Date: 20200529
Docket: CI 18-01-17220
(Winnipeg Centre)
Indexed as: Weremy v.
The Government of Manitoba
Cited as: 2020 MBQB 85

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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	)	
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	)	
THE GOVERNMENT OF MANITOBA,	)	JIM KOCH
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defendant.	)	for the defendant
	)	
	)	JUDGMENT DELIVERED:
	)	May 29, 2020

GRAMMOND J.

INTRODUCTION

[1] This action relates to allegations of physical and sexual abuse of the residents at the Manitoba Developmental Centre ("MDC"), in Portage la Prairie, Manitoba. MDC is owned and operated by the defendant, and has housed developmentally delayed and other disabled persons since 1890.

[2] The plaintiff seeks, on his own behalf, and on behalf of the members of a class of persons, an order certifying this action as a class proceeding and appointing him as the representative plaintiff for the class pursuant to ***The Class Proceedings Act***, C.C.S.M. c. C130 ("***Act***"). I must determine whether the certification criteria set out in s. 4 of the ***Act*** have been satisfied.

THE CERTIFICATION CRITERIA

[3] Section 4 of the ***Act*** provides:

> Certification of class proceeding
>
> 4 The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if
>
> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of two or more persons;
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> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
>
> (e) there is a person who is prepared to act as the representative plaintiff 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, on the common issues, an interest that conflicts with the interests of other class members.

[4] In ***Hollick v. Toronto (City)***, 2001 SCC 68, the court set out general principles surrounding the certification of class proceedings. In particular, it stated that:

a) class proceedings legislation should not be interpreted in an overly restrictive manner, and should be construed generously to realize its underlying goals, including judicial economy, access to justice, and behaviour modification (paras. 14 and 15);

b) a certification motion focuses upon the form of the action, in terms of whether it is appropriately prosecuted as a class action, and not on whether the claim is likely to succeed (para. 16); and

c) the proposed representative of the class must show "some basis in fact" for each of the certification requirements (para. 25).

[5] In ***Walls et al. v. Bayer Inc.***, 2005 MBQB 3[1], the court stated that the evidentiary threshold for meeting the statutory criteria is low (para. 19), that the court must fulfill a gatekeeper function, and that it must consider the evidence in light of the statutory criteria (para. 22). In addition, the court should consider the form and procedure of the action, but not its substance or merits (para. 22).

[6] The court in ***Pro-Sys Consultants Ltd. v. Microsoft Corporation***, 2013 SCC 57, stated that:

> [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 ... [and] that ... the class representative will have to establish an evidentiary basis for certification.

[1] aff'd 2005 MBCA 93, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 409 (QL)

...

> [104] ... there is limited utility in trying to define 'some basis in fact' in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow for the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

[7] A certification motion is, in essence, a screening mechanism to determine whether a claim should proceed as a class action. As McKelvey, J. stated in ***Pisclevich v. Manitoba***, 2018 MBQB 52, class proceedings are meant to provide a fair and efficient resolution of common issues of fact and law, as well as fair compensation for all, while avoiding a multiplicity of similar actions that could lead to inconsistent results (para. 7).

[8] The defendant in this case has acknowledged that the claim discloses a cause of action and that a class proceeding is the preferable procedure in which to resolve the issues. I will address each of those criteria as follows.

DOES THE CLAIM DISCLOSE A CAUSE OF ACTION?

[9] In ***Soldier v. Canada (Attorney General)***, 2009 MBCA 12, the court stated:

> [42] All allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proved. The statement of claim must be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting. Evidence is not admissible on the question of whether there is a cause of action aside from the pleadings themselves. ... While that is a low standard, there must be some air of reality to the cause of action. It cannot be entirely speculative.

[10] In ***Pro-Sys***, the court confirmed that a claim discloses a cause of action unless, assuming all facts pleaded to be true, it is plain and obvious that the claim cannot succeed.

[11] In this case, the plaintiff pleaded negligence and breach of fiduciary duty, relative to alleged systemic abuse and mistreatment of the proposed class by MDC personnel. I agree with the parties that the essential elements of both of those causes of action are pleaded sufficiently for the purposes of certification, such that the s. 4(a) criterion is met.

[12] The plaintiff has also alleged that the defendant is vicariously liable "for the physical, sexual and psychological abuse committed by its servants, employees, agents and representatives to residents of MDC" and by MDC residents upon other residents. As the defendant has pointed out, vicarious liability is not a cause of action.[2]

[13] In ***Tutton v. Pickering (Town)***, 46 O.R. (3d) 503, [1999] O.J. No. 4811 (QL) [cited to O.R.], the court stated:

> [14] ... The theory behind vicarious liability is that the tort of the employee is imputed to the employer and that the employer is therefore liable for the employee's unlawful action; it is *not* that the employer itself has committed any wrong. The damage is caused by the employee and is imputed to the employer for sound policy reasons, such as provision for an adequate and just remedy, and deterrence of future harm.

[14] In the leading case of ***Bazley v. Curry***, 1999 CanLII 692 (SCC), [1999] 2 S.C.R. 534, the court considered the parameters within which vicarious liability could be imposed upon an employer for sexual abuse by an employee of children in his care. The court stated that vicarious liability is "known as "strict" or "no-fault" liability, because it is imposed in the absence of fault of the employer." At the conclusion of its analysis on this issue, the court stated:

> 46 In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the

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[2] *Unger (Litigation guardian of) v. Unger*, [2003] O.J. No. 4587 at para. 21 and *Hoisington v. Johnson & Johnson Inc.*, 2016 BCSC 807 at para. 29

> harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability – fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

[15] In other words, vicarious liability accrues to a defendant not because of its own actions, but because of the actions of another person.[3] Accordingly, the plaintiff's allegation of vicarious liability in this case is unusual, because there is no allegation of an underlying tort, such as assault. Clearly, however, the plaintiff took this approach purposefully, because he has named only the defendant as a party, and has not indicated an intention to amend the claim.

[16] The allegations of negligence and breach of fiduciary duty against the defendant relate to alleged acts or omissions in the manner in which it operated MDC. Similarly, many of the vicarious liability allegations are focused upon the defendant's role relative to the abuse of MDC residents, including:

a) the defendant's responsibility for the safety, care and control of MDC residents;

b) the defendant's failure to control its personnel;

c) the defendant's encouragement of physical and psychological intimacy between its personnel and MDC residents; and

d) the failure of the defendant and its personnel to stop assaults by MDC residents upon other residents.

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[3] *John Doe v. Bennett*, 2004 SCC 17

[17] These are all allegations of direct liability against the defendant, which differ from seeking to impute vicarious liability upon a party that has committed no wrong. I appreciate that the plaintiff may have chosen not to plead the tort of assault because of the individualized nature of that cause of action, which some courts have held is not conducive to a class proceeding. I will comment further upon that issue and the relevant authorities below, relative to the proposed common issues regarding vicarious liability.

[18] For the purposes of determining whether the pleading discloses a valid cause of action relative to the allegations of vicarious liability, I have read the claim as generously as possible, with a view to accommodating any inadequacies in the drafting. I have concluded that the pleading, as written, is deficient, because a claim in "vicarious liability" cannot stand alone, without an underlying tort. Having said that, the plaintiff is entitled to seek to amend the claim, and if he does so, the necessary steps should be taken forthwith.

WOULD A CLASS PROCEEDING BE THE PREFERABLE PROCEDURE FOR THE FAIR AND EFFICIENT RESOLUTION OF THE COMMON ISSUES?

