IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MIRAMICHI

COPY/COPIE

Docket: N/C/41/08
Citation Number: 2010 NBQB 128

Between: ALBERT JOHN GAY, KIMBERLEY ANN DOYLE, and JAMES BLISS WILSON,
Plaintiffs

- and -

REGIONAL HEALTH AUTHORITY 7, a corporation incorporated under the laws of the Province of New Brunswick,
First Defendant

-and-

DR. RAJGOPAL S. MENON
Second Defendant

Before: Justice Jean-Paul Ouellette

Date of hearing: February 25, 2010

Date of decision: April 13, 2010

Appearances:

Chesley F. Crosbie, Q.C.
Raymond F. Wagner - for the Plaintiffs

David T. Hashey, Q.C.
Catherine Bowlen - for the First Defendants

Rodney J. Gillis, Q.C.
Catherine A. Fawcett - for the Second Defendants

Ouellette, J.

Introduction:

[1] The defendants each filed motions in this matter. Hearing of these motions is within a claim intended to be a procedure under the *Class Proceedings Act*. The proposed class action was commenced on behalf of the representative plaintiffs Albert John Gay, Kimberley Ann Doyle and James Bliss Wilson. The defendants are Regional Health Authority 7, and Dr. Rajgopal S. Menon.

[2] The plaintiffs also filed a notice of motion for the certification of the proposed class action proceeding. The hearing for that motion is set for September 20, 2010.

[3] These two motions have similarities in the order sought. They are seeking the following remedies:

a) That the date for cross-examination of the plaintiffs be set prior to the filing of the defendants' certification record,

b) That the plaintiffs produce their medical records for cross-examination purposes,

c) That a portion of the affidavits of Michael Dull be struck or that he be ordered to attend for a cross-examination on his affidavits,

d) That portions or all of the affidavits of Dr. Charles Hutton be struck,

e) That portions of the plaintiff's amended statement of claim be struck.

[4] It was agreed during the hearing of these motions that the Court is not required to deal with the affidavits of Michael Dull as he will be by consent subject to cross-examination at a date to be determined.

Issue

[5] The issues to be addressed at the hearing of this motion are as follows:

1) Should the affidavits filed by Dr. Charles Hutton or a portion thereof be struck?

2) Should the plaintiffs be required to attend for cross-examination on their affidavits filed in support of their motion for certification and, if so, when should this cross-examination be held?

3) Should the plaintiffs provide to the defendants all medical records prior to the motion for certification and be subject to cross-examination before the said hearing on those records?

4) Should portions of the plaintiffs' statement of claim be struck?

Law and analysis

1- Should the affidavits filed by Dr. Charles Hutton or a portion thereof be struck?

[6] The plaintiffs' solicitors, at the hearing of this motion, withdrew the first impugned affidavit of Dr. Charles Hutton sworn on November 17, 2009. Subsequently, they filed an affidavit of Sheri Geehan, a legal assistant, which appends a proposed revised affidavit of Dr. Hutton sworn February 5, 2010. The Geehan affidavit also appends the face page of the Report of the Commission of Inquiry into Pathology Services Miramichi Regional Health Authority - Vol. 1, intending this report to be part of the motion's record. The plaintiffs contend that the Hutton affidavit, dated February 5, 2010, and the Report of Inquiry are principally relevant to common issues, to class definition and to preferable procedure.

[7] The Court will initially rule on the admissibility of the report of inquiry and the reference to the evidence adduced therein and later deal with the other issues to be decided in relation with the affidavit of Dr. Hutton sworn on February 5, 2010.

