C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO.: 500-06-000550-109

S U P E R I O R C O U R T
(Class Action)

ALAN DICK, domiciled and residing at 9 Calais, in the City of Kirkland, District of Montreal, Province of Quebec, H9H 3R7

Plaintiff

-v.-

JOHNSON & JOHNSON INC., a legal person, duly constituted according to law, having its office at 7101 Notre Dame East, in the City and District of Montreal, Province of Quebec, H1N 2G4

-and-

DEPUY ORTHOPAEDICS INC., a legal person, duly constituted according to law, with its head office located at 700 Orthopaedic Drive, Warsaw, Indiana, USA 46582

Defendants, Solidarily

MOTION TO INSTITUTE PROCEEDINGS

THE PLAINTIFF RESPECTFULLY DECLARES THE FOLLOWING:

INTRODUCTION

1. On the 13th of May, 2014, the Honourable Justice Robert Castiglio authorized the Plaintiff to bring a class action for the benefit of the persons forming part of the group hereinafter described, namely:

   "All natural persons who, between July 2003 and August 24, 2010 (the "**Period**"), were surgically implanted with an ASR XL Acetabular Hip System or an ASR Hip Resurfacing System ("**ASR Implant**

System" or "**ASR Implant Systems**"), designed, manufactured, sold or distributed by the Respondents, which system was recalled by the Respondents on August 24, 2010, and who were either: (i) Quebec residents at the time of receipt of the ASR Implant System or any revision thereof; or (ii) Quebec residents at the time of the Respondents' recall of the ASR Implant System; or (iii) Recipients of the ASR Implant System or any revision thereof in Quebec, who were Canadian residents at that time, and who now reside outside of Canada (the "**Group**"). All individuals who make claims against the Respondents in the context of class actions elsewhere in Canada will be excluded from the Group."

2. The Honourable Justice Castiglio ascribed the status of Group representative to the Plaintiff and identified the principal questions of law or fact to be dealt with collectively in the class action as follows:

a) "Did the Respondents (hereinafter, "**Depuy**") manufacture, design, sell or distribute the ASR Implant System in Quebec during the Period?

b) Did Depuy have an obligation to ensure that the ASR Implant System was free of manufacturing and design defects, including latent and safety defects?

c) Did Depuy have an obligation to warn of problems with the ASR Implant System in a responsible and timely manner?

d) If the answer to any of the above questions is "yes", did Depuy breach its obligations as a manufacturer, designer, vendor or distributor of the ASR Implant System?

e) If Depuy breached any or all of its obligations, are the Group members entitled to recover from the Respondents, either collectively or at an eventual individual recovery stage, (i) pecuniary damages; (ii) non-pecuniary damages; and/or (iii) punitive damages in virtue of the *Charter of Human Rights and Freedoms* or the *Consumer Protection Act*?

f) What damages or quantum of damages (pecuniary, non-pecuniary, punitive), if any, can be determined on a collective basis, and what damages may only be determined at an eventual individual recovery stage?

BACKGROUND

3. At all relevant times, physicians have performed hip replacement and/or hip resurfacing procedures for patients with *inter alia* arthritic hip joints and/or which contain bone/cartilage disease;

4. Depuy has at all relevant times held itself out to be a worldwide leader in the design and manufacture of medical equipment, in general, and the ASR Implant Systems, in particular;

5. Depuy's ASR Implant Systems are commonly known as a "metal-on-metal" prosthesis, in that the femoral implant bearing and the acetabular cup implant bearing are both made of metal, i.e. cobalt-chromium alloy;

6. To the best of Plaintiff's knowledge, Depuy made the ASR Implant Systems available in Quebec in or around 2003;

7. Depuy marketed the ASR Implant Systems as particularly appropriate for relatively young, active patients who wished to resume active lifestyles following hip replacement surgery;

8. To the best of Plaintiff's knowledge, more than eight hundred and seventy five (875) members of the Group received Depuy's ASR Implant Systems during the Period;

