**CITATION:** Papassay v. The Queen (Ontario), 2015 ONSC 3438
**COURT FILE NO.:** CV-14-0018
**DATE:** 2015-05-28

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

| | |
|---|---|
| **B E T W E E N:** | |
| Holly Papassay, Toni Grann, Robert Mitchell, Dale Gyselinck and Lorraine Evans, | *Mr. J. Ptak*, for the Plaintiffs, assisted by *Messrs. G. Myers S. Zaitzeff and C. Watkins* |
| Plaintiffs | |
| **- and -** | |
| Her Majesty The Queen In Right of the Province of Ontario | *Ms. L. Favreau* and *Mr. J. Kelly*, for the Defendant, assisted by *Ms. C. Blom* |
| Defendant | |
| | **HEARD:** April 28, 2015, at Thunder Bay, Ontario |

**Madam Justice H.M. Pierce**

**Reasons on Motions**
**Pursuant to s. 5 (1)(a) of the *Class Proceedings Act, 1992* and Rule 21**

**Introduction**

[1] There are two complementary motions before the court. The plaintiffs move for an order that the cause of action criterion in s. 5(1)(a) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6, is satisfied by the fresh as amended statement of claim in that it discloses causes of action for negligence and breach of fiduciary duty.

[2] The defendants move for an order pursuant to Rule 21 striking the fresh as amended statement of claim and dismissing the plaintiffs' action on the grounds that it discloses no cause

of action. As the issues in these two motions are driven by the same test, they were heard together.

[3] The proposed class sought to be certified are individuals who became Crown Wards in Ontario on or after January 1, 1966. All of the named plaintiffs, as children, experienced physical or sexual abuse before and/or during their Crown wardships. They say that the Crown was aware of the abuse they experienced and owed them a duty of care in relation to it. The plaintiffs plead that the Crown breached its fiduciary duty to them and was negligent in:

(a) failing to advise them that they were entitled to seek compensation or civil damages for the criminal and tortious acts by which they were victimized;

(b) failing to collect and preserve evidence in respect of these criminal and tortious acts;

(c) failing to provide copies of incident reports and investigations to the plaintiffs related to these crimes and torts;

(d) failing to retain counsel for the plaintiffs or failing to advise the plaintiffs to retain counsel in respect of the crimes and torts; and

(e) failing to advise the plaintiffs of their rights to apply to the Criminal Injuries Compensation Board for compensation or to seek damages by way of civil action.

[4] The plaintiffs also plead that the Crown's duty of care to the plaintiffs as Crown wards extended to giving proper consideration as to whether it was in the children's best interests to advance a claim on their behalf during their Crown wardship. The plaintiffs do not, however, assert that the Crown was obliged to start a claim in every case. The plaintiffs also argue that the Crown's duty included taking all reasonable steps to protect and preserve their rights to recover compensation for damages suffered in criminal and tortious acts. They argue that limitation periods for making claims have passed and evidence has been lost as a result of the defendant's negligence.

[5] The plaintiffs say that, as a result of the defendant's negligence and breach of fiduciary duty, they have suffered delays in receiving compensation which has delayed treatment. As well,

the plaintiffs allege that they have been prevented from launching civil claims or applying for compensation to the Criminal Injuries Compensation Board by missed limitation periods or lack of evidence. The plaintiffs claim they have suffered psychological distress while in the care of the Crown as a result of the Crown's conduct.

[6] The plaintiffs further argue that the Crown, as their guardian, owed them a fiduciary duty which was breached when their legal rights were ignored, either deliberately or negligently.

[7] With respect to whether the claim should proceed, the plaintiffs submit that where the law is unsettled, a case should be allowed to proceed so that it may be considered on a full evidentiary record, rather than being dismissed at the pleadings stage. They argue that the law develops when novel cases are allowed to proceed.

[8] By contrast, the defendant seeks an order pursuant to rule 21.01(1) striking the claim on the ground that it is plain and obvious that the action could not possibly succeed. It argues that the defendant has no private law duty of care to commence proceedings on behalf of Crown wards pursuant to the test enunciated in *Anns v. Merton London Borough Council,* 1977, 2 All E.R. 492, as modified by the Supreme Court of Canada in *Cooper v. Hobart,* [2001] 2 S.C.R. 537 (S.C.C.), and *R. v. Imperial Tobacco Canada Ltd.,* [2011] 3 S.C.R. 45 (S.C.C.).

