IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Welshman v. Central Regional Health Authority*, 2024 NLSC 35
Date: February 28, 2024
Docket: 202103G0020

BETWEEN:

KAYLA WELSHMAN

FIRST PLAINTIFF

AND:

SUSAN ROBERTS

SECOND PLAINTIFF

AND:

CENTRAL REGIONAL HEALTH AUTHORITY

DEFENDANT

Before: Justice Melanie Del Rizzo

Place of Hearing:	Grand Falls-Windsor, Newfoundland and Labrador
Dates of Hearing:	October 4 and 5, 2023
Appearances:	
Eli W.P. Baker and Bob Buckingham	Appearing on behalf of the First Plaintiff

Eli W.P. Baker and Bob Buckingham	Appearing on behalf of the Second Plaintiff
Janet L. Carpenter Meaghan E. McCaw and Meghan R. Foley	Appearing on behalf of the Defendant

Authorities Cited:

CASES CONSIDERED: *Condon v. R.*, 2015 FCA 159, 255 A.C.W.S. (3d) 836 (C.A.); *Knight* v. *Imperial Tobacco Canada Ltd.*, 2011 SCC 42*; Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19; *Chiasson v. Nalcor Energy*, 2021 NLCA 34; *Hynes v. Western Regional Health Authority*, 2018 NLSC 164; *R. v. Sullivan*, 2022 SCC 19; *Gay v. Regional Health Authority 7*, 2014 NBCA 10; *Bazley v. Curry*, [1999] 2 S.C.R. 534; *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331; *Jones v. Tsige*, 2012 ONCA 32; *Owsianik v. Equifax Canada Co.*, 2022 ONCA 813; *Power v. Mount Pearl (City)*, 2022 NLSC 129; *Tucci v. Peoples Trust Company*, 2020 BCCA 246; *Del Giudice v. Thompson*, 2021 ONSC 5379; *Bozsik v. Livingston International Inc.*, 2016 ONSC 7168; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; *Stewart v. Demme*, 2020 ONSC 83; *Obodo v. Trans Union of Canada, Inc.*, 2021 ONSC 7297; *Evans v. Bank of Nova Scotia*, 2014 ONSC 2135; *Yepremian v. Scarborough General Hospital* (1980), 28 O.R. (2d) 494, 110 D.L.R. (3d) 513 (C.A.); *Rideout v. Health Labrador Corp.*, 2005 NLTD 116; *Bourbonnière v. Yahoo! Inc.*, 2019 QCCS 2624; *Cooper v. Merrill Lynch Canada Inc.*, 2006 BCSC 1905; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46; *Hollick v.* Metropolitan *Toronto (Municipality)*, 2001 SCC 68; *Warner v. Smith & Nephew Inc.*, 2016 ABCA 223; *Ring v. Canada (Attorney General)*, 2010 NLCA 20; *Rumley v. British Columbia*, 2001 SCC 69; *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901; *Fantl v. Transamerica Life Canada*, 2016 ONCA 633; *Windsor v. Canadian Pacific Railway*, 2006 ABQB 348; *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375;

STATUTES CONSIDERED: *Privacy Act*, R.S.N.L. 1990, c. P-22; *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Privacy Act*, R.S.B.C. 1996, c. 373; *Personal Health Information Act*, S.N.L. 2008, c. P-7.01

REASONS FOR JUDGMENT

DEL RIZZO, J.:

INTRODUCTION

[1] Ms. Welshman and Ms. Roberts have applied as representative Plaintiffs to certify a class action against the Defendant on behalf of a proposed class of 260 individuals. The Plaintiffs' cause of action stems from breaches of privacy by an employee or employees of the Defendant, whereby the Plaintiffs' personal and medical information was allegedly accessed outside of the scope of the employees' employment.

[2] The Plaintiffs have made the required preliminary application to this Court to certify their civil action as a class action. I have decided to certify this class action. In making this decision, I am making no determination as to any substantive rights or remedies that may be applicable in this case – these issues are for the trial of the matter.

FACTS

[3] The first set of privacy breaches alleged to have been committed by an employee of the Defendant took place between October 2018 and July 2020, and involved the employee's access to the private information of 240 individuals outside the scope of their employment, (the "First Breach"). The Plaintiffs became aware of breaches of electronic records in August 2020.

[4] The second set of privacy breaches were alleged to have occurred on January 28, 2021. This breach involved 20 individuals, (the "Second Breach"). The nature of the Second Breach was also that an employee of the Defendant accessed the private medical records of these 20 individuals outside the scope of the employee's employment. There was no evidence submitted with respect to whether or not these breaches involved the same or a different employee. Neither proposed representative was part of the Second Breach.

