CITATION: Daniells v. McLellan, 2017 ONSC 3466
COURT FILE NO.: CV-13-5565-CP
DATE: 2017/09/13

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
SHERRY-LYNN DANIELLS	)	*Geoffrey Larmer*, for the Plaintiff
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	)	
Plaintiff	)	
	)	
- and -	)	
	)	
MELISSA McLELLAN and NORTH BAY REGIONAL HEALTH CENTRE	)	
	)	
	)	*Deborah Berlach and Thanasi Lampropoulos*, for the Defendants
	)	
	)	
Defendants	)	
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	)	
	)	**HEARD:** April 20, 2017
	)	

ELLIES J.

REASONS FOR DECISION ON MOTION

OVERVIEW

[1] Melissa McLellan ("McLellan") was a nurse employed by the North Bay Regional Health Center (the "Hospital") until she was dismissed in May 2011. Not long before she was dismissed, the Hospital discovered that McLellan had improperly accessed the confidential personal health information of more than 5,000 patients of the Hospital between 2004 and 2011, including that of the plaintiff, Sherri-Lynn Daniells ("Daniells").

[2] Daniells commenced an action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*") against McLellan and the Hospital for breaching her privacy. In this motion, she seeks an order under s. 2 of the *CPA* certifying the action as a class proceeding.

[3] The Hospital consents to an order certifying the action. However, it submits that there should be subclasses of plaintiffs based on their reaction to the news that their personal health information had been accessed and on whether the information was acted upon. The Hospital also maintains that some of the damage issues Daniells seeks to certify as common issues ought not to be and that neither Daniells nor another proposed additional or alternative plaintiff, Andrea Kendall ("Kendall"), are suitable representative plaintiffs. Lastly, the Hospital seeks to reframe the remaining proposed common issues.

[4] These reasons explain my conclusion that the proposed subclasses should not be certified because the definitions of the subclasses fail to sufficiently identify the members of each class and because there is no basis in fact to support the assumptions on which they are based.

[5] These reasons also explain my conclusion that both the issue of whether compensatory damages can be assessed in the aggregate and the issue of whether punitive damages should be awarded can be certified, subject to further submissions from the parties on issue of damages in the aggregate.

[6] Finally, because I agree with the Hospital that the remaining common issues should be reframed, I do so in order to reflect the pleadings and for the sake of clarity.

BACKGROUND

[7] I have already set out the factual background to these proceedings in two earlier motions. In the first, the Hospital sought an order under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194 that Kendall is not a suitable representative plaintiff as a result of her involvement in an earlier action against the Hospital. That motion was dismissed (2016 ONSC 3854).

[8] In the second motion, which was also dismissed (2016 ONSC 5458), the Hospital sought an order compelling Kendall to provide certain information and to produce certain documents further to her cross-examination on the affidavit she swore in support of the present motion.

[9] Throughout the balance of these reasons, I will refer to the moving parties collectively as "the plaintiffs", even though Kendall has not yet been added to the action.

[10] For the sake of convenience, I will again set out the background facts, none of which are in dispute.

[11] Daniells and McLellan were both employees of the Hospital. In March 2011, Daniells was admitted as a patient at the Hospital. Shortly after her admission, Daniells was visited by a number of staff members of the Hospital who ought not to have known that she had been admitted. Daniells complained to the Hospital, as a result of which an investigation was undertaken. That investigation revealed that 14 members of the Hospital staff, including McLellan, had improperly accessed Daniells' electronic health records. During the course of the investigation, the Hospital learned that, beginning in

2004, McLellan had accessed the personal health information of 5,803 other patients with respect to whom she was not dealing professionally. McLellan was dismissed as a result.

[12] Following its investigation, the Hospital sent a letter (the "Notice Letter") to the patients and former patients whose personal health information had been improperly accessed by McLellan. In the Notice Letter, the Hospital advised the recipients that a Registered Nurse employed with the North Bay Regional Health Center had accessed the personal health information of many patients without being involved in their care.

[13] The Notice Letter also advised regarding McLellan's actions that:

> The person admits to looking at patient information without being involved in their care, however, the individual maintains that the information was never shared with anyone else inside or outside of the Hospital. We have no reason to believe that this breach extends beyond this individual. During this time, your care was never negatively affected.

[14] The Notice Letter provided the names and contact information for two employees of the Hospital and invited the recipients to contact them for additional information or to express their concerns. According to the evidence of Aidan West, Manager of Risk Services at the Hospital, hundreds of "extremely upset" patients called after receiving the Notice Letter.

[15] Daniells commenced this action in 2013. In the action, she seeks moral or symbolic damages in the amount of $20,000. In addition, she seeks non-pecuniary, pecuniary, special, and aggravated damages "in an amount and in a manner to be determined"; punitive damages in the amount of $500,000; as well as pre- and postjudgment interest and costs. Daniells bases her claim in negligence, breach of fiduciary duty, breach of contract, and intrusion upon seclusion.[1] She alleges the Hospital is vicariously liable for those damages.

[16] Although she delivered a statement of defence, McLellan did not participate in any of the previous motions. Nor has she participated in this one. For that reason, when I refer in these reasons to the "parties", I intend to refer only to the plaintiffs and the Hospital.

[17] The list of common issues the plaintiffs seek to certify is attached to these reasons as Appendix "A". It will be dealt with in more detail below.

ISSUES

[18] The issues in this motion are tied to s. 5(1) of the *CPA*, which sets out the requirements for certification. The subsection provides:

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[1] As I will expand upon later, the plaintiffs seek to certify a common question of a "breach of privacy." However, I have concluded that it should not be certified as it has not been pleaded as a separate cause of action.

> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[19] The parties agree that the pleadings disclose a cause of action against McLellan for tortious intrusion upon seclusion. They also agree that the pleadings disclose causes of action against the Hospital in negligence, breach of contract, and breach of fiduciary duty and for vicarious liability in connection with McLellan's intrusion upon seclusion. I share their opinion.

[20] The parties also agree that there is an identifiable class, that the claims of the class members raise common issues of liability, and that a class proceeding is the preferable procedure to resolve those common issues. Once again, I agree.

[21] Although no explicit agreement has been mentioned concerning the proposed plan of proceeding, no issue has been raised by the Hospital with respect to this requirement.

[22] The parties explicitly disagree, however, on certain requirements for certification set out in s. 5(1) of the *CPA*. Their differences give rise to the following issues:

(1) Should there be subclasses? If so, what should they be?

(2) Should the possibility of an aggregate assessment of damages for negligence, breach of fiduciary duty, or breach of contract be certified as a common issue? If so, with respect to which subclass or subclasses, if subclasses are certified?

(3) Should the possibility of an aggregate assessment of moral or symbolic damages for intrusion upon seclusion be certified as a common issue? If so, with respect to which subclass or subclasses, if subclasses are certified?

(4) Should punitive damages be certified as a common issue?

(5) Is Daniells an appropriate representative plaintiff?

(6) Is Kendall an appropriate representative plaintiff with respect to any common question related to damages? If so, should she be added to the action?

(7) Should entitlement to prejudgment and postjudgment interest be certified as common issues?

(8) Should the remaining common issues proposed by the plaintiff be reframed?

ANALYSIS

Should there be subclasses?

[23] The plaintiff proposes that there be one class (the "overall class"), defined as:

> All patients and former patients of the Hospital whose personal health information was accessed by McLellan without their consent, while McLellan was not involved in their care.