[19] I agree with the parties that, on the face of the plaintiff's allegations, a class proceeding would constitute a fair, efficient and manageable method of advancing the claim, and would be preferable to any alternative method of resolving the claim, such as individual actions. I have so concluded in the context of the policy objectives applicable to class proceedings, which are access to justice, judicial economy, and the modification of the behaviour of the wrongdoers.[4]

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[4] *Hollick, supra* at paras. 32 through 34, and *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46

[20] In addition, I note that actions regarding the alleged institutional abuse of vulnerable persons have been certified as class proceedings in many other instances. In ***Rumley v. British Columbia***, 2001 SCC 69, the court noted that proceeding by class action may mitigate the enhanced difficulties that vulnerable class members will experience as compared with other litigants.

[21] I accept that the proposed class in this case is comprised of vulnerable individuals with developmental or other issues, many of whom have no means to fund litigation. In addition, if this proceeding is certified, there will be a significant volume of documentary evidence advanced, and experts will be required to testify as to the standard of care. These factors would make the litigation to finance difficult for an individual. For these reasons, I accept that a class proceeding is likely the only means by which the proposed class can bring forward their allegations.

[22] In addition, there would be significant judicial economy in a class proceeding in this case, particularly with respect to the tendering of historical and contextual evidence regarding MDC, the tendering of expert evidence, and conclusions on the common issues. I appreciate that if liability is established, individual inquiries may be needed relative to damages or other issues, but that does not outweigh the advantages of a class proceeding.

[23] Lastly, I accept that there are opportunities for both behaviour modification, because MDC is still in operation, and deterrence, because the claim may include instances of widespread but individually minimal harm.

EVIDENTIARY ISSUES

[24] Before I consider the remaining, contested s. 4 criteria, I will address the evidentiary issues raised by the defendant.

[25] The defendant takes issue with the admissibility of several exhibits to an affidavit sworn by a lawyer from the office of the plaintiff's counsel, and one exhibit to the affidavit of the plaintiff's support worker, on the basis that the exhibits are hearsay. The nature of those exhibits is summarized as follows:

a) excerpts of four annual reports of the Manitoba Ombudsman, from 1986 to 1989 inclusive;

b) five arbitral decisions relative to grievances filed by MDC staff, decided between 1990 and 2005;

c) a 2001 decision of this court relative to the disciplinary appeal of an MDC staff member after sanction by a licensing body; and

d) two inquest reports issued by the Provincial Court of Manitoba in 2007 and 2014.

(collectively the "Documents")

[26] The plaintiff submitted that the Documents were not tendered to establish the truth of the underlying facts contained within them. Rather, the plaintiff seeks to establish that the authors of the Documents made the statements and conclusions set out in their reports and decisions, relative to systemic and operational issues at MDC, such that the Documents are admissible on this motion. In addition, the plaintiff argued that the defendant will not be prejudiced by admission of the Documents into evidence

because no factual or legal findings will be made at this stage. The defendant can raise defences at trial and, if the plaintiff seeks to rely upon any of the Documents at that time, the weight to be attributed to them can be addressed.

[27] As I have already noted,[5] the plaintiff must establish an evidentiary basis for certification. In ***Slark (Litigation guardian of) v. Ontario***, 2010 ONSC 1726, [2010] O.J. No. 5187 (QL), the court stated:

> [58] There appears to be a developing trend in a number of the recent cases on certification in which attempts are made to discharge the minimum evidential burden required under section 5(1)(b) through (e) of the CPA by relying on allegations in the pleading, or evidence that does not satisfy the usual rules of admissibility in civil proceedings. Such attempts were strongly criticised in the Court of Appeal of British Columbia in *Ernewein v. General Motors of Canada Ltd.*, [2005] B.C.J. No. 2370 (C.A.) where it was held that evidence intended to provide the necessary factual basis for the existence of class members' claims must be legally admissible. The approach adopted in this court has been essentially the same. Certification has important consequences and fairness to defendants requires that the principles governing the admissibility of evidence should not be dispensed with even for the purpose of satisfying the unusually low standard of proof.

[28] In ***Martin v. Astrazeneca Pharmaceuticals Plc***, 2012 ONSC 2744, the court stated:

> [25] While the evidentiary threshold for meeting the statutory criteria is low, the court has a gatekeeper function and it must consider all of the admissible evidence ... Evidence tendered on a motion for certification of a class proceeding must meet the usual criteria for admissibility: see *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, (2005), 260 D.L.R. (4th) 488, at para. 31 ("*Ernewein*"), leave to appeal to SCC dismissed, [2005] S.C.C.A. No. 545. ...
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> ...
>
> [38] ... As the gatekeeper, it is the role of the certification judge to determine admissibility. It is not the role of the certification judge to assess and weigh evidence ... [w]hen considering all of the admissible evidence that is before the court, the certification judge is assessing if there is some basis in fact for the... criteria.

[5] *Pro-Sys*, *supra* at paras. 100 and 104

[29] The court in ***Bennet v. Hydro One Inc.***, 2017 ONSC 7065, reached a similar conclusion.

[30] In ***Ewert v. Canada (Attorney General)***, 2016 BCSC 962, at paras. 32 and following, the court considered several case authorities[6] and stated that as a general rule, investigative or commission reports are inadmissible on a certification motion. This is so because these reports may contain broad and vague statements, and may be based upon evidence that is confidential or inadmissible in a civil proceeding and cannot be tested. In addition, the proceedings giving rise to these reports are conducted for a specific purpose completely unrelated to the filing of evidence in court.

[31] There are also cases before me that support the admissibility of the Documents. For example, in ***Hague v. Liberty Mutual Insurance Co.***, [2001] O.J. No. 6069 (QL), the court considered a request to strike automobile manufacturers' reports filed in support of a certification motion. The court stated:

> [7] ... A certification motion is held for the purpose of determining whether the proceeding satisfies certain threshold requirements to proceed as a class action. It is not a determination of the merits of the claim. It is a procedural motion. ... [T]he scope for putting information before the court on a certification motion, given its procedural nature, is considerably broader than it would be on a motion going to the actual determination of the merits of the claims advanced.
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> [8] ... I do not view the affidavit as putting the reports forward as direct evidence. Rather, I see them as being put forward as some evidence that there may be an issue, specifically a common issue, which it is appropriate to have resolved on a class-wide basis. In that respect, I see nothing improper in this aspect of the affidavit. Again it is not uncommon for various reports, studies, articles and the like to be put before the court on a certification motion to demonstrate that a given action meets the requirements of ... the Act.

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[6] *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, *Rumley, supra*, and *Robb v. St. Joseph's Health Care Centre; Rintoul v. St. Joseph's Health Centre; Farrow v. Canadian Red Cross Society,* [1998] O.J. No. 5394 (Ont. Gen. Div.) (QL)

[32] In ***Seed v. Ontario***, 2012 ONSC 2681, reports similar to the Documents were admitted because "[t]hey are not being tendered for the truth of their contents, but rather to satisfy the some evidence test" (para. 72). The decision in ***Seed*** contains no reference to ***Rumley***, ***Ernewein***, or ***Slark***.

[33] The court in ***Harrison v. XL Foods Inc.***, 2014 ABQB 720, permitted the admission of a government review report on a certification motion not for the truth of its contents, but to determine whether there was some reality to the claim.

[34] In ***Johnson v. Ontario***, 2016 ONSC 5314, the court stated that:

> [54] A certification motion is not to be treated as an evidentiary free for all.
>
> [55] However, the motion's nature and purpose must be kept in mind. A motion for certification is procedural. ...
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> ...
>
> [63] Even if unchallenged the inquest material, the newspaper articles, the Ombudsman Report and the reasons for sentence would not, standing alone, provide some basis in fact for the remaining elements of the certification test.
>
> [64] They do not stand alone. In this case, Glenn Johnson and Michael Smith have sworn affidavits which detail their personal experiences and observations while incarcerated at EMDC. Those affidavits form the primary evidence on which the plaintiffs rely. ...
>
> [65] In my view, the inquest material, newspaper articles and [the] ... Ombudsman Report simply provide additional support for the plaintiffs' assertions that their experiences were not isolated ones: *Schwoob v. Bayer Inc.*, 2013 ONSC 2207 (S.C.J.) at para. 39.

