Court of Queen's Bench of Alberta

Citation: Nette v. Stiles, 2010 ABQB 14

Date: 20100111
Docket: 0803 08204
Registry: Edmonton

Between:

Sandra Gay Nette and David Nette

Plaintiffs

- and -

Gregory John Stiles, 402294 Alberta Ltd., Lydia Jean Saunders, Shera Brandley, 860058 Alberta Ltd., a partnership operating under the trade name, The Spa At Life Stiles, Alberta College and Association of Chiropractors and Her Majesty the Queen in Right of Alberta (Minister of Health and Wellness)

Defendants

Corrected judgment: A corrigendum was issued on January 14, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment re an Application for Certification of a Class Proceeding of the Honourable Mr. Justice R. Paul Belzil

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Part 1. The Application

[1] The Plaintiffs seek certification of a class action under the *Class Proceedings Act*. I heard this application in my capacity as Case Manager of the action.

Part 2. The Action

[2] On June 12, 2008, the Plaintiffs filed a Statement of Claim in a proposed class proceeding. An Amended Statement of Claim was filed on October 17, 2008. The claim arises as a result of catastrophic injuries sustained by Sandra Nette who alleges that the injuries were caused by the Defendant Gregory John Stiles, Doctor of Chiropractic, who provided chiropractic treatment to her.

[3] The action has been discontinued against 402294 Alberta Ltd., Lydia Jean Saunders, Shera Brandley, and 860058 Alberta Ltd., a partnership operating under the trade name The Spa At Life Stiles.

[4] On July 9, 2009, I issued a Judgment, reported at 2009 ABQB 422, striking out all allegations against Her Majesty the Queen in Right of Alberta (Minister of Health and Wellness) pursuant to Rule 129(1)(a) on the basis that these allegations did not disclose a cause of action against the Provincial Crown. No appeal has been taken from that Judgment.

[5] Prior to hearing the Certification Application, I granted an Order, consented to by the remaining Defendants, permitting the Plaintiffs to file an Amended Amended Statement of Claim which essentially deletes all references to the discontinued parties as well as the Provincial Crown, and which also amended some defined terms.

[6] The AASOC is a complex and lengthy pleading, seeking certification as a class proceeding under the *Class Proceedings Act*, S.A. 2003, c. C-16.5, various claims against Dr. Stiles and the Alberta College and Association of Chiropractors (ACAC). Dr. Stiles is named as a proposed representative Defendant. ACAC is named as a Defendant on the basis that it failed to properly regulate the practice of chiropractic in the Province of Alberta, including the practice of Dr. Stiles, which it had the authority to do pursuant to the *Health Professions Act*, R.S.A. 2000, c. H-7 (as amended) (*HPA*). Claims for pure economic loss were abandoned in the course of argument.

Part 3. *Class Proceedings Act*

[7] The *Class Proceedings Act* enables a plaintiff who has commenced a proceeding to apply for certification of the action as a class proceeding. Section 5 governs the certification of a class proceeding and reads as follows:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
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> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of 2 or more persons;

(c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,

(i) will fairly and adequately represent the interests of the class,

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

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

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

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

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

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

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

(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

(4) The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).

. . .

[8] In considering the *Act*, I am guided by the recent decision of the Alberta Court of Appeal in ***Elder Advocates of Alberta Society v. Alberta***, 2009 ABCA 403 wherein it was observed at para. 76 that the *Act* "supports a purposive approach and provides for extensive flexibility in terms of procedures available to certification judges to deal with class actions as they unfold."

Part 4. Do the Pleadings Disclose a Cause of Action?

A. Alberta College and Association of Chiropractors

[9] The parties agree that the principles which apply to determine whether there was a cause of action disclosed are identical to the principles which apply on an application to strike out a Statement of Claim for failure to disclose a cause of action, that is, is it plain and obvious that the Statement of Claim discloses no cause of action?: ***Tottrup v. Alberta (Minister of Environmental Protection***), 2000 ABCA 121.

[10] The pleadings are to be read generously, and facts alleged are presumed to be true. The Court has a duty to strike out claims which have no chance of success.

[11] The AASOC alleges that ACAC was negligent in three broad respects: First, it failed to properly supervise the competence of Dr. Stiles; second, it failed to impose standards of practice on him, and, third, failed to prevent misrepresentations as to the nature, benefits and risks of treatment proposed by him.

Does ACAC Owe a Private Law Duty of Care?

