (z) New Brunswick Telegraph Journal (NB);
- (aa) The Times & Transcript (Moncton, NB); and
- (bb) The Telegram (St. John's NL).

#### Digital News Notice

6. A digital notice campaign will be established by the Claims Administrator using banner advertisements (abridged form) directing potential Class Members to the Settlement Website where they will be able to obtain more information about the Settlement Agreement. The banner advertisements will be displayed on the following online news sources, in English and French as proportionate to the population:

- (a) [theglobeandmail.com](http://theglobeandmail.com);
- (b) [lapresse.ca](http://lapresse.ca);
- (c) [neomedia.com/saguenay-lac-st-jean](http://neomedia.com/saguenay-lac-st-jean) (Le Réveil); and
- (d) [lechodetroisrivieres.ca](http://lechodetroisrivieres.ca).

#### Settlement Website

7. The Notices (full form) will be posted in English and French on [www.canadabscmeshclassaction.com](http://www.canadabscmeshclassaction.com) for the purpose of this Settlement Agreement (the

“Settlement Website”). All Notices will direct potential Class Members to the Settlement Website where they will be able to obtain more information about the Settlement Agreement, review the Settlement Agreement, Compensation Protocol, and related documents, download the Opt Out Form and claim forms and communicate with the Claims Administrator.

#### Press Release

8. A national press release with form and content to be agreed by the Parties will be issued in English and French through Canada Newswire.
9. Class Counsel may apply to the Court on notice to the Defendants for approval to make any further distribution of Notices to Class Members as may be deemed necessary to facilitate their interests in the settlement.

**Schedule “B”**

Court File No. CV-15-527760-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE )  
 ) \_\_\_\_\_ DAY, THE  
JUSTICE P. PERELL ) DAY OF \_\_\_\_\_, 2020

B E T W E E N:

*(Court Seal)*

SUSAN VESTER and DARIN VESTER

Plaintiffs

and

BOSTON SCIENTIFIC LTD. and BOSTON SCIENTIFIC CORPORATION

Defendants

***Proceedings under the Class Proceedings Act, 1992***

**ORDER  
(COMPENSATION PROTOCOL)**

**THIS MOTION**, made by the plaintiffs for an Order approving the Compensation Protocol, was heard this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

**ON READING** the materials filed, including the Compensation Protocol attached hereto as Schedule “A”;

**AND ON READING** the submissions of Class Counsel and on hearing the submissions of Class Counsel;

10. **THIS COURT ORDERS** that, except as otherwise specified in, or as modified by, this Order, capitalized terms used herein shall have the meaning ascribed in the Settlement Agreement and the Compensation Protocol.

11. **THIS COURT ORDERS** that the Compensation Protocol substantially in the form attached hereto as Schedule “A” is hereby approved.

12. **THIS COURT ORDERS** that the Compensation Protocol shall govern the administration of the Settlement Agreement.

13. **THIS COURT ORDERS** that RicePoint is hereby appointed the Claims Administrator for the purposes of the administration of the Settlement and for the purposes of coordination of the Notice Plan, and related tasks, including operating the Settlement Agreement Website for purposes of posting the Settlement Approval Notice, Claim Form, and all related documents.

14. **THIS COURT ORDERS** that the Net Settlement Proceeds shall be distributed by the Claims Administrator in accordance with the Compensation Protocol.

15. **THIS COURT ORDERS** that all information provided by claimants as part of the claims process is collected, used, and retained by the Claims Administrator, Class Counsel, and their agents pursuant to Ontario privacy laws for the purposes of administering the Settlement Agreement, including evaluating the claimants’ eligibility status under the Settlement Agreement. The information provided by a claimant shall be treated as private and confidential and shall not be disclosed without the express written consent of the claimant, except in accordance with the Settlement Agreement, the Compensation Protocol, and/or orders of the Ontario Court.