[35] Having considered the above-referenced authorities, I agree that the rules of evidence apply on a certification motion, and that the plaintiff bears the onus to provide admissible evidence upon which to base certification. If that was not the case, these motions would become an evidentiary "free for all", which would be disproportionately unfair to defendants.

[36] I am also mindful of Court of Queen's Bench Rule 39.01(4) which provides:

> Contents — motions
>
> An affidavit for use on a motion, including a motion for summary judgment, may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

[37] In this case, neither of the affiants deposed as to the source of their information and belief relative to the Documents, nor did they attest that they believed their contents to be true. The lawyer swore: "As set out in the Statement of Claim, a series of reports, media articles, reported cases, and ombudsman reports have outlined various wrongdoings and failures that relate to MDC". The care worker swore that her employer had standing in a Provincial Court inquest, and she attested to the basic facts relevant to that proceeding, but her affidavit is silent as to what personal knowledge, if any, she had of either the incident giving rise to the inquest or the inquest itself.

[38] On that basis, I infer that neither deponent has any direct knowledge of the truth of the contents of the Documents. Having said that, I am satisfied that the plaintiff does not seek to rely upon the Documents for the truth of their contents. Rather, he seeks to establish that the Documents were published as written. Accordingly, the contents of the Documents are not hearsay for the purposes of this motion, and are admissible.[7]

[39] If, however, I am wrong, I will consider the remaining issues relative to the admissibility of the Documents.

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[7] *R. v. Khelawon*, 2006 SCC 57

[40] First, I will address the five arbitral decisions and the court decision. Those documents were put forward both as exhibits to an affidavit and in a book of authorities, but in my view the plaintiff could have taken only the latter approach, to establish that the decisions were made and the underlying reasons for each of them.

[41] Four of the arbitral decisions[8] involved allegations of resident abuse or neglect at MDC, and in two cases the grievances were dismissed.[9] In the other two cases, the grievances were granted in part, and the discipline reduced.[10] The fifth decision[11] related to the "egregious" sexual harassment of MDC employees, not residents, but the arbitrator found that MDC residents were neglected as a consequence of the grievor's behaviour. In the court decision[12], discipline imposed upon an MDC staff member by her licensing body was upheld, for allegations of inappropriate force against a resident.

[42] I accept that these decisions and the reasons for them are relevant to determining whether there is some basis in fact upon which a class proceeding could be based, because the decisions confirm that between 1990 and 2005:

a) allegations of resident abuse or neglect were made against MDC staff;

b) the defendant was aware of the allegations;

c) staff members were disciplined, either by the defendant or a licensing body; and

d) there was an adjudicated review of the discipline.

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[8] *Manitoba (Re),* [1990] M.G.A.D. No. 64, *Manitoba (Re),* [1990] M.G.A.D. No. 67, *Manitoba v. Manitoba Government and Employees' Union*, [2005] M.G.A.D. No. 8, and *Manitoba Developmental Centre (Re),* [2001] M.G.A.D. No. 8

[9] *Manitoba (Re),* [1990] M.G.A.D. No. 64 and *Manitoba Developmental Centre (Re),* [2001] M.G.A.D. No. 8

[10] *Manitoba (Re),* [1990] M.G.A.D. No. 67 and *Manitoba v. Manitoba Government and Employees' Union*, [2005] M.G.A.D. No. 8

[11] *Manitoba and M.G.E.U. (Ward), Re*, 1996 CarswellMan 699

[12] *Bermel v. Registered Psychiatric Nurses Assn. of Manitoba*, 2001 MBQB 223

[43] With respect to the rest of the Documents, it is important to remember that an affiant can be cross-examined on the contents of his or her affidavit, including the exhibits. In this instance, it is difficult to imagine what, if any, questions either affiant could answer about the Documents. In other words, the Documents cannot be tested by the defendant on this motion.

[44] The excerpts of the Manitoba Ombudsman annual reports deal with an investigation that began relative to the serious physical injury of an MDC resident in 1985, and evolved into a review of MDC's programs, staffing, facility and environmental issues. The Ombudsman made eight recommendations to the defendant with respect to MDC, listed in the 1986 report. The recommendations related to resident programming and educational needs, the administration of medication, staffing levels, the filing of incident reports, and air conditioning within the facility. The subsequent reports reflect updates and actions taken in response to the recommendations.

[45] Section 33 of ***The Ombudsman Act***, C.C.S.M. c. O45, provides that:

> Admissibility of evidence
>
> 33 Except on the trial of a person for perjury, no statement made, or answer or evidence given by that or any other person in the course of an investigation by or any proceedings before the Ombudsman is admissible in evidence against any person in any court or at any inquiry or in any other proceedings, and no evidence respecting proceedings before the Ombudsman shall be given against any person.

[46] The defendant argued that this section prohibits the admission of the Ombudsman reports into evidence. Considering the wording of this section in its grammatical and ordinary sense, however, I do not agree that s. 33 has that effect. Given the object and scheme of the legislation, including s. 26, which provides that every Ombudsman investigation shall be conducted in private, I accept the plaintiff's submission that s. 33

protects individuals involved in an Ombudsman's investigation from later being required to answer for their role in another proceeding. The reports at issue here contain no reference to any specific individuals to whom the Ombudsman spoke in its investigation, or to their witness statements or interviews. Accordingly, s. 33 does not apply.

[47] Each of the Provincial Court inquest reports was generated following a mandatory inquest arising from ***The Fatality Inquiries Act***, C.C.S.M. c. F52, after the death of an MDC resident. The Provincial Court heard from witnesses and made a series of recommendations on a variety of topics, including MDC's hiring practices, vehicle trips by staff and residents, the content of resident care guides, and the resident transfer policy. It is important to note that pursuant to the legislation, an inquest is not subject to the same rules of procedure and evidence that apply in civil or criminal proceedings[13], which is relevant to the weight to be attributed to the reports.

[48] I have considered the submissions of the plaintiff that the Documents should be admitted into evidence pursuant to the principled exception to the hearsay rule, which requires proof of necessity and threshold reliability on a balance of probabilities. I reject that submission, for the following reasons:

a) the plaintiff has advanced no evidence of why the Documents are necessary to decide the certification motion, or more specifically, why no other evidence is available. Although the Documents pertain to events that occurred from and after the 1980's, there is no indication why affidavit

[13] *The Fatality Inquiries Act*, C.C.S.M. c. F52, s. 26.2(2)

evidence of one or more MDC residents is unavailable for that time frame; and

b) to establish threshold reliability, the plaintiff must show that the hearsay evidence "is sufficiently reliable to overcome the dangers arising from the difficulty of testing it"[14], which dangers arise "notably due to the absence of contemporaneous cross-examination of the hearsay declarant before the trier of fact."[15] Here, the affiants have no knowledge of the material facts within the Documents, and even if the authors of the various reports were available to testify and be cross-examined, their evidence would pertain not to the events underlying their reports, but to the processes in which they were involved (an investigation or an inquest). Accordingly, the hearsay evidence in the Documents is multi-layered and threshold reliability cannot be established relative to the truth of their contents.

[49] The plaintiff also pointed to the public documents exception to the hearsay rule[16], which provides that a document is admissible if it is made by a public official in the discharge of a public duty or function, with the intention that it serve as permanent record, and is available for public inspection. I accept that the Ombudsman reports and inquest reports meet all of these requirements, and are admissible. Having said that, I make no findings of fact relative to the truth of the allegations underlying the reports.

