SUPREME COURT OF NOVA SCOTIA
Citation: *Choyce v. Gaum*, 2023 NSSC 177

Date: 20230605
Docket: Hfx No. 502811
Registry: Halifax

Between:

Sunyata Choyce and Ryan Binder as litigation guardian of Peyton Binder

Plaintiffs

v.

Dr. Errol Gaum

Defendant

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	April 26, 2023, in Halifax, Nova Scotia
Counsel:	Jamie MacGillivray, for the Plaintiffs Michael Brenton, for the Defendant

By the Court:

[1] The representative Plaintiffs (who will hereinafter be referred to as "the Plaintiffs") Sunyata Choyce and Peyton Binder (Litigation Guardian, Ryan Binder) apply for class certification pursuant to the *Class Proceedings Act*, SNS 2007, c.28 ("the Act"). The action is brought against the Defendant, Dr. Errol Gaum ("the Defendant") alleging assault, battery, and negligence, resulting largely, if not exclusively, from his alleged use of substandard behavioural management techniques ("BMT's") upon patients (who were children at the time) in the course of his dental practice, which began in the early 1970s and ended in 2020.

[2] The Defendant was certified to practice as a pediatric dentist in the Province of Nova Scotia during this period and operated out of a number of clinics located throughout the province, including those on Spring Garden Road in Halifax, at Mic Mac Mall in Dartmouth, and on Granville Road in Bedford. His license was temporarily suspended by the Provincial Dental Board of Nova Scotia in November 2020, pending an investigation of some complaints that have been made against him. As the Defendant has pointed out, he has not yet had an opportunity to respond to same, and no adjudication has occurred (*Statement of Defence, para. 6*).

[3] The Defendant's practice focused exclusively upon the treatment of children. His patients were generally referred to him from other dentists.

The Plaintiffs' Position

[4] The Plaintiffs argue that a trial of common issues on the standard of care, on informed consent, and on certain limitations issues will save "...repetitive expert and factual evidence from hundreds of witnesses". They elaborate:

> …There are essentially eight categories of Behaviour Management Techniques that the Plaintiffs say were improper, once there is a ruling on these the litigation is significantly advanced. Essentially this method will save an expert from having to testify on the same issue hundreds of times, and not require hundreds of separate trials. It will reduce Court time for witnesses where many have suffered from similar events and have similar damages. Settlement would be facilitated by having the Court set a range of general damages where the cases involve common although not identical injuries. Common issues predominate this case.
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> (*Plaintiffs' certification brief, para. 3*)

[5] Specifically, the Plaintiffs envision a trial involving the common issues of standard of care and informed consent, which they say permeate all of the claims. Selected Plaintiffs, from the class, would testify as to their experience, such that each of the impugned BMTs would be covered.

[6] The techniques specifically mentioned in the proposed litigation plan consist of the Defendant's alleged use of one or more of the following on individual patients:

> A. Shut ups
>
> B. Hand over mouth and nose, hand over mouth alone
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> C. Slapping and hitting
>
> D. Body restraint
>
> E. Leather strap restraints
>
> F. Threats
>
> G. Denied access to guardian
>
> H. Choking
>
> (*Plaintiffs' certification brief, para. 9*)

[7] The Plaintiffs propose to call their expert (Dr. Peter Copp) to provide opinion evidence with respect to each of the above categories of BMTs, as well as whether, how, and in what circumstances a child and their guardian could provide informed consent for particular techniques. After this, it is proposed that the Court would make a ruling on whether the Defendant's use of BMTs was "…substandard for each category. The decision would also make a ruling on the presence or absence of informed consent and how, or if, that effects the Defendant's liability" (*Plaintiffs' certification brief, para. 11*).

[8] The Court (the argument continues) could make certain damage awards for any one or number of Plaintiffs, and in so doing create a range of damages. A ruling would also be expected on whether Section 11 of the *Limitation of Actions Act*, 2014, c.35, s.1 ("LAA") applies to the adult Plaintiffs.

[9] The Plaintiffs' explication of the proposed litigation plan concludes as follows:

> 13. Following the Court's ruling on these issues everyone of the 315 plus Plaintiffs could submit affidavits similar to those prepared for this motion. Each

> Plaintiffs' case could be negotiated, and if it fails to settle determined through a truncated arbitration. The arbitrator would read the affidavit and the Defendant would have time available for cross-examination. The arbitrator would then apply a damage award within the range set by the Trial Judge. The arbitrator would also be able to make awards for earning capacity and future care. The arbitrator could have authority to award zero if he does not accept a certain rouge [sic] Plaintiffs evidence.
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> 14. Following the ruling on the common issues it is highly probable that most or all of the damages issues would be resolved. However, the arbitration would provide an alternative to negotiated settlement. The arbitration hearings should have set times for examinations and submission by counsel. The repetitive nature of the case and the ruling and guidance from the Court on ranges would streamline the process.
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> (*Plaintiffs' certification brief*)

