IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Birrell v. Providence Health Care et al.,*** 2006 BCSC 1814

Date: 20061207
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 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. Klein N. Hartigan
Counsel for Defendant Providence Health Care:	C. Woods, Q.C. A. Hasan
Counsel for Defendant Vancouver Coastal Health Authority:	J. Dives
Counsel for Defendant The University of British Columbia:	R. Kennedy
Date and Place of Hearing:	November 10, 2006 Vancouver, B.C.

[1] This decision stems from my role as case management judge in this action under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50. This is an action by the plaintiff 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") for negligence arising from the operation of the Ear Bank by the defendants. The statement of claim alleges Health Canada found that the Ear Bank was maintaining incomplete and insufficient records. As a result, tissue recipients were advised by letter from their physicians to undergo testing for certain diseases (including HIV, Hepatitis B and Hepatitis C) as a precautionary measure. Damages for loss of life expectancy, loss of income, cost of care, medical expenses, and nervous shock are alleged.

[2] After this action was initiated, it was learned that the plaintiff had actually received an autologous transplant of tissues (that is, her own tissue was used in the surgery, not tissue from the Ear Bank). Thus, she could have no cause of action against any of the named defendants. Additionally, the expiry of the ultimate limitation period in section 8 of the ***Limitation Act***, R.S.B.C. 1996, c. 266, may bar the plaintiff's claim against some of the defendants. As a result, the plaintiff brings an application pursuant to R. 15(5) of the ***Rules of Court*** to add two new plaintiffs, who were minors at the time they received their transplant. The defendants oppose this application, and the defendants Providence Health Care Society ("Providence") and Vancouver Coastal Health Authority ("Vancouver Coastal") intend to bring an application to have the action against them dismissed pursuant to R. 18A. In addition to the plaintiff's application to add plaintiffs and the defendants' motion for

summary judgment, there is also the matter of when the certification motion should be heard. These reasons deal with my determination of the order in which these applications should be heard.

THE POSITIONS OF THE PARTIES

[3] The plaintiff asserts that all three motions should be heard together, and that the court has discretion to determine when the motions should be heard. Her counsel submits that there are several interrelated motions that should be heard together, and that the issues on each of those are interdependent. Further, he submits that the defendant's motions to dismiss the action are dependent on the court's determination with respect to certification. He argues that sub-section 2(4) of the ***Class Proceedings Act*** can impact a defendant's summary judgment motion, and that the defendants' motions should not be decided until after the decision regarding certification is made, relying on decisions of the Court of Appeal in ***MacKinnon v. Instaloan Financial Solution Centres (Kelowna) Ltd.*** (2004), 33 B.C.L.R. (4th) 21, 2004 BCCA 472 and (2004), 203 B.C.A.C. 103, 2004 BCCA 473. He argues that commencement of a proceeding under the ***Class Proceedings Act*** suspends the limitation period for class members, both in this and other jurisdictions, and that the plaintiff could be certified as the representative plaintiff pursuant to sub-section 2(4) of the ***Class Proceedings Act*** even if she has no cause of action against the defendants to avoid substantial injustice to other potential members of the class due to the expiration of the limitation period. Additionally, he argues that the question of whether any class member's claim, including the plaintiff's, is statute-barred is an individual issue that should be decided after the common issues trial.

[4] The defendants agree that the court has discretion to determine the order in which the applications are heard. Providence and Vancouver Coastal argue that the addition of section 38.1 to the ***Class Proceedings Act*** means that even if the plaintiff's claim is dismissed, other plaintiffs will receive the benefit of the suspension of the limitation period from the commencement of this action. They also argue that this is an action with little merit, as there is no evidence anyone has been infected and the chances of infection are miniscule, and that leaves only claims for damages for nervous shock. Further, they argue that this proceeding has not yet been certified as a class proceeding, and is therefore subject to the ***Rules of Court***, without consideration to any of the rules set out in the ***Class Proceedings Act***. They rely on several cases where courts have allowed preliminary applications prior to the certification hearing, and where claims have been dismissed prior to the certification hearing. They also rely on cases in which the action was dismissed on the ground that none of the representative plaintiffs had a cause of action that could succeed against a defendant.

ANALYSIS

[5] Below, I elaborate on some of the factors that have been important to my determination of the appropriate timing of the hearings.

