Court File No. N/C/41/08

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MIRAMICHI

2012 NBQB 088

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,

Defendant

- and -

Dr. RAJGOPAL S. MENON

Defendant

Before: Justice Jean-Paul Ouellette

Date(s) of hearing: September 6 and 7, 2011

Date(s) of decision: March 8, 2012

Appearances:

Chelsey F. Crosbie Q.C.
Raymond F. Wagner - for the Plaintiff

David T. Hachey Q.C.
Catherine M. Bowlen - for the Defendant (Hospital)

Rodney J. Gillis Q.C.
Catherine A. Faucett - for the Defendant (Dr. Menon)

OUELLETTE J.

INTRODUCTION

[1] This is a motion by the Plaintiffs for certification of this action as a Class Proceeding pursuant to the ***Class Proceedings Act***. The Plaintiffs, Albert John Gay, Kimberley Ann Doyle and James Bliss Wilson propose to bring this action on behalf of the following class: Patients, including their estates, whose tissue samples underwent pathology testing for potential cancer or potential cancer-related disease reported by the Defendant Dr. Rajgopal S. Menon (Dr. Menon) at the hospital of the Defendant, Regional Health Authority 7 (Hospital) from the period of January 1, 1995 to February 7, 2007. These tissue samples were subsequently retested at the direction of the Hospital. The Plaintiffs also identified another class defined as children, parents and spouses (as defined by the ***Fatal Accident Act***) of the deceased patients (Estate).

[2] The Hospital is an institution incorporated under the laws of the Province of New Brunswick to provide for the delivery and administration of health services in the region of Miramichi. In the early 1990's, a new regional hospital in Miramichi was opened and Dr. Menon, a pathologist, was hired to operate the new pathology lab of the Hospital.

[3] In February 2007, Dr. Menon was suspended by the College of Physicians and Surgeons of New Brunswick after a formal complaint was made to the College by the Hospital who dismissed him. The complaint relates to the operation of the lab resulting from clinical error, bad turn-around time, the lack of quality assurance and quality control in the lab operated by Dr. Menon.

[4] After the dismissal of Dr. Menon, the Hospital saw it necessary to conduct an external peer review on the work of Dr. Menon. It retained the services of a qualified expert pathologist for its purposes. As a result of this external review, it was decided to review all of Dr. Menon's surgical pathology from 1995 to 2007. A laboratory from Ontario was retained to do an independent review.

[5] Upon having decided to have all specimens reviewed by an independent lab in Ontario, the Hospital informed the Plaintiffs and other patients that their specimens were being reviewed and would be informed through their respective doctors of their findings.

[6] Consequently, 23,080 specimens were reviewed involving approximately 15,700 patients. Of the 23,080 specimens, 5,267 had changes of some nature made to the original pathology reports. Of the 5,267 cases, 370 cases had a complete change in findings, - 101 cases were cancer related changing from a diagnosis of benign to malignant and 10 changing from malignant to benign.

[7] The Plaintiffs claim against the Defendants general, special and aggravated damages in relation to personal injuries allegedly sustained by themselves, potential class members and their estates as a result of pathology specimens analysed by Dr. Menon at the Hospital between January 1995 and February 2007.

FACTUAL BACKGROUND

THE PLAINTIFFS

[8] Albert John Gay was born on January 5, 1945 and resides in Tabusintac, New Brunswick. On March 17, 2004, he had a biopsy on his left forearm due to scarring and discoloration in the area of a skin graft done in 1982. Dr. Menon had originally reviewed the specimen in 2004 and it was subsequently reviewed in 2008 by the Ontario lab. The review resulted in no change in his original pathology report. Like the other Plaintiffs, he was initially advised by his family doctor that his biopsy was being reviewed and later advised of the results.

[9] Kimberley Ann Doyle was born on September 29, 1963 and resides in the Miramichi area. She was advised in March 2008 by her doctor that a specimen, which she believes arose from surgery on her elbow, was being reviewed. She contacted her doctor's office and was advised by his secretary that the review was with tissue from a biopsy that was conducted at the time of a hysterectomy in 1998. She was advised of the results in September 2008. It resulted in no change to the pathology report in relation with the specimens being reviewed. It was in course of this consultation with her doctor that she learned that two other biopsies in relation to specimens taken earlier had also been reviewed which, as the first, had no change in diagnosis.

[10] James Bliss Wilson was born on December 11, 1941 and also lives in Miramichi. He had biopsies taken on December 8, 2004 and November 30, 2005. Both were reported by Dr. Menon as negative for cancer. On January 29, 2007 he had a third biopsy done

and was reviewed by another pathologist which result was positive for cancer. He immediately began treatment and had already completed these treatments when he was advised that both of his earlier biopsies were being reviewed by an independent lab. After this review it was determined that Mr. Wilson was misdiagnosed in 2004 and 2005 and is advancing a claim in relation with these misdiagnoses.

[11] All three Plaintiffs are claiming damages for stress as a result of being told their biopsy specimens were being reviewed. Neither has been diagnosed with depression nor been treated by a psychiatrist or psychologist as a result of the review of their specimens. Nor were they prescribed any medication for any issues related to the review of their specimens. Mr. Wilson did not either receive any treatment of any kind for stress or anxiety in relation to his misdiagnosis nor upon being advised that his specimens were reviewed. By then he had already completed his cancer treatment.

THE DEFENDANTS

The Hospital

[12] Regional Health Authority 7 was incorporated under the ***Regional Health Authority Act*** which one of its facilities was the Miramichi Regional Hospital. It subsequently became Regional Health Authority B operating under the business name Horizon Health Network.

[13] The Miramichi Regional Hospital opened its doors in December 1995 after the closure of two hospitals, one in Chatham and the other in Newcastle. The facility would provide pathology services in its laboratory which had not been available in the old hospitals. The planned establishment for the hospital called for two pathologists. Dr. Menon was the only applicant and was eventually appointed its first Chief of the Department.

[14] The hospital did recruit a second pathologist in April 1996 who worked for approximately one year. In July 1997, a second pathologist was hired and worked with Dr. Menon. Even though the Department of Health's findings were that 2.5 pathologists was adequate for the Hospital, only two pathologists were on staff.