[9] The defendant also argues that it has no fiduciary duty to commence litigation on behalf of Crown wards or to preserve evidence. It says that if there was any duty, it lay with the children's aid societies that were entrusted with the children's care and that the Crown had no residual responsibility for Crown wards. It adds that there is no evidence that the plaintiffs are statute-barred from asserting claims to the Criminal Injuries Compensation Board or at civil law, or that evidence has been lost. The defendant submits that these alternative remedies are still available to the plaintiffs.

[10] If the defendant did not owe the plaintiffs a duty of care, it can have no potential liability in negligence and the claim should be struck. If the Crown is not in a fiduciary relationship with the Crown wards, the plaintiffs have no claim against it and have no hope of succeeding at trial. In those circumstances, the claim should also be struck.

**The First Criterion for Certification Under s. 5(1)(a) of the *Class Proceedings Act, 1992***

[11] The first criterion for certification of a class proceeding under s. 5(1)(a) of the *Class Proceedings Act, 1992* is that the pleading or the notice of application discloses a cause of action. If it cannot show a cause of action, the claim cannot be certified. This is the same test for deciding whether a statement of claim should be struck out as disclosing no cause of action as enunciated in *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959, at para. 33. The defendant must show that it is "plain and obvious" that the plaintiff cannot succeed before the claim is struck: *Hunt,* para. 30.

[12] The plaintiffs may not file evidence on the motion. The court simply considers the statement of claim in determining whether it discloses a cause of action. In this case, the plaintiffs' response to the defendant's demand for particulars also forms part of the pleading under consideration.

[13] For the purpose of the argument, the court must accept that the facts, as pleaded, are true unless they are "patently ridiculous or incapable of proof:" *Abdool v. Anaheim Management Ltd.,* [1995] O.J. No. 16 (Div. Ct.), para. 100. The court's approach to evaluating the case pleaded "must be generous and err on the side of permitting a novel but arguable claim to proceed to trial": *Imperial Tobacco,* para. 21.

[14] In *Hunt,* the court emphasized at para. 33 that the novelty of a case should not be a bar to proceeding. It commented:

> Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

[15] The court's power to strike a claim will be used sparingly, and only in the clearest of cases: *Temelini v. Ontario Provincial Police Commissioner,* [1990] O.J. No. 860 (C.A.), para. 8.

**The Elements of Negligence**

[16] For a case of negligence to be made out, the defendant must first owe the plaintiff a duty of care. If no duty of care is owed, no claim in negligence exists. However, if there is a duty of care, the plaintiff must prove that the standard of care was breached. Damage must be foreseeable and there must be actual damage suffered which is caused by the negligence of the tortfeasor. The plaintiff must prove causation and the plaintiff's conduct must not pose a bar to recovery. See: *Baric v. Tomalk,* [2006] O.J. No. 890 (S.C.J.), para. 18.

**Did the Crown Owe the Plaintiffs a Duty of Care?**

[17] The Supreme Court of Canada in *Cooper* and *Imperial Tobacco* developed the following test for examining whether the defendant owed the plaintiff a duty of care:

(1) Do the facts pleaded bring the plaintiff and the defendant within a relationship that has already been recognized as giving rise to a private law duty of care?

(2) If not, the court must apply the two-part *Anns* test as follows:

(a) Is the relationship between the parties sufficiently proximate such that the defendant's failure to take reasonable care might foreseeably cause harm to the plaintiff? If foreseeability and proximity are established, then a *prima facie* duty of care arises;

(b) Are there policy reasons why the *prima facie* duty of care should not be recognized?

See: *Imperial Tobacco,* paras. 37 - 38.

**Has a Duty of Care to the Plaintiffs Been Recognized?**

[18] The first inquiry under the modified *Anns* test is whether a duty of care has been recognized between the Crown in its capacity as guardian to the plaintiffs or in an analogous capacity.