***Cooper-Anns* Analysis - Stage One**

[12] In ***Cooper v. Hobart***, 2001 SCC 79, the Supreme Court of Canada affirmed that the analysis of the House of Lords in ***Anns v. London Borough of Merton***, [1977] 2 All E.R. 492 is to be applied in determining whether a party owes a duty of care.

[13] At paras. 22 and 23, the Court noted that duties of care are extended to those who might suffer foreseeable harm; however, foreseeability is limited by the concept of proximity.

[14] At paras. 30 and 31, the contemporary ***Anns*** analysis is summarized:

> 30 In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test,

> that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. . . .
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> 31 On the first branch of the Anns test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.

[15] At para. 33, the Court cited its earlier decision in ***Hercules Management Ltd. v. Ernst & Young***, [1997] 2 S.C.R. 165 in defining the term proximity:

> The label “proximity”, as it was used by Lord Wilberforce in ***Anns****, supra,* was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff’s legitimate interests in conducting his or her affairs.

[16] In ***Cooper***, at paras. 41 and 42, the Court held that in determining whether a duty of care exists, the first consideration is whether a recognized duty of care can be found, and the second is whether a novel duty of care should be recognized.

[17] In the subsequent case of ***Finney v. Barreau du Québec***, [2004] 2 S.C.R. 17, the Supreme Court of Canada accepted that a relationship of proximity may arise in exceptional circumstances from interaction between the parties.

a) <u>Does This Case Fit Within a Recognized Category of a Proximate Relationship Creating a Duty of Care?</u>

[18] In ***Cooper***, it was held that determining whether a duty of care is owed by a governing body requires consideration of the governing statute.

[19] The AASOC defines the class period as encompassing two statutory regimes governing chiropractic: the *Chiropractic Profession Act,* S.A. 1984, c. C-9.1 (as amended) (*CPA*), was replaced by the *HPA*, effective March 1, 2007, which was made applicable to chiropractors.

[20] The *CPA* did not expressly refer to the predecessor of ACAC, the College of Chiropractors, but it authorized the establishment of bylaws governing the practice of chiropractic, maintenance of the dignity and honor of the profession of chiropractic and the protection of the public interest.

[21] The *CPA* and regulations enacted thereunder contained no reference to private law duties of care.

[22] The *HPA* governs 28 health professions including chiropractic. By regulation, the *HPA* authorizes chiropractors to carry out spinal manipulations.

[23] Section 3(1)(a) of the *HPA* states that health profession colleges, including ACAC, have a duty to serve the public interest. There is no reference to any duty of care owed to individual citizens.

[24] The jurisprudence recognizes a legal distinction between a duty of care owed to the public at large contrasted to a private law duty of care owed to individuals.

[25] In ***Williams v. Canada (Attorney General)***, 2009 ONCA 378 at paras. 27 - 28, the Ontario Court of Appeal observed that a number of recent cases have expressly rejected the notion that bodies granted statutory authority to regulate can be liable under the theory of a private law duty of care:

> [27] Two subsequent decisions of this court came to the same conclusion in relation to statements of claim alleging a private law duty of care on the part of a public authority charged with the statutory responsibility of monitoring the quality of certain medical devices. In *Attis*, the court considered a claim against Health Canada for its alleged failure to test, ban or recall certain breast implants that allegedly caused harm to the plaintiffs. *Drady v. Canada (Minister of Health)*, [2008] O.J. No. 3722, 300 D.L.R. (4th) 443 (C.A.), leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 492, dealt with a similar claim against the same defendant for failing to enforce labelling and regulatory standards in relation to temporomandibular joint implants. In *Attis*, Lang J.A. held, at para. 59, that "the government's duty is owed to the public as a whole, not to the individual consumer". Likewise, in *Drady*, she concluded, at para. 38: "While undoubtedly Health Canada owed a public law duty of care to the residents of Canada generally, the law is clear that a breach of such a public law duty does not give rise to a private law cause of action."
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> [28] The allegations made regarding decisions and actions taken by Ontario in relation to the SARS outbreak fall into the [page411] same category as those made and dismissed as disclosing no cause of action in *Cooper*, *Edwards*, *Eliopoulos*, *Attis* and *Drady*. The Directives mandated standards to be followed and implemented by health care facilities and health care professionals. It is simply not arguable in law that by promulgating these quasi-legislative standards to hospitals and health care workers, Ontario created a relationship of proximity with the plaintiff sufficient to give rise to a private law duty of

> care. In addition [to] the cases already referred to, see *Welbridge Holdings Ltd. v. Winnipeg (Greater)*, [1971] S.C.R. 957, [1970] S.C.J. No. 102; *Holtslag v. Alberta*, [2006] A.J. No. 150, 380 A.R. 133 (C.A.); *Kimpton v. Canada (Attorney General)*, [2002] B.C.J. No. 2691, 9 B.C.L.R. (4th) 139 (S.C.).

