



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Central Regional Health Authority v. Welshman*,
2025 NLCA 31

Date: August 25, 2025

Docket Number: 202401H0041

BETWEEN:

CENTRAL REGIONAL HEALTH AUTHORITY
APPLICANT/INTENDED APPELLANT

AND:

KAYLA WELSHMAN
INTENDED FIRST RESPONDENT

AND:

SUSAN ROBERTS
INTENDED SECOND RESPONDENT

Coram: K.J. O'Brien J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
Grand Falls-Windsor, General Division,
202103G0020 (2024 NLSC 35)

Application Heard: July 16, 2025
Judgment Rendered: August 25, 2025

Reasons for Judgment by: K.J. O'Brien J.A.

Counsel for the Applicant/Intended Appellant: Ruth E. Trask and Janet L. Carpenter
Counsel for the Intended First Respondent: Stephen E. Barnes
Counsel for the Intended Second Respondent: Stephen E. Barnes

Authorities Cited:

CASES CITED: *Welshman v. Central Regional Health Authority*, 2024 NLSC 35; *Thorne v. The College of the North Atlantic*, 2017 NLCA 30; *Dewey v. Corner Brook Pulp and Paper Limited*, 2025 NLCA 8; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *The Dow Chemical Company v. Ring*, 2010 NLCA 20, leave to appeal to SCC refused, 33711 (21 October 2010); *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184; *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3; *Hynes v. Western Regional Integrated Health Authority*, 2014 NLTD(G) 137; *Broutzas v. Rouge Valley Health System*, 2018 ONSC 6315, aff’d 2023 ONSC 540; *Newfoundland and Labrador v. Chiasson*, 2020 NLCA 28; *Power v. Mount Pearl (City)*, 2022 NLSC 129, rev’d 2025 NCLA 16; *Mount Pearl (City) v. Power*, 2025 NLCA 16.

STATUTES CONSIDERED: *Class Actions Act*, SNL 2001, c. C-18.1, sections 9, 36(3), 11, 5(1), 2(b), 5(2), 7(1), 8(e), 37(1); *Privacy Act*, RSNL 1990, c. P-22, section 3(1).

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rule 38.

K.J. O’Brien J.A.:

OVERVIEW

[1] This is an application for leave to appeal a certification order under the *Class Actions Act*, SNL 2001, c. C-18.1 (the “CA Act”). The respondents (the “Plaintiffs”) applied as representative plaintiffs to certify a class action against Central Regional Health Authority (“Central Health”) on behalf of a proposed class of 260 Central

Health patients whose personal health information was accessed by Central Health employees without a valid reason.

[2] The Plaintiffs' statement of claim alleges four causes of action: (i) breach of privacy pursuant to the *Privacy Act*, RSNL 1990, c. P-22; (ii) breach of privacy at common law; (iii) negligence; and (iv) breach of contract. With respect to the first three causes of actions, the Plaintiffs claim that Central Health is directly liable because it failed to establish or enact sufficient safeguards to protect their private information and also vicariously liable for the actions of its employees.

BACKGROUND

[3] There are two alleged incidents of wrongful access to medical records. The first incident is alleged to have been committed over the period from October 2018 to July 2020, during which time a Central Health employee wrongfully accessed the private information of 240 Central Health patients. The Plaintiffs were both affected by the first incident.

[4] The second incident was publicly announced by Central Health on January 28, 2021, and involved a further 20 Central Health patients who had their private information wrongfully accessed by another Central Health employee. The Plaintiffs are not among the 20 patients affected by the second incident.

The Certification Order

[5] The judge who heard the Plaintiffs' application for certification allowed the application (*Welshman v. Central Regional Health Authority*, 2024 NLSC 35 (the "Certification Decision")) and issued a Certification Order conforming to section 9 of the *CA Act* (Application Record, Tab 4). The Certification Order defines a single class, which includes the patients affected by the first incident and those affected by the second incident. The Certification Order appoints the Plaintiffs as representative plaintiffs of the class.

