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Case Name:

Rideout v. Health Labrador Corp.

Between
Brenda Rideout, plaintiff, and
Health Labrador Corporation, defendant

[2005] N.J. No. 228
2005 NLTD 116
Docket: 2003 01T 4242 CP

Newfoundland and Labrador Supreme Court - Trial Division
D.L. Russell J.

July 7, 2005.
(141 paras.)

Brought under the Class Actions Act.

Cases considered:

Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534.

Wheadon et al. v. Bayer Inc., [2004] N.J. No. 147 (SCTD).

Hollick v. Toronto (City), [2001] 3 S.C.R. 158.

Rose v. Pettle, 2004 CarswellOnt 774 (Ont. S.C.J.).

Hodder et al. v. Waddleton's Store Ltd. 1993 CarswellNfld 373, 110 Nfld. & P.E.I.R. 222 (Nfld. S.C.T.D.).

Fitzgerald v. Tin, 2003 CarswellBC 176 (B.C.S.C.).

Garner v. Blue & White Taxi Co-operators Ltd., 1995 CarswellOnt 2538 (Ont. Gen. Div.).

Peters-Brown v. Regina District Health Board, 1995 CarswellSask 291 (Sask.Q.B.), aff'd, [1996] S.J. No. 761 (C.A.).

Mason v. Westside Cemetaries Ltd., 29 C.C.L.T. (2d) 125, 135 D.L.R. (4th) 361.

Anderson v. Wilson, [1999] O.J. No. 2494 (C.A.) leave to appeal to the Supreme Court of Canada denied.

Fakhri v. Alfalfa Canada Inc., 2003 BCSC 1717.

Fidler v. Sun Life Assurance of Canada, 2004 BCCA 273.

Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd., 2002 BCCA 78.

Hollinsworth v. BCTV, (1998), 59 B.C.L.R. (3d) 121 (C.A.).

Peters-Brown v. Regina District Health Board, 1995 CarswellSask 291 (Sask.Q.B.), aff'd, [1996] S.J. No.761 (C.A.).

Hodgkinson v. Simms, [1994] 2 S.C.R. 377.

Frame v. Smith [1987] 2 S.C.R. 99; Reibl v. Hughes, [1980] 114 D.L.R. (3d).

Sansolone v. Wawanesa Mutual Insurance Co., [2000] 185 D.L.R. (4th) 57 (S.C.C.).

Kita v. Braig, 1992 CarswellBC 256, 71 B.C.L.R. (2d) 135 (B.C.C.A.).

Taylor v. Brenton No. 2 (1984), 48 Nfld. & P.E.I.R. 18 (Nfld. T.D.).

Power v. Moss (1986), 61 Nfld. & P.E.I.R. 5 (Nfld. T.D.).

McLean et al. v. Carr Estate et al. (1994), 125 Nfld. & P.E.I.R. 165 (Nfld. T.D.).

Ordon Estate v. Grail (1998), 166 D.L.R. (4th) 193 (S.C.C.).

Bywater v. Toronto Transit Commission, [1998] O.J. No. 4913 (Gen. Div.).

Publications considered:

Ellen Picard, Legal Liability of Doctors and Hospitals in Canada (Toronto: Carswell, 1996).

Counsel:

Plaintiff: Chesley F. Crosbie, Q.C. and David Klein.

Defendant: Daniel M. Boone and Michelle Davis.

REASONS FOR JUDGMENT

¶ 1 **D.L. RUSSELL J.**:— The plaintiff, a patient at the defendant's gynecological clinic, claims the defendant's failure to properly sterilize medical instruments put the health of her and other patients of the clinic, as well as the health of their matrimonial partners, at risk. She claims the way in which the defendant communicated notice of this problem also breached a duty of care and violated the privacy of the patients. The plaintiff now applies for certification of this action as a class proceeding.

¶ 2 The application is based on the pleadings and supported by the affidavit of the plaintiff and the affidavit of Pamela Taylor (a solicitor with the law firm retained by the plaintiff).

BACKGROUND (FACTS):

¶ 3 The defendant is the hospital board responsible for the management, control and operation of the Captain William Jackman Memorial Hospital, at Labrador City, Newfoundland and Labrador.

¶ 4 Between October 2001 and March 2003, various medical instruments used at the defendant's gynecological clinic were not properly sterilized and at least 333 patients (including the plaintiff) were treated with these instruments, putting them at risk of exposure to infections.

¶ 5 The problem was discovered and corrected in March 2003. On November 10, 2003 the defendant issued a press release advising that unsterilized instruments may have been used at its clinic between October 2001 and March 2003 and that because of the risk of contracting infections, letters had been mailed to patients who were at the clinic during that period asking that they undergo medical testing.

¶ 6 Also on November 10, 2003 the defendant sent a registered letter to the patients (including the plaintiff) advising that due to its failure to properly sterilize the instruments, the plaintiff and the other patients were at minimal risk of contracting an infection. The letter advised them of a need for medical testing of blood and urine to determine whether they had contracted Hepatitis B, Hepatitis C, HIV, Chlamydia, and Gonorrhea and that they were to go directly to the defendant's hospital laboratory to have the tests done.

¶ 7 The plaintiff heard about the press release prior to getting her registered letter and alleges the news left her distraught, horrified and in a state of nervous shock and that she feared for her health and the health of her family. She also alleges her matrimonial partner was shocked and horrified by the news of the potential infection of his partner and that the relationship, including intimate relationship of the partners, has been interfered with and shaken, and that the partners have each suffered loss of physical and emotional consortium.

¶ 8 The plaintiff also alleges that the defendant conducted the medical testing in such a manner as to make the identities of the infected and uninfected patients obvious to other patients, and thereby their identities became known in their small community. This, the plaintiff alleges, was an invasion of personal privacy; made known confidential medical information resulting in embarrassment; and exposed them to insulting commentary from other patients.

¶ 9 The plaintiff submits the defendant should have first informed the patients' physicians of the problem and allowed them to manage the issues within the confidentiality of the physician-patient relationship.

ISSUE:

¶ 10 The issue is whether this action should be certified as a class proceeding.

POSITION OF THE PLAINTIFF:

¶ 11 The plaintiff submits the defendant's failure to properly sterilize the medical instruments affected the lives of 333 patients at the clinic; it put the health of those women and their partners at risk; and it required them to undergo medical testing. In addition, the plaintiff submits the manner in which the defendants communicated news of its breach violated their privacy.

¶ 12 The plaintiff submits this case is ideally suited for class certification because the goals of any

class action are to protect public safety by dealing with negligent wrongdoing while at the same time enabling persons to have access to the Courts for modest claims which they might not otherwise be able to afford to litigate.

¶ 13 The plaintiff also submits that Courts in other provinces have repeatedly certified cases involving a defendant's failure to follow proper sterilization procedures resulting in risk to the public health.

