IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Hynes v. Western Regional Integrated Health Authority*, 2014 NLTD(G) 137
Date: 20141114
Docket: 201204G0180 and 201204G0190

BETWEEN:
BARBARA HYNES AND VALERIE DYKE PLAINTIFFS

AND:
WESTERN REGIONAL INTEGRATED HEALTH AUTHORITY DEFENDANT

Before: The Honourable Mr. Justice William H. Goodridge

Place of Hearing: Corner Brook, Newfoundland and Labrador

Dates of Hearing: February 6 and 7, 2014

Summary:

The Plaintiffs applied for certification of a class action involving individuals who had their personal health information improperly accessed. The application was divided into two stages, with the first stage (the subject matter of this decision) determining whether the pleadings disclosed a cause of action and whether the proposed class was identifiable. The determination of whether the action is appropriate for certification is deferred until completion of the second stage of the application.

The court agreed that the pleadings disclosed a cause of action. The court disagreed that the proposed class was identifiable, but agreed that a smaller class, comprising 1,043 affected individuals, would be identifiable and acceptable for certification purposes.

Appearances:

Robert W. Buckingham, Scott Burden & Andrew May	Appearing on behalf of the Plaintiffs
Daniel M. Boone, Q.C. & Janet L. Carpenter	Appearing on behalf of the Defendant

Authorities Cited:

CASES CONSIDERED: Davis v. Canada (Attorney General), 2007 NLTD 25; **Ring v. Canada (Attorney General)**, 2010 NLCA 20; **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959; **R. v. Imperial Tobacco Canada Ltd.**, 2011 SCC 42; **Hollick v. Toronto (City)**, 2001 SCC 68; **Wheadon v. Bayer Inc.**, 2004 NLSCTD 72; **Alberta v. Elders Advocates of Alberta Society**, 2011 SCC 24; **Bazley v. Curry**, [1999] 2 S.C.R. 534; **Jones v. Tsige**, 2012 ONCA 32; **Hung v. Gardiner**, 2002 BCSC 1234, aff'd 2003 BCCA 257; **Bracken v. Vancouver (City) Police Board**, 2006 BCSC 189; **Demcak v. Vo**, 2013 BCSC 899; **Mohl v. University of British Columbia**, 2009 BCCA 249; **Dawe v. Nova Collection Services (Nfld.) Ltd.** (1998), 160 Nfld. & P.E.I.R. 266, 494 A.P.R. 266 (N.L. Prov. Ct.); **Hagan v. Drover**, 2009 NLTD 160; **Mustapha v. Culligan of Canada Ltd.**, 2008 SCC 27; **Rideout v. Health Labrador Corp.**, 2005 NLTD 116; **Doucette v. Eastern Regional Integrated Health Authority**, 2007 NLTD 138; **Anderson v. Wilson** (1999), 44 O.R. (3d) 673, 122 O.A.C. 69, leave to appeal denied [1999] S.C.C.A. No. 476; **Rose v. Pettle** (2004), 23 C.C.L.T. (3d) 21, 129 A.C.W.S. (3d) 655 (Ont. Sup. Ct.); **Fakhri v. Alfalfa's Canada Inc. (c.o.b. Capers Community Market)**, 2003 BCSC 1717, upheld at 2004 BCCA 549; **Canada v. Saskatchewan Wheat Pool**, [1983] 1 S.C.R. 205; **Stoffman v. Vancouver General Hospital**, [1990] 3 S.C.R. 483; **Eldridge v. British Columbia (Attorney General)**, [1997] 3 S.C.R. 624; **Yepremian et al. v. Scarborough General Hospital et al.** (1980), 28 O.R. (2d) 494, 110 D.L.R. (3d) 513 (Ont. C.A.); **Fidler v. Sun Life Assurance Co. of Canada**, 2006 SCC 30; **J.O. v. Strathcona-Tweedsmuir School**, 2010 ABQB 559; **Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.**, 2002 BCCA 78