16. **THIS COURT ORDERS** that the time for filing and serving the motion record is abridged.

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THE HONOURABLE JUSTICE P. PERELL

## Schedule "A"

**Boston Scientific Corporation National Settlement Agreement Compensation Protocol**

1. Unless otherwise indicated or required by context, capitalized terms in this Compensation Protocol have the meanings assigned to them in the Settlement Agreement.
2. In this protocol, the following terms shall have the meanings set forth below.
  - (a) "Approved Claimant" means a Settling Claimant that the Claims Administrator determines is eligible for compensation under the Compensation Protocol.
  - (b) "Claim Form" means the claim form developed by the Claims Administrator in consultation with Class Counsel and approved by the Court.
  - (c) "Claim Deadlines" means the Initial Claim Deadline and the Supplemental Claim Deadline.
  - (d) "Implant Evidence" means the documentation that must be provided to establish proof of implantation with a BSC Transvaginal Mesh Device, namely:
    - (i) product identification sticker, tag, or label from the implanted BSC Transvaginal Mesh Device;
    - (ii) medical records contemporaneous to the implantation procedure for the BSC Transvaginal Mesh Device recording the product identification information (product numbers) from the product identification sticker, tag, or label;
    - (iii) medical records contemporaneous to the implantation procedure for the BSC Transvaginal Mesh Device identifying the information of the model of the BSC Transvaginal Mesh Device;
    - (iv) documentation from the implanting surgeon providing confirmation of the model of the BSC Transvaginal Mesh Device;
    - (v) documentation from the implanting hospital purchasing department providing confirmation of the model of the BSC Transvaginal Mesh Device;
    - (vi) documentation from the implanting surgeon providing confirmation that the implanted device was a BSC Transvaginal Mesh Device; or,
    - (vii) documentation from the implanting hospital purchasing department providing confirmation that the implanted device was an BSC Transvaginal Mesh Device.

- (e) “Initial Claims” are injuries extant as of [initial claims deadline] experienced by women in whom BSC Transvaginal Mesh Devices were implanted prior to April 1, 2016 and that are eligible for compensation under the Compensation Protocol.
- (f) “Initial Claim Deadline” means one hundred and twenty (120) days after the last day on which the Settlement Approval Notice is published.
- (g) “Initial Compensation Pool” means \$18,000,000 less Class Counsel Legal Fees and Claims Administration Costs.
- (h) “Initial Payment Per Point” means the dollars allocated for each point in section 14.
- (i) “Referee” means the person, selected by Class Counsel and approved by the Courts, that will hear appeals from decisions of the Claims Administrator.
- (j) “Settling Claimant” has the meaning ascribed to it in the Settlement Agreement but also includes, where the context requires, a lawyer or other representative acting on behalf of a Settling Claimant.
- (k) “Supplemental Claim Deadline” means two years after the Initial Claim Deadline.
- (l) “Supplemental Claims” are injuries not extant as of [initial claim deadline] experienced by women in whom BSC Transvaginal Mesh Devices were implanted prior to April 1, 2016 and/or injuries experienced by women in whom BSC Transvaginal Mesh Devices were implanted on or after April 1, 2016 that are eligible for compensation under the Compensation Protocol. Supplemental Claims include claimed worsening of Initial Claims.
- (m) “Future Injury and Late Implant Compensation Pool” means \$3,500,000.00 CAD less any Class Counsel Legal Fees and Claims Administration Costs.
- (n) “Surgical or Treatment Evidence” means proof, by way of contemporaneous medical records, which may include contemporaneous physician or hospital records supplemented by a letter from the physician providing any needed clarification of the contents of the records, of each claimed surgical intervention or treatment which is used to claim compensation.

