Davies v. Clarington (Municipality), [2010] O.J. No. 3703

Ontario Judgments

Ontario Superior Court of Justice

P. Lauwers J.

Heard: January 14 and 15, 2010.

Judgment: September 2, 2010.

Court File No. CV-00-1075-00CP

[2010] O.J. No. 3703 | 2010 ONSC 418 | *196 A.C.W.S. (3d) 1092* | 2010 CarswellOnt 6412

Between Bonnie Davies, Plaintiff, and The Corporation of the Municipality of Clarington, VIA Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc., Blue Circle Canada Inc. and Ontario Hydro Services Company, Defendants

(63 paras.)

Case Summary

Civil litigation — Civil procedure — Parties — Class or representative actions — Members of class or sub-class — Procedure — Pleadings — Amendment — Statement of claim — To alter or add to claim for relief — Motion by class member for leave to amend pleadings to increase amount claimed allowed — Class member was passenger on train that derailed and caused him serious injury — Class was comprised of all passengers — All claims save for moving party's were settled — He sought to amend pleadings to increase amount claimed from $10 million to $50 million — Leave granted, as amendment would not have materially changed defendants' litigation strategy and did not constitute abuse of process — No prejudice, as defendants remained free to contest liability under terms of settlement — Class Proceedings Act, ss. 11, 12, 25(3).

Motion by a class member, Zuber, for leave to amend a fresh statement of claim to increase the amount claimed from $10 million to $50 million. Zuber was a passenger on a train operated by the defendant, VIA Rail, that derailed in an accident in 1999, striking the remnants of a tractor trailed owned and operated by the defendants, Apache and Garnham. The tractor trail had been stuck on a railway crossing. The crossing linked lands owned by the defendants, Blue Circle Canada and Ontario Hydro Services. The roadway north of the rail corridor was owned and maintained by the defendant, the Municipality of Clarington. The continuation of the roadway was owned and maintained by Blue Circle. Zuber was thrown forward into the wall of the passenger coach. He struck his head, was rendered unconscious and suffered a compression injury to his cervical spine. A class proceeding was commenced and certified by Davies. Zuber was a member of the class, which included all of the passengers on the train. The class was divided into a group of 75 that suffered no notable injuries, and 10, including Zuber, who suffered more significant injuries. The action claimed $10 million in compensatory damages. Zuber issued his own statement of claim after the opt-out period. His action was discontinued. The defendants in the class action resolved contribution issues and concluded a cost sharing agreement that included an apportionment of liability for the payment of settlement funds. Eventually, all of the claims except Zuber's claim were settled. The settlement was approved. Zuber now sought to amend pleadings to increase the amount claimed, as his injuries were more severe than initially contemplated. The defendants opposed the relief sought.

HELD: Motion allowed.

The issue of Zuber's status to bring a motion to amend a class proceeding no longer involving the representative plaintiff was resolved by granting Zuber leave to bring the motion to amend the pleading in respect of his own claim only, nunc pro tunc. The settlement did not contain a provision permitting a subsequent opt-out by Zuber. He was thus bound by the class proceeding as he found it. The amendment increasing the amount claimed was permitted. It was unlikely that the change in amount would have materially changed the litigation strategy of the defendants, as the case was a major undertaking for the defendants at $10 million or $50 million. Under the terms of the settlement, it was open to the defendants to contest liability in respect of Zuber. Zuber's economic claims remained active from the outset and always included a loss of income claim. The proposed amendment was not for an improper purpose and did not constitute an abuse of process. No prejudice was established by the defendants.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, *S.O. 1992, c. 6, s. 11*, s. 12, s. 25, s. 25(1), s. 25(2), s. 25(3), s. 35

Ontario Rules of Civil Procedure, Rule 26.01

Counsel

D. Fulton, for Christopher Zuber, Class Member.

R. Winsor, for the Defendant, The Corporation of the Municipality of Clarington.

J. Campion, D. Merner, for the Defendant, VIA Rail Canada Inc. and Canadian National Railway.

B. Sunohara, for the Defendant, The BLM Group Inc.

J. Regan/A. Sciacca, for the Defendants, Apache Specialized Equipment Inc., Apache Transportations Services Inc.

J. Agostino, for the Defendant, Ontario Hydro Services Company.

REASONS FOR DECISION

P. LAUWERS J.

1 Class member Christopher Zuber moves for leave to amend the Fresh Statement of Claim in this class action to increase the amount claimed from $10 million to $50 million.