POSITION OF DEFENDANT:

¶ 14 The defendant submits that upon discovery of the breach of the sterilization procedures it immediately corrected the problem and that likely no patients of the defendant were, in fact, infected as a result of the improperly sterilized instruments.

¶ 15 The defendant also submits that it took the necessary time to complete a comprehensive risk assessment of the situation and to identify the patients who were at risk. It submits these patients were then notified in a proper manner.

¶ 16 As an overview, the defendant submits that care must be taken to ensure that deference to the social objectives of class action legislation, manifested in broad and liberal interpretation of the legislation, not be adhered to in a manner which results in unprecedented expansion of tort liability. In particular, the defendant submits that no individuals in the proposed classes suffered any compensable damage as a result of the defendant's breach of sterilization procedures.

¶ 17 The defendant takes issue with the various causes of action set forth by the plaintiff and this will be dealt with when dealing with the causes of action.

LAW AND ANALYSIS:

(A) Purpose of Class Actions

¶ 18 Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 dealt with the purpose of class actions, and McLachlin, C.J.C. stated at pars. 26-29:

> The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.
>
> Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation

> costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W. K. Branch, Class Actions in Canada (1998), at para. 3.30; M. A. Eizenga, M. J. Peerless and C. M. Wright, Class Actions Law and Practice (1999), at para. 1.6; Bankier, supra, at pp. 230-31; Ontario Law Reform Commission, Report on Class Actions (1982), at pp. 118-19.
> Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, supra, at para. 3.40; Eizenga, Peerless and Wright, supra, at para. 1.7; Bankier, supra, at pp. 231-32; Ontario Law Reform Commission, supra, at pp. 119-22.
> Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law -- The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 Harv. L. Rev. 1806, at pp. 1809-10; see Branch, supra, at para. 3.50; Eizenga, Peerless and Wright, supra, at para. 1.8; Bankier, supra, at p. 232; Ontario Law Reform Commission, supra, at pp. 11 and 140-46.

¶ 19 I adopt this as the purpose of class actions. In addition, our Rule 7A.01(4) of the Rules of the Supreme Court, 1986 provides:

> (4) The rules of court, including Rule 7A, and the procedures to be followed with respect to class proceedings shall be interpreted and applied to achieve the objects of the Act, and in particular
>
> (a) to promote the effective and economical use of the judicial system;
> (b) to make the court system more accessible to the public; and
> (c) to ensure that parties responding to a class proceeding are able to present their case fairly to the court.

(B) Test for Class Certification

¶ 20 Section 5 of the Class Actions Act, S.N.L., c.C-18.1, deals with when the Court shall certify a class action. That section states:

> When court shall certify class action
>
> 5(1) On an application made under section 3 or 4 , the court shall certify an action as a class action where
>
> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 or more persons;
> (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;

(d) a class action is the preferable procedure to resolve the common issues of the class; and
(e) there is a person who

(i) is able to fairly and adequately represent the interests of the class,
(ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and
(iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

(2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether

(a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;
(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
(c) the class action would involve claims that are or have been the subject of another action;
(d) other means of resolving the claims are less practical or less efficient; and
(e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

(C) The Evidentiary Threshold

¶ 21 With respect to the level of the threshold, Barry, J. in Wheadon et al. v. Bayer Inc., [2004] N.J. No. 147 (SCTD) stated at par. 90:

> I agree with the Plaintiffs that this test establishes a "low threshold" for class certification. This was confirmed in Hollick where the Chief Justice noted the evidentiary threshold is not an onerous one.[FN5] Canadian courts have tended to give class proceedings legislation a large and liberal interpretation to insure that its policy goals are realized.[FN6] Courts must be mindful not to impose undue technical requirements on plaintiffs.

¶ 22 Section 6(2) of the Act provides that an order certifying an action as a class action is not a determination of the merits of the action. Barry, J. noted this in Wheadon where he stated at par. 91:

> Class certification is not a trial. It is not a summary judgment motion. Class certification is a procedural motion which concerns the form of an action, not its merits. Contentious factual and legal issues between the parties cannot be resolved on a class certification motion.

¶ 23 In Hollick v. Toronto (City), [2001] 3 S.C.R. 158, Chief Justice McLachlin dealt with the evidentiary burden stating at par. 25:

> In my view, the class representative must show some basis in fact for each of the certification requirements set out in s.5 of the Act, other than the requirement that the

> pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: See Branch, supra, at para. 4.60.

(D) Cause of Action

¶ 24 Section 5(1)(a) of the Act states that one of the requirements for certification of a class action is that the pleadings disclose a cause of action. The plaintiff has the onus of showing the pleadings disclose a cause of action and the defendant takes issue with many of the plaintiff's proposed causes of action. The main thrust of the defendant's argument is that the pleadings fail to disclose a cause of action.

¶ 25 The requirement that the plaintiff have a cause of action is to be determined solely on the pleadings and the allegations in the statement of claim are to be accepted as true. The parties agree that the plaintiff will satisfy this test unless it is shown that it is "plain and obvious" from the pleadings that the action must fail. (See: Wheadon and Hollick)

¶ 26 In Rose v. Pettle, [2004] O.J. No. 739, 2004 CarswellOnt 774 (Ont. S.C.J.), Cullity, J. stated at par. 9:

> There was no disagreement among counsel on the approach to be taken in determining whether the requirement in section 5(1)(a) is satisfied. The applicable law is well-established. The question is to be determined on the basis of the pleadings and the principles are essentially the same as those that apply in motions under rule 21.01(1)(b). The requirement will be satisfied unless it is plain and obvious that no reasonable cause of action is disclosed by the statement of claim. For this purpose the pleading should be read as generously as possible with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies: Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453 (Div. Ct.), at page 469. Neither novelty of the action, the complexity of the issues nor the potential for a defendant to present a strong defence will prevent the requirement from being satisfied. This will occur only if the action, as pleaded - and assuming that the facts set out in the statement of claim are proven is certain to fail: Hunt v. T & N plc (1990), 74 D.L.R. (4th) 321 (S.C.C.), at page 336; Abdool (above). The requirement in section 5(1)(a) will be satisfied if the claims could, in law, succeed on the basis of the material facts pleaded. For this purpose, it has been held that a finding to the contrary should not be made if it is dependent on a resolution of a question of law that is not fully settled in the jurisprudence: Anderson v. Wilson (1999), 44 O.R. (3d) 673 (C.A.), at page 679; Toronto-Dominion Bank v. Deloitte Haskins & Sells (1991), 5 O.R. (3d) 417 (Ont. Gen. Div.).

¶ 27 As a cause of action the plaintiff has pleaded negligence; breach of contract; breach of Privacy Act; breach of fiduciary duty; battery; loss of consortium; and loss of guidance, care, and companionship.

¶ 28 I shall deal with each of these in turn.

