

Case Name:
Rose v. Pettle

PROCEEDING UNDER the Class Proceedings Act, 1992

Between
Sheila R. Rose, plaintiff, and
Dr. Alvin Pettle and Sandra Testaguzza, defendants

[2004] O.J. No. 739
Court File No. 03-CV-242180 CP

Ontario Superior Court of Justice
Cullity J.

Heard: February 17-18, 2004.
Judgment: February 26, 2004.
(55 paras.)

Counsel:

Michael McGowan, Dorothy Fong and Nicola Savin, for the plaintiff, Sheila R. Rose.
Mary M. Thomson and Christopher Hubbard, for the defendant, Dr. Alvin Pettle.
Michelle Brodey, for the defendant, Sandra Testaguzza.

¶ 1 **CULLITY J.**— The plaintiff, Sheila R. Rose, contracted a skin infection - Mycobacterium abscessus - that she attributes to a course of acupuncture treatments administered by the defendant, Sandra Testaguzza, at the Ruth Pettle Wellness Centre (the "Centre") between July 5, 2002 and September 25, 2002. The action was commenced under the Class Proceedings Act, 1992 ("CPA") on behalf of a class of persons who received acupuncture treatments from Ms Testaguzza between January 1, 2000 and December 16, 2002 at the Centre, or at Ms Testaguzza's home in Islington Avenue, Toronto, and the relatives of such persons. In the statement of claim, as amended, Ms Rose seeks compensatory and punitive damages against Ms Testaguzza and the other defendant, Dr. Alvin Pettle, for battery, negligence, breach of contract and breach of fiduciary duty. Central to each of these causes of action, as pleaded, is an allegation that the acupuncture treatments Ms Rose - and other putative class members - received were administered without regard to proper infection control procedures and, in particular, without the use of disposable needles. Statements of defence have been delivered.

¶ 2 Dr. Pettle is a licensed medical practitioner who is alleged in the statement of claim to own, operate and supervise the Centre in association with Ms Testaguzza. He carries on a practice of preventative medicine at 3910 Bathurst Street under the name of the Centre. The Centre is not a legal entity.

¶ 3 At the commencement of the hearing of the motion for certification, Mr. McGowan indicated that the plaintiff proposed to proceed only with the claims based on negligence. In his submission, the deletion of the other claims would require the court's approval pursuant to section 29 of the CPA as a "discontinuance" but that such approval should be granted.

¶ 4 I note that, unlike rules 23.01(1) and 23.04(1), section 29 refers to the discontinuance of a proceeding and not to that of "part of" an action and it may be that the approval of the court is not required where it is proposed to continue a class proceeding on the basis of one or more of the causes of action that have been pleaded. However, even if this is correct, leave of the court would still be required pursuant to rule 23.01(1) if the statement of claim is to be amended.

¶ 5 The reasons Mr. McGowan gave in support of his request for the court's approval were that, to the extent that each of the claims depended on the same allegations of a failure to observe infection control procedures, the causes of action, other than negligence, should be considered to be largely redundant; and, to the extent that they would require proof of different facts, he anticipated greater difficulty in satisfying the requirements for certification in section 5(1) of the CPA. In this connection he referred specifically to *Egglestone v. Barker et al*, [2003] O.J. No. 3137 (S.C.J.).

¶ 6 In my opinion, the considerations to which Mr. McGowan referred involve an exercise of counsel's professional judgment with which the court should be slow to interfere and I do not intend to do so. There is nothing to suggest that the interests of other putative class members would be adversely affected if approval is granted and I do not believe it is necessary for notice to be given to them at this stage of the proceedings.

¶ 7 Ms Thomson expressed some concern that the discontinuance of the particular claims would leave open the possibility that they might subsequently be resurrected in separate proceedings, or at a later stage of this action. As far as the first of these possibilities is concerned, I do not see why the position should be any different than if, from its inception, this action had been pleaded solely in negligence. The fact that the abandonment of the additional causes of action might strengthen the plaintiff's case for certification - and weaken that of the defendants in opposing certification - is not, I think, a consideration that helps the defendants. As a practical matter, the possibility that the plaintiff might obtain leave to resurrect those causes of action in these proceedings, after certification, seems unlikely to have much weight even if the submissions of Ms Thomson that were accepted in *Egglestone* are found to be less persuasive elsewhere. In any event, Mr. McGowan indicated that he would be prepared to give an undertaking on behalf of his client that no attempt to revive the discontinued claims will be made in this action and, if this is reflected in any order certifying the proceedings, it should be sufficient to deal with Ms Thomson's concerns.

Certification

¶ 8 The plaintiff must establish that the requirements in section 5(1) of the CPA are satisfied. Evidence is admissible to establish that each of the requirements - other than that in section 5(1)(a) - has some basis in fact. Where the application of the requirements may differ in relation to each of the defendants, I will consider their respective positions - and the submissions of their counsel - in turn, beginning, in each case, with that of Ms Testaguzza.