[24] The Hospital argues that there should be three subclasses. Its argument centers around the possibility of assessing damages in the aggregate under s. 24(1) of the *CPA*, which reads:

> 24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
> (a) monetary relief is claimed on behalf of some or all class members;
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[25] The Hospital submits that there should be subclasses to address the fact that damages in respect of certain members of the proposed overall class cannot be determined in the aggregate. It proposes that there be three subclasses, defined as follows:

> Subclass (A): those class members who received the Notice Letter and did not react in any identifiable way;
>
> Subclass (B): those class members who, upon receipt of the Notice Letter, reacted in some way that evidenced upset, disapproval, or disgust of some sort with the inappropriate access of their medical records by Melissa McLellan; and

> Subclass (C): those class members whose personal health information was acted upon.

[26] The Hospital submits that an aggregate assessment of damages is not possible with respect to subclasses (B) and (C) because the defendants' liability to those class members cannot be determined without proof of loss by individual members of those subclasses. However, the Hospital contends that the extent of the damages for members of subclass (A) "would be uniform among those class members and an individualistic inquiry ... on behalf of each of those class members would not be necessary" (Factum, at para. 52). Thus, the Hospital argues, the assessment of general damages for negligence, breach of contract, breach of fiduciary duty, and intrusion upon seclusion could be determined on an aggregate basis for members of subclass (A) and, therefore, a common issue for general damages could be certified with respect to that subclass.

[27] I am unable to accept the Hospital's argument for two reasons: (1) the subclass definitions are too vague, and (2) the assumptions upon which they are based have no factual support in the record before me. However, as I will explain, I do believe that the possibility of an aggregate assessment of at least *part* of the compensatory damages can be certified, subject to the parties' further submissions on the issue.

Subclass Definitions

[28] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, the Supreme Court of Canada identified four conditions necessary to certify a class action. The first is a clearly identifiable class. Writing on behalf of the court, McLachlin C.J.C. stated as follows, at para. 38:

> Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.... [Citations omitted.]

[29] In my view, the subclass definitions, at least with respect to subclasses (A) and (B), fail to define membership in a way that would readily allow a person whose privacy was breached by McLellan to know whether he or she was in the subclass. What does "identifiable" mean in subclass (A)? "Identifiable" to whom? Do close family members or friends count? What qualifies as evidence of "upset, disapproval, or disgust" in subclass (B)? Is tearing up the Notice Letter enough?

[30] These unanswered questions demonstrate the vagueness of the proposed subclass definitions and the fact that they fail to meet the requirement of clarity referred to in the excerpt set out above from *Western Canadian Shopping Centres*.

No Basis in Fact for the Assumption

[31] Even if the definitions of subclasses (A) and (B) were changed to refer specifically to calling the Hospital as a reaction, I would still not be able to agree with the Hospital's position because of the assumption on which it is based.

[32] In *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25, the Supreme Court of Canada held that the representative of a putative class must show "some basis in fact" to support the certification order requested. I believe the same onus should apply regardless of whether it is a plaintiff or a defendant proposing a particular certification order, including the certification of subclasses.

[33] The Hospital's argument that damages for members of subclass (A) can be assessed in the aggregate rests on the assumption that those recipients of the Notice Letter who did not react by contacting the Hospital were all affected the same way by the breach of their privacy and, therefore, suffered similar damages (Factum, at para. 52). I am unable to accept this premise.

[34] There is no basis in fact in the materials before me to support the assumption that a patient's failure to contact the Hospital is a reliable indicator of the degree to which the actions of McLellan affected that patient.

[35] The evidence filed by the Hospital indicates that there were hundreds of calls received after the Notice Letter was sent out and that the patients "were extremely upset", but it gives no information as to why they were upset. Reactions to the Notice Letter might well have depended on the nature of the confidential information contained in the affected patient's medical records. The problem is that we have no evidence as to the content of the records of those patients that called. Recipients of the Notice Letter who called the Hospital may also have done so for reasons not completely related, or even completely unrelated, to the extent to which they were actually affected by the breach. For example, they may have known one particular nurse at the Hospital and wanted simply to ensure that that particular nurse was not the one that accessed their information.

[36] More importantly, the record before me also contains no information concerning why other patients chose not to contact the Hospital. There is no basis in fact upon which to conclude that they did not call because they were not upset or affected. As I will mention again below, in support of their punitive damage claim, the plaintiffs argue that the Notice Letter misleadingly made it sound as though the privacy breach was the act of a rogue employee and that the hospital was not to blame. In those circumstances, it is easy to see why a patient, even one whose records contained highly personal information, might decide that there was no point in calling the hospital.

[37] There is, therefore, no basis in fact for certifying subclasses (A) and (B) and for certifying a common question of aggregate damages only in respect of subclass (A).

[38] There is also no basis in fact for certifying subclass (C). As I will again mention later in these reasons, the plaintiffs' claims relate only to the acts of McLellan in viewing their personal health information. There is no evidence that McLellan acted on the personal health information of any of the members of the overall class. [2]

[39] I also note, parenthetically, that, while Daniells is a potential member of subclass (A) and Kendall is a potential member of subclass (B),[3] that would no longer be true if I accepted the Hospital's argument that neither are appropriate representative plaintiffs.

[40] For the foregoing reasons, I believe that the subclasses proposed by the Hospital should not be certified. However, mine is not the final word on the matter. As the plaintiffs correctly submit, it is still open to the common issues trial judge to create subclasses based upon the evidence called during the trial: *Peppiatt v. Royal Bank*, 27 O.R. (3d) 462, [1996] O.J. No. 118 (Q.L.) (Gen. Div.), at para. 45 [cited to Q.L.].

[41] Moreover, as I will now explain, I believe that it is possible to certify a common issue of aggregate damages with respect to the overall class proposed by the plaintiffs.

Should the possibility of an aggregate assessment of damages for negligence, breach of fiduciary duty, or breach of contract be certified as a common issue?

[42] The entire list of common issues proposed by the plaintiffs is attached as Appendix "A" to these reasons. Common issues (m) through (r) deal with the various types of damages claimed in the action. Common issues (m) through (q) raise the question of whether the damages claimed, other than punitive damages, can be determined "on a global basis."

[43] The Hospital submits that an aggregate assessment of general damages is possible only with respect to proposed subclass (A) regarding the claims based in negligence, breach of fiduciary duty, and breach of contract. I disagree. I believe that an aggregate assessment of at least *part* of the compensatory damages suffered by each member of the overall class is possible in this case with respect to these causes of action.

[44] The plaintiffs' claims for damages for negligence, breach of fiduciary duty, and breach of contract are set out in paragraph 17 of the Statement of Claim, as follows:

> 17. As a result of the Defendants' negligence, breach of fiduciary duty and/or breach of contract, the Plaintiff and certain Class Members have suffered damages, including the following:
>
> (a) Pain, suffering, loss of enjoyment of life and loss of amenities;

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[2] McLellan was not one of the staff members who visited Daniells in the hospital (Aiden West Affidavit, at para. 12).

[3] Although the plaintiff argues that there is no evidence that there is a single potential class member who fits into subclass (A) (Reply Factum, at para. 10), I believe that Daniells would fit into this subclass. There is no evidence before me that she reacted in any way to the Notice Letter. The evidence does indicate that Kendall contacted the Hospital. Therefore, there are presently potential representative plaintiffs for both of these subclasses.

(b) Mental distress, mental anguish, anxiety and/or frustration over the disclosure of some of the most private and intimate details of their lives;

(c) Past and future loss of income, diminished earning capacity and future loss of earning capacity;

(d) Past and future cost of care; and

(e) Out-of-pocket expenses.

