IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Anderson v. Canada (Attorney General)*, 2012 NLTD(G) 147
Date: 20121017
Docket: 2007 01T 4955

BETWEEN:	**CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Docket: 2007 01T 5423

BETWEEN:	**TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Docket: 2008 01T 0844

BETWEEN:	**SELMA BOASA AND RITA CHIDO**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Docket: 2008 01T 0845

BETWEEN:	**SARAH ASIVAK AND DELANO FLOWERS**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Docket: 2008 01T 0846

BETWEEN:	**EMILY DICKMAN AND DOMINIC DICKMAN**	PLAINTIFFS
AND:	**ATTORNEY GENERAL OF CANADA**	DEFENDANT

Before: The Honourable Madam Justice Gillian D. Butler

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: July 25 and 26, 2012

Summary:

The Defendant sought to add four proposed defendants to five certified class actions. The Plaintiffs objected on the basis that they had made a conscious choice to sue Canada only alleging that it owed an exclusive non-delegable fiduciary duty of care to the Plaintiffs relative to the operation of residential schools in Labrador after March 31, 1949.

Held: Rule 7.04.(2)(b) was the applicable Rule and required the Defendant to establish either the "ought to" or "necessary" branches of the test. The Court concluded that neither branch was met and that therefore no discretion arose under Rule 7.04.(2)(b). To the extent that an independent basis to add the proposed defendants was available under section 7 of the *Contributory Negligence Act*, the Court declined to exercise discretion concluding that to do so would cause substantial prejudice to the Plaintiffs.

Appearances:

Chesley F. Crosbie, Q.C. with Kirk M. Baert and Celeste Poltak	Counsel for the Plaintiffs
Jonathan D.N. Tarlton with Mark S. Freeman and Melissa A. Grant	Counsel for the Defendant
Daniel M. Boone	Counsel for Western School Board and Labrador District School Board
Rolf Pritchard, Q.C. with M. Gerard Quigley	Counsel for Her Majesty is Right of Newfoundland and Labrador

Philip J. Buckingham	Counsel for The International Grenfell Association
Steven J. May	Counsel for The Moravian Church of Newfoundland and Labrador

Authorities Cited:

CASES CONSIDERED: 10475 Newfoundland Ltd. v. Houston, 2012 NLCA 34, 323 Nfld. & P.E.I.R. 1; **Tucker v. Unknown Person**, 2012 NLTD(G) 132; **Mandavia v. Central West Health Care Institutions Board**, [2003] N.J. No. 17, 222 Nfld. & P.E.I.R. 265 (S.C.T.D.(G)); **Clearwater Fine Foods Inc. v. Day & Ross Inc.**, 2003 NLSCTD 106, 227 Nfld. & P.E.I.R. 187; **Vardy v. Dufour**, 2008 NLCA 22, 275 Nfld. & P.E.I.R 247; **Amon v. Raphael Tuck & Sons Ltd.**, [1956] 1 Q.B. 357, [1956] 1 All E.R. 273; **C.(Y.) v. Canada (Attorney General)**, 2001 SKQB 217, [2001] S.J. No. 296; **Letvad v. Fenwick**, 2000 BCCA 630, 82 B.C.L.R. (3d) 296); **Schroeder v. DJO Canada Inc.**, 2009 SKQB 169, 77 C.P.C. (6th) 279; **Rice v. Atlantic Lottery Corporation Inc.**, 2011 NLTD(G) 65, 310 Nfld. & P.E.I.R. 234.

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.) (Terms of Union), as amended; *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.); *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33.

RULES CONSIDERED: *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42, Rule 7.04.

TEXTS CONSIDERED: A.S. Diamond, I.H. Jacob & P. Adams, *The Annual Practice 1963*, Vol. 1 (London, UK: Sweet & Maxwell, Ltd., 1963) (the "White Book"); Klar, Lewis, *Tort Law*, 3rd ed. (Toronto: Carswell, 2003) at pages 487-488; Klar, "Contribution Between Tort-Feasors" (1975), 13 *Alberta Law Review*, at page 359, fn. 6; *Odgers' Principles of Pleading and Practice*, 21st ed. (London: Stevens & Sons, 1981).

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REASONS FOR JUDGMENT

BUTLER, J.:

INTRODUCTION

[1] The Defendant applies to add The Moravian Church of Newfoundland and Labrador, the Labrador District School Board or the Western School Board ("the Boards"), The International Grenfell Association, and Her Majesty in Right of Newfoundland and Labrador as proposed defendants to the five class actions reflected in the style of cause.

[2] The class actions concern the management of residential schools in Labrador which the Plaintiffs or their families attended and at which it is alleged the students suffered mental and physical abuse. The class actions were initially certified by this Court in June 2010 and the Certification Orders were affirmed by the Court of Appeal in December 2011.

PROCEDURAL HISTORY

[3] The original Statements of Claim were issued between November 2007 and February 2008 and served on the sole Defendant, the Attorney General of Canada (hereinafter referred to as "Canada") immediately. On December 10, 2007, Fowler, J. was designated as the case management judge.

[4] Section 3 of the *Class Actions Act*, S.N.L. 2001, c. C-18.1 ("the *Act*"), requires an application for certification of a class action within 90 days of the service of the defence or the day on which the *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42, require a defence to be filed. However, within that period Canada filed an Application to address the timing of certain defence motions and this was heard by the case management judge in May 2008.