[8] The Commission of Inquiry referred to above was established pursuant to an Order-In-Council issued by the Government of New Brunswick dated February 22, 2008. The Order-In-Council stated in part:

> **"Now Therefore, pursuant to section 2 of the Inquiries Act, the Lieutenant-Governor in Council directs a commission to issue under the Great Seal of the Province to Honourable Paul S. Creaghan of the Court of Queen's Bench of New Brunswick who shall, without expressing any conclusion of law regarding civil or criminal responsibility, have the authority and responsibility to conduct an inquiry into, and report and make recommendations..."**

The Honourable Justice Paul S. Creaghan issued his report in May 2009. (Inquiry Report)

[9] The Defendants objects to the admission of the Inquiry Report and further oppose any reference to the evidence adduced during the hearing of the inquiry in the affidavit of Dr. Hutton. They further allege that the plaintiffs cannot rely on section 43 of the *Evidence Act* R.S.N.B. 1973 c. E.11, as the Rules of Procedure of the Commission differ from the Rules of Procedure of a trial.

[10] The plaintiffs counter that section 43 of the *Evidence Act* supports their position that the Commissioner's report is admissible. This section deals with public records and reads as follows:

> **43 Any report, publication or statement on any matter of science, technology, geography, population, natural resources, engineering or other matter of fact or fact and opinion purporting to have been prepared by or under the authority of any department or branch of the Government of Canada or of the Province or of any other province is, in so far as relevant, admissible as evidence of the matters stated therein**

[11] This section of the *Evidence Act* addresses, generally, the admissibility of a certain class of documents. However, the defendants argued that it does not address the specific circumstances of a document generated as a result of a Commission of Inquiry set pursuant to the *Inquiries Act*, R.S.N.B. c. I-11.

[12] The Court is of the opinion that the Inquiry Report is a public document for the purpose of public reference and is a report that was prepared after the issuance of an Order-in-Council by a proper authority. For those reasons, it could be admitted in a court of law under section 43 of the *Evidence Act* for the purpose intended by the plaintiff for certification.

[13] The defendants further argued that the Rules of Procedure edited by the Commission did not favor the use of the evidence gathered at that inquest from witnesses. The specific rules relied upon by the defendants read as follows:

> **"15. Witnesses are encouraged to come forward and give full and forthright evidence to the Inquiry. The testimony of witnesses during the Inquiry may not be used in subsequent legal proceedings. The Commissioner will express no conclusion or recommendation regarding civil or criminal responsibility of any person or organization.**
>
> **43. The Commissioner may receive any evidence that he considers to be helpful in fulfilling the mandate of the Inquiry. The strict rules of evidence used in a court of law to determine admissibility of evidence will not apply.**
>
> **59. The Commissioner will perform his duties without expressing any conclusion or recommendation regarding civil or criminal liability of any person or organization."**

[14] The defendants submitted in support the decision in *Robb Estate v. St-Joseph's Health Care Centre*, 1998 Carswell Ontario 4898 where a plaintiff had moved at trial to have admitted into evidence a report of the Royal Commission of Inquiry into Blood Services (Krever Report) and the report of the information Commissioner John W. Grace (the Grace Report) as prima facie proof of liability of the subject matter as contained in those reports. MacDonald J. rejected the request as he concluded that the reports were not intended for findings to be used in subsequent civil proceedings and to admit the report into evidence for the proposed purpose would convert the Commission of Inquiry into something that was not intended. The Ontario Court of Appeal affirmed the decision on this issue at 2001 Carswell Ontario 4159.

[15] The *Robb Estate* decision cannot assist the defendants in excluding the Inquiry Report as it can be distinguished for a number of reasons. Most importantly, the object of the plaintiffs at bar in filing the Inquiry Report is not for the purpose of determination of liability and the Commission of Inquiry was not intended for that purpose.