Dr. Menon

[15] Dr. Rajgopal S. Menon was born on December 3, 1934. He received his degrees of Bachelor of Medicine and Surgery in 1961 in Glasgow, Ireland. He has been trained as a general pathologist and came to New Brunswick in early 1970's. He was then licensed to practice medicine by the College of Physicians and Surgeons of New Brunswick. He worked in the provincial pathology laboratory in Fredericton for several years and later moved to Holland and worked as a pathologist in an obstetric hospital for several years. He had recently returned to New Brunswick and was working as a locum at the lab at the Saint John Regional Hospital when he was granted privileges at the Hospital in Miramichi as a pathologist upon being appointed Chief of the Department of Pathology in January 1994.

[16] On February 6, 2007, Dr. Menon's privileges at the Hospital were suspended and his contract of employment was terminated. His license to practice medicine was also suspended pending investigation by the College of Physicians and Surgeons after receiving a complaint from the Hospital. His license to practice medicine has since been reinstated by the College of Physicians and Surgeons of New Brunswick.

THE PLAINTIFFS' ALLEGATIONS

[17] In their statement of claim, the Plaintiffs allege inter alia that:

a) The Hospital misdirected themselves when they hired Dr. Menon by failing to proper investigate his credentials before he was hired as the Chief of the Department and their pathologist, failing to follow its own by-laws, rules and regulations and for hiring Dr. Menon with no probationary period and no end/renewal date.

b) The Plaintiffs main allegations against Dr. Menon centre on his lack of competence and his duty to maintain competency, in failing to introduce quality assurance programs and perform a reasonable turnaround time. In general terms, they alleged that he did not possess the skills and knowledge expected by his patients necessary to meet the standard of competency of a competent anatomical pathologist.

c) The Plaintiffs state that they experienced panic when advised that their specimens were being reviewed and feared that they might have cancer that was

misdiagnosed and consequently no longer had trust and confidence in treatment received at the Hospital in particular and in the New Brunswick health care system in general.

d) The fault or negligence of the Hospital is its failure to select a competent physician and its duty to review and monitor qualifications and competence of physicians they credentialed. The Plaintiffs also claim for mental distress as a result of being advised that the specimens for their cancer related conditions had to undergo a review as the previous diagnosis may have been incorrect. These individuals in the class may or may not have been misdiagnosed and suffered no physical harm. They maintain that the Hospital has to be vicariously liable in tort for its employee.

e) The Plaintiffs also submitted that the family class members of deceased patients may claim under the ***Fatal Accidents Act*** for loss of guidance, care and companionship.

PRELIMINARY MOTION - ADMISSIBILITY OF CHRISTINE ROKOSH'S AFFIDAVIT

[18] Before proceeding with the analysis of the certification requirements, at the certification motion hearing, the Hospital made preliminary objections to the admissibility of portions of the evidence being used by the Plaintiffs on the certification motion. Some objections had already been subject to consideration and decisions by this court in previous hearing and were noted on record. However the court has indicated that it would give

reasons in writing on one particular subject, this being the admissibility of Christine Rokosh's affidavit dated February 15, 2011.

[19] The Hospital submitted that the affidavit of Mrs. Rokosh filed by the Plaintiffs should not be admitted as she was giving evidence on a subject that should be restricted to a trained pathologist which she is not. Furthermore, she was referring to reviews done by other nurses employed by her and she was preparing this information from paper reports on the subject matter not from slide specimens examined by Dr. Menon or other pathologists hired for an independent review. Dr. Menon joined in the Hospital's motion to object to Mrs. Rokosh's affidavit.

[20] In rendering my oral decision admitting the affidavit, I had given the following consideration. In ***R. v. Mohan*** [1994] 2.S.C.R.9 Sopinka J. speaking for the court wrote:

> **"17 Admissibility of expert evidence depends on this application of the following criteria:**
> **a) relevance;**
> **b) necessity in assisting the trier of fact;**
> **c) the absence of any exclusionary rule;**
> **d) a properly qualified expert."**

[21] There was no issue with the relevancy, the necessity in assisting the trier of fact and the absence of any exclusionary rule. The Defendants were mostly concerned with her qualification as a proper qualified expert.

[22] On a certification motion, the court is not called upon to ultimately decide the merits of the expert evidence. Mrs. Rokosh is, in her affidavit, sorting work done by her team of nurses in reply to the affidavit of Marilyn Underhill's affidavit executed on behalf of the

Hospital. Mrs. Underhill, a hospital administrator, gives evidence of the total number of cases reviewed during the process. The number of cases changed of some nature which some involved discrepant cases involving cancer. Mrs. Rokosh's evidence is entered to counter Mrs. Underhill's statement.

[23] The affidavit of Mrs. Rokosh is admissible and should be given the weight that is deemed appropriate in these circumstances. Mrs. Rokosh is an experienced nurse, familiar with medical terminology to examine reports prepared by a qualified pathologist. It is in this limited capacity that this evidence is to be considered. It could easily be reviewed by a pathologist who could demonstrate that there is no basis for her evidence.

[24] At the certification hearing, the evidence should not be subjected to the exact scrutiny required at a trial. In ***Griffin v. Dell Canada Inc.*** [2009] O.J. No 418 (S.C.J.) Lax J. wrote:

> **"76. The court's "gatekeeper" role in respect to expert evidence was clearly articulated by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 and urged upon trial judges in subsequent decisions. This role applies equally to judges hearing motions for certification: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488. However, where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 19 (Sup. Ct.)."**

[25] With respect to the statutory burden of "some basis of fact" required for certification, other than the disclosure of a cause of action to be discussed later, the decision in ***Hollick*** stands to justify the very weak evidential burden on the Plaintiff for each

statutory requirement. The purpose of Mrs. Rokosh's evidence is not intended to replace the opinion of a pathologist and should not be considered beyond what it was intended for. I will say no more on the admissibility of this affidavit.

ISSUE

[26] The sole issue to be decided is whether this action should be certified as a class action.

ANALYSIS

[27] A class action is a procedural mechanism as an alternative to multiple individual proceedings involving one or more common issue. The fundamental principles of class action in Canada were delineated in the so-called "Class Action Trilogy": ***Hollick Metropolitan Toronto (Municipality)*** [2001] 3 S.C.R. 158; **Rumley v. British Columbia** [2001] 3 S.C.R. 184 and ***Western Canadian Shopping Centres Inc. v. Dutton*** [2001] 2 S.C.R. 534.