[10] Ten affidavits have been filed by the Plaintiffs, consisting of the following:

1. The adult Plaintiff Ms. Choyce
2. The child Plaintiff Peyton's father Ryan Binder
3. The child Plaintiff Peyton's grandmother Kelly Smith
4. An adult Plaintiff Kharmenn-Gayle Rachelle-Ward
5. Lisa Stinson, the mother of a child Plaintiff Ryan Stinson
6. Cara Yee, an adult Plaintiff
7. Tanya Andrews-Heard, an adult Plaintiff
8. Kirsten Anderson, an adult Plaintiff
9. Case Manager Aqeel Yousafzai
10. Expert Dr. Peter Copp

(*Plaintiffs' certification brief, para. 7*)

The Defendant's Position

[11] Simply stated, the Defendant argues that the Plaintiffs have failed to satisfy the requirements of s. 7 of the Act, and that the Plaintiffs' application for class certification must be dismissed as a result.

[12] I will elaborate further upon the particulars of the Defence argument, after consideration of the Act, and in particular, s. 7 thereof.

What are class action proceedings and what are their advantages?

[13] Clearly, class action proceedings, where appropriate, possess a number of advantages over the alternative. Generally, the alternative involves a multiplicity of proceedings against a common Defendant or Defendants.

[14] In *Hollick v. Toronto (City)*, 2001 SCC 68, the Court discussed some of these advantages at para. 15:

> …First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, Report on Class Actions (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> [Emphasis added]

[15] This received further elaboration in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, where Rothstein, J., explained:

> [100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that "the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification" (para. 25).
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> . . .
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> [102] . . . The *Hollick* standard has never been judicially interpreted to require evidence on a balance of probabilities. Further, Microsoft's reliance on U.S. law is novel and departs from the *Hollick* standard. The "some basis in fact" standard does not require that the court resolve conflicting facts and

> evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon*, at para. 65).
>
> [103] Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.
>
> [Emphasis added]

[16] In *Joyce v. Nova Scotia*, 2022 NSSC 22, this Court explicitly approved a passage from *The Law of Class Actions in Canada*, (Canada Law Book, Thompson Reuters Canada Limited 2014) as follows:

> The class action is a procedural device for people who have suffered a common wrong. One or more plaintiffs can bring an action on behalf of many, and in this way have an efficient mechanism to achieve legal redress... In its modern formulation, the class action promotes more than just efficiency; there is also the idea that modern society creates harms that affect large numbers of people who do not have the means to seek redress. As discussed further in this chapter and a theme throughout the text, the three public policy purposes that underlie the modern class action are:
>
> 1) access to justice
>
> 2) behaviour modification; and
>
> 3) judicial economy, including the avoidance of a multiplicity of proceedings.

What is required for class certification?

[17] Sections 7 to 10 of the Act are reproduced below:

Certification by the Court

7(1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 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 two or more persons that would be represented by a representative party;

(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 representative party 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.

(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 or defences 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.

(3) Notwithstanding subsection (1), where an application is made to certify a proceeding as a class proceeding in order that a settlement will bind the members of a settlement class, the court shall not certify the proceeding as a class proceeding unless the court approves the settlement. *2007, c. 28, s. 7.*

Adjournment of application and effect of certification

8(1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.

(2) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding. *2007, c. 28, s. 8.*

Subclasses

9. Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that the subclass members be separately represented, the court may, in addition to appointing the representative party for the class, appoint for each subclass a representative party who, in the opinion of the court,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the subclass and of notifying subclass members of the class proceeding; and

(c) does not have, with respect to the common issues for the subclass, an interest that is in conflict with the interests of other subclass members. *2007, c. 28, s. 9.*

Certain matters not bar to certification

10. The court shall not refuse to certify a proceeding as a class proceeding by reason only that

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable; or

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members. *2007, c. 28, s. 10.*

[18] I begin, therefore, with the criteria set forth in s. 7(1). I observe that they are to be read conjunctively. Cumulatively, they comprise the issues to be addressed when an application of this nature is made. All will be considered sequentially.

Analysis

I. s. 7(1)(a) - Do the pleadings and/or the notice of application disclose a cause of action?

[19] In answering this question, I am to determine whether at least one cause of action is discernible on the basis of the pleadings. This statutory criterion is intended only to ensure that the claim pleaded by the Plaintiff is a good claim at law. The mere presence of complexity, the potential strength of the defence to be mounted, and/or the novelty of the cause of action are not bars. The pleadings will pass muster unless it is plain, obvious, and beyond doubt that the Plaintiff cannot succeed and/or the action is certain to fail because it contains a radical defect. I am to read the Statement of Claim as generously as possible with a view to accommodating any inadequacies in the form of the pleading (see *Hunt v. Carey Canada Inc*., [1990] 2 SCR 959, *Cloud v. Canada (AG)*, [2004] 0J No. 4924 (CA), *Gay v. New Brunswick (Regional Health Authority 7)*, 2014 NBCA 10; *Elwin v. Nova Scotia Home for Coloured Children*, 2013 NSSC 411).