[5] The two representative Plaintiffs intend by their action to represent the class consisting of all 260 individuals who had their privacy breached, excepting those who opt out. If this action is certified, all the remaining individuals will be bound by the ultimate judgment of this Court on the common issues.

[6] The Plaintiffs' claim against the Defendant is rooted in the Defendant's alleged failure to safeguard private and confidential records which contained the Plaintiffs' personal information. As a result of this, the Plaintiffs claim that they have suffered distress, humiliation, anger, upset, mental anguish, shock, fear of identity theft, along with uncertainty and confusion. Their claim is based upon the statutory tort of breach of privacy under the *Privacy Act*, R.S.N.L. 1990, c. P-22 (as amended), (hereinafter referred to as the "Newfoundland and Labrador *Privacy Act*"), breach of privacy based upon the common law tort of intrusion upon seclusion, negligence, and breach of contract. The Plaintiffs have claimed, among other things, aggravated, punitive and exemplary damages from the Defendant.

[7] The Defendant has delayed filing a Defence to the Plaintiffs' Statement of Claim pending the outcome of the within application.

STATUTORY BASIS FOR APPLICATION

[8] The basis for certification of a class action is set forth in s. 5 of the *Class Actions Act*, S.N.L. 2001, c. C-18.1, (as amended), (hereinafter referred to as the "*Class Actions Act*"):

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.

[9] I will deal with each of the statutory factors set forth above in turn.

Section 5(1)(a): Do the Pleadings Disclose a Cause of Action?

[10] As per section 5(1)(a) of the *Class Actions Act*, the first issue to be determined is whether or not the pleadings as filed disclose a cause of action. My determination in this regard must be made with regard only to the pleadings, without consideration of any evidence (*Condon* v. *R.*, 2015 FCA 159, 255 A.C.W.S. (3d) 836 (C.A.)). The test for whether or not the pleadings have disclosed a cause of action is the same as the test for striking a pleading: assuming all facts that have been pleaded are true, is it plain and obvious that the Plaintiffs' claim will not succeed? This is not an automatic acceptance of the Plaintiff's cause of action – courts have a responsibility to evaluate every class action claim that comes before it to weed out those that have no prospect for success (see: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42*; Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013, SCC 57, *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, *Chiasson v. Nalcor Energy*, 2021 NLCA 34).

[11] The onus is on the Plaintiffs to show the existence of an arguable cause of action, but this bar is not high. The Plaintiffs do not have to show that their claim will probably or likely succeed. Even if the claim may ultimately fail, if the Plaintiffs have an arguable case in light of the facts and the applicable law, it should be allowed to proceed. Any review of the merits of the case is properly left to the trial of the matter, when the evidence will be weighed.

[12] As stated above, the Plaintiffs have alleged that the Plaintiffs' personal information was improperly accessed by an employee or employees of the Defendant in the course of their employment. The issue is whether or not these facts, if proven, could support the claims made by the Plaintiffs in their Statement of Claim.

[13] The nature of the claims made by the Plaintiffs are as follows:

(1) Breach of privacy based upon a *Privacy Act* statutory tort;
(2) Breach of privacy based upon the common law tort of "intrusion upon seclusion";
(3) Negligence; and,
(4) Breach of Contract.

[14] The Plaintiffs have pled the doctrine of vicarious liability to support their claims against the Defendant.

[15] A similar application was taken in the matter of *Hynes v. Western Regional Health Authority*, 2018 NLSC 164. While *Hynes* has been considered multiple times, it has not been appealed, overturned or distinguished in this province in a case involving a health authority privacy breach.

[16] I note that the court in *Hynes* was only asked to consider sections 5(1)(a) and (b) of the *Class Actions Act*, with consideration of sections 5(1)(c), 5(1)(d) and 5(1)(e) to be considered at a later date.

[17] In *Hynes*, Justice Goodridge determined that the plaintiffs' claim disclosed a cause of action on the sections considered, and that it was not plain and obvious that this cause of action would be unsuccessful.

[18] The Supreme Court of Canada in the case of *R. v. Sullivan*, 2022 SCC 19 reviewed the law of horizontal *stare decisis*. The Court found that decisions of the same court within a province should be followed as a matter of judicial comity. It is not enough to simply disagree with previous rulings, or to hold that they are "plainly wrong". On this principle, this court would only be able to depart from the ruling in *Hynes* in one of the three following narrow circumstances:

(1) If the rationale of this decision has been undermined by subsequent appellate decisions;
(2) If the decision was reached *per incuriam* (through carelessness or inadvertence); or,

(3) If the decision was not fully considered (for example, taken in exigent circumstances).