1. Section 5(1)(a) - disclosure of a cause of action

¶ 9 There was no disagreement among counsel on the approach to be taken in determining whether the requirement in section 5(1)(a) is satisfied. The applicable law is well-established. The question is to be determined on the basis of the pleadings and the principles are essentially the same as those that apply in motions under rule 21.01(1)(b). The requirement will be satisfied unless it is plain and obvious that no reasonable cause of action is disclosed by the statement of claim. For this purpose the pleading should be read as generously as possible with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies: *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d)

453 (Div. Ct.), at page 469. Neither novelty of the action, the complexity of the issues nor the potential for a defendant to present a strong defence will prevent the requirement from being satisfied. This will occur only if the action, as pleaded - and assuming that the facts set out in the statement of claim are proven - is certain to fail: *Hunt v. Carey* (1990), 74 D.L.R. (4th) 321 (S.C.C.), at page 336; *Abdool* (above). The requirement in section 5(1)(a) will be satisfied if the claims could, in law, succeed on the basis of the material facts pleaded. For this purpose, it has been held that a finding to the contrary should not be made if it is dependent on a resolution of a question of law that is not fully settled in the jurisprudence: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.), at page 679; *Toronto-Dominion Bank v. Deloitte Haskins & Sells* (1991), 5 O.R. (3d) 417 (G.D.).

(a) Ms Testaguzza

¶ 10 The statement of claim alleges that, in providing acupuncture treatment to patients, Ms Testaguzza was negligent in re-using needles and purporting to sterilise them between treatments instead of using single-use disposable, pre-sterilised needles; or in using contaminated solutions to store the needles, or contaminated antiseptic on the patient's skin prior to the insertion of the needles. It alleges further that, in so doing, she failed to take all proper care and failed to exercise the skill, knowledge and judgment of an ordinary and prudent acupuncturist and that, when using re-usable needles, she knew or ought to have known that patients had already contracted, or could, contract *Mycobacterium abscessus* or other diseases such as HIV, hepatitis B and hepatitis C.

¶ 11 It is further pleaded that Ms Rose and other patients within the putative class suffered harm as a result of Ms Testaguzza's negligence - either by becoming ill or suffering severe nervous shock when informed by public health authorities that they may have been exposed to the above infections infection as a result of the acupuncture treatment they received at the Centre and that they should undergo testing to ascertain whether they have contracted them.

¶ 12 Ms Brodey did not dispute that these allegations of fact in the statement of claim are sufficient to satisfy the requirement in section 5(1)(a) and I do not believe there is any doubt that they do.

(b) Dr. Pettle

¶ 13 Dr. Pettle is not alleged to have been present at, or otherwise directly involved in, Ms Testaguzza's treatment of her patients. Nor is it pleaded that she was his employee. Although Mr. McGowan indicated that he would rely on Dr. Pettle's vicarious liability for Ms Testaguzza's negligence if he could, the statement of claim does not set out material facts on which an employer-employee relationship could be based. As pleaded, any liability of Dr. Pettle must, in my judgment, be based fundamentally on the plea in paragraph 3 of the statement of claim that he "owns, operates and supervises" the Centre.

¶ 14 It is pleaded, further, that Dr. Pettle was negligent in that, among other things, he did not operate the clinic in accordance with acceptable standards applicable to acupuncture treatment, he failed to exercise the skill, knowledge and judgment of an ordinary prudent physician in the supervision and administration of acupuncture treatment by Ms Testaguzza at the Centre and he failed to ensure that she used only disposable needles when he knew, or ought to have known, of the risk that patients would contract *Mycobacterium abscessus*, HIV, hepatitis or other diseases.

¶ 15 Ms Thomson submitted that it was plain and obvious that proof of the factual propositions involved in the above allegations would not establish that Dr. Pettle owed a duty of care to patients treated by Ms Testaguzza. She emphasized that, in Ontario, there is no statutory requirement that

acupuncturists work under the supervision of licensed medical practitioners and, in her submission, there was no common law duty on Dr. Pettle to monitor, and supervise, the treatment administered by Ms Testaguzza.

¶ 16 Ms Thomson also submitted that the harm that the patients allegedly suffered was not reasonably foreseeable as a probable consequence of Dr. Pettle's failure to control or supervise Ms Testaguzza and that, independently of the question of reasonable foresight, the relationship of proximity required at the first stage of the *Anns* analysis was absent.

