IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Birrell v. Providence Health Care Society,*** 2007 BCSC 668

Date: 20070511
Docket: L050414
Registry: Vancouver

Between:

Margaret Birrell

Plaintiff

And

Providence Health Care Society dba Providence Health Care and dba St. Paul's Hospital and dba The B.C. Ear Bank, and Vancouver Coastal Health Authority dba Vancouver General Hospital and dba Vancouver Hospital and dba The B.C. Ear Bank, and the University of British Columbia dba The B.C. Ear Bank, and John Doe

Defendants

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for Plaintiff	D.A. Klein
Counsel for Defendant Vancouver Coastal Health Authority	R. Harper
Counsel for Defendant Providence Health Care Society	C.L Woods, Q.C.
Counsel for Defendant University of British Columbia	R.B. Kennedy
Date and Place of Hearing:	April 4, 2007 Vancouver, B.C.

INTRODUCTION

[1] These are the reasons for decisions in two separate motions. The underlying action is brought by the plaintiff, Margaret Birrell, on her own behalf and on behalf of all other persons who received transplants with tissue and/or bone supplied by the British Columbia Ear Bank (the "Ear Bank"). It involves claims in negligence arising from the operation of the Ear Bank by the defendants. In late 2002, Health Canada conducted a review of the Ear Bank's operations and found that the Ear Bank was maintaining incomplete and insufficient records relating to whether donors of tissue had been screened for various infectious diseases.

[2] As a result of this review, Health Canada issued a public health warning. Tissue recipients were advised by letter from their treating physicians to undergo testing for certain diseases including HIV, Hepatitis B and Hepatitis C as a precautionary measure. The letter also advised that the risk of infection was extremely low. It is common ground that no person has yet come forward with infection as a result of receipt of tissue from the Ear Bank. As a result of these events, the plaintiff claims damages for loss of life expectancy, loss of income, cost of care, medical expenses and nervous shock.

[3] However, after the plaintiff initiated this action, it was discovered that she had not actually received tissue from the Ear Bank. She had, in fact, received an autologous transplant, which means a transplant of her own tissue. Therefore, the defendants argue, and the plaintiff does not disagree, that she has no cause of action against the defendants because no duty of care was ever owed by the defendants to the plaintiff. However, the plaintiff argues that, pursuant to sub-

section 2(4) of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50, she can still be a representative plaintiff in this action even if she is not a class member.

[4] The first motion is brought by the plaintiff to add further plaintiffs, Thomas Little and Robert Corfield (the "Proposed Plaintiffs") who actually received transplants of tissue from the Ear Bank. The defendants Providence Health Care Society ("Providence") and the Vancouver Coastal Health Authority ("Coastal") (together the "Hospital Defendants") oppose this motion and the University of British Columbia ("UBC") has taken no position.

[5] The second motion is an application under Rule 18A of the ***Rules of Court*** by Providence and Coastal to have the plaintiff's claims against them dismissed. UBC has likewise taken no position with respect to this application.

[6] If the plaintiff's motion to add plaintiffs is allowed, then the plaintiff Margaret Birrell consents to the action against her being withdrawn. Otherwise, she seeks to continue as the representative plaintiff to ensure the continuation of this class proceeding. These two motions are highly interrelated and, in particular, the issue of whether the limitation period has expired and against what class of plaintiffs plays a significant role in both applications. In earlier reasons at 2006 BCSC 1814, I gave reasons for deciding to hear these two applications together, prior to the certification hearing.

FACTS

[7] The plaintiff, Margaret Birrell, received an ear tissue transplant on July 6, 1994. Although she alleges in her statement of claim that she received an ear tissue

transplant with tissues and bones supplied by the Ear Bank, evidence was subsequently pointed to by the defendants that showed that she had, in fact, received a transplant of her own tissues. Ms. Birrell does not dispute that the evidence clearly establishes that her own tissue was used in the surgery to repair her ear drum and, therefore, that she never received tissue from the Ear Bank.

[8] The Ear Bank commenced operations in 1974 and collected bone and tissue which were used in transplant operations for patients suffering from hearing loss. Tissue and bone were sent to various hospitals across North America, for both transplant and teaching purposes. In late 2002, Health Canada initiated a review of the procedures followed by the Ear Bank and on February 19, 2003, Providence, in cooperation with Health Canada, issued a public health advisory regarding the operations of the Ear Bank. Tissues that had been sent to various institutions were recalled and patients who had received transplanted tissues were advised to undergo testing for various diseases as a precautionary measure. Following the public health advisory, there was significant media coverage of the issue in late February of 2003.

[9] In January of 2005, Ms. Birrell received a letter from her surgeon informing her of documentation problems at the Ear Bank, as identified by Health Canada, and relayed to her the advisory from Health Canada that she should undergo testing for various infectious diseases as a precautionary measure. The wording of that letter is as follows:

> I am writing to you following a recent notification from Health Canada regarding the use of bone and tissue samples from the British

Columbia Ear Bank. A review of my records reveals that tissue from the BC Ear Bank was used during your ear surgery.

The BC Ear Bank has been in existence since 1974, and served as a combination teaching lab and transplant tissue bank under the medical direction of the University of British Columbia. The BC Ear Bank collected, processed, sterilized and stored bone and tissue. The Bank then sent these materials to hospitals across the country and the United States, who requested them for both teaching purposes and for use on transplant operations in patients suffering from hearing loss. Records from 1985 to 2002 show that 6,016 individual specimens of tissue and bone were distributed by the British Columbia Ear Bank for such purposes.

Due to incomplete documentation, the BC Ear Bank was not able to confirm that all proper procedures were followed in the donor screening process in each case, and some patients may have been exposed to a risk of disease transmission. Consequently, Health Canada suggests that individuals who have undergone surgery involving tissue from the BC Ear Bank, as a precautionary measure, may wish to seek testing for HIV, Syphilis, Hepatitis B, and C and Human T-lymphotropic virus types I and II.

I stress that since the inception of the BC Ear Bank in 1975, there have been no reports of Disease transmission due to transplantation of the bone and tissue samples. Health Canada has assessed that recipients of tissues processed and distributed by the British Columbia Ear Bank are at an extremely low risk for disease transmission. I stress again that this advisory is a precautionary one, and that there have been no reports of disease transmission due to the transplantation of these tissues.

My primary wish is not to cause you undue concern. Based on the information provided by various infectious diseases experts and Health Canada, I am of the opinion that the possibility of disease transmission through the tissue used in your surgery is extremely low. Once you have had time to consider this information, I would be pleased to answer any questions and concerns that you may have, and to arrange the appropriate testing.

The possibility of disease transmission in this situation is extremely remote and I am satisfied that you and your family can be assured that the probability of developing any disease as a result of the transplant is very unlikely. Please see your family doctor for further advice if needed.

[10] Similar letters were sent by treating physicians to other patients who had tissue supplied by the B.C. Ear Bank. The letters appear to have been sent across a fairly large time span and in a somewhat sporadic manner, with one letter being sent as late as February 2007.

[11] The proposed new plaintiffs, Thomas Little and Robert Corfield (the "Proposed Plaintiffs"), received ear tissue transplants with tissue supplied by the Ear Bank on April 19, 1996 and in 1991, respectively. Mr. Little received a letter in March of 2005 informing him of the documentation problems and advising him to undergo testing for various communicable diseases. Mr. Corfield received a similar letter in January of 2006.

[12] The letter sent to Mr. Corfield quotes in part the statement released by Health Canada:

> Health Canada therefore recommends that all recipients of dura mater, pericardium and ear bone, sourced from the BC Ear Bank, presently located at St. Paul's Hospital, be tested, as a precautionary measure, as there may be a low risk of contracting one or more of the following: HIV 1 and 11; Hepatitis B, Hepatitis C; there may also be a theoretical risk of contracting HTLV 1 and 11 and Syphilis. Furthermore, as there is insufficient information available currently to determine whether the donors of these tissues were assessed for the risk of Creutzfeldt-Jacob Disease (CJD) (i.e. family history, travel to countries at risk of CJD), there may be an additional theoretical risk in this respect.

[13] There is no evidence that either the plaintiff or the Proposed Plaintiffs, or anyone, has actually been infected as a result of tissues received from the Ear Bank. Additionally, an affidavit from an employee of the plaintiff's counsel states that there exist two potential plaintiffs who would have been minors at the time of their surgery. One was born September 4, 1981; had surgery on May 27, 1994 and reached the

age of majority on September 4, 2000. In February 2007, he received a letter informing him that tissue from the Ear Bank was used during his surgery.

[14] A second individual was born on January 20, 1981, had surgery on September 26, 1995 and reached the age of majority on January 20, 2000. On April 19, 2006, he received a letter from his surgeon informing him that tissue from the Ear Bank was used during his surgery. However, these individuals are not seeking to be added as plaintiffs in this proceeding.

[15] Ms. Birrell filed her writ on February 18, 2005. It was served on the defendants in January of 2006. The application to add the Proposed Plaintiffs pursuant to Rule 15(5) was served on the defendants on August 16, 2006. There was correspondence between the parties in June and July of 2006 relating to the possible lack of a valid cause of action on the part of the plaintiff, and the plaintiff's intention to attempt to add further plaintiffs or have Ms. Birrell continue as the representative plaintiff pursuant to sub-section 2(4) of the ***Class Proceedings Act***, regardless of the validity of her cause of action.