[28] Class actions offer three important advantages over a multiplicity of actions by individuals. It allows judicial economy by avoiding unnecessary duplication in fact-findings and legal analysis; it improves access to the courts by distributing litigation costs over a large number of plaintiffs which might be otherwise unaffordable or allow claims with merit to proceed but legal costs of proceeding are disproportionate to the amount of individual claim; and by improving access to justice, modifies the behaviour

of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations.

[29] Pursuant to Section 6(1) of the New Brunswick ***Class Proceedings Act***, on a motion, the court shall certify a proceeding as a class proceeding if and only if all five of the following requirements are met:

a) the pleadings disclose a cause of action;

b) There is an identifiable class of two or more persons;

c) the claims of the class members raise common issue of fact or law;

d) a class proceeding would be the preferable procedure; and

e) there is a representative plaintiff who would fairly and adequately represent the interest of the class without conflict of interest and who has produced a workable litigation plan.

[30] Under Section 6(2), in determining whether a class proceeding would be preferable procedure for a fair and efficient resolution of the dispute, the court shall consider:

a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;

b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;

c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

d) whether other means of resolving the claims are less practical or less efficient;

e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and

f) any other matter the court considers relevant.

[31] The onus is on the class representative to bring forward sufficient evidence to support certification and the opposing party may respond with evidence of its own to challenge certification. The class representative must show some basis in fact for each of the certification requirement other than the requirement that the pleading disclose a cause of action.

[32] The evidentiary threshold for meeting the statutory criteria is low, but the court has a gatekeeper function and must consider the evidence from both the party propounding certification and the party opposing in light of the statutory criteria.

[33] In ***Hollick v. Toronto*** (*supra*) McLachlin C.J.C. made it clear that the ***Class Proceedings Act*** should be construed generously to realize the benefits of the legislation namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. Madam Chief Justice also emphasized that the certification stage is not meant to be a test of the merits of the action but is merely an inquiry as to whether the proceeding is suitable for prosecution as a class action.

CERTIFICATION REQUIREMENTS

[34] Each of the certification criteria set under Section 6 of the New Brunswick ***Class Proceedings Act*** must be met for this court to decide whether this matter should be permitted to proceed as a class proceeding. Even though aware that each criteria are linked to one another, I will deal with each individually keeping in mind this linkage.

REASONABLE CAUSE OF ACTION - section 6(1)(a)

[35] For an action to be certified under the class proceeding, it must disclose a cause of action. The "plain and obvious" test for disclosing a cause of action is used to determine whether the proposed class proceedings may proceed. (See ***Hunt v. Carey Canada*** [1990] 2 S.C.R. 959). On a certification application, the burden is on the Paintiff to demonstrate affirmatively from the facts pleaded in his statement of claim that a cause of action is properly pleaded (see ***Brogaard v. Canada (Attorney General)*** [2002] B.C.J. No 1775), but this test has a very low threshold. (See ***Hollick v. Metropolitan Toronto*** *(supra)*).

[36] For the purpose of deciding whether the Plaintiff has demonstrated a cause of action, Cullity J. in ***Risorto v. State Farm Mutual Automobile Insurance Co.*** [2007] O.J. No 676 (S.C.J.0) wrote at paragraph 23:

> **"[23] ...the pleading is to be read generously and allowance made for drafting inadequacies. It has been held that the novelty of a cause of action is not, in itself, a reason for rejecting it and that a decision to do so should not be made if the court would be required to decide matters of law that are not fully settled in the jurisprudence and that should be viewed in the light of a full evidential record."**

THE HOSPITAL

[37] The Plaintiffs claim that the Hospital has responsibilities to its patients both directly as a corporate entity and indirectly through the acts of its employees. The Plaintiffs pleaded negligence, vicarious liability, breach of contract and breach of fiduciary duty against the Hospital claiming that these are well-established in law.

[38] The Plaintiffs alleges the Hospital's fault or negligence is in the hiring process by ignoring advice and inadequate background checks it improperly credentialed Dr. Menon; in failing to investigate and ignoring complaints about pathology staff's professional competency it credentialed a pathologist who was medically impaired and not competent.

[39] Creaghan J. in ***Bateman v. Doiron*** 1991 Carswell NB 225 states:

> **"34 A hospital has an obligation to meet standards reasonably expected by the community it serves in the provision of competent personnel and adequate facilities and equipment and also with respect to the competence of physicians to whom it grants privileges to provide medical treatment. It is not responsible for negligence of physicians who practice in the hospital, but it is responsible to ensure that doctors or staff are reasonably qualified to do the work they might be expected to perform. *Yepremian v. Scarborough General Hospital* (1980), 13 C.C.L.T. 105, 28 O.R. (2d) 494, 3 L. Med. Q. 278, 110 D.L.R. (3d) 513 (C.A.)."**

[40] The Hospital operated a laboratory for pathology services. It has an obligation to meet standards reasonably expected by the community it serves in the provision of competent personnel and adequate facilities and equipment. The Hospital is also responsible to ensure that Dr. Menon is reasonably qualified to do the work he might be expected to perform in that environment. Otherwise, the Hospital could be responsible for the damages suffered by its patients.

[41] The law does recognize that a hospital can in certain circumstances be directly liable to patients for the negligent performance of medical services and could be liable for the torts of an employee committed within the scope of employment. Whether or not a hospital will be held vicariously liable for the negligence of a physician is a matter of fact dependent upon the evidence. (See ***Saint John Regional Hospital v. Comeau***, 2001 NBCA 113). Dr. Menon was as Chief of Pathology an employee of the hospital.

[42] To establish a cause of action in negligence and be entitled to damages, the plaintiff to be successful in their claim must establish the following elements: (1) that the Hospital owed them a duty of care; (2) that the Hospital failed to meet the standard of care appropriate in the circumstances; (3) that the plaintiffs suffered a compensable loss or injury; and (4) that the loss or injury was caused by the Hospital's negligent act or omission.

