CITATION: Lundy v. VIA Rail Canada Inc., 2015 ONSC 7063
COURT FILE NO.: CV-12-447653-00CP
DATE: 20151116

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
SANDRA LUNDY, DAVID CARMICHAEL, ALLISON KACZMAREK and MARC COUROUX Plaintiffs	*Theodore P. Charney* and *Jody Brown* for the Plaintiffs
– and –	
VIA RAIL CANADA INC. and CANADIAN NATIONAL RAILWAY COMPANY Defendants	*John A. Campion* and *Sarah J. Turney* for the Defendants
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: November 10, 2015

PERELL, J.

REASONS FOR DECISION

[1] This mini-sized class action is a test centre for underdeveloped but very important aspects of class action procedure under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. This time, the matter to be examined is an Individual Issues Motion pursuant to s. 25 of the *Act;* i.e., a motion to settle a litigation plan for the final stage of a class action. In the immediate case, the Defendants have admitted liability, and only the idiosyncratic issue of the quantum of damages remains to be determined. The parties, however, disagree about the procedure for the individual issues phase of the class action.

[2] One might think that the matter of designing the individual issues phase of a class action is no big deal and that designing the individual issues phase pales in significance to the matters of certification, the common issues trial, and the settlement approval stages of a class action. However, one would be wrong in undervaluing the importance of the litigation plan for the final stage of a class action. The design of the individual issues phase has a substantial impact on achieving the goals of the class action regime of access to justice, behaviour modification, and judicial economy. The matter of designing the individual issues phase of a class proceeding is actually a matter of substantial importance.

[3] In the immediate case, the parties cannot agree about the litigation plan for the individual issues phase of the action, and this vigorously argued motion reveals how serious the matter is regarded by the parties. I say - without criticism - that both parties' lawyers attempted to use the settling of the litigation plan as an opportunity for strategic and tactical purposes.

[4] Class Counsel designed a litigation plan with the not well hidden hidden-agenda of devising a means to increase the likelihood of all the Class Members enjoying a bump up in their damages awards to include emotional stress damages, and the Defendants designed a litigation plan with the not well hidden hidden-agenda of scuppering Class Counsel's strategy and tactics. And, the Defendants' not well hidden hidden-agenda was to design a litigation plan to increase the likelihood that the Class Members would accept the Defendants' Offers to Settle rather than proceed further into the individual issues phase of the proceeding. In any event, the parties could not agree about the litigation plan, and it is now for the court to settle the matter.

[5] The background to this Individual Issues Motion is largely set out in *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879, but for the present purposes of settling the litigation plan, the following account of the background facts is necessary.

[6] On Sunday, February 26, 2012, Sandra Lundy, David Carmichael, Allison Kaczmarek and Marc Couroux were passengers on VIA Rail Train 92 en route to Toronto when the train derailed near Burlington, Ontario. The Plaintiffs commenced a proposed class action.

[7] On July 9, 2012, the Plaintiffs delivered a Fresh as Amended Statement of Claim, asserting the claims of a class of persons comprising the passengers on the train and their family members (*Family Law Act* ("*FLA*") claimants).

[8] On October 1, 2012, on consent, the action was certified as a class proceeding.

[9] On April 29, 2013, the Defendants, VIA Rail Canada Inc. and Canadian National Railway Company, filed a Fresh as Amended Statement of Defence in which VIA Rail confessed judgment for four of the five common issue questions.

[10] The parties participated in a mediation before Graeme Mew, now Justice Mew, on September 9, 2013. At that time, there were 45 passengers remaining in the class. There were originally 69 passengers on the train, but 8 of these accepted settlement offers from VIA Rail before certification, and 16 passengers opted-out of the action, leaving a class of 45 members.

[11] In advance of the mediation, the Plaintiffs delivered a Damages Brief containing medical information concerning the alleged physiological and psychological injuries claimed by 37 passengers. The mediation was not successful in resolving the action.

[12] On August 14, 2014, VIA Rail served Rule 49 Offers to Settle addressed to each individual class member. The Offers to Settle were sent to Class Counsel. The offers ranged from a minimum of $8,000 to a maximum of $40,000 for the Class Member. The offers included a requirement that the Class Member execute, on his or her own behalf as well as on behalf of any person asserting a derivative claim under the *FLA*, a full and final release in the form attached to the offer. The offers also contained a promise by VIA Rail to pay the individual Class Member's legal fees and disbursements in an amount equal to 15% of the settlement amount paid to the Class Member.