[45] In its submissions, the Hospital focuses on the damages claimed in para. 17(b) above for mental distress, etc. (collectively referred to as "mental suffering" for the purpose of these reasons). It submits that the plaintiff cannot obtain these damages unless the level of mental suffering rises to the level of a recognizable psychiatric injury: *Mustapha v. Culligan of Canada Ltd*, [2008] S.C.R. 114, at paras. 8-9. Therefore, the Hospital submits, the damage assessments with respect to these causes of action are necessarily individualistic: *Healey v. Lakeridges Health Corporation*, 2011 ONCA 55, 103 O.R. (3d) 401, at para. 71.

[46] The plaintiffs respond that *Healey* has no application here because they are not advancing a claim for nervous shock. Perhaps, although the plaintiffs have not explained how the damages they are seeking in para. 17(b) differ from a claim for damages for nervous shock. However, I need not decide whether the plaintiffs' submission is correct because, correct or not, it is not a complete answer to the Hospital's argument.

[47] In addition to claiming damages for mental suffering, the plaintiffs are claiming damages for (physical) pain and suffering, loss of earning capacity, costs of care, and other pecuniary losses. Undoubtedly, these claims for compensatory damages are also ordinarily assessed on an individual basis.

[48] To obtain an order certifying an assessment of compensatory damages in the aggregate, the plaintiff must establish a reasonable likelihood that the requirements for aggregate relief under s. 24 of the *CPA* will be met if the plaintiffs are otherwise successful at a trial on the common issues: *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 44. The plaintiffs contend that an aggregate assessment of compensatory damages can be undertaken in this case. They rely in support of that submission on two decisions: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, 192 O.A.C. 239 and *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392. I am not able to agree that either case stands as clear authority for the plaintiffs' submission.

St. Lawrence Cement Inc. v. Barrette

[49] I will begin my analysis with the more recent, and potentially more precedential, decision in *Barrette*. The plaintiffs submit that, in *Barrette*, "the Supreme Court held that use of average amounts to compensate for the general experiences of class members was reasonable and appropriate" (Reply Factum, at para. 26). That is true, but *Barrette* was a

Québec class proceeding, and I am not persuaded that it is as authoritative in the context of the *CPA* as the plaintiffs suggest.

[50] The representative plaintiffs in *Barrette* sought damages in connection with disturbances arising from the operation of a cement plant in their neighbourhood. The issue before the Supreme Court of Canada was "whether in Quebec civil law there is a scheme of no-fault civil liability in respect of neighbourhood disturbances" under the *Civil Code of Québec*, S.Q. 1991, c.64 (the "*C.C.Q.*"): *Barrette*, at para. 3.

[51] The common issues judge had found the defendant liable under the *C.C.Q.*, but without fault. She awarded varying damages on an aggregate basis ("collectively", to use the terminology of the *C.C.Q.*), using different geographic zones. Because it was difficult to determine the exact number of class members in each zone, she held that individual claims would be required.

[52] The Supreme Court of Canada upheld the trial judge's decision. In doing so, it explained that the Québec *Code of Civil Procedure*, R.S.Q., c. C-25 (the "*C.C.P.*") authorizes the use of "average amounts" to determine compensation collectively. On behalf of the court, LeBel and Deschamps JJ. wrote, at paras. 111-112:

> However, one aspect of [the common issues judge's] decision is unusual: she ordered that recovery be subject to an individual claims procedure but assessed the amount to be awarded to each member using an average determined for each zone. The procedure chosen for recovery should not be confused with the assessment of injury. From a procedural standpoint, the trial judge must decide whether "the claims of the members [will] be recovered collectively or be the object of individual claims" (art. 1028 *C.C.P.*). Regardless of whether recovery is collective or individual, each member will, in theory, be compensated for "the amount of the loss he has sustained and the profit of which he has been deprived" (art. 1611 *C.C.Q.*). This is because a class action is only a "procedure which enables one member to sue without a mandate on behalf of all the members" (art. 999(d) *C.C.P.*; see *Dell Computer*, at paras. 105-8). The nature of the action itself remains unchanged. Thus, even in the context of an order for collective recovery, the injury the trial judge must assess is, at first glance, individual rather than common.
>
> The provisions of the *Code of Civil Procedure* on individual claims do not suggest that the trial judge may not decide the amount to be awarded in respect of an individual injury (see arts. 1037 to 1040 *C.C.P.*). Moreover, a judge who opts for collective recovery does so "if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; [the judge] then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is not established" (art. 1031 *C.C.P.*). This

> suggests that the total amount is based on an assessment of the sum of the [members'] individual injuries. Finally, the trial judge has considerable discretion in making this assessment in the context of a class action (arts. 1039 and 1045 *C.C.P.*; see also *Thompson v. Masson*, [2000] R.J.D.T.1548 (C.A.), at paras. 38-40).

[53] The focus in *Barrette* was on the specific provisions of the *C.C.Q.* and *C.C.P.* I have not been taken to any part of the decision or the articles in question that demonstrates any parallel to the provisions of s. 24(1) of the *CPA*. For that reason, I am not comfortable relying on the decision as support for the proposition that the *CPA* permits the use of average amounts to compensate for the general experience of class members.

[54] I turn now to the decision in *Cloud*.

Cloud v. Canada (Attorney General)

[55] The plaintiffs rely on the decision in *Cloud* in support of the submission that:

> Courts have certified aggregate damages in actions concerning breach of fiduciary duty, where there is a baseline common experience distress component, and personal injuries beyond common experience, based on physical and sexual abuse, may be individually assessed. (Reply Factum, at para. 25)

[56] I am unable to find any support for this submission in *Cloud*.

[57] In *Cloud*, the plaintiffs sought damages for the harm they suffered as a result of attending the Mohawk Residential School for Aboriginal children. Certification had been refused by both the motion judge and a majority of the Divisional Court. On appeal to the Court of Appeal, the appellant conceded that individual assessments of both causation and damages would be necessary for each class member, provided the class was successful on the common issues trial (at para. 68). Relying on the reasons of Cullity J., who dissented in the Divisional Court, the Ontario Court of Appeal allowed the appeal and certified the action. On behalf of the court, Goudge J.A. wrote, at para. 70:

> I also agree with Cullity J. that in a trial of these common issues, the claims for an aggregate assessment of damages and punitive damages are property included as common issues. The trial judge should be able to make an aggregate assessment of the damages suffered by all class members due to the breaches found, if this can reasonably be done without proof of loss by each individual member.

[58] In the result, the Court of Appeal certified the following question, after setting out the three common issue liability questions, at para. 72(4):

> If the answer to any of these common issues is yes, can the court make an aggregate assessment of the damages suffered by all class members of each class as part of the common trial?

[59] I am unable to conclude from this language that the Court of Appeal approved of a baseline assessment of common experience damages, coupled with further individual damage assessments.

[60] Moreover, if one examines Cullity J.'s dissent in *Cloud v. Canada (Attorney General)*, 65 O.R. (3d) 492 (Div. Ct.), at para. 31, it is apparent that no detailed analysis was conducted by him with respect to the issue of the aggregate assessment of damages. Only two references are made to the issue in his reasons. The first is at para. 31, where he states as follows:

> I would also include as common issues the claim for punitive damages arising from any of the above breaches that are proven and the possibility of an aggregate assessment of damages.

[61] The other reference is found at para. 38 of his dissent:

> If a breach of a systemic duty is established, the questions of causation that will remain to be determined are likely to be less complex and difficult than they would have been under the scenario considered, and rejected, by the learned judge. The fact that individual assessments of damages may be required is, by virtue of s. 6.1 [of the *CPA*] not, by itself, a bar to certification. As I have indicated, the question whether an aggregate assessment of damages can be made should be left to be determined by the judge trying the common issues.