¶ 17 In Mr. McGowan's submission, those of Ms Thomson were very largely beside the point as it was not the plaintiff's position that Dr. Pettle would have breached a common or statutory duty if he had not purported to supervise the treatment administered by Ms Testaguzza. If it is proven at trial that he had - as pleaded - purported to do so, the common law would, in Mr. McGowan's submission, have imposed a duty to exercise care in so doing. Dr. Pettle's reasonable foresight of the risk of infection from the re-use of acupuncture needles was pleaded and it could not be said that there was an absence of proximity between Dr. Pettle and Ms Testaguzza's patients.

¶ 18 The requirement of proximity was explained by Iacobucci J. in *Odhavji v. Woodhouse* 2003 S.C.C. 69 as follows:

48. ... It is only if harm is a reasonably foreseeable consequence of the conduct in question and there is a sufficient degree of proximity between the parties that a prima facie duty of care is established. The question that thus arises is what precisely is meant by the term proximity.
49. McLachlin C.J. and Major J. concluded, [in *Cooper v. Hobart*, [2001] 3 S.C.R. 537] at para. 32, that the term proximity, in the context of negligence law, is used to describe the type of relationship in which a duty of care to guard against foreseeable harm may rightly be imposed. As this court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24:

The label "proximity", as it was used by Lord Wilberforce in *Anns*, ... was clearly intended to connote that the circumstances of the relationship inherent between the plaintiff and defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.

50. Consequently, the essential purpose of the inquiry is to evaluate the nature of that relationship in order to determine whether it is just and fair to impose a duty of care on a defendant. The factors that are relevant to this inquiry depend on the circumstances of the case. As stated by McLachlin J. (as she then was) in *Norsk*, [1992] 1 S.C.R. 1021, ... at p. 1151, "[proximity] may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" ... Examples of factors that might be relevant to the inquiry include the expectations of the parties, representations, reliance and the nature of the property or interest involved.

¶ 19 *Odhavji* was the only authority cited on the question of proximity. There, claims of negligence were made against the Chief of Police, the Toronto Police Services Board and the Province for allegedly

failing to ensure that police officers co-operated in an investigation of the fatal shooting of an individual. The Supreme Court of Canada found that it was not plain and obvious that the material facts pleaded would not establish proximity between the Chief of Police and the family of the deceased but reached the opposite conclusion with respect to the Board and the Province. One of the factors relied on by the court was that, while the Chief had a statutory obligation to ensure that the police officers co-operated with the investigation, there was no similar duty on the Board or the Province.

¶ 20 In this case, as I have already indicated, it was not suggested that Dr. Pettle had a statutory, or a professional, responsibility to supervise the treatment administered by Ms Testaguzza. Rather it was suggested that a finding of proximity could be made as a consequence of his ownership, operation and supervision of the clinic. Implicit in this plea is that he had a right to ensure that proper infection control procedures were observed by her. I find the question whether the existence of such a right would be sufficient to establish proximity between him and the patients who received treatment from other professionals at the Centre to be one of some difficulty. While it might well be reasonably foreseeable that a failure to exercise such supervision would expose patients to the risk of harm, by itself that is not enough to give rise to a duty of care. In *Odhavji*, when dealing with the claim in negligence against the Chief of Police, Iacobucci J. stated:

The next question that arises is whether there is sufficient proximity between the parties so that a duty of care may rightly be imposed on the Chief. It may be that the appellants can show that it was reasonably foreseeable that the alleged misconduct would result in psychiatric harm, but foreseeability alone is an insufficient basis on which to establish a prima facie duty of care. In addition to showing foreseeability, the appellants must establish that it is just and fair to impose on the Chief a private law obligation to ensure that the defendant officers co-operated with the SIU. A broad range of factors may be relevant to this inquiry, including a close causal connection, the parties expectations and any assumed or imposed obligations.

¶ 21 There is some support in the authorities for a general proposition that a person who has a right to exercise control over another person's conduct will have a duty of care that will be breached if other individuals suffer harm as a result of a failure to exercise such control. In *Dutton v. Bognor Regis UDC*, [1972] 1 Q.B. 373 (C.A.), for example, Lord Denning M.R. stated:

Much discussion took place before us as to whether the council were under a duty to [inspect] or had only a power to do so. ... There is a middle term. It is control. ... The common law has always held that a right of control over the doing of work carries with it a degree of responsibility in respect of the work. (at pages 392-3).

¶ 22 Similarly, in *Dorset Yacht Co. Ltd. v. Home Office*, [1970] A.C. 1004 (H.L.), at pages 1038-9, Lord Morris emphasized the relevance of the existence of a right to control third parties whose actions caused damage to the plaintiffs:

I consider that the feature in the present case that there was a right to exercise control over the boys makes it sufficiently analogous with cases in which it has been held that there was a duty situation to make it reasonable so to hold here. In his judgment in *Smith v. Leurs* (1945) 78 C.L.R. 256 Dixon J. said, at pp. 261-262:

But, apart from vicarious responsibility, one man may be responsible to another

for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature.

In the present case there was, I think, a special relation of this nature.