[43] In **Matthews v Macharen** [1969] 2 O.R. 137 DLR 3d 557, Lacoucière J. Wrote:

> **It is trite law that liability does not follow a finding of negligence, even where there exists a legally recognized duty, unless the defendant's conduct is the effective cause of the loss: Cork v. Kirby MacLean, Ltd., [1952] 2 All. E.R. 402 at p. 407, per Denning, L.J.:**
>
> > **Subject to the question of remoteness, causation is, I think, a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage.**

[44] In ***Osburn v. Mohindra***, 1980 Carswell NB 220 (Q.B.) Stratton J., as he then was, found the hospital contractually liable to the plaintiff for the failure of its doctors to provide adequate medical services. Stratton J. stated:

> **"30. Upon consideration of the evidence adduced at trial, I am satisfied and find that there existed here a contract between the Hospital and Mr. Osburn to provide him with medical services and that Drs. Mohindra and Stevenson were the agents through whom the Hospital performed this obligation: see *Roe v. Ministry of Health*, [1954] 2 All E.R. 131 (C.A.). That contract extends to include all practices which are "reasonably certain and so notorious and so generally acquiesced in that [they] may be presumed to form an ingredient of the contract": per Duff, J., in *Georgia Construction Co. v. Pacific Great Eastern Ry. Co.*, [1929] S.C.R. 630, at 633. One of such practices was the maintenance of an outpatient emergency department to provide medical services of the type here performed by Drs. Mohindra and Stevenson and included the obligation to use the utmost care in the organization of the Hospital's system of work."**

[45] On the basis that there is a cause of action against Dr. Menon for negligence and/or breach of contract and/or breach of fiduciary duty, the Hospital could be vicariously liable to the Plaintiffs. I find that the necessary element of a cause of action have been pleaded against the Hospital.

[46] The Plaintiffs further allege against the hospital and claim damages for mental distress in giving notice to their patient that the biopsy of their tissue samples were being reviewed notwithstanding that they may or may not have been misdiagnosed or suffered any physical harm. Summarily, they claim from just being informed that their previous diagnosis may have been incorrect, they suffered damages for mental distress.

[47] A recent decision of the Ontario Court of Appeal in ***Healey v. Lakeridge Health Corporation*** 2011 ONCA 55 (CanLII) denied the recovery in tort for mental distress. The Plaintiffs submitted that this case could be distinguished in that the distress was not severe.

[48] In the case at bar, the Plaintiffs in their amended statement of claim at paragraphs 39 to 64 set out the alleged complaints. In their respective affidavit, neither Albert John Gay, James Bliss Wilson nor Kimberley Anne Doyle state that they were diagnosed or suffered from a recognized psychological or psychiatric illness or injury as a result of their biopsy being reviewed. They were not seen or treated by a psychologist or psychiatrist either. It can only be said that they experienced fear of an initial misdiagnosis and worried of the outcome. They would also have lost confidence in our medical system.

[49] In ***Healey v. Lakeridge Health Corporation*** (*supra*) the Ontario Court of Appeal fully revisited the law through the recent case law that relates to mental distress and the right to compensation. ***Healey*** was a class action arising from alleged exposure of a large number of people to two patients with tuberculosis. One of the claims against Health Corporation was that the notices sent to the people exposed to the tuberculosis patients, advising that they should be tested for tuberculosis, caused them mental anxiety, suffering and distress. Following certification, on motion for summary judgement, Perell J. dismissed the claim for compensable damages for the harm suffered by the Plaintiffs and class members for mental distress.(see:[2010] O.J. No 417)

[50] On appeal Sharpe, J. A. speaking for the Ontario Court of Appeal in a five judge panel states the following:

> **"39. A plaintiff who claims damages for nervous shock or psychological injury faces two hurdles. First, the plaintiff must satisfy the court that he or she has suffered the type of damages that are compensable. It is well-established that, absent physical injury, there is a threshold that the plaintiff must meet when**

> **claiming damages for the negligent infliction of mental, psychological or psychiatric harm.**
>
> **[...]**
>
> **40. The second hurdle is that the plaintiff must satisfy the court that the psychological injury was caused by the negligence of the defendant. This involves asking whether psychological damage was a reasonable foreseeable consequence of the defendant's negligence."**

[51] Sharpe J. reviewed the law in relation to claims for mental distress in great detail including the Supreme Court of Canada in ***Mustapha v. Culligan*** [2008] 2 S.C.R. 114. He upheld the motion judge's position that ***Mustapha*** did not change the standard for compensation for a psychological injury. I am also of the view that the Supreme Court of Canada in ***Mustapha*** did not intend to change the law with respect to the threshold level of psychological or psychiatric injury required to be compensable.

[52] The Plaintiffs further submitted that it could still be argued that the ***Healey*** decision did not put an end to the debate of whether the "recognizable psychiatric illness" test must be applied in every case. They submitted that the ratio of the case was rather that "it was conceptually sound to limit compensable claims for psychological harm to those that are serious". This is not the law applicable at bar.

[53] As submitted by the Plaintiffs given the state of the law with respect to the threshold level of psychological or psychiatric injury that is required in order to be compensable, it is plain and obvious that the Plaintiffs could not succeed in establishing the causes of action for mental stress in the absence of a physical injury against the Hospital. No evidence was submitted in that regard.

[54] The Plaintiffs further claim, as a result of its alleged breach for mental distress, in contract independently to its claim for such in tort. The Plaintiffs submit that the contract contemplated psychological benefit of knowing either that cancer or pre-cancer was not present in the bodily tissue removed with the patient's consent which was lost after being informed that their biopsy was being reviewed.

[55] The Plaintiffs rely on ***Fidler v. Sunlife Insurance Co. of Canada*** 2006 SCC 30 and ***Saunders v. RBC Life Insurance Co.*** 2007 NLTD 104 where it is stated that these are so-called "peace of mind" contracts. Their position is that the contract's object is to provide the patient with a psychological benefit: namely, their peace of mind. Both of these matters, ***Fidler*** and ***Saunders,*** were insurance contract claims. However, as it was stated by the Plaintiffs and agreed to by the Defendant Menon, recovery would depend on the unique circumstances of each individual case including a determination of what was foreseeable. It is certainly of concern when considering the common issue.

[56] The Plaintiffs further alleged that the Hospital breached its fiduciary duty with the patients stating that their relationship between them was fiduciary in nature.