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[14] *supra,* see note 7 *(Khelawon)* at para. 49
[15] *R. v. Bradshaw,* 2017 SCC 35 at para. 26
[16] *Finestone v. The Queen* [1953] 2 S.C.R. 107 at p. 109 and *Levac v. James,* 2016 ONSC 7727 at paras. 112 – 123

Rather, I accept that:

a) in the mid to late 1980's the Ombudsman conducted an investigation relative to the serious physical injury of an MDC resident, that evolved into a review of several aspects of MDC's operations;

b) thereafter, the Ombudsman made recommendations for change at MDC, and monitored the defendant's responses to the recommendations; and

c) two inquests were held in Provincial Court following the deaths of MDC residents, after which reports were prepared and issued, that also contained recommendations for change at MDC.

[50] I am not troubled by the fact that the defendant raised these admissibility issues in its motion brief, approximately one month before the hearing, as opposed to filing a motion to strike the portions of the affidavits at issue. Motions to strike are discouraged.[17] In addition, although the plaintiff argued that he did not receive sufficient notice of these issues, his response to the defendant's materials included the filing a comprehensive reply brief and 61 additional authorities. I expect, therefore, that he could have filed further evidence. Alternatively, he could have sought an adjournment of the motion, and requested costs arising from any undue delay, but he did not do so.

IS THERE AN IDENTIFIABLE CLASS OF TWO OR MORE PERSONS?

[51] The plaintiff has proposed the following class definition:

> All persons who resided at MDC between July 1, 1951 and the date of the certification order, and were alive as of October 31, 2016.

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[17] *Lexogest Inc. v. Manitoba (Attorney General)*, [1990] M.J. No. 353 (QL) and *The Winnipeg School Division No. 1 v. The Winnipeg Teachers' Association of the Manitoba Teachers' Society*, 2007 MBQB 23

[52] In ***Western*** the court stated:

> 38 ... 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.
>
> [citations omitted]

[53] In addition, as Chief Justice McLachlin stated in ***Hollick***:

> [21] ... There must be some showing, ... that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.
>
> [emphasis in original]

[54] In addition, s. 7(d) of the ***Act*** provides that the court must not refuse to certify a class proceeding because the number of class members or the identity of each class member is not ascertained or may not be ascertainable.

[55] The class definition must be connected to the common issues raised by the causes of action as asserted, without a determination of the merits of the claims. It is clear, however, that as a matter proceeds, the class definition may be amended as appropriate if evidence becomes available that necessitates such a course of action. A proposed class will not be considered overly broad, however, because it may include persons that ultimately will not be found to have a claim against the defendant.

[56] The defendant has conceded that the proposed class definition is objective, in that it includes the requirement of residency at MDC and reflects specific time parameters. The defendant acknowledges that similar class definitions have been certified in other cases. There is no objection to the proposed requirement that class members must have been alive as at October 31, 2016, which is two years prior to the claim being filed. This restriction arises from s. 53(2) of ***The Trustee Act***, C.C.S.M. c. T160, which provides that a personal representative must file any claim on a deceased's behalf within two years of their death.

[57] I agree, speaking generally, that the proposed class definition reflects objective criteria, because it is clear that the potential members of the class can be identified on a factual basis, and without reference to the merits of the claim.

[58] The defendant raised three arguments that the scope of the proposed class definition should be restricted:

a) there is a lack of evidence to support claims after 1977, so the class period should be confined to 1951 through 1977;

b) the claims for systemic negligence and breach of fiduciary duty are statute-barred, except for the claims for breach of fiduciary duty by plaintiffs who were or are under a disability; and

c) any alleged assault of a class member by another resident of MDC gives rise to a conflict of interest and should be excluded from the class.

Lack of evidence after 1977:

[59] The affidavit evidence of the plaintiff and other MDC residents pertains to the period from 1954 to 1977. The Documents are the only evidence that pertain to the later part of the proposed class period. The defendant submitted that the Documents are insufficient to support certification for that time frame, notwithstanding the relatively low evidentiary threshold.

[60] The defendant acknowledged that the plaintiff need not present evidence of harm suffered in each year of the proposed class period, and it does not oppose the opening time frame of the class (1951), despite the fact that there is no evidence of abuse until 1954. The defendant submitted, however, that there is a 42 year period, from 1977 to 2019, for which there is no direct evidence before the court relative to systemic abuse or mistreatment at MDC. The court should not infer that the situation at MDC remained static after 1977. MDC has experienced operational changes over the years, and although it housed 1,200 residents at one time, it now houses 160 residents.

[61] The defendant acknowledged that evidence from a current MDC resident is not required, but it argued that there should be more recent evidence from someone, whether a former resident, care provider, family member, or former employee. The defendant argued that there is limited evidence of specific incidents after 1977, and the evidence filed is unconnected and unsupportive of the common issues. Accordingly, the plaintiff is asking the court to fill gaps in the evidentiary record.

[62] The plaintiff submitted that the merits of the claim are not to be proven at this stage, and the issue of whether the plaintiff can establish a breach of the standard of care will be determined at trial. The defendant can raise defences at trial, including changes or improvements implemented at MDC over time, and the steps that it took to discipline employees when necessary.

[63] The plaintiff emphasized that the "some basis in fact" test is a low burden, and noted that the defendant has filed no evidence to seek to establish that the various issues referenced in the Documents were resolved satisfactorily.

[64] There is no direct evidence before me of post-1977 abuse. The Documents establish that one allegation of resident abuse was made in 1985 (reflected in the Ombudsman's reports), followed by a series of allegations between 1990 and 2005 (reflected in the arbitral and court decisions) and resident deaths in 2004 and 2011 (reflected in the Provincial Court inquest reports). The plaintiff also submitted a 2008 video documentary entitled *The Freedom Tour*, online: People First of Canada <https://www.peoplefirstofcanada.ca/the-freedom-tour>, which includes interviews of various individuals who claim to have direct knowledge of mistreatment at MDC.

[65] The law is clear that "some basis in fact" is required to support the proposed class definition, and that certification is a matter of procedure, and not substance. In ***Seed*** the court considered a class period for which there was no direct, underlying evidence. The court stated:

> [120] The defendant relies on the court's restriction of the class definition in *Slark*. The problem in *Slark* was more pronounced. The proposed class definition reached back to 1876 and there was no evidence of any mistreatment at the school until 1961. There was some evidence to support the allegations of mistreatment from 1961 through 1979. Cullity J. limited the class period to the years 1961-1979.

> However, in doing so he did not conclude that the plaintiffs had an obligation to provide some evidence for every year in the class period. Such an approach is inconsistent with the low burden of the some evidence requirement and contrary to how other courts have applied the identifiable class requirement.

[66] I have also considered the decision in ***Slark***, and I agree that it does not stand for the proposition that evidence is required for every year of the class period (see also ***Cavanaugh v. Grenville Christian College***, 2012 ONSC 2995). That approach would be onerous for plaintiffs, and would not be in keeping with the class proceedings regime. In this case, the plaintiff does not have access to MDC attendance records at this time and does not know the names of all potential class members. Having said that, I also agree with the conclusion in ***Slark*** that direct evidence to support allegations over a 16-year period is insufficient to certify a class period of over 100 years. This is so mainly due to the significant length of the unsupported time frame in that case, of 85 years.

[67] I also accept, as stated in ***Slark***, after the court considered ***Cloud v. Canada (Attorney General)***, 2004 CanLII 45444 (ONCA), that there is some latitude in the selection of the class period where claims of systemic breach of duty are made. In my view, that latitude is enhanced where the period for which no direct evidence is filed post-dates the period for which direct evidence is filed. I have come to this conclusion based on the general premise that older events are less likely to be supportable by available evidence than more recent events. In this case, unlike in ***Slark***, the time period for which no direct evidence was filed succeeds the time period for which direct evidence was filed.