There was a special relation in that the officers were entitled to exercise control over boys who to the knowledge of the officers might wish to take their departure and who might well do some damage to property near at hand. The events which are said to have happened could reasonably have been foreseen. The possibility that the property of the company might be damaged was not a remote one. A duty arose. It was a duty owed to the [plaintiff]. It was not a duty to prevent the boys from escaping or from doing damage but a duty to take such care as in all the circumstances was reasonable in the hope of preventing the occurrence of events likely to cause damage to the [plaintiff].

(See also at page 1063 per Lord Diplock; *Smith v. Littlewoods Organisation Ltd.*, [1987] A.C. 241 (H.L.), at page 272 per Lord Goff; and *P. Perl (Exporters) Ltd. v. Camden LBC*, [1984] Q.B. 342 (C.A.), at page 359 per Goff L.J.)

¶ 23 I am not persuaded that a medical practitioner who owns and operates a clinic where he supervises the treatment provided by other health practitioners cannot, by reason of those facts, be in a sufficient degree of relationship of proximity to those who receive such treatment to give rise to a duty of care. Whether proximity exists in this case may depend on proof of the extent to which such supervision, if any, was exercised, the extent that Ms Testaguzza's activities should be considered - or were considered by patients - to be associated with those of Dr. Pettle and the Centre, the extent of his involvement - economic or otherwise - in such activities and the extent and nature of any contacts he had with her patients. These, and questions relating to Dr. Pettle's ability to control Ms Testaguzza's performance of her occupational functions are, in my view, matters on which evidence might be given at trial and not material facts that must be pleaded.

¶ 24 The extent to which the law will recognize the existence of duties of care of persons who voluntarily exercise supervision and control over others outside particular relationships is, I believe, by no means settled in the jurisprudence: *Brazier and Murphy*, *Street on Torts* (10th edition), at pages 193-5; *Fleming, The Law of Torts* (8th edition), at pages 151-5; *Klar, Tort Law* (3rd edition), at pages 196-7; *Fridman, The Law of Torts in Canada* (2nd edition), at page 326. In determining whether sufficient proximity exists, all the circumstances that throw light on the relationship between the parties must be considered. The question cannot, in my judgment, be disposed of on a motion such as this without a full evidential record; cf. *Anderson*, at page 679.

¶ 25 Section 5(4) of the CPA expressly empowers the court to adjourn a motion for certification to permit amendments to the pleadings and, in his closing submissions, Mr. McGowan requested that, if I was inclined to accept Ms Thomson's submissions, I should exercise this power to enable the statement of claim to be amended to include allegations relating to some of the matters I have mentioned. On

balance, I do not believe it is necessary to do this. I am not persuaded that it is plain and obvious that proof of the allegations in the statement of claim would be insufficient to establish the required relationship of proximity between Dr. Pettle and Ms Testaguzza's patients at the Centre and to justify a finding of negligence against him. As I indicated above, the question that arises under section 5(1)(a) requires the pleading to be read generously. Despite its brevity, the allegation that Dr. Pettle supervises the Centre implies that he exercises superintendence and control over the treatment administered there. As pleaded, the duty of care implicit in the allegations of negligence against Dr. Pettle can only be based on that alleged fact. Dr. Pettle has pleaded and has denied the allegations of negligence though not specifically the absence of a duty of care. The additional facts that Ms Thomson submitted should be considered to be material relate, in general, to the nature and extent of the supervision conducted by Dr. Pettle. As I have indicated, evidence of such facts may be relevant to the proof of that material fact but it is not required to be pleaded.

¶ 26 Ms Thomson submitted, also, that the claims against Dr. Pettle were defective as the class definition includes individuals that could not possibly have been within his contemplation and for whom harm was not reasonably foreseeable. Such individuals would be those treated by Ms Testaguzza only at her home. To the extent that the statement of claim can be read as alleging that Dr. Pettle owed a duty of care to such patients, I believe Ms Thomson is correct in her submission that it does not disclose that they have a cause of action in negligence against him. The duty on which Ms Rose relies is predicated on Dr. Pettle's ownership, operation and supervision of the Centre. It is pleaded that she was treated there but the putative class, as defined, is not confined to patients who attended the Centre.

¶ 27 It follows that, if Dr. Pettle was the only defendant, a motion to strike any parts of the statement of claim that should be considered to plead a cause of action of the Islington patients against him would, in my opinion, be successful. The inclusion of such patients in the proposed class may need attention when the other requirements of section 5(1) are being considered, but I do not think it is a ground for denying certification of the action against Dr. Pettle on the basis of section 5(1)(a) alone. The statement of claim does, in my judgment, disclose that Ms Rose and the patients who attended the Centre have a cause of action against him and that is sufficient to satisfy the requirements of section 5(1)(a).