[16] For the record, this Court is not bound by any findings of fact by the Commission and it will reach after a trial, its own conclusions that may not necessarily be the same as those of the Commission. This Court agrees with the defendants that the Commission of Inquiry was not a trial and its result cannot be used to replace a thorough independent judicial review of the facts prior to a determination of liability. (see *Canada (Attorney General) v. Canada Commission of Inquiry on Blood System* [1977] 3 S.C.R. 440)

[17] The defendants mentioned the fact that Mr. Justice Creaghan expressed the following in his opening remarks:

> **"Witnesses will testify with the constitutional protection their testimony will not be used in any criminal or civil proceedings"**

They argued that this statement and section 5 of the regulation edited under the *Inquiry Act* prevented the plaintiff or its witnesses from referring to the findings or evidence heard by the Commissioner and the Inquiry Report in the case at bar. Section 5 of the regulation read as follows:

> **"5(1) No answer given by a witness at an inquiry is thereafter receivable in evidence in any civil trial to which that person is a party or in any other proceedings against him, other than a prosecution for perjury in giving that evidence."**

[18] With all due respect, the statement by Mr. Justice Creaghan was not intended to prevent anyone from referring to the evidence received at the inquiry or from referring to its report. Had that been his intent, he would have specifically said so. The caution expressed by Mr. Justice Creaghan is intended to notify the witnesses, who were summoned to testify, of their constitutional right which is that their testimony will not be used against them in any subsequent criminal or civil proceeding.

[19] With respect to the striking of the new affidavit of Dr. Charles Hutton, the defendant Dr. Menon argues that it is not relevant to certification and goes to the merit of the action and is subject to challenge. Furthermore, Dr. Hutton's affidavit is inadmissible on the certification

motion as the expert opinion evidence must meet the test of relevancy and necessity in assisting the trier of fact and is hearsay evidence.

[20] The admission of an affidavit at a motion hearing is governed by the Rules of Court. Rules 4.05(2) and 37.01(4) reads as follows:

> **"4.05(2) Every affidavit shall be confined to a statement of facts within the personal knowledge of the deponent, except as provided otherwise in these rules."**
>
> **"39.01(4) Except in the case of a motion for summary judgment under Rule 22, and subject to section 34 of the judicature Act, an affidavit for use on a motion need not be confined to statements of fact within the personal knowledge of the deponent, but may contain statements as to his information and belief, if the source of his information and his belief therein are specified in the affidavit."**

[21] The admission of an affidavit is a matter of procedure and determined by the exercise of judicial discretion. The Plaintiffs submit that Dr. Hutton's affidavit and the Inquiry Report are principally relevant to common issues to class definition and preferable procedure as it addresses the evidentiary basis necessary for certification of the class action as there must be some basis in fact for each of the certification requirements.

[22] The Rules of Court allow for hearsay evidence to be placed before the Court within affidavits provided certain conditions are met. One of these conditions is that the affidavit is accompanied by a statement of source and belief on the truth of the statement. In the first paragraph of Dr Hutton's affidavit of February 5, 2010, he states: "where my knowledge is based on information obtained by others, I have so stated below, and I believe that information to be true".

[23] As for expert evidence, Watt J. in *R. v. Worrall* [2004] O.J. No. 3463 discusses the governing principles in relation to the requirement for the admissibility of an expert opinion based on hearsay evidence as follows:

> **The governing principles**
>
> **81 It is well-established that, as a general rule, an expert may base his or her opinion on second-hand information. But when an opinion based on second-hand information is admitted, and the second-hand information is not otherwise established before the trier of fact, the weight of the opinion may recede accordingly, See, for example, R. v. Lavallee [1990] a S.C.R. 852, 55 C.C.C. (3rd) 97, 129-30 per Wilson J.**
>
> **82 The nature of the second-hand information on which an expert may rely varies significantly. For example, a psychiatrist whose opinion is sought on an issue of criminal responsibility, or a toxicologist summoned to offer an opinion about a blood alcohol concentration will often rely on information provided on interview with an accused. On the other hand, experts in the physical sciences may rely on a variety of test results compiled by others in accordance with generally-accepted scientific principles.**