[5] On October 28, 2008, Fowler, J. ordered that Canada's intended applications to add other parties as defendants and to require the Plaintiffs to file replies to particulars should not be heard prior to the certification hearing, which was subsequently scheduled for and heard on June 1, 2009. A year later, in June 2010, each of the five actions were certified as class actions.

[6] Canada appealed the Certification Orders and the appeals were heard on November 7, 2010. On December 21, 2011, the Court of Appeal affirmed the Certification Orders.

[7] Once the leave to appeal period had expired for the Supreme Court of Canada, the parties continued the case management process and on March 21, 2012, I was designated to replace Fowler, J. as case management judge.

[8] A revised Litigation Timetable Order was filed on March 27, 2012. This timetable required (*inter alia*) that Canada deliver any Demands for Particulars by April 23, 2012, and file any Application to add parties by May 15, 2012 which Application would then be heard on July 26, 2012. Discoveries were set for September 10–14 and October 15–31, 2012. The common issues trial (estimated to be six weeks in duration) was tentatively scheduled for September–October 2013.

[9] Canada's Application to add proposed defendants proceeded as anticipated on July 26, 2012, and was coupled with an Application to compel Replies to Demands for Particulars, which caused the hearing to extend to a second day. I gave an oral decision on the Rule 14 Application on July 27, 2012, and reserved this Reasons for Judgment on the Application to add the proposed defendants.

ANALYSIS

Interpretation of Rule 7.04.(2)(b)

[10] At the time of the hearing, counsel agreed that the most recent decision in this jurisdiction to address the issue of adding new party defendants was **10475 Newfoundland Ltd. v. Houston**, 2012 NLCA 34, 323 Nfld. & P.E.I.R. 1. Counsel did not agree however on whether the Court of Appeal's decision altered the approach to be taken on the Application before me. I shall therefore address this as a preliminary issue.

[11] Coincidentally, subsequent to the hearing in this matter, Orsborn, C.J. filed his reasons in **Tucker v. Unknown Person**, 2012 NLTD(G) 132, which decision contains a comprehensive review of the authorities from this and other jurisdictions (including **Houston**) relative to the addition of a proposed party. Following the release of that decision, I invited all counsel to make any additional submissions they felt were required by the release of the **Tucker** decision. I have considered the submissions received from counsel for the Plaintiffs, the Defendant and the Boards in these Reasons.

[12] In **Tucker**, Orsborn, C.J. broadly concluded that the Court of Appeal in **Houston** had not modified the test to be applied to such an Application (see paras. 93 and 137-147). At paragraph 88 he specifically held that:

(a) the only Rule applicable to the addition of a new party defendant to an existing proceeding is Rule 7.04.(2)(b) (at para. 88(3));

(b) to be successful, an applicant must satisfy either or both of the "ought to" and "necessary" branches of the Rule (at para. 88(4)); and

(c) if (but only if) either test was met, the Court had discretion in the relief sought (at para. 88(10)).

[13] I proceed therefore on the basis that the onus is on Canada to satisfy one of the two branches of Rule 7.04.(2)(b) being the "ought to" or "necessary" tests.

[14] I confirm as well that I accept the following related conclusions made by Orsborn, C.J. relative to the interpretation of the branches of this Rule:

(a) Prior to 2008, the "necessary" branch of Rule 7.04 had been subject to two different interpretations (one broader than the other). However, in April 2008, the narrow interpretation espoused in the **Mandavia v. Central West Health Care Institutions Board**, [2003] N.J. No. 17, 222 Nfld. & P.E.I.R. 265 (S.C.T.D.(G)), and the **Clearwater Fine Foods Inc. v. Day & Ross Inc.**, 2003 NLSCTD 106, 227 Nfld. & P.E.I.R. 187, decisions was approved by the Court of Appeal in **Vardy v. Dufour**, 2008 NLCA 22, 275 Nfld. & P.E.I.R 247, as applicable to both paragraphs (a) and (b) (**Tucker** at paras. 30, 31, 37 and 48);

(b) The **Houston** decision did not overrule **Vardy** (**Tucker** at paras. 111 and 144); and

(c) The entitlement to add a new party under this Rule is limited to meeting one of these legal tests and does not extend to the wider factual inquiry that is warranted by the language of "just and convenient" used in other jurisdictions (**Tucker** at para. 61).

[15] I note that there is no suggestion made in the case before me that a limitation period has expired. However, that does not affect either the interpretation or application of Rule 7.04.(2)(b) (**Tucker**, at paras. 21, 76 and 88(2)).

Application of Rule 7.04.(2)(b)

Nature of the Claims Made By the Plaintiffs

[16] The starting point for the application of either branch of the test is the nature of the claim made by the Plaintiffs.

[17] While all five actions have since been consolidated by Consent Orders filed in July 2012, the nature of all claims is expressed in five similar Amended Statements of Claim.

[18] In essence, the Plaintiffs acknowledge that residential schools were in operation in Newfoundland (as it was then known) prior to 1949 but assert that they continued in operation after Newfoundland joined Confederation on March 31, 1949, consistent with a federal policy requiring the attendance of aboriginal children at such schools, a policy that terminated in 1996.