[57] In ***Rideout v. Health Labrador Corp*** 2005 Carswell NFLD 193, Russell J. wrote:

> **"66. A fiduciary relationship has the following characteristics:**
>
> **1. Scope for the exercise of some discretion or power,**
>
> **2. that power or discretion can be exercised unilaterally so as to affect the beneficiary's legal or practical interests and,**
>
> **3. a peculiar vulnerability to the exercise of that discretion or power. (See: Hodgkinson v. Simms, [1994] 3 S.C.R. 377 (S.C.C.) and Frame v. Smith [1987] 2 S.C.R. 99 (S.C.C.))**

[58] The Plaintiffs in their amended statement of claim state that the Hospital violated its duties of disclosure of a fiduciary nature and failed to exercise its sole discretion in its decision not to tell the Plaintiffs and class members in a timely manner of the potential problem. Again, recovery would depend on the unique circumstances of each individual case.

Dr. Menon

[59] In their amended statement of claim at paragraph 73, the Plaintiffs cause of action against Dr. Menon is in negligence and stated to be a failure to maintain his duty of competency. They allege his failure to introduce quality assurance, obtain second opinions, participate in external proficiency programs and not to possess the skill and knowledge expected by his patients to meet the standard of a competent anatomical pathologist or of a competent Chief of Pathology amounts to fault on his part.

[60] Dr. Menon does not dispute that he owed a duty of care to individual patients whose tissue samples were sent to the Department of Pathology at the Hospital for his review. He further acknowledges that the obligation or duty to his patients was to act in a manner consistent with a reasonable and prudent pathologist of like experience and training whether in tort or in contract and concedes that these are proper causes of action to plead in the circumstances of this litigation.

[61] Dr. Menon concedes also that there are proper causes of action to plead in the circumstances which relates to his administrative duties as Chief of Pathology for which the Hospital is at law responsible or if Dr. Menon's failure to discharge them has resulted in harm to individual patients. At bar, it must be tied to the standard of care owed by Dr. Menon which resulted in harm to an individual patient or patients .

[62] Cases framed in negligence do not contain a general duty to maintain competence: it is whether Dr. Menon failed to meet the standard of care expected of him when reviewing the pathology tissue of a particular claimant and in the affirmation, whether such breach caused injury to that particular plaintiff. This must be proven on an individual basis not on a class-wide basis.

[63] In his evidence, Dr. Charles Hutton, who filed an affidavit on behalf of the plaintiffs and gave evidence at discovery filed with this Court, discussed the uniqueness of each individual mentioning age, gender, location of biopsy, histology change as interpretation relies on a good history and characteristics as factors that relate to each type of specimen. He also noted that another important factor in the diagnosis and interpretation of the sample is the information provided by the surgeon who performs the surgery to the pathologist. All this renders each reading unique and involves a multitude of considerations that may affect a patient's outcome.

[64] The Plaintiffs further claim for pecuniary losses submitting that there are claims available to family class members of the deceased patients pursuant to the provisions of the ***Fatal Accidents Act*** RSNB 1973 c. F-7. Under section 3 of the ***Act***, damages for

non-pecuniary losses are recoverable in limited circumstances to the parents of minor children and the parents of dependent children. The Plaintiffs suggest to extend the claim for non-pecuniary losses to a broader class of persons than is permitted in section 3(4) of the act by extending it to the children, parents, and spouses of deceased members of the injured class.

[65] The Plaintiffs argue that this submission is justified and supported by a decision of the Supreme Court of Canada in ***Ordon Estate v. Grail*** (1998), 166 D.L.R. (4th) 193 ["Ordon Estate"].

[66] ***Ordon Estate*** involved claim by the parents, brothers, sisters and an infant daughter of a deceased for loss of guidance, care and companionship. The ***Canada Shipping Act*** had been previously interpreted to permit recovery for only pecuniary damages in fatal cases. The ***Act*** did not address the recovery of damages by the dependents of an individual who was injured but not killed.

[67] The Supreme Court in ***Ordon Estate*** held that the common law should be judicially reformed to allow claims for damages for loss of guidance, care and companionship. The Plaintiffs argue that there is reason to conclude that the ***Fatal Accidents Act*** in this province, which does not by legislation permit non-pecuniary claims for loss of guidance, care and companionship, has simultaneously been reformed by the pronouncement in ***Ordon***. They further allege that the Supreme Court has imposed liability and it is for this court to find liability, by recognizing and declaring it. This court

does not agree that ***Ordon Estate*** supports the existence of an arguable case that the common law has been reformed to allow this claim.

[68] ***Ordon Estate*** did not deal with the Fatal Accident legislation but provisions of fatal accident under the ***Canada Shipping Act*** and the application of the maritime common law. In Ordon Estate, Iacobucci and Major J.J. for the court wrote:

> **"102 [...] In this light, we are of the view that changing the definition of damages within the context of maritime accident claims is required to keep non-statutory maritime law in step with modern understandings of fairness and justice, as well as with the dynamic and evolving fabric of our society: *Salituro, supra,* at p. 670."**

[69] In R. v. Salituro [1991] 3 SCR 654 in reference to the above quote, they quoted from page 670 the following:

> **"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins*, *supra*, [Watkins v. Olafson, 1989 CanLII 36 (S.C.C.), [1989] 2 S.C.R. 750] in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."**

[70] It is the conclusion of this court that it is plain and obvious that any claims beyond what is permissible under the New Brunswick ***Fatal Accidents Act*** are not recoverable and would fail in the present case.

[71] In summary, by reading the pleadings generously and making allowances for drafting inadequacies, after applying the "plain and obvious" test, it does disclose a cause of

action against the Hospital and Dr. Menon and service the requirement set in section 6(1)a of this CPA. However, there are problems with other aspect of the causes of actions that do not fit well with the other criteria. It will become manifest in the following analysis whether the other criteria for certification have been satisfied.