## **PART I: CLAIMS ADMINISTRATION**

3. Administration of the Settlement Agreement and the submission, processing, approval, compensation and appeal of individual claims made pursuant to the Settlement Agreement shall be governed by the Compensation Protocol, which shall be implemented by the Claims Administrator, subject to the ongoing authority and supervision of the Ontario Superior Court of Justice.
4. Purpose of the Compensation Protocol

The purpose of the Compensation Protocol is to provide further guidance to the Claims Administrator to help ensure that:

- (a) only Class Members who satisfy the eligibility criteria set out in this protocol will receive compensation from the Net Settlement Proceeds;
- (b) similarly situated Approved Claimants will be treated as uniformly as possible; and
- (c) Approved Claimants will receive timely compensation in a way that minimizes, to the extent reasonably possible, the Claims Administration Costs and other transaction costs associated with implementation and administration of the Settlement Agreement.

#### 5. Claim Form

In addition to any other requirements in the Settlement Agreement and Compensation Protocol, in order to become an Approved Claimant, a Class Member must properly complete, execute and submit a Claim Form to the Claims Administrator by the relevant Claim Deadline.

The Claims Administrator may also develop such other forms as it deems necessary for the implementation and administration of the Settlement Agreement in accordance with the purpose of this Compensation Protocol. If developed, such forms must be properly completed by Settling Claimants.

Claims that are not properly and timely submitted to the Claims Administrator by the relevant Claim Deadline will be denied by the Claims Administrator. For greater clarity, the failure to meet the relevant Claim Deadline with the mandatory evidence will result in rejection of the claim within the relevant Compensation Pool.

#### 6. Claim Deadlines

To make a claim for a portion of the Initial Compensation Pool, a Settling Claimant must file a Claim Form by the Initial Claim Deadline. To make a claim for a portion of the Future Injury and Late Implant Compensation Pool, a Settling Claimant must file a Claim Form by the Supplemental Claim Deadline.

7. Mandatory Evidence

In order to claim compensation, a Settling Claimant must provide Implant Evidence and, if claiming compensation for surgeries or treatment, Surgical or Treatment Evidence in a manner satisfactory to the Claims Administrator.

8. Claim Processing Guidelines

If, during claims processing, the Claims Administrator finds technical deficiencies in a Settling Claimant's Claim Form or Evidence, the Claims Administrator shall notify the Settling Claimant of the technical deficiencies and shall allow the Settling Claimant 60 days from the date of mailing to correct the deficiencies. Such notification shall be by way of letter sent via email, if available, or through first class regular mail.

If the deficiencies are not corrected within the 60-day period, the Claims Administrator shall reject the claim and the Settling Claimant shall have no further opportunity to correct the deficiencies.

“Technical deficiencies” shall not include missing the Claim Deadline or failure to provide sufficient Evidence to support the Settling Claimant's claim. In the event that a Settling Claimant has requested but not yet received the Evidence, the Settling Claimant may submit true copies of the records requests that were made requesting the Evidence, and the failure to provide that Evidence will be deemed a “technical deficiency”.

9. Provincial Health Insurer Rights of Recovery

A Provincial Health Insurer Fund shall be established for compensation of the relevant Provincial Health Insurer Rights of Recovery, which amount shall be taken from the Initial Compensation Pool and/or the Future Injury and Late Implant Compensation Pool, as follows.

For each payment of an Approved Claimant's claim, with a BSC Transvaginal Mesh Device implanted prior to April 1, 2016, the Claims Administrator shall apportion a payment of \$6,306.34 to the Provincial Health Insurer Fund.

For each payment of an Approved Claimant's claim with a BSC Transvaginal Mesh Device implanted on or after April 1, 2016, the Claims Administrator shall apportion a payment of \$3,153.17 to the Provincial Health Insurer Fund.

The Provincial Health Insurer Fund shall be no less than \$1,891,902.00 (such that regardless of the number of Approved Claimant claims, there will be payment for a minimum of 300 claims) and no more than \$2,364,877.50 (such that regardless of the number of Approved Claimant claims, there will be payment for a maximum of 375 claims).