[19] The plaintiffs submit that the law has long accepted that a parent owes a duty of care to his or her child and that the Crown, by analogy, is the parent to each Crown ward; therefore a

duty of care is made out: see *Edwards v. Law Society of Upper Canada,* [2001] 3 S.C.R. 562 (S.C.C.), paras. 9 – 10.

[20] The defendants deny there is an actual or analogous duty of care, as they say any responsibility for Crown wards devolves by statute to the children's aid society in whose day-to-day care they are.

[21] In law, a parent owes a duty of care to his or her child. This duty of care has been recognized in many spheres. In criminal law, for example, a parent is obliged to provide his child with necessities of life; discipline administered to the child must not be excessive; the parent is precluded from having a sexual relationship with his child. In certain circumstances of neglect, he may be found criminally negligent.

[22] Child welfare legislation has long recognized the duty of a parent to care for his child, and to avoid neglecting, abusing, or exploiting him.

[23] Family law legislation requires a parent to provide financial support for his child, including, in some circumstance, a child to whom he stands *in loco parentis*. This obligation continues after the death of a parent, when a child is dependent on the deceased parent. These are but a few examples. Clearly, the parent owes a duty of care to his or her child.

**Is the Crown in an analogous position to the parent?**

[24] In *Reference re Broome v. Prince Edward Island,* [2010] 1 S.C.R. 360, the Supreme Court of Canada held that a child's legal status is key to understanding the Crown's obligation or lack of obligation to him. The court there determined that children being cared for in a private care home who were not wards of the province could not expect a duty of care from the province. At para. 47, the court noted, "...the fact of legal guardianship matters in considering whether a duty of care exists." By implication, legal guardianship leads to a duty of care.

[25] The plaintiffs' argument about the legal relationship between the Crown and Crown wards during the relevant time is grounded in the legislative history underpinning the *Child Welfare Act, 1965,* S.O. 1965, c. 14., and its successor Acts.

[26] Prior to 1965, permanent wards received care from a variety of children's aid societies throughout Ontario. The provincial government became concerned about inconsistent care for the wards and inconsistent standards by which the societies administered care. It commissioned a report to seek recommendations about the province's child welfare scheme. These recommendations were known as the *Foster Report*.

[27] The *Foster Report* was delivered to the Minister of Public Welfare in 1964. It recommended a change to the existing practice of making neglected children wards of the children's aid society in the child's jurisdiction. Instead, it was recommended that the Crown in Right of Ontario become the legal guardian of these children, with actual care and custody to be delegated to the most appropriate agencies. The report emphasized that "legal guardianship and ultimate responsibility" would remain vested in the Province.

[28] Ontario's child welfare legislation was accordingly amended as reflected in the *Child Welfare Act, 1965,* S.O. 1965, c. 14. The new Act came into effect on January 1, 1966. It made a distinction between temporary wards for whom the children's aid society providing care for a child assumed "all the rights and responsibilities of a legal guardian of the wards of the society for the purpose of their care, custody, and control" (s. 33) and permanent or Crown wards. Section 32 of the Act described the duties of the Crown to its wards:

> The Crown has and shall assume all the rights and responsibilities of a legal guardian of its wards for the purpose of their care, custody and control, and the powers, duties and obligations of the Crown in respect of the wards of the Crown, other than those assigned to the Director by this Act, may be exercised and discharged by the children's aid society having the care of the ward.

I note that the delegation of responsibilities to children's aid societies under this Act was permissive, not mandatory.

[29] The same dual structure of temporary or society wardship and permanent or Crown wardship continues in the current *Child and Family Services Act,* R.S.O. 1990, c. 11. The relationship between the Crown and its wards is described in s. 63(1) of the Act as follows:

> Where a child is made a Crown ward under paragraph 3 of subsection 57(1), or under subsection 65.2(1), the Crown has the rights and responsibilities of a parent for the

> purpose of the child's care, custody and control and has the right to give or refuse consent to medical treatment for the child where a parent's consent would otherwise be required, and the Crown's powers, duties and obligations in respect of the child, except those assigned to a Director by this Act or the regulations, shall be exercised and performed by the society caring for the child.