1. Negligence

¶ 29 The plaintiff alleges the defendant was negligent in his failure to properly sterilize the instruments and was further negligent in its approximately eighth-month delay in warning the plaintiff and class members of their potential exposure to the infections, and in the manner in which they gave

notice. The statement of claim alleges that as a result of the defendant's breach of its obligations, the plaintiff and class members have suffered a loss which was foreseeable by the defendant. One of the particulars of the loss is nervous shock, involving psychiatric illness.

¶ 30 In its defence, the defendant denies all allegations of negligence. In the alternative, the statement of defence states that no damage was caused to the plaintiff, and proposed class members, as a consequence of either the use of improper sterilized instruments, or as a result of the manner, or timing, of the disclosure of the use of these instruments.

¶ 31 With respect to causation and damages, the defence says that neither the plaintiff, nor the proposed class members, have suffered nervous shock, involving psychiatric illness and that it was not foreseeable that the plaintiff and proposed class members would suffer nervous shock.

¶ 32 On this hearing the defendant admitted they owed a duty of care to the patients. However, they denied they owed a duty of care to the matrimonial partners of the patients. The defendant, on this hearing, also admitted that they breached the duty of care to the patients with respect to the instruments being improperly sterilized.

¶ 33 However, in spite of this admission, the defendant denies liability on the basis that the plaintiffs have not proved they suffered damage which was caused by the defendant's negligence. In particular, the defendant submits a claim for nervous shock requires that the nervous shock was a foreseeable consequence of the defendant's negligence and that there is a recognizable psychiatric or psychosomatic illness resulting from the defendant's negligence.

¶ 34 The defendant submits that this is settled law in this jurisdiction as a result of the decision of Green, J. (as he then was) in Hodder et al. v. Waddleton's Store Ltd., 1993 CarswellNfld 373, 110 Nfld. & P.E.I.R. 222 (Nfld. S.C.T.D.).

¶ 35 The plaintiff has cited a number of authorities which support claims for nervous shock (See: Fitzgerald v. Tin, [2003] B.C.J. No. 203, 2003 CarswellBC 176 (B.C.S.C.); Garner v. Blue & White Taxi Co-operators Ltd., [1995] O.J. No. 2636, 1995 CarswellOnt 2538 (Ont. Gen. Div.); Peters-Brown v. Regina District Health Board, [1995] S.J. No. 609, 1995 CarswellSask 291 (Sask.Q.B.), aff'd, [1996] S.J. No. 761 (C.A.); Mason v. Westside Cemetaries Ltd., 29 C.C.L.T. (2d) 125, 135 D.L.R. (4th) 361).

¶ 36 At this stage of the proceedings (certification application) the plaintiff will satisfy the test unless it is shown that it is "plain and obvious" from the pleadings that the action must fail.

¶ 37 This issue has been considered by courts in various provinces in the context of certification applications. In Anderson v. Wilson, [1999] O.J. No. 2494 (C.A.) leave to appeal to the Supreme Court of Canada denied, [1999] S.C.C.A. No. 476, there is a fact situation somewhat similar to this case. There, a public health inspector identified a possible link between the defendant's clinics and an outbreak of Hepatitis B. Public Health authorities notified over eighteen thousand patients, by letter, that they may have been infected and that they should be treated. One of the proposed classes for certification was uninfected patients who had been sent the notice and who feared for their health. Commencing at p. 5, the Ontario Court of Appeal stated:

> In the present case it is at least arguable that the defendant's alleged negligence had the foreseeable consequence of a general notice to patients that a test was required to determine if they were infected. It was also arguably foreseeable that some suffering from shock would be occasioned by the notice. When the claimants are limited to those

> who received the notice and family law claimants it can further be argued that there is no ever widening circle of potential liability created in these circumstances and that there is no policy concern to justify excluding recovery.
> Given the uncertain state of the law on tort relief for nervous shock, it is not appropriate that the court should reach a conclusion at this early stage and without a complete factual foundation. It cannot be said, in this case, that it is plain and obvious that the claim for the tort of mental distress standing alone will fail. On the assumption that a legal obligation may exist, this segment of the class proceeding is ideally suited for certification. There are many persons with the same complaint, each of which would typically represent a modest claim that would not itself justify an independent action. In addition, the nature of the overall claim lends itself to aggregate treatment because individual reactions to the notices would likely be similar in each case -- fear of a serious infection and anxiety during the waiting period for a test result. If evidence from patients to support such reactions to the notices is necessary, it would probably suffice to hear from a few typical claimants. The balance of the evidence as to liability would relate to the conduct of the clinics, the reaction of the Public Health Authorities and foreseeability issues.
> Thus, in my view, the claim in tort for mental distress for this group of persons should proceed as the preferable mode of bringing these claims forward.

¶ 38 With respect to the issue of psychiatric illness, the Ontario Court of Appeal wrote at p. 4:

> In my view the Divisional Court was wrong to put aside the class of persons who received notice from the Public Health Authorities of the possibility of infection, were tested and are unaffected. The basis for their claim is in nervous shock. Although the House of Lords [See Note 1 at end of document] has decided that emotional suffering without psychiatric symptoms does not qualify for tort relief, two recent Ontario Superior Court judges have held to the contrary ...

¶ 39 In Rose v. Pettle the Ontario Superior Court of Justice certified a class action against an acupuncturist who allegedly had negligently exposed his patients to the risk of a serious skin disease through the use of unsterilized needles. The patients had to seek medical testing. There, it was pleaded that the patients had suffered harm either by becoming ill, or suffering nervous shock when informed by Public Health authorities that they may have been exposed to this skin disease. The Court cited and followed Anderson.

¶ 40 In Fakhri v. Alfalfa Canada Inc., [2003] B.C.J. No. 2618, 2003 BCSC 1717 the defendant sold food products tainted by Hepatitis A virus from an infected employee. One of the proposed classes for certification was a group who did not become ill, but who received an injection as a result of a health advisory. This claim was for damages for anxiety. The British Columbia Supreme Court followed Anderson and stated, commencing at par. 46:

> As well, the plaintiffs claim damages for anxiety. The defendant argues that no such claim is recognized in law. However, the plaintiffs have referred to the case of Anderson v. Wilson (1999), 44 O.R. (3d) 673, 175 D.L.R. (4th) 409 (Ont. C.A.) which was an action involving the identification of a possible link between an outbreak of Hepatitis B and clinics where the defendants provided electroencephalogram tests (EEGs). Health authorities notified over 18,000 patients by letter that they should be tested. The plaintiffs brought a proposed class proceeding and claimed in negligence and for breach of contract. Their motion for certification was granted and the certification order was upheld but amended by the Divisional Court, which removed

> from the class of plaintiffs a group who did not contract the disease, but who were informed of the possibility and who were tested.
> In setting aside the order of the Divisional Court the Court of Appeal stated that the Divisional Court was wrong to exclude the group of person who received notice of the possibility of infection, were tested and were uninfected. Given the uncertain state of the law on tort relief for nervous shock, it was not appropriate for the Court to reach a conclusion at the certification stage without a complete factual foundation. On the assumption that a legal obligation existed, this segment of the class was ideally suited for certification as there were many people with the same complaint, each of whom would represent a modest claim that would not justify an independent action. ([paragraphs] 17 - 18)
> Although the defendant argues that anxiety is different from nervous shock and not recognized, the plaintiffs submit that anxiety is the same as nervous shock. It would be inappropriate to determine this matter at this early stage as it is not plain and obvious that the plaintiffs' claim in this regard will fail.