[20] As we have seen, at this juncture the Court is not to engage in a preliminary merits test when determining whether to grant class certification pursuant to the Act. Rather, as per Wood, J. (as he was then) in *Sweetland v. GlaxoSmithKline Inc.*, 2016 NSSC 18:

> 5. The certification motion is procedural in nature. It is not the time for assessing the substantive merits of the plaintiffs' allegations except to the extent that they may impact on the certification criteria. At this stage the court performs a gatekeeping function directed to ensuring that the claims being advanced in the litigation lend themselves to resolution through the mechanism of a class proceeding.
>
> 6. … <u>It is important to remember that this does not involve any threshold assessment of the relative strength or weakness of the allegations being made</u>.
>
> [Emphasis added]

[21] The Plaintiffs' Notice of Action, as amended on October 13, 2022, references claims in assault and battery and professional negligence, stemming largely from the use of BMT's "... which are unapproved within his [the Defendant's] field, aberrant and cruel." The allegations are particularized in paragraphs 1, 9, and 20-23 thereof.

[22] The pleadings go on to allege that:

> The Defendant knew or ought to have known that the use of his [BMTs] exposed the Plaintiffs and the Class Members to risks of physical injury and serious psychological harm.
>
> (*Notice of Action, as amended, paras. 19 and 20*)

[23] In *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, our Court of Appeal pointed out at paragraph 37:

> In his decision, the certification judge correctly described the test for ascertaining whether a cause of action is made out:
>
> > [16] ***The requirement under section 7(1)(a) of the Act that pleadings disclose a cause of action is assessed strictly on the pleadings***, assuming all facts pleaded to be true and reading the claim generously realizing that drafting deficiencies can be addressed by amending the pleadings (Ward Branch, *Class Actions in Canada*, Aurora, ON, Canada Law Book, 2009 para 4.80).
> >
> > [Emphasis in original]

[24] The Defendant does not take issue with the Plaintiffs' assertion that the pleadings disclose a cause of action for professional negligence and assault and battery due to lack of informed consent for the purposes of this Application. On the basis of the pleadings and the case law, this was an appropriate concession.

II. s. 7(b) - Is there an identifiable class of two or more persons that would be represented by a representative party?

[25] Obviously, this criterion goes to the very heart of what is meant by a "class-action proceeding". Among other things, a class definition identifies who is entitled to notice of the proceeding; who is to be bound by any judgment on the common issues; and who is entitled to relief if relief is granted. (See, for example, *Western Canadian Shopping Centre Inc. v. Dutton*, 2001 SCC 46, at para. 38).

[26] Indeed, as the Court explained in *Dutton*:

> 38. While there are differences between the tests, four conditions emerge as necessary to a class action. 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: see *Branch, supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.
>
> [Emphasis added]

[27] This receives further elaboration in *Gay*, where the New Brunswick Court of Appeal distilled the Supreme Court of Canada's comments in *Hollick* thus:

> 100. In general terms, *Hollick* sheds light on the requirements of an identifiable class for s. 6(1)(b) purposes. We would summarize them as follows: (1) it must be shown that membership in the proposed Class is ascertainable by objective criteria, without having to delve into the merits of the action (para. 17); (2) there must be a rational relationship between the proposed Class and the asserted common issues (para. 19); and (3) the plaintiffs have a low threshold obligation to show that the proposed Class is not unduly broad and that it cannot be defined more narrowly without arbitrarily excluding individuals who share the same interest in the resolution of the common issues (paras. 20-21).

[28] Further clarification with respect to this issue is obtained from cases such as *Merck Frosst Canada Ltd v. Wuttunee*, 2009 SKCA 43. This was one in which leave to appeal to the Supreme Court of Canada was refused. In *Merck*, the Court said this:

> 73. In addition to these Supreme Court authorities, there is considerable authority, from other jurisdictions, suggesting, in general terms, that a merits based class definition is impermissible, and, in particular, that class definitions in terms of persons who suffered damages as a result of the defendant's conduct are barred. See, for example, the decisions of the Divisional Court, (2001), 54 O.R. (3d) 520 and the Ontario Court of Appeal, (2003), 63 O.R. (3d) 22, in *Chadha v. Bayer Inc.*, overturning the judgment certifying the action [(1999), 45 O.R. (3d) 29].