[26] In ***Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)*** (2006), 82 O.R. (3d) 321, the Ontario Court of Appeal rejected the claim that private law duties of care existed in the context of the alleged failure of governmental authorities to stop the spread of the West Nile virus.

[27] At paras. 17 and 18, the Court held that a broad mandate to act in the public interest does not establish the proximity required to find a private law duty of care:

> [17] In my view, these important and extensive statutory provisions create discretionary powers that are not capable of creating a private law duty. The discretionary powers created by the HPPA are to be exercised, if the Minister chooses to [page331] exercise them, in the general public interest. They are not aimed at or geared to the protection of the private interests of specific individuals. From the statement of purpose in s. 2 and by implication from the overall scheme of the HPPA, no doubt there is a general public law duty that requires the Minister to endeavour to promote, safeguard and protect the health of Ontario residents and prevent the spread of infectious diseases. However, a general public law duty of that nature does not give rise to a private law duty sufficient to ground an action in negligence. I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals. Although Mitchell (Litigation Administrator of) v. Ontario (2004), 71 O.R. (3d) 571, [2004] O.J. No. 3084 (Div. Ct.) was concerned with a different statute, I agree with and adopt Swinton J.'s analysis at paras. 28 and 30 as applicable to the present case:
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> > [T]he governing statutes make it clear that the Minister has a wide discretion to make policy decisions with respect to the funding of hospitals. The legislative framework gives the Minister the power to act in the public interest, and in exercising her powers, she must balance a myriad of competing interests. The terms of the legislation make it clear that her duty is to the public as a whole, not to a particular individual.
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> . . . .
>
> [A] consideration of the statutory framework makes it clear that the requisite proximity in the relationship between the plaintiffs and the defendant has not been established so as to give rise to a private law duty of care. The overall scheme of the relevant Acts confers a mandate on the Minister of Health to act in the broader public interest and does not create a duty of care to a particular patient.

> [18] The decisions of the Supreme Court of Canada in Cooper and Edwards are particularly instructive. Both cases centred on claims by a specific class of individuals who alleged that they had suffered loss as a result of the failure of a public authority to exercise its supervisory and investigatory powers. Cooper involved a claim by investors who suffered losses at the hands of a mortgage broker. The plaintiffs alleged that the British Columbia Registrar of Mortgage Brokers owed them a private law duty to suspend a mortgage broker's licence or to notify investors if a mortgage broker was under investigation. In Edwards, the plaintiffs suffered losses at the hands of a lawyer who allegedly used his trust account improperly. The plaintiffs alleged that the Law Society of Upper Canada, which had knowledge of the manner in which the lawyer operated his trust account, owed them a private law duty to ensure that the lawyer's trust [page332] account was operated according to the regulations or to warn the plaintiffs that it had abandoned its investigation.

[28] In ***Lewis v. Emanuele***, [2000] O.J. No. 1085, the plaintiff alleged that negligent regulation of chiropractic created a private law duty of care. The Court, in striking out the claim, noted at para. 16 that the Plaintiff's interest in chiropractic regulation was no different from that of the general public.

[29] It is significant that s. 77(1) of the repealed *CPA*, and s. 126(1) of the *HPA*, contain statutory immunities against claims arising out of actions made in good faith. This is strong evidence that the Legislature was not creating private law duties of care.

[30] Although bad faith against ACAC is pled, I do not accept that this bare pleading, without more, is sufficient to create a duty of care if it otherwise does not exist. In ***Williams***, at para. 28, the Court adopted the analysis of the motions judge who found:

> . . . that to the extent the plaintiff relied on alleged negligence "involving, or calling [page 414] for, policy decisions," those allegations could not be saved by "the unparticularized assertion that... [the policy decisions] were made irrationally or in bad faith."

[31] Given the foregoing, I conclude that the claims in this case do not fit within a recognized category of a proximate relationship establishing a duty of care.

b) Is There an Actual Relationship of Proximity Between the Plaintiffs and ACAC?

[32] In ***Finney v. Barreau du Québec***, [2004] 2 S.C.R. 17, the Supreme Court of Canada accepted that in exceptional circumstances, a course of dealings between a plaintiff and a statutory regulator may create a relationship of proximity.