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Privacy Act*, R.S.N.L. 1990, c. P-22; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Privacy Act*, R.S.B.C. 1996, c. 373; *Personal Health Information Act*, S.N.L. 2008, c. P-7.01; *Regional Health Authorities Act*, S.N.L. 2006, c. R-7.1

REASONS FOR JUDGMENT

GOODRIDGE, J.:

INTRODUCTION

[1] The Plaintiffs are among a class of 1,043 individuals who had their privacy violated when an employee of the Defendant accessed their personal health information without a valid reason. They commenced a civil action seeking damages and other relief against the Defendant. This decision relates to a preliminary procedural application to have their civil action certified as a class action.

[2] At the hearing, the parties requested that the court divide the application into two stages, with this first stage addressing (1) whether the pleadings disclose a cause of action, and (2) whether the proposed class is identifiable. The second stage, to be scheduled for hearing at a later date, will consider other criteria that are required in order to have the action certified as a class action.[1]

[1] The court shall certify an action as a class action if the five criteria listed in section 5(1) of the *Class Actions Act*, S.N.L. 2001, c. C-18.1 are met. Whether the pleadings disclose a cause of action, and whether the proposed class is identifiable, are two of the five criteria.

FACTS

[3] In May 2012, the Defendant became aware that one of its employees had improperly accessed its electronic medical record system (Meditech) and reviewed the personal health information of several patients. The employee had no patient care responsibilities and had no valid reason to access the information. The employee's motive in accessing the records and what use, if any, she made of the records is unknown at this stage. An internal audit determined that 1,043 patients, including the Plaintiffs, had some parts of their personal health information accessed by this employee. These patients were notified by registered letters from the Defendant dated August 1, 2012 advising that "a portion of your personal health information was recently accessed without a valid reason by a Western Health employee". The information accessed included demographic information (address, age, religion); name of next of kin; name of emergency contact person; information about visits to the hospital; reasons for the visit; and diagnostic or surgical procedures that occurred during hospital visits. The proposed class includes "Canadian residents whose medical records were accessed without valid reason by the Defendant's employee".

[4] If the application is ultimately granted, the civil action will be prosecuted by the two representative Plaintiffs on behalf of all members of the class, excepting any members who elect to opt out. Those who do not opt out of the class action are bound by a judgment on the common issues identified in the certification order.

[5] Several causes of action are raised in the Statement of Claim, all related in one way or another to the failure to safeguard the privacy of personal health information. The Plaintiffs say that they have suffered stress, humiliation, anger, upset, anguish, shock and fear of identity theft as a result of the Defendant's failure to safeguard the privacy of their personal health information. Part of the claim for damages relates to distress arising from the actual invasion of privacy and part relates to distress arising from uncertainty as to how the personal information was used. The categories of damages sought include general, aggravated, exemplary, punitive and special.

CLASS ACTIONS ACT

[6] As stated by Orsborn, J. in **Davis v. Canada (Attorney General)**, 2007 NLTD 25 at para. 34, the certification of a class action under the *Class Actions Act* is a procedural mechanism only. The fact that a matter is conducted as a class action has no effect on the determination of the substantive rights and remedies in issue. In its simplest terms, the class action is an alternative to multiple individual proceedings involving one or more common issues.

[7] The test to determine if this matter is appropriate for certification as a class action is set out in section 5(1) of the *Class Actions Act*. It provides that a certification order shall be issued if five listed criteria are present:

> 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.

[8] This first stage of the application will deal only with the criteria specified in sub-sections 5(1)(a) and (b).

ONUS OF PROOF

[9] The onus is on the Plaintiffs to establish the criteria for certification.