[29] The Court added, in the subsequent paragraph:

> 74. … (1) that if the criteria for class membership depend upon the outcome of the litigation it would be impossible, at the outset of the litigation, to determine who is a member of the class, and (2) that definition of class membership in terms of the outcome of the litigation leads to a kind of "circularity" in determining who is bound by the results of the litigation, particularly where the defendant is successful on the common issues.

[30] In the Notice of Motion for Certification, the Plaintiffs propose a class definition as such:

> All natural persons who suffered physical and psychological harm while subjected to substandard, cruel and aberrant Behaviour Management Techniques by the Defendant during the course of their dental treatment with the Defendant between the date the Defendant was first licensed to work as a dentist until he was suspended from practice.

[31] The Plaintiffs argue that the proposed class is defined in objective terms and allows for the identification of individuals with potential claims, who will be bound by the results, and who will be entitled to notice pursuant to the Act. They further contend that such individuals can ascertain whether they are members of the class, independent of the outcomes of any subjective issues in the litigation. The negligence of the Defendant and the assault due to a lack of informed consent are at issue and pertinent to the claims of all of the Plaintiffs.

[32] The Defendant responds that:

> … the proposed class definition, as stated, fails to accord with the requisite elements identified in *Dutton* and elaborated on in *Health Authority*. Specifically, membership in the class is predicated on subjective criteria that is entirely dependent on the outcome of the common issues and the within litigation more generally.
>
> (*Defendant's brief on motion, para. 24*)

[33] With respect, the Plaintiffs must fail on this issue. The definition, as we have seen, purports to encompass all those who suffered harm as a result of the application of "...substandard, cruel and aberrant behaviour management techniques…". However, as will be seen, one of the common issues sought to be certified asks whether "the Defendant's use of each of the following behaviour management techniques are substandard".

[34] The consequence of this is obvious. Unless and until the Court makes a ruling on (one of) the common issues sought to be certified, no single individual can know whether they have been, in fact, subjected to "substandard, cruel and aberrant behaviour management techniques".

[35] The Plaintiffs seek to remedy this concern by adding the words "claim to" in the wording of the class definition (*Notice of Action, as amended October 13, 2022, para. 9*). The definition is thus rendered:

> All natural persons who claim to have suffered physical and psychological harm while subjected to substandard, cruel and aberrant behaviour manage techniques during the course of their dental treatment with the Defendant between the date the Defendant was first licensed to work as a dentist until he was suspended from practice.
>
> [Emphasis added]

[36] In *Raganoonan v. Imperial Tobacco Canada Limited*, 2005 CanLII 40373 (ONSC) the Court rejected such an approach in the following terms:

> 45. If it were possible to define a class in terms of persons who claim that one, or more, individual issues should be decided in their favour, there would very likely be no members of the class -- and no one bound by the decision -- if the common issues were decided in favour of the defendant. Persons who made no such claim could, in subsequent proceedings, resist a defence of issue estoppel on that ground. In a class action for damages for breach of contract, for example, a decision at a trial of common issues, that there was no contract, could be ignored by putative class members who had never been called on to make a claim, and who subsequently commenced proceedings for restitutionary, or equitable, remedies that did not depend on proof of damages.
>
> 46. Accordingly, and despite the respect and deference due, and accorded, to the judges who have expressed inconsistent views in other jurisdictions, I do not consider that the problem of merits-based definitions can be avoided in this case by replacing causation as a fact with the fact that causation is claimed or asserted -- at some unspecified time -- by a potential class member.

[37] Without wishing to categorically state that such an approach should always be rejected, I confine myself to the observation that, in this case, such an approach would not address the principal concern with respect to the proposed class definition. Indeed, if an individual can never know whether they have been subjected to "substandard, cruel and aberrant BMTs" absent a Court ruling on that common issue, how can they know whether the BMTs to which they have claimed they were subjected were "substandard, cruel and aberrant" without the same ruling? Either way, until the Court makes a ruling on that common issue, no individual can meet the proposed definition for class membership.

[38] As the Plaintiffs have failed with respect to the criterion set forth in s. 7(b) of the Act, this application for class certification must fail. However, in the event that I am in error with respect to the appropriateness of the "identifiable class" definition, I will proceed to consider the other criteria set out in s. 7.

III. s. 7(1)(c) - Do the claims of the class members raise a common issue, whether or not the common issue predominates over other issues affecting only individual members?

[39] In s. 2(e) of the Act, "common issues" are defined as those which are:

> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[40] In *Dutton*, the Court canvassed the case law and summarized:

> 39. …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…
>
> [Emphasis added]

[41] In *Hollick*, the court appositely pointed out that:

> 18. ... an issue will not be "common" in the requisite sense unless the issue is a "substantial...ingredient" of each of the class members' claims.