IDENTIFIABLE CLASS- SECTION 6(1)(b)

[72] The Plaintiffs filed an amended notice of motion and propose the class and class period to be defined as follows:

> **"a) Patients, including their estates, whose tissue samples underwent pathology testing for potential cancer or potential cancer-related disease, and were reported by the Second Defendant (pathologist), at the First Defendant (hospital) during the class period, and whose tissue samples the First Defendant (hospital) subsequently caused to be retested; and,**
>
> **b) Children, parents and spouses (as defined by the *Fatal Accidents Act*), of deceased patients (estates).**
>
> **c) The "Class Period" is defined as: January 1, 1995 to February 7, 2007, or such other dates as may be approved by the court."**

[73] Madam Chief Justice McLachlin highlighted the importance of a clearly and objectively defined class in ***Western Canadian Shopping Centres Inc. v. Dutton*** (*supra*) and wrote:

> **"First, the class must be capable of clear definition. 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."**

[74] The purpose of the class definition was explained by Winkler J. as he then was in ***Bywater v. Toronto Transit Commission*** [1998] O.J. No. 4913 in the following terms:

> **"10 The purpose of the class definition is three fold: (a) it identifies those persons who have a potential claim for relief against the defendants; (b) it defines the parameters of the law suit so as to identify those persons who are bound by its result; and lastly, (c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.**
>
> **11 In the instant proceeding the identities of many of the passengers who would come within the class definition are not presently known. This does not constitute a defect in the class definition. In Anderson v. Wilson (1998), 37 O.R. (3d) 235 (Div. Ct.), Campbell J. adopted the words of the Ontario Law Reform Commission and stated at 248:**
>
> > **...a class definition that would enable the court to determine whether any person coming forward was or was not a class member would seem to be sufficient.**
>
> **On this point, Newberg on Class Actions (3d ed. Looseleaf) (West Publishing) states at 6-61:**
>
> > **Care should be taken to define the class in objective terms capable of membership ascertainment when appropriate, without regard to the merits of the claim or the seeking of particular relief. Such a definition in terms of objective characteristics of class members avoids problems of circular definitions which depend on the outcome of the litigation on the merits before class members may be ascertained...**
>
> **The Manual for Complex Litigation, Third (1995, West Publishing) sates at 217:**
>
> > **Class definition is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled to notice in a [class] action. It is therefore necessary to arrive at a definition that is precise, objective, and presently ascertainable... Definitions ... should avoid criteria that are subjective (e.g. a plaintiff's state of mind) or that depend upon the merits (e.g. persons who were discriminated against). Such definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a claim in deciding whether to certify a class, and create potential problems of manageability."**

[75] The Plaintiffs proposed class definition identifies every patient, including their estate, whose tissue samples underwent pathology testing for potential cancer or potential cancer-related disease whose tissue samples subsequently caused to be retested from January 1, 1995 to February 7, 2007. This definition should provide a basis by which the

members of the class can reasonably be identified in an objective manner. As it is presented, it would be difficult for any of the 15,700 patients who had their biopsy retested to identify themselves whether they are or not part of that class. Who would know without consultation with an expert if their tissue samples underwent pathology testing "for potential cancer or potential cancer related desease".

[76] There is evidence that the Plaintiffs have engaged a team of nurses to review the pathology reports and based on the criteria that they have been provided to identify the pathology reports that fit the definition and would further be reviewed by a pathologist to identify the potential claimant who fit the proposed definition.

[77] From what this court has defined to be the causes of action, not all patients have a claim against Dr. Menon and /or the Hospital. This definition lacks parameters of the lawsuit so as to identify those persons who are bound by its result and who should be notified. The definition is unduly broad.

[78] While it was conceded by the Hospital and Dr. Menon that a proper cause of action is found in the pleadings of this litigation, proof of these allegations inevitably breaks down into individual claims. Notifying all of the Plaintiffs' proposed class members would cause upset amongst persons who are not entitled to compensation. It would also compound the already existing problems with the proposed common issues as it will be discussed.

[79] As for the class identified as children, parents and spouses as defined by the Fatal Accident Act of the deceased patients, this has already been dealt with.

COMMON ISSUE - SECTION 6(1)(c)

[80] The third requirement for certification of the class proceeding is that the claims of the class members raise a common issue whether or not the common issue predominates over issues affecting only individual members.

[81] Section 1 of the CPA defines "common issues" as: (a) common but not necessarily identical issues of fact, or, (b)common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[82] The Plaintiffs' propose the following as common issues:

> **"a) Did the First Defendant (hospital) owe a duty, in tort or contract or as a fiduciary, to credential competent medical staff, and if so,**
>
> **b) Did the First Defendant (hospital) breach that duty, and if so when?**
>
> **c) Did the Second Defendant (pathologist) owe a duty of competence in tort or contract or as a fiduciary, and if so,**
>
> **d) Did the Second Defendant (pathologist) breach that duty, and if so when?**
>
> **e) Are the Defendants, or either of them, liable in tort, contract or for fiduciary breaches, for damages for mental distress:**
>
> **f) If so, whether damages for mental distress should be assessed in the aggregate, and if so, what is the quantum of aggregate damages for mental distress?**
>
> **g) Is an award of aggravated damages warranted, and if so, whether they can be assessed in the aggregate, and if so, in what amount?**
>
> **h) Are the Defendants jointly and severally liable for the remedies for the conduct set out in the Statement of Claim?"**

[83] The Supreme Court of Canada in ***Western Canadian Shopping Centres Inc. v. Dutton*** (*supra*), McLachlin C.J. explained the common issues in the following terms:

> **"39 Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.**
>
> **40 Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests."**

[84] In **Hollick v. Toronto** (supra), McLachlin C.J. added the following:

> **"18 A more difficult question is whether "the claims . . . of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act, 1992*. As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial . . . ingredient" of each of the class members' claims."**

[85] The Plaintiffs suggest that the diagnostic pathology error rate alleged in the Hospital lab, being higher than the norm, supports the contention that Dr. Menon was incompetent and of concern. They further submit that it is evident from this exorbitantly high rate of error that Dr. Menon did not possess the necessary skills to run a pathology lab as Chief of Pathology and perform pathology work and due to system failures, diagnostic errors occurred.

[86] It is in that context that the Plaintiffs put the general question of whether systemically high pathology error rates in Miramichi were caused by Dr. Menon's incompetence, system failures, or both, is something each class member shares in common and does amount to tortuous conduct.