Applicability of the *Rules of Court* to Proposed Class Proceedings

[6] The decision of a five member panel of the B.C. Court of Appeal in ***McKinnon***, 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)?

[7] 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 nonmember 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.

[8] 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.

[9] 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. This principle is particularly important in determining the timing of the applications, as it

may weigh heavily on both the plaintiff's motion to add new plaintiffs and the defendants' motion to have Ms. Birrell's claim dismissed.

The Fact that Proposed Plaintiffs May Have a Valid Cause of Action Against the Defendants

[10] Bearing the ***MacKinnon***, 2004 BCCA 472, case in mind, I am unable to accede to the defendants' request to rely on earlier decisions of this Court in which actions were dismissed prior to the certification hearing on the ground that the representative plaintiff had no cause of action against any of the proposed defendants to justify hearing their application under R. 18A first. Here, I draw a distinction between cases in which a cause of action is found not to exist and there are no potential class members who might have a valid cause of action, and those cases where the proposed representative plaintiff has no valid cause of action, although other putative members of the class might have a valid cause of action against that particular defendant (see *e.g.* ***Koo v. Canadian Airlines International Ltd.*** (2000), 95 A.C.W.S. (3d) 22, 2000 BCSC 281 (plaintiffs' action for breach of contract against Canadian Airlines for deliberately overbooking its flights denied certification, as neither representative plaintiff had missed a flight due to overbooking, even though counsel asserted that suitable prospective representative plaintiffs had since come forward).

[11] Here too, it is important that the court not allow persons with no cause of action against defendants to act as a litigation vehicle for other persons who *might* come forward with a valid cause of action against the defendants. The scenario in ***Koo*** would appear to come quite close to this. A similar scenario was present in

MacKinnon v. Vancouver City Savings Credit Union (2004), 24 B.C.L.R. (4th) 340, 2004 BCSC 125. There, the plaintiff sought to add new defendants in a proposed class proceeding pursuant to R. 15(5)(iii), even though the evidence showed that neither the plaintiff nor any members of the class had any cause of action against the proposed additional defendants. As the claims were based in contract, Ballance J. held that there was not the degree of nexus required for joinder under R. 15(5)(iii). In the course of her reasons, Ballance J. distinguished ***Campbell v. Flexwatt***, noting that in that case, members of the class had causes of action against the defendants in respect of which the representative plaintiffs did not have causes of action (at para. 15). Thus, she refused to extend the principles established in ***Campbell*** to provide a litigation vehicle for other persons, not currently connected to the proceeding, to prosecute a claim against the proposed defendants (at para. 19).

[12] The case at bar falls somewhere very close to the line between not requiring the representative plaintiff to have a cause of action against every named defendant, and not allowing a person with no valid cause of action to serve as a litigation vehicle to others who subsequently are able to assert a valid cause of action against the defendants. Here, although the plaintiff probably has no valid cause of action, the circumstances establishing her inability to assert a claim arose after the litigation had been commenced. Additionally, the reasons why the plaintiff may have no cause of action against the defendants is unique to the plaintiff's situation, and other potential members of the class may be able to validly assert the same cause of

action set out in the statement of claim against these defendants. This has been an important factor in my reasoning.

Relevance of the Limitation Period in This Case

[13] Another relevant factor in this case is the risk of prejudice to potential class members of the expiration of the limitation period if the plaintiff's action does not proceed to the certification stage. In this regard, the recent addition of section 38.1 to the ***Class Proceedings Act*** is relevant. Section 38.1 provides:

> **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.

[14] Counsel for Coastal Health urged that the enactment of this section minimizes the effect of the ***MacKinnon*** decision (2004 BCCA 472), which required a court to consider an application to strike the statement of claim pursuant to R. 19(24) in the context of a proceeding's stated intention to become a class proceeding. In the presence of section 38.1, counsel urges that other potential plaintiffs who may be relying on the proposed class proceeding are protected from the running of the limitation period in the event that the action against the proposed representative plaintiff is dismissed prior to the certification hearing. However, I do not read the reasons of Saunders J.A. in ***MacKinnon*** as being solely concerned with, if at all concerned with, protecting potential class members from the expiration of a limitation period. Furthermore, I am not satisfied that s. 38.1 will be interpreted so as to suspend the running of the limitation period in this case.