FACTUAL CONTEXT

2 Mr. Zuber was a passenger on an east-bound VIA train that was derailed in an accident on November 23, 1999. It struck the remnants of a 65-foot tractor trailer owned by Apache Specialized Equipment Inc. or Apache

Transportation Services Inc. and operated by Timothy Garnham, which was stuck on a railway crossing. The crossing links the lands to the south of the rail corridor, owned by Blue Circle Canada Inc., and the lands to the north, owned by Hydro One Networks Inc. Symons Road proceeds north from the railway corridor and is owned and maintained by the Municipality of Clarington. The continuation of the roadway south of the railway corridor is owned and maintained by Blue Circle.

3 Mr. Zuber was thrown forward into the wall of the coach. He struck his head and was rendered unconscious, suffering a compression injury to his cervical spine. The details of his injuries are set out in various medical reports provided to the defendants.

PROCEDURAL HISTORY

4 A Statement of Claim was issued by Bonnie Davies against The Corporation of the Municipality of Clarington under the *Class Proceedings Act*, *1992*, *S.O. 1992, c. 6*, on March 8, 2000. She also issued a Statement of Claim against the defendants other than Clarington on March 9, 2000. Each of these actions claimed $10 million in compensatory damages and $1 million in punitive, aggravated and/or exemplary damages. They were consolidated and certified as a class proceeding on August 30, 2000, by order of MacKinnon J. A Fresh Statement of Claim was issued pursuant to the order on September 5, 2000 and claimed $10 million in compensatory damages and $1 million in punitive, aggravated and/or exemplary damages.

5 MacKinnon J.'s certification order appointed Bonnie Davies as the plaintiff and appointed Michael F. Head of Walker Head as class counsel. The class included all passengers on the VIA train. The order permitted any class member to opt out of the class proceeding by providing the required notice within 90 days of the sending of the specific notice to Class Members. There were 101 passengers who were notified of this proceeding pursuant to the Certification Order. Seventeen delivered "opt out" coupons and were not heard from again. Mr. Zuber did not opt out and has been a Class Member throughout.

6 Mr. Zuber's lawyer, Jeffrey Strype, issued a Statement of Claim on November 23, 2001, well after the opt-out period, seeking compensatory damages of $1 million and punitive, aggravated and/or exemplary damages of $100,000. Mr. Zuber discontinued this action on November 4, 2002 after discussions with the defendants.

7 Parallel to the class proceeding, VIA and CN commenced a separate action on November 15, 2001 against Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc., Hydro One Networks Inc., and Blue Circle Canada Inc. for property damage as a result of damages to the trains and rail lines; the defendants in the VIA action brought cross-claims, counterclaims and third-party claims to include Clarington in the VIA action.

8 The Davies class action and the VIA action were tried together by J. Ferguson J. over 11 weeks between April 2005, and June 2005. The class was represented by class counsel, Mr. Head. The trial was to determine liability issues only.

9 After the evidence was heard by Ferguson J. and before argument, mid-trial conferences were held and the defendants in the class action were able to resolve the contribution issue for all of them except Blue Circle. By September 15, 2005, the co-defendants had concluded a cost sharing agreement that included an apportionment of liability for the payment of settlement funds to Class Members on the following basis:

(a) Garnham, Apache Transportation Services Inc., Apache Specialized Equipment Inc., (49.83%)

(b) CNR (33.84%)

(c) Clarington (9.165%)

(d) Hydro (7.165%)

I have not been provided with a copy of the cost sharing agreement.

10 I am advised that under the agreement all the defendants, except Blue Circle, agreed to the following:

(a) The quantum of the claims of Via Rail Canada Inc. and Canadian National Railway;

(b) The proportionate share of liability of the settling defendants for the claims of Via and CNR and the claims of the Class Members;

(c) The law firm of Regan, Kram, Desjardins LLP was appointed to negotiate and attempt to resolve the claims of the Class Members with Class counsel, subject to court approval;

(d) Regan, Kram, Desjardins LLP was retained by the defendants to argue the unresolved issue of the liability of Blue Circle before Ferguson J.

11 The argument on Blue Circle's liability was heard on November 14-17, 2005. On April 5, 2006, Ferguson J. dismissed the action against Blue Circle, which accordingly had no obligation to compensate either the members of the class or its co-defendants. Her decision is reported at *(2006), 266 D.L.R. (4th) 375*.

12 In total, there were 84 Class Members. They were divided into two groups, the first being those whose only claim was for the trauma of being involved in the accident, and the second being those who claimed that they suffered more significant injury. All but 10 of the Class Members did not suffer any notable injuries. The first group's claims were for trauma and were settled for $3,000 each. The claims of eight of the remaining 10 Class Members were settled in the following amounts.