[33] In ***Finney***, the Court held that the Barreau du Québec was liable to the plaintiff because it failed to take action against the lawyer notwithstanding that the plaintiff had made numerous

complaints about the lawyer's misconduct and notwithstanding that the lawyer had a prior disciplinary record.

[34] ***Finney*** is not authority for the proposition that the Supreme Court of Canada abandoned the *Cooper-Anns* test in determining duties of care. This was made clear in the subsequent decision in ***Childs v. Desormeaux***, [2006] 1 S.C.R. 643 where the Court again applied the *Cooper-Anns* test. (See also ***Syl Apps Secure Treatment Centre v. D.(B.)***, 2007 SCC 38.)

[35] ***Sauer v. Canada (Attorney General)***, 2007 ONCA 454 was a case arising from mad cow disease infecting Canadian cattle herds. The Ontario Court of Appeal refused to strike out a claim against the Federal Crown respecting its regulation of cattle feed.

[36] At para. 62, the Court observed that in making public representations to Canadian farmers about the quality of cattle feed, the Federal Government may have created a duty of care to farmers in an operational sense contrasted to duties of care owed to the public at large. Thus it was not plain and obvious that the claim should be struck out.

[37] In this case, the AASOC does not plead that there was any relationship between the Plaintiffs and ACAC, nor is it pled that the Plaintiffs made any complaint to ACAC about Dr. Stiles. Moreover, it is not pled that the Plaintiffs had any form of communication with ACAC.

[38] The factual situation in this case, accordingly, is not analogous to the situations in ***Finney*** or ***Sauer***, and on a generous reading of the pleadings, there is no duty of care which could be owed by ACAC to the Plaintiffs arising from any course of dealings as none ever existed.

_____*Cooper-Anns* Analysis - Stage Two

[39] In ***Cooper v. Hobart***, at para. 37 the Court affirmed that residual policy concerns ought to be considered at the second stage of the analysis:

> This brings us to the second stage of the Anns test. As the majority of this Court held in Norsk, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in Hercules Management, supra, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.

[40] If I am wrong in having decided that there was no proximate relationship between the Plaintiffs and ACAC, I have concluded that the imposition of a duty of care would, in any event, be negatived by residual policy considerations.

[41] As noted, the *CPA* and *HPA* established legislative authority over chiropractic within the Province, which must necessarily involve policy decisions. Imposing private law duties of care on regulators would interfere with their ability to make decisions considering the needs of the public at large.

[42] If a private law duty of care is recognized, ACAC would become the virtual insurer of chiropractic within the province. This would interfere with the statutory duty imposed upon it to regulate in the interest of the public at large.

[43] In the context of a certification application, this concern is answered by observing that individual claimants are not in any way precluded from advancing their claims even if certification of the class proceeding is denied.

c) Should a Duty of Care be Recognized Outside of an Existing Category of Proximate Relationships Giving Rise to a Duty of Care?

[44] In ***Cooper***, at paras. 15 and 39, it was observed that in considering whether a duty of care should be recognized, it is necessary to apply the two-stage *Anns* test. (See also ***Childs v. Desormeaux*** at para. 23.)

Cooper-Anns - Stage One

[45] At para. 43 of ***Cooper***, it was noted that in any claims involving statutory regulators, private law duties of care must arise from the governing statute.

[46] In ***Holtslag v. Alberta***, 2006 ABCA 51, at para. 18 the Alberta Court of Appeal held that the issue is whether the statute contemplates private law duties of care contrasted to public law duties of care owed to the public at large.

[47] As noted, the class period encompasses the now repealed *CPA* and the *HPA*. Neither statute references any duties owed to individuals.

[48] Pursuant to s. 3(1)(a) of the *HPA*, the College "must carry out its activities and govern its regulated members in a manner that protects and serves the public interest."

[49] The analyses of the Ontario Court of Appeal in ***Eliopoulos*** and ***Williams*** are instructive on this issue.

[50] In the result, there is no legal basis for recognizing a new category of a proximate relationship giving rise to a duty of care.

d) Does *Finney* Create a new Category of a Proximate Relationship Which Should be Recognized?

[51] As noted, ***Finney*** was decided in the context of a factual finding of the course of dealings between the plaintiff and the statutory regulator, that is, a specific complaint to the regulator which was not acted on. Liability arose from the failure to respond properly.

[52] The AASOC does not plead a factual situation remotely close to the situation in ***Finney***. The ***Finney*** principle is applicable only in certain circumstances which are not found in this case. Thus, I do not accept that, on these facts, ***Finney*** can be used to recognize a new category of proximity.