ASR IMPLANT SYSTEMS' DEFECTS AND THE URGENT RECALL

9. A proper hip implant system that is free of defects is expected to last in excess of twenty years, during which time patients are supposed to be able to engage in normal, pain-free activity;

10. The premature failure of an artificial hip implant entails extremely serious consequences for patients, including pain, difficulty walking, inability to engage in normal activity and, in certain cases, the need for complicated and risky surgery to remove the artificial implant and replace it with another (hereinafter, "**Revision Surgery**");

11. Revision Surgery is a significant operation, entailing the risk of infection, loss of bone and other serious complications; following Revision surgery, patients require a period of convalescence of approximately three months and physiotherapy, during which time patients are in pain and are unable to work or to engage in their daily activities;

12. Between 2007 and 2010, Depuy learned that throughout the world the ASR Implant Systems were failing at a higher rate and within a shorter time period than expected;

13. Although Depuy was aware of the problems reported with the ASR Implant Systems, Depuy did not inform Quebec physicians or members of the Group, and Depuy delayed removing the ASR Implant Systems from the Quebec market;

14. In particular, beginning in 2007, the Australian National Joint Replacement Registry began issuing warnings to Depuy, indicating that the ASR Implant Systems had abnormally high Revision Surgery rates due to bone fractures, dislocations, loosening of the implant and metallosis;

15. Metallosis, the aseptic fibrosis, local necrosis, or loosening of a device due to metallic corrosion and the release of wear debris, increases the risk of stroke, heart attack, death and other devastating consequences;

16. In December 2009, as the results of the ASR Implant Systems continued to worsen, Depuy withdrew the ASR Implant Systems from the Australian market, however Depuy continued to sell and distribute the same ASR Implant Systems to the Canadian market, fully aware of the devastating consequences which would likely be suffered by numerous members of the Group;

17. In fact, it was only on August 24th, 2010, approximately nine (9) months after withdrawing the ASR Implant Systems from the Australian market, that Depuy issued a letter to orthopedic surgeons across Canada entitled "URGENT-VOLUNTARY PRODUCT RECALL" (hereinafter, "**Recall Notice**") (**Exhibit P-3**) and Depuy "recalled" the ASR Implant Systems in Canada (the "**Recall**");

18. As appears from the Recall Notice, Depuy announced that it had issued a study in March 2010 based on data indicating a high failure rate associated with the ASR Implant Systems;

19. Depuy did not inform Quebec physicians or the members of the Group of the foregoing high failure rate and Depuy did not suspend sales or use of the ASR Implant Systems pending the results of the study it had issued;

20. Depuy announced that studies at that time indicated an astonishing, premature failure rate of 12% to 13% for the ASR Implant Systems at (5) years following implantation;

21. It was only in August 2010 at the time of the Recall that Depuy finally issued a warning that patients who have received the ASR Implant Systems may experience significant pain, swelling and difficulty walking due to metallosis, loosening of the implant, a fracture near the site where the implant was inserted and/or dislocation of the implant, as can be seen from Recall documents issued by Depuy, **Exhibit P-4**;

22. Upon learning of the Recall, any member of the Group would undoubtedly experience stress, anxiety and fear of the potentially serious consequences associated with the ASR Implant Systems;

23. Furthermore, Depuy recommended that patients with an ASR Implant System consult their physicians and undergo tests, thereby entailing absences from work and/or other daily activities and expenses associated with certain tests, transportation, parking, etc.;

24. While Depuy's Recall and warnings required all members of the Group to incur expenses, as well as to experience stress, anxiety, fear, pain and suffering, a significant portion of Group members, including the Plaintiff, also required or would require Revision Surgery;

25. The abnormally high premature failure rate which led to the urgent Recall demonstrates that Depuy's ASR Implant Systems contain safety and latent defects, are unfit for their intended purpose, and cause significant damage to the members of the Group;