[19] While the Plaintiffs agree that the Terms of Union (*Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), as amended) do not refer to Indians or Eskimos, they allege that section 91(24) of *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), placed "Indians and lands reserved for Indians" exclusively under federal jurisdiction. The Plaintiffs allege therefore that effective with the 1949 Terms of Union, Canada assumed exclusive jurisdiction over aboriginal persons in Newfoundland, they being "Indians" under section 91(24) of *The Constitution Act, 1867*.

[20] The Plaintiffs acknowledge the existence of formal agreements between Canada and churches to operate the schools but assert that Canada nevertheless controlled the operation. They also acknowledge Contribution Agreements between Canada and the Province respecting resources and programs to Indians and Eskimos in Labrador but allege that such a cost sharing was a breach of Canada's duty.

[21] The Representative Plaintiffs acknowledge that others had involvement in the operation of the residential schools in question pre- and post-Confederation but they have made a conscious and deliberate choice not to name them as defendants. The Representative Plaintiffs do not seek redress for any wrongs allegedly suffered pre-1949. The pleadings suggest that while there may be agency relationships between Canada and others, liability nevertheless rests with Canada.

[22] Generally, the Plaintiffs allege that Canada owed an exclusive, non-delegable fiduciary duty of care (arising from its constitutional jurisdiction) in relation to the operation of the schools and that Canada did, through its employees, agents or representatives, breach the duty of care owed.

[23] Using the Anderson Amended Statement of Claim as an example, the claims are made solely against Canada on the basis that it:

(a) was at all material times responsible for the maintenance, funding, oversight or management of the relevant residential school, either on its own or in combination with other of its governmental agents or servants; and

(b) assumed and possessed exclusive legislative and executive responsibility over aboriginal persons once Newfoundland (as it was then known) entered confederation in 1949.

[24] The Plaintiffs seek declarations that:

(a) Canada owed an exclusive non-delegable fiduciary duty of care to the Plaintiffs in relation to the funding, oversight, operation, supervision, control, maintenance and support of the schools;

(b) Canada was negligent in its duty aforesaid and breached the duty owed; and

(c) Canada is liable to the Plaintiffs for the damages caused by its neglect and breach of duty.

[25] Paragraph 7 of each of the Certification Orders confirms that the common issues for each Class are:

(a) by its operation or management of the respective school, did the Defendant breach a duty of care owed to the students of the school to protect them from actionable physical or mental harm?

(b) by its purpose, operation or management of the respective school, did the Defendant breach a fiduciary duty owed to the students of the school to protect them from actionable physical or mental harm?

(c) by its purpose, operation or management of the school, did the Defendant breach a fiduciary duty owed to the families and siblings of the students of the school?

(d) if the answer to any of the above common issues is "yes'", can the Court make an aggregate assessment of the damages suffered by all class members as part of the common issues trial?

(e) if the answer to any of these common issues is "yes" was the Defendant guilty of conduct that justifies an award of punitive damages? and

(f) if the answer to common issue (e) is "yes", what amount of punitive damages ought to be awarded?

[26] Since the Defendant has not yet filed its Defence, its position on these issues is not reflected in the pleadings, however, I can rely upon the submission made by counsel for Canada on July 27, 2012.

[27] Canada maintains that the duties which the Plaintiffs claimed are owed to them are in fact owed to the Plaintiffs by one or more of the proposed defendants and not by Canada. Canada does not seek to add the proposed defendants as third parties but instead seeks a judicial declaration that others are liable - a ruling that would be of significance to Canada.

[28] As a result of the pleadings as presently framed and Canada's position as stated by counsel at the hearing, two potential determinations are obvious:

(a) the actions will fail; or

(b) Canada will be found liable to the Plaintiffs.

[29] Counsel dispute, however, whether (on the basis of the case as currently framed) Canada could be held jointly or partially responsible for the Plaintiffs' alleged losses.

[30] The Plaintiffs assert that their claims are unique to the Defendant, having a constitutional root of liability exclusive to Canada.

[31] The Defendant, however, points to references in the Amended Statements of Claim that raise issues of agency and which may suggest a joint tortfeasor relationship.

[32] Against this backdrop, Canada maintains that the proposed defendants both "ought to" be added and are "necessary" parties.

Ought to be Added

[33] This branch of the Rule had its origins in common law and is stricter than the "necessary" branch which had its creation in equity (**Tucker** at para. 74 citing **Amon v. Raphael Tuck & Sons Ltd.**, [1956] 1 Q.B. 357, [1956] 1 All E.R. 273, at 380).

[34] At paragraph 47, the Court of Appeal in **Houston** acknowledged that this branch was commonly considered to apply in rare cases where a person having a direct or legal interest in the adjudication of the issue had not been named. The frequently cited example is one of joint contractors because (as Orsborn, C.J. stated in **Tucker** at paragraph 78) they make up a single entity. This is confirmed in A.S. Diamond, I.H. Jacob & P. Adams, *The Annual Practice 1963*, Vol. 1 (London, UK: Sweet & Maxwell, Ltd., 1963) (the "White Book") under Order 16, r. 1, at page 308, which states, "Where a contract is made with several persons jointly, all such persons must join in an action upon such contract".

[35] By contrast, the White Book confirms that where a tort is committed by several persons, "the injured plaintiff may sue all or any of them at his election, for the liability of joint tortfeasors is joint and several" (under Order 16, r. 1), at page 315. In other words, joint tortfeasors do not make up a single legal entity (this distinction was made by Orsborn, C.J. in **Tucker** at paras. 79 and 80).