For the purpose of calculating the number of Approved Claimant claims for the Provincial Health Insurer Fund, each Approved Claimant with a BSC Transvaginal Mesh Device implanted on or after April 1, 2016 shall be counted as half (0.5) an Approved Claimant.

The Provincial Health Insurers will be paid by jurisdiction in a manner proportionate to the number of Approved Claimants from each jurisdiction.

To the extent that an Approved Claimant has received health care services that have been paid for by more than one Provincial Health Insurer, the health care cost recovery will be divided on a proportionate basis consistent with the relevant health care costs borne by each Provincial Health Insurer.

Payments apportioned to the Provincial Health Insurers shall be aggregated by Provincial Health Insurer for payment from and in proportion to the total amount of each of the Initial Compensation Pool, the Future Injury and Late Implant Compensation Pool and, if further payments are made to Approved Claimants, the Excess Funds.

10. Settling Claimant Notification and Claim Appeals

(a) Notification

The Claims Administrator shall notify each Settling Claimant by way of a letter sent via email, if available, or through first class regular mail as to the approval or rejection of his or her claim and the points awarded to the Settling Claimant.

(b) Appeals

Settling Claimants will be granted a 30 day period from the date notice was sent to appeal the rejection and/or classification of their claims. Appeals will be reviewed and assessed by the Referee. Appeals will be made in writing to the Referee, supported only by the documentation provided to the Claims Administrator. Following the outcome on appeal, there shall be no right of further appeal or review.

11. Payment of Funds and Stale Dating

The Claims Administrator shall select the most cost effective method possible to make payments to the relevant Provincial Health Insurers as may be required and to each Approved Claimant provided the payment recipient is able to accept funds in that manner.

Cheques shall be issued such that they are stale-dated six months after issuance. Cheques that are not cashed and become stale-dated will be re-issued in the Claims Administrator's sole discretion based on the circumstances of the case, and at the expense of the individual requesting the re-issuance. In no circumstances will cheques be reissued after the passage of six (6) months from the date on which the first cheque became stale-dated. In no case will a third cheque be issued.

## **PART II: ALLOCATION OF NET SETTLEMENT PROCEEDS**

### 12. Estate Representatives

Estate representatives of deceased Primary Class Members are eligible to submit a claim as a Primary Class Member.

### 13. Allocation of Settlement

The Net Settlement Proceeds will be allocated among the Settling Claimants in two pools. Settling Claimants with Initial Claims will claim against the Initial Compensation Pool. Settling Claimants with Supplemental Claims will claim against the Future Injury and Late Implant Compensation Pool.

### 14. Allocation of Points

Approved Claimants will be assigned points at the sole discretion of the Claims Administrator, subject to the right of appeal provided herein. The Claims Administrator

will assign points based on the totality of the information and resources available to it, using its best judgment and expertise to fairly and reasonably adjudicate claims. In the event that an Approved Claimant meets the criteria for both qualifying treatment(s) and qualifying surgery(s), the Approved Claimant shall receive the points allocated to both levels. In the event that an Approved Claimant received more than one BSC Transvaginal Mesh Device, the Approved Claimant shall receive the points allocated to each BSC Transvaginal Mesh Device, including any points allocated for qualifying treatment(s) and qualifying surgery(s) attributable to each BSC Transvaginal Mesh Device.

<b>BASE POINTS</b>		
<b>LEVEL</b>	<b>DESCRIPTION</b>	<b>POINTS</b>
<b>1</b>	Device only (does not qualify in any other category).  *Points allocated for Level 1 claims shall be capped at a maximum for \$4,000.00 for each device implanted.	4 points
<b>Qualifying</b>		<b>Treatment(s)</b>
(maximum qualifying treatment points = 9)		
<b>2a</b>	One of the following qualifying treatments performed after implantation of a BSC Transvaginal Mesh Device <u>and</u> where the qualifying treatment was performed or prescribed for the purpose of treating a condition or symptom that is attributed by the treating	6 points