RELEVANT LEGISLATION

Limitation Act, R.S.B.C. 1996, c. 266

> **Limitation periods**
>
> 3 (2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:
>
> (a) subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty…

Counterclaim or other claim or proceeding

4 (1) If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to…

> (d) adding or substituting a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

Running of time postponed

6 (4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that

> (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
>
> (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

(5) For the purpose of subsection (4),

> (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
>
> (b) "facts" include
>
> > (i) the existence of a duty owed to the plaintiff by the defendant, and
> >
> > (ii) that a breach of a duty caused injury, damage or loss to the plaintiff,

Ultimate limitation

8 (1) Subject to section 3 (4) and subsection (2) of this section but despite a confirmation made under section 5, a postponement or suspension of the running of time under section 6 or 11 (2) or a

postponement or suspension of the running of time under section 7 in respect of a person who is not a minor, no action to which this Act applies may be brought

> (a) against a hospital, as defined in section 1 of the *Hospital Act*, or against a hospital employee acting in the course of employment as a hospital employee, based on negligence, after the expiration of 6 years from the date on which the right to do so arose
>
> …
>
> (c) in any other case, after the expiration of 30 years from the date on which the right to do so arose.

(2) Subject to section 7 (6), the running of time with respect to the limitation periods set by subsection (1) for an action referred to in subsection (1) is postponed and time does not begin to run against a plaintiff until the plaintiff reaches the age of majority.

Class Proceedings Act, R.S.B.C. 1996, c. 50

1 In this Act: …

> "class proceeding" means a proceeding certified as a class proceeding under Part 2;

Plaintiff's class proceeding

2 (1) One member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class.

…

(4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

Limitation period for a cause of action not included in a class proceeding

38.1 (1) If a person has a cause of action, a limitation period applicable to that cause of action is suspended for the period referred to in subsection (2) in the event that

(a) an application is made for an order certifying a proceeding as a class proceeding,

(b) when the proceeding referred to in paragraph (a) is commenced, it is reasonable to assume that, if the proceeding were to be certified,

(i) the cause of action would be asserted in the proceeding, and

(ii) the person would be included as a member of the class on whose behalf the cause of action would be asserted, and

(c) the court makes an order that

(i) the application referred to in subsection (1) (a) be dismissed,

(ii) the cause of action must not be asserted in the proceeding, or

(iii) the person is not a member of the class for which the proceeding may be certified.

(2) In the circumstances set out in subsection (1), the limitation period applicable to a cause of action referred to in that subsection is suspended for the period beginning on the commencement of the proceeding and ending on the date on which

(a) the time for appeal of an order referred to in subsection (1) (c) expires without an appeal being commenced, or

(b) any appeal of an order referred to in subsection (1) (c) is finally disposed of.

Limitation periods

39 (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a proceeding that is certified as a class proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when any of the following occurs:

(a) the member opts out of the class proceeding;

(b) an amendment is made to the certification order that has the effect of excluding the member from the class proceeding;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is discontinued or abandoned with the approval of the court;

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(2) If there is a right of appeal in respect of an event described in subsection (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

Rules of Court

40 The Rules of Court apply to class proceedings to the extent that those rules are not in conflict with this Act.

Rules of Court, B.C. Reg. 221/90

Removing, adding or substituting party

15(5)(a) At any stage of a proceeding, the court on application by any person may…

(ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and

(iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected

(A) with any relief claimed in the proceeding, or

(B) with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and that party.

ANALYSIS -- THE LIMITATION ISSUE

[16] The central debate between the parties on both applications is whether the claims of the plaintiff and the Proposed Plaintiffs are statute-barred by reason of the ***Limitation Act***. In particular, there is considerable debate about whether the limitation period applicable to claims for nervous shock began to run at the time of the original negligent act, or at the time that each plaintiff received notice that proper documentation procedures had not been followed.

[17] There is also some debate as to whether the limitation period should run from the time of receipt of the letter from the treating physician, or at the time of the original Health Canada notice. Both parties appeared to be willing to proceed on the assumption that time began to run from the date of receipt of the letter. The plaintiff seemed to adopt this position to suggest that the Proposed Plaintiffs should be added as the limitation period had not expired, while the Hospital Defendants were content to follow this assumption because it suggested less prejudice to the Proposed Plaintiffs if the plaintiff's claim was dismissed.

[18] However, in suggesting prejudice to the class members due to the loss of the benefit of the date of filing Ms. Birrell's writ, one day short of the expiration of two years after the public health notice, the plaintiff seemed to recognize that there was a risk that the two year limitation period for damages for personal injury could have begun to run as at the date of the public health notice. Regardless of the submissions of counsel, neither party evinced any intention to be bound by any

assumption as to when the limitation period may have started to run. I consider that the matter remains a live issue between the parties.

[19] The defendants contend that receipt of the notice informing the plaintiff and Potential Plaintiffs of the possible risk of infection is a discoverability issue. As the ultimate limitation periods are not subject to postponement by reason of a lack of discoverability, the Hospital Defendants submit that the ultimate limitation period of six years for an action in negligence to be brought against a hospital pursuant to paragraph 8(1)(a) of the ***Limitation Act*** applies to bar the claims of the Proposed Plaintiffs.

[20] The plaintiff agrees with the law regarding limitation periods as set out by the defendants, but disagrees as to how it applies to the facts of this case. The plaintiff submits that the cause of action in tort does not arise until damage occurs. In the case of damages for nervous shock, the damages are suffered when the shock is received—at the time of receiving the warning letter.

[21] The plaintiff further submits that there are individuals who received transplants of tissue as minors, and against whom the running of the ultimate limitation period would be suspended until they reached the age of majority; and that other individuals in other jurisdictions with longer ultimate limitation periods may also have received tissue and, therefore, would have claims that are not statute-barred.

[22] The plaintiff acknowledges that under her interpretation of when the limitation period begins to run, those individuals who suffered physical harm as well as nervous shock would be barred by the expiration of the ultimate limitation period

from pursuing a claim, while those who suffered only nervous shock would be able to pursue their claims.

Relevant Law

Scheme and Object of the ***Limitation Act***

[23] The purpose of limitation statutes, including the significance of the ultimate limitation period, was set out by McLachlin J. (as she then was) in ***Novak v. Bond***, [1999] 1 S.C.R. 808, 63 B.C.L.R. (3d) 41. After stating the traditional rationales of limitation statutes, which typically favoured defendants, and setting out the evolution of limitations statutes to ensure fair consideration of the plaintiff's interests, she stated at paras. 66-70:

> Contemporary limitations statutes thus seek to balance conventional rationales oriented towards the protection of the defendant - certainty, evidentiary, and diligence - with the need to treat plaintiffs fairly, having regard to their specific circumstances. As Major J. put it in *Murphy*, *supra*, "[a] limitations scheme must attempt to balance the interests of both sides" (p. 1080). See also *Peixeiro*, *supra*, at para. 39, per Major J.
>
> The result of this legislative and interpretive evolution is that most limitations statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics.
>
> The general scheme of the British Columbia *Limitation Act* reflects this evolution. Section 3 provides concrete limitation periods for most actions. Depending on the cause of action, an action must be

> commenced within two, six, or ten years after the date on which the right to bring it arose, i.e., the date on which all the elements of the cause of action came into existence: see s. 3(2), (3), (5) and (6); ***Bera v. Marr*** (1986), 1 B.C.L.R. (2d) 1 (C.A.).
>
> At the same time, the Act contains provisions aimed at treating plaintiffs fairly. For example, s. 6(3) to (5) reflect the common law view that it is unfair to the plaintiff if the running of time commences before the existence of the cause of action is reasonably discoverable… Section 7 of the Act allows the running of time to be postponed if the plaintiff is under a legal disability, a provision that is also directed to ensuring fairness to plaintiffs.
>
> Certainty and diligence, however, remain important goals. The running of time cannot be postponed indefinitely. Therefore, s. 8 of the Act sets forth a series of ultimate limitation periods, the length of which depends on the particular type of action in issue. Generally, regardless of whether the running of time has been postponed or the cause of action confirmed by the defendant, no action can be brought after the expiration of -- depending on the classification of the action -- six or thirty years after the date on which the right to bring the action arose. Where the plaintiff is a minor, the running of time for the purposes of the ultimate limitation period is postponed until he or she reaches the age of majority: see s. 8(2). Only upon the expiration of the relevant ultimate limitation period can the potential defendant truly be assured that no plaintiff may bring an action against him or her. At that time, any cause of action that was once available to the plaintiff is extinguished: see s. 9(1)…
>
> [Emphasis in original.]

[24] Thus, the need to provide fairness to plaintiffs by postponing the beginning of the limitation period, until the plaintiff ought reasonably to be able to commence an action, is counterbalanced by a desire to provide fairness and certainty to defendants by imposing an absolute limitation period, beyond which defendants can be sure they will be free of claims.

[25] In British Columbia, expiration of the limitation period extinguishes the cause of action. In the case of hospitals and medical practitioners, the Legislature has concluded that an ultimate limitation period of six years, from the date on which the

right to bring an action in negligence arose, is the appropriate balance between the rights of plaintiffs and defendants (see paragraphs 8(1)(a) and (b)). This period is significantly shorter than the 30 year ultimate limitation period provided against all other defendants in paragraph 8(1)(c), indicating that the Legislature places significantly greater value on finality and certainty for hospitals.