[30] By contrast, s. 63(2) deals with responsibility for temporary or society wards as follows:

> Where a child is made a society ward under paragraph 2 of subsection 57(1), the society has the rights and responsibilities of a parent for the purpose of the child's care, custody and control.

[31] The defendant submits that no common law or statutory duty has been imposed on parents or their surrogates to commence or continue litigation on behalf of their children.

[32] This submission overlooks the court's approach in *T.L. v. Alberta (Director of Child Welfare),* [2006] A.J. No. 163 (Q.B.).

[33] In *T.L.,* the court considered whether it would certify a class action in a case of proposed plaintiffs who, as minors in the care of Alberta's child welfare authorities, suffered personal injuries at the hands of a third party tortfeasor. The litigation was described as "a lawsuit about lawsuits." The plaintiffs in the proposed class claimed that the Director of Child Welfare should have pursued claims on behalf of his minor wards and did not do so.

[34] At para. 94 of *T.L.,* the court describes the nature of the claim in these terms:

> The proposed class would include children who were the victims of torts, and subsequently were under the care of the Defendant. In some cases the abuse will have been one, and perhaps the primary, reason for the apprehension of the child. The action therefore goes to the heart of the nature of a Child Welfare apprehension. Is the apprehension merely to ensure that the child receives "protective services," or does the apprehension go further and require the Defendant to protect the civil legal rights of the apprehended child? In other words, does the Defendant discharge its duty by simply ensuring that the child is placed in a safe environment, or must the Defendant also then pursue the legal rights of the child for the abuse that resulted in the apprehension? What is the effect of the statutory provisions making the Defendant the guardian of the children? Would the social workers employed by the Defendant be distracted from the protection of the children if they had to attend to their legal rights as well?

[35] The court held there was a cause of action and, with some amendments, certified the class proceeding.

[36] The defendant submits that *T.L.* is distinguishable because under the Alberta *Limitations Act*, R.S.A. 2000, c. L-12, the time for a minor to sue ran during his minority; therefore, the duty to protect a child's legal rights during his minority is more compelling. The Ontario *Limitations Act,* S.O. 2002, c. 24, Sch. B, by contrast, preserves the right of a minor to claim for two years after he or she attains the age of majority.

[37] The defendant's submission that *T.L.* is distinguishable misapprehends the nature of the plaintiffs' claim in this case. Here, the plaintiffs' claim is broader than simply asserting that the defendant should have commenced litigation on the plaintiffs' behalf and failed to do so. The claim includes damages for failure to advise the Crown wards of their right to make claims upon attaining their majority, or to refer them to counsel for advice and assistance, or to preserve evidence in order that they might advance those claims. The decision in *T.L.* recognizes that the Crown, in the context of a child welfare regime, may owe a duty of care to protect the legal rights of its wards.

[38] In *Rivet v. British Columbia,* [2007] B.C.J. No. 1085 (S.C.), an individual plaintiff sued the province, including its child welfare authorities, for failing to collect and preserve evidence from an motor vehicle accident that injured him as a child before he became a ward of the province and for failing to provide him with appropriate medical care. The defendants moved to strike out his action as disclosing no reasonable claim. The court refused to do so holding that although the claim was novel, it was not plain and obvious that the law might encompass such a claim.

[39] In the case at bar, the defendant argues that the Crown's obligation been delegated to the children's aid societies by virtue of s. 32 of the *Child Welfare Act, 1965,* and by virtue of s. 63(1) of the *Child and Family Services Act.*

[40] I do not agree with this submission. In the 1965 Act, guardianship of Crown wards is comprehensively assigned to the Crown. Section 32 provides that the provincial Director of Child Welfare, appointed under the Act, shall assume designated responsibilities under the Act.

[41] The 1965 Act further provides that the obligations of the Crown for its wards *may* be discharged by the society having care of the young person. Thus, in the hierarchy of responsibilities to Crown wards, the Crown stands first, as the Act states:

> The Crown has and shall assume all the rights and responsibilities of a legal guardian of its wards for the purpose of their care, custody and control…

[42] Certain responsibilities are carved out by statute for the Director of Child Welfare. The residual responsibilities are left for the children's aid societies, should they be assigned responsibility by the Crown for day-to-day care.