	<p>medical provider to that Approved Claimant’s complication from the implantation of a BSC Transvaginal Mesh Device:<sup>32</sup></p> <ul style="list-style-type: none"> <li>A. Pain medications for treatment of pelvic pain (commencing at least 90 days after implantation of BSC Transvaginal Mesh Device, and with continuous use for a period of at least two months);</li> <li>B. Physical therapy of pelvic floor and/or vaginal area (commencing at least 90 days after implantation of BSC Transvaginal Mesh Device, and involving at least 4 sessions over a 60 day period);</li> <li>C. Anesthetic block (e.g. epidural, spinal) for treatment of pain in or originating from the pelvic area;</li> <li>D. Trigger point injection, local nerve block, or nerve ablation in the pelvic area;</li> <li>E. Botox injection(s) into the pelvic muscles;</li> <li>F. Revision and/or trim of BSC Transvaginal Mesh Device(s), which is performed using topical anesthesia or local anesthesia;</li> <li>G. Drainage of sinus tract or abscess occurring within the vicinity of the site of implantation or the insertion tract of BSC Transvaginal Mesh Device(s), and which is performed at least 30 days after the implantation of a BSC Transvaginal Mesh Device;</li> <li>H. 3 or more bacterial infections of the vagina or urinary tract treated with antibiotics at least 30 days after the implantation of a BSC Transvaginal Mesh Device; or</li> <li>I. Such other non-surgical mesh-related treatment(s) and/or new-onset mesh-related condition(s) as may be appropriate to consider under Level 2, including extraordinary injuries such as fistula, and organ (i.e. bladder or bowel) perforation.</li> </ul>	
<p><b>2b</b></p>	<p>Two or more qualifying treatments</p> <p>Approved Claimants shall receive 1 point for each additional</p>	<p>Add 1-3 points to</p>

<sup>32</sup> Attribution of a condition or symptom to a complication from implantation of mesh and/or the treatment thereof may be established by a temporal relationship between the implantation of mesh, the condition and/or symptom, and/or the treatment.

	qualifying treatment up to a maximum of 3 points.	2a
<b>Qualifying</b>		<b>Surgery(s)</b>
(maximum qualifying surgery points = 24)		
<b>3a</b>	<p>One qualifying surgery, defined as a surgical procedure performed under general anesthesia<sup>33</sup> or regional anesthesia<sup>34</sup> to:</p> <ul style="list-style-type: none"> <li>A. Remove all or a portion of BSC Transvaginal Mesh Device;</li> <li>B. Release the arms of a BSC Transvaginal Mesh Device;</li> <li>C. Excise or lyse scar tissue or scar bands at site of implant of a BSC Transvaginal Mesh Device; or</li> <li>D. Explore the cause of a condition or symptom suspected by the treating medical provider(s) in the contemporaneous medical records to be caused by the implantation of a BSC Transvaginal Mesh Device, which is performed via an open or laparoscopic approach, and for which the operative records do not reflect that another cause of the condition or symptom (e.g., ovarian cyst, endometriosis) was determined as the cause during surgery. For clarification, where the operative records reflect that another cause of the condition or symptoms (e.g., ovarian cysts, endometriosis) was determined as a cause during surgery, and in addition reflect a concomitant findings that a BSC Transvaginal Mesh Device was also a cause of the condition or symptom, such surgical procedure constitutes a qualifying surgery<sup>35</sup>. For clarification, a diagnostic cystoscopy without further surgical intervention is not included in such procedures.</li> </ul> <p>*In the event that an eligible claimant is implanted with both a BSC Transvaginal Mesh Device(s) and one or more non-BSC mesh product(s) and during any qualifying surgery it is unclear which mesh</p>	10 points

<sup>33</sup> Absence of sensation and consciousness as induced by various anesthetic medications given by inhalation or IV. Components of general anesthesia are analgesia, amnesia, muscle relaxation, control of vital signs, and unconsciousness.