[10] For the first criterion noted, whether the pleadings disclose a cause of action, there is a different onus of proof applied than to the remaining four criteria (**Ring v. Canada (Attorney General)**, 2010 NLCA 20 at para. 11). In considering whether the Plaintiffs have met the onus of proof on that first certification criterion, the court assumes the facts as stated in the Statement of Claim can be proved, and then, reading the claim generously, the court assesses whether it is "plain and obvious" that the Statement of Claim discloses no reasonable cause of action (**Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959 at 980). Unless it is plain and obvious that the Statement of Claim discloses no reasonable cause of action, then the onus of proof on this first criterion is met. Another way of putting the test is that the onus of proof on the first criterion is met unless the claim has no reasonable prospect of success (**R. v. Imperial Tobacco Canada Ltd.**, 2011 SCC 42 at para. 22).

[11] For the remaining four criteria, the Plaintiffs satisfy the onus of proof if they are able to show "some basis in fact" for each of the certification criteria (**Hollick v. Toronto (City)**, 2001 SCC 68 at para. 25). This burden is obviously a lesser onus of proof than that required for the determination of the merits of the claim. The courts must give the *Act* a liberal interpretation to ensure that its policy goals are realized, and the courts must be cautious not to impose undue technical requirements on plaintiffs in assessing whether the onus of proof has been met. As Barry, J. noted at paragraph 92 of **Wheadon v. Bayer Inc.**, 2004 NLSCTD 72:

> 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. …

ISSUES

[12] The issues, at this first stage, are whether the Plaintiffs have met the first two criteria under section 5(1) of the *Class Actions Act* to establish that this matter is appropriate for certification as a class action.

ANALYSIS

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

[13] The proposed causes of action set out in the pleadings must be assessed separately (**Alberta v. Elders Advocates of Alberta Society**, 2011 SCC 24 at para. 21). These proposed causes of action include:

- breach of privacy based on statutory tort established under the *Privacy Act*, R.S.N.L. 1990, c. P-22;
- breach of privacy based on common law tort ("intrusion upon seclusion");
- negligence;
- breach of statute;
- breach of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11;
- breach of contract; and
- breach of fiduciary duty.

[14] Vicarious liability is pleaded in relation to the first three of the proposed causes of action. I shall deal with each cause of action in order as listed.

Breach of Privacy Based on Statutory Tort Established under the Privacy Act

[15] An action based on a statutory tort is pleaded in paragraphs 33-35 of the Statement of Claim. I quote the relevant portions of those pleadings:

- [Pursuant to sub-section 3(1) of *Privacy Act*] 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.
- [The Plaintiffs'] personal health information … was accessed by an employee without valid reason.
- [T]he Defendant failed [to] establish … safeguards to protect the Plaintiffs … from its employee … .
- [T]he Defendant is vicariously liable for the … employee(s)' breaches ... .
- The Plaintiffs [have] suffered damages … .

[16] Section 3 of the *Privacy Act* states:

> 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.

[17] At this stage, the development of the jurisprudence respecting the *Privacy Act* is quite limited. There are only a few cases that have even cited the *Act*; no cases have interpreted section 3; no cases have considered whether the tort doctrine of vicarious liability applies to the *Act*.

[18] The Defendant agrees that there would be a statutory cause of action against the employee, because she is the person who acted "wilfully and without a claim of

right". The Defendant disagrees that the pleadings establish a statutory cause of action against Western Health. It submits that (1) nothing is pleaded to suggest that the Defendant wilfully violated the Plaintiffs' privacy; and (2) the common law doctrine of vicariously liable should not apply to this statutory tort.

[19] On the first point, the pleadings include a direct allegation against the Defendant, stating that it failed to establish safeguards. The determination of whether this alleged conduct is sufficient to establish that the Defendant "wilfully violated the Plaintiffs' privacy" will be determined at trial. It does not depend on vicarious liability. Accordingly, I reject the Defendant's argument that nothing is pleaded to suggest that the Defendant wilfully violated the Plaintiffs' privacy. The alleged conduct of the employee may be a more obvious example of wilful conduct resulting in a violation of the Plaintiffs' privacy, but that too will need to be established at trial.