A Single Cause of Action Arises for Damages Arising from a Single Negligent Act

[26] One of the difficulties in the present case is that the damages suffered by reason of nervous shock would have occurred much later than any physical injury. The physical injury of infection would have occurred at the time of the original surgery, while damages for nervous shock would not occur until a patient received notification of a risk of infection.

[27] However, it is clear that only one cause of action can arise out of a single negligent act, and that the suffering of different or more serious damage at a later time cannot form the basis of a new cause of action. In this regard, the decision of the Supreme Court of Canada in ***Cahoon v. Franks***, [1967] S.C.R. 455, 63 D.L.R. (2d) 274, makes clear that a single tortious act gives rise to only a single cause of action, even if different types of damage are suffered.

[28] In that case, the plaintiff was permitted to amend his statement of claim, which initially claimed only for damage to property, to add a claim for damages for personal injury after the limitation period had passed. It was held that to do so did not set up a new cause of action and that damages, resulting from a single tort, create only a single cause of action and must be assessed in the same proceeding.

[29] In the realm of the law of personal injuries, this decision has been interpreted to mean that a plaintiff cannot further recover for increased damages where his or her injuries subsequently turn out to be much worse than thought at the time of trial, provided that the injury was sufficiently serious to justify bringing an action from the beginning: see ***Craig v. Insurance Corporation of British Columbia*** (2003), 46 M.V.R. (4th) 102, 2003 BCSC 1856 at paras. 26-28, aff'd 2005 BCCA 275.

[30] Expiration of the limitation period will act to bar all types of damage claims in negligence arising as a result of one original breach of duty: see ***410727 B.C. Ltd. v. Dayhu Investments Ltd.*** (2004), 30 B.C.L.R. (4th) 157, 2004 BCCA 379 (holding that the expiration of the ultimate limitation applies to bar causes of action, both for economic loss and for the subsequent destruction of a building that was negligently constructed and inspected, and that the limitation period began to run at the time that the building first suffered damage, even though this damage remained undetected).

[31] In the case at bar, although physical injury and nervous shock may be suffered at significantly different times, only one action may be brought to claim damages in respect of both types of injuries. Once the limitation period has expired, no action may be brought, even if there is subsequent damage of a different type arising from the same negligent conduct. The disagreement between the parties centres on when the limitation period began to run in this case for those persons who did not become infected as a result of the original transplant—at the time of the original transplant, or at the time nervous shock was allegedly suffered.

The Ultimate Limitation Period

[32] The six-year ultimate limitation period in place for doctors and hospitals has been strictly construed by the courts, and there is no principle of discoverability applicable to this ultimate limitation period that would extend time, even if the plaintiff remains unaware she has a cause of action: see ***Bera v. Marr*** (1986), 1 B.C.L.R. (2d) 1 at 27, 27 D.L.R. (4th) 161 (C.A.) [cited to B.C.L.R]; ***Letvad v. Fenwick*** (2000), 82 B.C.L.R. (3d) 296, 2000 BCCA 630 at para. 48; ***Wittmann v. Emmott*** (1991), 53 B.C.L.R. (2d) 228 at 237, 77 D.L.R. (4th) 77 (C.A.), leave to appeal to S.C.C. refused, [1991] 3 S.C.R. xii; ***Clover v. Hurley*** (1993), 23 B.C.A.C. 155 at para. 2, leave to appeal to S.C.C. refused, [1993] 4 S.C.R. v.

[33] The ultimate limitation period begins to run once all elements of a cause of action are present, even if the plaintiff remains unaware of their existence. For example, ***Bera v. Marr***, *supra*, involved a claim for medical malpractice where the writ was filed approximately 7½ years after the performance of the allegedly negligent surgical procedure. The plaintiff had not sought medical advice in relation to his injury until approximately seven years after the date of the surgery, and the parties agreed that this was the date on which he became aware of the relevant facts. An appeal was brought by way of stated case to the Court of Appeal to determine the limitation period applicable to the plaintiff's action. In giving reasons for a majority of the Court, Esson J.A. stated at 14:

> The Limitations Act, as appears from ss. 3(2) and 8(1), defines the beginning of the period of limitation as being the date on which the right to bring action arose. That must mean the date upon which the cause of action was complete; the date upon which all of the elements

> of the cause of action had come into existence, whether or not the person entitled to the cause of action was aware of all the facts upon which its existence depended.
>
> [Emphasis added.]

[34] Esson J.A. based this analysis of when the limitation period commences to run on an analysis of previous case law, as exemplified in the English decision of ***Cartledge v. E. Jopling & Sons Ltd.***, [1963] A.C. 758, [1963] 1 All E.R. 341. In ***Cartledge***, the House of Lords held that the cause of action accrued in tort at the time that the plaintiff first suffered significant damage, even if that damage remained undetected and undetectable for a significant period of time.

[35] Esson J.A. noted that the addition of section 6 to the ***Limitation Act*** avoided the injustice in ***Cartledge*** by postponing the commencement of the limitation period until the plaintiff had knowledge of the facts, giving rise to a cause of action (at 15). In view of the balance created by sections 3, 6 and 8 of the ***Limitation Act***, Esson J.A. refused to construe the date on which the right to bring the action arose in a manner different from the previous jurisprudence—thus, the ultimate limitation period began to run on the date on which the damage occurred (which was the date of the surgery in that case), not on the date the plaintiff had knowledge of the damages (at 27-28).

[36] The distinction between the date on which the right to bring the action arose and the date on which the plaintiff has knowledge of the damages is well-illustrated by the often-cited English decisions in ***Sparham-Souter v. Town & Country Dev.***

(Essex) Ltd., [1976] Q.B. 858, [1976] 2 All E.R. 65 (C.A.) and ***Pirelli Gen. Cable Works Ltd. v. Oscar Faber & Partners***, [1983] 2 A.C. 1, [1983] 1 All E.R. 65 (H.L.).

[37] In ***Sparham-Souter***, the English Court of Appeal held that a cause of action in negligence accrues to the purchaser of a building that is negligently constructed at the time that the actual plaintiff suffers damage, and not at the time that damage, such as unnoticeable cracks in the foundations, first appears. The rationale was, in part, that the plaintiff could have no cause of action, at least until it was the owner of the building at issue.

[38] However, this decision was overruled by the House of Lords in ***Pirelli***. In that case, it was held that a cause of action accrues in negligence at the time that damage is first suffered by the building, even if such damage cannot be detected. Thus, the cause of action accrues at the same time for all future owners of the building, regardless of the fact that the owner at the time that the damage becomes manifest would not have been capable of bringing an action at the time damage was first suffered by the building. This decision emphasizes that it is the time at which damage is suffered that is critical to a determination of when the limitation period began to run.

[39] In this case, the difficulty is that many people, including the plaintiff, may suffer no damage until the time of the nervous shock and, consequently, have no cause of action in negligence until well past the expiration of six years from the date of the original negligent act. The cases in which damages have been awarded for nervous shock have tended to focus on those who witness the aftermath of a

negligent act and suffer a recognized psychiatric illness as a direct consequence of what they observed (see *e.g.* Allen M. Linden, *Canadian Tort Law*, 8th ed. (Markham: Butterworths, 2006) at 425-427).

[40] The damages from nervous shock in these cases arise essentially at the same time as the negligent act and, therefore, the limitation period would start to run at that time. However, that is not the scenario posed in the case at bar, where the nervous shock arose many years after the alleged negligent act.

[41] The plaintiff has cited several cases in which class actions, including claims for nervous shock, have been certified: see *e.g.* ***Fakhri v. Wild Oats Markets Canada, Inc. (c.o.b. as Capers Communtiy Markets)*** (2004), 34 B.C.L.R. (4th) 201, 2004 BCCA 549; ***Anderson v. Wilson*** (1999), 44 O.R. (3d) 673, 175 D.L.R. (4th) 409 (C.A.), leave to appeal to S.C.C. denied, [1999] S.C.C.A. No. 476 (QL); ***Rose v. Pettle*** (2004), 23 C.C.L.T. (3d) 21, 43 C.P.C. (5th) 183 (Ont. S.C.J.); ***Rideout v. Health Labrador Corp.*** (2005), 12 C.P.C. (6th) 91, 2005 NLTD 116; ***Healey v. Lakeridge Health Corp.***, [2006] O.J. No. 4277 (S.C.J.) (QL).

[42] However, the issue of expiration of the limitation period does not appear to have been raised in these cases, nor was the issue of how to deal with the prospect of liability for an indeterminate period of time for nervous shock, particularly in the context of hospitals and medical doctors.

[43] To complicate matters further in this case, the Proposed Plaintiffs received notice of the negligent conduct more than six years after the original negligent act. This means that if they were actually infected at the time of their transplant, they

have no cause of action against the Hospital Defendants by virtue of section 8 of the ***Limitation Act***—they suffered damage at the time of the original surgery when they received the infected tissue. The limitation period began to run at the date of the original negligent conduct and their actions are statute barred.

[44] However, if they were not infected, as counsel advise, they would be able to assert a cause of action against the Hospital Defendants, as they would have suffered no damages until receiving notice of the risk of infection, causing nervous shock. Ironically, this means that a person who suffers transient shock on receipt of the letter may assert a cause of action, while a person who receives the same notice and suffers the same shock, only to go on to find out that they have a permanent, infectious and life-threatening illness, which will drastically affect them, has no claim for damages. The plaintiff acknowledges this is an absurdity that flows from this interpretation of the ***Limitation Act***.