[13] Taking the position that it was premature to do so, Class Counsel refused to communicate the Offers to Settle to Class Members, because the class action had not entered into the individual issues phase of the proceedings.

[14] VIA Rail's position was that notwithstanding the absence of a formal judgment, given the admissions of liability, the action was already in the individual issues phase and the Offers to Settle should have been provided immediately to the individual Class Members. With the parties unable to agree about how to proceed, the Plaintiffs brought a motion for: (a) an order granting judgment on the common issues; (b) an order appointing an adjudicator; (c) an order setting the terms under which such adjudications will be conducted; and (d) orders granting the Plaintiffs the costs of the certification motion and the costs of the action.

[15] I regarded the Plaintiffs' motion as resort to s. 25 of the *Class Proceedings Act, 1992* and labelled it an Individual Issues Motion, which I described in paras. 45 and 46 of my Reasons for Decision, as follows:

> 45. In the main, s. 25 requires the court to do four things. First, the court must define the issues to be resolved in the further hearing that will constitute the individual issues stage of the class action. Second, the court must decide who will decide those issues. The court's choices as to a decision-maker are limited to: (a) the judge who determined the common issues; (b) another judge, possibly the judge who was case managing the class action but potentially other judges; (c) one or more referees under the rules of court (this is an allusion to Rules 54 and 55 of the *Rules of Civil Procedure*); and (d) with the consent of the parties another adjudicator, whose determination of the individual issues will be given the authority of a court order. Third, the court must give any necessary directions relating to the procedures for the individual issues stage. Fourth, the court shall set a reasonable time limit for individual claims.
>
> 46. Seven observations may be made about these four matters that a court must determine under s. 25.
>
> - First, the court's power under s. 25 to design the individual issues stage is augmented by other sections of the *Class Proceedings Act, 1992,* most particularly s. 12, which states:
>
>> *Court may determine conduct of proceeding*
>>
>> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> - Second, in my opinion, the parties should have an opportunity to propose how the four matters should be determined before the court makes a final decision. As a matter of statutory interpretation, this follows because s. 25 envisions the possibility of the parties agreeing about the design of the individual issues stage.
>
> - Third, there is a very extensive jurisdiction for the parties by consent, and a somewhat more limited but still very generous jurisdiction for the court by order, to design the individual issues stage of the class action.
>
> - Fourth, s. 25 (3) empowers the court in giving directions as to the procedure to dispense with any procedural step or to authorize any special procedural steps. To that empowerment, I would add the court's powers on a summary judgment motion under rule 20.05 and the urgings of the Supreme Court of Canada in *Hryniak v. Mauldin, supra* and *Bruno Appliance and Furniture, Inc. v. Hryniak, supra* to employ those powers when justice can be done without requiring a regular trial. Creativity and the principles of

> proportionality have a role to play in designing the individual issues stage of a class action.
>
> - Fifth, the only major constraint on the design of the individual issues stage is that the court's procedural and evidentiary choices must be consistent with justice to class members and the defendants. What is consistent with justice will depend upon the nature of the particular case and upon the fundamental principles of justice and of natural justice. Once again the lessons being learned about proportionality and access to justice from the *Hryniak v. Mauldin*, and *Bruno Appliance and Furniture, Inc. v. Hryniak* jurisprudence will be informative in illuminating what is consistent with justice for the parties.
>
> - Sixth, the major constraint of consistency with justice is necessarily vague, and I doubt that many universal principles can be extracted beyond saying that each party is entitled to notice of the case they have to meet and that each party is entitled to some sort of procedural and evidentiary means to make its case and to meet the case of the opponent. The means chosen must be non-arbitrary and the resulting adjudication must be capable of meaning appellate review, but beyond that I do not know what more can be said.
>
> - Seventh, the design of the individual issues stage; i.e., the steps to be taken to establish an individual claim must be settled in order that the class members may receive the notice prescribed by s. 18 of the *Act* for where individual participation is required. This notice must be approved pursuant to ss. 20-22 of the *Act*.