[20] On the second point, there is a statutory cause of action against the Defendant if the doctrine of vicarious liability applies. Vicarious liability can operate with a common law tort to create liability with an employer – the *respondeat superior* – for an unauthorized, intentional wrong committed by its employee, depending on the circumstances (see **Bazley v. Curry**, [1999] 2 S.C.R. 534 at para. 41). The circumstances would include, *inter alia*, the connection between the employee's misconduct, her assigned tasks, and any risks created by the employer. The issue is whether this common law doctrine of vicarious liability can also operate with a statutory cause of action created under the *Privacy Act*. It is an arguable point, and determination of the point will be influenced by the evidence presented at trial. At this stage, based on a review of the pleadings, it is not plain and obvious that Plaintiffs' assertion of vicarious liability will fail.

[21] I am satisfied that the Plaintiffs' claim discloses a cause of action based on a statutory tort and that it is not plain and obvious that this cause of action would be unsuccessful against the Defendant.

Breach of Privacy Based on Common Law Tort ("Intrusion upon Seclusion")

[22] Paragraphs 14-18 and 30-31 of the Statement of Claim advance a cause of action for "intrusion upon seclusion". The relevant portions of the pleadings provide that:

- [The Defendant's] employee(s), without valid reason, intentionally intruded on the seclusion of the Plaintiffs …;
- [T]he Plaintiffs suffered losses and damages as a result … ; and
- [T]he Defendant is vicariously liable for the actions of the Defendant's employee(s).

[23] Intrusion upon seclusion is a novel common law cause of action that was recently recognized in the Ontario Court of Appeal decision of **Jones v. Tsige**, 2012 ONCA 32. Its recognition in other Canadian jurisdictions, particularly those where a statutory cause of action for breach of privacy already exists, remains unsettled. Ontario had no statutory cause of action to address a privacy breach and therefore it had the more obvious need to develop the common law to address privacy violations.

[24] British Columbia has a statutory cause of action under the *Privacy Act*, R.S.B.C. 1996, c. 373 and its courts elected not to recognize a common law tort cause of action for intrusion upon seclusion. The Defendant relies on several court decisions[2] from that province to argue that our courts should not recognize a common law tort cause of action for intrusion upon seclusion. It argues that existing legislation in Newfoundland and Labrador, *viz.* the *Privacy Act* and the *Personal Health Information Act*, S.N.L. 2008, c. P-7.01, already exhaustively "occupy the field", leaving no room and no need to recognize this novel intrusion upon seclusion tort.

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[2] **Hung v. Gardiner**, 2002 BCSC 1234 at para. 110, aff'd 2003 BCCA 257; **Bracken v. Vancouver (City) Police Board**, 2006 BCSC 189 at para. 28; **Demcak v. Vo**, 2013 BCSC 899 at para. 8; and **Mohl v. University of British Columbia**, 2009 BCCA 249 at para. 13.

[25] Sub-section 7(1) of our *Privacy Act* declares that "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***" [my emphasis in bold]. No similar wording exists in the British Columbia legislation. On that basis, I distinguish the several court decisions from British Columbia and conclude that our legislative scheme does not exhaustively occupy the field. There are two Newfoundland and Labrador court decisions which support this view. In **Dawe v. Nova Collection Services (Nfld.) Ltd.** (1998), 160 Nfld. & P.E.I.R. 266, 494 A.P.R. 266 (N.L. Prov. Ct.) at para. 13 and **Hagan v. Drover**, 2009 NLTD 160 at paras. 163-164, the Provincial Court and the Supreme Court, respectively, accepted that a common law cause of action for breach of privacy can co-exist with the statutory cause of action granted under the *Privacy Act*.

[26] This remains an unsettled issue, but at the level of a procedural application for certification of a class action, it is not appropriate to preclude the possibility of the common law tort action for intrusion upon seclusion. Under the circumstances, I am satisfied that the Plaintiffs' claim discloses a cause of action in tort and that it is not plain and obvious that this cause of action would be unsuccessful against the Defendant. The related issue of whether the employee's acts were so connected to authorized acts to justify the imposition of vicarious liability must be resolved at trial.