[36] I acknowledge, however, that the Court of Appeal in **Houston** suggested that it saw no reason why the "ought to" branch "could not also apply to an occupiers' liability case where owners and occupiers at common law can be held to be jointly and generally liable for a breach of duty of care respecting dangerous premises", *on the specific facts of that case* (**Houston**, at para. 47).

[37] Counsel for Canada relies on this passage to suggest that the "ought to" branch is satisfied here where negligence is asserted and there could be tortfeasors who may be held to be jointly and severally liable for any damages arising from a finding of negligence. In Canada's supplementary submissions respecting the

Tucker decision, it suggests that Canada is "not fully constituted" in the absence of the proposed defendants.

[38] With the greatest of respect to Canada's position, I do not agree. In addition to the White Book references made above, where the distinction between joint contractors and joint tortfeasors is explained, I note the following.

[39] Firstly, I accept Orsborn, C.J.'s conclusion at paragraph 93 of **Tucker** that the Court of Appeal in **Houston** dealt with the application before it primarily as a Rule 15 application to amend pleadings and to change the name and capacity of the defendants. At paragraphs 56-57 of **Houston**, the Court of Appeal held that the amendment sought (party to be added) was in fact akin to a "capacital correction" under Rule 15.02.(1)(b) where the pleaded cause of action would remain substantially unchanged.

[40] Secondly, in **Houston** it was clear from the pleadings that the plaintiff had intended to sue the owners and occupiers of the walkway on which the fall took place. The Court of Appeal concluded therefore that adding the proposed defendants would not alter the basic nature of the pleaded action. It distinguished this situation from the pleadings in both **Clearwater** and **Vardy** where the addition of new party defendants would have involved consideration of new causes of action not arising out of the same originally pleaded fact scenario (**Houston**, at para. 50).

[41] The pleadings in **Houston** are in stark contrast to those in these class actions. The Representative Plaintiffs have never expressed any intention of suing any of the operators of the residential schools. They chose to limit their claims to breach of duties owed to them exclusively by Canada. The addition of new party defendants here will (like **Clearwater** and **Vardy**) involve consideration of new causes of action not arising out of the same originally pleaded fact scenario.

[42] Thirdly, the Court of Appeal in **Houston** accepted that the plaintiff had experienced difficulties in confirming the parties responsible for the ownership and occupation of the walkway on which she had fallen. The Court of Appeal accepted

that the plaintiff had intended to include the proposed defendant and that it ought now to be added, despite the lapse of the limitation period.

[43] In the class actions before me, Plaintiffs' counsel have engaged in considerable research on the legal and constitutional issues raised by the Terms of Union (including responsibilities for education and aboriginal affairs). They acknowledge that their claims relate to management of residential schools that were in operation prior to 1949, continued for varying periods after confederation and involved other persons.

[44] Unlike **Houston**, the Plaintiffs do not seek a "capacital correction" and they are not deterred by the Defendant's suggestion that they have sued the wrong party. Their pleadings do not reflect any intention to pursue anyone but Canada and the Plaintiffs do not assert any difficulty in identifying the party responsible. It is the Defendant who seeks to add the proposed defendants, over the Plaintiffs' objections.

[45] As Orsborn, C.J. stated in **Tucker** at paragraph 80:

> Clearly a plaintiff may choose to sue only one of a number of potential defendants. The fact that the defendant may seek to bring in others by means of third party proceedings or otherwise goes to the ability to share any losses; it does not go to the integrity of the proceeding as initially structured.

[46] For these reasons, I conclude that the finding at paragraph 47 of **Houston** respecting the "ought to" branch does not assist the Defendant. Applying the narrow construction that the Court of Appeal has confirmed is applicable to Rule 7.04.(2)(b), I conclude that there is no basis on which Canada can succeed to have the proposed defendants added to the within proceedings under the "ought to" branch of Rule 7.04.(2)(b).

Necessary

[47] In **Tucker** (at para. 81), Orsborn, C.J. described the "necessary" branch as the "ought to branch" as adapted by the courts of equity, designed to enable remedies such as specific performance to be effective if and when ordered.

[48] I rely upon and accept the following conclusions of Orsborn, C.J. in **Tucker**:

(a) "Necessary" in Rule 7.04.(2)(b) does not mean simply more convenient but rather necessity in the sense of avoiding dismissal of the proceedings because the proper parties were not before the Court (at para. 30 citing **Mandavia**); and

(b) In other words, the Court must conclude that there cannot be a final determination of the issues raised unless the proposed party is added and is subject to the final and binding effect of the Court's decision (at para. 33 citing **Clearwater** at paras. 14–16).

[49] In the within case the Plaintiffs have not claimed either - that any of the proposed defendants owed them a duty or care, or that there was any breach of duty. In stark comparison to **Houston**, to add the proposed defendants to the existing action would therefore drastically alter the basic nature of each of the class actions that has been certified.

[50] Canada does, however, suggest that while the Plaintiffs have sued only one Defendant, the pleadings raise the concept of joint and/or several tortfeasors. I shall therefore re-address this argument in the context of the "necessary" branch of Rule 7.04.(2)(b).