[45] While the absurdity caused by the commencement of the running of the ultimate limitation period from the date damage is suffered is acutely demonstrated by the present case, the problem has not escaped prior notice. The British Columbia Law Institute in ***The Ultimate Limitation Period: Updating the Limitation Act*** (Vancouver: BCLI Report No. 19, July 2002) at 16-18 has noted that sub-section 8(1) provides that the ultimate limitation period starts to run from the date the cause of action arose which, in the case of negligence, means that time runs from when the damage occurs. The BCLI notes several problems with this position and recommends amending section 8 of the ***Limitation Act***, so that the

ultimate limitation period commences from the date an act or omission that constitutes a breach of duty occurs, regardless of the basis of the cause of action.

[46] However, the Legislature has not acted upon these recommendations. The wording of section 8 speaks in terms of *the date on which the right to bring an action arose*. Despite the strong arguments of the Hospital Defendants, to the effect that the nervous shock head of damages relates to the issue of discoverability and, therefore, that the ultimate limitation period of six years has expired for both the plaintiff and the Proposed Plaintiffs, I cannot agree that the plain and clear language of the section allows such an interpretation.

[47] In an action for negligence, there is no cause of action and, consequently, no right to bring an action until after the plaintiff suffers damages. In the case of a plaintiff who suffers no physical injuries, there is no right to sue until harm causing nervous shock creates damages. If the nervous shock never occurs, the plaintiff has not suffered any damages and, consequently, never has a right to bring an action.

[48] While I find this interpretation to result in an absurdity that is irreconcilable with the scheme and object of the ***Limitation Act***, not to mention unjust for those who have actually suffered physical harm, I cannot see that the right to bring an action for uninfected persons arose at any time before the nervous shock was suffered. Consequently, the ultimate six-year limitation period has not expired against the Hospital Defendants if, as counsel agree, the plaintiff and Proposed Plaintiffs suffered not physical harm, but only nervous shock, as a result of the alleged negligence on the part of the defendants.

The Two Year Limitation Period for Personal Injury

[49] The issue of whether the two-year limitation period for damages for personal injury, provided by paragraph 3(2)(a) of the ***Limitation Act***, has expired for the Proposed Plaintiffs cannot be determined on the evidence before the Court.

[50] If either of the Proposed Plaintiffs suffered physical injury, as explained above, the six-year ultimate limitation period would have expired several years before Ms. Birrell filed her writ. However, if the Proposed Plaintiffs suffered only nervous shock, then a determination of when the limitation period began to run requires an individual determination of when each of them suffered nervous shock. If neither of them learned of the risk of infection until after receiving the letter, then the plaintiff's application to add the Proposed Plaintiffs would have been brought within the two-year limitation period, since the Proposed Plaintiffs had allegedly suffered nervous shock due to the receipt of their letters.

[51] However, the Hospital Defendants submit that there was widespread public notice of the health advisory in February of 2003 and that, therefore, every resident of Canada knew, or could have known, of the potential cause of action against the Ear Bank at that time. However, it is not clear if either of the Proposed Plaintiffs, or any putative class member, suffered nervous shock at the time of the public notice, or at the time of receipt of the individual letters.

[52] Consequently, I cannot determine whether the limitation period had expired, as against the Proposed Plaintiffs, at the time that the application to add them was brought. However, given my conclusions on the issue of joinder, a determination of

whether the limitation period had expired is not necessary in order to decide the issues on the present application.

ANALYSIS – JOINDER OF PARTIES PURSUANT TO RULE 15(5)(a)

Adding Plaintiffs to a Proposed Class Action

[53] The issue of adding plaintiffs to a proposed class action does not appear to have been discussed in previous B.C. cases. Ballance J. dealt with a motion to add defendants to a proposed class action pursuant to Rule 15(5)(a)(iii) in ***MacKinnon v. Vancouver Savings Credit Union*** (2004), 24 B.C.L.R. (4th) 340, 2004 BCSC 125 ("***MacKinnon v. VanCity***").

[54] That case involved a proposed class action against VanCity Credit Union for charging criminal rates of interest on overdraft loans. In that case, the plaintiff sought to add seven further credit unions as defendants, although neither he nor any member of the proposed VanCity class had a cause of action against those credit unions.

[55] The plaintiff conceded that the only basis upon which joinder of the additional credit unions could be justified was on the basis of the Court of Appeal's holding in ***Campbell v. Flexwatt*** (1997), 44 B.C.L.R. (3d) 343, 15 C.P.C. (4th) 1 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 13 (QL), that a representative plaintiff in a class proceeding need not have an individual cause of action against each named defendant—it is sufficient if members of the class can assert such a claim.

[56] Ballance J. denied the motion to add further defendants as there was no person in the VanCity class who had a cause of action against any of the proposed defendants. Further, the subject matter of the claims involved specific contracts between VanCity and the members of the VanCity class, which would be different from contracts entered into with other financial institutions. Therefore, Ballance J. concluded there was not a sufficient degree of connection to justify adding further defendants.

[57] The Court of Appeal in ***MacKinnon v. National Money Mart Co.*** (2004), 33 B.C.L.R. (4th) 21, 2004 BCCA 472 ("***MacKinnon v. Money Mart***"), specifically noted at para. 58 that its reasons did not deal with Ballance J.'s reasons in ***MacKinnon v. VanCity***.

[58] The matter of adding plaintiffs to a proposed class action, where it subsequently turns out that the named and proposed representative plaintiff has no legitimate cause of action, was dealt with in Ontario in the case of ***Segnitz v. Royal & Sun Alliance Insurance Co. of Canada*** (2003), 66 O.R. (3d) 238, 40 C.P.C. (5th) 140 (S.C.J.), which presents a similar scenario to the case at bar. That case involved a proposed class action against a group of insurers who paid the value of salvage for vehicles after deducting the deductible amount. The plaintiffs claimed that if the insurer exercised the option of taking possession of a vehicle for salvage, it should be required to pay the insured the entire value of the vehicle without subtracting the deductible.

[59] The representative plaintiff had no cause of action, as he had been paid the entire value of the salvaged vehicle, and the insurer had not deducted the deductible. The defendants, therefore, brought a motion for summary judgment dismissing the action against them, while the plaintiff brought a motion to add several plaintiffs who had been paid the value of salvaged vehicles, minus the deductible.

[60] Haines J. held that the proposed representative plaintiff had no claim against the defendant. However, he went on to consider the plaintiff's application to add further plaintiffs, who could assert a valid cause of action, and stated at paras. 17 and 19:

> However, I do not agree with the defendant's contention that a finding that Mr. Giuliano has no cause of action ends the matter. Indeed, the reason for seeking the amendment pursuant to r. 5.04(2) is to sustain the action. Although the motions to add or substitute plaintiffs in *Mazzuca* and the other cases referred to therein were apparently not heard in conjunction with motions for summary judgment, there is little doubt that those actions would have perished had the amendments been refused. The issue here is whether this action, commenced in the name of a person with no tenable claim, can continue in the name of another with a tenable claim…
>
> …
>
> Further, I do not see that considering a motion to add or substitute a party in tandem with a motion for summary judgment offends any principle enunciated in either *Hughes* or *Stone*. Obviously, if there is a finding that the named plaintiff has no cause of action against the named defendant, and no substitute plaintiff with a tenable claim is being proffered, then the action must be dismissed. However, where there is a viable alternative plaintiff, circumstances may dictate that the action be continued with appropriate amendments.

[61] Haines J. further stated in relation to his decision to grant the amendment and add further plaintiffs (at paras. 21-22):

> … The commencement of this action, defective though it may have been, put the defendant on notice with respect to potential claims on behalf of numerous past and current policyholders. If the substitution of a plaintiff with a tenable claim is not permitted, many claims may be lost to a limitation defence. I am satisfied, therefore, that special circumstances do exist to support the granting of the amendment requested provided it is established that the proposed plaintiffs have a tenable cause of action.
>
> Before moving on to consider the specific claims of both Japetco Corporation and Cheryl Barash, I should deal with the defendant's legitimate concern about the naming of token representative plaintiffs to toll the limitation period. I agree that such a practice would constitute an abuse of process, but there is no evidence to support any finding that that was the intention of counsel in this case. In my view, the presence of such evidence might well constitute sufficient grounds for refusing to add or substitute a party and could also attract appropriate costs consequences for the offending counsel.

[62] Although that case was decided in Ontario, the issues discussed and principles applied are highly relevant in British Columbia. In particular, the fact that sections 38.1 and 39 of the ***Class Proceedings Act*** have the effect of suspending the limitation period for all class members, if a certification application is dismissed or if the proceeding is certified, means that the concern regarding the use of token representative plaintiffs, to act as litigation vehicles for others with legitimate claims, is similarly applicable in this province. Such a practice is to be avoided.

[63] The Hospital Defendants pointed to another decision from Ontario, ***Menegon v. Philip Services Corp.***, [2001] O.J. No. 5547 (S.C.J.) (QL), in which certification was denied where the proposed representative plaintiff had no valid cause of action, even though counsel assured the Court that he had other proper plaintiffs who could be substituted as the representative plaintiff. Gans J. commented on the unfairness

of allowing a stranger to the litigation to take over the plaintiff's position where the representative plaintiff has no cause of action (at para. 53):

> …why should the defendant not be able to avail itself of a limitation period prescribed by statute? Put another way, why should a stranger to the current litigation be able to take over someone else's place in the queue when his own cause of action might long since be statute barred? This result would be manifestly unfair.