Negligence

[27] Paragraphs 19-26 and 48 of the Statement of Claim advance the negligence claim, both directly and vicariously. Unspecified monetary damages (special, general, punitive, aggravated and exemplary) are claimed for "distress, humiliation, anger, upset, anguish, shock, fear of identity theft, uncertainty as to how information was used, confusion … [and] feeling of vulnerability". No specific psychiatric illness or prolonged psychological injury is pleaded. The relevant portions of those pleadings provide:

- [T]he conduct of the Defendant constitutes negligence, by … not having in place management and operations procedures that would reasonably have prevented … privacy breaches …

- [T]he Defendant was negligent in failing to properly … train and supervise its employees … .
- [T]he Defendant was negligent in failing to conduct … reviews … to determine if the electronic or other data storage were being accessed by employees … without valid reasons.
- [T]he Defendant was negligent in failing to recognize its procedures … were inadequate.
- [T]he Defendant was negligent in failing to ensure its standards, if any, for maintenance of personal health information … fell below [*sic*] the reasonable standard … .
- [T]he Defendant's employee(s) either intentionally and/or negligently accessed … personal health information … and they thereby breached the Plaintiffs' confidentiality … .
- [T]he Defendant is vicariously liable … for its employee(s) actions.
- [A]s a result of the Defendant's negligence … the Plaintiffs … have suffered losses, which said losses were foreseeable … .

[28] The Defendant disputes this cause of action on the basis that there is no compensable harm pleaded. With no specific psychiatric illness or prolonged psychological injury, there can be no compensable harm, and therefore no cause of action in negligence. The Defendant relies on **Mustapha v. Culligan of Canada Ltd.**, 2008 SCC 27, where McLachlin, C.J.C. stated at paragraph 9 that "[p]ersonal injury at law connotes serious trauma or illness" and that a "psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset". If the loss is limited to minor psychological upset then there will be no compensable harm.

[29] The Plaintiffs agree that there is a threshold that must be passed before mental or emotional distress is compensable in damages, but they do not agree that the harm alleged falls below that threshold. They point out that arguments similar to the Defendant's (no cause of action in negligence because no damages for mental or emotional distress) were advanced, and rejected, in several class action certification applications: **Rideout v. Health Labrador Corp.**, 2005 NLTD 116; **Doucette v. Eastern Regional Integrated Health Authority**, 2007 NLTD 138; **Anderson v. Wilson** (1999), 44 O.R. (3d) 673, 122 O.A.C. 69, leave to appeal denied [1999] S.C.C.A. No. 476; **Rose v. Pettle** (2004), 23 C.C.L.T. (3d) 21, 129 A.C.W.S. (3d) 655 (Ont. Sup. Ct.); and **Fakhri v. Alfalfa's Canada Inc. (c.o.b. Capers Community Market)**, 2003 BCSC 1717, upheld at 2004 BCCA 549. In most of these applications, the court acknowledged that minor mental or emotional

distress would not be compensable, even if foreseeable, but elected not to determine the issue at the certification stage of the proceedings. Whether the Plaintiffs' claims fall above or below the threshold of compensable harm will depend on evidence presented at trial. In this case, there may be some class members who have suffered no compensable harm, others who have nominal claims, and others who have more significant claims. It is not appropriate at the pleading stage to eliminate the possibility of compensable harm.

[30] It is not plain and obvious that there was no compensable harm and therefore it is not plain and obvious that this cause of action in negligence would be unsuccessful against the Defendant.

Breach of Statute

[31] Paragraphs 36-42 of the Statement of Claim advance breach of statute as a cause of action. The relevant portions of the pleadings provide that:

- [T]he Defendant breached its statutory duty [under the *Personal Health Information Act*] in relation to the collection, storage, transportation and safe guarding of … personal health information … .
- [I]t was reasonably foreseeable that harm to the Plaintiffs … would result from the breach of the Defendant's statutory duty.
- The Plaintiffs … are entitled to damages as a result of the breach … .

