SUPREME COURT OF NOVA SCOTIA

Citation: *Hemeon v. South West Nova District Health Authority*, 2015 NSSC 287

Date: 20151014
Docket: Halifax No. 398067
Registry: Halifax

Between:

Alicia Hemeon and Willa Magee

Plaintiffs

v.

South West Nova District Health Authority, a body corporate

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	July 24, 2015 in Halifax, Nova Scotia
Subject:	Disclosure and discovery; class proceedings
Summary:	In a certified class proceeding, the plaintiffs claimed damages for the tort of intrusion upon seclusion, in respect of unauthorized accessing of their medical records by an employee of the defendant health authority. In discovery, the defendant sought disclosure of the representative plaintiff's medical records. The plaintiff refused. The defendant brought a motion for production.
Issues:	Should the requested records be produced?
Result:	The defendant agued, inter alia, that disclosure of the representative plaintiff's medical records was necessary to determine the elements of the tort. There had not been a successful claim for intrusion upon seclusion in Nova Scotia. However, the tort had been recognized implicitly in several decisions, with elements that had been set out by the Ontario courts. There was no apparent basis for requiring production

of an individual plaintiff's medical records in determining the existence or the elements of the tort in Nova Scotia. The court held that the scope of production in a class action was determined by the common issues.

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Heard:	July 24, 2015, in Halifax, Nova Scotia
Counsel:	Michael Dull and Madeleine Carter, for the Plaintiffs Nancy G. Rubin, Q.C., Scott Campbell and Gavin Johnston (Articled Clerk), for the Defendant

By the Court:

[1] This is a production motion brought by the defendant, a result of their request of one of the representative plaintiffs, Alicia Hemeon, for production of records during a discovery held on August 14, 2014.

[2] The main action involves an alleged breach of privacy. The plaintiffs commenced this action in June 2012 as a proposed class action proceeding, pursuant to the *Class Proceedings Act*, S.N.S. 2007, c. 28. The plaintiffs allege that a former employee of the defendant committed the tort of "intrusion upon seclusion" by accessing their medical records in an unauthorized manner at the Roseway Hospital in Shelburne. They claim that the defendant is vicariously liable, and also that the defendant is independently negligent for the way in which it administered its medical records system.

[3] By certification order issued on August 26, 2013, this action was certified as a class proceeding. The following six issues were certified as common issues which will be adjudicated at a common issues trial in April 2016:

i. Is the tort of intrusion upon seclusion recognized as an independent tort in Nova Scotia? If so, what are its parameters and constituent elements?

ii. Did an employee of the defendant, over the course of his or her employment, intentionally access the medical records of the class members without a valid purpose?

iii. If the tort of intrusion upon seclusion is ultimately available in Nova Scotia and established by any of the class members, would the defendant be vicariously liable for the commission of this tort by the employee?

iv. Did the defendant owe a duty of care to the class members to protect the privacy of their personal health information?

v. If so, did the defendant breach the corresponding standard of care as pleaded by the plaintiffs in the statement of claim?

vi. If the tort of intrusion upon seclusion is recognized in Nova Scotia, can damages of class members be determined on an aggregate basis in the circumstances of this action?

[4] Ms. Hemeon was discovered on August 14, 2014. She was asked a series of questions about how she felt when she learned about the alleged privacy breach. She described how she felt and how it affected her. One question posed to Ms. Hemeon was whether she had changed her hospital attending behaviour as a result of the alleged breach of her privacy. She responded that she did attend other hospitals (that is, other than Roseway Hospital where the breach allegedly happened) if at all possible. The defendant's counsel asked for production of medical records to confirm this answer. Plaintiff's counsel refused to produce the requested medical records. Accordingly the defendant has initiated this motion to compel production. Civil Procedure Rule 14.12 allows the court to order production.

Discovery and Disclosure in Class Action Proceedings

[5] Parties to litigation are subject to broad obligations of discovery and disclosure under our *Civil Procedure Rules*. However, in my view, the determination of the production motion before me also requires consideration of elements that are specific to the context of a class action proceeding. This raises the question of the scope of discovery in a class proceeding. In particular, the issue is whether discovery is limited to the common issues.

[6] The plaintiffs argue that relevance at this stage is defined by the common issues and the information sought is not relevant to these issues.

[7] The defendant's position appears to be while the common issues are one consideration, the litigation plan and issue of credibility must also be taken into account. The defendant also appears to rely on the general principles of relevance pertaining to production and discovery in regular non-class proceedings litigation.