[42] Finally, in *Rumley v. British Columbia*, 2001 SCC 69, the Court observed:

> 29. There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres, supra*, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". 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.
>
> [Emphasis added]

[43] The Plaintiffs have identified the following common issues:

A. Professional negligence

Duty of Care

1. Did the Defendant owe Class Members a duty of care in dispensation of treatment?

Standard of Care

2. Was the Defendants use of each of the following Behavior Management Techniques substandard?

    a. Telling the Plaintiffs to "shut up"

    b. Covering the Plaintiffs' mouths and noses together or the mouth alone

    c. Slapping or hitting Plaintiffs

    d. Forcibly holding Plaintiff down using body weight

    e. Threatening Plaintiffs with increased pain through needles, with teeth extraction, and sending their parents away

    f. Denying Plaintiffs access to and company of guardians during treatment

    g. Choking Plaintiffs

    h. Strapping and restraining Plaintiffs

B. Assault and battery due to a lack of informed consent

3. What is the standard for informed consent with regard to treatment and use of Behavior Management Techniques on children?

4. In the case of minors, should a dentist seek the informed consent of patients and their guardian before subjecting them to the following Behavior Management Techniques?

    a. Telling patients to shut up

    b. Covering patients' mouths and noses together or covering their mouths and while pinching or plugging or squeezing their noses during their treatment,

    c. Slapping patients in the face/ hitting them to comply

    d. Forcibly holding them down

    e. Threats of increased pain through needles, injections, teeth extraction, sending their parents away etc. to coerce cooperation

    f. Denying patients access to and company of parents during treatment

    g. Choking them to overcome them

h. Strapping and restraining them

C. Remedies

5. What is a range of general damages for pain and suffering for these cases?

6. What amount of punitive damages should be awarded against the Defendant?

D. Limitation Issue

7. Are the adult Plaintiffs exempted from the 2 year limitation through Section l l(b)(2) of the *Limitation of Actions Act* 2014, c.35, s.l.

(*Plaintiff certification brief, para. 48*)

[44] I will proceed to consider the common issues.

A. Professional negligence

1. Duty of care in the dispensation of care

[45] It is uncontroverted that a professional such as Dr. Gaum owed a duty of care to patients that he treated as a dentist. Such is a question of law, and it is true in every case. It is not a question that needs to be certified – the answer is not in any doubt. Affirming that it is true with respect to each class member who is able to establish that they were indeed a patient of Dr. Gaum will not, in the circumstances of this case, advance this litigation.

2. Standard of care and the use of the following BMTs:

a. Telling the Plaintiffs to "shut up"
b. Covering the Plaintiffs' mouths and noses together or the mouth alone
c. Slapping or hitting Plaintiffs
d. Forcibly holding Plaintiff down using body weight
e. Threatening Plaintiffs with increased pain through needles, with teeth extraction, and sending their parents away
f. Denying Plaintiffs access to and company of guardians during treatment
g. Choking Plaintiffs
h. Strapping and restraining Plaintiffs

[46] The difficulty which the Plaintiffs face with respect to this issue stems from the fact that common issues, in this context, must advance the litigation by avoiding "duplication of fact-finding or legal analysis" (*Rumley*, para. 29). Here, there will still need to be individual inquiries as to the circumstances of each class member when they, for example, say they were told to "shut up", or their mouth was covered.

The same applies for most of the other examples cited by the Plaintiffs as examples of "substandard and aberrant BMT's".

[47] Moreover, and to consider only two paragraphs (for the moment) from the affidavit of Dr. Peter Copp, sworn June 28, 2022 filed in support of this motion:

> 52. There are clear situations where the use of physical restraint is inappropriate and falls below the standard of care, these include the following:
>
> - a cooperative non-sedated patient,
> - an uncooperative patient when there is no clear need to provide treatment at that particular visit,
> - a patient who cannot be immobilized safely due to associated medical, psychological, or physical conditions,
> - a patient with a history of physical or psychological trauma, including physical or sexual abuse or other trauma that would place the individual at greater psychological risk during restraint,
> - a patient with non-emergent treatment needs in order to accomplish full mouth or multiple quadrant dental rehabilitation,
> - a practitioner's convenience, and
> - a dental team without the requisite knowledge and skills in patient selection and restraining techniques to prevent or minimize psychological stress and decrease of physical injury to the patient, the parent, and the staff.
>
> . . .
>
> 84. Decisions about Behavior Management Technique must be based on a review of the patient's medical, dental, and social history followed by an evaluation of current behavior.
>
> [Emphasis added]

[48] The clear corollary of what Dr. Kopp is saying in these paragraphs is that there are some circumstances in which "physical restraint" is appropriate. Indeed, all BMTs must be considered relative to an individual's medical, dental, and social history, as well as their current behaviour. Even the most extreme of the BMTs alleged, such as "slapping or hitting Plaintiffs" require an explanation from the individual Plaintiff as to what type of action on Dr. Gaum's part is alleged to constitute a "slap" or "hit", and the circumstances under which such was administered.