¶ 41 That decision was upheld by the British Columbia Court of Appeal in a decision filed October 27, 2004, [2004] B.C.J. No. 2200. There, the Court referred to Anderson and adopted the analysis of that Court. In particular, it quoted from and adopted the same quote from that case as set forth earlier in these reasons.

¶ 42 Given the above authorities, I am unable to conclude, at this early stage, that it is plain and obvious that this claim will fail.

2. Breach of Contract

¶ 43 The plaintiff pleads that the defendant has a contractual relationship for the provision of medical services to the plaintiff and its patients and that a major or important part of the contractual relationship was to provide the plaintiff and class members with peace of mind. The plaintiff also pleads that implied terms of the contract were that the defendant would employ competent and properly trained staff and would use properly sterilized equipment; that the defendant would properly notify the plaintiff and class members of the risk of contracting any infections that arose as a result of their exposure to the unsterilized instruments; and that the defendant would preserve the privacy of the plaintiff and class members.

¶ 44 The plaintiff also pleads that the nature of the confidential relationship was such that the parties contemplated that the defendant's breaches of its contractual duties might entail mental distress by the plaintiff and class members.

¶ 45 In its defence, the defendant denies it owed a contractual duty to the plaintiff and proposed class members and, in the alternative, says that if a duty was owed, it was not breached. The defendant also denies that a major part of the contractual relationship was to provide peace of mind, and denies any of the implied terms pled by the plaintiff. The defendant also denies that the parties contemplated that a breach of contract might result in mental distress to the plaintiff and the proposed class members.

¶ 46 The defendant, citing Fidler v. Sun Life Assurance of Canada, [2004] B.C.J. No. 982, 2004 BCCA 273, submits that the general rule for damage awards for mental distress, resulting from a breach of contract, is that the contract breaker is not liable for damages arising from the breach. The defendant submits the exception to the rule is the "peace of mind" contract where damages will be awarded if the fruit of the contract is not provided.

¶ 47 The defendant submits that if there was any contract with the plaintiff, it cannot be characterized as a "peace of mind" contract and, therefore, any breach cannot give rise to a contractual claim for mental distress. The defendant refers to some authorities where plaintiffs were successful in proving damages and some others where they were unsuccessful.

¶ 48 I concur with the plaintiff's submission that the defendant impermissibly on this issue seeks to argue the merits of the action. In Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd., [2002] B.C.J. No. 233, 2002 BCCA 78, the British Columbia Court of Appeal, in dealing with a claim for damages for mental distress, anxiety and inconvenience, stated at par. 57:

> The reasons for judgment in Farley, [2001] H.L.J. No. 49, provide a summary and survey of the law as it has developed, in England, to date. They are helpful in analyzing and summarizing the principles derived from Watts, [1991] 1 W.L.R. 1421, which are, in my view, applicable to the case at bar. In summary they are (borrowing the language from both Watts and Farley):
>
> (a) A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension, or aggravation which the breach of contract may cause to the innocent party.
> (b) The rule is not absolute. Where a major or important part of the contract is to give pleasure, relaxation or peace of mind, damages will be awarded if the fruit of the contract is not provided or if the contrary result is instead procured.
> (c) In cases not falling within the "peace of mind" category, damages are recoverable for inconvenience and discomfort caused by the breach and the mental suffering directly related to that inconvenience and discomfort. However, the cause of the inconvenience or discomfort must be a sensory experience as opposed to mere disappointment that the contract has been broken. If those effects are foreseeably suffered during a period when defects are repaired, they sound in damages even though the cost of repairs is not recoverable as such.

¶ 49 I am unable to conclude, at this early stage, that it is plain and obvious that this claim will fail.

3. Breach of Privacy

¶ 50 The plaintiff claims that the release of information outside the physician-patient relationship invaded the confidentiality of their medical information and invaded their privacy, contrary to the Privacy Act, R.S.N.L. 1990, c. P-22, and the Hospitals Act, R.S.N.L. 1990, c. H-9.

¶ 51 Sections 35(2) and 35(7) of the Hospitals Act state:

> (2) A hospital authority shall not allow a person access to, or disclose to a person information contained in the records of the hospital authority
>
> ...
>
> (7) A hospital authority is not liable for damages caused to a person as a result of the release of information or the allowing of access to information by a person under subsection (3) or as a result of the reasonable exercise by the hospital

authority of the discretion conferred upon it by subsection (4).

¶ 52 Section 3 of the Privacy Act states:

> Violation of privacy
>
> 3(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of an individual.
>
> (2) The nature and degree of privacy to which an individual is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of an individual, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.

¶ 53 The statement of defence denies it released information outside the hospital-patient relationship; and denies the defendant's actions constituted wilful conduct such as to constitute the tort of violation of privacy. The defendant submits the use of personal information was reasonable and confined to communication by private means of information it was obliged to advise each of the proposed class members. The defendant also says the testing of the plaintiff and proposed members was done in a safe and reasonable manner with close attention to the patient's privacy needs.

¶ 54 Both parties referred to Hollinsworth v. BCTV, (1998), 59 B.C.L.R. (3d) 121 (C.A.) and Peters-Brown v. Regina District Health Board, [1995] S.J. No. 609, 1995 CarswellSask 291 (Sask. Q.B.), aff'd, [1996] S.J. No.761 (C.A.), where the Courts considered the meaning of the word "wilfully" and the phrase "without claim of right" in privacy acts substantially similar to the Privacy Act in this jurisdiction.

¶ 55 In Peters-Brown the plaintiff had been a patient at the hospital and treated for Hepatitis from which she had recovered. The plaintiff's name was subsequently placed on a list of identified cases and posted in a restricted zone of the hospital which was frequented only by staff. However, the list got copied and found its way to the plaintiff's place of employment.

¶ 56 There, the Court was dealing with the Saskatchewan Privacy Act which is substantially similar to the Privacy Act in this jurisdiction.