Class Member	**Settlement Amount**
Bonnie Davis	$75,000.00
Wendy Craig	$5,000.00
Daphne Singwall	$25,000.00
Melanie Kerr	$6,500.00
Carly Kovendi	$5,000.00
Scott McKibbon	$7,500.00
Maureen McGinn	$5,000.00
Heather Worsfold	$25,000.00
Total	$154,000.00

13 By Order dated September 13, 2006, Ferguson J. set December 13, 2006 as the date for the fairness hearing and referred Mr. Zuber's claim for damages to Regional Senior Justice Shaughnessy for case management.

14 The Minutes of Settlement between the Plaintiff and the Defendants other than Blue Circle were signed on October 11, 2006. Ferguson J. signed the order approving the settlement on December 13, 2006; there were then two remaining claims; Anne Pritchard's claim was settled for $50,000 on May 25, 2007, leaving only Mr. Zuber's claim.

15 Ferguson J.'s order of December 13, 2006 provides:

1. THIS COURT ORDERS that the terms of the Minutes of Settlement entered between the Plaintiff and the Defendants, The Corporation of the Municipality of Clarington, Via Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache

Specialized Equipment Inc., Apache Transportation Services Inc., and Ontario One Networks Inc. (the "Settling Defendants") and all appendices attached to the Minutes of Settlement (the "Minutes of Settlement") are fair, reasonable, adequate and in the best interests of the Class Members.

2. THIS COURT ORDERS that in accordance with sub-section 29(2) of the Class Proceedings Act, 1992 the Minutes of Settlement entered into between the parties, except Blue Circle Canada Inc. dated October 26th, 2006 be and are hereby incorporated by reference into this Order and are hereby approved and binding upon the Class Members who have not opted out of the Class and upon the defendants, except Blue Circle Canada Inc.

3. THIS COURT ORDERS that the Minutes of Settlement be implemented in accordance with their terms.

4. THIS COURT ORDERS that, upon settlement or adjudication (and the resolution of any appeals taken there from) of the claims of individual Class Members Christopher Zuber and Anne Pritchard the Settling Defendants shall deduct from the proceeds otherwise to be paid to these two individual Class Members 20% of his or her claim (to the maximum of $4,000.00 in the case of Anne Pritchard and to a maximum of $10,000.00 in the case of Christopher Zuber) and pay that sum to Walker, head as contribution to its fees and disbursements approved herein.

5. THIS COURT ORDERS that this action be otherwise dismissed against the defendants, without costs and with prejudice.

10. THIS COURT ORDERS that the settlement of the Class Members' claims as contemplated and approved by this Order does not compromise the claims of Class Members Christopher Zuber and Anne Pritchard.

16 The Minutes of Settlement, incorporated by reference into the approval order, provide:

13. The Released Parties do not admit any liability of obligation whatsoever to the Releasing Parties and such liability and obligation are in fact denied.

Settlement not an Admission of Liability

17. Neither these Minutes of Settlements nor any steps taken to carry out these Minutes of Settlement may be construed as, or may be used as, an admission by or against the Released Parties, or of the truth of any allegations or of liability of the Released Parties or as a waiver of any applicable legal rights or benefit other than expressly stated in these Minutes of Settlement. Likewise, these Minutes of Settlement may not be construed as, or used as an admission by or against the Class Members or as a waiver of any applicable legal right or benefit of the Class Members other than as expressly stated in the Minutes of Settlement.

17 Mr. Zuber produced a first affidavit of documents on August 10, 2006, which lacked any documentation related to his economic claims. His examination for discovery was started on August 11, 2006, and continued much later on April 4 and 10, 2008. An updated Affidavit of Documents was provided on November 17, 2009. During a Case Conference on that day the defendants advised that they would resist Mr. Zuber's request to amend the Statement of Claim to increase the damages claim from $10 million to $50 million, leading to this motion.

Analysis

18 This motion obliges me to consider three issues:

1. Mr. Zuber's status to bring the motion;
2. The extent to which Mr. Zuber is bound by the class proceeding to date;

3. Whether the amendment should be permitted under Rule 26.01 of the *Rules of Civil Procedure.*

I address each of these issues in turn.

Issue One: Mr. Zuber's Status to Bring the Motion

19 Under the *Class Proceedings Act*, any motions are required to be brought by the representative plaintiff, Bonnie Davies, using class counsel, Mr. Head.

20 Ms. Davies has no further interest in this action. The only class member with a remaining interest is Mr. Zuber himself. Mr. Strype has been counsel for Mr. Zuber throughout. In his affidavit in support of this motion sworn December 10, 2009, Mr. Strype states:

> In order to amend the Statement of Claim herein, and with the approval of Class counsel, I served a Notice of Change of Solicitor in the Class Proceeding on all counsel on December 3, 2009. One of the issues to be resolved is whether Mr. Strype can become Class counsel in this way and at this stage of the proceeding.