[8] The scope of discovery and disclosure in a class proceeding was discussed in *1176560 Ontario Ltd* v. *Great Atlantic & Pacific Co of Canada*, [2003] O.J. No. 5703 (Ont. Sup. Ct. J.), where Master MacLeod said at paras. 6 and 9:

> In any proceeding the starting point to determine relevance is the pleadings. Relevance of course is the touchstone in determining whether or not a question is proper. A class proceeding, however, takes place in two stages. Firstly there is a

> trial on the common issues. Thereafter a mechanism is established for resolution of the issues that have not been defined as common issues. Discovery of the representative plaintiffs at the present stage in the case before me is limited by the definition of common issues. In other words, the pleadings inform interpretation of the common issues and set out the facts to be relied upon but a question is only a proper question in this phase of the action if it relates to the common issues and not the individual claims. It is therefore the certification order as informed by the pleadings and not the pleadings at large that define relevance for the first phase of the trial…
>
> …
>
> The certification motion is procedural but, like any order defining the issues for trial, it limits the scope of relevant inquiry. What a definition of issues for trial does is to remove other items from consideration at that trial. In that sense the certification order defining the common issues is similar to an order for trial of an issue on an application or to an order under Rule 20.05(1) defining the issues to be tried. The issues that are not to be tried do not exist for purposes of discovery at this time. Defining and narrowing the issues, does not guarantee success on the issues and it narrows the issues for both parties. In this case, the plaintiff is restricted to proving aggregate liability to the class and can not advance a different theory of liability that would take the trial outside of the common issues.

[9] The same issue was addressed in *TL v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2010 ABQB 203, [2010] A.J. No. 329, where Thomas J. said, at para. 16:

> While the traditional starting point for determining relevance and materiality is the pleadings, I am satisfied that the bifurcated nature of class proceedings requires a modified approach. In this case, the class proceeding is still at its first stage and as such, the relevance and materiality of a record ought to be determined by reference to the common issues. This position is consistent with the C.P.A., which clearly sets out a bifurcated process that distinguishes between the common issues that are shared collectively by all class members, and the individual issues particular to each separate class member. In order to preserve the goals of access to justice and judicial economy, it is imperative to respect the bifurcated process and to not confuse the common issues at the first stage with matters that are best left to the determination of any outstanding individual issues at the second stage.

[10] The general rule, as stated by Strathy J. in *Abdulrahin* v. *Air France*, 2010 ONSC 3953, [2010] O.J. No. 3126, is that "in a class proceeding, where the common issues are bifurcated and tried before the individual issues, examination for discovery is limited to the common issues." The defendant had taken the position that "all matters that touch upon the common issues" – including the

damages alleged by the representative plaintiffs – were subject to discovery. Strathy J. adopted the plaintiffs' position that "the scope of the examination of the representative plaintiffs should be restricted to the common issues…" He said at paras. 12 - 13:

> No authority is necessary for the proposition that the purpose of discovery is to enable a party to learn about and test the opponent's case, to narrow the scope of the issues, to obtain admissions favourable to the party's case and to promote settlement. In the usual case, the scope of the action, and therefore the scope of discovery, is defined by the pleadings.
>
> A class proceeding is not, however, a usual action. It is a special form of action and the C.P.A. contemplates that the proceeding will be bifurcated and that issues that are common will be tried before individual issues in order to achieve efficiency. The scope of the common issues trial is, therefore, defined by and limited to the common issues. For the same reason, discovery prior to the common issues trial should be limited to the issues that are common. Once those issues have been resolved, discovery may be ordered of individual class members (including the representative plaintiffs) on individual issues. It would not serve efficiency or economy to conduct discovery of the representative plaintiffs on matters that are not relevant to the common issues.

[11] Justice Strathy went on to state at para. 21 of his decision stated:

> In my view, these cases are exceptions that support the general rule that in a class proceeding, where the common issues are bifurcated and tried before the individual issues, examination for discovery is limited to the common issues. This approach is consistent with the objective of judicial economy as well as the principle expressed in rule 1.04: "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits…

[12] This principle of judicial economy is recognized under our Civil Procedure Rule 1.01:

> These rules are for the just, speedy and inexpensive determination of every proceeding.

[13] In the more recent case of *Fischer v. IG Investment Management Ltd.*, 2015 ONSC 3535, [2015] O.J. No. 2780, Perell J. summarized the general rule at para. 64:

> In class proceedings, the general rule is that the examinations for discovery are restricted to just the issues that have been certified: *1176560 Ontario Ltd. v. Great*

> *Atlantic & Pacific Co. of Canada*, [2003] O.J. No. 5703 (Master) at paras. 6 and 9; *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 3659 (Master), aff'd [2006] O.J. No. 5769 (S.C.J.); *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2010 ABQB 203 at para. 18; *Abdulrahim v. Air France*, 2010 ONSC 3953. However, the approach of restricting the scope of the common issues trial and the associated discovery process to the certified questions is not an absolute rule: *Pennyfeather v. Timminco Limited*, 2011 ONSC 4257; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2008] O.J. No. 3304 (S.C.J.).