<sup>34</sup> Anesthesia provided by injecting an anesthetic to block a particular group of sensory nerve fibres (e.g. spinal, epidural, or block).

<sup>35</sup> Where the operative report reflects that another cause of the condition or symptoms was determined during surgery and there is not a concomitant finding that a BSC Transvaginal Mesh Device was also the cause of the condition or symptoms, such surgery is not related to a BSC Transvaginal Mesh Device.

	product is revised or removed, or the cause of the condition or symptom being explored, the points attributed to such qualifying surgery will be reduced by 50%. For greater clarity, this consideration is applicable for each qualifying surgery.	
<b>3b</b>	Two qualifying surgeries.	14 points
<b>3c</b>	Three qualifying surgeries.	18 points
<b>3d</b>	Four or more qualifying surgeries  Approved Claimants shall receive 2 points for each additional qualifying surgery up to a maximum of 6 points.	Add 2-6 points to 3c

(maximum qualifying treatment + qualifying surgery points = 33 points)

<b>Age Adjustments</b>	
Age as of date of implantation of BSC Transvaginal Mesh Device	a) 0-30 years = 6 points  b) 31-40 years = 5 points  c) 41-50 years = 4 points  d) 51-60 years = 3 points  e) 61-70 years = 2 points  f) 71-80 years = 1 point  g) 81 + years = 0 points

<b>Date of Device Implantation Adjustment</b>	
Date of Implantation of BSC Transvaginal Mesh Device on or after April 1, 2016	50% point deduction

For greater clarity, pursuant to this Compensation Protocol points are not allocated for any reason other than as provided in this section including, without limitation, derivative claims of family members, pursuant to section 61(1) of the *Family Law Act*, RSO 1990, c F 3, or analogous provincial legislation or at common law.

15. Payment of the Initial Compensation Pool

Approved Claimants with Initial Claims will be paid a *pro rata* share of the Initial Compensation Pool based on the points allocated to each such Approved Claimant.

If six months after the payment of the Initial Compensation Pool there are excess funds in the Initial Claims Pool as a result of cheques having become stale dated and/or such other forms of payment as may be made to Approved Claimants and which may otherwise expire without having been claimed, such excess funds shall be added to the Future Injury and Late Implant Compensation Pool.

16. Payment of the Future Injury and Late Implant Compensation Pool

Approved Claimants with Supplemental Claims shall be paid as follows:

- (a) first, Approved Claimants with Supplemental Claims who also had Initial Claims shall have the points allocated for their Initial Claims subtracted from the points allocated for the Supplemental Claims, such that only the increase in points shall be considered (the “Net New Points”);

- (b) second, the Future Injury and Late Implant Compensation Pool is divided by the sum of the Net New Points and the points allocated to Approved Claimants with Supplemental Claims who did not have Initial Claims to produce the “Supplemental Payment Per Point.”

Unless the Claims Administrator decides otherwise and the Court so approves, if the Supplemental Payment Per Point is greater than the Initial Payment Per Point, then Approved Claimants with Supplemental and Late Implant Claims shall be paid the Initial Payment Per Point. If the Supplemental Payment Per Point is lesser than or equal to the Initial Payment Per Point, then Approved Claimants with Supplemental and Late Implant Claims shall be paid the Supplemental Payment Per Point.

For greater certainty, Approved Claimants with Supplemental Claims who also had Initial Claims shall only be entitled to payment for Net New Points under this section.

The Provincial Health Insurer Fund will only be apportioned further funds in accordance with this Compensation Protocol for Approved Claimants that were not approved as Initial Claims. For greater clarity, further funds will not be apportioned to the Provincial Health Insurer Fund for Approved Claimants with Supplemental Claims who also had Initial Claims and such Supplemental Claims shall not be further counted towards the total number of Approved Claimants for the purpose of calculating the Provincial Health Insurer Fund described in section 9.