21 Section 11 of the *Class Proceedings Act* would appear to apply in this situation:

> **11.(1)** Subject to section 12, in a class
>
> proceeding,
>
> (a) common issues for a class shall be determined together;
>
> (b) common issues for a subclass shall be determined together; and
>
> (c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25.
>
> (2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

22 Section 12 provides:

> **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.

23 Section 25 provides:

> **25.**(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,
>
> (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court; ...

24 This is precisely what happened when Ferguson J. in her Order dated September 13, 2006, stated at paragraph 5:

> [5] This Court orders that the issue of the claim for damages by Class Member Christopher Zuber, be referred to Regional Senior Justice Shaughnessy for Case Management on a date to be fixed by the trial coordinator at Newmarket.

Shaughnessy J. has been case managing the matter since and this motion before me is a step in that process.

25 Subsections 25(2) and (3) of the *Class Proceedings Act* provide:

> (2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.
>
> (3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,
>
> (a) dispense with any procedural step that it considers unnecessary; and,
>
> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

26 Mr. Fulton argues:

> Given the uniqueness of this case, that being no guidance in the law on how a Class Member (not a representative plaintiff) can amend a class proceeding, a choice of serving a filing a Notice of Change in solicitors in hindsight was not the appropriate procedure. However, the Class Member must be able to amend the pleadings both out of a fairness and also in keeping with the goals of the Class Proceeding Act ... We agree with Mr. Winsor that the Court may provide directions under Section 25 of the Act regarding the appropriate procedures to follow to determine individual issues and I submit that the Court under this section may set out the procedure to follow when a Class Member wishes to amend the class claim.

27 Mr. Winsor was not quite that accommodating. He said: "A Class Member may seek an order substituting himself for the current personal representative Bonnie Davies. If successful such person may move to amend the pleading. However, Mr. Zuber has not done so." Mr. Winsor here was speaking of the formal process for changing class counsel and the class representative. Mr. Campion supports him in the argument that this would only be done by amending the existing certification order. The process to do so would, in my opinion, be unwieldy and unnecessary at this stage of the proceeding.

28 It seems to me, giving reasonable effect to sections 11 and 12, and the instructions in Section 25(3) of the *Class Proceedings Act*, that the most expeditious way to deal with this situation so that the parties can get to the heart of the matter is to give Mr. Zuber leave to bring this motion to amend the pleading in respect of his own claim only, *nunc pro tunc*, and I do so.

29 I do not mean to suggest that such a procedure would always be appropriate in a class action when it comes to the determination of individual claims. The determination of the fairest and most expeditious process is fact and context driven. I do not challenge in any way the decision of the Court of Appeal in *Dabbs v. Sun Life Assurance Company of Canada* *(1998), 41 O.R. (3d) 97*, *[1998] O.J. No. 3622* per O'Connor A.C.J.O. at paras. 6, 7 and 19. I next discuss the extent to which Mr. Zuber is bound by the class proceedings to date.

Issue Two: To What Extent is Mr. Zuber Bound by the Class Proceedings to Date?

30 Mr. Fulton argues the position asserted by Mr. Strype in his supporting Affidavit:

> Liability is not in issue as the Class Action has been finalized with liability being determined against the defendants, save for Blue Circle Canada Inc. The balance of the litigation is to solely determine the quantum of damages arising from Mr. Zuber's personal injuries. (para. 2)
>
> There cannot be any prejudice to my client amending the Class proceeding in any event, because it was a term of the dismissal of Mr. Zuber's personal claim (in 2002) that it was on a without prejudice basis that Mr.

> Zuber was free, if he chose not to participate in the class proceeding at any time, to re-instate Mr. Zuber's personal action. In my opinion, that preserved my client's rights to start a fresh action in which my client could claim damages for any amount ... (para. 14)
>
> Mr. Zuber is at liberty to commence a fresh action seeking damages for $50 million. However, Mr. Zuber has decided to operate within the existing frame of the class proceeding ... (para. 15)

31 Mr. Fulton submits that it was a term of the discontinuance of Mr. Zuber's personal action in 2002 that it was on a "without prejudice" basis, and argues that Mr. Zuber was free, if he chose not to participate in the class proceeding at any time, to reinstate his personal action. This flows, he says, from the words of a letter from Brian J.E. Brock, then counsel for Blue Circle:

> Mr. Strype's action should be dismissed without costs and without prejudice to him re-instating that action at some future time if he chooses to do so and follows the appropriate procedures. Might I suggest to you at this stage his client to be included in the Class, because he did not opt out.
>
> However, it is certainly possible within the framework of the Class Proceedings Act, for any individual to seek the permission of the court to opt out at some later state. To do so, however, you need the court's fiat. Whatever those rights might be, Mr. Strype and his client should be deemed to have retained those, even though they brought this action.