[51] Professor Lewis Klar offers the following explanation of the terms:

> A joint tort will arise in two general areas. The first is where one person is vicariously liable for the torts committed by another. This occurs as between

> master and servant, and principal and agent. Vicarious liability may also be imposed by statute ... In all of these cases, the tort-feasor and the person who is vicariously liable for the former's acts are joint tort-feasors.
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> A joint tort will also arise when two or more persons act together in furtherance of a common design or plan, during the course of which a tortious act is committed.
>
> *Tort Law*, 3rd ed. (Toronto: Carswell, 2003) at 487-48

> The expression "joint-tort-feasors" refers to tort-feasors jointly liable, e.g. those engaged in a concerted action who combine to injure the Plaintiff. The expression "several, concurrent tort-feasors" refers to those who independently act and cause the Plaintiff the same damage.
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> Klar, "Contribution Between Tort-Feasors" (1975), 13 *Alberta Law Review*, at 359, fn. 6

[52] As indicated previously, Canada does not suggest that either of the proposed defendants are several, concurrent tortfeasors or joint tortfeasors with Canada in the second example described by Klar (those engaged in a concerted action who combine to injure the Plaintiff); in fact, Canada asserts instead that the proposed defendants are the *only* parties liable to the Plaintiffs.

[53] I acknowledge that Canada has not yet received particulars of the agency relationships that are alluded to in the pleadings and that this is currently the subject of the Demands for Particulars. Nevertheless, I accept that if Canada can be found vicariously liable for the torts of another (because of a master/servant, principal/agent relationship or by statute) Canada and the other person are joint tortfeasors. In this situation, however, the Plaintiffs have elected (as is their right) to seek relief only from Canada.

[54] Unless and until Canada serves third party notices, the only issue for the Court is whether Canada is liable to the Plaintiffs and, if so, what damage (if any) Canada's actions caused the Plaintiffs to suffer.

[55] The following conclusions made by the Court of Appeal in **Vardy** at paragraphs 27-30 were not affected by the Court of Appeal's decision in **Houston**:

> 27 The first of the four reasons set out at paragraph 65 of the decision is that Ms. Vardy "had a relationship with both the Clarenville and the St. John's Defendants, giving rise to questions of negligence and breach of contract in respect of each Defendant". This factor does not address why the St. John's Defendants are necessary in order to determine the liability of the original parties, that is, the Clarenville doctors, the Clarenville Hospital and the Peninsulas Health Care Corporation (together, "the Clarenville Defendants"). As submitted by the St. John's Defendants, if the evidence and applicable law do not support a finding that the Clarenville Defendants are liable, either fully or partially, for the Vardys' losses, this does not mean that there has been an incomplete adjudication of the original action against the Clarenville Defendants.
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> 28 The second reason set out by the Trial Division judge is that, "there was persuasive evidence from an expert, Dr. Farrell, that either or both sets of Defendants may have contributed to [Ms. Vardy's] injuries and damages" The fact that another defendant, not named in the original pleadings, may have been responsible for, or contributed to, the Vardys' injuries does not interfere with, or prevent, the court's assessment of the liability of the original defendants, the Clarenville Defendants.
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> 29 The third reason stated by the Trial Division judge for adding the St. John's Defendants is that, "the evidence of Dr. Farrell points to the fact that the issue of causation may only be determined if both sets of Defendants are parties and subject to any final decision of the Court". This proposition fails to take account of the fact that causation may be determined with respect to the Clarenville Defendants, based on the evidence adduced, without adding the St. John's Defendants as parties. If the St. John's Defendants have evidence that may be relevant in the assessment of the Clarenville Defendants' liability, including the question of causation, that evidence may be called without adding the St. John's Defendants as parties.
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> 30 The fourth reason stated by the Trial Division judge for adding the St. John's Defendants is that "the evidence of Dr. Farrell points to the requirement that both sets of Defendants be parties for proper determination of the issue of apportionment of damages, should that be an issue". Again, this rationale fails to recognize that the Clarenville Defendants' liability, whether whole, partial or not proven, can be determined without the inclusion of the St. John's Defendants as parties.

[56] Thus, relying on paragraphs 27-30 of **Vardy**, regardless of whether the Plaintiffs:

(a) had a relationship with the proposed defendants; and/or

(b) suffered injuries for which the proposed defendants were responsible,

the alleged liability of the Defendant and the alleged causation of the Defendant for injuries suffered by the Plaintiffs can be determined without adding the proposed defendants as parties to the existing class actions.

[57] The law is settled that being either an alleged joint or several tortfeasor (who a plaintiff chose not to pursue) does not trigger an entitlement to be added under either branch of Rule 7.04.(2)(b) (see **Clearwater** at para. 23, **Vardy** at paras. 27-30, and **Tucker** at para. 34).

[58] If the proposed defendants are not parties, the trial judge can nevertheless determine the constitutional issue, the operational issue, liability, causation, and assessment of any damage caused by Canada because all of these issues are determined on the basis of the evidence.

[59] The Court of Appeal in **Vardy** supported the conclusions of Orsborn, C.J. in **Mandavia** and **Clearwater** that, while the addition of the proposed defendants may provide another party from whom the plaintiff could recover if its claim was made out, this was "opportunity" and not "necessity".