[6] The Certification Order further sets out the questions that are certified as common issues for the class, including questions relevant to each of the four causes of action and questions relevant to the relief claimed.

Intended Grounds of Appeal

[7] Central Health does not seek to appeal the Certification Order in its entirety. Its intended grounds of appeal fall into two broad categories:

- a. The judge erred by including patients affected by the second incident in the class because those patients do not share common issues with the patients affected by the first incident and there was no basis upon which to conclude that a class action is the preferable procedure to resolve any issues for those affected by the second incident.
- b. The judge erred in assessing the causes of action and in determining the common issues such that this Court should now intervene to: (i) strike the claim for breach of contract, (ii) strike the claim for intrusion upon seclusion, (iii) clarify certain principles of law relevant to the other causes of action, and (iv) narrow the common issues in relation to those affected by the first incident.

LAW RELATED TO LEAVE TO APPEAL IN CLASS ACTIONS

[8] Section 36(3) of the *CA Act* requires leave to appeal a certification order. In the present case, the parties requested that the leave application be heard separately from the appeal. The Court agreed.

[9] In *Thorne v. The College of the North Atlantic*, 2017 NLCA 30, at paragraph 13, this Court listed factors that provide a “useful starting place” for assessing the question of leave to appeal under the *CA Act*:

- (a) there is a conflicting decision by another judge or court upon a question involved in the proposed appeal and, in the opinion of the Court, it is desirable that leave to appeal be granted,
- (b) the Court doubts the correctness of the order in question,
- (c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted,
- (d) the Court considers that the nature of the issue is such that any appeal on that issue following final judgment would be of no practical effect, or

(e) the Court is of the view that the interests of justice require that leave be granted.

[10] In addition to the above factors, the Court in *Thorne* identified a further consideration: whether the appeal involves a refusal or a granting of certification. Leave is less likely to be granted when a class action has been certified because section 11 of the *CA Act* gives the court below authority to amend a certification order, decertify an action, or make any other order it considers appropriate where it appears to the court that the statutory requirements for certification are no longer met as the class action progresses. The Court in *Thorne* explained further:

[19] Accordingly, the balance may tip in favour of granting leave to appeal where certification has been refused while, by contrast, there may be some reticence to give leave where certification has been granted. In the latter situation, the ability to adjust the certification order to take account of a change or need to clarify the order may obviate the need to bring a challenge on appeal which would interfere with the efficient progression of the action through the court.

[11] The Court went on to note that on an application for leave to appeal under the *CA Act* consideration may be given to prejudice to a party, the effect of delay, inconvenience, efficient use of judicial resources, or other good reason (at para. 20).

LAW RELATED TO THE CERTIFICATION OF CLASS ACTIONS

[12] Section 5(1) of the *CA Act* sets out the requirements that the Plaintiffs must establish on a balance of probabilities for a class action to be certified:

5. (1) On an application made under section 3 or 4, the court shall certify an action as a class action where

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;
- (d) a class action is the preferable procedure to resolve the common issues of the class; and
- (e) there is a person who

- (i) is able to fairly and adequately represent the interests of the class,
- (ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and
- (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

[13] The test to be applied when considering whether there is a cause of action under section 5(1)(a) is the “plain and obvious test”, which is whether, assuming the facts as pleaded to be true and without considering any evidence, it is “plain and obvious” that the claim as pleaded discloses no reasonable cause of action (*Dewey v. Corner Brook Pulp and Paper Limited*, 2025 NLCA 8, at para. 44; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 14; and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17, 22).

[14] As for sections 5(1)(b) to (e), the Plaintiffs must show that these criteria have “some basis in fact” (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25).

STANDARD OF REVIEW ON APPEAL

[15] I am deciding an application for leave to appeal, not the appeal itself. As such, I will not be reviewing the Certification Decision on the standards of review applicable to appeals of certification orders. However, it is helpful to identify what those standards of review are as they may influence the granting of leave, particularly the consideration of whether the Court doubts the correctness of the Certification Order.