[62] None of the excerpts I have set out above, either from the dissent of Cullity J. in the Divisional Court or from the reasons of Goudge J.A. in Court of Appeal, refer to an aggregate assessment of baseline common distress damages. However, I do believe such jurisprudential authority exists, although it was not referred to by either side in the motion.

[63] In *Good v. Toronto Police Services Board*, 2016 ONCA 250, 130 O.R. (3d) 241, leave to appeal refused, [2016] S.C.C.A. No. 255, the representative plaintiffs sought damages in connection with detentions that occurred during the G20 Summit held in Toronto in June 2010. The representative plaintiff alleged, among other things, that her *Charter* rights and those of the class members had been breached by the detentions. The motion judge dismissed the motion for certification. The representative plaintiff narrowed her claim and appealed to the Divisional Court. The Divisional Court set aside the motion judge's order and certified the narrowed claim as two separate class proceedings.

[64] The defendant appealed. The Court of Appeal dismissed the appeal and granted the plaintiff's cross-appeal from the Divisional Court's decision to reduce the costs awarded to the plaintiff by the motion judge. One of the issues before the Divisional Court and the

Court of Appeal was whether a common issue of aggregate damages should be certified. Both courts held that it should. In doing so, they endorsed the notion that, under s. 24(1) of the *CPA*, a common issues judge can determine a base amount of damages to which each member of a class is entitled. At paras. 74-75, Hoy A.C.J.O. wrote for the court:

> I agree with the Divisional Court that it should be open to the common issues judge to consider whether aggregate damages would be an appropriate remedy, in whole or in part. The motion judge's decision pre-dated the Supreme Court's decision in *Pro-Sys* [*Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477]. At para. 134, Rothstein J. wrote this for the court, in relation to legislation in British Columbia that parallels the Act:
>
> > The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. *The ultimate decision as to whether the aggregate damages provisions of the CPA should be available is one that should be left to the common issues trial judge.*
>
> Further, this appears to be a case where the common issues judge may well determine that at least part of TPS' liability can reasonably be determined without proof by individual class members. As the Divisional Court highlighted, s. 24(1) asks whether the aggregate or a part of the defendant's liability can reasonably be determined without proof by class members. And, as the Divisional Court observed, it would be open to a common issues judge to determine that there was a base amount of damages that any member of the class (or subclass) was entitled to as compensation for breach of his or her rights. It wrote, at para. 73, that "[i]t does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in breach of their rights at common law or under s. 9 of the *Charter*, a minimum award of damages in a certain amount is justified." [Emphasis in original.]

[65] As a further indication that *Cloud* does not stand as authority for the plaintiffs' submission about the baseline assessment of common experience damages, I point out that the decision is not referred to anywhere in *Good*, either at the Divisional Court level or that of the Court of Appeal. I would also highlight the different approaches taken by the Court of Appeal in *Good* and the Supreme Court of Canada in *Barrette*. In *Barrette*, the court held that, under Québec law, courts may assess the total damages per claimant and then award that amount after an individual claim is assessed. In *Good*, the court held that a common issues judge may assess part of each individual's claim and award the remainder after an individual assessment. To my mind, these are fundamentally different approaches.

[66] Based on the Court of Appeal's decision in *Good*, I believe that the issue of whether damages can be assessed in the aggregate should be certified in this case. At present, I believe that there is a reasonable likelihood that the common issues judge could assess at least a part of the defendants' liability to class members on an aggregate basis with respect to the claims in negligence, breach of fiduciary duty, and breach of contract, even though, as in *Good*, individual assessments may also be necessary.

[67] However, given that the decision in *Good* was not referred to by either party to the motion, I also believe that fairness requires that they be given an opportunity to make submissions regarding its applicability to the case at hand.

Should the possibility of an aggregate assessment of moral or symbolic damages for intrusion upon seclusion be certified as a common issue?

[68] As mentioned earlier, in addition to claiming damages for negligence, breach of fiduciary duty, and breach of contract, the plaintiffs claim damages for intrusion upon seclusion. This relatively new tort was recognized by the Court of Appeal in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241, in which the court held that "symbolic" or "moral" damages may be awarded to a plaintiff whose seclusion or private affairs have been intentionally intruded upon by another (at paras. 70, 71, and 75). Writing on behalf of the court, Sharpe J.A. fixed the upper end of the range of such damages at $20,000 (at para. 87). To determine the amount of damages that should be awarded within that range, Sharpe J.A., at para. 81, identified the following factors:

(1) the nature, incidence and occasion of the defendant's wrongful act;

(2) the effect of the wrong on the plaintiff's health, welfare, social, business or financial position;

(3) any relationship, whether domestic or otherwise, between the parties;

(4) any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and

(5) the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

[69] As it did with respect to the assessment of aggregate damages for the other causes of action advanced by the plaintiffs, the Hospital submits that an aggregate assessment of moral or symbolic damages is not possible for any class member except those in proposed subclass (A). It submits that the factors identified by the Court of Appeal require individual assessments for members of the other proposed subclasses.

[70] Subject to the parties' further submissions on the decision in *Good*, I would reject this submission for the same reasons that I rejected the Hospital's submission with respect to the aggregate assessment of damages for the other causes of action. If, as I presently believe, it is possible to assess in the aggregate at least part of the damages with respect to the claims that sound in negligence, breach of fiduciary duty, and breach of contract, it

is certainly possible with respect to the tort of intrusion upon seclusion. Section 24(1)(c) of the *CPA* allows an aggregate assessment where no proof of loss by individual class members is required. In defining the tort of intrusion upon seclusion, Sharpe J.A. in *Jones* held that proof of actual loss is not an element of the cause of action (at paras. 71 and 74).

Should punitive damages be certified as a common issue?

[71] The Hospital submits that there is no basis in fact to permit certification of a common issue of punitive damages against either McLellan or the Hospital. It argues that there is no evidence that McLellan acted upon the information she improperly accessed and that there *is* evidence that the Hospital acted appropriately after discovering McLellan's actions by writing the Notice Letter and terminating McLellan's employment. Alternatively, it argues that the Hospital could not be found liable for punitive damages for the independent intentional acts of McLellan.

[72] In response, the plaintiff argues that it is not "plain and obvious" that punitive damages are not available (Reply Factum, at para. 32). I agree. However, this is not the Hospital's complaint. It is true that a claim for punitive damages must be adequately pleaded: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 87. But the Hospital does not object to the manner in which the claim for punitive damages has been pleaded. Instead, it contends that the plaintiff has shown no basis in fact which would permit the court to certify punitive damages as a common issue. I disagree.

[73] As pleaded, the plaintiff's punitive damages claim rests on four allegations, namely (the references are to the Statement of Claim):

(1) the well-known, open and flagrant nature of the breaches (para. 19);

(2) the Hospital's attempt to paint a false picture to members of the class and to the public that McLellan was solely responsible for the privacy breaches (paras. 20 and 22);

(3) the lack of other sanctions brought against the defendants (para. 21); and

(4) the way in which the matter was "skillfully orchestrated to prevent the true scope of the privacy breaches … from becoming known" (para. 22).