[16] Keeping these observations in mind, I made the following orders: (1) judgment on common issues 1, 2, 3, and 5 of the Certification Order; (2) an assessment of costs from the commencement of the action to date; (3) the parties shall have 40 days to prepare an Individual Issues Litigation Plan; and (4) after the Plan has been settled, VIA Rail may deliver individual Offers to Settle (Rule 49) and Class Counsel shall prepare notices to Class Members of the completion of the common issues stage of the class action, which notices are subject to court approval. See *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879.

[17] In my Reasons for Decision, I held, among other things, that: (1) the matter of costs needed to be dealt with at the conclusion of the common issues stage before the entry into the individual issues phase of the class action; (2) the successful Representative Plaintiffs were entitled to costs for the successful completion of the common issues stage; (3) there should be no double counting for costs attributable to the certification stage of the action; (4) costs should be assessed without regard to the offers to settle, which are not factors until the action enters into the individual issues state; and (5) the costs of the individual issues motion were reserved until the Individual Issues Litigation Plan was settled.

[18] In light of those directives and holdings, the Representative Plaintiffs requested costs of $332,052.51 for the common issues stage, comprised of: (a) counsel fees, inclusive of HST, totalling $127,876.00; and (b) disbursements, inclusive of HST, totalling $204,176.51. I subsequently made a costs award to the Plaintiffs. More precisely, I awarded counsel fees, inclusive of HST, totalling $125,472.47 plus $89,151.94 for disbursements. I reserved the decision about disbursements totalling $102,402.73 for the Individual Issues Phase of the class action. In the result, the I awarded the Representative Plaintiffs $214,624.41, all inclusive for the communal portion of the class action. See *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 3531.

[19] As already noted above, the parties could not agree about the litigation plan for the individual issues phase of the class action and delivered competing plans.

[20] The Plaintiffs' Plan has the following features:

- A judge of the Superior Court will decide the individual issues.
- A Class Member's claim for damages is to be made by a paper record of affidavit evidence.
- The Defendants are entitled to reply to the Class Member's claim with a paper record of their own and the Defendants are entitled to one defence medical examination.
- There shall be no discoveries and no *viva voce* evidence at the hearings except from the Class Member Claimant unless the judge orders otherwise.
- Parties may be represented at the hearing by articling students, or paralegals.
- For claims up to $50,000, hearings shall be restricted to half a day.
- For claims over $50,000, hearings shall be restricted to one day.
- The Class Member is presumed to be the only party who may testify, and he or she may be cross-examined, although discretion for further witnesses is allowed.
- The *FLA* claims should be tried concurrently with the main claim.
- The normal rules about costs apply.
- Prior to scheduling hearings for any Class Members, the Plaintiff shall bring a Test Case for one Claimant who has claimed damages, anxiety, distress (mental distress) to determine the evidentiary threshold and requirements for mental distress claims and, if necessary, the applicable pre-judgment interest rate for the Claimants.
- There is a right of appeal for claims involving $50,000 or less to the Divisional Court.
- There is a right of appeal for claims in excess of $50,000 to the Court of Appeal.

[21] The Defendants' Plan has the following features:

- A judge of the Superior Court will decide the individual issues.
- A Class Member shall prepare a written claim for damages supported by affidavit evidence to include: (a) medical and hospital records; (b) employment records to support loss of income claims; (c) invoices and receipts for incidental loss claims; and (d) other documents relevant to the assessment of damages.
- The Defendants may request additional productions from a Class Member Claimant. The Defendants are entitled to one defence medical examination.
- The Defendants shall produce any relevant documents including surveillance relied on by the Defendants.
- The Defendants shall prepare a Defendants' Record including all responding affidavits.
- The Class Member may deliver a Reply Record after the delivery of the Defendants' Record.
- Cross-examinations and Examinations for Discovery:

- Where the claim is below $25,000 and there is no claim for mental distress, there shall be no cross-examinations or examinations for discovery.
- Where the claim is below $25,000 and there is a claim for mental distress, there shall be no examination for discovery but cross-examinations. (3 hours)
- Where the claim is greater than $25,000 and less than $50,000, there shall be no examinations for discovery but cross-examinations. (4 hours)
- Where the claim is between $50,000 and $100,000, there shall be no examinations for discovery but cross-examinations. (7 hours)
- Where the claim is greater than $100,000, there shall be examinations for discovery in accordance with the *Rules of Civil Procedure.*

- For claims up to $100,000, the hearing will proceed as a motion (3.5 days) save that there may be *viva voce* evidence from the Class Member.
- For claims greater than $100,000, there shall be a trial.
- Parties may be represented at the hearing by articling students, or paralegals.
- The *FLA* claims should be tried concurrently with the main claim.
- The normal rules about costs apply.
- There shall be no appeal except on a question of law.