This statement formed the basis of the discontinuance of Mr. Zuber's personal claim since it was accepted by the co-defendants.

32 Mr. Fulton argues that Mr. Brock's letter should be read as providing that Mr. Zuber had, by private agreement among the parties, effectively contracted out of section 9 of the *Class Proceedings Act* (the opt-out provision). This is objectionable in principle, given the policy thrust of the Act. But I also find that this interpretation of Mr. Brock's words is wrong. Mr. Brock was simply pointing out the rights of the parties under the *Class Proceedings Act*, which might permit Mr. Zuber to opt out at some later state, with the court's permission, and which might permit him to later start his own action in whatever amount.

33 But choices have consequences. Mr. Zuber did not opt out within the time period provided in the certification order. He neither sought nor obtained a provision in the minutes of settlement or the approval order permitting him to opt out later. His failure to take these steps leaves him bound by the class proceeding as he finds it; he is not free to start a new action and insist on another liability trial.

34 Contrary to Mr. Strype's assertion, it is not true that liability has been determined, as Ferguson J.'s order approving the settlement and the minutes of settlement make plain. Ferguson J. heard the evidence and has not rendered a decision on the liability of defendants other than Blue Circle. Consequently, since Mr. Zuber clearly intends to continue against the other defendants, then they may properly reconvene the trial before Ferguson J. and argue liability taking the trial record as it is; the decision determining liability is still open. The defendants may, of course, instead agree with Mr. Zuber to waive the determination of the liability issue by Ferguson J. That is, however, what it means "to operate within the existing frame of the class proceeding," in Mr. Strype's words.

35 I am supported in this conclusion by the court's approach in *Dabbs, supra*. The approved settlement agreement specifically permitted class members to opt out of the settlement and sue on their own behalf for whatever claim they wished to assert at a number of different times; see *(1998), 40 O.R. (3d) 429*, *[1998] O.J. No. 2811*, per Sharpe J. This figured importantly in the Court of Appeal's decision, *supra*, at para. 20, to refuse a dissident's motion for leave to appeal. A similar degree of flexibility does not, however, exist in Ferguson J.'s approval order.

Issue Three: Should the Amendment be Permitted?

36 The major issue is whether Mr. Zuber should be given leave to amend the Statement of Claim to increase the amount claimed from $10 to $50 million.

37 Section 35 of the *Class Proceedings Act* simply states that the Rules of Court apply to class proceedings. Rule 26.01 of the Rules of Civil Procedure obliges the court to approve the amendment:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

38 There are numerous supporting precedents in ordinary personal injury cases such as this one. The burden of showing prejudice lies with the party opposing the amendment: *Barker v. Furlotte,* [1985] O.J. No. 1517, 12 O.A.C. 76 (Div. Ct). There is much case law supporting the right of a party to amend a pleading to increase the amount claimed prior to trial, during trial or even after a decision is made by a judge or a jury after a trial: *370866 Ontario Ltd. v. Chizy*, [1987] O.J. No. 2244, 57 O.R. (2d) 587 (H.C.J.) [claim amended from $10,000 to $100,000]; *Hill v. Church of Scientology of Toronto*, [1992] O.J. No. 451, 7 O.R. (3d) 489 [claim amended to match jury award from $400,000 for general damages and $400,000 for aggravated damages to $300,000 for general damages, $500,000 for aggravated damages and $800,000 for punitive damages]; *Haikola v. Arsenau,* [1996] O.J. No. 231, 27 O.R. (3d) 576 (C.A.) [claim amended from $200,000 to $1,650,000]; [2000] O.J. No. 778; *Beals v. Saldanha,* [2001] O.J. No. 2586, 54 O.R. (3d) 641 at paras. 98-99 (C.A.); *Apotex Inc. v. Wellcome Foundation Ltd.*, [2009] F.C.J. No. 177.

39 The plaintiff argues that it is appropriate to permit the increase in the amount of damages where his injuries turn out to be more severe than contemplated at the commencement of the action and where no prejudice can be shown: *Shuker v. Gagne*, [2007] O.J. No. 941.

Is There Prejudice?