[15] The explanatory notes accompanying the first reading of Bill 64, *Justice Modernization Statutes Amendment Act*, 5th Sess., 37th Parl., British Columbia, 2004, explain that section 38.1 "suspends the running of a limitation period applicable to a cause of action if that cause of action could have been dealt with in a proceeding and that proceeding could have been, but was not, certified as a class proceeding." Although this suggests that the suspension of the limitation period would apply if a proceeding is dismissed prior to the certification hearing, the statutory language is narrower than the language used in other legislation. The

class proceedings legislation in several other provinces suspends the limitation period where a cause of action is *asserted* in a class proceeding, whether or not that proceeding is certified, if it is reasonable for a person to assume that he or she was a class member for the purposes of that action (see S.A. 2003, c. C-16.5, s. 40; S.S. 2001, c. 12.01, s. 43; C.C.S.M. c. C130, s. 39; S.O. 1992, c. 6, s. 28; S.N.L. 2001, c. 18.1, s. 39). By including two additional limitations in section 38.1: first, in subparagraph (a) that an application be made for an order certifying a proceeding as a class proceeding; and second, in subparagraph (c) that a court must make a certain order before the limitation period will be suspended, the legislature presumably intended that the mere commencement of a proceeding under the ***Class Proceedings Act*** would not suffice to suspend the limitation periods.

[16] I therefore conclude that in this instance, it cannot be said with certainty that section 38.1 of the ***Class Proceedings Act*** would operate to suspend the limitation period for other potential plaintiffs in this action. There is a risk that the limitation periods may have expired for some of the potential class members since the commencement of these proceedings if the running of the limitation period is not suspended. That risk of prejudice to other class members has also been a factor in determining the timing of the hearings in this case.

[17] The expiration of a limitation period is a relevant consideration in the context of class proceedings. It 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: see ***Halvorson v. British Columbia (Medical Services Commission)*** (2003), 13 B.C.L.R. (4th) 205, 2003 BCCA 264 at paras. 33

and 35; ***Dalhuisen v. Maxim's Bakery Ltd.*** (2002), 112 A.C.W.S. (3d) 1020, 2002 BCSC 528 at para. 20; ***Ruddell v. B.C. Rail*** (2005), 50 B.C.L.R. (4th) 87, 2005 BCSC 1504 at para. 124. Section 38.1 no doubt ameliorates some of this concern with respect to the certification application, but the expiration of limitation periods is still a relevant factor in the case at bar.

The Cost of Certification Proceedings

[18] In determining whether motions should be heard before or after the certification hearing, it is important to bear in mind the increased cost involved once an action has been certified as a class proceeding. As stated by Kirkpatrick J. in ***Royster v. 3584747 Canada Ltd. d/b/a Kmart Canada Ltd.*** (19 January 2001), Vancouver A992095 at para. 19 (B.C.S.C.):

> … There can be no doubt that, once certified, class actions transform an individual action into a proceeding that has significantly greater administrative procedures that are both time-consuming and costly for the litigants and the court. Thus, the court must be careful to scrutinize such claims and be assured that the time, effort, and expense is justified.

[19] As I stated in ***Consumers' Association of Canada v. Coca-Cola Bottling Co.*** (2006), 150 A.C.W.S. (3d) 1155, 2006 BCSC 863 at paras. 34-35:

> … The question of judicial efficiency should be addressed pragmatically, but most importantly, in relation to the particular case. In some cases, litigation in slices may contribute to excessive delay and expense. In others, determination of some issues prior to others may contribute to the speedy resolution of the matter…
>
> The fact that this is a potential class action does not militate against the use of pre-trial applications generally, or this R. 18A application specifically, as the plaintiff argues… I view pre-trial interlocutory

> applications in an appropriate case as potentially streamlining an increasingly cumbersome process, particularly in cases where the pleadings are lacking in merit, yet may meet the low threshold for certification. Not coincidentally, this threshold has been judicially considered to be the same as the R. 19(24) threshold for striking pleadings: ***Endean v. Canadian Red Cross Society*** (1998), 157 D.L.R. (4th) 465, 48 B.C.L.R. (3d) 90 at para. 6 (C.A.).

[20] In some cases, hearing motions prior to the certification hearing can be a way to reduce the overall expense and complexity of a proceeding, by narrowing and defining issues and potential class members before the more expensive and time-consuming procedures associated with a class proceeding are required.