[74] There is some evidence offered as a basis in fact to support the first two allegations and some evidence in conflict with the third. The number of breaches and the length of time over which it occurred is some evidence in support of the allegation that the unauthorized access occurred openly and flagrantly. The content of the Notice Letter is some evidence in support of the allegation that the Hospital blamed the breaches on a rogue employee. The evidence that McLellan was fired seems to contradict the third allegation, as it relates

to her. I have not been referred to any other evidence in support of the third and fourth allegations.[4]

[75] I agree that the evidence in support of the allegations is weak. However, a certification motion is decidedly not an assessment of the merits of the claim: *Hollick*, at para. 16. Moreover, the plaintiffs' claim for damages is based on systemic shortcomings. In that sense, this case is similar to that in *Rumley v. British Columbia*, 2001 SCC 69, [2001] S.C.R. 184. Like *Cloud*, *Rumley* was a residential school case, this time involving disabled children. In *Rumley*, the Supreme Court of Canada upheld a decision of the British Columbia Court of Appeal in which the Court of Appeal certified the issue of punitive damages. On behalf of the court, McLachlin C.J.C. wrote, at para. 34:

> As noted above, Mackenzie J.A. certified as common not only the standard-of-care issue but also the punitive damages issues. Here, too, I agree with his reasoning. In this case resolving the primary common issue – whether [the school] breached a duty of care or fiduciary duty to the complainants – will require the court to assess the knowledge and conduct of those in charge of [the school] over a long period of time. This is exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified...

[76] I believe these comments apply to the present case as well. The plaintiffs' assertion that the privacy breaches were well-known, open, and flagrant amounts to an allegation that there was a systemic failure. The allegations will require the common issue trial judge to assess the knowledge and conduct of those in charge of maintaining the privacy of the patients' records. As McLachlin C.J.C. said, this is exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified.

[77] For these reasons, I have concluded that the question of punitive damages should be certified as a common issue.

Is Daniells an appropriate representative plaintiff?

[78] The Hospital submits that Daniells is not a suitable representative plaintiff with respect to common issues relating to liability because her grievance with the Hospital arises not out of McLellan's acts, but out of the acts of fellow employees – one in particular – who accessed her information and came to visit her in the hospital. In the alternative, the Hospital submits that Daniells cannot stand as a representative plaintiff with respect to any common question of damages for essentially the same reason. I will deal with the Hospital's argument concerning the suitability of Daniells as a representative plaintiff with respect to damages issues when I address the Hospital's submission that Kendall is also inappropriate with respect to those issues.

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[4] Kendall's evidence that the Hospital would not give her any information about the specific records that had been accessed nor about who had accessed them (affidavit, at para. 20) is specifically relied upon in support of the claim for aggravated, not punitive, damages (Statement of Claim, at para. 24).

[79] As I understand the Hospital's argument, Daniells fails to meet the requirements of ss. 5(1)(e)(i) and (iii) of the *CPA*, namely, that she must fairly and adequately represent the interest of the members of the class and that she must have no interest in conflict with those members on the common issues. I cannot see how Daniells fails to meet either of these requirements with respect to the common issues relating to liability.

[80] The Hospital relies on evidence Daniells gave during cross-examination on her affidavit in which she testified that she was upset when at least one staff member learned from her personal health records that she was in the hospital as a patient and came to visit her. Beginning at p. 13, question 75 of the transcript, she testified as follows:

75. Q. Melissa McLellan did not act on the breach, correct?

A. Correct.

76. Q. But you asked for an investigation as a result of another staff member of North Bay, or other staff members of North Bay, coming to visit you. Correct?

A. Correct.

77. Q. And that's what upset you and caused you to institute or initiate the investigation. Correct?

A. Correct.

78. Q. And as it relates to the other members of the proposed class, you don't know if there was anything other than their receipt of the letter in September 2011 that alerted them to the privacy breach. Correct?

A. Right. Yes.

...

82. Q. Well, let's go to that. We know that the breach of confidentiality affected you because you were upset when people came to see you. Correct?

A. Correct.

83. Q. And that was what started your upset.

A. Correct.

84. Q. Would that be a fair statement?

A. Yes.

85. Q. So it was the action on the information that at least one individual had that caused you your upset. Let me re-phrase that. Because people who …

A. Yes.

86. Q. People who came to see you, who you didn't tell you had been admitted to the hospital, that was the initial cause of your upset. Correct?

A. Yes.

87. Q. Because you didn't want them to know.

A. Right.

88. Q. And you didn't want them to come visit you.

A. Yes.

89. Q. Right

A. Thank you.

90. Q. Is that – is that – ?

A. Ummhmm.

91. Q. I want to get it out there fairly, Ms. Daniells.
And so when that happened, and because you were upset, you brought that to the attention of the co-ordinator?

A. Yes.

92. Q. And you knew that once you brought that to the attention of the co-ordinator, that a process would be started to investigate how that came to pass.

A. Yes.

93. Q. And for the other individuals who were notified of this breach of privacy, you don't know what their reaction was to the letter. Correct?

A. Correct.

94. Q. And as you sit here today, do you have any information – and your counsel can help you with this – that there was a similar incident with any or – with any of them where they were upset because something happened either while they were in the hospital or after they left the hospital that related to the breach of their privacy?

A. No.

95. Q. Okay. So if I understand that the only commonality you have with the others would be the receipt of the letter in September 2011?

A. Correct.

96. Q. And by the time you received the letter in 2011, you actually had received other correspondence from the hospital that dealt with your specific situation.

A. Yes.

97. Q. Correct? So it's fair to say the receipt of the letter of September 2011 was just a continuum of what the hospital was communicating to you.

A. Right.

98. Q. And yet for the others, that may have been the first information they had. Correct?

A. Possibly.

99. Q. You don't know.

A. I don't know.

[81] Based on this evidence, the Hospital argues that Daniells' "grievance with the hospital arises out of a completely different breach" than that of the other class members (Factum, at para. 80). I do not see how this could be true. As the Statement of Claim makes clear, Daniells' claim is based solely on McLellan's act of accessing her personal health information and on the acts of no other. In that respect, the receipt by Daniells of the Notice Letter is the only commonality required to make her a member of the overall class. The fact that McLellan's breaches were discovered as a result of Daniells' complaints about breaches by other staff members does not create any interest in conflict with the other members of the class. Nor does the fact that Daniells was upset by those breaches.

[82] I am also unable to see how Daniells' experience would affect her ability to represent the class fairly and adequately. The fact that Daniells may have been upset initially about being visited by a staff member does not logically lead to an inference that she will not vigorously and capably prosecute the interests of class members whose personal health information, like that of Daniells, was accessed by McLellan.

[83] If anything, Daniells' experience puts her in a better position than any of the other members of the class as far as liability is concerned. The events that led to the discovery of McLellan's breaches would, at a minimum, be part of the narrative in this case, if not evidence in support of the plaintiffs' claim of a systemic failure deserving of an award of punitive damages. Daniells might well have been called as a witness, if not as a party.

[84] Further, as the plaintiffs submit, Daniells is a Hospital employee whose knowledge of her employer's policies, practices, and procedures in relation to protecting the privacy of its patients will be a valuable advantage to the class members.

[85] In my view, Daniells is an appropriate representative plaintiff with respect to common liability issues.

Is Kendall an appropriate representative plaintiff with respect to any common question related to damages? If so, should she be added to the action?

[86] In response to the Hospital's concern about the suitability of Daniells as a representative plaintiff, plaintiffs' counsel proposes to add or substitute Kendall as a representative plaintiff. However, the Hospital also contests Kendall's suitability as a representative of the class because of her involvement in an earlier lawsuit involving the Hospital.

[87] In 2011, Kendall sued a number of defendants, including the Hospital for medical malpractice. In the motion it brought under Rule 21, the Hospital sought an order that Kendall was not a suitable representative plaintiff because of a release she had signed in favour of the Hospital as part of the settlement of the action. The Hospital argued that it was possible that Kendall had absolved the Hospital of liability for all or a part of the damages she suffered as a result of the breach of her privacy by McLellan when she signed the release. I held that she had not.