[43] This distribution of powers leaves the province with the power to rationalize and oversee the practices of the children's aid societies and regulate conditions for the children in the societies' care, a problem that the *Foster Report* sought to address.

[44] Under s. 63(1) of the current *Child and Family Services Act*, the wording of the statute has changed. It now provides that the Crown has the rights and responsibilities of the parent for the purpose of the child's care, custody and control, including medical care, but assigns responsibility for that care to the children's aid society caring for the child, except for the duties assigned to the Director of Child Welfare, or those reserved under the regulations. Thus, the primary grant of responsibility in respect of Crown wards continues to be to the Crown. The implementation of the Crown's responsibility for Crown wards is delegated to the Director of Child Welfare, an official appointed by the province and defined in the Act.

[45] The role of the Director of Child Welfare was enlarged by contemporary legislation. Under s. 17 of the *Child and Family Services Act*, the Director:

> (a) shall advise and supervise societies;
>
> (b) shall inspect or direct and supervise the inspection of the operation and records of societies;

(c) shall exercise the powers and duties of a society in any area in which no society is functioning;

(d) shall inspect or direct and supervise the inspection of places in which children in the care of societies are placed; and

(e) shall ensure that societies provide the standard of services and follow the procedures and practices required by subsection 15(4).

[46] Section 66 of the current Act also requires the Director or his designate to review the status of each Crown ward at least annually. This provision belies the defendant's submission that the Director of Child Welfare only exercises administrative functions at a "higher level." The prescribed annual audit includes a provincial review of children's aid society files, questionnaires completed by the children, and personal interviews with them. The plain meaning of the statute requires the Director or his designate to undertake this annual review, not the society caring for the child.

[47] By this and other mechanisms, the Crown continues to exercise oversight in relation to the children's aid societies and thus, to Crown wards. I conclude that the care provided by children's aid societies for Crown wards is secondary, and is always subject to the direction and supervision of the province.

[48] As I have previously stated, the court must first determine whether the facts pleaded bring the plaintiff and the defendant within a relationship that has already been recognized as giving rise to a private law duty of care. I conclude that a private law duty of care analogous to that between parent and child has been recognized as subsisting between the plaintiffs and the defendant. It is therefore unnecessary to engage in the balance of the *Anns* test analysis. In this case, as in *Rivet* and *T.L.,* it is not plain and obvious that the Crown's obligation to its wards does not extend to protecting their legal rights.

**The Standard of Care**

[49] The next step in determining if the plaintiffs have a cause of action against the defendant in negligence is determining whether the standard of care was breached. In *Rausch v. Pickering*

*(City),* [2013] O.J. No. 5584, the Court of Appeal described the common error of conflating a duty of care with a standard of care. At paras. 39 – 40 of *Rausch*, the court observed:

> [39] The existence of a duty of care simply means that the defendant is in a relationship of sufficient proximity with the plaintiff that he or she ought to have the plaintiff in mind as a person foreseeably harmed by his or her wrongful actions. It is not a duty to do anything specific; it is a duty to take reasonable care to avoid causing foreseeable harm. [Citation omitted].
>
> [40] If a duty of care is recognized, then the standard of care necessary to discharge the duty and whether it has been breached will be determined at trial.

[50] I conclude, therefore, that the nature of the standard of care is an issue to be determined on a full evidentiary record at trial, and not on a pleadings motion.

**Was Harm Reasonably Foreseeable?**

[51] The defendant disputes that the risk of harm was reasonably foreseeable. It submits that the risk could not have been foreseeable because the children's aid societies are, by statute, responsible for day-to-day care of Crown wards. Having concluded that the Crown owes its wards a primary duty of care by virtue of the statutory grant of guardianship, I do not accept these submissions.

[52] The defence also contends that the risk of harm was not foreseeable because s. 81(2) of the *Child and Family Services Act* delegates to the Children's Lawyer the responsibility to commence litigation on behalf of a child in care. There is no comparable provision in the *Child Welfare Act, 1965* which was in force when the proposed class began. However, there is a predecessor provision in s. 51 of the *Child Welfare Act, 1978,* S.O. 1978, c. 85, where the Official Guardian or the society was authorized to litigate on behalf of abused children. However, the wording in the 1978 statute was permissive, and it was not exclusive to the children's aid societies.