[60] I find it helpful to quote from Lord Devlin's decision in **Amon** at page 363 where he cited the White Book (1955 ed., at page 232) as follows:

> Generally in common law and Chancery matters a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons whom he has no desire to sue ... Generally speaking, intervention can only be insisted upon in three classes of case, namely: (A) In a representative action where

> the intervener is one of a class whom plaintiff claims to represent, but who denies that the plaintiff does in fact represent him; (B) Where the proprietary rights of the intervener are directly affected by the proceedings, and (C) In actions claiming the specific performance of contracts where third persons have an interest in the question of the manner in which the contract should be performed.

[61] In a subsequent portion of his reasons, Lord Devlin explained why these three classes represented exceptions to the plaintiff's general right to sue who he pleases. He confirmed that the remedies that were available in a court of equity had wider legal repercussions than a court of common law. For example, if a person was ordered to pay damages at common law, the decision affected him only, but if he was ordered to refrain from doing something (an equitable remedy), third parties may prevent the exercise of the plaintiff's right (page 370).

[62] Starting with this basic premise, Lord Devlin proceeded to review authorities that had taken different approaches to the application of the "necessary" branch and concluded at page 368:

> Accordingly, the present case, in my view, really turns upon the true construction of the rule, and in particular the meaning of the words whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. The beginning and end of the matter is that the court has jurisdiction to join a person whose presence is necessary for the prescribed purpose and has no jurisdiction under the rule to join a person whose presence is not necessary for that purpose.

[63] The decision in **Amon** did not enlarge the three categories of case under which a court of equity (applying the "necessary" branch of the Rule) could add a party.

[64] The relief sought by the Representative Plaintiffs does not fall in either of the categories identified in **Amon**. They seek declaratory relief and damages against Canada alone. I accept the conclusion of Orsborn, C.J., at paragraph 88(8) in **Tucker** as follows:

> ... The authorities do not suggest that an action in which a plaintiff simply seeks damages from a defendant is such as to require the addition of another party to make any award of damages effective as a matter of law. The authorities also do not suggest that in such an action the pre-condition for adding a defendant is satisfied either by providing the plaintiff with an additional and perhaps more successful avenue of recovery or by simply establishing a connection to the subject matter of the proceeding.

[65] Similar to **Tucker**, I conclude that all questions in the actions as presently framed can be effectively and completely settled without adding the proposed defendants as parties.

[66] The facts of the case before me are similar to those in **Vardy**, where the plaintiff sought to join a specialist physician and a medical facility in St. John's to an existing proceeding against other physicians and the Clarenville hospital. The Court of Appeal held that, while it may be convenient to have all alleged tortfeasors involved in the one action, this was not the test. I agree with Canada that the proposed defendants may have an interest in these proceedings, but that is an insufficient reason to add them as parties under the "necessary" branch of the Rule in question.

[67] I note that a similar application was made (albeit not in class proceedings) by the **C.(Y.) v. Canada (Attorney General)**, 2001 SKQB 217, [2001] S.J. No. 296. At issue was the defendant's request to have Missionary Oblates added as proper defendants to the plaintiff's action alleging physical and sexual abuse at a residential school and which relief was opposed by the plaintiff.

[68] In **C.(Y.)** MacLeod, J. addressed "the Crown's solicitous concern" that the plaintiff had sued the wrong party and concluded that the real reason for the application was that the Crown considered that it would be significantly disadvantaged if the Oblates were not added as a defendant (see paras. 10-12). The Court of Queen's Bench concluded at paragraph 16 that it had no authority to "*compel* a plaintiff to seek redress from a person he or she chooses not to sue".

[69] I have not been convinced that there is any basis on which the proposed defendants are "necessary" parties to the actions as currently framed.

Discretion

[70] Orsborn, C.J. confirmed in **Tucker** that if either of the two branches of Rule 7.04.(2)(b) had been met, and a *prima facie* entitlement to add a party was found, the decision (whether or not to add the party) is nonetheless discretionary (at para. 88(9)). It is at this stage of the analysis that issues such as prejudice are considerations.

[71] However, since I have concluded that the Defendant was unable to satisfy either branch of the test, such considerations are not relevant to my analysis under Rule 7.04.(2)(b) and the Defendant's Application under Rule 7.04.(2)(b) is therefore denied.

Rule 7.02(3) and Section 7 of the *Contributory Negligence Act*

[72] I acknowledge that the Defendant also relies on Rule 7.02.(3) and section 7 of the *Contributory Negligence Act* as alternative means to have the proposed defendants added.

[73] Rule 7.02.(1)-(3) states:

> (1) Subject to rule 7.03, two or more persons may be joined together in one proceeding as plaintiffs or defendants where,
>
> (a) if separate proceedings were brought by or against each of them, some common question of law or fact would arise in all the proceedings; and
>
> (b) all rights to relief claimed in the proceeding, whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions; or

(c) the Court grants leave to do so.

(2) Subject to the provisions of any statute and unless the Court otherwise orders, a plaintiff, who claims any relief that any other person is entitled to jointly with the plaintiff, shall join all persons so entitled as parties to the proceeding, and any of them who do not consent to be joined as a plaintiff shall be made a defendant.

(3) Where relief is claimed against a defendant who is jointly liable with some other person and also severally liable, the other person need not be made a defendant to the proceeding; but where persons are jointly, but not severally, liable under a contract and relief is claimed against some but not all of those persons in a proceeding in respect of the contract, the Court may stay the proceeding until the other persons so liable are added as defendants.