***Cooper-Anns* - Stage Two**

[53] Even if a new category of proximate relationship were recognized at stage one, it would be negatived by residual policy considerations.

[54] ACAC is required to govern in the public interest. Recognizing private laws duty of care would have a chilling effect on its decision-making role and expose it to indeterminate liability as it would become the virtual insurer of chiropractic within the Province.

[55] Refusing to recognize a duty of care owed by ACAC in no way impairs the ability of any individual claimant to bring action against the treating chiropractor.

[56] In the result, it is plain and obvious that the AASOC does not disclose a cause of action against ACAC.

B) Dr. Stiles

[57] Dr. Stiles admits that a cause of action is pleaded against him to the extent that he was allegedly negligent in providing chiropractic treatment to Sandra Nette or in obtaining her informed consent as to treatment. He does not admit that the AASOC discloses any other cause of action against him.

[58] The bulk of the allegations against him, as a proposed representative Defendant, involve claims based on the assertion that he was providing treatments without medical foundation, and that in so doing, misrepresented to Sandra Nette information pertinent to chiropractic. In essence, the AASOC alleges that the practice of chiropractic relating to spinal manipulation is based on a flawed scientific foundation.

[59] It is his position that this allegation does not constitute a recognized cause of action in that it is, in reality, an attack on the legitimacy of chiropractic.

[60] He argues that the Legislature of the Province has regulated chiropractic since 1923, and currently it is regulated by the provisions of the *HPA*.

[61] Unquestionably, regulating chiropractic falls within the legislative competence of the Province. I have already referenced, at para. 27 above, that ***Lewis v. Emanuele*** concluded that individuals do not have standing to question ministerial oversight of a profession.

[62] In ***Corvaro v. Canadian Memorial Chiropractic College***, [2005] O.J. No. 2220, the plaintiff claimed that she was injured as a result of receiving chiropractic treatment. She sued the individual chiropractor as well as the Canadian Memorial Chiropractic College. The allegation against the College involved claims that chiropractic treatment did not accord with scientific standards.

[63] The Court struck out these allegations against the College, and the following passages appear at paras. 14 and 15:

> 14 The essence of the allegations against these defendants is that the College and administrators made false claims about the high standards of excellence and care delivered by the institution in health care education, research and service, the leading edge care provided at the clinic, the relationships the institution had with other educational and medical institutions, and the "allegedly solid scientific basis for teaching and treatment." These claims were made in annual reports, visions statements and other publications made available to the public and to the students. Finally, the plaintiff alleges that the care delivered at the Lee Clinic 'was not consistent with accepted scientific principles.'
>
> 15 Counsel for the plaintiff concedes that the claim cannot be based upon an attack of the legitimacy of the chiropractic science and treatment. This would constitute an attack upon a regulated profession as provided for by the legislature. Similarly, the legislation permits student interns to provide supervised treatment within such clinics. Many of the allegations and particulars alleged that the defendants falsely claim that there is a solid scientific basis for chiropractic teaching and treatment. These pleadings would relate to a non-justiciable issue and not a valid cause of action. The courtroom is not the forum to challenge the legitimacy of chiropractic medical treatment and its profession as regulated by statute. It would be unfair for an individual defendant to bear the brunt of such a public debate. A claim based upon a broad attack on the entire chiropractic profession, for what was in essence a malpractice claim, was dismissed in Lewis v. Emanuele [2000] O.J. No. 1085 (SCJ).

[64] In ***Palmer v. Stora Kopparbergs Bergslags AB***, [1983] 2 D.L.R. (4th) 397, the plaintiff argued that her health was endangered by the use of herbicides. The Nova Scotia Supreme Court rejected the notion that a courtroom is a proper forum for resolving matters of science, and the following passage appears at para. 552:

> As to the wider issues relating to the dioxin issue, it hardly seems necessary to state that a court of law is no forum for the determination of matters of science. Those are for science to determine, as facts, following the traditionally accepted methods of scientific inquiry. A substance neither does nor does not create a risk to health by court decree and

> it would be foolhardy for a court to enter such an enquiry. If science itself is not certain, a court cannot resolve the conflict and make the thing certain.

[65] In the case of ***ter Neuzen v. Korn***, [1995] 3 S.C.R. 674, the Supreme Court of Canada dealt with the issue of whether or not a physician could be found liable to a patient in circumstances wherein treatment followed generally accepted standards.