[19] None of these three circumstances are applicable here. However, given the passage of time since *Hynes* was decided, and subsequent decisions from other jurisdictions on some of the points raised, I will re-examine each point raised.

[20] In order to satisfy this requirement of the *Class Actions Act*, I must only find that one of the four claims as set forth above discloses an arguable cause of action (see *Gay v. Regional Health Authority 7*, 2014 NBCA 10).

[21] I will deal with each of the claims made by the Plaintiffs in turn.

1. Newfoundland and Labrador *Privacy Act* Breach

[22] Section 3 of the Newfoundland and Labrador *Privacy Act* states as follows:

> **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.

[23] The Plaintiffs' argument is that an employee or employees of the Defendant violated the privacy of the Plaintiffs and other members of the proposed class "wilfully and without a claim of right" by accessing their private records outside the scope of their employment. Using the doctrine of vicarious liability for actions of

their employees, the Plaintiffs argue that Defendant would be guilty of a breach of the statute should this be proven at trial.

[24] The two issues to be considered with respect to the strength of the claim for a statutory breach of the Plaintiffs' right to privacy are:

a. Direct Liability: could the behaviour of the Defendant itself reach the threshold of "wilful" and "without colour of right" as provided in s. 3(1) of the Newfoundland and Labrador *Privacy Act* and thus allow for direct liability on the part of the Defendant?

b. Vicarious Liability: Could the Defendant be held vicariously liable for the actions of its employees if a statutory breach of the Newfoundland and Labrador *Privacy Act* is proven?

Direct Liability of the Defendant under the Newfoundland and Labrador Privacy Act

[25] The Defendant argues that the term "wilfully" as contained in the Newfoundland and Labrador *Privacy Act* means something more than accidentally or recklessly – it would have to be an intentional or purposeful action done with the knowledge that it would violate an individual's privacy. The Defendant submits that the Plaintiffs have not pled any wilful conduct on the part of the Defendant, and that at best, the Plaintiffs are alleging negligence on the part of the Defendant. The Defendant's position is that negligence is not enough to satisfy the threshold of wilfulness.

[26] The Plaintiffs have claimed that, among other things, the Defendant failed to establish or maintain safeguards to protect the privacy of the Plaintiffs. Whether or not the action or inaction of the Defendant is ultimately sufficient to reach the threshold of wilfulness and thus ground a direct liability claim against the

Defendant is unclear at the present time. However, for the purposes of this Application, it is a claim that the Plaintiffs may flesh out at the trial of this matter.

Vicarious Liability of the Defendant under the Newfoundland and Labrador Privacy Act

[27] Vicarious liability operates to create liability for an employer for wrongful acts committed by an employee. The principles of the common law doctrine of vicarious liability are set out in *Bazley v. Curry*, [1999] 2 S.C.R. 534. The issue raised by the Defendant in this case is whether or not vicarious liability would apply to the statutory tort created by the Newfoundland and Labrador *Privacy Act*.

[28] In *Hynes*, Justice Goodridge found that a finding of vicarious liability in the context of a statutory tort under the Newfoundland and Labrador *Privacy Act* was an arguable point best dealt with at the trial of the matter. When *Hynes* was decided, the point had not yet been considered at a trial before the Newfoundland and Labrador courts.

[29] While it appears that there have been no cases that consider the issue of vicarious liability under the Newfoundland and Labrador *Privacy Act*, the recent case of *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331, deals in part with this issue. In *Ari*, the trial judge's finding that the Defendant was vicariously liable for the actions of its employee with respect to a statutory breach of the *Privacy Act*, R.S.B.C. 1996, c. 373 (referred to as "British Columbia *Privacy Act*") was upheld on appeal. Section 1 of the British Columbia *Privacy Act* contains substantially similar wording as s. 3 of the Newfoundland and Labrador *Privacy Act*. As such, it is clear that it is possible for the principles of vicarious liability to operate with a statutory tort. It will be up to the trial judge to determine if the application of the principles as set out in *Bazley* apply to the facts of this case.

[30] As such, I am satisfied that the Plaintiffs' claim discloses a cause of action against the Defendant based upon a breach of a statutory tort under the Newfoundland and Labrador *Privacy Act*, as it is not plain and obvious that this cause of action would be unsuccessful in the trial of this matter.