[88] In this motion, the Hospital submits that Kendall is not an appropriate class representative for two reasons. First, as it did with respect to Daniells, the Hospital submits that Kendall will not fairly and adequately represent the interests of the class. However, the Hospital makes that submission for a different reason than it did with respect to Daniells. The Hospital submits that Kendall is an inappropriate representative plaintiff because her credibility has suffered in the course of pre-trial proceedings. In particular, during cross-examination on her affidavits sworn in support of the certification motion, Kendall testified that she had discussed the privacy breach with a counsellor. However, a subsequent review of the counsellor's notes and records showed that there was no reference at all in them to the privacy breach.

[89] In my opinion, the Hospital's argument about this aspect of Kendall's suitability must fail. The apparent inconsistency between Kendall's evidence and the clinical notes and

records gives rise, at best, to a question relating to Kendall's *reliability* as a witness, not necessarily her *credibility*. There is no evidence to support the assumption that everything Kendall discussed with her counsellor found its way into the notes in question. Even if one assumes that the absence of any entry in the notes probably means that Kendall did not discuss the privacy breach with her counsellor, there is no evidence that Kendall was anything other than mistaken about what they discussed. This is not sufficient to make her unsuitable as a representative plaintiff.

[90] The Hospital also argues that Kendall is unsuitable as a representative plaintiff specifically with respect to any common issue of damages. As it did with respect to Daniells, the Hospital submits that Kendall's experience is too unique to allow her to stand as a representative of the class. I disagree with this argument as it relates to both Daniells and Kendall.

[91] As the Hospital correctly submits, the proposed representative plaintiff need not be "typical" of the class, nor the "best" possible plaintiff: *Western Canadian Shopping Centres*, at para. 41. The distinct nature of a plaintiff's situation will only preclude that plaintiff from representing the class where it is so unique as to undermine the commonality requirement that underpins the *CPA*: *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.), at para. 183. That is not the case with respect to either Daniells or Kendall.

[92] Contrary to the submissions of the Hospital, the uniqueness of each of these two plaintiffs is an advantage to the class, not an impediment. Their experiences will provide a better backdrop to the question of whether an aggregate assessment of damages is possible than would the experience of a "cookie-cutter" plaintiff. It is of no assistance to approach the issue of aggregate damages on the basis of a benign fact situation, only to realize later that the experience of other members of the class fits badly into the mold, if it fits at all. In other words, it is better to determine whether an aggregate assessment of damages is possible on a unique fact situation than on any other, except where the uniqueness of that fact situation is such as to preclude the result at trial from applying to the experiences of other class members. It does not rise to that level in the case of either Daniells or Kendall.

[93] For this reason, I do not accept that either of the proposed representative plaintiffs are inappropriate. One question remains, however, namely whether Kendall should be added to the action. I believe that she should be, for three reasons.

[94] First, I would not preclude the possibility that the trial judge might wish to create subclasses, even if not along the lines proposed by the Hospital. The trial judge might wish, for example, to create subclasses for those plaintiffs who were hospital employees and those who were not.

[95] Second, Kendall's situation seems to me to be the one underpinning the claim for aggravated damages advanced on behalf of the overall class, as I mentioned in a footnote above.

[96] Third, in their notice of motion, the plaintiffs request an order adding Kendall to the action, if suitable, rather than substituting her for Daniells. The Hospital has taken the position that neither plaintiff is suitable. It has not taken the position that only one should be appointed, if the court finds that both are suitable.

[97] For these reasons, Kendall should be added as a representative plaintiff.

Should prejudgment and postjudgment interest be certified as common issues?

[98] The plaintiffs propose to certify the following as two of the common issues:

> Are the class members entitled to prejudgment interest on their damages? If so, how will said interest be calculated?

[99] The Hospital submits that there is no need to certify a common issue of prejudgment and postjudgment interest. The plaintiffs have taken no position in reply.

[100] I agree with the Hospital. As Belobabba J. wrote in *DaSilva v. 2162095 Ont. Ltd.*, [2016] O.J. No. 2397 (Q.L.) (S.C.), at para. 14, "the certification judge should not clutter up the common issues list with issues that (1) do not advance the litigation, and (2) obviously fall within the inherent jurisdiction of the trial judge whether certified or not."

Should the remaining common issues proposed by the plaintiff be reframed?

[101] The Hospital submits that the common issues proposed by the plaintiffs should be reframed. The full list of common issues proposed by the Hospital is attached as Appendix "B". Originally, the Hospital's position was tied to its submission concerning the creation of subclasses. Although I do not agree that subclasses should be created at this point in time, I do agree that the common issues proposed by the plaintiffs should be reframed. In the discussion that follows, for ease of reference, I will set out the common issues proposed by the plaintiffs and, in some cases, the Hospital, followed by a discussion of my reasons for reframing the issue or issues.

[102] The first two common issues proposed by the plaintiffs are as follows:

> PRIVACY
>
> Did the defendants owe a legal duty to the class members to keep and maintain the privacy of their personal health information and to protect it from unauthorized access or disclosure? If so, did the defendants breach that legal duty?
>
> Did Melissa McLellan breach the privacy of the class members by accessing and viewing their personal health information without their consent?

[103] As well, under the heading "Vicarious Liability", the plaintiffs propose the following common issue:

> Is the North Bay Regional Health Centre vicariously liable for Melissa McLellan's breaches of the class members' privacy?

[104] In these proposed common issues, the plaintiffs question whether the defendants owed the class members a legal duty "to maintain the privacy" of their health records. In my view, these issues should not be certified as proposed because they have not been pleaded as a separate cause of action.

[105] The common issues must arise from and be framed by the pleadings. Nowhere in the Statement of Claim do the plaintiffs plead that the defendants have a duty to maintain the privacy of the records of the class members in any way other than as part of a recognized, well-established legal duty. Instead, in paragraphs 7 to 9, inclusive, of the Statement of Claim, under the heading "The Breach of Privacy", the plaintiffs set out the *manner* in which it is alleged McLellan breached the privacy of the class members, not the *legal duty* that was breached. The plaintiff (Daniells) goes on to allege damages for negligence, breach of fiduciary duty, breach of contract, and intrusion upon seclusion. It is within the framework applicable to these established legal duties that the plaintiffs allege that the class members are owed damages, not within some generalized and novel new "breach of privacy" tort.

[106] I turn now to the issues relating to the causes of action actually pleaded, beginning with negligence. The plaintiffs propose the following common issues:

> NEGLIGENCE
>
> Did the defendants owe a duty of care to the class members to keep their personal health information private, secure and protected from unauthorized access or disclosure? If so, did the defendants breach that duty of care?
>
> What is the standard of care required by the defendants to properly collect, store and safeguard the personal health information of the class members in order to protect it from unauthorized access or disclosure? Did the defendants breach that standard of care?
>
> Were the defendants negligent in allowing Melissa McLellan to breach the privacy of the class members by accessing and viewing their personal health information without their consent?

[107] The Hospital proposes that these issues be framed as follows:

> Did the hospital owe a duty of care to the plaintiffs to protect the private health information of the class members from unauthorized disclosure, and was that duty breached by Melissa McLellan's access to their private health information without authorization?

> Did Melissa McLellan owe the class members a duty of care to refrain from accessing their private health information without consent or authorization, and did her actions breach that duty?

[108] As framed, the negligence common issues proposed by both the plaintiffs and the Hospital refer to both defendants. However, the Statement of Claim alleges only that *the Hospital* owed the plaintiff a duty of care. No duty of care is alleged against McLellan in the Statement of Claim. No additional duties are alleged in the Hospital's cross-claim against McLellan beyond those duties alleged against her in the Statement of Claim. For this reason, I would not certify a common issue of negligence against McLellan.