[68] It is clear that certification may be granted even where there is no evidence relating to part of the class period, including a period of 20 or more years, comprising approximately half of the class period.[18]

[69] I agree that it would be unduly burdensome, given the general approach to certification motions and the "some basis in fact" test, to require evidence relative to every year of a proposed class period. That approach would require a disproportionate volume of evidence, and could evolve into an assessment of the merits of the claim.

[70] In this case, approximately two-thirds of the class period is not supported by direct evidence, which is significant. I acknowledge that at trial, the class period can be shortened, but this possibility must be balanced against the interests of the defendant, including the costs of litigating unnecessary and extraneous years within the approved class period.

[71] Although I have not been presented with any direct evidence of systemic abuse or mistreatment at MDC after 1977, I am satisfied by the Documents that the following events occurred:

a) in 1985 an allegation of resident injury was made, which prompted the Ombudsman to conduct an investigation of MDC, and make a series of recommendations to the defendant;

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[18] *Cloud, supra*; *Seed, supra* at paras. 118-125 and *Brown v. Canada (Attorney General)*, 2010 ONSC 3095 at paras. 44, 45 and 157

b) between 1990 and 2005 five arbitral decisions issued, by which MDC staff were disciplined for resident abuse or neglect, or conduct that resulted in resident neglect;

c) in 2001 this court upheld a serious disciplinary sanction imposed upon a long-term MDC staff member by her professional licensing body for the use of inappropriate force against a resident;

d) in each of 2007 and 2014, inquest reports and recommendations were issued by the Provincial Court of Manitoba, relative to the death of an MDC resident[19]; and

e) in 2008, a video documentary was produced in which individuals made allegations of abuse at MDC.

[72] Although I can attach only limited weight to this evidence, it generally supports the plaintiff's allegations and provides some basis in fact for the claim from 1977 to present. I reject the defendant's argument that the direct evidence and the events referenced in the Documents must pertain to the same time frame, pursuant to ***Johnson*** or otherwise.

[73] I recognize that as this matter progresses it may become apparent that there is no evidence to advance the claim for all or part of the time frame after 1977, including with respect to the allegations raised in the Documents. Those issues will be determined at trial. There is enough evidence on the record, however, to satisfy me that there is

[19] Note: one of the inquest reports and one of the arbitral decisions related to the same resident death

some basis in fact for the class period in this case to extend from 1977 to the present.

The Defendant's other arguments:

[74] In my view, the defendant's arguments relative to applicable limitation periods and assaults by MDC residents pertain more properly to the common issues than to the proposed class definition, so I will address those arguments in the appropriate sections below.

[75] The plaintiff's proposed class definition is approved as written.

DO THE CLAIMS OF THE CLASS MEMBERS RAISE A COMMON ISSUE?

[76] The plaintiff must prove that the claims of the class members raise common issues. The ***Act*** reflects the following definition:

> "common issues" means
>
> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[77] In ***Pro-Sys*** the court stated:

> [108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that '[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis' (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> (1) The commonality question should be approached purposively.
>
> (2) An issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It [is] not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The

> court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.
>
> ...
>
> [110] ... In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

[78] In ***Vivendi Canada Inc. v. Dell'Aniello***, 2014 SCC 1, the court stated:

> [44] In *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, this Court confirmed the principles from *Dutton*. ... The Court also stated that a question can remain common even though the answer to the question could be nuanced to reflect individual claims: para. 32.
>
> [45] Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.
>
> [46] *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.

[79] The plaintiff proposed the following common issues in this case:

a) by its operation or management of MDC, did the defendant breach a duty of care it owed to the class to protect them from actionable sexual, physical or mental harm?

b) by its operation or management of MDC, did the defendant breach a fiduciary duty owed to the class to protect them from actionable sexual, physical or mental harm?

c) is the defendant vicariously liable during the class period for the actionable physical, mental or sexual perpetrated by its employees, agents and representatives to the class?

d) is the defendant vicariously liable for the actionable physical, mental or sexual harm perpetrated by the residents of MDC to the class?

e) if the answer to any of common issues (a), (b), (c) or (d) is "yes", can the court make an aggregate assessment of the damages suffered by all class members as part of the common issues trial?

f) if the answer to any of common issues (a), (b), (c) or (d) is "yes", was the defendant guilty of conduct that justifies an award of punitive damages? and

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

a) Negligence

[80] The law is clear that common issues can include whether a defendant owed a duty of care, and whether it breached the standard of care in connection with that duty.[20] The only basis on which this issue would not be certified is if I accept the defendant's limitation argument at this stage of the proceeding.

[20] *Rumley, supra*

[81] ***The Limitations of Actions Act***, C.C.S.M. c. L150, (the "***LAA***") provides:

> 2(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:
>
> ...
>
> (e) actions for ... trespass to the person, assault, battery, wounding or other injuries to the person, whether caused by misfeasance or non-feasance, and whether the action be founded on a tort or ... on any breach of duty, within two years after the cause of action arose
>
> ...
>
> (k) actions grounded on accident, mistake, or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action;
>
> ...
>
> Definition of "assault"
>
> 2.1(1) In this section, "assault" includes trespass to the person and battery.
>
> No limitation period re certain assaults
>
> 2.1(2) An action for assault is not governed by a limitation period and may be commenced at any time if
>
> (a) the assault was of a sexual nature; or
>
> (b) at the time of the assault, the person commencing the action
>
> (i) had an intimate relationship with the person or one of the persons alleged to have committed the assault, or
>
> (ii) was financially, emotionally, physically or otherwise dependent on the person or one of the persons alleged to have committed the assault.
>
> Other limitation periods do not apply
>
> 2.1(3) Subject to subsection (4), subsection (2) applies
>
> (a) notwithstanding any other provision of this Act, including, for greater certainty, the ultimate limitation periods set out in subsections 7(5) and 14(4); and
>
> (b) whether or not the person's right to commence the action was at any time governed by a limitation period under this or any other Act.

...

Persons under disability

7(1) For the purposes of this section and section 8, a person is under a disability

(a) while he is a minor; or

(b) while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition.

Time under a disability not included

7(2) Subject to section 8, any period during which a person entitled to bring an action is under a disability shall not be included in calculating the time within which the action is required to be brought

(a) whether that time is limited under this or any other Act of the Legislature; and

(b) whether the person was under the disability at the time the cause of action arose or the disability commenced after the cause of action arose.

...

Ultimate time

7(5) Notwithstanding anything in this section, but subject to section 7.1, no action to which this section applies shall be brought by a person who is or has been under a disability or for or on his behalf by another after the expiration of 30 years after the occurrence of the act or omission that gave rise to the cause of action.

...

Exception to ultimate limitation in subsection 7(5)

7.1 The limitation period set out in subsection 7(5) does not apply to an action referred to in clause 2(1)(j) or (k).

[82] The defendant argued, correctly, that the limitation period applicable to the plaintiff's claim in negligence has expired pursuant to s. 2(1)(e) of the ***LAA***. The defendant also argued that the s. 7 exceptions for persons under a disability are subject to the ultimate 30-year limitation period reflected in s. 7(5). Accordingly, the 30-year

ultimate limitation period applies and any events that occurred before October 1988 are statute-barred, since the claim was filed in October 2018. The defendant submitted, therefore, that the plaintiff's claim in negligence relative to events that occurred before 1977 is doomed to fail.

[83] The defendant contended that a common issue must be connected to a cause of action, and that if a claim does not include a particular cause of action, no common issues respecting that cause of action should be approved.[21] In this case, the plaintiff did not plead assault, and the defendant argued that s. 2.1 of the ***LAA*** does not apply to negligence claims. The word "for" in s. 2.1 does not equate to the phrase "based on" as the plaintiff argued.