40 The defendants say that there is prejudice here arising out of a number of elements.

Litigation Strategy

41 First, they point to the litigation strategy decisions they made, particularly in reaching the cost sharing agreement by which they apportioned responsibility for paying settlements, and in agreeing to the minutes of settlement. The defendants rely on *Family Delicatessen v. London*, [2006] O.J. No. 669 (C.A.). The Court refused leave to amend the Statement of Claim to allege new causes of action:

> **6** The appellants could have brought the motion to amend their claim at any time after the outset of these proceedings. They chose not to do so despite repeated requests from the City that they either bring a motion to amend or agree to a dismissal of the action against the City. There is no justification for the inordinate delay in bringing the motion to amend the statement of claim. While delay is not in and of itself a basis for refusing an amendment, there must come a point where the delay is so long and the justification so inadequate that some prejudice to the defendants will be presumed absent a demonstration by the party seeking the amendment that there is in fact no prejudice despite the lengthy and unexplained delay.
>
> **7** We agree with counsel for the City that there would be some prejudice to the City had the amendment been allowed. The City had participated in the proceedings for some six years on the basis that it was a nominal defendant. Its participation in the lawsuit was minimal and it took a cooperative stance with the other parties. Were the proposed amendment to be allowed, the City would be in a very different position with serious allegations of misrepresentation being brought against it. Its litigation strategy may well have been entirely different. It, of course, cannot undo what has already been done in this proceeding. While it is true that the prejudice to the City flowing from the proposed dramatic change in the course of this litigation could be addressed in part by appropriate orders concerning added discoveries and related matters, we are satisfied that the City could not be put in the position it would have been to meet these allegations had they been made in a timely fashion.

42 For VIA Rail and CNR, Mr. Campion submits that the amount claimed in a Statement of Claim means

something. It signals to the parties the range of risk within which they are operating. The fact that Mr. Zuber is bringing this motion is an acknowledgement that the prayer for relief damages set at $10 million limits his claim.

43 Accordingly, within the structure of the class proceeding, Mr. Campion submits that Mr. Zuber ought to have come to the fairness hearing before Ferguson J. on December 13, 2006 and voiced his concern about the limit on damages set by the Statement of Claim. If the representative plaintiff, Bonnie Davies, and class counsel, Mr. Head, had then sought an amendment to increase the amount claimed from $10 million to $50 million, the defendants would have recognized their exposure. The alternative, Mr. Campion submits, was for Mr. Zuber to have requested permission to opt out and to commence a new action for the higher amount. Mr. Zuber did neither and permitted the defendants to carry on with their settlement not knowing his intentions. Mr. Zuber, in effect, waited in the weeds and should not be rewarded for his conduct.

44 In her affidavit, Carole Mackaay, general counsel and corporate secretary of VIA, sets out the elements of prejudice:

> (a) It [VIA] participated in a lengthy trial at which its liability was always an issue and not admitted;
>
> (b) it proceeded to trial on the basis of a Trial Record in which the Prayer for Relief was never amended;
>
> (c) it participated in two mid-trials after 11 weeks of evidence in which the liability of the Defendants was in focus;
>
> (d) Zuber at no point prior to the trial attempted to opt out of the class action and thus was considered one of the claimants within the class and the global amount of the Prayer for Relief;
>
> (e) VIA Rail decided to contribute by assessing its risk, which included the maximum potential exposure to all Defendants of $10 million as pleaded, and on the basis that any settlement would lead to finality;
>
> (f) VIA Rail's contribution was fixed and settled on that basis and cannot now be altered by changing the Prayer for Relief in the class proceeding, which was $10 million or less, including the Zuber claim;
>
> (g) costs or an adjournment cannot compensate VIA Rail for the prejudice;
>
> (h) there was no indication at the mid-trial conferences that [VIA Rail] would be facing a multi-million-dollar claim for one party, but rather claims within modest range of damages and thus was able to make an economic assessment of its position;
>
> (i) Mr. Zuber's claim was made at $1 million as part of his Statement of Claim, which would have exposed VIA Rail to approximately $330,000 at the maximum; and
>
> (j) by April 2005, when the trial started, which was almost six years after the accident date, Mr. Zuber had presented no evidence for economic loss assessments that would indicate an amount greater than $1 million;

45 Mr. Agostino submits that the legal position of Hydro One is not substantively different from that of Blue Circle as the landowner on the other side of the rail corridor, against which the action was dismissed. Hydro One did not consider that it was liable but decided, on an economic basis, to participate in the settlement expecting the financial outlay to be modest. Karin McDonald, the risk manager of Hydro One, swears that:

> (e) Hydro One decided to contribute by assessing its risk which included the maximum potential exposure, namely $10,000,000 as pleaded and which would give finality to the lawsuit;
>
> (f) Hydro One's contribution percent is fixed, settled and cannot be undone and was based on the upside $10,000,000 global amount in the prayer for relief, which included the Zuber claim;

(g) had Zuber's claim at $50,000,000 been part of the consideration at the time of settlement, Hydro One would have fought liability as Blue Circle did and could have reasonably succeeded as its position is not dissimilar to Blue Circle's, which did succeed in getting the claim dismissed.