2. Section 5(1)(b) - existence of a class

¶ 28 The class that it is proposed to certify consists of three separate groups defined as follows:

A. All persons - except the defendants - who received acupuncture treatment at the Ruth Pettle Wellness Centre or at the Islington Clinic between 1 January 2000 and 16 December 2002 and who contracted *Mycobacterium abscessus*, Hepatitis, or HIV after receiving the acupuncture treatment (the Infected Patients) or where such a person is deceased, the personal representative of the estate of the deceased person; (Persons included in this paragraph are hereinafter referred to as "Infected Patients".);

B. All persons - except the defendants - who received acupuncture treatment at the Ruth Pettle Wellness Centre or at the Islington Clinic between 1 January 2000 and 16 December 2002 and who

- (a) did not contract *Mycobacterium abscessus*, Hepatitis, or HIV after receiving the acupuncture treatment, and
- (b) were notified by public health authorities that they may have contracted *Mycobacterium abscessus*, or Hepatitis, or HIV and/or other diseases and

should be tested, and

- (c) attended at a hospital medical clinic for testing, or where such a person is deceased, the personal representative of the estate of the deceased person; (Persons included in this paragraph B are hereinafter referred to as "Uninfected Patients".);

and

C. All living parents, grandparents, children, grandchildren, siblings, spouses and same-sex partners (within the meaning of S. 61 of the Family Law Act) of Infected Patients, or Uninfected Patients, or where such a family member died after:

- (a) his or her related Infected Patient was diagnosed with Mycobacterium abscessus and/or HIV, Hepatitis and/or other diseases, or
- (b) his or her related Uninfected Patient was contacted by a public health authority, as the case may be, the personal representative of the estate of the deceased family member; (Persons included in this paragraph C are hereinafter referred to as "Family Law Claimants".)

¶ 29 Requirements of section 5(1)(b) were summarized succinctly by McLachlin C.J. in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, at page 554.

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 a 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 a class be determinable by stated, objective criteria.

¶ 30 It is estimated that there are approximately 327 members of the putative class other than family law claimants. Their identities are not all known at this stage but counsel indicated that he anticipated that they will be ascertainable from the defendants' files. In accordance with the principles stated by the Chief Justice, objective criteria are provided for the identification of class members and there is no reason to anticipate that this will give rise to significant difficulties. Further, the definition does not beg the question of a causal link between the treatments received and the infections suffered by the infected patients and its application is not dependent on the outcome of the litigation. For the reasons I will give when considering the requirements of section 5(1)(c), there is a rational relationship between class definition and the common issues.

(a) Ms Testaguzza

¶ 31 In Ms Brodey's submission, the class definition, properly understood, does depend on the outcome of the litigation in that it implies that the putative class members contracted Mycobacterium abscessus, HIV or hepatitis as a result of the treatment they received from Ms Testaguzza. I do not

accept that submission. The objection of circularity - or question begging - has no possible application to the uninfected patients and the existence of a causal link between the acupuncture treatment and the infections contracted by infected patients is not expressly, or impliedly, included in the criteria to be applied for the purpose of identifying them. Patients of Ms Testaguzza who became infected will be included in the class whether they are able to prove that their infections were caused by the treatment and are able to recover damages on that basis, or are confined to recovering damages for nervous shock.

(b) Dr. Pettle

¶ 32 For the reasons already given, the putative class includes persons for whom no cause of action against Dr. Pettle has been sufficiently pleaded. Moreover, there is evidence of Dr. Pettle - undisputed for the purpose of this motion - that indicates that Ms Testaguzza did not become associated with him at the Centre until early in 2001. It is, therefore, clear that, if Dr. Pettle was the only defendant in the action, the proposed class would be too broad. I do not believe this should be regarded as a significant defect in the circumstances of this case where there are two defendants but, if it was, it could, I believe, be remedied by placing patients who were treated by Ms Testaguzza at the Centre in a subclass of those treated by her. This, however, would be necessary only if the interests of such patients required representation separately from those of the other patients. I accept Mr. McGowan's submission that, at this stage, there is no reason to believe that separate representation is required and that, if any such reason becomes apparent in the future, the court would have jurisdiction then to amend the certification order to create a subclass.

3. Section 5(1)(c) - common issues

¶ 33 In the draft order delivered with the notice of motion, the common issues are defined as "the issues of liability and punitive and exemplary damages". Mr. McGowan supported this definition at the hearing and in his factum but, in the event that it was found to be too broad, he provided the following alternative:

"THIS COURT ORDERS that

- (a) the issue of whether the defendants owed a duty of care to the class members to maintain infection control practices be a common issue for the Class;
- (b) the issue of whether the defendants breached the standard of care for infection control practices be a common issue for the Class; and
- (c) the issues of liability and punitive and exemplary damages be common issues for the Uninfected Patients and their derivative Family Law Claimants.