[84] The plaintiff argued that limitation issues should be raised and determined at trial. At the certification stage, the issue is whether defences to the claims can be determined in common, not whether the defences have merit. The defendant has asked the court to make a determination of substantive rights at this stage, when all the plaintiff must show is that his claim is not destined to fail and has some basis in fact.

[85] The plaintiff also submitted that under s. 2.1 there is no limitation period applicable to any of the causes of action in the claim because they all involve sexual or physical assaults that occurred when the class members were in a dependent relationship with the defendant.

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[21] *Good v. Toronto Police Services Board*, 2013 ONSC 3026 at para. 194

[86] The plaintiff argued that the language of s. 2.1 of the ***LAA*** regarding an "action for assault" should be interpreted broadly and liberally. Applying both the ***LAA*** definition of "action"[22] and the dictionary definition[23] of "for", s. 2.1 should be read as: "Any civil proceeding in respect of, with reference to, regarding, or so far as concerns an assault". Section 2.1 should not be applied only in actions against abusers, with the result that a party who contributed or stood by and did nothing would not be held accountable for their acts or omissions.

[87] In ***Fantl v. Transamerica Life Canada***, 2013 ONSC 2298, the court stated:

> [168] Courts will exclude persons from class membership when it is clear that ... their claims are statute-barred: *Stone v. Wellington County Board of Education*, 1999 CanLII 1886 (ON CA), [1999] O.J. No. 1298 (C.A.) at para. 10, leave to appeal to S.C.C. ref'd [1999] S.C.C.A. No. 336; *Farquhar v. Liberty Mutual Insurance Co.*, [2004] O.J. No. 148 (S.C.J.); *Caputo v. Imperial Tobacco Ltd.,* 2004 CanLII 24753 (ON SC), [2004] O.J. No. 299 (S.C.J.); *Graham v. Imperial Parking Canada Corp. (c.o.b. Impark)*, 2010 ONSC 4982. However, where the application of the limitation period is unclear and depends upon a factual inquiry about when the class members knew or ought to have known about the facts constituting his or her cause of action, the limitations issues should not be resolved on the motion for certification: Mayotte v. Ontario, 2010 ONSC 3765 at para. 64, leave to appeal refd. 2010 ONSC 5275 (Div Ct).

[88] I accept, as a general proposition, that a clearly statute-barred claim should not be certified. To do otherwise would be an injustice to the parties and the court, and would waste judicial and litigants' resources. Having said that, I also recognize that as a general rule, the merits of a claim and any defences should not be determined on a certification motion. I must attempt, therefore, to balance these objectives, and determine whether it is clear that the plaintiff's claim is statute-barred.

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[22] In the ***LAA*** "action" is defined as "any civil proceeding", with exclusions that do not apply in this case.

[23] *The Oxford Dictionary English Dictionary*, 8th ed, *sub verbo* "for".

[89] The plaintiff's claim in negligence hangs upon the interpretation of s. 2.1 of the ***LAA***, because both his original limitation period and the ultimate limitation period have expired.

[90] ***The Interpretation Act***, C.C.S.M. c. I80, s. 6 requires that the ***LAA*** be interpreted as remedial, with a fair, large and liberal interpretation that best serves its objectives. In addition, I must consider the words of s. 2.1 in their grammatical and ordinary sense.

[91] Section 2.1 was enacted in 2002, after the court in ***M.M. v. Roman Catholic Church of Canada et al.***, 2001 MBCA 148, dismissed an indigenous residential school claim by applying the ultimate limitation period found in s. 7(5) of the ***LAA***. The legislative debates[24] that preceded the enactment of s. 2.1 included comments on ***M.M.***, and centered around the pursuit of indigenous residential school claims. It appears from the discussions that the Legislature wanted to avoid the dismissal of that type of claim due to the passage of time. The discussions also included references to the broader context of historical assault claims, with no obvious intention to limit the applicability of s. 2.1 based on the cause of action pleaded by a plaintiff.

[92] The Premier of Manitoba commented[25] that:

> In every province in Canada save one, these stories could be dealt with hopefully in an effective, healing way, a restorative way, but because of an [sic] historic law in Manitoba we would have three territories and nine provinces being heard in one way and one province and one jurisdiction, because of a limitation law, being heard in another way.
>
> ...

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[24] Manitoba, Legislative Assembly, *Official Report of Debates and Proceedings (Hansard)*, 37th Parl., 3rd Sess., No. 35 (22 May 2002)

[25] Manitoba, Legislative Assembly, *Official Report of Debates and Proceedings (Hansard)*, 37th Parl., 3rd Sess., No. 35 (23 May 2002) at 1774 and 1776

> ... if there are issues of justice, there should not be nine provinces in Canada with one set of standards of justice and Manitoba with a different and lower ability of having justice.
>
> ...
>
> ... I think the practice of the residential schools is one part of this bill. Obviously, the issue of limitations has other aspects to it.

[93] The question is whether the applicability of s. 2.1 should be restricted by the cause of action in which a claim is pleaded or by the substance of the allegations made by a plaintiff.

[94] The parties pointed to two Manitoba cases regarding the interpretation of s. 2.1. In ***J.B.T. et al. v. Victoria General Hospital et al.***, 2003 MBQB 196, the court considered a motion to dismiss for delay and an application to extend a limitation period filed under s. 14 of the ***LAA***. The court stated that:

> [21] This action is not an action for assault as defined [in s. 2.1]. It is an action founded in negligence and breach of trust. Furthermore, these causes of action are not directed against any person who committed the assault.

[95] In ***Raubach et al. v. The Attorney General of Canada et al.***, 2004 MBQB 154, the court considered a motion to determine issues before trial, where the plaintiff conceded that only his claim pleaded in assault could proceed. The issue was whether a claim for false imprisonment was included in the definition of "assault" in the ***LAA***, and the court determined that it was not included.

[96] There is no binding authority in Manitoba that a claim "for assault" pleaded in negligence cannot be encompassed by s. 2.1. In my view, the comments of the court in both ***J.B.T.*** and ***Raubach*** are distinguishable because this issue was not argued, the legislative intent of s. 2.1 was not examined, and neither case involved a certification motion under the ***Act***.

[97] I accept that the purpose of legislation like s. 2.1 may be to permit victims the time that they may need to come to grips with the harm they have suffered, and to bring actions in court when they are ready to do so. In ***R. v. L. (W.K.)***, 1991 CanLII 54 (SCC), [1991] 1 S.C.R. 1091, the court stated that "It is well documented that non-reporting, incomplete reporting, and delay in reporting are common in cases of sexual abuse." The court noted that the reasons for this behavior can include the personal or sensitive nature of the events, and feelings of shame. I accept, for the purposes of this motion, that these issues would be as prevalent, if not more common, among developmentally delayed persons, who are more vulnerable than average.

[98] The plaintiff pointed to several out-of-province authorities as support for his proposed interpretation of s. 2.1, all of which concern legislation with language different than the ***LAA***. In British Columbia and Ontario, the legislative exemption pertains to claims "based on" assault[26] and in Newfoundland, the phrase "arising from" sexual misconduct is used.[27]

[99] I am satisfied that for the purposes of this motion the phrase "action for assault" in s. 2.1 of the ***LAA*** should be interpreted broadly. There is no indication that when s. 2.1 was enacted the Legislature intended either that only claims pleaded in the tort of assault, as defined in the ***LAA***, would benefit from s. 2.1, or that class proceedings were to be excluded from s. 2.1 because of the individualized nature of those claims, discussed below. In other words, the policy underlying s. 2.1 appears to be the prevention of

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[26] *J.P. v. Sinclair* [1997] B.C.J. No. 1327 (QL) at paras. 7 and 17, and *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414 at para. 82

[27] *Penney v. Lahey*, 2002 NFCA 47 at para. 209

wrongdoers escaping claims that by their nature can be historical. For the purposes of certification, I have determined that it should not matter if a claim for assault is brought against an alleged perpetrator in the tort of assault, or against a third party by a different cause of action. This issue should be argued fully at trial.