[66] At para. 51, the Court concluded that liability could not be found, and observed that Courts are not the proper forum to settle scientific disputes:

> It is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent. This is because courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field. In a sense, the medical profession as a whole is assumed to have adopted procedures which are in the best interests of patients and are not inherently negligent. As L'Heureux-Dubé J. stated in *Lapointe*, in the context of the Quebec Civil Code (at pp. 363-64):
>
> > Given the number of available methods of treatment from which medical professionals must at times choose, and the distinction between error and fault, *a doctor will not be found liable if the diagnosis and treatment given to a patient correspond to those recognized by medical science at the time, even in the face of competing theories.* As expressed more eloquently by André Nadeau in "La responsabilité médicale" (1946), 6 R. du B. 153, at p. 155:
> >
> > [TRANSLATION]
> >
> > The courts do not have jurisdiction to settle scientific disputes or to choose among divergent opinions of physicians on certain subjects. *They may only make a finding of fault where a violation of universally accepted rules of medicine has occurred. The courts should not involve themselves in controversial questions of assessment having to do with diagnosis or the treatment of preference.* [Emphasis added.]

[67] The issue of whether there is or is not a scientific basis for chiropractic engages similar concerns.

[68] On the facts in this case, Dr. Stiles was licensed to practice chiropractic by ACAC under the governing legislation and provided treatment to Sandra Nette. While unquestionably a cause of action exists, if he negligently provided treatment to her, to recognize a cause of action beyond that would amount to nothing more than an attempt to resolve a scientific dispute in a court of law, and would also amount to an attack on the legislative competence of the Province in enacting the *HPA*.

[69] In the result, it is plain and obvious that the only cause of action disclosed in the AASOC against Dr. Stiles arises from having provided chiropractic treatment to Sandra Nette.

Part 5. Proposed Plaintiffs' Class

[70] In ***Bywater v. Toronto Transit Commission***, [1998] O.J. No. 4913, Winkler, J. (as he then was) at para. 10 described the purpose of class definition:

> The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and lastly, c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.

[71] In this case, the Plaintiffs propose a class definition as follows:

> . . . all persons, except the Class Defendants, who
>
> (i) were recommended and received, spinal adjustment involving the atlas or axis [the C1 and C2 vertebrae] ("INBAs") by a chiropractor in Alberta during the Class Period and suffered personal injury as a result or, where such person is deceased, the personal representative of the estate of the deceased person;
>
> (ii) were the spouse or adult interdependent partner of persons in (i),
>
> where "spinal adjustment" means use of a dynamic thrust to move the selected joint beyond its end range of passive motion.

[72] The remaining Defendants argue that this proposed class definition is too vague and contains terminology which will make it difficult for members of the public to ascertain whether or not they fall within this definition.

[73] Affidavits of Dr. Leslie Shaw and Dr. Bryan Redpath, both experienced chiropractors, were filed in support of their argument.

[74] Dr. Redpath deposes that the definition in the AASOC of "inappropriate and non-beneficial adjustment" ("INBA") is confusing and that he and other chiropractors would find it difficult to determine whether treatment they administered fell within this definition. Moreover, he deposes that chiropractic patients would find it difficult to determine if the treatment they received fell within this definition. For example, the term "subluxation" is not a term he uses with patients, and that chiropractors use various terms like "fixation" and "spinal dysfunction" in interacting with their patients. As well, patients will not always know if they have received chiropractic treatment which could be defined as an adjustment.

[75] He further deposes that the phrase "analytical instruments," found in the AASOC, may mean many things within the field of chiropractic, including x-rays and MRIs.

[76] In his opinion, patients receive a wide variety of chiropractic treatments, different terms are used, and each patient has his or her own understanding of what treatment is actually occurring.

[77] Dr. Shaw shares these concerns and noted that in order to determine whether or not an individual fell within the proposed Plaintiffs' class, it would be necessary to review an enormous number of records at chiropractic offices pertaining to the proposed class period.

[78] In the result, the remaining Defendants argue that the proposed class definition is unworkable in that it is objectively unclear as to who falls inside or outside the class.

[79] I accept that while superficially it may appear that the class definition is appropriate, there will be significant difficulties encountered in determining whether or not a given plaintiff underwent C1, C2 treatments, and for this reason alone, the proposed class definition is too vague and thus unworkable.

Part 6. Proposed Defendants' Class

[80] Based on the evidence submitted, it is clear that chiropractors in Alberta who practiced during the class period will have to review a substantial number of files to determine if C1, C2 treatments were administered, but that a file review will not necessarily be determinative of whether or not such treatment was provided. In the result, the proposed Defendants' class is too broad and thus unworkable.