¶ 57 The Saskatchewan Court of Queen's Bench stated, commencing at par. 32:

> 32 "Willfully" is defined in Black's Law Dictionary, 5th ed. (St. Paul, Minn.: West Publishing Co., 1990):
>
> In civil actions, the word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. [Emphasis added]
>
> 33 There are no Saskatchewan decisions construing this act. However, similar legislation in British Columbia and Manitoba has received a narrow interpretation (see Davis v. McArthur (1970), 17 D.L.R. (3d) 760 (B.C.C.A.) and Parasiuk v. Can. Newspapers Co., [1988] 2 W.W.R. 737 (Man. Q.B.).
> 34 On the facts as presented, it cannot be said the hospital "wilfully and without claim

> of right" violated the privacy of the plaintiff. There was no participation by the hospital in the circulation of the list in the correctional centre. Circulation to hospital departments is a more complicated issue.
> 35 Internal distribution of the plaintiff's private information was wilful in the sense that it was done intentionally by the hospital. However, there was never an intention to violate the plaintiff's privacy. Moreover, there was a "claim of right". The aim of the hospital was to safeguard its employees, and it did not mean thereby, to infringe the rights of the plaintiff by revealing confidential patient data. Quite the opposite. The hospital intended to preserve secrecy by limiting the circulation to restricted, non-public areas. The only persons who were entitled to see the list were in turn, sworn to secrecy.

¶ 58 In the British Columbia Court of Appeal decision in Hollinsworth the Court was dealing with the British Columbia Privacy Act which, again, was substantially similar to the Privacy Act in this jurisdiction. In that case the Court stated, commencing at par. 29:

> 29 I turn first to the word "wilfully". In my opinion the word "wilfully" does not apply broadly to any intentional act that has the effect of violating privacy but more narrowly to an intention to do an act which the person doing the act knew or should have known would violate the privacy of another person. That was not established in this case.
> 30 I move now to the phrase, "without a claim of right". I adopt the meaning given by Mr. Justice Seaton to that very phrase, "without a claim of right" in Davis v. McArthur (1969), 10 D.L.R. (3d) 250:
>
> > ... an honest belief in a state of facts which, if it existed, would be a legal justification or excuse ...
>
> 31 It is unnecessary in this case to decide whether the honest belief must be a reasonable one. Here, on the evidence, the belief was both honest and reasonable. I would not accede to this claim under the Privacy Act. It is not necessary for me to consider the exceptions under the Act.

¶ 59 The defendant submits that while it acted intentionally in that it sent out registered mail to affected patients, there was no intention to act "wilfully and without a claim of right, to violate the privacy of an individual." The defendant submits this is similar to the decision in Peters-Brown where the Court acknowledged that the defendant's distribution of private information was wilful in the sense that it was done intentionally, but there was never an intention to violate the plaintiff's privacy. The defendant also submits that as was held in Peters-Brown, it can be said there was a "claim of right" on behalf of the hospital in contacting the patients in this case.

¶ 60 The plaintiff submits that the defendant should have known that sending the letters would lead to the identification of the plaintiffs, and this met the definition of "wilfully" in Hollinsworth.

¶ 61 The plaintiff also notes that in dealing with the meaning of the phrase "without claim of right" the Court did not find it necessary to decide whether the honest belief must be a reasonable one. The plaintiff also submits that Peters-Brown did not consider this point either.

¶ 62 From the submissions, it is clear that there are different views on the interpretation of the word "wilfully" and the phrase "without a claim of right." There is also a factual component to this issue, that being the defendant's method of communicating the medical information and how the testing was accommodated. That will have to be determined on the evidence.

¶ 63 In spite of the defendant's able submission on this issue, I am mindful of the fact that on this application I am not to deal with the merits of the case. Applying the applicable test to this application, I am unable to conclude, at this early stage, that it is plain and obvious that this claim will fail.

¶ 64 With respect to the Hospitals Act the defendant raises the issue of whether there is a civil cause of action for a breach of that Act by reason of the fact that the Act provides no remedy for a breach. The defendant also submits that s. 35(7) relieves the defendant from liability for any damages.

¶ 65 These are issues to be dealt with at trial, I am unable to conclude that it is plain and obvious, at this stage, that the plaintiff's claim under the Hospitals Act will fail.

4. Breach of Fiduciary Duty

¶ 66 A fiduciary relationship has the following characteristics:

1. Scope for the exercise of some discretion or power,
2. that power or discretion can be exercised unilaterally so as to affect the beneficiary's legal or practical interests and,
3. a peculiar vulnerability to the exercise of that discretion or power. (See: Hodgkinson v. Simms, [1994] 3 S.C.R. 377 and Frame v. Smith [1987] 2 S.C.R. 99)

¶ 67 The plaintiff states the defendant stands in the position of a fiduciary, pleading that the defendant exercised a discretion in its decision not to tell the plaintiff and class members, over an eight-month period, of its failure to properly sterilize the instruments; that the defendant's discretion was exercised unilaterally so as to affect the plaintiff and the class members by denying them knowledge of their medical condition and the chance to seek early medical treatment; and that the plaintiff and class members were peculiarly vulnerable for they had no way of knowing about the problem.

¶ 68 The plaintiff states the defendant breached the fiduciary duty by failing to notify the plaintiff and the class as soon as they found out about the problem and in the manner they gave notice.

¶ 69 The defendant denies any fiduciary duty to the plaintiff and the class, and in the alternative denies any breach of duty by reason of taking time to notify and by the manner in which it issued the notification. Here, there is an issue as to whether there was a fiduciary duty and whether the defendant has breached these duties by failing to notify in a timely fashion and by the manner used for the notification.

¶ 70 I am unable to conclude, at this early stage, that in this respect it is plain and obvious that the plaintiff's claim will fail.

5. Battery

¶ 71 In Reibl v. Hughes (1980), 114 D.L.R. (3d) 1, the battery aspect of the plaintiff's claim was based upon lack of informed consent in that the operating doctor had not informed him of the risk of paralysis. The Court held that the failure to disclose attendant risk should go to negligence rather than to battery.

¶ 72 In Reibl, Laskin, C.J.C. referred to the sometimes confusing distinction between battery and negligence and then with respect to battery stated at p. 9:

> ... The tort is an intentional one, consisting of an unprivileged and unconsented to invasion of one's bodily security. True enough, it has some advantages for a plaintiff over an action of negligence since it does not require proof of causation and it casts upon the defendant the burden of proving consent to what was done. Again, it does not require the adducing of medical evidence, although it seems to me that if battery is to be available for certain kinds of failure to meet the duty of disclosure there would necessarily have to be some such evidence brought before the Court as an element in determining whether there has been such a failure.
> The well-known statement of Cardozo J. in Schloendorff v. Society of New York Hospital (1914), 211 N.Y. 125 at p. 129, 105 N.E. 92 at p. 93, that "every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages" cannot be taken beyond the compass of its words to support an action of battery where there has been consent to the very surgical procedure carried out upon a patient but there has been a breach of the duty of disclosure of attendant risks. In my opinion, actions of battery in respect of surgical or other medical treatment should be confined to cases where surgery or treatment has been performed or given to which there has been no consent at all or where, emergency situations aside, surgery or treatment has been performed or given beyond that to which there was consent.
> This standard would comprehend cases where there was misrepresentation of the surgery or treatment for which consent was elicited and a different surgical procedure or treatment was carried out.
> ...
> In situations where the allegation is that attendant risks which should have been disclosed were not communicated to the patient and yet the surgery or other medical treatment carried out was that to which the plaintiff consented (there being no negligence basis of liability for the recommended surgery or treatment to deal with the patient's condition), I do not understand how it can be said that the consent was vitiated by the failure of disclosure so as to make the surgery or other treatment an unprivileged, unconsented to and intentional invasion of the patient's bodily integrity. I can appreciate the temptation to say that the genuineness of consent to medical treatment depends on proper disclosure of the risks which it entails, but in my view, unless there has been misrepresentation or fraud to secure consent to the treatment, a failure to disclose the attendant risks, however serious, should go to negligence rather than to battery. Although such a failure relates to an informed choice of submitting to or refusing recommended and appropriate treatment, it arises as the breach of an anterior duty of due care, comparable in legal obligation to the duty of due care in carrying out the particular treatment to which the patient has consented. It is not a test of the validity of the consent.