[100] I have concluded that the proposed common issue in negligence will proceed pursuant to s. 2.1 of the ***LAA***, because it is unclear that the plaintiff's claim in negligence is statute-barred. In addition, the trial court will consider the interpretation of s. 2.1 on its merits.

[101] I recognize, as acknowledged in ***L.R. v. British Columbia***, 1999 BCCA 689, that the nature of a duty owed to the class may have varied over time depending upon the defendant's knowledge, the educational policies in effect, and the measures taken to prevent abuse. At trial, liability could be imposed for some periods of MDC's operation and not others, but "these potential complications are not insurmountable."

[102] The defendant also argued that this proposed issue should be divided into two questions, to separate the issue of whether a duty was owed from whether it was breached. The language will remain as proposed, because it is worded clearly and objectively, and as I have stated already, while the standard of care may have changed over time, the question of whether a duty was owed at any given time is not really at issue.

b) Fiduciary Duty

[103] The defendant argued, correctly, that the limitation period applicable to the plaintiff's claim for breach of fiduciary duty has expired pursuant to s. 2(1)(k) of the ***LAA***.

The defendant acknowledged that pursuant to s. 7.1 of the ***LAA***, s. 7(5) and the ultimate limitation period do not apply to the claim. Accordingly, any class member who can establish a disability may bring a claim for breach of fiduciary duty.

[104] The defendant argued that whether a class member was under a disability is an individual question that would require an individual hearing, which cannot occur in the certification process. The defendant agreed that the common issue could proceed, on the basis that if liability is found, each class member would then have to establish that he or she was under a disability and qualifies for the s. 7(2) exception.

[105] I agree with this suggested approach. One cannot assume that every MDC resident was and is under disability for ***LAA*** purposes. The defendant has stated that MDC housed developmentally delayed and other persons, but detailed evidence of their capacity can be explored after the common issues trial.

[106] Again, the defendant argued that this proposed issue should be divided into two questions, to separate the issues of duty and breach. The language will remain as proposed, for the same reasons set out at paragraph 102 above.

Resident on resident assaults:

[107] Having approved the two common issues pertaining to negligence and breach of fiduciary duty, and before considering the next proposed common issue, I will comment upon the defendant's argument that an action including allegations of resident on resident abuse cannot be certified, because a conflict within the class is inherent and obvious.

[108] In ***Western*** the court stated that "A class action should not be allowed if class members have conflicting interests" (para. 40). Similar comments were made in ***Vivendi***, at paras. 45 and 46, quoted above.

[109] In ***Nixon v. Canada (Attorney General)***, [2002] O.J. No. 1009 (QL) at para. 3, the court refused to certify a class because its proposed members included the perpetrators of wrongdoing who may be prevented from recovery because of that wrongdoing, and who may be liable to the defendant or other class members. The court found that the conflict within the proposed class was inherent, and was certain, though the identities of the wrongdoers were unknown.

[110] The plaintiff pointed to cases where the court has certified a class despite the potential for a conflict of interest.[28]

[111] In this case, it is clear that some of the class members will make allegations of abuse against other class members. At this time, the full nature and extent of any conflict is unknown. Having said that, in ***L.R.*** the court stated:

> [20] ... [T]he emphasis on systemic negligence should overcome any distinction between students abused by staff and students abused by other students at the school. The allegation is essentially akin to occupiers liability, that the defendant failed to make the school premises reasonably safe from sexual abuse for students from either staff or students.

[112] Similarly, in ***Johnson***, having considered ***Nixon***, ***Ewert***, and ***Good***, the court stated:

> [83] ... The claims are based on the theory harm was occasioned because of the manner in which Ontario managed and operated EMDC. The plaintiffs allege systemic negligence which McLachlin C.J. described as 'negligence not specific to

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[28] *Ewert, supra*, at para. 77 and following, *Sherry Good v. Toronto Police Services Board*, 2014 ONSC 4583 at para. 55 and *Lauzon v. Canada (Attorney General)*, 2014 ONSC 2811 at para. 26

> any one victim but rather to the class of victims as a group': *Rumley*, supra at p. 203.
>
> [84] On that crucial front, the class is united.

[113] The same principles apply in this case. Put simply, conflicts of interest among the class are overcome in a systemic negligence claim, and in my view, these comments apply equally to allegations of breach of fiduciary duty, because the cause of action is focused upon the acts or omissions of the defendant. The reality is that some class members may have been both victims and perpetrators of abuse at MDC through no fault of their own, given their disabilities or vulnerabilities. Those individuals should have the opportunity to pursue their claims in a class proceeding.

[114] For these reasons, the approved common issues relative to negligence and breach of fiduciary duty can be heard and decided regardless of any conflicts within the class raised by claims of abuse by MDC residents.

c) Vicarious Liability – MDC personnel

[115] I have already determined that the plaintiff's claim does not disclose a cause of action relative to vicarious liability. If, however, I am wrong, I will comment upon the proposed common issues relative to vicarious liability.

[116] The defendant submitted that this proposed common issue cannot be certified because it arises from the underlying alleged assault of each proposed class member, which will require findings for each individual, and for each alleged perpetrator, relative to his or her relationship with the defendant. The vicarious liability test (the "VL Test") set out in ***Bazley*** at para. 46, (quoted above), and in ***K.L.B. v. British Columbia***, 2003 SCC 51, includes an analysis of the nature of the relationship between the alleged

tortfeasor and the person against whom liability is sought, as well as whether the assault was sufficiently connected to the perpetrator's assigned tasks that it was a materialization of the risks created by the enterprise.

[117] Support for the defendant's argument is found in ***L.R.*** where a class action was certified relative to the sexual abuse of students at a residential school. The plaintiffs did not rely upon vicarious liability, which the court stated:

> [17] ... might require identification of individual perpetrators of sexual assault and a determination of whether the misconduct was within the course and scope of their employment.
>
> ...
>
> [19] Claimants will not have to prove that the abuse was caused by a particular staff member or other student in the absence of a claim for vicarious liability. In essence the claims will be based on systemic negligence, the failure to have in place management and operations procedures that would reasonably have prevented the abuse.

[118] In ***Fehringer v. Sun Media Corp.***, [2002] O.J. No. 4110 (QL), 27 C.PC. (5th) 155, the plaintiff sought to certify as a common issue the following question: "Is The Sun vicariously liable for the actions of Betts?"[29] The Court stated:

> 17 ... it is simply not possible to make a blanket determination of the liability of any of the defendants without first engaging in an individual examination of the specific events which underlie each member's claim. ... What [Betts] may or may not have done in respect of each putative class member, where and in what circumstances ... and other like matters would need to be known to determine any liability of Mr. Betts to that individual. ... Any conclusion regarding vicarious liability requires an examination of what happened, where it happened, when it happened, the state of the knowledge of the Sun defendants at the time of the occurrence and like matters.

[29] Betts was a former employee of The Sun and was a named defendant in the action, accused of harassment, intimidation and other torts.

[119] The plaintiff argued that common issues relative to claims for vicarious liability have been certified in a number of more recent cases:

a) ***Cannon v. Funds for Canada Foundation***, 2012 ONSC 399;

b) ***Elwin v. Nova Scotia Home for Coloured Children***, 2013 NSSC 411;

c) ***Hayes v. Saint John (City)***, 2017 NBQB 25;

d) ***Doucet v. The Royal Winnipeg Ballet***, 2018 ONSC 4008; and

e) ***Keeping v. Her Majesty the Queen (Ontario)***, Certification Order of Newton J., dated November 30, 2018 in Court File CV-17-0578-00.