2. Intrusion Upon Seclusion

[31] The common law tort of intrusion upon seclusion is a relatively recent development in the law, having been first recognized in the case of *Jones v. Tsige*, 2012 ONCA 32, and most recently reiterated in the case of *Owsianik v. Equifax Canada Co.*, 2022 ONCA 813 (leave to appeal refused 2023). The definition of the tort as found in paragraph 70 of *Jones*, as follows:

> …
>
> One who intentionally intrudes, physically or otherwise, upon the seclusion of another of his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

[32] The Parties note that Ontario does not have specific privacy legislation to redress privacy breaches, so the issue before me is whether or not this tort can stand alongside the Newfoundland and Labrador *Privacy Act* as additional claim.

[33] This issue was addressed by this Court in the case of *Power v. Mount Pearl (City)*, 2022 NLSC 129, whereby McDonald, J. found that the defendant had breached both the plaintiff's common law right to privacy along with committing a statutory tort under the Newfoundland and Labrador *Privacy Act*. The Defendant has asked me to disregard this decision as the determination of the interaction between the two actions was an ancillary issue, and that the decision disregards relevant Court of Appeal decisions from the British Columbia Court of Appeal.

[34] The decisions referenced by the Defence were considered in the case of *Tucci* v. *Peoples Trust Company*, 2020 BCCA 246. The Court states in paragraph 56 of *Tucci* that the issue of whether or not a common law tort of breach of privacy/intrusion upon seclusion can coexist with the British Columbia *Privacy Act* should be reconsidered. In *Ari*, at paragraph 69, the British Columbia Court of Appeal states that the issue of whether or not there is a common law tort of breach of privacy in British Columbia is "unsettled".

[35] Further, paragraph 7(1) of the Newfoundland and Labrador *Privacy Act* states as follows:

> **Additional remedies**
>
> 7.(1) The right of action for violation of privacy under this Act and the remedies under this Act are in addition to, and not in derogation of, another right of action or other remedy available otherwise than under this Act.

[36] There is no mirroring provision in the British Columbia *Privacy Act*.

[37] Given that the Newfoundland and Labrador *Privacy Act* specifically provides for additional remedies, that the British Columbia Court of Appeal has explicitly stated the need to re-examine the law on intrusion upon seclusion as the law is unsettled, and the existence of a precedent from this Court that specifically provides for both remedies, I cannot say that the Plaintiffs' claim under the tort of intrusion upon seclusion will fail.

[38] The Defendant also argues that the Plaintiffs have not sufficiently pleaded a basis for the claim of intrusion upon seclusion, in that there was no reference in the Statement of Claim to a wilful or intentional conduct on behalf of the Defendant itself. The Statement of Claim does allege a clear wilful breach on the part of an employee of the Defendant, and further pleads the doctrine of vicarious liability to ground the liability of the Defendant. In addition, the Statement of Claim alleges that the Defendant's failure to establish or enact sufficient safeguards to protect the Plaintiffs' private information also forms the basis of their claim of intrusion upon seclusion. For the purposes of this Application, I find that the pleading is sufficient.

[39] The Defendant refers to the case of *Del Giudice v. Thompson*, 2021 ONSC 5379 as support for their proposition that the Plaintiffs' claim under intrusion upon seclusion cannot be supported. The Court in *Del Giudice* declined to certify the Plaintiffs' claim in intrusion upon seclusion against two of the corporate Defendants. However, *Del Giudice* can be distinguished from the within case, as in *Del Giudice* there was a contract between the Plaintiffs and the corporate Defendants dealing with privacy issues. As well, the information that was alleged to have been disclosed

in *Del Giudice* was deemed by the court to be relatively inoffensive, such as identifying and contact information. In this case, the information that has been alleged to have been accessed was medical information, which has the possibility of being extremely sensitive and private, and which may be treated differently at trial.

[40] As such, I find that the Plaintiffs' claim for a breach of intrusion upon seclusion discloses a cause of action sufficient for the purposes of certification.

3. Negligence

[41] The Statement of Claim alleges the following:

a. The Defendant owed a duty of care to the Plaintiffs to protect their private information;
b. This duty of care was breached by the Defendant;
c. The Plaintiffs sustained damage; and,
d. The damage sustained was caused by the Defendant's breach.

[42] The Statement of Claim contains ten separate claims of negligence.

[43] The Defendant did not argue that the Plaintiffs' claim in negligence did not disclose a *prima facie* case. The Defendant's argument focused on the damage claims put forward by the Plaintiffs.

[44] Damages claimed by the Plaintiffs include (but are not limited to) mental distress, anguish, anxiety, and stress. The Statement of Claim as a whole claims aggravated, punitive and/or exemplary damages on behalf of the Plaintiffs. As well, the Plaintiffs claim an order for an aggregate monetary award pursuant to the *Class Actions Act*.