Part 7. Are There Common Issues?

[81] The proposed common issues are as follows:

1. Was scientific evidence, or lack of it, relevant to ACAC's regulation of chiropractic and the establishment the standards of practice of chiropractors? If so, how?

2. What information did the ACAC and the Class Defendants have regarding the clinical relevance of vertebral misalignment/subluxation, and the efficacy of INBAs in addressing this entity in patients?

3. Were INBAs unreasonably dangerous, or defective or unfit for the purpose for which they were provided by the Class Defendants to the Class members? If so, in what respects, and when did the defendants know it?

4. Did the ACAC owe a duty of care to the Class? If so, what was the standard of care? Did the ACAC breach the standard of care? If so, how, when and why?

5. Did the Class Defendants owe a duty of care, or a fiduciary duty, to the Class? If so, what was the standard of care? Did the Class Defendants' breach the standard of care? How?

6. Where the INBA was derived from a diagnosis of vertebral misalignment/ subluxation, is consent to the INBA a defence?

7. Where the INBA was derived from a diagnosis of vertebral misalignment/ subluxation, was the diagnosis a representation by the Class Defendants to the Class plaintiffs that they could benefit from the INBA they offered?

8. If the answer to the last common issue is yes, were the representations identified by this issue false?

9. Can damages of class members be determined, in whole or in part, on an aggregate basis? If so, who should pay what amount, to whom and why?

10. Should one or more of the defendants pay punitive damages? Should punitive damages be assessed in the aggregate? If so, in what amount and how should punitive damages be distributed?

11. Should the defendants, or any of them pay prejudgment and post-judgment interest, at what annual interest rate, and should the interest be compound interest?

12. Should the defendants, or any of them, pay the cost of administering and distributing any monetary judgment and/or the cost of determining eligibility and/or the individual issues? If so, who should pay what cost, why, in what amount and to what extent?

[82] In ***Hollick v. Toronto (City)***, [2001] 3 S.C.R. 158, at para. 18, the Supreme Court of Canada defined the necessity of common issues being substantial ingredients in each of the class member claims:

> A more difficult question is whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c) of the Class Proceedings Act, 1992. As I wrote in Western Canadian Shopping Centres, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, [page172] an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.

[83] The Plaintiffs argue that the proposed class definition is narrow as it includes only individuals who suffered personal injury as a result of receiving spinal adjustments to C1 and C2 vertebrae, thus the requirement of common issues is satisfied.

[84] The Defendants argue that the claims would have very few, if any, common issues, and that, in essence, the Plaintiffs are proposing that multiple chiropractic malpractice claims be prosecuted under the umbrella of a single class proceeding.

[85] Evidence was tendered during this application to the effect that chiropractic patients may or may not receive C1, C2 adjustments, and may or may not be aware of what treatments they receive.

[86] Even if one assumes that each of the potential class plaintiffs has sustained an injury, the issue of whether such injury was caused by C1, C2 adjustment is extremely complicated and likely would require a causation finding in each case to determine the origin of the injury.

[87] Moreover, the causation of injuries may arise from multiple causes, including pre-existing conditions, and is subject to numerous variables including prior medical condition, age, and physical conditioning.

[88] In addition, the evidence before me establishes that there are many variables in chiropractic, including terminology, practice and procedures, and duration of treatments, all of which are modified to suit the needs of the individual patient. There are variables in terms of how much information is communicated to the patient, and when, and in what terms.

[89] These variables would impact each claim but not uniformly. As well, the variable of consent issues would not be common between claimants. In the result, issues 1 to 8 could not be said to have a substantial common ingredient.

[90] This situation is analogous to the case of ***Controltech Engineering Inc. v. Ontario Hydro***, [1998] O.J. No. 5350. In that case, bidders for an Ontario Hydro project sought certification of a class proceeding.

[91] In rejecting the application, the Court noted at para. 16 that the proposed common issues would not move the litigation forward as the circumstances of each bid would have to be examined.

[92] While ***Controltech*** is not a personal injury case, the result is informative in that in this case the circumstances of each injured plaintiff would have to be separately examined and thus certification of the class proceeding would not move the litigation forward.

[93] Issues 9 to 12 deal with damages. Personal injury damages are not at all amenable to an award of aggregate damages. They vary from claimant to claimant and are in no sense common.