[64] ***Menegon*** was affirmed on appeal, although on the issue of the insufficiency of the pleadings (167 O.A.C. 27, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 95 (QL)).

[65] The Hospital Defendants argue that here the Proposed Plaintiffs are likewise queue-jumping with their statute-barred claims. However, I would distinguish ***Menegon*** on the basis that the plaintiff in that case appeared to be incapable of asserting that particular cause of action from the commencement of the proceedings. That is unlike the situation in ***Segnitz***, *supra*, where the action was commenced under the *bona fide* belief that the plaintiff had a valid cause of action.

[66] Certification was also denied in ***Koo v. Canadian Airlines International Ltd.***, 2000 BCSC 281, where neither of the proposed representative plaintiffs could validly assert the cause of action set out in the Statement of Claim and, therefore, could not act as representative plaintiffs. This result was reached despite the fact that counsel assured the Court that others had since come forward who could be substituted as representative plaintiffs. However, I would observe that this decision was reached before the judgment of the Court of Appeal in ***MacKinnon v. Money Mart***, *supra*, and that sub-section 2(4) of the ***Class Proceedings Act*** appears not to have been

discussed in that case. There were also other features of the action that made it unsuitable for determination as a class proceeding, in particular the fact that the majority of the issues relating to liability were individual issues and, therefore, the lack of a representative plaintiff was not the only consideration in reaching that determination.

[67] The Hospital Defendants also cite the case of ***Kimpton v. Canada (Attorney General)*** (2002), 9 B.C.L.R. (4th) 139, 2002 BCSC 1645, where Macaulay J. rejected an application for certification on the ground that it was plain and obvious that the proposed representative plaintiff's causes of action were bound to fail. Her attempt to amend her statement of claim to set out claims not available to herself, but that might be available to other members of a proposed class, was rejected as an attempt by the plaintiff to provide a vehicle for others who may have an underlying claim.

[68] Macaulay J. concluded that it was not sufficient for a plaintiff to plead a cause of action that may be available to other persons in different circumstances and that, where there is a single plaintiff, she must demonstrate a personal cause of action against each defendant (at para. 81). I note that his comments were made in the context of an application for certification and not in the context of a pre-certification motion, pursuant to Rule 19(24), as was the case in ***MacKinnon v. Money Mart***, *supra*.

[69] The concern with not allowing actions to be brought by token representative plaintiffs must be balanced with language from the Court of Appeal's decision in

MacKinnon v. Money Mart, *supra*. While that decision expressly did not deal with the discretion to add parties pursuant to Rule 15(5)(a) (see para. 58) and the Hospital Defendants argue that it, therefore, does not apply here, some clear statements of law were made that are applicable to the present application. In previous reasons in this action, at 2006 BCSC 1814, I dealt with the impact of that decision on the application of the ***Rules of Court*** to a proposed class proceeding as follows, at paras. 6-9:

> The decision of a five member panel of the B.C. Court of Appeal in ***MacKinnon***, 2004 BCCA 472, is important to consider in this context. That case dealt with the defendants' motion to strike the statement of claim under R. 19(24). The action was based in contract, and the plaintiff had contractual dealings with only some of the named defendants. The basic issue was whether the plaintiff had standing to bring an intended class action against some defendants solely to benefit persons other than himself. The Court rejected the Ontario position that for every defendant, there must be a representative plaintiff who has a valid cause of action against that defendant. The Court held that a representative plaintiff need not have a cause of action against all defendants, relying on the earlier decision of ***Campbell v. Flexwatt*** (1997), 44 B.C.L.R. (3d) 343, 15 C.P.C. (4th) 1 (C.A.). At paras. 34-35, Saunders J.A. stated for the Court:
>
> > It is true that in one sense the action, before certification, is an ordinary action. And s. 40 of the ***Class Proceedings Act*** expressly provides that the ***Rules of Court*** apply. It does so, however, with the caveat "to the extent those rules are not in conflict with this Act". I think it is also clear that an action commenced under the ***Class Proceedings Act*** is, even before the certification application, more than just "any old action": it is an action with ambition. That ambition, by Rule 4(4.1), must be reflected on the face of the pleadings. The question is whether that ambition stated on the face of the pleadings affects the application of Rule 19(24)(a) to the question before this Court.
> >
> > I turn then to Rule 19(24). No doubt Rule 19(24)(a) can be invoked prior to a certification hearing. But

> what does it mean in the context of an action started under the ***Act***? Obviously if the pleadings disclose no cause of action between any persons, whether or not named, the action may be dismissed. But that is not the case here. The statement of claim alleges a cause of action between members of the potential class and the defendants, even though those members have as yet no personal identity. Is this sufficient pleading to escape dismissal under Rule 19(24)?

Ultimately, the Court concluded that the determination of whether the action had no chance of success was to be "considered in the context of its stated ambition to be a class proceeding" (at para. 38), as there was a prospect that the action would be certified as a class action, and that further representative plaintiffs could be appointed to represent a sub-class of persons who did have contractual dealings with those defendants. Therefore, the defendants could not succeed on their R. 19(24) application. Saunders J.A. bolstered this conclusion by looking to the context of the ***Class Proceedings Act***, and particularly to sub-section 2(4), which provides:

> 2(4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

She interpreted the significance of this provision at paras. 50-51 as follows:

> Although s. 2(4) only allows a non-member of a class to be the representative plaintiff where it is necessary "to avoid a substantial injustice to the class", the fact that the ***Act*** allows such a situation at all indicates, in my view, that the cause of action nexus is not solely between defendants and the representative plaintiff, but also between defendants and the plaintiff class as a whole. This shifts the focus in the cause of action analysis from the representative plaintiff onto the class, and is consistent with a litigation process that seeks to resolve common issues, rather than to resolve entire claims.
>
> I conclude that while the ***Act*** requires a cause of action against each named defendant, that cause of action must be held by class members, not necessarily the representative plaintiff.

She noted that there was a possibility of flushing out a representative plaintiff with a cause of action against a defendant by establishing

> subclasses, through the section 4 certification application, and through the discovery process.
>
> From this decision, I take the following principle: a proposed class proceeding is subject to the ordinary ***Rules of Court***, but those rules are to be applied in the context of considering its potential future as a class action…
>
> [Emphasis added.]

[70] Thus, while a court must not permit persons to act as litigation vehicles for others, the statements of Saunders J.A. in ***MacKinnon v. Money Mart*** clearly indicate that the ***Rules of Court*** should be applied to a proposed class proceeding by considering the claims of the class as a whole, rather than just the named plaintiff.

[71] In ***MacKinnon v. VanCity***, *supra*, the issue was whether the plaintiff could join defendants against whom no member of the proposed class had a cause of action, simply because the claims against those defendants arose under the same section of the ***Criminal Code***. Ballance J. concluded that joinder would enable the named plaintiff to act as a litigation vehicle for others, who were unconnected to the proceeding, to join defendants who had no connection with the action and she, therefore, rejected the plaintiff's application.

[72] That situation, on which the Court of Appeal in ***MacKinnon v. Money Mart***, *supra*, made no comment, is quite different from the one in the case at bar. In particular, here the cause of action asserted against the defendants is for the same negligence and the proceeding was commenced as a class action. The Proposed Plaintiffs themselves are members of that potential class.

[73] As discussed below, unlike in ***MacKinnon v. VanCity***, *supra*, the requisite degree of interconnectedness for joinder is present. It is only through a careful consideration of the rules relating to the exercise of a judge's discretion, to permit or refuse joinder in particular circumstances that a decision can be reached in the present case. The fact that the proceeding is a proposed class action will have an impact on that decision, in particular because of the potential prejudice to putative class members and the fact that notice of a class proceeding, not just the plaintiff's action, was given to the defendants at the time they were served with the writ.

[74] The decision in ***MacKinnon v. Money Mart***, *supra*, is filled with references to the fact that the cause of action analysis is shifted from the representative plaintiff onto the class. These are words with broad implications for many of the ***Rules of Court*** and, of relevance here, for Rule 15(5). Although the Hospital Defendants contend that the decision has no impact on a discretionary decision to add parties, I can see no way of distinguishing the impact of the reasons of Saunders J.A. in ***MacKinnon v. Money Mart*** on that basis.

Adding Plaintiffs to an Action Generally

[75] The approach to be followed by a court in deciding whether to add parties to an existing action has been the subject of many decisions. Generally, if the limitation period has not expired, the application for joinder will be granted if there are common issues to be determined. However, the expiration, or possible expiration, of a limitation period complicates the analysis.

[76] The recent decision of the Court of Appeal in ***Strata Plan LMS 1463 v. Krahn Bros. Construction Ltd.*** (2004), 25 B.C.L.R. (4th) 203, 2004 BCCA 190, clarifies the correct approach to be taken by a court when it is unclear whether a limitation period has expired. If, on the assumption the limitation period has expired it is, nonetheless, just and convenient that a party should be added, then that party should be added. Joinder then precludes the assertion of a limitation defence.