¶ 34 The first of the proposed definitions is not, in my opinion, acceptable as questions of causation must be determined on an individual basis before any liability of the defendants to pay damages in respect of infection contracted by an infected patient will arise. This is consistent with the finding of the Court of Appeal in *Anderson* where a similar issue arose. In delivering the judgment of the Court of Appeal, *Carthy J.A.* stated (at page 682 and 684):

Causation is an individual issue with respect to every infected member of the class.

Some of the patients ... probably contracted the virus prior to attending the clinic. The evidence of causation as to some individuals may be equivocal in the sense that there may be other competent sources. In such cases the only approach is for one judge to assess the evidence concerning all competent sources and make a finding of liability on the basis of probability on all the evidence. If there were only one plaintiff, the trial would deal with the appropriate standard of care, the actual standard of care, the plaintiff's evidence as to treatment, and the plaintiff's medical and lifestyle history. Evidence on all of these issues would be necessary to arrive at a balanced conclusion as to whether there was negligent conduct and whether this was the probable cause of the plaintiff's complaint. ... The trial judge may apply common sense to the evidence and thus draw an inference that the failure to meet the required standard of competence was the cause of the injury. That may be the ultimate test, but it is too soon to anticipate it, and it should only follow discoveries and a trial involving each claimant. ...

Thus, it is my view that the common issues for the uninfected patients and their family law claimants should extend from liability through damages but that the common issue for the infected patients and their derivative claimants should be restricted to whether the defendants breached the standard of care for infection control practices.

¶ 35 The alternative definition of the common issues proposed on behalf of the plaintiff is consistent with the reasoning of the Court of Appeal. The issues in paragraphs (a) and (b) are common to the claims of infected patients and uninfected patients alike, while those in paragraph (c) will be applicable to uninfected patients only. In my opinion, paragraphs (a) and (b) sufficiently relate to the cause of action in negligence pleaded against Dr. Pettle as well as the claims against Ms Testaguzza but, for greater clarity, I would add the words "the maintenance of" before the words "infection control practices" in paragraph (b). For the same reason, as Mr. McGowan indicated that paragraph (c) was intended to include the possibility of an aggregate assessment of damages, I would amend it to read:

"the issues of liability, punitive damages and an aggregate assessment of damages be common issues for the Uninfected Patients and their derivative Family Law Claimants."

¶ 36 In *Anderson*, the Court of Appeal (at pages 679-80) did not consider that the probability that individual issues of causation would arise in relation to uninfected patients was sufficient to foreclose liability as a common issue applicable to them.

It cannot be said, in this case, that it is plain and obvious that the claim for the tort of mental distress standing alone will fail. On the assumption that a legal obligation may exist, this segment of the class proceeding is ideally suited for certification. There are many persons with the same complaint, each of which would typically represent a modest claim that would not of itself justify an independent action. In addition, the nature of the overall claim lends itself to aggregate treatment because individual reactions to the notices would likely be similar in each case - fear of a serious infection and anxiety during the waiting period for a test result. If evidence from patients to support such reactions to the notices is necessary, it would probably suffice to hear from a few typical claimants.

The alternate definition proposed here makes the same assumption.

(a) Ms Testaguzza

¶ 37 The objection taken on behalf of Ms Testaguzza to each of the alternative proposed definitions of common issues was essentially that their resolution would not significantly advance the outcome of the litigation. As well as the questions of causation that would remain after the trial of common issues, there would be the possibility that some of the patients were treated with disposable needles and, in consequence, in Ms Brodey's submission, the question whether Ms Testaguzza breached a duty of care can only be determined on an individual basis.

¶ 38 Although, in her statement of defence, Ms Testaguzza denied all allegations of fact in the statement of claim to the extent that they relate to her treatment of patients, she has not pleaded that she used disposable needles and has not delivered an affidavit - or been examined - for the purpose of this motion. I am satisfied that the evidence filed establishes a sufficient factual basis for the existence of each of the common issues in relation to the claims against her. If, in her evidence at a common issues trial, she were to assert that disposable needles were used on all, or some, occasions, this would be relevant to the determination of the issue in paragraph (b) of the proposed alternate common issues. If it was found that issue (b) should be determined against her even though she probably used disposable needles on some occasions, that fact should have no bearing on the question of liability to uninfected patients and, as far as infected patients are concerned, it would be relevant to the question of causation that would remain to be decided as an individual issue relating to her liability for the infections contracted - though not necessarily for nervous shock. If, on the other hand, it was found that her practices did not breach the standard of care, that would, presumably, lead to the decertification of the proceedings.