[49] There simply cannot be a blanket or abstract pronouncement that will have relevance to any, much less all, of the Plaintiffs who can establish that they were patients of the Defendant. As a result, there is no "standard of care" ruling that would be applicable to the entire class. By necessary implication, such a ruling cannot obviate the need for an inquiry into whether the particular BMT(s) complained of was/were appropriate in the circumstances of each individual case.

[50] Moreover, and to state the obvious, Dr. Gaum is not precluded from taking the position that some or all of the alleged BMTs were never administered by him at all in the course of his treatment of the patient(s) who have alleged they were subjected to them.

[51] In *St. Jean v. Mercier*, [2002] S.C.J. No. 17, the Court, albeit while discussing the standard of care applicable to physicians, said this:

> 52. …The Court of Appeal essentially said that the question to be answered should be cast in general terms according to the appropriate standard of conduct in the analysis of fault under Quebec civil law, rather than incorporating the specific facts of the case into the question.
>
> 53. … To ask, as the principal question in the general inquiry, whether a specific positive act or an instance of omission constitutes a fault is to collapse the inquiry and may confuse the issue. <u>What must be asked is whether that act or omission would be acceptable behaviour for a reasonably prudent and diligent professional in the same circumstances.</u> The erroneous approach runs the risk of focussing on the result rather than the means. Professionals have an obligation of means, not an obligation of result.
>
> [Emphasis added]

[52] This was echoed in *Jameson Livestock Ltd. v. Toms Grain & Cattle Co.*, [2006] 279 Sask. R. 281 (Sask. CA) at para. 35:

> ... [an] issue that can be resolved only by inquiry into the circumstances of each individual claim is not a "common issue", even though the same question must be posed in each case.

[53] In addition, the Defendant points out that standards, in a profession such as pediatric dental treatment, change over a period of time as broad as the approximately 50 years spanned by Dr. Gaum's practice. As he points out:

> 46. . . . The Plaintiffs' own expert, dental anesthesia specialist and general dentist, Dr. Peter Copp, states the following at paragraphs 43 and 44 of his affidavit:

> 43. While dentists continue to use these Behaviour Management Techniques, societal attitudes toward dealing with children change, the use and acceptance of a technique by the profession does not assure its legitimacy.
>
> 44. The American Association of Pediatric Dentistry publishes and updates "Best Practices: Behaviour Guidance for the Pediatric Dental Patient", which directs that a dentist who treats children should be able to accurately assess the child's developmental level, dental attitudes, and temperament to anticipate the child's reaction to care.
>
> 47. The fact that the American Association of Pediatric Dentistry sees fit to "update" its best practices guidelines over time, would imply that these are topics that evolve in response to things like the customs, academia and/or technology.
>
> (*Defendant's brief on motion, August 15, 2022*)

[54] With respect, I agree.

[55] The necessary implication is that there is no scope for a blanket ruling with respect to each BMT, whether or not it is substandard, and/or otherwise fails to meet the duty of care. A finding that the Defendant's alleged misconduct was substandard with respect to one Plaintiff based upon an assessment of the factors of that individual's case cannot be transformed into a blanket statement that would be applicable to the circumstances of all class members.

[56] The Plaintiffs' case is quite different, in this respect, from a decision such as *Rumley*, which they have cited. *Rumley* dealt with claims of sexual abuse at a residential school. The claim rested upon allegations of institutional or "systemic negligence", including "the failure to have in place management and operations procedures that would reasonably have prevented abuse". As a consequence, the Court determined that "...these are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member" (para. 30).

[57] The plethora of factors which would have to be analysed in each individual Plaintiff's case renders the proposed common issue relating to the standard of care unsuited to the "commonality" requirement of the Act.

B. Assault and battery

3. Standard for informed consent with respect to treatment and use of BMTs on children

[58] By and large, the problems with the proposed common issue as to the standard for informed consent in this context are the same as those identified with respect to the standard of care.

[59] Reference to merely one case will suffice to explain why this is so. *Joanisse v. Barker*, 2003 CanLII 25791 (ON SC) dealt with a situation involving inmates of a mental health centre, who sought to certify a class action on behalf of people who had been incarcerated and made subject to experimentation. The second proposed common issue was:

> Was informed consent to participation in the Programs possible having regard to the nature of the Social Therapy Unit at the Oak Ridge Division of the Mental Health Centre at Paradise and the design and structure of the programs?