[14] The authors of *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014) state at 192:

> The general rule in Ontario is that discovery for the common issues trial should be limited to the issues that are common and once those issues have been resolved, discovery may be ordered of individual class members. There are few exceptions to this rule; depending on the exigencies of the particular class action, the scope of the discovery may extend to all of the pleaded issues. The British Columbia courts have interpreted the Ontario line of cases as not restricting discovery strictly to the common issues…

[15] The British Columbia approach is set out in *Stanway* v. *Wyeth Canada Inc.*, 2013 BCSC 369, [2013] B.C.J. No. 411. In denying leave to appeal to the British Columbia Court of Appeal (2013 BCCA 256, [2013]B.C.J. No. 1093), Prowse J.A. described the Chambers judge's reasoning as follows:

> Madam Justice Gropper clearly identified the issue before her as "the proper scope of examination for discovery in the context of class proceedings." She then set out the common issues which had been certified. She noted that the scope of examination for discovery under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 ["Rules"], is broad, and that s. 17(1) of the *Class Proceedings Act, R.S.B.C. 1996, c. 50 ["CPA"] provides that parties to a class proceeding* have the same rights of discovery as under the Rules. She then referred to three Ontario decisions on the scope of discovery in the context of class proceedings. In her view, those decisions did not stand for any absolute proposition that discovery was strictly limited to the common issues. In that regard, she referred to *Andersen v. St. Jude Medical, Inc.*, 2010 ONSC 4708, and quoted para. 38 of that decision, which states:
>
> > In a civil proceeding, the relevance of the facts to the issues in the proceeding is usually determined with reference to the claims and defences raised in the pleadings. In the context of a class proceeding, relevance is also governed by the common issues that have been certified for trial, and not by any individual issues that remain. It is therefore the certification order as informed by the pleadings that define relevance for this phase of the trial: [Citations omitted.]

> I am not persuaded that there is an arguable case that Madam Justice Gropper erred in her interpretation of the Ontario authorities, or that they restrict discovery strictly to the common issues as an absolute principle, as the applicants appear to suggest.
>
> In the result, she concluded that the scope of discovery in class proceedings should be governed by the usual rules for discovery regarding materiality and relevance, but with the key determinant of materiality and relevance being the certified common issues. At para. 26 of her decision, she states:
>
> > I find the scope of examination for discovery in the context of class proceedings shall also be defined broadly. It will not be limited by the common issues. Questions led in examination shall be subject to the evidentiary principles of materiality and relevance, the key determinant of relevance and materiality being the certified common issues.

[16] The British Columbia approach to this issue as set out in *Stanway, supra,* reflects the essence of the defendant's argument that production in a class proceeding should be handled the same way as production in a conventional proceeding. With respect, I am persuaded that the Ontario authorities provide a more convincing method of applying general production and relevance to class proceedings.

[17] I am satisfied that the appropriate approach in this type of proceeding is to follow the general rule – though obviously not an absolute one – that discovery will generally be tied to the common issues and to depart from this approach is the exception, not the rule.

[18] The defendant's stated reason for requesting disclosure of the representative plaintiff's medical records is in order to "corroborate or refute the plaintiff's assertion that the breach caused her to change her behavior". The defendant claims the requested records are relevant to the common issues of (1) whether the tort should be recognized in Nova Scotia and, if so, what its elements are; (2) whether damages can be assessed in the aggregate in this case; (3) vicarious liability; and (4) credibility of the representative plaintiff.

Elements of the tort of intrusion upon seclusion

[19] The Ontario Court of Appeal confirmed the existence and elements of the tort of intrusion upon seclusion in *Jones v. Tsige,* 2012 ONCA 32, [2012] O.J. No. 148, where the intrusion consisted of unauthorized accessing of the plaintiff's bank

records by a bank employee. After confirming the tort existed in Ontario, Sharpe J.A. (for the court) described the elements at para. 70 - 71:

> I would essentially adopt as the elements of the action for intrusion upon seclusion the *Restatement (Second) of Torts* (2010) formulation which, for the sake of convenience, I repeat here:
>
> > One who intentionally intrudes, physically or otherwise, upon the seclusion of another or 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.
>
> The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

[20] More recently, in *Evans* v. *Wilson*, 2014 ONSC 2135, [2014] OJ No. 2708, on a certification motion in a class proceeding, Smith J. cited *Jones, supra*, and set out the elements as follows at para. 18:

> a) The defendant's conduct must be intentional (which could include recklessness);
>
> b) The defendant must have invaded the plaintiff's private affairs or concerns without lawful justification; and
>
> c) A reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

[21] The defendant says that the tort has not been recognized in Nova Scotia and its elements have, therefore, not been defined. While the defendant is correct that there has been formal recognition of the tort in Nova Scotia, it has been referred to in Nova Scotia jurisprudence.