THE PLAINTIFF'S PERSONAL EXPERIENCE

26. The Plaintiff (hereinafter, "**Alan**") underwent a procedure described as "Right Total Hip Arthroplasty, The Resurfacing Type" (hereinafter, the "**Initial Hip Surgery**") on January 11, 2008, the whole as appears more fully from the Operative Report of the Initial Hip Surgery, **Exhibit P-1**;

27. During the Initial Hip Surgery, an ASR Hip Resurfacing System was surgically implanted into Alan's right hip;

28. Alan understood and legitimately expected that upon receipt of the ASR Hip Resurfacing System, he would be able to resume a normal, active lifestyle free of pain;

29. Shortly after his Initial Hip Surgery, Alan underwent physiotherapy treatment and eventually resumed certain activities; however, he experienced certain discomfort and pain in his right hip;

30. Beginning in the Fall of 2008, the pain in Alan's right hip worsened, and he underwent additional physiotherapy;

31. Despite the additional physiotherapy, Alan's pain continued to worsen and, beginning in May 2009, Alan also began undergoing extensive osteopathy treatment;

32. Alan's pain still did not subside and he consulted a physiatrist and a rheumatologist, as well as his orthopedic surgeon;

33. In an attempt to alleviate his excruciating pain, Alan was prescribed daily doses of oxycontin and oxycodin pain medication, he underwent a cortisone shot and he received a fluoroscopy-guided injection;

34. Notwithstanding the foregoing treatments, by late 2009, Alan's pain had become so unbearable that he was no longer able to walk without the aid of a cane, crutches or a wheelchair;

35. On or about January 8, 2010, Alan's orthopedic surgeon informed him that x-rays revealed that his femur had fractured near the site where the ASR Implant System had been surgically implanted, and that he required Revision Surgery;

36. On February 12, 2010, Alan underwent Revision Surgery described as "Revision Right Hip Resurfacing Arthroplasty to ASR XL Hip Arthroplasty" to replace the ASR Implant System that had been inserted during the Initial Hip Surgery, the whole as appears more fully from a copy of the Operative Report, **Exhibit P-2**;

37. Unfortunately, although Depuy had withdrawn the ASR Implant Systems from the Australian market by this time, they had not done so in Quebec, nor had they communicated the problems associated with the ASR Implant Systems to patients such as Alan. As a result, during the Revision Surgery, Alan's surgeon implanted another ASR Implant System (the ASR XL Acetabular Hip System), rather than a different implant system free of defects;

38. Alan again understood and legitimately expected that the new ASR Implant System would allow him to resume his normal active lifestyle, pain-free;

39. As a result of the pain, the need for Revision Surgery and the ensuing period of convalescence and rehabilitation, Alan had to forego a job

opportunity in January 2010, thereby losing five months of income-earning potential;

40. In the weeks and months immediately following the Revision Surgery, Alan's pain diminished, however, he continued to experience pain and discomfort after long walks or physical activity as well as "clunking" in his right hip;

41. Upon learning of Depuy's August 2010 Recall, Alan became extremely anxious about the "clunking" in his hip, about the possibility that he would require another Revision Surgery and about the serious potential consequences of metallosis, given that he had a metal-on-metal hip implant in his body;

42. Alan's fear of complications came true. Alan experienced pain and discomfort, and on October 23rd, 2013, Alan required a second Revision Surgery to remove the ASR Implant System that had been implanted during the first Revision Surgery, the whole as appears more fully from a copy of the operative report dated October 23rd, 2013, **Exhibit P-5**;

43. As a result of the Revision surgery, Alan missed more than three (3) months of work, thereby losing further income;

44. Thus, as a result of the defective ASR Implant Systems, Alan has experienced extraordinary injuries, pain, suffering, stress and anxiety about the potential complications associated with metallosis, significant treatment, expense, two premature Revision Surgeries and a substantial loss of income;