[32] There is no independent cause of action for breach of statute (**Canada v. Saskatchewan Wheat Pool**, [1983] 1 S.C.R. 205 at 225). Breach of statute, where it has an effect upon civil liability, is considered in the context of the general law of negligence.

[33] It is plain and obvious that this cause of action would be unsuccessful against the Defendant.

Breach of Charter

[34] Paragraphs 43-46 of the Statement of Claim plead violation of section 7 of the *Charter* as a cause of action. The relevant portions of the pleadings provide that:

- [T]he Defendant breached its [section 7] Charter duty in relation to the collection, storage, transportation and safeguarding of … personal health information … .
- [I]t was reasonably foreseeable to the Defendant that harm could result to the Plaintiffs … from a breach of the Defendant's Charter duty.
- The Plaintiffs plead for damages pursuant to s. 24(1) of the Charter … for the breach … .

[35] The *Charter* applies to the Parliament and Government of Canada and to the legislature and government of each province in respect of all matters within their authority. The *Charter* can occasionally extend to a delegated authority that exercises power as a "state actor", depending on the level of government control over the delegated authority and the nature of the decision. If there is a breach of section 7 by the government or a "state actor", then there is a possible cause of action. If there is a breach of section 7 by a non-state actor, then there is no possible *Charter* cause of action.

[36] The Defendant submits that the pleadings do not indicate that the Defendant is a state actor and accordingly the pleadings do not support a *Charter* cause of action. In **Stoffman v. Vancouver General Hospital**, [1990] 3 S.C.R. 483 at para. 43, LaForest, J. found that a hospital was not a state actor and could not be subject to a *Charter* action. In **Stoffman**, an action alleging *Charter* violation was initiated by several doctors adversely impacted by a mandatory retirement regulation adopted by a hospital. The determination that the hospital was not a state actor was influenced by the hospital's high level of independence from government and the fact that its decision to adopt a mandatory retirement regulation did not represent ministerial policy.

[37] I agree that the pleadings do not indicate Western Health is a state actor. The pleadings indicate that it is a corporation established under a statute. Even if one looks beyond the pleadings, into the details of that statute (*Regional Health Authorities Act*, S.N.L. 2006, c. R-7.1), the conclusion is the same. Western Health is managed by a board of trustees and that board has authority as necessary to carry out its duties and responsibilities. The board has statutory obligations imposed upon it, including the obligation to protect personal health information against unauthorized access. Extending the reach of the *Charter* to micro-manage the administrative details as to how the board fulfills that obligation is not justified in this case. In **Eldridge v. British Columbia (Attorney General)**, [1997] 3 S.C.R. 624 (seven years after **Stoffman**), LaForest, J. noted that the mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of the *Charter*. Only if the particular activity is the implementation of a specific governmental policy or program could it fall within the purview of "government" for the purposes of the *Charter*. In my view, the particular activity under attack here, alleged inadequacies in the health records management system, does not attract *Charter* scrutiny.

[38] It is plain and obvious that this cause of action would be unsuccessful against the Defendant.

Breach of Contract

[39] Paragraph 32 of the Statement of Claim advances breach of contract as a cause of action. The relevant portions of the pleadings provide:

- [T]he Defendant was in a contractual relationship with the Plaintiffs … to provide medical services … and there was implied term … [to] keep the Plaintiffs' … personal health information from being access by individuals without valid reason. …
- [T]he Defendant breached its contractual duty … and the Plaintiffs suffered damages as a result … .

[40] The Defendant disputes that the Statement of Claim establishes a cause of action in contract. It says there is no contract because there was no negotiation, no consideration, no freedom of contract, no intention to contract, and no bargain. The public has a right of access to hospital services and hospitals do not have the right to deny access. Alternatively, the Defendant says that even if there is a contract, there is no cause of action because the pleadings do not establish any economic loss. The mental or emotional distress-type damages that are pleaded are non-economic and cannot arise from breach of contract.