[16] The standard of review with respect to section 5(1)(a), whether the pleadings disclose a cause of action, is correctness because whether a cause of action is disclosed is a question of law. Sections 5(1)(b) to (e) involve questions of mixed fact and law and so the standard is palpable and overriding error unless the judge made an extricable error in law, which would be reviewed on a correctness standard (*Dewey*, at paras. 31-32; and *The Dow Chemical Company v. Ring*, 2010 NLCA 20, at paras. 6-8, 34, leave to appeal to SCC refused, 33711 (21 October 2010)).

ANALYSIS

[17] Leave to appeal may be granted in whole or in part, so I will assess the potential issues on appeal separately to determine if leave should be granted.

Did the judge err by including patients affected by the second incident in the class?

[18] If granted leave on this issue, Central Health intends to argue that the judge erred in finding that the certification criteria of section 5(1)(c), that the claims of the class members raise a common issue, and section 5(1)(d), that a class action is the preferable procedure, were met for patients affected by the second incident.

[19] Central Health submits that leave to appeal should be granted because there is reason for this Court to doubt the correctness of the Certification Decision, primarily because the judge failed to appreciate that the incidents involved different employees and wrongfully analyzed them as one collective privacy breach. Central Health further submits that it would be meaningless for this Court to address the commonality of the issues between those affected by the first and second incidents after the trial of the matter. Central Health asserts that judicial economy and the interests of justice favour this Court determining this issue at an early stage.

[20] The judge was aware that there were two alleged incidents, occurring at different times. The Statement of Claim identified the second incident as involving “another employee” and the Plaintiffs’ application to cross-examine an affiant identified the second incident as involving a “separate employee” and “unrelated” to the first:

In or around late November 2020, following routine audit procedures, Central Health became aware of a second, unrelated incident involving inappropriate access by a separate employee (“Second Incident”). Central Health notified the 20 individuals affected by that inappropriate access. It publicly announced the matter in early January 2021.

[21] In the Certification Decision, the judge referred to the incidents as “separate” and “disclosed at two different times” (at para. 76). Although she stated that the incidents “may or may not involve different employees” (at para. 76), when the Plaintiffs claimed different employees were involved, this error did not materially affect her analysis because she did not assume a single employee was involved.

[22] Despite the differences between the two groups, the judge found that there were “sufficient commonalities in the questions asked” to support there being common issues to ground a class action. The judge elaborated:

[76] ... The Plaintiffs have all alleged the same basic wrong, being a breach of their privacy by an employee or employees accessing their private medical records. They are seeking similar remedies, under the same legal theories. The issues as set forth by the Plaintiffs are the same, despite there being two sets of breaches.

[23] Central Health does not dispute that some of the common issues the Judge identified are legal questions that are shared between the two groups of patients. However, Central Health asserts that these legal issues are not “common” in the requisite sense because they are too general to be “common issues” within the meaning of the *CA Act*.

[24] I do not doubt the correctness of the judge’s decision that there were sufficient commonalities in the issues raised by the two groups of patients to support there being common issues to ground a class action.

[25] The *CA Act* specifies that “common issues” may be issues of fact or law:

2. ... (b) “common issues” means

(i) common but not necessarily identical issues of fact, or

(ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[26] While a court should avoid framing commonality between class members in overly broad terms, the guiding question is whether allowing the suit to proceed as a class action will avoid duplication of the fact-finding or legal analysis (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 39; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29). As stated by the Supreme Court of Canada in *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3:

[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.

[27] That the incidents involved two different employees who accessed the records at different times and, possibly, by different means, is not sufficient to defeat the commonality requirement. The common issues identified by the judge include several legal questions that will advance the resolution of all class members' claims.