DEPUY'S LIABILITY

45. Depuy designed, manufactured, marketed and sold the ASR Implant Systems to Quebec hospitals and clinics, to be surgically implanted into members of the Group;

46. Depuy failed to fulfill its obligation to ensure that its products were free of safety defects, were fit for their intended purposes, and would not cause the members of the Group significant medical problems;

47. Depuy knew or ought to have known that failing to remove defects in the ASR Implant Systems prior to marketing and selling said systems would have disastrous consequences for patients undergoing hip surgery, in general, and for Alan and all members of the Group, in particular;

48. Specifically, Depuy knew or ought to have known that its defective ASR Implant Systems would require numerous patients to undergo complicated and painful Revision Surgery that would put them at risk for infection, bone reduction and other adverse consequences;

49. Indeed, the defective ASR Implant Systems have caused and will continue to cause numerous members of the Group, including Alan, considerable pain, suffering, expense, and the need to undergo Revision Surgery;

50. Based on the 12% - 13% failure rate reported by Depuy in the Recall Notice and the number of members of the Group according to Depuy (875), it is likely that in excess of 114 members of the Group will prematurely require at least one Revision Surgery;

51. Furthermore, Depuy failed to act responsibly and diligently as it only issued the Recall Notice in Canada in August 2010, despite having received numerous reports of problems associated with the ASR Implant Systems for several years prior to the Recall, and despite withdrawing the ASR Implant Systems from the Australian Market in December 2009;

52. By failing to promptly inform and warn the medical community and patients, such as Alan, upon first receiving reports of problems with the ASR Implant Systems, Depuy prevented patients from knowing about defects associated with the ASR Implant Systems and thereby demonstrated a wanton disregard for the health and safety of Group members who received the ASR Implant Systems and who Depuy knew to be the end users of the products it was selling to hospitals in Quebec;

THE DAMAGES

53. As a result of the defective ASR Implant Systems inserted during the Initial Hip Surgery, Alan experienced agonizing pain, suffering and mental anguish, he had to undergo physiotherapy and osteopathy treatment, required pain medication, a cortisone shot and injection, as well as two Revision Surgeries in February 2010 and in October 2013;

54. Alan required medical care and attention as well as numerous visits to health professionals as a result of the problems associated with the Initial Hip Surgery, the first Revision Surgery and the second Revision Surgery, and he will continue to require medical care and attention as a result thereof;

55. Alan was forced to forego accepting employment in January 2010 as a result of the pain and problems he was experiencing following the Initial Hip Surgery, and he was only able to accept employment beginning in May 2010;

56. Following each of his Revision Surgeries, Alan was incapable of earning income for several months;

57. Alan continues to require follow-up medical attention and will unquestionably suffer the long-term effects of having undergone two Revision Surgeries, neither of which should have been necessary;

58. As a result, Alan is entitled to claim and does hereby claim from Depuy an amount of $300,000.00 in respect of his extraordinary non-pecuniary damages resulting from the defective ASR Implant Systems he received;

59. In addition, Alan is entitled to claim and does hereby claim from Depuy pecuniary damages in the amount of $40,000.00 for the loss of income earning capacity incurred as a result of the problems associated with the first Revision Surgery, and $40,000.00 for the loss of income earning capacity incurred as a result of the second Revision surgery, for a total of $80,000.00;

60. In addition, Alan is entitled to claim and does hereby claim from Depuy pecuniary damages in the amount of $10,000.00 for all of the expenses incurred and that he will have to incur as a result of the Revision surgeries and the Recall;

61. Furthermore, inasmuch as Depuy failed to act in a responsible manner upon learning of the defects associated with the ASR Implant Systems and of the drastic consequences that patients would suffer, Alan is also entitled to claim and does hereby claim an amount of $50,000.00 as exemplary and punitive damages, the whole pursuant to the *Quebec Charter of Human Rights and Freedoms,* and the *Quebec Consumer Protection Act*;