[87] In their brief, the Plaintiffs express the following:

> **"132. The Plaintiffs propose as the unifying theme of the common issues, not whether Dr. Menon was negligent in the execution of any individual medical act performed in his capacity as surgical pathologist, but whether he breached his duty of care to be competent to perform those individual medical acts.**
>
> **133. In common understanding, a practitioner is competent if he possesses the requisite knowledge and skill for a practitioner of that speciality. This is also the definition of competence adopted by the *Medical Act*, in the section which lists the objects of the College:**
>
> > **To establish, maintain and develop standards of knowledge and skill among its members and associate members. [Emphasis added]**
>
> ***Medical Act*, at s. 5(3)(b) [Appendix B, Tab 3]**
>
> **134. In the event that physicians may fail to meet the competence standard, the *Medical Act* establishes, monitors, and enforces standards that will reduce incompetent and impaired practice amongst its members. The *Medical Act* has specific reference to incompetent physicians and provides the College of Physicians and Surgeons with specific mechanisms for assessing a physician's competence and for dealing with a physician's incompetence.**
>
> ***Medical Act*, at 53(1)(a), 57(7)(c), 58(6)(c)(iii), 59(c) [Appendix B, Tab 3]**
>
> **135. Section 5(3)(c) separately refers to "standards of qualification and practice", suggesting that these standards may be met without simultaneously meeting standards of knowledge and skill (i.e. competence).**
>
> **136. Not only the concept of competence but the term itself, is expressly embedded in the *Medical Act*. For example, the definition section of the *Act* contemplates a complaint as to competence:**
>
> > **3. In this Part, unless the context otherwise requires,**
> >
> > > **"complaint" means any allegation made ... regarding the ... competence ... of a present or former member or, associate member;**

137. Further, the *Medical Act* provides for investigation with search and seizure powers where there are reasonable grounds to believe that a member or associate member *"is incompetent"*. Examinations and inquiries may be made to determine whether a member or associate member *"is competent to practise medicine"*.

***Medical Act*, at ss. 55.3(1(a), 57(7)(c), 58(6)(c)(iii), and 59(14.6)(c) [Appendix B, Tab 3]"**

[88] The court can determine whether a physician was negligent in carrying out a medical procedure and in breach of the standard of care in the exercise of his duties. However, there is no cause of action for breach of statutory duty but it does not follow that a person through a failure to exercise reasonable care, who breaches such a duty, not be liable in negligence.

[89] I do not find in the provisions of the ***Medical Act***, above stated, any implication of a legislative intention to relieve or impose liability for incompetency of physicians in the event they fail to meet the requirements set thereunder to be able to practice medicine.

[90] It's not the duty of a court to determine whether a physician is competent to practice medicine as this is the responsibility of the Provincial licensing and regulatory body which object is set under the ***Medical Act***. This is not an action against the College of Physicians and Surgeons.

[91] Dr. Robert Boutilier who filed an affidavit on behalf of Dr. Menon explains that the process of pathology involves many different individuals within the hospital institution. He explains that errors can occur before the specimens arrive in the laboratory evaluation or after the report leaves the Pathology Department. There are many types

of errors but few are related to incompetence as most are due to systemic failure or may be difference of professional opinion. It would be a mistake and not possible to extrapolate the findings in one case to form a conclusion in any other case.

[92] In his report to consider the issue at bar, Dr. Bayardo Perez-Ordenez on behalf of the Hospital discusses about the controversy as to what constitutes a "diagnosis error". He submits that there is a general agreement that a "diagnosis error" occurs when the pathologist's diagnosis does not represent the true nature of the disease, or absence of disease, in the patient's sample. He explains that it is estimated that diagnostic pathology operates at a 2.0% error rate and has been reported that errors in cancer diagnosis range from 4.0% to 11.8%. Again it would be a mistake to try to resolve what is submitted as common issue on a class-wide basis.

[93] As previously mentioned, there is no legal duty of competency known whether this is pleaded in negligence, breach of contract or breach of fiduciary duty. It is proposed by the Plaintiffs to avoid having to prove on an individual basis the duty of care owed by Dr. Menon in an action in negligence.

[94] Each claimant must, in their particular circumstances of each case, make proof of Dr. Menon's misinterpretation of their initial tissue sample, i.e. that Dr. Menon fell below the standard of care expected of a reasonable and prudent pathologist in the circumstances; his failure to meet the standard of care expected of him resulted in injury suffered by the individual claimant and that the injury suffered is one that is compensable at law. These are the essential elements to prove a claim in negligence.

[95] In support of the alleged systemic negligence against Dr. Menon and the Hospital, the plaintiff referred to ***Bellaire v Daya*** [2007] CanLII 53236 (ON S.C.). In ***Bellaire***, systemic negligence was alleged against a doctor and the hospital that had credentialed him. He was doing a specific surgical procedure which was acknowledged as out dated. The parties had filed with the court their consent for the purpose of certifying the action and approval of a settlement terms. It cannot support the Plaintiffs position as presented.

[96] I have already indicated that in my opinion damages for mental distress are excluded in the absence of a recognized psychological or psychiatric illness. In this instance, none of the Plaintiffs state that they were diagnosed with a psychological or psychiatric illness or injury as a result of hearing about the review of their biopsy or receiving notice of such. This cannot be recognized as a common issue.

[97] In ***Williams v. Mutual Life Assurance Co. of Canada*** 2000 CanLII 22704 (ON S.C.) Cumming J. commented as follows:

> **"[39] The causes of action are asserted by all class members. But the fact of a common cause of action does not in itself give rise to a common issue. A common issue cannot be dependent upon findings of fact which have to be made with respect to each individual claimant. While the theories of liability can be phrased commonly, the actual determination of liability for each class member can only be made upon an examination of the unique circumstances with respect to each class member's purchase of a policy."**

[98] In ***Rumley v. British Columbia*** *(supra)* the Supreme Court of Canada also cautioned against certification when there is an issue with commonality of issues:

> **"[39] It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual**

proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient."

The above principles are applicable to the present case.

[99] As formulated by the Plaintiffs, there is no common issue identified that meets the test for certification to avoid duplication of fact finding or legal analysis.

PREFERABLE PROCEDURE - SECTION 6(1)(d)

[100] Under section 6(1)(d) of the CPA, the fourth criteria for certification, is whether a class proceeding "would be the preferable procedure for the fair and efficient resolution of the dispute". In comparing with other Canadian jurisdictions with the exception of the province of Nova Scotia, class action legislative makes referral to the "fair and efficient resolution of the common issue" and not "the dispute".