[41] The possibility of a patient/hospital contract was recognized by Blair, J.A. in **Yepremian et al. v. Scarborough General Hospital et al.** (1980), 28 O.R. (2d) 494, 110 D.L.R. (3d) 513 (Ont. C.A.):

> 154 The possibility of a hospital becoming liable in contract for professional negligence has never been disputed. …
>
> 155 The Supreme Court of Canada [**Nyberg v. Provost Municipal Board**, [1927] S.C.R. 226, per Anglin, C.J.C., at p. 232] expanded the contractual basis of liability to a case where a contract to nurse was implied from the mere admission of the patient to a hospital. …
>
> 164 In the present case I consider that the hospital's responsibility to provide medical care *can* be founded on a contract implied from all the circumstances. …

[42] A contract-type claim against a hospital may be rare because the law of negligence and vicarious liability is more responsive in assessing liability. Nevertheless, the **Yepremian** decision at least recognizes the possibility of a hospital becoming liable in contract. It is reasonable to assume that an implied term of that contract would be the obligation to protect privacy of personal health information. That is reasonable to assume because the Defendant's responsibility to protect the privacy of the personal health information is required under the *Personal Health Information Act*. A contract could be founded on a contract implied from all the circumstances, despite the absence of a user pay type consideration for the health care service.

[43] The alternate argument advanced by the Defendant (the contract claim will fail because there is no economic loss) has merit, but there are exceptions. Non-economic damages have been awarded on occasion where they may reasonably be considered to arise naturally from the contract breach, or reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of a breach. Examples of contract claims where courts awarded non-economic damages include **Fidler v. Sun Life Assurance Co. of Canada**, 2006 SCC 30, **J.O. v. Strathcona-Tweedsmuir School**, 2010 ABQB 559 and **Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.**, 2002 BCCA 78. In the last decision, while making a non-economic damage award for mental distress arising from a contract breach, the court suggested that such awards should be restrained and modest. Other examples exist where courts certified for class action purposes contract claims for non-economic losses. The **Rideout** decision from this court is one such example.

[44] In **Rideout**, Russell, J. was considering an application to certify a class action, which included a claim for mental suffering arising from an alleged breach of a patient/hospital contract. It is implicit from the reasons (paras. 43-49) that Russell, J. accepted the possibility of a contractual patient/hospital relationship and the possibility that non-economic damages for mental suffering could be recoverable. Russell, J. made no definitive ruling on either point, but for purposes of the certification application, concluded that it was not plain and obvious that the contract claim for mental distress would fail.

[45] I come to the same conclusion as Russell, J. I am satisfied that the Plaintiffs' claim discloses a cause of action in contract and that it is not plain and obvious that the cause of action would be unsuccessful against the Defendant.

Breach of Fiduciary Duty

[46] Paragraphs 27-29 of the Statement of Claim advance breach of fiduciary duty as a cause of action. The allegation of breach of fiduciary duty is directed at Western Health and does not engage the doctrine of vicarious liability. The Plaintiffs say that both the privacy invasion, and the delay in advising them of the privacy invasion, constitute a breach of fiduciary duty by the Defendant. On the

privacy breach, the pleading (para. 29) fails to indicate how the Defendant breached its alleged duty. The relevant portions of those pleadings provide:

- [T]he Defendant was in a fiduciary relationship to the Plaintiffs … and had a duty of utmost faith to be forthright … .
- [T]he Defendant exercised its discretion not to tell the Plaintiffs … of this breach of privacy for a period of eleven (11) months … in so doing denied the Plaintiffs … the opportunity to take possible steps to protect themselves from the misuse of the information. …
- [T]he Defendant breached its fiduciary duty to the Plaintiffs … by not informing them sooner of the breach and in so doing caused … damages.
- [T]he Defendant was in a fiduciary relationship to protect … personal health information … and the Defendant breached its duty … .