¶ 39 The issues of causation that would remain to be determined in relation to infected patients if the alternate common issues (a) and (b) are decided in favour of the class do not, in my opinion, detract significantly from the progress in the litigation that would be achieved by a trial of common issues. The exact number of infected patients has not been determined but there is evidence that, of the 327 former patients of Ms Testaguzza that have been contacted by public health authorities, there have been 32 with either confirmed, probable or suspect Mycobacterium abscessus infections. Ms Rose's infection is located where acupuncture needles were inserted and her belief, based on the advice of class counsel, is that each of the 19 other members of the putative class who have contacted the firm claim to have had the same experience. Whether or not that turns out to be the case for many of the infected patients - and even if, on the basis of evidence at a trial of the common issues, it was held that the claims of uninfected patients raised questions of causation that would need to be determined separately for each such member of the class - a resolution of the common issues in paragraphs (a) and (b) should substantially advance the litigation for all members of the class.

¶ 40 I accept Ms Brodey's submission that previous decisions in class proceedings must always be considered in the light of their own facts and will rarely, if ever, be determinative of the issues on a motion for certification in another case. In this case, however, I believe the following statement of the conclusions of the Court of Appeal in respect of infected patients in Anderson is equally applicable to the facts of this case:

If causation cannot be handled as a common issue, then liability and damages must also fall. The question then becomes whether there are sufficient common issues left to justify certification. In my view, it seems sensible with this number of potential plaintiffs and the similarities that are evidenced in their claims, that any potential efficiency in advancement of their claims through the flexibility provided by the CPA should, where reasonable, be utilized. ...

I agree with the British Columbia Court of Appeal's observation, ... that the common

issues need only involve a matter, that if determined, would move the litigation forward. ...

In this case, the common issue as to the standard of conduct expected from the clinics from time to time, and whether they fell below the standard, can fairly be tried as a common issue. Resolving this issue would move the litigation forward. The participation of class members is not needed for that inquiry, although their later evidence may bear upon whether standards such as the use of gloves [here the use of disposable needles], were actually met in individual cases. Isolating this one major issue, the class-action proceeding clearly appears to be the preferable method of resolution to the benefit of all parties. (at pages 683-4)

¶ 41 The issues in paragraphs (a) and (b) of the alternate definition proposed on behalf of the plaintiff should, in my judgment, be considered to be substantial ingredients of the claims of each member of the putative class and a resolution of those in paragraph (c) should decide the question of liability for those members of the class who are uninfected patients. Given the nature of the claims advanced on behalf of uninfected patients, the possibility of an aggregate award and assessment of damages, including punitive damages, in their favour should, I believe, be raised for the consideration of the court at any trial of common issues; cf., *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.), at pages 54-5; *Anderson*, at page 679. Overall, I am satisfied that the proposed alternate common issues have the required attributes of commonality, that their resolution will avoid a duplication of fact-finding and legal analysis and that, by so doing, it should significantly advance the litigation against Ms Testaguzza.

(b) Dr. Pettle

¶ 42 In her factum, and at the hearing of the motion, Ms Thomson challenged the relevance of the proposed common issues to the claims against Dr. Pettle. In her submission, the only common issues in the proceeding relate to Ms Testaguzza. Indeed, more than once she repeated a statement in her factum that "Ms Testaguzza is the only common issue in this case".

¶ 43 I do not accept this submission. The claims against Dr. Pettle in negligence involve the existence, and breach, of a duty of care that is pleaded to have arisen from his operation of the Centre and his assumption of control and supervision of the treatments that were administered there. The alleged breach consisted of his failure to ensure that Ms Testaguzza observed acceptable standards in administering acupuncture. In consequence, the proposed common issues are essential ingredients of each class member's claims against him. To the extent that the class includes the patients treated by Ms Testaguzza at the Centre, the existence of a rational connection between such issues and the class definition is evident and there is, in my opinion, ample evidence to satisfy the requirement that they have some basis in fact. The conclusions I have drawn above in relation to Ms Testaguzza apply equally to Dr. Pettle.

¶ 44 The requirements that common issues must significantly advance the litigation and that a class proceeding must be the preferable procedure overlap to the extent that, on the basis of the analysis of the Chief Justice in *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158, each may be affected by the number and complexity of issues that will have to be dealt with on an individual basis. In her factum, Ms Thomson pointed to an "overwhelming number of individual issues" that, in her submission, demonstrated that a class proceeding would not be the preferable procedure. As these included the questions of causation that I have considered above in connection with the requirement that the common issues must advance the proceeding, I will deal with them in this part of my reasons rather than in relation to the requirement of preferability.

¶ 45 Apart from the questions of causation, the individual issues identified by Ms Thomson are concerned with the requirement of proximity and the assessment of damages. The former are premised, for the main part, on the fact that the class - as defined - includes persons who received treatment from Ms Testaguzza only at her home office in Islington and not at the Centre. It follows, in Ms Thomson's submission, that, in order to determine whether proximity existed between Dr. Pettle and the members of the class, an inquiry would need to be made into the circumstances of each member's relationship with him. Such circumstances would involve their contacts, if any, with him, any treatment they received from him and even their personal details including their nationality, ethnic origin, age and sexual practices.