17. Excess Funds

If six months after the payment of the Future Injury and Late Implant Compensation Pool there are excess funds in the Future Injury and Late Implant Compensation Pool as a result of cheques having become stale dated and/or such other forms of payment as may be made to Approved Claimants and which may otherwise expire without having been

claimed, and/or limiting of the Supplemental Payment Per Point to the Initial Payment Per Point value, such excess funds shall be dealt with as follows.

The Claims Administrator shall determine, in its sole discretion, if there are sufficient excess funds such that a payment can be made to Approved Claimants in an economically efficient manner. If so, such excess funds shall be paid to all Approved Claimants on a *pro rata* basis.

If the Claims Administrator determines that it is not efficient to make the *pro rata* payment or if there are still excess funds six months after the *pro rata* payment has been made and such payments are stale dated, then all excess funds shall be donated, *cy près* to an organization(s) to benefit women's health as approved by the Court and advised by Class Counsel, subject to any amounts payable to the Fonds d'aide aux actions collective in accordance with the applicable Regulation.

**Schedule “C”**

Court File No. CV-15-527760-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE )  
 ) \_\_\_\_\_ DAY, THE  
JUSTICE P. PERELL ) DAY OF \_\_\_\_\_, 2020

B E T W E E N:

*(Court Seal)*

SUSAN VESTER and DARIN VESTER

Plaintiffs

and

BOSTON SCIENTIFIC LTD. and BOSTON SCIENTIFIC CORPORATION

Defendants

***Proceedings under the Class Proceedings Act, 1992***

**ORDER  
(Fee Approval)**

**THIS MOTION** brought by the Plaintiffs for an Order approving the payment of legal fees was heard this day, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

**ON READING** the materials filed, on hearing submissions of counsel for the Plaintiffs, and on the Defendants taking no position on this motion:

1. **THIS COURT ORDERS** that, for purposes of this Order, except to the extent that they are modified in this Order, the definitions set out in the Settlement Agreement apply to and are incorporated into this Order.
2. **THIS COURT ORDERS** that Legal fees are approved in the amount of \$5,375,000.00 (plus applicable taxes), to be paid out in the form of \$4,500,000.00 (plus applicable taxes) from the First Settlement Payment upon approval of the Settlement and \$875,000.00 (plus applicable taxes) from the Second Settlement Payment upon receipt of the Second Settlement Payment in the Trust Account.
3. **THIS COURT ORDERS** that the payment of \$224,965.51 (plus applicable taxes) in relation to disbursements incurred up to [May 29](#), 2020 is approved and is to be paid out from the First Settlement Payment upon approval of the Settlement.
4. **THIS COURT ORDERS** that Class Counsel may bring a further motion to this Court for approval of additional disbursements incurred after [May 28](#), 2020 (plus applicable taxes), which may be requested upon receipt of the Second Settlement Payment in the Trust Account.
5. **THIS COURT ORDERS** that honoraria be paid to the Representative Plaintiffs from the Settlement Amount in the following amounts:
  - a) Susan Vester - \$10,000.00; and
  - b) Darin Vester - \$10,000.00.

6. **THIS COURT ORDERS** that a copy of this Order shall be posted on the Settlement Website.

7. **THIS COURT ORDERS** that the time for filing the motion record is abridged.

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THE HONOURABLE JUSTICE P. PERELL

**CITATION:** Vester v. Boston Scientific Ltd., 2020 ONSC 3564  
**COURT FILE NO.:** CV-15-527310 CP  
**DATE:** 2020/06/12

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**SUSAN VESTER and DARIN VESTER**

Plaintiffs

– and –

**BOSTON SCIENTIFIC LTD. and BOSTON  
SCIENTIFIC CORPORATION**

Defendants

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**REASONS FOR DECISION**

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PERELL J.

Released: June 12, 2020