[53] Section 81(2) of the *Child and Family Services Act* provides:

> When the Children's Lawyer is of the opinion that a child has a cause of action or other claim because the child has suffered abuse, the Children's Lawyer may, if he or

> she considers it to be in the child's best interests, institute and conduct proceedings on the child's behalf for the recovery of damages or other compensation.

The related provision in s. 81(3) states:

> Where a child is in a society's care and custody, subsection (2) also applies to the society with necessary modifications.

[54] The defendant submits that s. 81(2) explicitly charges a children's aid society with the discretion to assess whether it is in the child's best interests to bring a proceeding on behalf of a child in care.

[55] I do not agree. No such responsibility is referenced in s. 81(2). The Act is silent as to how the Children's Lawyer, a Crown agency, might be engaged and by whom. Sections 81(2) and 81(3), when read together suggest that both the Crown and children's aid societies may seek advice from the Children's Lawyer on behalf of their respective wards. The section is permissive, rather than mandatory.

[56] The defendant argues that the claims proposed by the plaintiffs exceed the scope of the Crown's duty of care and are therefore not foreseeable.

[57] The inclusion of s. 81(2) in the *Child and Family Services Act,* and a predecessor provision in the *Child Welfare Act, 1978,* suggests that the Legislature considered that children in care might require claims to be started on their behalf to address abuse they experienced. It is a recognition by the Legislature that children in care might have *legal* needs. For that reason, it is difficult to accept the defendant's submission that the risks pleaded in the statement of claim exceed the scope of the defendant's duty of care when the Legislature obviously had them in mind. When that duty of care commenced will be an issue for determination at trial.

[58] The defendant also submits that loss was not foreseeable because the plaintiffs could have commenced litigation on their own behalf once they reach the age of majority.

[59] Like the court in *Rivet,* I am not prepared to conclude that the harm that the plaintiffs pleaded occurred was not foreseeable. The plaintiffs have pleaded that as vulnerable young people they suffered physical and sexual abuse. They claim they were unaware of their rights and

the evidence to support claims had not been preserved. This may be a novel claim, but it is an issue for proof at trial.

**Breach of Fiduciary Duty**

[60] In addition to pleading that the defendant was negligent, the plaintiffs claim that the defendant was in a fiduciary relationship with them and breached its duty in that relationship.

[61] Specifically, the plaintiffs claim that the Crown placed its interests ahead of those of the Crown wards by:

(a) failing to protect their legal rights;

(b) failing to consider whether the plaintiffs had suffered compensable harm; and

(c) failing to seek and pay compensation through the Criminal Injuries Compensation Board.

[62] They claim that the criterion for a cause of action for breach of fiduciary duty under s. 5(1)(a) is thereby satisfied.

[63] The elements of a fiduciary relationship were described in *Frame v. Smith,* [1987] 2 S.C.R. 99 (S.C.C.), at para. 60 as follows:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[64] The defendants argue that it is "plain and obvious" that the Crown was not in a fiduciary relationship with the plaintiffs that requires it to commence litigation on their behalf.

[65] The defendant relies on *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 S.C.R. 261 (S.C.C.), which deals with cases where an existing category of fiduciary relationship has not

been recognized. The court held, in those circumstances, that plaintiffs must show that the alleged fiduciary had undertaken to act in the best interests of the beneficiaries; the defined class of persons was vulnerable to the fiduciary's control; and the legal or substantial practical interests of the fiduciaries would be adversely affected by the alleged fiduciary's exercise of discretion or control.

[66] The defendant submits that since child welfare legislation delegates the decision to sue on behalf of Crown wards to the children's aid societies, there is no fiduciary obligation in the defendant.

[67] The defendant also submits that the plaintiffs had at least two years after attaining the age of majority to commence civil claims, or claims to the Criminal Injuries Compensation Board, or alternatively, that the time to make claims could be extended.

[68] There are several problems with this argument. First, the Supreme Court has determined that in the same way that parents owe a fiduciary duty to children in their care, guardians owe a fiduciary duty to their wards: see *M. (K.) v. M. (H)*, [1992] 3 S.C.R. 6.