¶ 46 In view of the findings I have made, I do not believe that such inquiries will be required. I have held that the cause of action pleaded against Dr. Pettle is restricted to claims of patients treated by Ms Testaguzza at the Centre and that proximity - if it exists - must be found in inferences to be drawn from Dr. Pettle's ownership, operation and supervision of the Centre. I am satisfied that the question whether it exists can be determined at a trial of the common issues.

¶ 47 Section 6 of the CPA provides that certification shall not be denied solely on the ground that individual assessments of damages will be required after a trial of common issues. Here, with respect to the infected patients, there will also be issues of causation to be determined on an individual basis. Notwithstanding the existence of these issues, I see no reason to doubt that a trial and resolution of the common issues will move the litigation against Dr. Pettle forward to a significant extent.

4. Section 5(1)(d) - the preferable procedure

¶ 48 It follows from the findings I have made that certification of this action will prevent duplication of fact-finding and legal analysis to an extent that the issues to be resolved on an individual basis are relatively few in number. On the basis of the evidence now in the record I do not believe they should be particularly complex. If established, the claims of infected patients may result in significant awards of damages. Uninfected patients, and the family law class members, would, in general, be likely to recover substantially less. I am satisfied that the objective of access to justice, as well as judicial economy, will be achieved if certification is granted. As far as the latter is concerned, it does not appear that, despite the myriad of possible causes of infection identified by Ms Thomson, the issues of causation relating to the infected patients are likely to be of great complexity in the majority of cases. As was contemplated by Carthy J.A. in the passage I have quoted from Anderson (at page 682), separate trials of these issues may be unavoidable in some instances - as well as with respect to the assessment of damages - but I decline to accept that this will be the invariable rule. A degree of crystal-ball gazing is always involved in deciding whether a class action is the preferable procedure but the question is to be decided on the bases of the record and probabilities and not just possibilities. Section 10 of the CPA would permit a certification order to be amended - or revoked - if, at further stages in the proceedings, evidence reveals that the requirements of section 5(1) have not been satisfied.

¶ 49 The size of the class in this case does not suggest that serious problems of manageability should arise. There is no reason to believe, at this stage, that the powers conferred on the court under section 12 of the CPA will not be sufficient to resolve procedural issues. As McLachlin C.J. stated in Dutton (at page 559):

The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation [in Alberta], a court must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action

should be allowed; in a flexible and liberal manner, seeking a balance between efficiency and fairness.

¶ 50 The submissions on preferability made on behalf of the defendants, were focused for the most part on the number of individual issues that could not be resolved at a common issues trial. As I have indicated, I do not believe such issues are sufficiently substantial in number or complexity to detract significantly from the extent to which the objectives of access to justice and judicial economy would be achieved. Nor do I accept that behavioral modification has no relevance on the facts of this case.

5. Section 5(1)(e) - the representative plaintiff and litigation plan

¶ 51 It was not suggested by defendants' counsel that Ms Rose lacks the ability to fairly and adequately represent the interests of the class. Although she received treatment only at the Centre, and not at the Islington clinic, there is nothing to indicate the existence of any conflict between her interests and those of any other members of class. She is, in my judgment, acceptable as a representative plaintiff.

¶ 52 The proposed litigation plan is brief but relatively straightforward. It may need to be amended as further information is received with respect to the members of the class and the effects, if any, of the treatment they received from Ms Testaguzza. The possibility of ADR, including mediation, should be considered but I do not regard this to be a case where inadequacies or deficiencies in the litigation plan highlight the existence of problems in satisfying other requirements for certification.

Conclusion

¶ 53 In my judgment, the plaintiff has discharged the onus of demonstrating that the requirements for certification are satisfied.

¶ 54 For the reasons already given - and despite Ms Thomson's submission that the litigation is essentially concerned with Ms Testaguzza's conduct and not that of Dr. Pettle - I am not prepared to exclude the claims against him from the proceedings on the ground of fairness or otherwise. Nor, as at present advised, do I see a justification for requiring claims against him to be decided separately from those to be dealt with at a trial of the common issues involving Ms Testaguzza. Power to make such an order pursuant to section 12 of the Act is, however, reflected in the provisions of section 11 and, if counsel wishes to pursue such an option, a motion for this purpose could be made after certification. This, of course, is without prejudice to the right of Dr. Pettle to move for summary judgment if he so chooses.

¶ 55 Subject to any further submissions that counsel may wish to make with respect to the form of the order and the contents of the notice to be sent to class members, the relief sought in the notice of motion is granted. Any such further submissions, and the of the costs of the motion, can be dealt with at a case conference.

CULLITY J.

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