[74] Joinder is a coupling or consolidation of claims at first instance and not the addition of a party to a single existing claim. For example, *Odgers' Principles of Pleading and Practice*, 21st ed. (London: Stevens & Sons, 1981) at pages 32-35 discusses joinder in a chapter entitled "Matters to be Considered before Writ".

[75] I note also that Orsborn, C.J. in **Tucker** addressed "...the analytical distinction between the ability to name a party when litigation starts and the question of law of whether, when later considering matters in the context of the existing pleadings, a party ought to have been joined or whose participation was necessary." (**Tucker** at para. 58 citing **Letvad v. Fenwick**, 2000 BCCA 630, 82 B.C.L.R. (3d) 296)

[76] Rule 7.02.(3) therefore addresses when it is appropriate to have another person jointly liable added (at first instance). It says, "Where relief is claimed against a defendant who is jointly liable with some other person and also severally liable, the other person need not be made a defendant to the proceeding". Rule 7.02.(3) merely affirms that a plaintiff cannot be compelled to sue all persons jointly and severally liable. This Rule does not assist the Defendant.

[77] Further, I accept the conclusion of Orsborn, C.J. in **Tucker** that the only Rule applicable to the addition of a new party defendant to an existing proceeding

is Rule 7.04.(2)(b) (see **Tucker** at para. 88(3)). I conclude that Rule 7.02.(3) has no application to the issue before me.

[78] The relevant section of the *Contributory Negligence Act* states:

> 7. Where it appears that a person not a party to an action is or may be wholly or partly responsible for the damages claimed, that person may be added as a party defendant or may be made a 3rd party to the action, upon the terms that are considered just.

[79] Canada argues that this section also provides an independent basis upon which the Court can add the proposed defendants.

[80] A similar argument was advanced by plaintiff's counsel in **Clearwater** and addressed by Orsborn, C.J. at paragraphs 25-30. He concluded that section 7 of the *Contributory Negligence Act* did not stand alone and that the application could only succeed if the requirements of Rule 7.04.(2)(b) were met.

[81] I acknowledge, however, that Orsborn, C.J.'s conclusions in **Clearwater** were reached in the context of a plaintiff seeking to add a defendant tortfeasor after the expiry of the relevant limitation period.

[82] Subsequently, at paragraphs 21, 76 and 88(2) of **Tucker**, however, Orsborn, C.J. held that the existence of a limitations period defence was immaterial to an application to add a party under Rule 7.04.(2)(b). I believe therefore that he has since concluded that (regardless of whether any limitation issue arises) there is no independent right under the *Contributory Negligence Act* and that the Application stands or falls under Rule 7.04.(2)(b).

[83] Nevertheless, if I am incorrect and an independent avenue exists under this legislation, there is no doubt that relief is discretionary, the section using the word "may" relative to both forms of relief addressed.

[84] To the extent that section 7 of the *Contributory Negligence* Act gives the Court any discretion to add the proposed defendants, I accept that the following factors require consideration:

(a) Avoidance of multiplicity of actions;

(b) The addition of an issue that might complicate or lengthen the trial of the existing action;

(c) The point in the progress of the existing proceeding when the issue of adding parties arises;

(d) Whether the addition would embarrass or delay the trial;

(e) Inconvenience or prejudice to either of the parties; and

(f) The nature of the claims being class actions.

[85] Since:

- the Plaintiffs have expressed no intention of pursuing a tort claim against either of the proposed defendants;

- the Defendant currently maintains that it is not liable to the Plaintiffs at all; but

- the Defendant has the right to seek to add the proposed defendants as third parties to the existing action,

I conclude that there are no other proceedings that would otherwise be avoided by adding the proposed defendants. For the same reasons, I conclude that there is no prejudice to the Defendant in denying the Application.

[86] Were the Defendant successful in this Application, it would require the Plaintiffs to prepare claims against persons who informed counsel have concluded their clients have no claim. Not only would there be considerable delay in setting down the hearing but the adjudication of the existing claims would take a very different form, which would lengthen the trial. Each of these facts would be both inconvenient and prejudicial to the Plaintiffs.

[87] This is an important claim for the Defendant involving allegations of abuse of children over decades. I accept that Canada would prefer to have everyone who was involved with the residential schools in question named in the actions.

[88] I acknowledge also that, despite the passage of five years, the Defendant has taken this Application at the earliest point possible. There was no delay on Canada's part. The parties are currently in the discovery phase of proceedings with a tentative trial set for the fall of 2013.

[89] I turn finally to the context of the claims as class actions. In **Schroeder v. DJO Canada Inc.**, 2009 SKQB 169, 77 C.P.C. (6th) 279, the Court of Queen's Bench was addressing a proposed class action concerning allegedly defective medical products (disposable pain pumps). The defendant vendor sought to have the manufacturers added as party defendants prior to or at the certification hearing. In dismissing the application, Popescul, J. addressed the issue of exercise of discretion in favour of adding a party defendant against the plaintiff's wishes in a class action. I quote from paragraphs 19–26 as follows:

> 19 In this case the plaintiffs did not sue the McKinley Group and, as the situation stands right now, the McKinley Group is in no jeopardy of being bound by any judgment rendered. The McKinley Group will not be directly affected by any judgment, in either "their legal rights" or "in their pocket".