[101] The hospital took the position that consequently, the ***New Brunswick Act*** should be interpreted differently from the wording in the jurisdictions referenced above. It submits that case law from other jurisdictions which focuses solely on resolution of the common issues should not be given judicial weight in New Brunswick.

[102] I have considered this issue and adopted McNally J. opinion in ***Bryon et al. vs Attorney General of Canada*** [2009] N.B.Q.B. 204 where he states:

[75] Although the New Brunswick legislation specifically directs the Court to consider the greater context of the overall "dispute" and not merely the "common

issues" in determining the preferable procedure criteria, the distinction in the wording does not appear to provide for any significant difference in the analytical approach to be undertaken than what is required with respect to the preferability criteria under the Ontario *CPA*. In Hollick v. Toronto (City), *supra*, (at paras. 29 & 30) the Supreme Court of Canada directed that in considering the preferability criteria under the Ontario legislation the Court must assess the common issues in relation to the claims as a whole:

> 29 The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes:
>
> > The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.
>
> See Branch, supra, at para. 4.690. I would endorse that approach.
>
> 30 The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues: see Federal Rules of Civil Procedure, Rule 23(b)(3) (stating that class action maintainable only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"); see also British Columbia Class Proceedings Act, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider "whether questions of fact or law common to the members of the class predominate over any questions

> **affecting only individual members"). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, Class Actions: A Guide to the Class Proceedings Act, 1992 (1993), at p. 27.**

[103] Section 6(2) of the CPA provides factors to be considered by the Court in determining the preferable procedure. It reads as follows:

> **6(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider**
>
> **(a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members,**
>
> **(b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings,**
>
> **(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings,**
>
> **(d) whether other means of resolving the claims are less practical or less efficient,**
>
> **(e) whether the administration of the class proceeding would create greater diffculites than those likely to be experienced if relief were sought by other means, and**
>
> **(f) any other matter the court considers relevant.**

[104] In ***Hollick v Toronto City*** supra, the Supreme Court addresses the issue of preferability in these words:

> **27 I cannot conclude, however, that "a class proceeding would be the preferable procedure for the resolution of the common issues", as required by s. 5(1)(d). The parties agree that, in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification: see also *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (2d) 453 (Div. Ct.); compare British Columbia *Class Proceedings Act*, s. 4(2) (listing factors that court must consider in assessing preferability). Beyond that, however, the appellant and respondent part ways. In oral argument before this Court, the appellant contended that the court must look to the common issues alone, and ask whether the common issues, taken in isolation, would be better resolved in a class action rather than in individual proceedings. In response, the respondent argued that the common issues must be viewed contextually, in light of all the issues – common and individual – raised by the case. The respondent also argued that the inquiry should take into account the availability of alternative avenues of redress.**
>
> **28 The report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": *Report of the Attorney General's Advisory Committee on Class Action Reform*, *supra*, at p. 32. In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.**

[105] These two concepts, as mentioned above, are found in section 6(1)(d) and 6(2) of our CPA. Rosenberg J.A. in ***Markson v. MBNA Canada Bank*** [2007] ONCA 334 summarizes those applicable principles as set out in ***Hollick*** by the Supreme Court of Canada as follows:

> **(1) the preferability inquiry should be conducted through the lens of the three principal advantages of class proceeding: judicial economy, access to justice, and behaviour modification;**
>
> **(2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,**
>
> **(3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.**

[106] Applying these principles to this case, the proposed class action does not satisfy this criteria. To be the preferable procedure, it must represent a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claims.

[107] The question of standard of care is paramount to the resolution of this dispute and this cannot be determined by means of a class action for the reasons set out earlier. By having Dr. Menon as a party is such that standard of care is individual to each patient and liability must be determined on an individual basis. Following the determination of the standard of care, causation in fact and causation in law (remoteness) would then have to be determined on an individual basis and quantification of damages would then have to be assessed again on an individual basis.

[108] A great deal of work at a common issue trial will be of no utility for an individual claimant and will offer little in the way of judicial economy. A procedure pursuant to the

Simplified Procedure under Rule 79, if outside the monetary jurisdiction of the Simplified Proceedings under Rule 80, would be the preferable procedure.

Representative Plaintiffs – Section 6(1)(e)

[109] Section 6(1)(e) of the CPA defines the duties of the proposed representative plaintiffs as follows:

> **(i) They will fairly and adequately represent the interests of the class;**
>
> **(ii) They will produce 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 proceedings; and**
>
> **(iii) The do not hove, with respect to the common issues, an interest that is in conflict with the interest of other class members.**

[110] The Plaintiff must propose a representative plaintiff who can fairly and adequately represent the class, does not have a conflict with other class members and who has developed a reasonable plan for litigating the action and provide notice. (see ***Wheadon v. Bayer Inc*** [2004] NL SCTD 72, para-150, 154 and 161).

[111] In ***Western Canadian Shopping Centers Inc. v. Sutton*** Supra, McLachlin C.J.C. set the criterion by which the representative plaintiffs are to be evaluated as follows:

> **41. [...] In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.**

[112] The proposed representative Plaintiffs have attested to their willingness to represent the classes and have set their plan for advancing the litigation through the issues. Two of the three representative Plaintiffs, Gay and Doyle, has no change in diagnosis upon the review of their pathology slides. They have suffered no physical harm and they have suffered no recognizable psychiatric harm as a result of the action of Dr. Menon or the Hospital. It is questionable as to whether they are appropriate representatives.

[113] However, Mr. Wilson in contrast has a prima facie cause of action against Dr. Menon as a result of the alleged misdiagnosis of prostate cancer. I see no reason why he could not be a representative plaintiff, if so required.

[114] At the present time, it would serve no purpose to elaborate on the proposed litigation plan in the context of this decision and it would be awkward to attempt a detached assessment of the adequacy of the Plaintiffs litigation plan.

CONCLUSION AND DISPOSITION

[115] The plaintiffs have failed to establish an identifiable class, define workable and manageable common issue or establish that a class action would be the preferable procedure for proceeding within the requirements of the ***Class Proceedings Act***. For the above reasons, this motion for certification, is therefore dismissed.

[116] If the parties cannot agree as to the matter of costs, the plaintiffs shall have 30 days to file a written submission from the release of these reasons for Decision and the Plaintiffs 30 days to respond.

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