[28] There are factual, or mixed fact and law, issues in common as well. The Plaintiffs' statement of claim alleges systemic negligence against Central Health. The claims are detailed but generally they allege that Central Health failed to have or implement sufficient procedures and policies to safeguard patient records.

[29] The Supreme Court of Canada found systemic negligence claims sufficient to meet the commonality requirement in *Rumley*. That case involved current and former students at a residential school for deaf and blind children operated by the British Columbia government, who commenced a class action against the government seeking damages for abuse suffered at the school. The abuse was carried out by various perpetrators (staff and students) and occurred over a period of roughly 42 years. Although the government conceded that none of the class members could prevail without showing that its conduct fell below an acceptable standard of care, it contended that ultimate liability turned not on the breach of a standard of care in the abstract, but on whether the standard of care was breached with respect to the school's supervision of the particular class member in a way that contributed materially to his or her abuse. In essence, the government argued that the required analysis was inescapably individualistic.

[30] The Supreme Court of Canada did not agree. The Supreme Court found that the systemic claims put at issue actions or omissions by the government whose reasonability could be determined without reference to the circumstances of any individual class member. Although it was quite possible that the standard of care varied over the 40-plus year period, the Supreme Court noted that this "simply means that the court may find it necessary to provide a nuanced answer to the common question" (at para. 32). The individual aspects of the analysis were not a bar to certification. There are similarities between *Rumley* and the present case.

[31] Additionally, I do not doubt the correctness of the judge's decision that the preferability requirement was met for patients affected by the second incident.

[32] Section 5(2) of the *CA Act* sets out factors that a court may consider in assessing the preferability requirement:

5. (2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether

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

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

(c) the class action would involve claims that are or have been the subject of another action;

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

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

[33] The judge considered each of these in turn. She found that either the factor weighed in favour of a class action or she had no evidence to suggest that it weighed against a class action. She considered the differences between the two groups of patients specifically with respect to section 5(2)(a):

[84] There may be differences in the questions of fact with respect to the two different groups, as the Second Breach may involve a different employee or employees and potentially different systems. However, I have no evidence before me as to whether or not this is the case – as is the normal practice, the Defendants have not yet filed a Statement of Defence, nor has any discovery proceeding been commenced. As such, I do not have sufficient evidence to say that the questions of fact in this matter are sufficiently different between the two groups so as to make individual (or two separate class action) trials preferable.

[34] I do not doubt the correctness of the Certification Decision on this point. It is early days for this proceeding. Although Central Health had the option of filing evidence on the certification application, it chose not to. At this stage, the extent of the similarities or differences between the two groups of patients is largely unknown. If this issue were to proceed to appeal now, this Court would not be expected to have any more information than was before the judge.

[35] If, as the file develops, significant factual differences between the two groups are revealed, the *CA Act* provides the court below with flexibility to adjust. Specifically, section 11(1) allows the court to amend a certification order, decertify an action, or make another order it considers appropriate where conditions for certification are no longer satisfied; section 7(1) contemplates the recognition of subclasses whose members have claims that raise common issues not shared by all the class members and authorizes the court to appoint a person to be the representative plaintiff for a subclass, in addition to the representative plaintiff for the class; and section 8(e) states that a class action shall not be refused certification solely because the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[36] In summary, I do not doubt the correctness of the judge's decision based on the information that was before her. I am not convinced there would be any efficiency gained by this Court hearing an appeal of the issue at this stage. In this case, an early appeal regarding the class definition would not obviate the need for a trial as the entirety of the Certification Order is not being challenged. Moreover, I do not agree with Central Health's assertion that an early appeal could dispose of the second incident entirely based on the information available. The court below has significant flexibility under the *CA Act* to create a subclass and add common issues specific to that subclass, or make any other amendment to the Certification Order that becomes appropriate as the file progresses. As such, the interests of justice do not favour granting leave to appeal on the inclusion of patients affected by the second incident in the class.

Did the judge err in assessing the cause of action for breach of contract?