[45] The Defendant argues that at the certification stage of the proceedings, the Plaintiffs have to prove that the damages alleged are suitable under the class action framework (i.e., are suitable for aggregate damages). While aggregate damages are open to the trial judge to consider should the Plaintiffs' action be successful, they are not required. It is up to the trial judge to determine what remedies are available, including whether or not an aggregate assessment of damages would be appropriate (see: *Bozsik v. Livingston International Inc.*, 2016 ONSC 7168).

[46] Subsection 8(a) of the *Class Actions Act* indicates that even if an individual assessment of damages is required, a class action can be certified.

[47] The Defendant also argues that the claims made by the Plaintiffs that they suffered "distress, humiliation, anger, upset, mental anguish, shock", "confusion" a "feeling of vulnerability", and being "alarmed and terrified", restated as mental distress, anguish, anxiety and stress, do not rise to the level of compensable losses in negligence. Further, the Plaintiffs have claimed fear of identity theft as a result of the privacy breach, which equates to a non-compensable fear of future harm without claiming any pecuniary losses. As such, the Defendant submits, there is no claim in negligence that can be certified.

[48] In support of their position, the Defendant relies on the decision of *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, which stands for the position that minor or transitory upsets are not compensable – the psychological disturbance must be serious and prolonged. The Defendant also relies on the *Del Giudice* case, where the Court refused to certify a class action as against two corporate Defendants in part because "the overwhelming majority of the six million Canadians affected by the data breach will not have suffered any compensable damages because negligence law does not recognize as compensable harm upset, disgust, anxiety, agitation or mere psychological upset that does not cause a serious and prolonged injury and that does not rise about the ordinary annoyances, anxieties and fears that people living in society routinely experience." However, in the *Del Guidice* case, as stated above, the data that was the subject of that application was relatively innocuous, relating to identity and contact information. In this case, the information that was alleged to have been accessed was some of the most private information available – personal medical files. It is therefore possible that members of the class can prove serious

and prolonged psychological impacts, at the trial of this matter. As such, the cases are distinguishable.

[49] The Defendant also referred to the case of *Stewart v. Demme*, 2020 ONSC 83, whereby the Court refused to certify a class action for a privacy breach where a nurse inappropriately accessed the personal information of thousands of patients over a ten-year period for the purposes of obtaining narcotic medication. In this case, the Court deemed the nurse's access to the personal information as "limited" and that the access was "fleeting" and "incidental to the medication theft" rather than to view the information for the purposes of discovering personal matters concerning the patients. There is no evidence available at this stage of the proceeding as to the reason why the Defendant's employee(s) accessed the Plaintiffs' medical information, and as such, I cannot draw a similar conclusion here.

[50] As stated in *Hynes*, there have been many cases where claims for mental and/or emotional distress have been certified as class actions. Since *Hynes* was decided, other similar cases have been certified (see: *Obodo v. Trans Union of Canada*, 2021 ONSC 7297, *Evans v. Bank of Nova Scotia*, 2014 ONSC 2135). As such, it cannot be said that it is settled law that claims in class actions for negligence that include only mental distress, anguish, stress, and like psychological harms should never be certified.

[51] The Defendant also argues that because there was no factual basis alleged in the Statement of Claim to support a claim for aggravated or punitive damages, that this type of damages would not be available to the class members. This is an issue to be argued at the trial of this matter and is not suited to the certification stage.

[52] Certainly, at trial, as acknowledged by the Plaintiffs, there may be claims by some members of the class that fall below the threshold of compensable harm. At this stage, assessment of this is not possible. As such, it is not plain and obvious that there is no chance of compensable harm to be proven, which would cause the negligence claim against the Defendant to fail to be certified.

4. Breach of Contract

[53] The Plaintiffs advance a claim of breach of contract as one of the bases for their action against the Defendant. Specifically, the Plaintiffs allege in paragraphs 32 to 38 of the Statement of Claim that there was a contractual relationship between the Plaintiffs and the Defendant as an implied term, to (a) not hire individuals who were not properly trained in protection of patient privacy; (b) keep their medical files private as part of the contract between them to provide medical services generally; (c) keep their personal health information private as is required by *Personal Health Information Act*, S.N.L. 2008, c. P-7.01; (d) protect the privacy of their health information given their written commitments in online policy statements and the Defendant's Privacy Brochure; and, (e) keep their information private as part of a good faith contract, which good faith was breached.

[54] The Defendant argues that there is no contract, either express or implied, between the Plaintiffs and the Defendant, as there was no offer, acceptance, consideration or certainty of terms. The Defendant's position is that the imposition of contractual rights and duties on the provision of health care services is a legal fiction that cannot be supported, as the law of contract is intended to protect the interests of parties who enter into agreements in order to enforce mutual promises. The Defendants argue that residents of Newfoundland and Labrador have a right to access services provided by hospitals, and hospitals cannot refuse to provide these services, regardless of whether or not a patient is satisfied with the hospital's privacy polices. In addition, the Defendant's position is that claims against hospitals are better suited to the law of negligence, rather than contract.