[77] However, if a court concludes that it would not be just and convenient to add a party if the limitation period has expired, and the limitation issue cannot be resolved on the application for joinder, the party seeking joinder should be given an opportunity to establish that the limitation has not expired, since that may tip the balance in favour of joinder.

[78] In this case, it is not possible to ascertain with certainty whether the limitation period has expired as against the Proposed Plaintiffs on the basis of the evidence before the Court. However, I proceed with the following analysis on the assumption, most favourable to the defendants, that the limitation period had expired as against both of the Proposed Plaintiffs (*i.e.* on the assumption that the two-year limitation period began to run at the time of the public health notice). If the limitation period had not expired, it would clearly be just and convenient to add both of the Proposed Plaintiffs to this action, because they could have simply filed a new writ and commenced an action against the defendants on their own behalf, and applied to have the actions tried together.

[79] Although the plaintiff relies on both Rule 15(5)(a)(ii) and (iii), it is really Rule 15(5)(a)(iii) that applies. Rule 15(5)(a)(ii) is construed disjunctively, so that either the person to be added ought to have been joined as a party, or it is necessary to add the person as a party in order to ensure there is effective adjudication of all matters in the proceeding: ***Lawrence Construction Ltd. v. Fong*** (2001), 18 C.P.C. (5th) 377, 2001 BCSC 813 at para. 22.

[80] This provision has been interpreted as mandating a narrow approach to joinder: either a person should have been a party in the first place, but for some compelling reason was not included, which is a test greater than mere convenience but less than necessity; or the question to be adjudicated between the original parties cannot be determined without the addition of the new party: ***Lawrence Construction***, *supra*, at paras. 24-26.

[81] In the case at bar, it cannot be said that the Proposed Plaintiffs ought to have been named as parties in the first instance, nor that the question to be adjudicated between Ms. Birrell and the defendants requires that they be added. Their claims against the defendants are independent of Ms. Birrell's claim and there is nothing that would require their presence to fairly determine matters between Ms. Birrell and the defendants. Therefore, if the Proposed Plaintiffs are to be added, they must meet the broader requirements of Rule 15(5)(a)(iii).

[82] The principles to be applied by courts in determining whether a party should be joined in an action were summarized in ***Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*** (1996), 19 B.C.L.R. (3d) 282, 71 B.C.A.C. 161 by Finch J.A. At

¶ 45, he stated that the discretion to permit such amendments is completely unfettered, subject only to the general rule that it is to be exercised judicially, and in accordance with the evidence adduced and such guidelines as may appear from the authorities. Relevant factors to be considered in exercising that discretion include the length of delay, the reasons for delay, the expiry of the limitation period, the presence or absence of prejudice, and the extent of the connection between the existing claims and the proposed new cause of action (at para. 67). McEachern C.J.B.C. in a concurring judgment stated at para. 74:

> I believe the most important considerations, not necessarily in the following order, are the length of the delay, prejudice to the respondents, and the overriding question of what is just and convenient.

[83] In discussing what is just and convenient, he noted that it was significant that the issue of insurance coverage for the cost of building repair would be tried between the plaintiff and the defendant broker and, therefore, it would not be inconvenient to include the plaintiff's claim against the insurers in the same litigation. Although ***Teal Cedar*** dealt with an application to add a new cause of action against the defendants under Rule 24(1), those same principles apply to the addition of a party pursuant to Rule 15(5)(a)(iii): see *e.g.* ***Teal Cedar***, *supra*, at paras. 37-39; ***J.C. Kerkhoff & Sons Construction Ltd. v. British Columbia and Yukon Territory Building and Construction Trades Council*** (1987), 17 B.C.L.R. (2d) 338 at 343, 24 C.P.C. (2d) 299 (S.C.) ("***J.C. Kerkhoff & Sons***" cited to B.C.L.R.); ***Letvad v. Fenwick***, *supra*, at para. 24.

[84] In ***Lui and Lui v. West Granville Manor Ltd.*** (1985), 61 B.C.L.R. 315, 18 D.L.R. (4th) 391 (C.A.) ("***Lui No. 1***" cited to B.C.L.R.), the significance of the expiration of the limitation period was considered in the context of third party proceedings. In that case, the plaintiffs brought an action against the defendants and 18 months later two of the defendants issued a third party notice against two of the other defendants. The third party notice included a claim against them by West Granville Manor for its own claims for damages for injury to property, including economic loss, from those two defendants. Other claims for indemnity in the third party notice were not challenged.

[85] Lambert J.A. observed that the relief or remedy claimed by West Granville was not substantially the same as that claimed by the plaintiffs, despite the fact that the damages arose from the same incident. However, the issues of law and fact to be determined in the original action were substantially the same as those in the third party proceedings, namely the relevant standard of care and whether it was complied with. Lambert J.A. went on to consider the principles that govern the exercise of the discretion under Rule 22 and further noted that Rule 15(5)(a)(iii) presented a very close parallel to Rule 22 in respect of section 4 of the ***Limitation Act*** (at 329).

[86] On the facts of ***Lui No. 1***, Lambert J.A. was particularly concerned that the claim by West Granville for damages was not closely connected with the original claim of the plaintiffs. He emphasized that there was no reason in justice and fairness for allowing West Granville to piggy-back its claim over the limitation barrier on the back of the plaintiffs' claim (at 330-331). There was no real and substantive

connection between the third party proceedings and the original action, except through a technical point of law. Lambert J.A. indicated that, in cases where the limitation period has expired and the third party proceedings set up a separate cause of action, prejudice to the third party must be presumed and the defendant must explain both the delay and the dependence of the third party proceedings on the original action.

[87] The same case was back before the Court of Appeal in ***Lui and Lui v. West Granville Manor Ltd.*** (1987), 11 B.C.L.R. (2d) 273, [1987] 4 W.W.R. 49 (C.A.) ("***Lui No. 2***" cited to B.C.L.R.). There, the Court made clear that the effect of sub-section 4(1) of the ***Limitation Act*** was to revive a cause of action where a cause of action in subordinate proceedings is begun without being struck out. However, a court could consider the fact that a consequence of permitting a new party to be added would eliminate a fully accrued limitation defence.

[88] Pursuant to Rule 15(5), the court has the power to permit or prevent the proceedings (at 297) and the expiration of the limitation period is a relevant factor to consider in exercising this power. Thus, the court has the power to prevent abuse by having parties dress up an independent action as if it were a subordinate proceeding for which there is no limitation period. As an example, Lambert J.A. provided the following (at 299):

> Suppose a car and a bus collide. Ten out of the twenty bus passengers are injured. The driver of the car is entirely at fault. All ten injured bus passengers are represented by the same lawyer. He misses the basic limitation period. But all is well. One of the passengers is an infant. By s. 7 of the ***Limitation Act***, the running of the limitation period is postponed during the period of the infant's minority. So an action is

> brought on behalf of the infant. It does not matter whether the infant is one of the passengers who was injured. The only thing that matters is that the action on behalf of the infant is brought within the extended limitation period that applies to him. All the other passengers arrange to be joined as plaintiffs. The effect of the joinder, if it is permitted, is to sweep away the defendant's fully accrued limitation defence against all the adult passengers.
>
> I cannot believe that it was intended that s. 4 of the ***Limitation Act*** should be open to that kind of abuse. Neither the mischief nor the legislative purpose requires such an interpretation.

[89] In defining the mischief at which section 4 of the ***Limitation Act*** was aimed, Lambert J.A. noted that the mischief to be avoided was that claims could be brought at the last moment, before the expiration of the limitation period, so that legitimate counterclaims and third party proceedings would be prevented, thereby simplifying the proceedings for the plaintiff. He stated at 300 that:

> The legislative purpose must surely have been to permit those proceedings which are brought within the applicable limitation period to go ahead, and to permit all subordinate proceedings which are dependent on the main proceedings to go ahead with them, but to prevent any proceedings which are truly independent from using bogus subordinate status to avoid a limitation period which would otherwise be applicable. In the example I have given, the principal action by the infant should go ahead, as the Limitation Act allows; any claim by the infant's mother or father that is closely dependent on the infant's claim should probably go ahead; any claim by the car driver against a mechanic for contribution should probably go ahead; but the independent claims of the injured adult bus passengers should not be permitted outside their own limitation period.
>
> [Emphasis added.]

The Meaning of “Dependence” When Adding Parties

[90] A consideration of the meaning of “a question or issue relating to or connected with the subject matter of the proceeding” in Rule 15(5)(a)(iii) was

provided by the Court of Appeal in ***Daco Developments Ltd. v. Edwards*** (1982), 33 B.C.L.R. 273, [1982] 2 W.W.R. 277 (C.A.).

[91] That case involved an application to add a plaintiff, whose cause of action was statute barred, where the failure to commence the action in time was because an insurance file had inadvertently not been sent to the solicitors. The person seeking to be joined as a plaintiff had suffered losses in the same fire, caused by negligence on the part of the defendants, that was at issue in the present action, although his claim was not dependent on that of the other plaintiffs. His losses had been paid by his insurer, who had an interest in the claim by subrogation.

[92] The subject matter of the action was characterized as "the damages flowing from the negligent conduct", which involved two components: damages and negligence (at ¶ 12 and 14). In the case of the fire, the negligence component of the claim was the same for both the existing plaintiffs and the person seeking to be joined as a plaintiff. The Court further held that it would be just and convenient to determine the question in issue and added the new party. The delay in seeking to add the plaintiff beyond the expiration of the limitation period was approximately three months, and the defendants did not show any facts or circumstances that would make it unjust or inconvenient to have the questions determined in the action.