THE PERSONAL CLAIMS OF EACH OF THE MEMBERS OF THE GROUP AGAINST DEPUY:

62. All members of the Group were implanted with an ASR Implant System. They were entitled to expect that they would resume normal activities without experiencing pain, suffering, difficulty walking and the need for Revision Surgery for at least approximately twenty years;

63. Members of the Group have experienced mental anguish knowing that they have been implanted with a defective medical product, and have incurred expenses and inconveniences as a result of the Recall. Furthermore, many members of the Group have or will prematurely experience pain and suffering associated with the defective ASR Implant Systems;

64. In addition, many members of the Group have required and/or will require premature Revision Surgery to remove and replace the defective ASR Implant Systems, and/or suffer serious consequences associated with the defective ASR Implant Systems;

65. Patients who require Revision Surgery are exposed to an increased risk of infection, bone reduction and other adverse consequences associated with an additional hip surgery;

66. Alan is accordingly entitled to claim and does hereby claim from Depuy on behalf of each member of the Group, non-pecuniary damages in the amount of $200,000.00 for each Group member who has required, requires or will require within the next seven (7) years Revision Surgery, an amount of $250,000.00 for each such Group member who requires two (2) Revision surgeries, an amount of $300,000.00 for each such Group member who requires more than (2) Revision Surgeries or who suffers extraordinary injuries, and an amount of $25,000.00 per Group member who does not require premature Revision Surgery;

67. Alan is entitled to claim and does hereby claim from Depuy on behalf of each member of the Group an amount to be determined by the Court per Group member for pecuniary damages, including loss of income and diminished earning capacity and expenses associated with the Recall, medical monitoring and treatment;

68. Alan is also entitled to claim and does hereby claim from Depuy an amount of $50,000.00 per Group member as exemplary and punitive damages to be recovered collectively, the whole pursuant to the *Quebec Charter of Human Rights and Freedoms* and the *Quebec Consumer Protection Act*;

69. The patrimonial situations of the Defendants are so significant that the foregoing amount of punitive damages is appropriate;

WHEREFORE, PLAINTIFF PRAYS FOR JUDGMENT OF THIS HONOURABLE COURT:

GRANTING the Class Action against Depuy Orthopaedics Inc. and Johnson & Johnson Inc. (hereinafter, the **"Defendants"**);

CONDEMNING the Defendants, solidarily, to pay to Alan Dick non-pecuniary damages in the amount of $300,000.00, the whole with interest and the additional indemnity provided by law from and as of service of Alan Dick's Motion for Authorization to Institute a Class Action (December 22nd, 2010);

CONDEMNING the Defendants, solidarily, to pay to each member of the Group who required, requires or will require within the next seven (7) years Revision Surgery, non-pecuniary damages in the amount of $200,000.00; for such Group member who requires two (2) Revision surgeries an amount of $250,000.00; for such Group member who requires more than two (2) Revision surgeries or who suffers extraordinary injuries an amount of $300,000.00; and to pay to each member of the Group who does not require premature Revision Surgery non-pecuniary damages in the amount of $25,000.00, to be recovered collectively, the whole with interest and the additional indemnity provided by law from and as of December 22nd, 2010;

CONDEMNING the Defendants, solidarily, to pay to Alan Dick pecuniary damages in the amount of $90,000.00 in respect of loss of income earning capacity and expenses, the whole with interest and the additional indemnity provided by law from and as of December 22nd, 2010;

CONDEMNING the Defendants, solidarily, to pay to each member of the Group pecuniary damages to be determined by the Court, the whole with interest and the additional indemnity provided by law from and as of December 22nd, 2010;

DETERMINING special modes of proof and procedure to determine each Group Member's pecuniary damages;

CONDEMNING the Defendants, solidarily, to pay to Alan Dick exemplary and punitive damages in the amount of $50,000.00, the whole with interest and the additional indemnity provided by law from and as of December 22nd, 2010;