[55] The Plaintiffs rely on *Hynes*, whereby the Plaintiffs' claim under contract was certified by the Court. In determining that it was not plain and obvious that a cause of action in contract would fail, Goodridge, J. examined case law including the Ontario Court of Appeal case of *Yepremian v. Scarborough General Hospital* (1980), 28 O.R. (2d) 494, 110 D.L.R. (3d) 513 (C.A.), whereby the Court recognized the possibility of a hospital being liable in contract, and the case of *Rideout v. Health Labrador Corp.*, 2005 NLTD 116, where Russell, J. accepted the possibility of a contractual patient/hospital relationship.

[56] In support of their position, the Defendant relies on the reasoning in the Ontario Superior Court of Justice case of *Broutzas*, in which a claim for breach of contract against a hospital for a privacy breach was not certified in the class action certification proceeding. The Court in *Broutzas* found that the relationship between patients and hospitals are not contractual, and that using a claim of an implied contract is an "artifice".

[57] While making a claim on the basis of an implied or good faith contract between the Plaintiffs and the Defendant may ultimately be difficult, the case law does not say that it is impossible. Given that the *Broutzas* decision is a Superior Court decision from another province, and there is no Court of Appeal decision varying *Hynes* on this point, I am bound by the principles of judicial comity and *stare decisis* to follow *Hynes*.

[58] As a result, I do not find it plain and obvious that an action in contract would be unsuccessful as against the Defendant.

Section 5(1)(b): Identifiable/Proper Class

[59] The Plaintiff has the burden to show that there is a basis in fact supporting the existence of a class. There are two elements to satisfy: first, the class must be sufficiently numerous, and secondly, the class must be identifiable.

[60] With respect to whether or not the class is sufficiently numerous, there need only be two or more members pursuant to section 5(1)(b) of the *Class Actions Act*. The Plaintiffs have identified 260 members of the proposed class.

[61] With respect to whether or not a class is identifiable, the main consideration is whether or not a potential class member can determine if they are in or out of the class. The class should also have a clear beginning and end date (see: *Bourbonnière v. Yahoo! Inc.*, 2019 QCCS 2624).

[62] To have an identifiable class, there must be a rational relationship between the class, the cause of action, and the common issues. Further the class must not be broad or over inclusive so that it binds people who ought not to be bound by the decision (see *Broutzas*, para. 248).

[63] In this case, the class is made up of the 260 individuals who had their privacy breached in the First Breach and the Second Breach. These individuals were identified and contacted by the Defendants. This defines the class through reference to objective criteria, without reference to the merits of the action, as provided for in *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, ("*Hollick*") at para. 17. The class is not too broad, and there is a rational relationship between the class, the cause of action, and the common issues in that they all suffered a breach of their privacy in the First Breach and the Second Breach..

[64] The beginning and end dates for the incidents covered by the proposed action are clearly set out in the Statement of Claim with respect to both the First Breach and the Second Breach.

[65] While it is true that neither Plaintiff had their data accessed in the Second Breach, this does not affect whether or not the class is able to be identified. This issue is more properly dealt with when considering the adequacy of the Plaintiffs as representatives of the class.

[66] As also was determined in *Hynes*, I therefore find that there is an identifiable class of two or more persons to support the application for certification.

Section 5(1)(c): Common Issues

[67] Section 2(b) of the *Class Actions Act* defines "common issues" as:

i) common but not necessarily identical issues of fact, or

> ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;
>
> …

[68] There need only be one common issue to support a class action, which common issues have to have some basis in fact. At this stage of the test, a common issue must simply be found to exist, whether or not it predominates over issues that affect only individual members of the prospective class. This has been referred to as a "low bar" (see: *Cooper v. Merrill Lynch Canada Inc.*, 2006 BCSC 1905 at para. 77).

[69] As stated by the Supreme Court of Canada in the case of *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, the question of commonality should be approached in a purposeful manner, bearing in mind that the question of whether or not the action proceeds as a representative one concerns the avoidance of duplication of fact-finding or legal analysis. The Court states at paragraph 39:

> … Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action.

[70] In order to be a "common issue", its resolution must be necessary to resolve the claim of each individual class member, and the issue forms a "substantial ingredient" of each class members' claim (see: *Hollick* at para. 18).

[71] The common issue does not need to be determinative, but it must advance the litigation towards a resolution (see: *Warner v. Smith & Nephew Inc.*, 2016 ABCA 223 at para. 30).