46 The elements paid for in the settlement included $204,000 for the nine class members with more serious damages, and trauma damages for all the passengers in the amount of $252,000 for a total of $456,000, of which Hydro One's share was about $32,000. If the damages had reached $10 million as pleaded, Hydro One's share would have been $716,500. This is contrasted with the $50 million claim. If Mr. Zuber is successful, Mr. Agostino calculates the additional amount to be paid by Hydro One at $3,582,500. In short, Hydro One would have never agreed to the settlement of the class proceeding with such exposure. He submits that Hydro One's share, as a result of the approved settlement, is now "fixed and irreversible" and this is a prejudice that cannot be overcome.

47 The affidavit sworn by Dieter Fischer, senior claims examiner, Frank Cowan Company, the risk manager for the Municipality of Clarington states:

> At the time that Clarington agreed to this percentage I believed that Clarington should not and would not be found liable but that there was a chance that there would be a small finding of liability against Clarington. I also believed at the time that the total of the class' claims, including costs, was likely to be in the approximate area of $750,000.00. There was also a property damage claim by CN and Via Rail totalling approximately $5,800,000.00. I recognized that the claim in this action alleged substantially more damages and that on the basis of the amount claimed in the pleading the maximum share of the injury claims to be paid by Clarington would be no more than $916,500. However I did not view the latter exposure as probable. Based upon these beliefs I agreed to authorize settlement on the basis that liability was apportioned as against Clarington to be no more than 9.165%. (This could have been reduced in the event that Blue Circle, which refused to contribute anything, was ultimately found liable by the trial judge.)

48 There is an unusual twist in the prejudice argument in this case arising from the fact that the enforceability of the cost sharing agreement among the defendants is apparently in issue. In support of this argument, Mr. Campion took the position that had Mr. Zuber's request for an amendment been successfully entertained by Ferguson J. at the fairness hearing, VIA Rail and CNR would not have been bound by the September, 2005 settlement agreement. He also takes the position that the cost sharing agreement entered into among the defendants would not be binding if the amendment sought by Mr. Zuber is granted. By contrast, Mr. Winsor takes the position that had Mr. Zuber appeared at the fairness hearing before Ferguson J. and successfully argued that the settlement could only be approved if the amount in the Statement of Claim were increased to $50 million, Clarington would not have been free to oppose the approval of the settlement. Mr. Regan agrees with Mr. Winsor and submits that the cost sharing agreement is binding on his client and the other defendants who signed it, even if the motion to amend is allowed.

49 This is a hard argument to assess, especially since the parties did not give me a copy of the cost sharing agreement, which leads me to wonder how serious their dispute is. Any dispute among the defendants about the enforceability of the cost sharing agreement is a matter for another lawsuit. It also seems premature since the actual award of damages to Mr. Zuber has not been made and might well not exceed $10 million.

50 The point made by Laskin J.A. in *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, [2009] O.J. No. 2642 at paras. 20-21 (C.A.) applies here:

> [20] However, to defeat a motion to amend, the party resisting the amendment must show that the non-compensable prejudice it relies on "would result" from the amendment. It must establish a link between the non-compensable prejudice and the amendment. It must show that the prejudice arises from the amendment.
>
> [21] This necessary link is missing in this case. That is because the non-compensable items of prejudice found by the motion judge already existed at or immediately after the time that the original statement of claim was issued.

51 The elements of prejudice alleged by Ms. Mackaay of VIA, for example, "already existed at or immediately after the time that the original statement of claim;" the steps she sets out were necessary in any event. I have some difficulty with the proposition that the change in the amount claimed would have materially changed the strategy of the defendants.