[22] As I noted at the outset, the design of the individual issues phase of a class action is a matter of substantial importance. Metaphorically, after moving the ball the length of the class action field, it is to fumble and to lose the game to design a dysfunctional Plan for the individual issues phase.

[23] With respect, in my opinion, in the immediate case, the Plans proposed by both parties are inadequate, and they do not serve the access to justice and judicial economy purposes of the *Class Proceedings Act, 1992.* (The Defendants have confessed judgment and the behaviour modification purpose of the *Act* is not a significant concern at this juncture.) In my opinion, both Plans do not utilize the creative resources available from s. 25 of the *Act*, the *Rules of Civil Procedure,* and, most significantly, the parties have not taken the benefit from the lessons learned from the allocation and distribution schemes designed for class actions that are settled. In the context of settlement approval hearings, the parties frequently extoll the features of a proposed claims process that is fast, efficient, and fair to both the claimant and the defendant who must pay for the claims. In the case at bar, the wisdom of this experience has not been reaped.

[24] After pointing out several problems with the parties' respective proposals, I shall propose – not order – a litigation plan, and I direct the parties to review it. I direct them to renew their efforts to negotiate a satisfactory litigation plan, failing which I shall direct a case conference to hear their final submissions and I will finally settle the plan.

[25] The Plaintiffs' proposal for the Test Case is problematic for two reasons.

[26] First, a genuine test case requires the consent of all parties to make the outcome binding on parties in other cases. A test case requires that the defendant and each prospective plaintiff agree to be bound by the result: *Jane Doe 1 v. Manitoba*, [2008] M.J. No. 292 (Q.B.) at para. 15;

CIBC v. Deloitte and Touche, [2003] O.J. No. 2069 (Div. Ct.). The Defendants do not consent to a test case.

[27] Second, in the circumstances of the case at bar, the Test Case about the law of damages for mental distress has no utility, because the law is already settled law and that settled law is already favourable for all but perhaps four of the remaining 45 Class Members. For those four Class Members, i.e. Class Members who have no claim other than for mental distress, the Test Case would have to work its way up to the Supreme Court of Canada or at least the Court of Appeal to change the law.

[28] All Class Members, save for perhaps four, suffered a physical injury from the train crash. Any mental suffering associated with the physical injury is routinely recoverable as pain and suffering in the general damages award. For the Class Members who did not suffer a physical injury the established law, which would be binding on the judge deciding the Test Case, is that there is recovery for mental distress in the absence of physical injury provided that the mental distress stems from a recognizable psychological injury that is causally connected to the defendant's negligence. There are no such Class Members in the case at bar.

[29] See: *Healey v. Lakeridge Health Corp.*, 2010 ONSC 725, affd. 2011 ONSC 55; *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.); *White and Others v. Chief Constable of South Yorkshire*, [1999] A.C. 455 (H.L.); *Koerfer v. Davies (c.o.b. Caerleon Farms)*, [1994] O.J. No. 1408 (C.A.); *Duwyn v. Kaprielian* (1978), 22 O.R. (2d) 736 (C.A.); *Hinz v. Berry*, [1970] 2 Q.B. 40.

[30] Put shortly, there is no utility to a Test Case in the circumstances of the case at bar, and it should not form part of the litigation plan for the individual issues phase of the class action.

[31] Turning to the Defendants' proposed litigation plan, in my opinion, it overreacts and attempts to thwart the Plaintiffs' exposed hidden agenda of attempting to reshape the established law about mental distress damages, and, in general, the Defendants' plan is far too cumbersome and ponderous.