¶ 73 Once a plaintiff proves direct interference with their person the burden is then on the defendant to prove the defence of consent (See: Sansolone v. Wawanesa Mutual Insurance Co. (2000), 185 D.L.R. (4th) 57 (S.C.C.)).

¶ 74 The plaintiff admits that she, and all the patients who attended the defendant's clinic between October 2001 and March 2003, consented to being examined with gynecological instruments.

¶ 75 However, the plaintiff submits they did not consent, and would not have consented, to undergo treatment and invasive examinations if they had known improperly sterilized instruments were employed. In this respect, the plaintiff submits the treatment actually received by the plaintiff and the

affected patients falls within the situation described by Laskin, C.J.C. in Reibl, that of a treatment performed or given beyond that to which there was consent.

¶ 76 Battery then is an intentional tort, which is committed where a party performs treatment without consent, whether or not the patient sustains physical injury as a result.

¶ 77 The defendant submits that the plaintiff and proposed class members consented to all medical treatment received at the clinic and such consent was not vitiated or revoked at any time.

¶ 78 There is an admission by the plaintiff that there was consent to the medical examination. In Reibl, Laskin, C.J.C. stated that unless there has been misrepresentation or fraud to secure consent to the treatment, a failure to disclose the attendant risk should go to negligence rather than battery. Here the plaintiff has not pleaded that there was any misrepresentation or fraud to secure consent.

¶ 79 Ellen Picard in the text Legal Liability of Doctors and Hospitals in Canada (Toronto: Carswell, 1996) states that misinformation regarding the risks of a procedure results in a claim for negligence rather than battery. At p. 113-114 she states:

> Failure to inform a patient of the risks (however serious) associated with proposed treatment does not vitiate the patient's consent so as to render the doctor liable in battery; rather the remedy lies in negligence.

¶ 80 It would appear that in order for battery to apply with respect to medical care, there would have to be some misrepresentation or fraud in order to secure consent to treatment. In Kita v. Braig, 1992 CarswellBC 256, 71 B.C.L.R. (2d) 135 (B.C.C.A.) the claim in battery was dismissed on the basis that innocent misrepresentation will not found a claim in battery.

¶ 81 Here, there was consent to the medical examinations; there is no suggestion that the examinations were not carried out with the honest belief and good faith that the instruments were properly sterilized; and there is no plea of fraudulent misrepresentation.

¶ 82 Under these circumstances I accept the defendant's submission that at best this case only amounts to an innocent misrepresentation, and that would not vitiate consent, but rather go to the negligence of the defendant. I also agree with the defendant that if the plaintiff's submission is correct, then every medical procedure performed negligently would also constitute a battery, since no patient would, presumably, ever consent to a negligently performed procedure. That, in my view, is not the state of the law.

¶ 83 I conclude that it is plain and obvious that the claim for battery will fail. Accordingly, the cause of action in battery will not be certified for class proceedings.

6. Loss of Consortium

¶ 84 The plaintiff pleas that the conduct of the defendant has caused a loss of consortium to the affected patients and their spouses. The defendant denies that there is a cause of action for loss of consortium.

¶ 85 In this jurisdiction Taylor v. Brenton No. 2 (1984), 48 Nfld. & P.E.I.R. 18 (Nfld. T.D.) recognized this claim with respect to a plaintiff husband. In Power v. Moss (1986), 61 Nfld. & P.E.I.R. 5 (Nfld. T.D.) this claim was extended to include a plaintiff wife.

¶ 86 Based on the authorities in this jurisdiction, I am unable to conclude, at this early stage, that it is plain and obvious that the plaintiff's claim will fail.

¶ 87 Also, pursuant to s. 8(a) of the Act the Court shall not refuse to certify an action as a class action solely on the grounds that the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

7. Loss of Guidance, Care, and Companionship

¶ 88 The plaintiff alleges the conduct of the defendant has caused a loss of guidance, care and companionship to the affected patients and their partners.

¶ 89 The defendant submits that in this jurisdiction the case law only supports this loss in fatal accident cases and does not support awards for this loss in these circumstances (See: McLean et al. v. Carr Estate et al. (1994), 125 Nfld. & P.E.I.R. 165 (Nfld. T.D.)). The defendant also submits that there is no case law in this jurisdiction that supports an expansion of these principles.

¶ 90 The defendant points out that unlike some jurisdictions, Newfoundland and Labrador does not have legislation in place whereby family members can make this claim as a result of injuries to another family member.

¶ 91 The defendant also submits the spouses did not suffer any damages and, therefore, their claim will fail.

¶ 92 The plaintiff agrees that to date, in this jurisdiction, an award under this claim has only been given in fatal accident cases. However, the plaintiff submits that the decision in Ordon Estate v. Grail (1998), 166 D.L.R. (4th) 193 (S.C.C.) has fundamentally altered this area of the law by mandating non-pecuniary awards of damages, in both death cases and personal injury cases.

¶ 93 Ordon concerned five separate actions for personal injury and wrongful death arising out of boating accidents in inland waters. The Court was dealing with Federal Maritime law and concluded that no existing common law rule permitted either personal injury or fatal accident claims for damages for loss of guidance, care and companionship. The Court then stated at par. 100:

> That said, the next question, in accordance with the framework established in Bow Valley Husky, [1997] 3 S.C.R. 1210, and in this case, is whether the common law rules barring recovery in both instances should be judicially reformed to allow claims for damages for loss of guidance, care and companionship (and, in the case of dependants of a person injured but not killed in a boating accident, to allow such claims to be brought by a broader class of plaintiffs than is currently permitted under the actio per quod servitium amisit and actio per quod consortium amisit). We agree with the Court of Appeal for Ontario that they should.

¶ 94 At par. 102 the Court stated:

> It is unfair to deny compensation to the plaintiff dependants in these actions based solely upon an anachronistic and historically contingent understanding of the harm they may have suffered. This is true both for the fatal accident claimants and for the personal injury claimants. In this light, we are of the view that changing the definition of "damages" within the context of maritime accident claims is required to keep non-

> statutory maritime law in step with modern understandings of fairness and justice, as well as with the "dynamic and evolving fabric of our society"...