> 83 In R. v. Lavallee, above, Sopinka J. drew a distinction between:
>
> i. evidence that an expert obtains and acts upon within the scope of his or her expertise; and
>
> ii. evidence that an expert obtains from a party to litigation about a matter directly in issue
>
> Where situation i, above applies, the expert arrives at his or her opinion on the basis of forms of enquiry and practice that an accepted means of decision within that expertise. Where the information on which the opinion is formed comes from the mouth of a party, or from any other source that is inherently suspect, we require independent proof of the information relied upon. See, R. v. Lavallee, above, at pp. 132-3 per Sopinka J. And see, City of Saint John v. Irving Oil Co. Ltd. [1966] S.C.R. 581; and R. v. Abby (1982), 68 C.C.C. (2d) 394, 132 per Dickson J.
>
> 84 The distinction drawn by Sopinka J. in his concurring judgment in R. v. Lavallee, above, has been recently re-affirmed in connection with data compiled by others and used by experts in offering opinions on the results of DNA analysis. See R. v. Terceira (1998), 123 C.C.C. (3d) 1 (Ont C.A.) affirmed [1999] 3 S.C.R. 866, 142 C.C.C. (3d) 95; and R. v. B. (S.A.) (2003), 178 C.C.C. (3d) 193, 217-8 (S.C.C.) per Arbour J. d.

[24] The rule of evidence for both criminal and civil matters are the same as it relates to the admission of hearsay evidence. Drapeau C. J. of the Court of Appeal in *R. v. Faulkner* [2007] N.B.J. No 212 wrote at paragraph 29:

> 29 Finally, it bears noting that, while the Court in R.v. Zeolkowski viewed as a relevant consideration the fact that the applicable standard of proof under s. 98(6) was proof on a balance of probabilities, it did not consider that feature sufficient, by itself, to allow the reception of otherwise inadmissible hearsay (see paras. 16-19). After all, the rule against hearsay evidence, Including its exceptions, applies in civil proceedings where, as is well know, the determinative standard is proof on a balance of probabilities (see the thorough and thoughtful reasons of Bennett J. in R. v. Acero (2006), 58 B.C.L.R. (4th) 148, [2006] B.C.J. No. 1494 (QL), 2006 BCSC 1015, particularly at paras. 10 and 15-18).

[25] The defendants further submitted that this evidence should not be referred to as an exception to the hearsay rule as they did not have an opportunity, at the Commission's Inquiry, to cross-examine the witness or at best was limited or cross-examination was just not available to Dr. Menon in particular. The Court disagrees.

[26] It can be said from the decision in *R. v. Worrall*, that the failure of the party advancing an expert opinion to call those on whom the opinion evidence is predicated is not fatal to admissibility. The evidence relied upon at bar is from other professionals who are skilled in their field. Absent evidence that those findings are suspect they can be dispensed with without affecting admissibility.

[27] It is clear that the evidence of one party given at the inquiry cannot be used against the same party in this hearing. There is no evidence that would indicate that Dr. Hutton did refer to the defendants' evidence or part thereof.

[28] The defendants' arguments cannot be the basis for rendering the evidence of Dr. Hutton inadmissible. It rather goes to the weight to be given to the evidence referred to

in Dr. Hutton's affidavit. For the defendants it is upon them to challenge the evidence at the certification hearing with its own.

[29] Finally, the defendant, Menon, further argued that the evidence referred to in Dr. Hutton's affidavit could be submitted by the plaintiff by having these witnesses referred to file their own affidavits. To have, at the certification stage of the procedure, the requirement to have these witnesses file their own affidavit, or testify viva voce to what has already been provided under oath at the inquiry, would have little accomplishment. Furthermore, the hearsay evidence is admissible, being evidence referred to, to provide expert opinion in the case at bar.

[30] It is the conclusion of this Court that the affidavit of Dr. Hutton dated February 5, 2010 is admissible along with the Inquiry Report for the above reasons. The defendant's motions in that regard are therefore rejected.