[109] My decision does not mean that the Hospital would escape liability in negligence for the acts of its employees, including McLellan. A non-corporeal entity such as the Hospital can only act, or fail to act, through its officers, directors, employees, and others. This legal truism is captured in para. 11 of the Statement of Claim, in which the plaintiffs plead that the Hospital "is in law responsible" for the acts of its employees, etc.

[110] Although I do not agree with the suggestion that a common question of McLellan's negligence should be certified, I do agree with the language used by the Hospital in framing the issues of negligence against it. In my view, it succinctly sets out the legal question to be answered. However, I find the reference to a duty to *the plaintiffs* to protect the private health information of *the class members* to be confusing. I would keep the language used by the plaintiffs in this regard. I would also separate the two issues of duty of care and breach of the duty by reframing these issues as follows:

> **Did the Hospital owe a duty of care to protect the private health information of the class members from unauthorized disclosure?**
>
> **If so, was this duty breached by Melissa McLellan's access to their private health information without consent or authorization?**

[111] The plaintiff proposes the following common questions with respect to the issue of fiduciary duty:

> FIDUCIARY DUTY
>
> Did the defendants owe a fiduciary duty to the class members to properly collect, store and secure their personal health information and protect it from unauthorized access or disclosure? If so, did the defendants breach that duty?
>
> Did Melissa McLellan's breach of the class members' privacy amount to the breach of the fiduciary duty owed to the class members by the defendants?

[112] The Hospital proposes that the issue be framed this way:

> Did the Hospital stand in a fiduciary relationship with the class members and if the answer is yes did the Hospital breach its fiduciary obligations by failing to prevent the actions of Melissa McLellan?

[113] Unlike the allegations of negligence, the plaintiff *has* pleaded that *both* defendants stood in a fiduciary relationship to the plaintiff (Statement of Claim, at para. 12). For this reason, I do not agree with the way in which the Hospital proposes to frame the common issue relating to fiduciary duty, which refers only to a fiduciary duty on its part, and not on the part of McLellan. However, once again, I believe that the phraseology proposed by the Hospital more succinctly captures the question, with the exception of the reference to a duty to the plaintiffs towards the class members. The wording used by the Hospital incorporates phraseology used by the plaintiffs in framing some of the common issues ("to properly collect, store and secure" the information), with which I agree. Therefore, I would reframe these proposed common issues as follows:

> **Did the defendants have a fiduciary duty to properly collect, store, and secure the personal health information of the class members?**
>
> **If so, was that duty breached by McLellan's access to their private health information without their consent or authorization?**

[114] The plaintiffs propose that the common issues relating to breach of contract be certified as follows:

> CONTRACT
>
> Did the defendants have a contractual obligation to the class members to properly collect, store and secure their personal health information and protect it from unauthorized access and disclosure? If so, did the defendants breach that contract?
>
> Did Melissa McLellan's breach of the class members' privacy amount to the breach of the contractual obligation owed to the class members by the defendants?

[115] Once again, the plaintiffs propose to frame the common issues relating to breach of contract by alleging a contractual obligation against both defendants. However, they have alleged only that the Hospital was under a contractual obligation (Statement of Claim, at para. 13). For that reason, I agree with the Hospital that the common issue relating to breach of contract should involve only the Hospital. In reframing the issue, I would again adopt the Hospital's proposed wording, but I would also separate the issues of duty and breach. I would reframe the contract issues as follows:

Did the Hospital have a contractual obligation to properly collect, store, and secure the personal health information of the class members?

If so, did the Hospital breach that contractual obligation?

[116] Dealing with the tort of intrusion upon seclusion, the plaintiffs propose that the following common issues be certified:

> INTRUSION UPON SECLUSION
>
> Is Melissa McLellan liable to the class members for the tort of intrusion upon seclusion?
>
> Is the North Bay Regional Health Centre vicariously liable for Melissa McLellan's tortious intrusion upon seclusion?

[117] The Hospital proposes that the common issue relating to intrusion upon seclusion be framed as follows:

> Is the Hospital vicariously liable for Melissa McLellan's intrusion upon the class members' seclusion?

[118] I have a problem with the way the Hospital frames this issue. It merges the issues of McLellan's liability with that of the Hospital. In my view, those two questions ought to be dealt with separately, as they are in the Statement of Claim and in the way the plaintiffs frame the proposed issues. Therefore, I would adopt the plaintiffs' proposed wording, with two small changes. Throughout the reframed common issues, the North Bay Regional Health Centre is referred to simply as "the Hospital" and I would keep it that way for the sake of consistency. I would also use the "if so" format for the second question. The issues would thus be reframed as follows:

> **Is Melissa McLellan liable to the class members for intrusion upon their seclusion?**
>
> **If so, is the Hospital vicariously liable to the class members for McLellan's intrusion upon their seclusion?**

[119] Finally, I come to the remaining common issues relating to damages. In framing these issues, the plaintiffs refer separately to each of the various types of damages that may be awarded, depending upon the cause of action, as follows:

> DAMAGES
>
> Are the class members entitled to moral or symbolic damages for the intrusion upon their seclusion? If so, what is the appropriate measure of said damages? Can these damages be determined on a global basis?

> Are the class members entitled to non-pecuniary damages? If so, what is the appropriate measure of said damages? Can these damages be determined on a global basis?
>
> Are the class members entitled to pecuniary damages? If so, what is the appropriate measure of said damages? Can these damages be determined on a global basis?
>
> Are the class members entitled to special damages? If so, what is the appropriate measure of said damages? Can these damages be determined on a global basis?
>
> Are the class members entitled to aggravated damages? If so, what is the appropriate measure of said damages? Can these damages be determined on a global basis?
>
> Are the class members entitled to punitive damages? If so, what is the appropriate measure of said damages? How will these damages be distributed among the class members?

[120] I have concerns about the way these proposed issues are framed. First, I believe that the questions should reflect as much as possible the wording of the *CPA*. The *CPA* refers to the aggregate assessment of damages, not assessment "on a global basis." As Winkler J.A. pointed out in *Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443, 111 O.R. (3d) 346, at para. 115, "it is important to be precise about what is meant by the term 'aggregate' in the class action context".

[121] Second, as framed, the questions relating to each type of damages include as a second question: "If so, what is the appropriate measure of said damages?" With the exception of the issues relating to punitive damages, I believe that this question should be asked only *after* the question relating to the possibility of an aggregate assessment of damages. This is because the measure of damages is not part of the common issues trial unless those damages can be ascertained on an aggregate, as opposed to an individual, basis. For this reason, the questions relating to an aggregate assessment of special damages should be removed completely, as the plaintiffs have conceded that special damages necessarily require individual assessments (Reply Factum, at para. 30).

[122] Third, in order to reflect the wording of s. 24(1)(c) of the *CPA*, as pointed out in *Good*, I would include in the question relating to an aggregate assessment of damages the possibility of an aggregate assessment of *part* of the defendants' liability.

[123] Thus, I would frame each of the damage issues set out in paras. (m) through (q) in the plaintiffs' proposed list of common issues as follows:

> **Are the class members entitled to moral or symbolic damages for the intrusion upon their seclusion? If so, can an aggregate**

assessment be made of all or part of these damages? If so, what is the appropriate measure of said damages?

Are the class members entitled to non-pecuniary damages? If so, can an aggregate assessment be made of all or part of these damages? If so, what is the appropriate measure of said damages?