[37] If granted leave on this issue, Central Health intends to argue that there is no contract between a patient and their health authority, and that the judge erred in law when she concluded that it was not plain and obvious that the breach of contract claim would fail.

[38] The Plaintiffs submit that the judge did not err in her analysis of this issue.

[39] The judge found that she was bound by judicial comity and horizontal *stare decisis* to follow a previous decision of the Supreme Court of Newfoundland and Labrador, *Hynes v. Western Regional Integrated Health Authority*, 2014 NLTD(G) 137, in which a similar contractual claim against a health authority was certified. Although the judge acknowledged the more recent decision of *Broutzas v. Rouge*

Valley Health System, 2018 ONSC 6315, aff'd 2023 ONSC 540, in which the court found that the relationship between patients and hospitals is not contractual and refused certification of a breach of contract claim against a hospital for a privacy breach, she did not follow *Broutzas* because it was from another province and not binding upon her.

[40] There have been other relevant developments in the law since *Hynes*. Notably, *Atlantic Lotto*, a decision in which the Supreme Court of Canada allowed an appeal from this Court and struck a certification order in its entirety. The Supreme Court stated that if a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. This is so even if courts must resolve complex questions of law and policy to make the determination. The relevant passages from *Atlantic Lotto* are:

[18] Secondly, and since *Microsoft* was decided, this Court has recognized in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the need for a culture shift to promote “timely and affordable access to the civil justice system” (para. 2). Where possible, therefore, courts should resolve legal disputes promptly, rather than referring them to a full trial (paras. 24-25 and 32). This includes resolving questions of law by striking claims that have no reasonable chance of success (S. G. A. Pitel and M. B. Lerner, “Resolving Questions of Law: A Modern Approach to Rule 21” (2014), 43 *Advocates’ Q.* 344, at pp. 351-52). Indeed, the power to strike hopeless claims is “a valuable housekeeping measure essential to effective and fair litigation” (*Imperial Tobacco*, at para. 19).

[19] Of course, it is not determinative on a motion to strike that the law has not yet recognized the particular claim. The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial (*Imperial Tobacco*, at para. 21; *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 73; see also *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670). That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present “no legal justification for a protracted and expensive trial” (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy (see e.g. *Imperial Tobacco*; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Syl Apps*; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261).

[41] This reasoning from *Atlantic Lotto* was relied upon by this Court in *Newfoundland and Labrador v. Chiasson*, 2020 NLCA 28, to grant leave to appeal a certification order in part. The Court in *Chiasson* granted leave to appeal for issues involving questions of law which had the potential of narrowing the litigation at an early stage.

[42] I am satisfied that whether a claim for breach of contract against Central Health is doomed to fail is an issue that may be able to be answered based on the facts as pleaded as it likely will not require evidence or reference to the particular circumstances of class members. The question of whether there is a contractual relationship between a patient and a hospital authority has not yet been decided in this province. Answering that question at the certification stage could substantially increase judicial efficiency and cost effectiveness because, if Central Health is correct, there would be no need for pre-trial procedures and a trial on the issue. As such, I find that the interests of justice favour granting leave to appeal on this issue.

Did the judge err in assessing the cause of action for intrusion upon seclusion?

[43] Central Health makes a similar argument in relation to the judge's finding that it was not plain and obvious that the allegation of intrusion upon seclusion would fail. The judge relied, at least in part, on a recent decision of the Supreme Court of Newfoundland and Labrador in *Power v. Mount Pearl (City)*, 2022 NLSC 129, in which the applications judge found that the common law tort of intrusion upon seclusion exists in this province. Since the Certification Decision, *Power* was overturned by this Court (*Mount Pearl (City) v. Power*, 2025 NLCA 16, ("*Power NLCA*")) and consequently Central Health submits that there is reason to doubt the correctness of the judge's certification of the common law privacy tort claim.