2- Should the plaintiffs be required to attend for cross-examination on their affidavits filed in support of their motion for certification and when this cross-examination be held?

[31] The plaintiffs have agreed to be cross-examined by the defendants on their respective affidavits. However, the plaintiff's solicitors dispute when these examinations should take place, saying that the defendants should initially file their affidavits in response to the certification motion before this cross-examination takes place. The defendants did not agree, arguing that the cross-examination of the plaintiffs was necessary to properly allow them to fully develop its arguments against certification of the action as a class action, in particular with the pre-requisites of the class identification: common issue, preferable procedure, representativeness and conflict of interest.

[32] The only issue is whether or not the defendants should have to file their affidavits in response to the certification motion before the cross-examination.

[33] The Rules of Court and the *Class Proceedings Act* do not specifically address whether or not a party must file its affidavits prior to cross-examination of the affiants. The defendants in support of their request, cite, section 14 of the *Class Proceedings Act*:

> **14. The Court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms or conditions the court considers appropriate.**

[34] When a person is called upon to give evidence under oath, the Court must assure that this person knows the reasons for his appearance, the nature of the matter in which he or she is involved and the consequences he or she faces. Otherwise prejudice could result. In the case at bar, if justice is to be done according to law, they must act within the law which includes the law of procedure.

[35] It is also of consideration that the plaintiffs might need to file supplementary affidavits in rebuttal to the defendants' affidavits. In this event, a second round of examination would be required if the plaintiffs had not received the benefit of the defendants' position prior to the cross-examination of the plaintiffs, in the first instance, and would bring further cost and delay in the process.

[36] To avoid a prejudice to the plaintiffs, and to ensure a fair and expeditious determination, it seems only fair and expeditious that the plaintiffs be provided with the defendants' response and get full and complete disclosure

before the cross-examination by the defendants. The defendants are therefore ordered to file their responding documents accordingly.

3- Should the plaintiffs provide to the defendants all medical records prior to the motion for certification and be subject to cross-examination before the said hearing?

[37] It is the defendants' respective position that the plaintiffs should produce for examination, prior to the certification hearing, their respective medical records for cross-examination purposes. They claim that these records are necessary to ensure an adequate evidentiary record before the Court to fully address the prerequisites for certification and allow them to develop the certification arguments.

[38] The right to examine as a witness a party under section 20 of the *Class Proceedings Act* before the hearing of a motion is not a matter of course but requires leave of the Court. Subsection 20(2) of the *Class Proceedings Act* states that subsection 19(3) applies with necessary modifications in a decision whether to grant leave. It is not intended to be a full examination procedure as it would be in the course

of a discovery under the Rules of Court before certification. Subsection 19(1) of the *Class Proceedings Act* provides for the discovery in a class proceeding to be the same as under the Rules of Court. These sections of the *Class Proceedings Act* read as follows:

> **19(1)Parties to a class proceeding have the same rights of discovery under the Rules of Court against one another as they would have in any other proceeding.**
>
> **19(2)After discovery of the representative plaintiff or, if there are subclasses, one or more of the representative plaintiffs, a defendant may, with leave of the court, discover other class members.**
>
> **19(3)In deciding whether to grant a defendant leave to discover other class members, the court shall consider**
>
> > **(*a*)the stage of the class proceeding and the issues to be determined at that stage,**
> >
> > **(*b*)the presence of subclasses,**
> >
> > **(*c*)whether the discovery is necessary in view of the defences of the party seeking leave,**
> >
> > **(*d*)the approximate monetary value of individual claims, if any,**
> >
> > **(*e*)whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered, and**
> >
> > **(*f*)any other matter the court considers relevant.**
>
> **19(4) A class member is subject to the same sanctions under the Rules of Court as a party for failure to submit to discovery.**

Examination of class members as witnesses

20(1) A party shall not require a class member, other than a representative plaintiff, to be examined as a witness before the hearing of any motion, except with leave of the court.