[72] In addition, all members should benefit from a successful prosecution of the class action, albeit not necessarily to the same extent (see: *Pro-Sys*, para. 108).

[73] I agree with the Defendant that while the case law provides for a relatively generous approach to certifying common issues, it should not be a "rubber stamp". There are cases, such as that of *Ring v. Canada (Attorney General)*, 2010 NLCA 20, where the circumstances of each individual plaintiff are sufficiently specific to that Plaintiff to go beyond the scope of a "common issue". In *Ring*, the class action being sought to be certified involved claims with respect to adverse medical impacts of chemicals sprayed at Canadian Forces Base Gagetown from 1956 to present. The Court of Appeal found that issues framed by the plaintiffs as single issues were in fact several questions involving several answers, depending on each plaintiffs' individual circumstances. This included differences in the chemicals to which the proposed class members were exposed and the various medical ailments alleged to have been caused by these chemicals for some (but not all) of the proposed class members. Given the circumstances, the Court of Appeal determined that there were no "common issues" for the purposes of certification. The case before this court does not have the same issues.

[74] McLaughlin CJC stated in the case of *Rumley* v. *British Columbia*, 2001 SCC 69 at para. 27 that commonality was found where "all class members share an interest in the question of whether the appellant breached a duty of care. On claims of negligence and breach of fiduciary duty, no class member can prevail without showing duty and breach." As such, resolving those issues is necessary to the resolution of each class member's claim as required in *Dutton*.

[75] In this case, the Plaintiffs argue that the common issues for all of the proposed members of the class include the following:

a. a determination of whether the Newfoundland and Labrador *Privacy Act* was breached;
b. whether or not there was negligence on the part of the Defendant and/or its employee(s);
c. whether there is in fact a separate tort of intrusion upon seclusion in the Province of Newfoundland and Labrador;

d. if so, whether this tort was committed as against the Class;
e. if the Defendant can be held vicariously liable for the actions of its employee(s);
f. whether or not there was a breach of contract; and,
g. whether or not aggregate, punitive, exemplary, and/or aggravated damages are appropriate.

[76] In this case, the questions to be determined are common to all members of the class, with some differences. The main difference is the existence of two separate alleged privacy breaches, which were disclosed at two different times, and which may or may not involve different employees. Despite this, there are sufficient commonalities in the questions asked, which questions apply to all Plaintiffs, to support there being common issues to ground a class action. The Plaintiffs have all alleged the same basic wrong, being a breach of their privacy by an employee or employees accessing their private medical records. They are seeking similar remedies, under the same legal theories. The issues as set forth by the Plaintiff are the same, despite there being two sets of breaches.

[77] I therefore find that there are common issues to support the class action as framed.

Section 5(1)(d): Preferable Procedure

[78] In order for me to certify this action as a class action, there must be a basis in fact for me to conclude that a class action is the preferable procedure. In doing so, this court must consider the extent to which the class proceeding will meet the general purposes for class actions, being improving access to justice, enhancing judicial economy, and encouraging behaviour modification.

[79] The fact that a proposed class action contains individual issues does not mean that individual trials are preferable, as almost all class actions will contain some individual issues. Individual trials will be the preferable procedure when (1) there are no real advantages to be achieved from the common issues trial and the case may

be unmanageable as a class action and (2) even if the case is manageable, a class action will not achieve access to justice, behaviour modification, and judicial economy (see: *Hycroft* para. 66). If significant issues would remain, or if the claimants would be left with the same practical and economic hurdles to overcome after a resolution of the common issues in a class action, then a class action may not be preferable (*Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901, para. 124; *Fantl v. Transamerica Life Canada*, 2016 ONCA 633, ("*Fantl*"), para. 26)

[80] In determining whether a class action would be the preferable procedure for the resolution of the common issues, section 5(2) of the *Class Actions Act* sets out five issues that the court may consider.

[81] Section 5(2) provides as follows:

> (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.

[82] I will address each of these considerations in turn.

(1) Do questions of fact or law common to the members of the class predominate over questions affecting only individual members?

[83] In this case, the questions of law raised by the Plaintiffs as being common questions appear to predominate over questions that affect only individual members. The legal issues surrounding the accessing of the Plaintiffs' private information are the same for all members of the proposed class, as set forth above.

[84] There may be differences in the questions of fact with respect to the two different groups, as the Second Breach may involve a different employee or employees and potentially different systems. However, I have no evidence before me as to whether or not this is the case – as is the normal practice, the Defendants have not yet filed a Statement of Defence, nor has any discovery proceeding been commenced. As such, I do not have sufficient evidence to say that the questions of fact in this matter are sufficiently different between the two groups so as to make individual (or two separate class action) trials preferable.