[93] An opposite result with respect to independent causes of action was reached in ***J.C. Kerkhoff & Sons***, *supra*, a case relied on by the Hospital Defendants. Relying on the decision in ***Lui No. 2***, Lysyk J. stated at 345-346:

> …amendments to add a plaintiff after the expiry of a limitation period for an original action stemming from the same incident should be refused if they relate to a cause of action capable of standing alone unless it is established by the proposed plaintiff (1) that there is a real and substantial connection between the proposed plaintiff's claim and the original action; (2) "such that" the proposed plaintiff's claim is to some degree dependent on the required action; and (3) "such that" the failure to take independent proceedings within this limitation period is explained by that dependence.

[94] These statements of the requirement for a connection to the original cause of action are consistent with the statements of Lambert J.A. in ***Lui No. 2*** regarding the mischief at which the legislation was aimed, as discussed above, and with the bus accident example of the inappropriate use of joinder given in that case. However, a strict application of these requirements, as prerequisites for adding an additional plaintiff, would seem to be inconsistent with the decision of the Court of Appeal in ***Daco Developments***, *supra*, in which the claim of the person seeking to be added as a plaintiff was entirely independent of the claims of the plaintiffs in the existing negligence action, and the failure to take independent proceedings within the limitation period would not be explained by any dependence on the existing action (the actual cause having been inadvertence). Yet the person was joined as a plaintiff. The correctness of the decision in ***Daco Developments*** was affirmed by the Court of Appeal in ***Lui No. 2***.

[95] An explanation for this apparent discrepancy was provided in ***Cementation Co. (Canada) v. American Home Assurance Co.*** (1989), 37 B.C.L.R. (2d) 172, 36 C.P.C. (2d) 147 (C.A.). Lambert J.A. held for a majority of the Court of Appeal that the use of "dependent", in relation to third party proceedings in ***Lui*****,** should be interpreted as "some degree of interrelationship" in the context of adding a party and

that the interrelationship must explain why the claim ought to be made in the same proceedings, as well as providing an explanation for the delay arising from the broad circumstances that explain the interrelationship, subject always to the paramount consideration of the interests of justice and convenience.

[96] He observed that in the earlier decisions of ***Knight Towing Ltd. v. General Motors of Canada Ltd.*** (1981), 27 B.C.L.R. 335, 23 C.P.C. 8 (C.A.) and ***Daco Developments***, *supra*, the action involving the new party could have been brought entirely separately and without reference to the other action involved in the proceedings so, although the new action was not entirely dependent on the original action, it was closely interrelated with the existing proceeding. In that case, the fact that the defendant and proposed defendant were two insurers of the same risk, being sued for the same loss, was held to provide a close connection to the existing proceeding.

[97] The fact that the plaintiff had not sued the second defendant because it had not known of the existence of the second insurer, although that insurer's name appeared on a copy of a proof of loss form, did not bar the addition of the second defendant. In contrast, the chambers judge had struck out the joinder because, on a consideration of ***J.C. Kerkhoff & Sons***, *supra*, the claim against the second insurer was not in any way dependent on the claim against the existing defendant insurer.

[98] For a more recent example of a case where the Court of Appeal has overturned a chambers judge's decision not to add a party because the claims were not sufficiently connected (although other factors were also relevant), see ***McIntosh***

v. Nilsson Bros. Inc. (2005), 48 B.C.L.R. (4th) 124, 2005 BCCA 297 (see para. 11), rev'g 2004 BCSC 1101 (see para. 69).

[99] In ***Cementation***, *supra*, Southin J.A. gave dissenting reasons in which she considered that, the inadvertent impact of the addition of Rule 15(5)(a)(iii) to the ***Rules of Court*** in 1980, was to change the effect of section 4 of the ***Limitation Act***. Specifically, she looked to the mischief that section 4 of the ***Limitation Act*** was intended to address and, consistent with the conclusions reached by Lambert J.A. in ***Lui No. 2*** discussed above, considered that the provision was aimed at allowing a defendant to raise a set-off or counterclaim where the plaintiff's late filing of the writ means that such claims would be statute-barred. The provision, thereby, avoided injustice by ensuring that all claims relating to the subject matter of the action, not just the plaintiff's claim, could be adjudicated.

[100] At the time that the ***Limitation Act*** was passed, only the narrower Rule 15(5)(ii) existed, meaning that only parties who ought to have been joined, or whose presence was necessary, could be added. Presumably, this would have restricted the joinder of new parties to the class of persons required, to avoid the type of injustice section 4 was intended to prevent. However, on the addition of Rule 15(5)(iii) to the ***Rules of* Court**, in response to the decision of the Court of Appeal in ***Enterprise Realty 81 Ltd. v. Barns Lake Cattle Co. Ltd.*** (1979), 13 B.C.L.R. 293 (C.A.) (a case which did not involve a limitation issue), a much broader class of persons and causes of actions could be joined, even after the expiration of the limitation period, subject to the overriding considerations of what is just and convenient.

The Presumption of Prejudice Arising Upon the Expiration of a Limitation Period

[101] The matter of adding a plaintiff to an action for damages for negligence was also before the Court of Appeal in ***Tri-Line Expressways v. Ansari*** (1997), 30 B.C.L.R. (3d) 222, 86 B.C.A.C. 161. In that case, the plaintiff had commenced an action against the defendant for his negligence in causing an accident involving a tractor-trailer. The plaintiff owned the trailer and had paid for certain repairs to the truck, but another person was the actual owner of the tractor.

[102] After examination for discovery of an officer of the plaintiff, which occurred after the expiration of the limitation period, it came to the attention of counsel that the tractor was owned by the proposed plaintiff. The defendant said it would resist the claim on this basis. The plaintiff applied at trial to join the owner of the tractor as a plaintiff. After reviewing the principles set down in a number of earlier cases, Lambert J.A. stated that the presumption of prejudice, where the limitation period has expired, should be confined to the context in which it was originally mentioned in ***Lui No. 1***: third party proceedings against a new party on an entirely new cause of action. In analyzing the facts before him, Lambert J.A. stated at para. 18:

> In this case the party sought to be added was to be added as a plaintiff; the total scope of the claim against the defendant was not to be affected in any way by the addition of the plaintiff; the defendant had full notice of the circumstances of ownership of the tractor; and the balance of justice and convenience falls heavily against permitting an admittedly negligent defendant from escaping liability on the basis of an artificial restriction of the Court's power to remedy injustice through a sensible application of Rule 15(5)(a).

[103] In that case, the application for joinder was granted.

[104] The issue of whether a presumption of prejudice arises due to the expiration of the limitation period does not appear to have been definitively settled by the Court of Appeal. While some comments in *obiter*, including those in ***Tri-Line Expressways***, *supra*, have questioned such a presumption, the position appears to be that a presumption of prejudice does arise on the expiration of the limitation period: see ***ASM Capital Corp. v. Mercer International Inc.*** (1999), 69 B.C.L.R. (3d) 177, 1999 BCCA 353 at para. 21; ***Letvad v. Fenwick***, *supra*, at para. 30; ***Lawrence Construction***, *supra*, at para. 44; ***Nandha v. Singh***, 2001 BCSC 638 at paras. 21-22.

[105] Additionally, other cases state that the prejudice that must be presumed should be restricted to situations where the period that has passed since the cause of action arose, is the length of the limitation period plus one year for service of the writ: ***McIntosh v. Nilsson Bros. Inc.*** (2005), 48 B.C.L.R. (4th) 124, 2005 BCCA 297; ***Link v. Texas Oil & Gas Inc.***, 2006 BCSC 1520 at para. 36. Thus, a presumption of prejudice arises after the expiration of the limitation period plus one year.

Application to the Facts of This Case

[106] In the case at bar, the plaintiff argues that the defendants were notified of the intention to bring a motion to add two additional plaintiffs as soon as it was learned that she may have received the letter from her surgeon in error. The plaintiff emphasizes that this is a proceeding brought under the ***Class Proceedings Act*** and relies on the decision in ***Segnitz***, *supra,* to argue that the application to add plaintiffs

with a tenable claim, should be allowed to ensure continuation of the action and avoid the risk of prejudice to class members due to the expiration of the limitation period. Further, the plaintiff argues that there is minimal prejudice to the defendants, as commencement of the action under the ***Class Proceedings Act*** put the defendant on notice of the claims of all class members.

[107] The Hospital Defendants counter that it would be manifestly unjust to add the Proposed Plaintiffs to an action which is itself a nullity. They argue that the ultimate limitation period had expired many years previously as against them (an argument that I have concluded fails as a matter of law), and that a non-existent claim should not be permitted to act as a shell vehicle to which other potentially more legitimate plaintiffs can be added at will. They further contend that it should have been obvious to Ms. Birrell from an examination of her chart that she had no cause of action against the defendants, and that there is no evidence of substantial injustice to the class if she is not permitted to act as the representative plaintiff.

[108] The Hospital Defendants also observe that, given the structure of the ***Class Proceedings Act***, which does not suspend the operation of the limitation period until certain orders have been made in relation to the certification hearing, any reliance by other potential class members on Ms. Birrell's action was unreasonable.