20(2) Subsection 19(3) applies with the necessary modifications to a decision whether to grant leave under subsection (1) of this section.

[39] At this stage of the proceeding, the purpose of the hearing is for cross-examination of the plaintiffs affidavits for the certification hearing. It is to give the defendants an opportunity to test the credibility and the evidence of the deponent filed in support of the plaintiffs motion for certification. It is obvious from reading section 19 and 20 of the *Class Proceedings Act* that it was not intended to be a full discovery.

[40] Section 20 of the *Class Proceedings Act* limits the evidentiary element of those proceedings before a full discovery is held in due course. In a discovery proceeding, rule 33 of the Rules of Court prescribe what the parties must produce for examination and inspection, which is not prescribed under section 20.

[41] The plaintiffs' application to certify this action as a class action is determined against the criteria set out in

section 6 of the *Class Proceedings Act* which reads as follows:

> **6(1) The court shall certify a proceeding as a class proceeding on a motion under section 3 or 4 if, in the opinion of the court,**
>
> **(*a*) the pleadings disclose or the Notice of Application discloses a cause of action,**
>
> **(*b*) there is an identifiable class of 2 or more persons,**
>
> **(*c*) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members,**
>
> **(*d*) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, and**
>
> **(*e*) there is a person seeking to be appointed as representative plaintiff for the class who**
>
> **(i) would fairly and adequately represent the interests of the class,**
>
> **(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and**
>
> **(iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.**

[42] The burden of proof and standard of proof in a certification application is on the plaintiff who must bring "some basis in fact" for each of the criteria set out in section 6(1)b to (e) of the CPA (see *Hollick v. City of*

Toronto, [2001]3.S.C.R.158 paragraph 25) as well as the criteria that the pleadings disclose a cause of action.

[43] The only evidence produced in support of the motion for disclosure of the medical records of the defendants, was by the Health Authority, where it is stated in paragraph 11 of the affidavit of Gary Foley vice-president, Professional Services at the Health Authority "that disclosure of medical records will be necessary to support the defendant Health Authorities opposition to certification and to allow complete cross-examination of the plaintiffs.

[44] As neither defendant has filed evidence opposing the certification, it is difficult to evaluate in what way these medical records would be useful. Subsection 19(3) of *Class Proceedings Act* with the necessary modification (subsection 20(2))quoted above give what the Court should consider in deciding to grant a defendant leave to examine a party. The defence of the party seeking leave is one of them.

[45] The defendants submitted the decision of Wrinkler J. as he then was in *Caputo et al. v. Imperial Tobacco Limited et al.* 1997 CanLii 12162 (On. S.C.), a proposed class action

concerning the addiction to cigarettes, for having access at this time to the medical records.

[46] Winkler J. ordered cross-examination of the representative plaintiffs as well as production of the medical records. His conclusion was on the basis that the defendants were entitled to these records where they had shown circumstances where there would be an insufficient evidentiary record before the Court for the determination of the certification motion. Furthermore, the defendants had shown that there was a myriad of potential issues relating to each class member's medical condition. These issues are not raised in this case at bar.

[47] The statement of claim alleges against the defendant Health Authority, the tort of negligence, a breach in the reasonable standard of care expected under the circumstances which was corporate or systemic in nature, vicarious liability for all loss or damage caused by the defendant Menon, breach of contract, breach of fiduciary duty and equitable fraud. The allegations against the defendant, Menon, relate to breach of his duty to maintain competency owed in the tort of negligence and in the law of fiduciary duties, which is the basis for the damages claimed.

[48] As for the cause of action of the individual plaintiffs, the first two are claiming damages even though they were diagnosed properly and the third one was on two occasions incorrectly diagnosed and eventually diagnosed with a form of cancer. The defendant, Health Authority, questioned the basis of the first two plaintiffs' cause of action which issue goes to the disclosure of a cause of action and will be part of the consideration to be addressed at the certification hearing.