[85] The damages suffered by each Plaintiff in the class may be individualized, which may impact recoverability for some of the Plaintiffs, but this is the case for many class actions.

(2) Do a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions?

[86] I have no evidence that any of the proposed class have a valid interest in individually controlling the prosecution of separate actions. The Defendant has not adduced any evidence that other members of the proposed class have commenced their own actions with respect to the alleged breaches. As such, I will not refuse certification on this basis.

(3) Does the class action involve claims that are or have been the subject of another action?

[87] I have no evidence that the actions complained of by the Plaintiffs have been the subject of another action.

(4) Are other means of resolving the claims less practical or less efficient?

[88] Given the number of people affected and the multiplicity of proceedings that would be generated should affected parties be required to take their own actions, it would not be practical or efficient to litigate each claim in this matter individually. As such, I will not refuse certification on this basis.

(5) Would the administration of the class action create greater difficulties than those likely to be experienced if relief were sought by other means?

[89] I do not see how the administration of the class action would create greater difficulties than proceeding with potentially 260 individual claims. Judicial economy favours certification.

Section 5(1)(e): Representative Plaintiffs

[90] The criteria regarding the suitability of a representative plaintiff to act as a class action representative is a relatively low bar (*Fantl*, para. 26). However, there must be some basis in fact for concluding that the proposed plaintiffs are adequate.

[91] There are three statutory considerations set forth in the *Class Actions Act* to consider when determining whether or not a representative plaintiff is appropriate to

carry the class action as set forth in s. 5(1)(e). As per that section, the representative plaintiff must:

(1) be able to fairly and adequately represent the interests of the class;
(2) have produced a litigation plan setting out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and,
(3) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

(1) Can the representative plaintiffs adequately represent the interests of the class?

[92] As members of the class of people who had their information improperly accessed in the first incident, the Plaintiffs are certainly adequate representatives of the group of people affected by the First Breach. The question raised by the Defendants is whether or not the Plaintiffs can adequately represent the group of people who were affected by the Second Breach.

[93] While it is true that there are two separate incidents described in the Statement of Claim, they are sufficiently similar and raise the same legal issues. This would, in my view, permit a Plaintiff with respect to the First Breach to represent a person involved in the Second Breach. Both the First Breach and the Second Breach involve an employee or employees of the Defendant accessing private medical records of the proposed class outside the scope of their employment. Based upon the information currently before this Court, there is sufficient commonality between the two incidents, both in substance and in relation to proximity of time of the events, for a proposed plaintiff affected by one such breach to be able to adequately represent the interests of both groups.

[94] As such, I see no reason why the Plaintiffs cannot represent the interests of the entire proposed class.

(2) Do the representative plaintiffs have a workable litigation plan?

[95] In order to be "workable", a litigation plan must only be capable of implementation in the circumstances – it need not be perfect (*Windsor* v. *Canadian Pacific Railway*, 2006 ABQB 348 at para. 162). The Plaintiffs have provided a litigation plan that appears reasonable and workable in the circumstances. The Defendant in its Brief raised an issue of how the Plaintiffs intend to deal with the interests of children whose records have been breached. Although the litigation plan provided to the Court does not specifically address this issue, it does not preclude the inclusion of minor plaintiffs in the class. The normal process of this court for plaintiffs who have not reached the age of majority can be adapted for this class action, and its exclusion from the litigation plan is not fatal to the process.

(3) Do the representative plaintiffs have any conflict of interest with the other members of the class?

[96] The Plaintiffs have signed Affidavits indicating that they do not have any conflicts of interest with the other members of the class, and I have received no evidence concerning any conflicts of interest. An example of a disqualifying conflict can be seen in the case of *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375. The court found an irreconcilable conflict where two sets of plaintiffs wanted two diametrically opposed results to the litigation. There is no such conflict to be seen here.

[97] In this case, the Plaintiffs have provided Affidavits outlining their understanding and acceptance of their roles as representative plaintiffs. In their Affidavits, the Plaintiffs have set out the steps in the class action along with their responsibilities, including familiarizing themselves with the issues to be decided, attending discovery and trial proceedings, and providing instructions to counsel. I see no reason why these Plaintiffs, with the assistance of counsel, should not be able to vigorously and capably represent the class, as provided for in *Dutton*.

CONCLUSION

[98] The requirements for certification are, in my view, satisfied. As a result, the class action is hereby certified.

[99] As per section 37(1) of the *Class Actions Act*, there will be no award of costs.

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MELANIE DEL RIZZO
Justice