[94] In ***Caputo v. Imperial Tobacco Ltd.***, [2004] O.J. No. 299, the Court rejected certification of a class proceeding involving personal injuries allegedly suffered by smokers, and at para. 54 it was observed that aside from other impediments to certification of the matter, the necessity of individual damage assessments made the case unsuitable for certification.

[95] In the result, I have concluded that the 12 proposed common issues would not qualify as common issues for the purposes of this proposed class proceeding.

Part 8. Is a Class Proceeding the Preferable Procedure?

[96] In ***Elder Advocates of Alberta Society***, the Court at para. 79 made the following observation about the issue of whether a class proceeding is the preferable approach:

> A class proceeding is the preferable procedure if it presents a fair, efficient and manageable method of determining common issues, and if such determination will advance the proceeding in accordance with the goals of achieving judicial economy, access to justice, and behaviour modification: *Carom v. Bre-X Minerals Ltd. (1999)*, 44 O.R. (3d) 173 (S.C.J.), at para. 257, aff'd 46 O.R. (3d) 315 (Div. Ct.), appeal granted in part on other grounds (2000), 51 O.R. (3d) 236 (C.A.), leave to appeal dismissed [2000] S.C.C.A. No. 660. The decision of a certification judge on the criterion of "preferable procedure" is entitled to special deference, because the judge must weigh and balance a number of factors: *Jeffery v. London Life Insurance Co.*, [2008] O.J. No. 3428 (Div. Ct.), 59 C.P.C. (6th) 30 at para. 22. . . .

[97] In ***Hollick***, at para. 29, it was observed that it is necessary to consider the impact of class proceedings on class members, the Defendants, and the Court.

[98] As noted, pursuant to s. 5(2) of the *Act*, I may consider any relevant matter but must consider five factors. My concerns on these factors are as follows:

a) Given the discussion pertaining to proposed common issues, I do not accept that common questions of fact or law will predominate over individual issues; rather, individual issues will predominate over common issues.

b) Given the unique circumstances of each claim, individual plaintiffs will have a valid interest in prosecuting their own claims, particularly as the seriousness and complexity of claims will vary widely. Individual claimants with modest claims will gain nothing while waiting for catastrophic claims like those of Sandra Nette to be litigated.

c) It may well be that other claims have been commenced given concerns about limitation issues.

d) Given the foregoing, it is unlikely that resolving individual claims would be less practical than resolving a class proceeding.

e) If this class proceeding is certified, the result would be an unwieldy proceeding with multiple administrative complexities. Multiple chiropractic malpractice claims would have to be adjudicated, and one can foresee that the process, even if tightly controlled, will become extremely difficult to manage.

[99] In ***Hollick***, at para. 30, it was observed that the question of preferability must take into account the importance of common issues in relation to the claim as a whole.
[100] If certification were ordered, the result would be, in essence, a trial involving multiple chiropractic malpractice claims. Each claim would require individualized evidence dealing with a myriad of issues including causation, consent, and damages. Each issue would be subject to many variables, and dependent on the particular circumstances of each plaintiff pre- and post-treatment. This would result in a lengthy, incredibly complex and costly trial which would be the antithesis of judicial economy. I do not accept that, by any measure, this would be the preferable procedure for resolving these claims.

Part 9. Are the Proposed Representative Plaintiffs Appropriate?

[101] While I accept, without hesitation, that the Plaintiffs are well-intentioned, I am concerned that the catastrophic injuries sustained by Sandra Nette and the impact of these injuries on her husband David Nette make it inappropriate for them to be representative plaintiffs.

Part 10. Conclusion and Order

[102] Section 5(1) of the *Act* requires that each subsection be satisfied before certification of a class proceeding can be ordered. The Plaintiffs are unable to satisfy any of the requirements, thus it necessarily follows that the application must be dismissed.

[103] Costs may be spoken to.

Heard on the 14th, 15th and 16th days of December, 2009.
Dated at the City of Edmonton, Alberta this 11th day of January, 2010.

R. Paul Belzil
J.C.Q.B.A.

Appearances:

Philip S. Tinkler
(Fraser Milner Casgrain LLP)
for the Plaintiffs

Richard C. Secord
Karin E. Buss
Karine de Champlain
(Ackroyd LLP)
for the Defendant, Gregory John Stiles

Ward K. Branch
Donald Lebans
(Branch MacMaster, Vancouver)
for the Alberta College and Association of Chiropractors

Corrigendum of the Reasons for Judgment
of
The Honourable Mr. Justice R. Paul Belzil

The neutral citation should read:

Nette v. Stiles, 2010 ABQB 14