¶ 95 The plaintiff submits that based upon the pronouncements in Ordon, it has an arguable case that in this jurisdiction, where the legislature has not addressed derivative or relationship claims, that the common law has been reformed to allow for claims for loss of guidance, care, and companionship. At this early stage, I am unable to conclude that it is plain and obvious that this claim will fail.

¶ 96 Also, pursuant to s. 8(a) of the Act the Court shall not refuse to certify solely on the grounds that the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

E. Identifiable Class

¶ 97 Section 5(1)(b) of the Act requires that there is an identifiable class of two or more persons.

¶ 98 In Western Canadian Shopping Centres the Supreme Court of Canada noted the importance of a clearly and objectively defined class. Chief Justice McLachlin stated at par. 38:

> ... First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, supra, at paras. 4.190-4.207; Friedenthal, Kane and Miller, Civil Procedure (2nd ed. 1993), at pp. 726-27; Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.

¶ 99 The plaintiff's proposed class definition is as follows:

(a) All persons who were patients at the gynaecological clinic at the Captain William Jackman Memorial Hospital (the "Clinic") between October 2001 and March 2003 and who contracted HIV, Hepatitis B, Hepatitis C., Chlamydia and/or Gonorrhea (the "Diseases") following treatment at the Clinic, or where such person is deceased, the personal representative of the estate of the deceased person (persons in paragraph (a) are hereinafter referred to as "Infected Patients");

(b) All persons who contracted the Diseases from an Infected Patient, or from another Cross-Infected Person, or where such person is deceased, the personal representative of the estate of the deceased person (persons in paragraph (b) are hereinafter referred to as "Cross-Infected Persons");

(c) All persons who were patients at the Clinic between October 2001 and march 2003, who

  (i) did not contract the Diseases following treatment at the Clinic;
  (ii) received a notice from the Health Labrador Corporation advising that they

may have contracted the Diseases and advising of the need for medical testing;

(iii) attended at a hospital or medical clinic for testing for the Diseases;

or where such person is deceased, the personal representative of the estate of the deceased person (persons in paragraph (c) are hereinafter referred to as "Uninfected Patients"); and

(d) The matrimonial and common-law partners of Infected Patients, Cross-Infected Persons, and Uninfected Patients ("Spouses").

¶ 100 In this regard, the plaintiff believes that there are likely 333 patients and a likely similar number of spouses of such persons.

¶ 101 The defendant agrees that the requirements of an identifiable class, as set out in s. 5(1)(b), is met with respect to the class definitions in (a), (b) and (c) (i.e. infected patients, cross-infected persons, and uninfected patients).

¶ 102 However, the defendant submits that the requirement is not met for the derivative claimants (spouses) as it would be difficult to identify them during this period.

¶ 103 I am unable to agree with the defendant's submission. I am satisfied that this is an identifiable class. This class has been defined by reference to objective criteria. As noted, the class of infected patients, or cross-infected persons, or uninfected patients is easily identified. A person is a member of the last proposed class if they were the matrimonial partner, or common-law partner, of a person in one of these other classes. This can be determined by an objective standard and can be determined without reference to the merits of the action.

¶ 104 The fact that it may be difficult at the certification stage to list by name every member of the class is not fatal. Also, the fact that the Court may be required to enter upon a factual investigation in order to determine class membership, does not render the class defective or any less adequate.

¶ 105 I note, as well, that s. 8(d) of the Act states that a Court shall not refuse to certify an action as a class action solely on the ground that the number of class members, or the identity of each class member, is not determined or may not be determined.

¶ 106 The plaintiff has met the evidentiary threshold with respect to this certification requirement and I am satisfied that the spouses class meets the requirements of an identifiable class.

¶ 107 I note, as well, that similar class definitions were approved in other cases (Anderson, Fakhri, and Rose).

¶ 108 I approve the proposed class definition.

F. Common Issues

¶ 109 Section 5(1)(c) of the Act requires that the claims of the class members raise a common issue, whether or not the common issue is the dominant issue.

¶ 110 Section 2 of the Act defines common issues as common but not necessarily identical issues of

fact, or common but not necessarily identical issues of law that arise.

¶ 111 The plaintiff has proposed the following common issues:

(a) Did the Defendant breach a duty or duties of care owed to class members;

(i) in respect of its provision of medical services to class members between October 2001 and March 2003; and
(ii) in respect of its subsequent conduct?

(b) Whether class members are entitled to damages under the Privacy Act, and if so, whether such damages may be determined on a global basis?
(c) Whether class members are entitled to punitive damages, and if so, whether such damages may be determined on a global basis?

¶ 112 In considering this requirement in Wheadon, Barry J. stated at par. 112:

> To satisfy s. 5(1)(c) of the Act, the action must raise common issues of fact or law. Such common issues need not be determinative of liability, nor do they need to be "dominant issues" in the litigation, as required in the United States [FN22]. They are simply issues which if decided at a common issues trial will advance the litigation in some meaningful way. Appellate courts have described common issues as follows:
>
> > When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. [FN 23]

¶ 113 With respect to common issue (a)(i) the defendant states it has admitted to a duty of care and admits they breached the standard of care. As a result, the defendant submits the only outstanding issues are whether the defendant's actions caused injury to each plaintiff. The defendant submits that that issue would require the evidence from each individual plaintiff and, therefore, is not a common issue between the parties.

¶ 114 I am not able to agree with that submission. While the defendant admits it owed a duty and that it breached the duty, it still denies liability mainly on the basis of foreseeability and proof of psychiatric illness. In my view these defences are common issues which could be resolved at a common-issue trial for the benefit of the class as a whole. This would move the case forward.

¶ 115 I also accept the plaintiff's submission that even where a defendant admits to all there is to admit as common (i.e. such as an admission of liability), this is not an argument against class certification, for certification would be required to render the defendant's admission binding for the class as a whole, and to create a structure for the resolution of the remaining individual issues of damages. See: Bywater v. Toronto Transit Commission, [1998] O.J. No. 4913 (Gen. Div.).

¶ 116 I agree with the plaintiff that their proposed common issue (a)(i) is a common issue, and a determination of which would move the litigation forward. It is suitable for certification as a common issue.

¶ 117 With respect to common issue (a)(ii) the defendant denies that it breached the duty of care owed to class members in respect of conduct subsequent to March 2003. I agree with the plaintiff's submission that there is a common issue as to the standard of conduct expected from the defendant clinic, and whether the defendant's conduct fell below that standard. The participation of class members is not needed for that inquiry, and resolving this issue would move the litigation forward.

¶ 118 Proposed common issue (a)(ii) is suitable for confirmation as a common issue.