[44] In *Power NLCA*, this Court recognized that the availability of the common law tort of intrusion upon seclusion is unsettled in this province (*Power NCLA*, at para. 64). Because it was not necessary to do so to decide the appeal, the Court in *Power NLCA* declined to pronounce upon the issue (at para. 70).

[45] Central Health submits that the availability of the tort could be determined by this Court in the present case based on the pleaded facts and so, following the guidance of *Atlantic Lotto*, should be determined at an early stage.

[46] As noted in *Power NLCA*, courts have generally declined to recognize new torts when adequate remedies already exist within the law to address the harm done

(at para. 68). As such, I have some reservation about whether this legal question can indeed be answered based on the facts as pleaded without a determination of the other causes of actions asserted and the related remedies. That said, that determination is best made by a full panel with the benefit of full argument of the issue. I agree with Central Health that if evidence is not required, determining the question early would facilitate judicial economy and could avoid unnecessary litigation costs. As such, I am satisfied that the interests of justice favour granting leave on this issue.

Should this Court intervene at the certification stage to clarify certain principles of law relevant to the other causes of action or to narrow the common issues?

[47] Central Health seeks leave on several issues that do not address whether the pleadings disclose a cause of action but rather are aimed at this Court giving clarity and guidance on questions of law that are expected to arise during the litigation.

[48] One is the interpretation of “wilfully” in section 3(1) of the *Privacy Act*:

3. (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of an individual.

[49] Although Central Health acknowledges that the judge did not consider the meaning of “wilfully” in the Certification Decision, it submits that this Court should undertake an interpretation at the outset of the litigation, particularly because there are conflicting decisions on the meaning of the term in the privacy legislation in other provinces.

[50] The Plaintiffs respond that, although it would be helpful to have a statutory interpretation from this Court at the outset, this is not the role of an appellate court. They submit that it would be more appropriate to permit the judge to conduct the common issues trial, render a decision as to whether there was a wilful breach of privacy in this case, and, if there are grounds to do so, appeal that decision.

[51] I agree with the Plaintiffs and would not grant leave on this issue. Statutory interpretation is best done with the context that an evidentiary foundation provides. The primary role of this Court is to identify errors from courts below when they occur, not to give guidance on statutory interpretation for cases that have not yet been heard by a first instance judge.

[52] Additionally, I am not convinced that any interpretive guidance that this Court could give in the absence of an evidentiary record would necessarily add any efficiency to the court proceedings. Ultimately, the law must be applied to facts by a first instance judge. If one of the parties believes there to be an error following final judgment, the decision can be appealed then and the appeal will still be of practical effect.

[53] It is likewise for the Central Health's requests that this Court provide guidance on (1) whether or how the doctrine of vicarious liability applies in the present case; and (2) whether the mental anguish and suffering pleaded by the Plaintiffs are sufficient to support compensable damages in negligence. Except to the extent that these issues are engaged by a consideration of whether it is plain and obvious based on the pleaded facts that the causes of action for breach of contract or intrusion upon seclusion will fail, there is little to no benefit to be gained by an appeal prior to trial. Although there may be some extricable legal questions involved that this Court could answer without an evidential record, such an exercise is unlikely to save any time or costs.

[54] If there is advantage to be gained by having the court below revisit the Certification Order prior to trial or determine a question of law or fact in advance, the parties can pursue that. As already discussed, the *CA Act* provides considerable flexibility for adjustment as a file develops. Additionally, when appropriate, the parties can seek pre-trial directions or determinations of questions of fact or law from the Supreme Court using Rule 38 of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D.

[55] As such, I would not grant leave to appeal for any of the further issues proposed by Central Health.

DISPOSITION

[56] Leave to appeal is granted with respect to the following issues:

1. Did the judge err in finding that the pleadings disclosed a cause of action for breach of contract?
2. Did the judge err in finding that the pleadings disclosed a cause of action for the common law tort of intrusion upon seclusion?

[57] There is no order as to costs (*CA Act*, section 37(1)).

K.J. O'Brien J.A.