CONDEMNING the Defendants, solidarily, to each member of the Group, exemplary and punitive damages in the amount of $50,000.00, to be recovered collectively, the whole with interest and the additional indemnity provided by law from and as of December 22nd, 2010;

RESERVING the rights of the members of the Group to apply for additional damages, the whole in accordance with Article 1615 of the *Civil Code of Quebec*;

ORDERING collective recovery of the total amount of the non-pecuniary and punitive damages claims herein, based on the precise figures from Depuy of the number of members of the Group, as well as numbers of people who required one or more premature Revision Surgeries and **ORDERING** individual recovery of the pecuniary damages claims of the Group members;

ORDERING that the claims of the members of the Group be the object of individual liquidation in accordance with Articles 1037 to 1040 C.C.P. or, if impractical or inefficient, ordering Depuy to perform any remedial measures that this Honourable Court deems to be in the interests of the members of the Group;

ORDERING Depuy to advise all hospitals and/or medical clinics in the Province of Quebec, which purchased the defective ASR Implant System, of the present Class Action lawsuit, and **DEMANDING** that these hospitals and/or clinics advise all of their patients who were implanted with the defective ASR Implant System of the pending Class Action and of their right to contact Counsel for the Group free of charge;

CONDEMNING Depuy to any further relief as may be just and proper;

THE WHOLE with costs, including the costs of all exhibits, reports, expertise and publication of notices.

MONTREAL, August 11, 2014

Kugler Kandestin, L.L.P.

KUGLER KANDESTIN, L.L.P.
Attorneys for Plaintiff

NOTICE TO DEFENDANTS
(Article 119 C.C.P.)

Take notice that Plaintiff has filed this action or application in the office of the Superior Court of the judicial district of Montreal.

To file an answer to this action or application, you must first file an appearance, personally or by advocate, at the courthouse of Montreal located at 1 Notre-Dame Street East, Montreal, Quebec, within 10 days of service of this motion.

If you fail to file an appearance within the time limit indicated, a judgment by default may be rendered against you without further notice upon the expiry of the 10-day period.

If you file an appearance, the action or application will be presented before the court on **September 26, 2014**, at **9:00 a.m., in room 2.16 of the Montreal Courthouse**. On that date, the court may exercise such powers as are necessary to ensure the orderly progress of the proceeding or the court may hear the case, unless you make a written agreement with the Plaintiffs or the Plaintiffs' advocate on a timetable for the orderly progress of the proceeding. The timetable must be filed in the office of the court.

In support of the Motion Introductive of Proceedings, Plaintiff discloses the following Exhibits:

EXHIBIT P-1: Operative Report of the Initial Hip Surgery on January 11, 2008.

EXHIBIT P-2: Operative Report of the Revision Surgery on February 12, 2010.

EXHIBIT P-3: Letter sent by the Respondents to orthopedic surgeons on or about August 24, 2010 entitled "**URGENT – VOLUNTARY PRODUCT RECALL**".

EXHIBIT P-4: Documentation available on the Depuy website regarding the symptoms associated with the defective Depuy Implant System.

EXHIBIT P-5: Operative report of the Revision Surgery on October 23, 2013.

These Exhibits are attached hereto.

MONTREAL, August 11, 2014

Kugler Kandestin, L.L.P.

KUGLER KANDESTIN, L.L.P.
Attorneys for Plaintiff

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO.: 500-06-000550-109

SUPERIOR COURT
(Class Action)

ALAN DICK

Plaintiff

-v.-

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LIST OF EXHIBITS

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MONTREAL, August 11, 2014

Kugler Kandestin, L.L.P

KUGLER KANDESTIN, L.L.P.
Attorneys for Plaintiff

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MOTION TO INSTITUTE PROCEEDINGS, NOTICE TO DEFENDANTS, LIST OF EXHIBITS AND EXHIBITS P-1 TO P-5

ORIGINAL

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