[22] While not explicitly recognizing the tort in *Trout Point Ltd.* v. *Handshoe*, 2012 NSSC 245, [2012] N.S.J. No. 427, Hood J. cited *Jones, supra*, and held that "in an appropriate case in Nova Scotia there can be an award for invasion of privacy or as the Ontario Court of Appeal called it, the "intrusion upon seclusion".

In *Murray v. Capital District Health Authority (cob East Coast Forensic Hospital),* 2015 NSSC 61, [2015] N.S.J. No. 77, Justice Denise Boudreau cited this comment in a certification decision, holding that while "the tort of intrusion upon seclusion is novel … s. 7(1) of the CPA does not exclude novel claims; it means to exclude claims that have absolutely no chance of success, or frivolous claims."

[23] In any event, the defendant's position is that (1) the tort has not been recognized in Nova Scotia, and (2) if it is to be recognized, it should include as an element that the breach caused "anguish and suffering". The defendant says this is supported by *Jones, supra.* In fact, the court in *Jones* was referring to an American textbook, Prosser's *Law of Torts,* 4th edn. published in 1971. Prosser set out a list of four elements somewhat different from those ultimately adopted by the court. In any event, Sharpe J.A. noted, "anguish and suffering are generally presumed once the first three elements have been established".

[24] The defendant argues that disclosure of the representative plaintiff's medical records is necessary to determine the elements of the tort. In particular, it is the defendant's position that these records are required in order to determine whether the court should apply the elements that have already been endorsed implicitly by this court and explicitly by the Ontario Court of Appeal, or whether Prosser's "anguish and suffering" – or the Australian "mental, psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do", also referred to in *Jones, supra,* – should be incorporated into the tort in Nova Scotia. Counsel has provided no clear argument to explain how the information sought is relevant.

[25] In summary, as I understand the defendant's position, the representative plaintiff's medical records are allegedly necessary because the court needs a factual record before it, in case it decides to interpret the tort of intrusion upon seclusion as requiring the element of "anguish and suffering". This element has not been required by Canadian courts that have recognized the tort, including, implicitly, this one.

[26] I am not persuaded that determining the elements of the tort would require such disclosure at this stage. In my view, determining the elements of the tort will be essentially a policy decision. How the subjective experience of a single representative plaintiff influences this decision is not clear.

Damages in the aggregate

[27] Counsel for the defendant submitted in oral argument that the representative plaintiff's medical records would be relevant to the common issue of whether damages could be assessed in the aggregate. Counsel submitted that it would be necessary to determine whether the damages would be too disparate for aggregate damages to be available.

[28] The defendant cites *Fischer, supra,* where the issue of aggregate damages had not been certified, and the court observed that if the issue had been certified, the documents respecting trading data that the plaintiffs sought from the defendant "would have become relevant to the common issues trial and producible for the discovery purpose". I am not satisfied that this is persuasive authority for requiring the plaintiffs to produce documents related to their individual alleged damages. The documents sought in *Fischer, supra,* went directly to the conduct of the defendant that had caused the damage, not to the individual damages of the plaintiffs. Moreover, the court in *Fischer, supra,* emphasized the novelty of the damages issue.

[29] The defendant offers no clear explanation or basis for the claim that the representative plaintiff's individual distress is relevant to the issue of whether aggregate damages are available. Rather, as the plaintiff argues, if aggregate damages are held not to be available, this will result in the individual damages of the plaintiffs becoming relevant at a later stage of the proceeding.

Evidence of individual distress in the litigation plan

[30] The defendant further argues that a reference to distress arising from the breaches appears in the litigation plan. In *Penyfeather v. Timminco Ltd.* 2011 ONSC 4257, Perell J. remarked that "the litigation plan and the certification order will define the nature of the common issues trial…". Accordingly, the defendant argues that the record of the representative plaintiff's hospital attendances is "relevant in relation to these common issues and to establish the elements of the tort in a precedent setting case for a novel tort, and it believes these documents are relevant for credibility of the plaintiff". Thus, following the general law of relevance and production, the defendant says the court should "err on the side of requiring production…".

[31] Plaintiff's counsel replies that the litigation plan "is not set in stone" and was developed long before the common issues trial.

[32] I am not satisfied this reference in the litigation plan displaces the basic principle that the representative plaintiff's individual distress is of no apparent relevance to the common issues.

[33] In summary, for the reasons set out above, I am of the view that in the context of class proceedings the distress of a class member is irrelevant to the common issues.

[34] The defendant's motion for production is dismissed.

Pickup, J.