DECISION

[21] In ***Lieberman v. Business Development Bank of Canada*** (2005), 11 C.P.C. (6th) 348, 2005 BCSC 389, leave to appeal denied (2005), 45 C.C.P.B. 321, 2005 BCCA 268, where the plaintiff sought to have the defendant's *forum non conveniens* application heard at the same time as the certification hearing, Davies J. stated (at paras. 16-17):

> My review of all of the authorities upon which counsel have relied leads me to conclude that the timing of the hearing of jurisdictional issues in proceedings for which certification is sought under the ***Class Proceedings Act*** is a matter requiring the exercise of discretion determined by the circumstances of each case.
>
> A non-exhaustive list of the factors that will likely have to be considered in exercising that discretion will include: the cost to the parties of participation in ***Class Proceedings Act*** pre-certification procedures; the strength of a defendant's jurisdictional arguments and the extent to which a preliminary application may dispose of the whole of the proceeding; the potential for delay arising from interlocutory appeals; the complexity of the evidentiary and legal issues that may arise in both the jurisdictional and certification applications; and, the interplay between the issues on both applications.

I consider that the same factors are relevant to my decision in this case.

[22] Considering the factors I have described above and the factors cited by Davies J. in ***Lieberman***, I have come to the conclusion that the plaintiff's application to add additional plaintiffs pursuant to R. 15(5) and the defendant's application to have Ms. Birrell's claims against it dismissed under R. 18A should be heard prior to the certification hearing.

[23] I have concluded that the plaintiff's application to add additional plaintiffs must be heard at this time in order to avoid the risk of prejudice to potential class members if the claim by Ms. Birrell is dismissed prior to the certification hearing. Even if Ms. Birrell's claim is dismissed, it may nonetheless be just and convenient to add the additional plaintiffs to avoid a risk that the limitation period may have expired, although I leave the determination of that issue to the hearing. The addition of new plaintiffs may mean that additional applications will be brought before the certification hearing in order to further streamline any new issues arising.

[24] I have also concluded that Providence and Vancouver Coastal's applications to have Ms. Birrell's claims against them dismissed should be heard prior to the certification hearing in order to streamline the issues and reduce the complexity of the certification hearing, avoid excessive expense in the pre-certification procedures required by the ***Class Proceedings Act***, and more clearly define the potential class of claimants. I also consider the strength of the defendant's claim that Ms. Birrell has no valid cause of action against them and the fact that this application is unlikely to raise complex legal or evidentiary issues in reaching this determination.

[25] While I agree that often a limitation period will be an individual issue that is best adjudicated after the common issues trial (see *e.g.* ***Pausche v. B.C. Hydro*** (2000), 81 B.C.L.R. (3d) 221, 2000 BCSC 1556 at paras. 35-38), that conclusion does not necessarily apply to the ultimate limitation period in section 8 of the ***Limitation Act***. Only the fact that a plaintiff was an infant at the time of the transplant would operate to suspend that limitation period – the discoverability provisions would not apply. Thus, the limitation period would clearly delineate persons who are or are not members of the class without regard to any individual circumstance except age at the time of the transplant, if determined before the certification hearing. Thus, I am of the opinion that clarification of this limitation issue ahead of the certification hearing would assist in defining the class and narrowing the issues to be determined. The plaintiff has cited other jurisdictions in which the ultimate limitation period may not have expired (*e.g.* Ontario and Manitoba), as well as authority for the propositions that limitation periods are substantive and that *lex loci delecti* applies to a tort action (***Tolofson v. Jensen***, [1994] 3 S.C.R. 1022, 100 B.C.L.R. (2d) 1), meaning that the law of the place where the tissue was transplanted would govern the limitation period. However, the conclusion with respect to Ms. Birrell would at least be the same for those who received their transplants in British Columbia, thereby reducing the number of potential class members, depending on the outcome of the R. 18A application.

[26] I have concluded that the possibility of streamlining some issues prior to the certification hearing outweighs the disadvantages that might accrue by reason of delay due to interlocutory appeals or the interplay between the issues on both

applications. In this case, I have concluded that the goal of judicial economy will best be achieved by hearing in this order, the applications to add plaintiffs and to dismiss the existing plaintiff's claim as against the defendants Providence and Vancouver Coastal before the certification hearing.

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The Honourable Madam Justice Russell