Are the class members entitled to pecuniary damages? If so, can an aggregate assessment be made of all or part of these damages? If so, what is the appropriate measure of said damages?

Are the class members entitled to special damages?

Are the class members entitled to aggravated damages for the intrusion upon their seclusion? If so, can an aggregate assessment be made of all or part of these damages? If so, what is the appropriate measure of said damages?

Are the class members entitled to punitive damages? If so, what is the appropriate measure of these damages? How will these damages be distributed to the class members?

[124] I have set out a complete list of the reframed common issues at Appendix "C" to these reasons.

CONCLUSION

[125] For the foregoing reasons, Kendall will be added to the action and the action shall be certified as a class proceeding under s. 2 of the *CPA*.

[126] There will be one class, namely, the overall class as defined by the plaintiffs.

[127] The Hospital will have 30 days from the release of these reasons to deliver written submissions with respect to the applicability of the decision in *Good* to the possibility of an aggregate assessment of damages in the case at bar. The plaintiffs shall have 20 days following receipt of the Hospital's submissions within which to deliver a reply. The submissions of the parties will be limited to 10 typewritten pages.

[128] Subject to the submissions of the parties regarding the issue of aggregate damages, I would certify the common issues set out in Appendix "C" to these reasons.

ORDER

[129] Once I have decided the outstanding issue surrounding the decision in *Good*, I will invite the parties to collaborate upon and submit a draft order for my review.

[130] I will also request the parties' submissions as to costs.

Ellies J.

Released: September 13, 2017

APPENDIX "A"

PRIVACY

(a) Did the defendants owe a legal duty to the class members to keep and maintain the privacy of their personal health information and to protect it from unauthorized access or disclosure? If so, did the defendants breach that legal duty?

(b) Did Melissa McLellan breach the privacy of the class members by accessing and viewing their personal health information without their consent?

NEGLIGENCE

(c) Did the defendants owe a duty of care to the class members to keep their personal health information private, secure and protected from unauthorized access or disclosure? If so, did the defendants breach that duty of care?

(d) What is the standard of care required by the defendants to properly collect, store and safeguard the personal health information of the class members in order to protect it from unauthorized access or disclosure? Did the defendants breach that standard of care?

(e) Were the defendants negligent in allowing Melissa McLellan to breach the privacy of the class members by accessing and viewing their personal health information without their consent?

FIDUCIARY DUTY

(f) Did the defendants owe a fiduciary duty to the class members to properly collect, store and secure their personal health information and protect it from unauthorized access or disclosure? If so, did the defendants breach that duty?

(g) Did Melissa McLellan's breach of the class members' privacy amount to the breach of the fiduciary duty owed to the class members by the defendants?

CONTRACT

(h) Did the defendants have a contractual obligation to the class members to properly collect, store and secure their personal health information and protect it from unauthorized access and disclosure? If so, did the defendants breach that contract?

(i) Did Melissa McLellan's breach of the class members' privacy amount to the breach of the contractual obligation owed to the class members by the defendants?

VICARIOUS LIABILITY

(j) Is the North Bay Regional Health Centre vicariously liable for Melissa McLellan's breaches of the class members' privacy?

INTRUSION UPON SECLUSION

(k) Is Melissa McLellan liable to the class members for the tort of intrusion upon seclusion?

(l) Is the North Bay Regional Health Centre vicariously liable for Melissa McLellan's tortious intrusion upon seclusion?

DAMAGES

(m) Are the class members entitled to moral or symbolic damages for the intrusion upon their seclusion? If so, what is the appropriate measure of said damages? Can these damages be determined on a global basis?

(n) Are the class members entitled to non-pecuniary damages? If so, what is the appropriate measure of said damages? Can these damages be determined on a global basis?

(o) Are the class members entitled to pecuniary damages? If so, what is the appropriate measure of said damages? Can these damages be determined on a global basis?

(p) Are the class members entitled to special damages? If so, what is the appropriate measure of said damages? Can these damages be determined on a global basis?

(q) Are the class members entitled to aggravated damages? If so, what is the appropriate measure of said damages? Can these damages be determined on a global basis?

(r) Are the class members entitled to punitive damages? If so, what is the appropriate measure of said damages? How will these damages be distributed among the class members?

PREJUDGMENT INTEREST

(s) Are the class members entitled to prejudgment interest on their damages? If so, how will said interest be calculated?

APPENDIX "B"

Negligence

1. Did the hospital owe a duty of care to the plaintiffs to protect the private health information of the class members from unauthorized disclosure and, was that duty breached by Melissa McLellan's access to their private health information without authorization?

2. Did Melissa McLellan owe the class members a duty of care to refrain from accessing their private health information without consent or authorization, and did her actions breach that duty?

Contract

3. Did the Hospital have a contractual obligation to properly collect, store, and secure the personal health information of the class members and, if so, did the Hospital breach that contractual obligation?

Fiduciary Duty

4. Did the Hospital stand in a fiduciary relationship with the class members and if the answer is yes did the Hospital breach its fiduciary obligations by failing to prevent the actions of Melissa McLellan?

Intrusion upon Seclusion

5. Is the Hospital vicariously liable for Melissa McLellan's intrusion upon the class members' seclusion?

Damages

6. What is the quantum of aggregate general damages in negligence that Subclass (A) is entitled to?

7. What is the quantum of aggregate general damages for breach of contract that Subclass (A) is entitled to?

8. What is the quantum of aggregate general damages for breach of fiduciary duty that Subclass (A) is entitled to?

9. What is the quantum of aggregate moral or symbolic damages for intrusion upon seclusion that Subclass (A) is entitled to?

APPENDIX "C"

Negligence

Did the Hospital owe a duty of care to protect the private health information of the class members from unauthorized disclosure?

If so, was this duty breached by Melissa McLellan's access to their private health information without consent or authorization?

Fiduciary Duty

Did the defendants have a fiduciary duty to properly collect, store, and secure the personal health information of the class members?

If so, was that duty breached by McLellan's access to their private health information without consent or authorization?

Contract

Did the Hospital have a contractual obligation to properly collect, store, and secure the personal health information of the class members?

If so, did the Hospital breach that contractual obligation?

Intrusion upon Seclusion

Is Melissa McLellan liable to the class members for intrusion upon their seclusion?

If so, is the Hospital vicariously liable to the class members for McLellan's intrusion upon their seclusion?

Damages

Are the class members entitled to moral or symbolic damages for the intrusion upon their seclusion? If so, can an aggregate assessment be made of all or part of these damages? If so, what is the appropriate measure of said damages?

Are the class members entitled to non-pecuniary damages? If so, can an aggregate assessment be made of all or part of these damages? If so, what is the appropriate measure of said damages?

Are the class members entitled to pecuniary damages? If so, can an aggregate assessment be made of all or part of these damages? If so, what is the appropriate measure of said damages?

Are the class members entitled to special damages?

Are the class members entitled to aggravated damages for the intrusion upon their seclusion? If so, can an aggregate assessment be made of all or part of these damages? If so, what is the appropriate measure of said damages?

Are the class members entitled to punitive damages? If so, what is the appropriate measure of these damages? How will these damages be distributed to the class members?

CITATION: Daniells v. McLellan, 2017 ONSC 3466
COURT FILE NO.: CV-13-5565-CP
DATE: 2017/09/13

ONTARIO

SUPERIOR COURT OF JUSTICE

SHERRY-LYNN DANIELLS

Plaintiff

– and –

MELISSA McLELLAN and NORTH BAY REGIONAL HEALTH CENTRE

Defendants

REASONS FOR DECISION ON MOTION

Ellies J.

Released: September 13, 2017