[32] My litigation plan proposal, which the parties are welcome to improve upon, involves: (1) a claims procedure for claims up to $50,000; (2) an application/summary judgment motion procedure for claims between $50,000 and $100,000; and (3) a trial of an issue procedure for claims over $100,000. All three procedures start with an Offer to Settle from the Defendants.

[33] More precisely, my proposed litigation plan for the individual issues phase is as follows:

- The Defendants shall deliver to Class Counsel: (1) an all-inclusive Offer to Settle for each Class Member; (2) a release; and (3) payment of the Offer, which payment is to be deposited in Class Counsel's Trust Account.
- A Class Member shall have 60 days from the receipt of an Offer to Settle (or 30 days from the receipt of a Revised Offer to Settle) to either: (1) sign the release and accept the Offer to Settle (or the Revised Offer to Settle); or (2) Deliver a Notice of Application (or a Revised Notice of Application) for his or her claim for damages with supporting affidavits, failing which the Class Member shall be deemed to have signed the release and accepted the Offer to Settle (or the Revised Offer to Settle).
- If a Class Member delivers an Notice of Application asserting a claim for less than $50,000, the Defendants shall have: (1) 15 days to deliver to Class Counsel an all-

inclusive Revised Offer to Settle with the funds necessary for the offer; (2) 60 days to pay to Class Counsel the difference between the amount of the damage claim and the Class Member's outstanding Offer to Settle, in which case the Class Member will be deemed to have signed the release; or (3) 60 days to deliver a Responding Application Record with supporting affidavits setting out the Defendants' explanation or defence to the Class Member's claim for damages.

  - In the event, that the Defendants deliver a Responding Application Record, the Notice of Application and the Responding Application Record along with factums from both parties shall be filed for an application in writing to be decided by a judge of the Superior Court, whose decision shall be final.

- If the Class Member delivers a Notice of Application asserting a claim for between $50,000 and $100,000, the Defendants shall have: (1) 15 days to deliver to Class Counsel an all-inclusive Revised Offer to Settle, with the funds necessary for the offer; (2) 60 days to pay to Class Counsel the difference between the amount claimed by the Class Member and the Offer to Settle, in which case the Class Member will be deemed to have signed the release; or (3) 60 days to deliver a Responding Application Record with supporting affidavits setting out the Defendants' explanation or defence to the Class Member's Claim for Damages.

  - In the event that the Defendants deliver a Responding Application Record, the Application shall continue as a summary judgment motion in accordance with Rule 20 of the *Rules of Civil Procedure*, including the attendant appeal rights for final orders.

- If the Class Member delivers a Notice of Application asserting a claim for over $100,000, the Defendants shall have: (1) 15 days to deliver to Class Counsel a revised all-inclusive Offer to Settle, with the funds necessary for the offer; (2) 60 days to pay to Class Counsel the difference between the amount claimed by the Class Member and the Offer to Settle, in which case the Class Member will be deemed to have signed the release; or (3) 60 days to deliver a Responding Application Record with supporting affidavits setting out the Defendants' explanation or defence to the Class Member's claim for damages.

  - In the event that the Defendants deliver a Responding Application Record, the Application shall continue as a trial of an issue in accordance with the *Rules of Civil Procedure*, including the attendant rights for discovery, delivery of expert reports and appeal rights.

- The normal rules about costs apply if there is a judicial determination of the application in writing, a summary judgment motion, or a trial of an issue.

[34] I direct the parties to consider the above proposal, and if they cannot come to an agreement about a litigation plan within 30 days, then the Plaintiffs shall arrange a case conference to settle the litigation plan. (Arrangements can be made with my assistant.)

[35] Finally, there is one additional matter that requires attention. The Plaintiffs claim $16,153.73, inclusive of taxes and disbursements for the Individual Issues Motion heard on March 12, 2015. This amount, which appears to be for services referable to the communal stage of the class action, should have been claimed as a part of the costs that I have already assessed,

see above, and for which the Plaintiffs recovered $214,624.41. Therefore, this request for costs is refused. The matter of the costs, if any, for settling the litigation plan have not yet been addressed, and I shall make an order in this regard after the litigation plan is finally settled.

[36] An Order should issue in accordance with these Reasons for Decision.

Perell, J.

Released: November 16, 2015

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