[47] In their written submissions, the Plaintiffs concede that their relationship with the Defendant is not one that is covered by an existing category of fiduciary relationship. They argue that it was an *ad hoc* fiduciary relationship.

[48] In **Elders Advocates of Alberta Society** at paras. 29-34, McLachlin, C.J.C. discusses the required elements to establish an *ad hoc* fiduciary relationship. To establish a fiduciary duty in cases not covered by an existing category, a claimant must show, in addition to the vulnerability arising from the relationship: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control. At paragraph 32 in **Elders Advocates of Alberta Society**, McLachlin, C.J.C. stated that "the undertaking by the alleged fiduciary may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interests." Nothing is pleaded to suggest that there was an undertaking by the Defendant, but the *Personal Health Information Act* is pleaded and sub-section 15(1) of that statute requires custodians of medical records to take reasonable steps to protect against unauthorized access. The statute imposes a responsibility on the Defendant to 'take reasonable steps' but that does not equate to the required undertaking.

[49] The pleadings in paragraphs 27-29 represent a novel attempt at a claim based on breach of fiduciary duty, but I find that the claim has no reasonable prospect of success.

(2) Is There an Identifiable Class of Two or More Persons?

[50] Paragraph 12 of the Statement of Claim identifies the class as "Canadian residents whose medical records were accessed without valid reason by the Defendant's employee".

[51] The Defendant says that it is not possible to identify this broad class with sufficient certainty. The Defendant had the capacity to search its records over a limited time period and all patients it had capacity to discover were notified. This is the group of 1,043 who received the August 1, 2012 registered letters. The Defendant has no capacity (either manually or through technology) to identify others, beyond the 1,043, whose medical records were accessed without valid reason by the Defendant's employee.

[52] The Plaintiffs were unable to respond to this argument, excepting to say that they "may" be willing to concede the point.

[53] I accept the Defendant's argument that the broad class suggested in the application is not an identifiable class. Therefore, the class shall include only the 1,043 people who received letters from the Defendant. These 1,043 are the people identified by the Defendant in the internal audit as having part of their personal health information improperly accessed by an employee. This group constitutes a clearly defined identifiable class.

(3) Do the Claims of the Class Members Raise One or More Common Issues?

[54] Although this issue is deferred for further submissions, I make a few comments to assist with the further submissions. I suggest to the parties that in preparing their submissions on the common issues, they pay close attention to the surviving causes of action, the legal elements of each and the facts asserted in support of each. A proper common issue is one that the determination of which will advance the adjudication of a specific cause of action. Should certification be granted, the conduct of the common issue trial will be more effective and efficient if the common issues are clearly relevant to a particular cause of action and are expressed in terms that enable the parties and the court to conduct a focused hearing. Generalities that lack a clear relationship to a specific cause of action do not advance the objectives of a class proceeding.

(4) Is a Class Action the Preferable Procedure to Resolve the Common Issues of the Class?

[55] This issue will be addressed at stage two of the application.

(5) Representative Plaintiffs, Action Plan and Notice

[56] This issue will be addressed at stage two of the application.

CONCLUSION

[57] The pleadings disclose causes of action for:

- breach of privacy based on statutory tort established under the *Privacy Act*;
- breach of privacy based on common law tort ("intrusion upon seclusion");
- negligence; and
- breach of contract.

[58] The identifiable class will be acceptable if it is limited to the 1,043 people identified by the Defendant in the internal audit. These are known individuals who had part of their personal health information improperly accessed by an employee of the Defendant.

[59] The civil action is not certified at this stage. The parties have leave to obtain a date for further submissions on the remaining three certification criteria as set out in sub-sections 5(1)(c), (d) and (e). The certification decision will be made following the further submissions.

COSTS

[60] Pursuant to section 37(1) of the *Class Actions Act*, costs are generally not awarded on a certification application. There is nothing exceptional here, and under the circumstances there is no order as to costs.

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WILLIAM H. GOODRIDGE
Justice