[49] The production at this stage of the procedure of the medical records seems to be contrary to the goals of judicial economy, access to justice and behaviour modification. If this claim is certified as a class proceeding, medical records of the plaintiffs will have to be disclosed and the plaintiffs have already agreed to that.

[50] The Court's primary concern is the adequacy of the evidentiary record before it, upon which it will determine the certification issue. The certification motion is procedural and there are limits on what evidence and procedure is to take place prior to that hearing. To order the production of the medical record at this stage and allow

cross-examination would only cause a lengthy and expensive hearing that would serve no purpose for the certification.

[51] The issues relevant to a certification motion are set in section 6 of the *Class Proceedings Act*. With respect to the pleadings, it is determined by the sole reference to the statement of claim as to whether the pleadings disclose a cause of action. For the certification, the statement of claim is presumed to be true. To be rejected, it must be plain, obvious and beyond doubt on the face of the pleadings that the plaintiffs cannot succeed.

[52] As to the remaining elements of section 6, the plaintiff must be in a position to satisfy the Court that it has produced evidence relevant to those remaining issues. In the absence of the defendants' evidence in opposing the certification motion, it seems that the evidentiary record is sufficient to determine the issue.

[53] It is therefore the conclusion of this Court that the defendants' motion to obtain the medical records at this stage of the proceeding is rejected.

4- Should portions of the plaintiffs' statement of claim be struck?

[54] The defendants request that a portion of the statement of claim be struck. The defendant Health Authority alleges that a portion or the entire contents of paragraphs 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, and 23 of the statement of claim are evidence not material fact and as such are not in compliance with rules 27.06(1) and 27.09 of the Rules of Court.

[55] The defendant Menon moves to strike paragraph 8, 13, 14, 16, 17, 32, 36, 45 and 48 from the statement of claim alleging that same contains evidence or not material facts and paragraphs 8, 14 and 45 are irrelevant and constitute improper pleadings.

[56] These rules reads as follows:

> **27.06 Rules of Pleading - Applicable to All Pleadings**
>
> ***Material Facts***
>
> **(1) Every pleading shall contain a concise statement of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved.**
>
> **27.09 Striking Out a Pleading or Other Document**

> **The court may strike out any pleading, or other document, or any part thereof, at any time, with or without leave to amend, upon such terms as may be just, on the ground that it**
>
> **(a) may prejudice, embarrass or delay the fair trial of the action,**
>
> **(b) is scandalous, frivolous or vexatious, or**
>
> **(c) is an abuse of the process of the court.**

[57] The Court is vested with extensive power to strike out pleadings. These powers are necessary to enforce the basic rules of pleadings and dispose of pleadings that are hopeless, baseless or without foundation in law or in equity or are otherwise an abuse of process of the Court. These powers are permissive not mandatory. They are discretionary and are to be exercised with the greatest of care and circumspection and only in the clearest cases. It must be exercised for justice to be done and to prevent the parties affected from incurring expenses by frivolous, vexatious or hopeless litigation.

[58] Trial by ambush has no place in our modern system of justice. The purpose of the rules of pleading, expressed in rule 27 of the Rules of Court, is designed to ensure that the relevant issues are raised and that no party is taken by surprise.

[59] The defendant Menon took offense to the allegations by the plaintiffs against the defendant Health Authority wherein they make allegations of facts in support of their claim using words that could be interpreted as evidence. In response, the plaintiffs' submitted that the statements made in the said paragraphs contain material facts directly related to the issues of liability and damages.

[60] These offensive paragraphs are reproduced from the pre-motion brief of the defendant Menon:

(i) **from paragraph 13 of the Statement of Claim:**
"...The by-laws clearly state..."

(ii) **from paragraph 16 of the statement of Claim:**

"On February 6, 1997, Dr. Lacey wrote Menon a letter copied to Dr. T. Venters, Vice President Medial with the First Defendant He accused Menon of mishandling several cases."