[69] In *Alberta*, the proposed class involved residents of nursing homes and long-term care facilities who were vulnerable. The elderly claimed that the government charged inflated costs for accommodation in order to defray the cost of medical care which the province could not charge directly to members of the proposed class.

[70] The court struck the claim for breach of fiduciary duty, as well as other claims, but allowed the claims for unjust enrichment and *Charter* damages to proceed. In doing so, the court held that if the alleged fiduciary gave an undertaking to act in the beneficiary's best interests, the language of the legislation must clearly support it. A mere grant of discretionary power to affect a person's interests was not sufficient to create the implied undertaking of the fiduciary: para. 45.

[71] In my view, because the law has recognized that guardians owe a fiduciary duty to their wards much as parents owe a fiduciary duty to their children, it is not necessary to embark upon the legislative analysis proposed in para. 45 of *Alberta.* The terms of the child welfare legislation

define the Crown as being in a parental relationship with its wards. Therefore, the legislation itself supports the existence of a fiduciary relationship.

[72] The second flaw in the defendant's argument is this: the defendant's submission focusses on only one small part of the plaintiffs' claim: that the defendant should have commenced litigation to recover damages for the Crown wards. The plaintiffs' claim is much broader. The plaintiffs plead that the defendant should have given consideration to whether litigation should be commenced; should have advised Crown wards of their right to sue or claim compensation from the Criminal Injuries Compensation Board; should have referred them to counsel; and should have preserved evidence and provided it to Crown wards upon their discharge from care. They claim that damages arise from the delay in obtaining compensation and consequently treatment because the Crown did not take these steps.

[73] The third difficulty with the defendant's argument is as I have discussed above: the children's aid societies are not solely or even explicitly delegated to commence litigation on behalf of Crown wards. The primary relationship of wardship is between the Crown and the Crown ward.

[74] Finally, the defendant submits that there is no proof that the Crown wards could not now commence civil suits or applications to the Criminal Injuries Compensation Board for compensation. This submission is difficult to accept. The nominal plaintiffs were discharged from Crown wardship more than thirty years ago. In some instances, the abuse they suffered preceded their status as Crown wards. In other instances, they also suffered abuse during their Crown wardship. It is hard to believe that extensions of the limitation period for several decades would be available under the Criminal Injuries legislation. It is even more difficult to believe that the plaintiffs could sue civilly after all this time. Even if the obstacles of limitation periods could be overcome, what evidence would be available to support their claims?

[75] While the plaintiffs' claim may be novel, I am not prepared to conclude on basis of the fresh as amended statement of claim that the plaintiffs have no cause of action for breach of fiduciary duty. It is conceivable that the plaintiffs will be able to prove that the defendant could

exercise power over them; that the exercise of the power was unilateral and negatively affected their legal interests, and that they were vulnerable to the Crown's exercise of its power.

**Conclusion**

[76] On consent, the plaintiffs are granted leave to file the fresh as amended statement of claim.

[77] For the reasons set out above, the defendant's motion to strike out the fresh as amended statement of claim and to dismiss the plaintiffs' action is dismissed.

[78] The plaintiffs' motion for an order that the cause of action criterion related to the test for certification under s. 5(1)(a) of the *Class Proceedings Act,* is granted.

[79] Costs are reserved. Counsel are ordered to contact the trial coordinator within thirty days to schedule an appointment to continue arguments relating to certification of the class, and in respect of costs of these motions.

Madam Justice H.M. Pierce

**Released:** May 28, 2015

**CITATION:** Papassay v. The Queen (Ontario), 2015 ONSC 3438
**COURT FILE NO.:** CV-14-0018
**DATE:** 2015-05-28

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Holly Papassay, Toni Grann, Robert Mitchell, Dale Gyselinck and Lorraine Evans,

Plaintiffs

**- and -**

Her Majesty The Queen In Right of the Province of Ontario

Defendant

---

**REASONS ON MOTIONS PURSUANT TO S. 5 (1)(A) OF THE *CLASS PROCEEDINGS ACT, 1992* AND RULE 21**

---

Pierce J.

**Released:** May 28, 2015

/mls