¶ 119 With respect to common issue (b) the defendant submits that while the Privacy Act does not require proof of damage, individual class members will have to give evidence on the issue of whether the defendant wilfully, and without claim of right, violated their individual privacy.

¶ 120 The Privacy Act does not require proof of damage, and I agree with the plaintiff's submission that therefore it is ideally suited to class certification. The issue of whether the defendant breached the Privacy Act should not require the participation of class members and a resolution of that issue would move the litigation forward.

¶ 121 Proposed common issue (b) is suitable for certification as a common issue.

¶ 122 With respect to common issue (c) the defendant agrees that punitive damages are suitable for certification as a common issue. I also agree.

¶ 123 A review of the authorities also shows that these common issues have been approved by courts in other jurisdictions (See: Anderson, Fakhri and Rose).

G. Preferable Procedure

¶ 124 Pursuant to s. 5(1)(d) the Court must determine whether class certification is the preferable procedure to resolve the common issues of the class. This involves a consideration of the extent to which the proposed proceeding will achieve the earlier mentioned goals of the Act, namely, judicial economy, access to justice, and behaviour modification.

i. Judicial Economy

¶ 125 Class certification, in the manner proposed, will serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis.

¶ 126 The defendant submits that due to the need for individual evidence for proving damages, and the complexity of the issues arising from a claim for negligence, that a class proceeding is not the preferable procedure. The defendant submits the goal of judicial efficiency will be compromised due to the time and expenses related to proving uncommon issues.

¶ 127 I recognize that the resolution of the common issues will not be completely determinative of liability, but resolution of the common issues will advance the interests of the class and, in my view, avoid unnecessary duplication and fact-finding and legal analysis with respect to these common issues. Also, the nature and extent of the common issues makes certification of the action meaningful, efficient and an effective exercise.

ii. Access to Justice

¶ 128 Here, the individual claims of class members are modest and, without class certification and the ability to share costs, they may be too small to justify individual litigation. Certification of the proceeding would promote access to justice for the class members by enabling them to pursue a remedy against the defendant. Denying certification would mean that many of them would be unable to pursue a remedy.

iii. Behaviour Modification

¶ 129 I agree with the plaintiff's submission that if the plaintiff's allegations are ultimately sustained at trial, then goals of specific and general deterrence will be advanced, public safety improved, and the public confidence in our health care system restored. Health care providers will be encouraged to exercise greater care in the sterilization of medical instruments and in the dissemination of confidential patient information.

¶ 130 Section 5(2) of the Act provides that in determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider all relevant matters including those enumerated therein.

¶ 131 On a consideration of the matters listed in that section, I conclude that this is a case where the common issues predominate over questions affecting only individual members; there is no evidence to suggest that a significant number of class members have a valid interest in individually controlling separate actions; there are no other proceedings involving the issues raised in this matter; other means of resolving the claims are less practical or less efficient; and there is no evidence to indicate that the administration of the class action would be more difficult than if it were to proceed in some other manner.

¶ 132 I conclude that a class action is the preferable procedure to resolve the common issues of the class.

H. Representative Plaintiff

¶ 133 Section 5(1)(e) provides that one of the requirements for certification is that there be a person who is prepared to act as the representative plaintiff; who is able to fairly and adequately represent the interests of the class; who has produced a plan for advancing the action and for providing notice to the class; and who does not have, on the common issues, an interest that is in conflict with the interests of other class members.

¶ 134 Brenda Rideout has been proposed as the representative plaintiff and she has filed an affidavit wherein she states she is prepared to act as a representative of the class. She also explains what has been done to date with the litigation, outlines and attaches the litigation plan, advises of her plan for future conduct of this action, and states she has no conflict on the common issues with the interests of any other class members.

¶ 135 The defendant agrees that she is a suitable representative plaintiff. Having reviewed the affidavit of Brenda Rideout, I conclude she does not, on the common issues, have any apparent conflict with the interests of the other class members. Her affidavit, and her involvement to date, also does not cause any concern about her being able to fairly and adequately represent the interests of the class.

¶ 136 Section 5(1)(e)(ii) also requires that the proposed representative plaintiff has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of

notifying class members of the action. Rule 7A.07 sets forth what the plan is to contain.

¶ 137 The defendant takes no issue with the litigation plan produced and filed by Rideout. I am satisfied that it sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and as well, meets the requirements of Rule 7A.07.

¶ 138 I conclude the plaintiff satisfies the requirements of a representative plaintiff.

I. Summary and Disposition

¶ 139 I conclude the plaintiff has discharged the onus of demonstrating that the requirements for certification are satisfied.

¶ 140 An Order will go:

1. Certifying this action as a class proceeding;
2. Describing as a "class":

   (a) All persons who were patients at the gynaecological clinic at the Captain William Jackman Memorial Hospital (the "Clinic") between October 2001 and March 2003 and who contracted HIV, Hepatitis B, Hepatitis C., Chlamydia and/or Gonorrhea (the "Diseases") following treatment at the Clinic, or where such person is deceased, the personal representative of the estate of the deceased person (persons in paragraph (a) are hereinafter referred to as "Infected Patients");

   (b) All persons who contracted the Diseases from an Infected Patient, or from another Cross-Infected Person, or where such person is deceased, the personal representative of the estate of the deceased person (persons in paragraph (b) are hereinafter referred to as "Cross-Infected Persons");

   (c) All persons who were patients at the Clinic between October 2001 and March 2003, who

      (i) did not contract the Diseases following treatment at the Clinic;
      (ii) received a notice from the Health Labrador Corporation advising that they may have contracted the Diseases and advising of the need for medical testing;
      (iii) attended at a hospital or medical clinic for testing for the Diseases;

   or where such person is deceased, the personal representative of the estate of the deceased person (persons in paragraph (c) are hereinafter referred to as "Uninfected Patients"); and

   (d) The matrimonial and common-law partners of Infected Patients, Cross-Infected Persons, and Uninfected Patients ("Spouses").

3. Appointing Brenda Rideout as the representative plaintiff of the class;
4. Stating the nature of the claims asserted on behalf of the class to be negligence; breach of contract; breach of fiduciary duty; privacy; loss of guidance, care and companionship; and loss of consortium (note: the claim asserted in battery is denied).
5. Stating the relief sought by the class members to be:

(a) All issues of the defendant's liability
(b) Damages

6. Stating the "common issues" to be:

(a) Did the Defendant breach a duty or duties of care owed to class members;

(i) in respect of its provision of medical services to class members between October 2001 and March 2003; and
(ii) in respect of its subsequent conduct?

(b) Whether class members are entitled to damages under the Privacy Act, and if so, whether such damages may be determined on a global basis?
(c) Whether class members are entitled to punitive damages, and if so, whether such damages may be determined on a global basis?

¶ 141 Leave is given to the parties to make any further submissions that they may wish to make with respect to the form of the Order and with respect to the form and content of the notification of certification and opt-out procedure.

D.L. RUSSELL J.

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