(iii) **from paragraph 17 of the Statement of Claim:**

"Dr. Venters reported Dr. Lacey's serious allegation against Menon to Mr. Tucker CEO... the minutes of a meeting between Menon and Mr. Tucker are dated August 4, 1998. Discussed were complaints from the surgeons over the past year..."

(iv) **from paragraph 32 of the Statement of Claim:**

"... Regional Health Authority 7 retained pathologist Dr. Rosemary Henderson to conduct a review of Menon's work. Eleven months after the suspension, this independent audit was conducted... found significant discrepancies in eighteen percent of the cases..."

(v) **from paragraph 36 of the Statement of Claim:**

"In late March 2008, it became known that the first defendant would provide approximately 23,000 - 24,000 patients specimens reported by Menon... to reviewing laboratory in Ottawa, Ontario. These included biopsies and surgical resection specimens... determined that 5,286 or 22% had a complete or partial change in findings..."

(vi) **from paragraph 48 of the Statement of Claim:**

"On March 4, 2008 this Plaintiff received a letter from Dr. Josef Hrncirik's office and was advised..."

[61] The defendant Menon further alleged that the following paragraphs were irrelevant and not material facts and as such do not comply and should be struck:

(i) **From paragraph 8 of the Statement of Claim:**

"In 1993, it was decided to build the Miramichi Regional Hospital..."

(ii) **from paragraph 14 of the Statement of Claim:**

"Menon completed his contract with the Saint John Regional Hospital and came to the Chatham Hospital in January 1994. The Miramichi Regional Hospital was still under construction. He performed little or no pathology services at Chatham Hospital..."

(iii) **from paragraph 45 of Statement of Claim:**

"The Plaintiff can feel lumps under the skin in the area graft on his left forearm. The Plaintiff experiences hot sensations and swelling in the area of the skin graft on his left forearm."

[62] The Court must do this assessment on a case-by-case basis. Most of the case law submitted by the defendants in support was in matters where pleadings were offensive; allegations against thirds parties; or, were prejudicial or embarrassing to the defendant.

[63] It is sometimes difficult to distinguish what constitutes material facts and what constitutes evidence. Evidence could be additional details that add to the material fact that could be required by a defendant to prepare its defence. If not part of the original pleadings, they become part of the particulars.

[64] In *Quann v. Creighton* (1990) 107 N.B.R (2d) 267. Riordon J. stated that "a plaintiff is entitled to frame his action as he chooses" and "an order to strike out pleadings should be exercised sparingly and only in the clearest of cases".

[65] The Statement of Claim lays the basis for the cause of action pleaded. At bar, this is a complex, multi-party class proceeding. The nature of the claim necessitates a detailed pleading of the material facts. It could be said from reading the pleadings that the series of events over a span from 1993 to 2007 that lead up to this action are long and complicated. It seems vital that the material facts be pleaded in details. It helps define the issues not only for the parties but also for the Court.

[66] The Court has some issue with one particular paragraph as pointed out by the defendant Health Authority. At paragraph 19 of the statement of claim it is written:

> **"His resignation was coincident with the firing of CEO, John Tucker, as a result at the fraudulent use of funds by administration in May 2001."**

[67] There seem to be no purpose for this statement which the Court finds to be scandalous, frivolous and vexatious and contrary to rule 27.09. The said line shall therefore be struck out of the pleadings of the plaintiff.

[68] With the exception of the above statement, the motion to strike portions of the Amended Statement of claim is denied.

[69] The clerk is to set a hearing to be held by teleconference at the earliest convenience for the Court to schedule the filing of the defendants' response for the certification motion and set a date for the cross-examination of the affiants.

[70] Cost shall be in the cause.

Jean-Paul Ouellette

Judge Jean-Paul Ouellette
Court of Queen's Bench of
New Brunswick