[109] Below, I discuss each of the factors relevant to the determination of whether joinder should be permitted. Given that the subject matter of the proceeding is damages for the negligence of the defendants in the operation of the Ear Bank, it is clear that there is a question or issue relating to, or connected with, any relief

claimed in the proceeding and with the subject matter of the proceeding. The negligent conduct alleged by the Proposed Plaintiffs is the same conduct as that alleged by the plaintiff in her statement of claim. The damages claimed for that negligence are claimed on behalf of all class members and, therefore, the relief claimed in the proceeding is identical. Thus, the key issue in whether joinder should be granted is whether it would be just and convenient to determine those issues as between the Proposed Plaintiffs and the defendants.

Length of the Delay

[110] The delay in this case, on the assumption that the limitation period began to run on the date of the public health warning and, therefore, expired on February 19, 2005, was approximately 18 months. While the defendants urged significantly longer periods of delay of many years beyond the expiration of the ultimate limitation period, this would apply only if either of the Proposed Plaintiffs suffered physical injury.

Reasons for the Delay

[111] The reasons for the delay are more difficult to assess. The plaintiff urges that, prior to being informed of the potential problems with her claims, there was no reason for Mr. Corfield and Mr. Little to file claims on their own behalf, as she had already done so. The plaintiff argues that the purpose of the ***Class Proceedings Act*** is to avoid a multiplicity of actions and, therefore, to have only one member of a

class file a writ of summons. The defendants were given notice within a few weeks that the plaintiff intended to bring a motion to add other plaintiffs.

[112] The defendant counters that, because the limitation period is not suspended until after the certification hearing, there cannot have been any reliance by the Proposed Plaintiffs on the plaintiff's action. The actions are independent. Further, the Proposed Plaintiffs have offered no explanation for the delay. Counsel for the plaintiff responded that the legislation is the explanation, that notice to class members is contemplated after the certification hearing and that it is not his role to contact other potential plaintiffs, *e.g.* those who may have been minors at the time of their surgery.

[113] I agree with the defendants that any reliance by the Proposed Plaintiffs on Ms. Birrell's action, prior to the certification hearing, would be unreasonable given the provisions of s. 38.1 and 39 of the ***Class Proceedings Act***. However, as discussed above with respect to ***Daco Developments*** and ***Cementation***, *supra*, in the context of adding parties, dependence of one action on another does not seem to be required to explain the delay—what is required is an interrelationship between the claims.

[114] While, as discussed by Southin J.A. in ***Cementation***, that may have been what the Legislature intended when enacting section 4 of the ***Limitation Act***, that is not its effect as it has been interpreted by the Court of Appeal. In this case, while there are no positive reasons to explain the delay in adding the Proposed Plaintiffs except, possibly, unreasonable reliance on the existence of the plaintiff's action,

there is likewise no evidence of voluntarily dilatory behaviour or a deliberate and informed choice not to sue by the Proposed Plaintiffs. Consequently, I find that this is a neutral factor.

Expiry of the Limitation Period

[115] Here, as I have stated, I have assumed that the limitation period expired, although that fact cannot be conclusively determined on the evidence before the Court. This assumption is the most favourable assumption for the defendants as, if the limitation period had not expired, it would have been just and convenient to simply add the Proposed Plaintiffs.

Presence or Absence of Prejudice

(i) Actual Prejudice

[116] While the defendants claim to be obviously severely prejudiced by the expiration of six years from the date of the original negligent conduct, they have not brought forward any evidence of actual prejudice, such as, for example, the destruction of clinical records. Therefore, I proceed on the basis that actual prejudice has not been demonstrated.

(ii) Deemed Prejudice

[117] As explained above, there is a presumption of prejudice that arises after a period of one year from the expiration of the limitation period (to allow for service of

the writ). In this case, the application to add the Proposed Plaintiffs was served on the defendants approximately six-months after the expiration of that one-year period and, consequently, a presumption of prejudice arises.

[118] The plaintiff argues that the defendants were put on notice of the claims of the entire class by the commencement of Ms. Birrell's action and, therefore, cannot assert that they could not have known or expected that the Proposed Plaintiffs would be pursuing their claims. The defendants counter that they only received notice of a statute-barred and defective claim, and could not possibly have expected that a court would permit joinder of further plaintiffs with statute-barred claims to such a nullity.

[119] In this case, the presumption of prejudice against the defendants is somewhat weakened by the fact that the plaintiff's action was commenced as a class proceeding. This did give the defendants notice of the claims against them prior to the expiration of the limitation period (within the time for service of the writ). In this regard, the defendants had notice of both the nature of the claims, specifically negligence, and the total scope of the claim, being a potential class action.

[120] The fact that the plaintiff did not have a cause of action against the defendants, while not known to her at the time the writ was filed, was raised within the space of a few months and, shortly thereafter, the plaintiff brought a motion to add further plaintiffs. While I accept that the Hospital Defendants should legitimately expect to be free from claims after six years based on the scheme of the ***Limitation***

Act, as I have explained, the current language of section 8 leaves them open to claims such as the present one for an indefinite period of time.

[121] Further, on the basis of ***MacKinnon v. Money Mart***, *supra*, a court is left with more limited scope to strike out class proceedings, prior to the certification hearing, because the cause of action nexus is between class members and the defendants and not simply the proposed representative plaintiff and the defendants. Therefore, upon being served with the plaintiff's writ of summons, the defendants could not reasonably have expected to be free from the claims of the Proposed Plaintiffs and other putative class members, on the basis of the expiration of the limitation period, even if they quickly realized that the proposed representative plaintiff had no personal cause of action against them.

[122] Had I concluded that the six-year ultimate limitation period had expired against the Hospital Defendants, I would have concluded that the presumption of prejudice was extremely strong in this case, due to the significant emphasis placed on finality for such defendants by the Legislature (see also ***Letvad v. Fenwick***, *supra*, at para. 48).

(iii) Prejudice to Potential Class Members

[123] The plaintiff argues that her action must be permitted to continue, or many other potential class members will have their claims statute-barred by the expiration of the limitation period. As I noted previously in 2006 BCSC 1814, the unique language of the B.C. ***Class Proceedings Act*** means that the mere assertion of a cause of action as a class proceeding will not operate to suspend the limitation

period. Thus, if the plaintiff's action is dismissed prior to the certification hearing, the limitation periods for many class members would have expired. The defendants counter that there could have been no reasonable reliance on Ms. Birrell's action, as the running of the limitation period would not be suspended until the certification hearing.

[124] As I explained at 2006 BCSC 1814 at ¶ 17, the expiration of a limitation period has been relied on by some courts as a factor in granting certification because of the risk of prejudice to prospective class members if the proceedings are not certified. The loss of a right to bring a claim, even a weak one, could cause prejudice to many class members, although I agree that many of them would not be relying on, or even aware of, Ms. Birrell's action.

Extent of Connection Between Existing Claims and Those of the Proposed Plaintiffs

[125] The final factor, the extent of the connection between the claims, weighs in favour of adding the Proposed Plaintiffs. Their claims are the same as those set out in Ms. Birrell's statement of claim and relate to the same allegedly negligent acts of the Ear Bank. The same evidence would be used to establish all of their claims. Further, the claims of the Proposed Plaintiffs have already been asserted to some degree in the present action, because it was commenced on behalf of all class members. Finally, because the relief sought by the plaintiff is damages for the entire class, the addition of the Proposed Plaintiffs does not change the scope of the claims faced by the defendants.

[126] Overall, considering all of the factors enumerated in ***Teal Cedar***, *supra*, and related cases, it would be just and convenient to add the Proposed Plaintiffs to the present action. While it does seem unfair that the hospitals are facing claims for which more than six years have elapsed from the date of the original negligent conduct, as I have stated, the law compels the conclusion that the ultimate limitation period has not expired. Likewise, the Court of Appeal jurisprudence favours the addition of parties having independent causes of action after the expiration of the limitation period, on the basis of Rule 15(5)(a)(iii), provided the test of interrelatedness is met and there are no overriding factors that would preclude joinder.

[127] In the case at bar, the presumed prejudice to the Hospital Defendants by reason of the expiration of the limitation period, in view of the fact that they had notice of the claims against them by all potential class members, is outweighed by the extent of connection between the claims. Further, as explained in ***MacKinnon v. Money Mart***, *supra*, the fact that a proposed class proceeding is something more than just an ordinary action also favours joinder in these circumstances. Consequently, the plaintiff's motion to add Mr. Little and Mr. Corfield as plaintiffs is granted.

ANALYSIS – MOTION TO DISMISS THE PLAINTIFF'S CLAIM

[128] In view of my conclusion on the plaintiff's motion to add parties, it appears that she consents to being removed as a party to this action. Had she not consented, I would have granted the Hospital Defendants' Rule 18A application as it

is clear that the plaintiff has not proven a claim in negligence against them. As Ms. Birrell received no tissue from the Ear Bank, the defendants never owed her a duty of care. Consequently, her claim in negligence cannot succeed against them.

CONCLUSIONS

[129] The plaintiff's motion to add Thomas Little and Robert Corfield as plaintiffs is granted. Margaret Birrell is to be removed as a party to this action.

[130] The plaintiff shall have her costs on the motion to add plaintiffs. The Hospital Defendants shall have their costs on their Rule 18A application.

"L. Russell, J."
The Honourable Madam Justice L. Russell