[60] The Court, in *Joanisse* refused to certify the issue, and stated:

> 30 There seems no doubt that at a trial of the common issues, the plaintiffs would be able to adduce expert evidence of the coercive effects of the environment in which the programs were conducted. In affidavits and reports filed on the motion, qualified psychiatrists provided opinions that support the position that a voluntary consent to participate in the programs was possible. The question that has troubled me most is whether this is enough to justify an order directing a trial of proposed issue 2. To do that I would have to be satisfied that the issue could be tried with evidence from none – or no more than a representative sample – of the members of the class. I cannot, of course, bind the parties or the trial judge with respect to the evidence at a trial of common issues. The most I can do is to exercise a practical judgment as to the future course of the proceedings if certification is granted and with respect to the conduct of the trial. The defendants take the position that the question of consent – free and informed or coerced – can be dealt with properly only on an individual basis. In *Norberg*, LaForest J. stated:
>
> > "The factual context of each case must, of course, be evaluated to determine if there has been genuine consent." (at page 458)
>
> 31 Similarly, Sopinka, J., who dissented on the application of the law to the facts, stressed that all relevant factors that tend to negate consent must be considered, and continued:
>
> > "In my view, these factors must be applied on a case-by-case basis rather than by establishing categories of individuals or relationships with respect to which apparent consent will never or rarely be considered valid. Certain relationships, especially those in which there is a significant imbalance in power or those involving a high degree of trust and confidence may require the trier of fact to be particularly careful in assessing the reality of consent. However, the question of consent in

> relation to a battery claim is ultimately a factual one that must be determined on the basis of all the circumstances of a particular case." (page 475)
>
> [Emphasis added]

C. Remedies

4. Range of damages for pain and suffering, and punitive damages

[61] This, too, is necessarily an individual exercise. The modern, functional approach served by damages was first articulated in *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 DLR (3d) 452. Therein, it was noted that "money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way." (pp. 476).

[62] Quantification is a completely individual exercise. If this requires further elaboration, resort may be had to a plethora of cases. For example, in *Lindal v. Lindal*, [1981] 2 SCR 629, where, at pp. 637, the Court noted:

> Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).
>
> [Emphasis added]

[63] In relation to causation, the Defendant can only be liable for injuries caused by his conduct. The need for a case-by-case assessment on this point (as well) cannot be avoided.

[64] Further, in these cases where there are claims advanced alleging psychological damage or harm, there is an additional hurdle. As discussed in *Mustapha v. Culligan*, 2008 SCC 27 at para. 9:

> This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious

> trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 1999 CanLII 2863 (ON CA), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage.

[65] As for punitive damages, it is important to recall their overall role. In *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, the Court explained at para. 94:

> To this end, not only should the pleadings of punitive damages be more rigorous in the future than in the past (see para. 87 above), but it would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[66] This must be read in tandem with cases such as *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19. Therein, courts are cautioned

that punitive damages may only be considered after other heads of damages have been decided, because "… an award of punitive damages is rational "if, but only if" compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation." (para. 87).

[67] This is logical. If the determination of compensatory damages (including, causation) is an individual exercise, it follows that this must necessarily be true of punitive damages, and the quantification thereof, as well.

[68] Neither the range of general damages, nor the issue of whether to impose punitive damages, and if so, how much, may be appropriately determined as a common issue.

[69] In sum, although the Plaintiffs seek to have the Court identify a range of damages within which individual claims may be determined, they have not shown that there is a workable methodology available with which to develop such a range. When one considers the myriad of individual circumstances encompassed within a damage award, it seems inconceivable that such a methodology or template could be developed.

D. Limitations issues

[70] The LAA must be considered. Beginning with section 8, it is noted that:

> **8 (1)** Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> **(2)** A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.
>
> **(3)** For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is

> (a) in the case of a continuous act or omission, the day on which the act or omission ceases; and
>
> (b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs. 2014, c. 35, s. 8.
>
> [Emphasis added]

[71] The above is modified, however, by the application of section 11:

> 11 Section 8 does not apply to a proceeding in respect of a claim in relation to trespass to the person, assault or battery if
>
> . . .
>
> b) at the time of the injury on which the claim is based
>
> . . .
>
> (ii) the claimant was dependent, whether financially, emotionally or physically, on one of the defendants.

[72] The Plaintiffs seek to certify, as a common issue, whether the adult Plaintiffs are exempted from the two-year limitation period set out in section 8(1)(a) via section 11(b)(ii). This is said to be applicable "... to many of the Plaintiffs" (i.e. see para. 61, Plaintiffs' certification brief).

[73] To begin with, this would involve differentiating between claimants who are currently adults, and those who are still children. The latter would automatically receive the benefit of section 11(b) of the LAA. But further divisions and, in effect, subclasses of claimants would also be necessarily created.