20 Should the defendants be entitled to indemnification from the McKinley Group, by operation of statute or by virtue of contractual arrangements, the inclusion of the McKinley Group would be better achieved by utilization of the third party procedure available to it in the Rules. Inclusion of the McKinley Group as third parties by virtue of alleged indemnification claims by the defendants results in a more logical process, clearly contemplated by the Rules, and avoids the anomalous situation of having defendants annexed to the claim where they are not mentioned and against whom no relief is sought.

21 There is a myriad of other circumstances where it would be just and appropriate for the court to exercise its discretion in favour of adding a party defendant. However the circumstances of this case, especially in the context of a class action proceeding, is not one of them. Given the nature of class action proceedings and the general deference that ought to be afforded to plaintiffs in drafting their claims as they see fit, it would be contrary to the spirit and intent of the legislation to "force" the plaintiff to sue a party that they chose not to pursue.

22 In arriving at this conclusion, I have kept in mind pronouncements of the Supreme Court of Canada that pertain to the overall objectives of class action legislation and a representative plaintiff's entitlement to frame his or her claim in such a way so as to make it most amenable to class action litigation.

23 In Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, paras. 26-29, McLachlin C.J., speaking for the Supreme Court of Canada, stated the goals of class action legislation as follows:

> 26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of enviromental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.
>
> 27 Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also

reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times); see W.K. Branch, Class Actions in Canada (1998), at para. 3.30; M. A. Eizenga, M.J. Peerless and C.M. Wright, Class Actions Law and Practice (1999), at para. 1.6; Bankier, supra, at pp. 230-31; Ontario Law Reform Commission, Report on Class Actions (1982), at pp. 118-19.

28 Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, supra, at para. 3.40; Eizenga, Peerless and Wright, supra, at para. 1.7; Bankier, supra, at pp. 231-32. Ontario Law Reform Commission, supra, at pp. 119-22.

29 Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law -- The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 Harv. L. Rev. 1806, at pp. 1809-10; see Branch, supra, at para. 3.50; Eizenga, Peerless and Wright, supra, at para. 1.8; Bankier, supra, at p. 232; Ontario Law Reform Commission, supra, at pp. 11 and 140-46.

24 The Supreme Court of Canada has put these general objectives into practice by specifying that plaintiffs are entitled to frame their cases as they may see fit in order to make it more fitting for class action litigation. Accordingly, plaintiffs are not required to assert every possible claim open to them. They can construct their action to target only those specific allegations best suited to class action litigation. In Rumley v. British Columbia, [2001] 3 S.C.R. 184, McLachlin C.J. confirmed the right of plaintiffs, in the context of a class action, to advance their case as they see fit. At para. 30, she stated:

... It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS

> [page201] had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9).
>
> 25 While Rumley dealt with the plaintiff's right to limit allegations within their claim, the concept and underlying principles can be interpreted to support the proposition that plaintiffs are also entitled to restrict the parties that they wish to sue in order to make their claim more amenable to class action litigation.
>
> 26 While it might be tempting to second-guess the plaintiffs and question why it would not be to their advantage to have the proposed defendants added to ensure that all entities potentially at fault are within the jurisdiction of the Court and thereby able to benefit from a greater resource pool in the event judgment is obtained, it is not for the Court to interfere in circumstances such as this. The plaintiffs have obviously considered their options and have clearly stated, through their counsel, that they are aware of the consequences of their choices and are nonetheless quite prepared to focus on the current defendants and abide by the results that flow from their decision.

[90] As Popescul, J. stated above, the Supreme Court of Canada has acknowledged that plaintiffs in class actions are entitled to restrict their grounds of negligence in order to advance a claim that is more amenable to class proceedings.

[91] Adding proposed defendants to the existing proceedings would require a comprehensive amendment to the "common issues" identified in the June 2010 Certification Orders. This could conceivably result in an application to decertify the proceedings on the basis that the conditions set out in the *Act* are no longer satisfied. In such a case, the prejudice to the Plaintiffs would be immeasurable (see **Rice v. Atlantic Lottery Corporation Inc.**, 2011 NLTD(G) 65, 310 Nfld. & P.E.I.R. 234).

[92] Considering each of these factors, I conclude that there is significant prejudice to the Plaintiffs and no prejudice to the Defendant in denying the exercise of discretion (if any exists) to add either of the proposed defendants to the within

actions under section 7 of the *Contributory Negligence Act*. I would therefore also deny the Application on this basis.

Third Party Notices

[93] Counsel for Canada was forthright in his submissions. Denial of the right to add the proposed defendants to the within proceedings does not preclude the Defendant's right to issue third party notices to the persons that Canada claims are responsible to the Plaintiffs.

[94] Section 40 of the *Act* confirms that Rule 12.02 is not in conflict with the class action legislation and this option therefore remains available to Canada, subject to Rule 7.03.(2). I note, however, that pursuit of third party claims would require Canada to modify its position on liability since shared responsibility is the underlying concept of such notices.

CONCLUSION

[95] For the reasons stated, I would deny Canada's Application to add either of the proposed defendants to the within certified class actions under both Rule 7.04.(2)(b) and section 7 of the *Contributory Negligence Act*.

[96] Either party or proposed defendant may address the issue of costs on Application.

GILLIAN D. BUTLER
Justice