[120] The plaintiff argued that MDC had an organizational hierarchy and defined roles, so the trial court can determine whether vicarious liability should accrue by examining the alleged tortfeasors by group or category including, for example, nurses, doctors, and direct residential care staff. Thereafter, determinations can be made about assaults suffered by individual claimants.

[121] In my view, however, the plaintiff's claim is not that simple. The plaintiff seeks a finding of vicarious liability for the acts of the defendant's "servants, employees, agents and representatives", which on its face is broad in scope, and too dependent upon individual findings of fact to be decided as a common issue, even by category. A trial judge would have to review and assess the following factors to apply the VL Test, for each category of potential tortfeasor:

a) the nature of the legal relationship with the defendant. While the legal relationship of "servants" and "employees" may be fairly straightforward,

"agents" and "representatives" could include almost anyone associated with MDC in a wide variety of contexts requiring individual analysis; and

b) whether the assault or mistreatment of MDC residents was sufficiently connected to the group's assigned tasks that it was a materialization of the risks created by the enterprise. This analysis could also vary widely, even by category.

[122] The plaintiff proposed that the trial judge determine these questions relative to the various categories of potential tortfeasors, but there is no evidence of:

a) MDC's organizational hierarchy and how it changed over time;

b) whether every role at MDC would lend itself to categorization;

c) what all of the categories would be; and

d) how many categories there would be.

[123] I can infer, however, that there were many roles within MDC's operations over the years, because of the long time frame at issue (1951 to present), and the large number of residents at issue (1,200 at its peak). Having said that, there may be categories of alleged wrongdoers against which no allegations will actually be made by the class members. Pursuant to the process suggested by the plaintiff, the defendant's vicarious liability for those categories would be decided before the determination of individual claims. If no allegations were made against individuals in a particular category, the findings against it would be unnecessary. That approach is an inefficient use of resources.

[124] I am mindful of the direction in ***Rumley*** and ***Vivendi*** that a common issue can be answered in a nuanced manner, and I accept that a finding of vicarious liability need

not depend upon proof and identification of the wrongdoer, or a determination of the status and number of individual perpetrators (***L.R.*** para. 17). Having said that, the court in ***Rumley*** cautioned, at para. 29, that a court should avoid certification of issues that are common only when stated in the most general terms, because inevitably those issues break down into individual proceedings. I have concluded that here, the proposed common issue would break down into an assessment of the relationships between the defendant and various MDC personnel over a period of almost 70 years. In the result, there are so many potentially individualized questions to answer that the issue is not common to all class members or all MDC personnel, even allowing for nuanced answers and the fact that class members need not be situated identically.

[125] The facts of this case distinguish it from ***Cannon***, ***Hayes*** and ***Doucet***. In each of those cases there was one alleged perpetrator, so the question of whether vicarious liability would accrue to a co-defendant was narrow, and an examination of only one relationship was needed.

[126] ***Elwin*** is also distinguished because the court considered an institution operated by a body corporate, and the issue was whether the province could be vicariously liable for that entity's wrongdoing. Again, that question could be answered by examining one relationship.

[127] I will not rely upon ***Keeping***, because the court granted a certification order by consent and I have not seen the reasons for the court's analysis, if one was conducted.

[128] For all of these reasons, this proposed common issue is not certified.

d) Vicarious Liability – Residents

[129] The plaintiff claims that the defendant is vicariously liable for assaults perpetrated by MDC residents upon other residents, that were condoned, facilitated and/or encouraged by servants, employees, agents and representatives of MDC. The plaintiff acknowledged that this claim is novel, and submitted that there is no conflict with respect to this proposed common issue because it is distinct from the individual claims of class members.

[130] The defendant argued that the conflict of interest relative to this aspect of the claim is irreconcilable, and that it cannot be decided at a common issues trial.

[131] The lack of previous case authority to support this aspect of the claim does not preclude certification, but the fact is that for vicarious liability to be imputed to the defendant for the wrongdoing of MDC residents, the VL Test would have to be met. That analysis would require an examination of the relationship between every alleged wrongdoer and the defendant, as well as a connection to the wrongdoer's assigned tasks, if any. The record reflects that while some MDC residents had jobs or assigned tasks, others did not. This is obviously an individualized analysis, and it is difficult to conceive of how vicarious liability could be decided as a common issue within these specific fact scenarios, even taking into account permitted nuances in the outcome of a common issue.

[132] For all of these reasons, this proposed common issue will not be certified.

e) f) and g) Aggregate assessment of damages and Punitive damages

[133] The defendant did not oppose the certification of these common issues relative to the claim for breach of fiduciary duty.

[134] Having certified the claim in negligence also, I am satisfied on the evidence that the plaintiff has established some basis in fact for each of these common issues. Both an aggregate assessment of damages and an award of punitive damages could be made after trial, given the systemic nature of the claims. These issues are certified.

Conclusion – Common Issues

[135] The common issues to be decided at trial are:

a) is the claim in negligence statute-barred under the ***LAA***?

b) by its operation or management of MDC, did the defendant breach a duty of care it owed to the class to protect them from actionable sexual, physical or mental harm?

c) by its operation or management of MDC, did the defendant breach a fiduciary duty owed to the class to protect them from actionable sexual, physical or mental harm?

d) if the answer to either common issue (b) or (c) 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 either common issues (b) or (c) 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?

Is The Plaintiff a Suitable Person to Act as a Representative Plaintiff?

[136] A representative plaintiff must fairly and adequately represent the interests of the class, must produce a workable plan for the class proceeding, and must not have a conflicting interest with other class members on the common issues.

[137] In ***Western*** the court stated:

> [41] ... The proposed representative need not be 'typical' of the class, nor the 'best' possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.

[138] The plaintiff has deposed that he will do his best to represent the proposed class, with the help of two support workers, who have sworn affidavits reflecting that they will assist him.

[139] The defendant argued that the plaintiff's claim is statute-barred, and accordingly he has no interest in the outcome of the claim. I have already determined that limitation defences will be determined at trial. Accordingly, at present, the plaintiff has an interest in advancing the claim.[30]

[140] As the defendant pointed out, the plaintiff commenced this claim in his personal capacity, and not by a litigation guardian, which on its face may be incongruous with certain aspects of his claim, but that is not an issue for me to decide at this stage. I acknowledge the evidence of third parties that the plaintiff can understand plain

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[30] *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572 at para. 56

language, and is an active advocate and volunteer for disabled rights. There is also evidence, however, that the plaintiff has limitations. I have no medical evidence or other details of the level of developmental disability that he experienced while residing at MDC as compared with the present. Accordingly, whether the plaintiff was or is under a disability for the purposes of s. 7(2) of the ***LAA*** will be determined after the common issues trial.

[141] The defendant also submitted that the plaintiff has a conflict of interest, because he has alleged abuse by MDC residents. As argued by the plaintiff, however, the ***Act*** prohibits a conflict "on the common issues". As I have defined the common issues, the plaintiff's allegations against other MDC residents will not give rise to a conflict of interest.

[142] I am satisfied that there is some basis in fact upon which I can conclude that the plaintiff will fairly and adequately represent the interests of the class, and has interests in common with the proposed class members. Accordingly, the plaintiff is appointed as the class representative.

CONCLUSION

[143] I am satisfied that the requirements of s. 4 of the ***Act*** have been met to a sufficient degree that this claim must be certified as a class proceeding.

[144] As requested, the defendant will forward to the plaintiff's counsel, within 60 days, or as otherwise agreed, the following:

a) a list of all known members of the class, including their names and addresses, date of birth, date of death, if applicable, dates of admission and

discharge at MDC, and associated Manitoba Health Registration Numbers; and

b) a list of the community agencies who are funded by the defendant in providing services to members of the class.

[145] If the parties require assistance regarding either the completion of these tasks, or the next steps in this litigation, they may schedule a case management conference before me.

J.