[74] Secondarily, the individual circumstances of each complainant at the time the treatment was administered must be considered. A blanket statement to the effect of "the Defendant was a dentist, all claimants were his patients, therefore, a condition of dependency existed within the meaning of s. 11(b)(ii)" would be improper.

[75] In these circumstances, the Court cannot pronounce upon this issue on a class wide basis. It must be done individually. It is not suitable as a common issue.

IV. s. 7(1)(d) – Would a class proceeding be the preferable procedure for the fair and efficient resolution of the dispute?

[76] *Hollick* tells us that the Court must focus its inquiry upon whether the class proceeding would be a fair, efficient, and manageable method of advancing the

claim, and also whether the class proceedings would be preferable to other procedures (para. 28). In furtherance of these objectives, the Court must consider the criteria specified in s. 7(2) of the Act when deciding whether the standard prescribed by s. 7(1)(d) has been met:

> 7 (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 or defences 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.

[77] Many of these above factors have already been referenced during the discussion of the criteria in s. 7(1)(a)-(c).

[78] For example it should be clear that the questions of fact or law common to the class members do not "predominate over issues affecting only individual members". In fact, the court would have to resort to an individual analysis of virtually all of the issues that have been raised with respect to general damages, punitive damages, and limitation issues, as we have seen.

[79] For the Court to analyse any of the "common issues" (as framed by the Plaintiffs) through the statutory "lens" of s. 7(1)(b)-(c) would likely create more (rather than less) complexity. There is no way to deal with these issues in a manner that will eliminate or even decrease the need for separate hearings dealing with individual factors, such as if the conduct took place at all, the circumstances surrounding it, the applicable standard of care at the time (and whether that was breached), the nature of the injuries sustained, causation, and the factors bearing upon whether that individual claim is statute barred.

[80] As for s. 7(2)(c), counsel for the Defendant has advised that there have in fact been three individual claims already brought against the Defendant. The Plaintiffs

have taken no issue with this assertion, and this would tend to suggest that individual claims against the Defendant can be "sustainable" *(Defendant's supplemental brief, para. 110)*.

[81] Turning to s. 7(2)(d), I am required to consider "whether other means of resolving the claims are less practical or efficient". It has already been noted that, by and large, the equivalent of individual trials will be necessary (in any event) to resolve the claims. As such, individual actions would not be less practical or efficient, because the "common issues" that have been proposed would not ameliorate the length, or complexity of these individual hearings. Even if the issues were ruled upon, such issues could not be decided in anything more than an exceedingly general way, so general that the ruling would not assist any of the individuals in the class.

[82] The above tends to address the considerations in s. 7(2)(e) as well. Since each class member will have to undertake an individual hearing, a class proceeding will not mitigate or assuage the difficulties facing litigants. Moreover, one of the issues defined in *Hollick*, that of judicial economy, would not be advanced in a situation such as this where each individual class member would still be required to prove the standard of care, breach, causation, and damages pertinent to them.

[83] This implicates considerations involving access to justice as well. Where individual claimants must advance essentially individual claims, a class action will do very little to provide economic relief with respect to the costs associated with the pursuit of each claim.

[84] The same could be said for any psychological barriers. If claims must be advanced individually with respect to what are (essentially) the central issues common to any torts claim, the process envisioned by a class action will not help emotionally frail claimants in any way either.

[85] I also have considered the final objective noted in *Hollick*, that of behaviour modification. Given the number of individual issues which must be sorted out, this would tend to frustrate or obfuscate such "modification", particularly where so many moving parts would have to be resolved before liability can be established. Certainly, the class action process, in these circumstances, would seem to be a less desirable method than cumulative individual actions.

[86] Indeed, in *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766, the Court pointed out at para. 68:

> ...Since there would still remain many individual issues to resolve, the defendants would not be exposed to any damage award consequent on the determination of the [common] issue and therefore that behavioural tool would be absent.

V. s. 7(1)(e) - Is there a representative party 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 proceedings, and (iii) does not have, with respect to the common issues, and interest that is in conflict with the interests of other class members ?

[87] Inasmuch as the defined class proposed would be represented by two representatives, an adult Plaintiff, Ms. Choyce, and a proposed child Plaintiff, Peyton Binder, who would be proceeding through a litigation guardian, they have satisfied s. 7(1)(i) and (iii) above. They have not, however, "produced a plan for the class proceeding that sets out a workable method of advancing the class proceedings on behalf of the class …" (s. 7(1)(e)(ii)).

Conclusion

[88] The Plaintiffs have failed to satisfy any of the criteria in s. 7(1) of the Act, with the sole exception of s. 7(1)(a). Their application for class certification pursuant to the Act is dismissed. If the parties are unable to agree as to costs, I will receive written submissions within 30 days.

Gabriel, J.