52 The Court of Appeal said in *Beals v. Saldanha, supra*, at paras. 98, 99:

> **98** Specific pleading rules cannot be confused with the rules of natural justice, and a particular pleading rule cannot be viewed in isolation. While rule 25.06(9) requires that damage claims specify "the amount claimed for each claimant in respect of each claim", the wide powers of amendment found in rule 26.01 demonstrate that the failure to comply with rule 25.06(9) does not mean that a defendant has been denied the opportunity to know the extent of its jeopardy or the case it has to meet. Under rule 26.01, a court can refuse to make amendments, including amendments increasing the amount of the damages claimed, only where the defendant can demonstrate on the balance of probabilities that the amendment would cause prejudice that could not be compensated for by costs or adjournment. The mere fact that an amendment substantially increases the quantum of the plaintiff's damages claim and therefore the defendant's potential liability is not a basis upon which to deny the amendment. The amending power in rule 26.01 has been invoked to substantially increase the quantum of damages claimed after judgment is granted, and even on appeal: see Hill v. Church of Scientology of Toronto *(1992), 7 O.R. (3d) 489* at 496 (Gen. Div.), aff'd. without reference to this point *(1994), 114 D.L.R. (4th) 1* (Ont. C.A.), aff'd. without reference to this point *(1995), 126 D.L.R. (4th) 129* (S.C.C.).
>
> **99** The approach dictated by rule 26.01 to motions that seek to amend pleadings to substantially increase the damages claimed no matter when in the proceeding that motion is brought, is inconsistent with the argument that knowledge of the amount claimed by the plaintiff at the time the defendant is called upon to reply to the statement of claim is essential to the defendant's ability to know the extent of its jeopardy and to make an informed decision as to how to respond to the claim. If knowledge of the amount claimed was essential to the defendant's ability to effectively respond to the claim, motions to significantly increase the amount of the claim as late as the appellate stage would be rejected out of hand. Rule 26.01 takes the opposite approach. It requires the court to make those amendments unless the defendant can show prejudice that cannot be cured by costs or an adjournment.

53 At $10 million or $50 million, this case was a major undertaking for the defendants and was treated that way. The liability trial before Ferguson J. took 11 weeks and was well attended by representatives of the defendants. And it is, as I held above, still open to the defendants to pursue the liability issue in respect of Mr. Zuber if they so choose. While they economized on the Blue Circle liability determination and the damages phase by deputing Mr. Regan as common counsel, their decision to do so can be revisited for Mr. Zuber's case.

54 The certification order and the settlement order both contemplate the individual assessment of damage claims. The general damages claim involving Mr. Zuber has been active from the outset and it has always included a loss of income claim. The class action was settled in October 2006, with defence counsel being fully aware of the existence of Mr. Zuber's claim. The order of December 13, 2006, approving the settlement specifically provides that the "settlement of the Class Members' claims as contemplated and approved by this order does not compromise the claims of Class Members Christopher Zuber and Anne Pritchard." In short, there is no "link" between the amendment and the elements of prejudice alleged by the defendants, as Laskin J.A. required in *Iroquois Falls Power Corp, supra.* I find no prejudice related to "litigation strategy".

Document Destruction

55 The defendants argue that there is prejudice in this case because Mr. Zuber admits that he destroyed a number of documents that would support (or contradict, on the defendants' view) his claim to damages for loss of income. The defendants argue that they are prejudiced by the absence of these documents in cross-examining Mr. Zuber.

There is no doubt that the destruction of documents is ordinarily a relevant consideration: *King's Gate Developments Inc. v. Colangelo,* [1994] O.J. No. 633, 17 O.R. (3d) 841 at para. 5 (C.A.); *Iroquois Falls Power Corp. v. Jacobs Canada Inc., supra*, at para. 28; *Mazzuka v. Silvercreek Pharmacy Ltd*. (2001), 56 O.R. (3d) 768 at para. 65 (C.A.).

56 The fact that Mr. Zuber destroyed documents may make it difficult for him to prove his case but there is no "link" between the request for an amendment and the prejudice in the manner required by *Iroquois Power Corp. v. Jacobs Canada Inc., supra*. I am not persuaded that I should refuse the amendment on this ground.

Abuse of Process

57 The defendants also assert that an amendment should be refused under Rule 26.01, on the basis that it is being sought for an improper purpose and is an abuse of process. They invoke the reasoning of Farley J. in *National Trust v. Furbacher*, [1994] O.J. No. 2385. The amendments there sought to more than double the amount of damages claimed, to add two parties as plaintiffs and 44 parties as defendants and to expand the number of causes of action. In paragraph 7, Farley J. said:

> Then we have Slade L.J.'s concerns at p. 424 of *Spritebrand*, *supra* [*C. Evans & Sons Ltd. v. Spritebrand Ltd. and another*, [1985] 2 All E.R. 415 (C.A.)] about proceedings which are "demonstrably a mere tactical move" such as "to put unfair pressure on the [other side] to settle". It is inappropriate to join parties for the sole purpose of obtaining discovery from them: see *MacRae v. Lecompte*, The Queen in Right of Ontario (Third Party) (1983), 32 C.P.C. 78 (Ont. H.C.J.) at pp. 86-7. As well, it is improper to make an excessive or grossly exaggerated claim for damages: see *Shaw v. The Queen*, [1980] 2 F.C. 608 (T.D.) at p. 620 where Walsh J. stated:
>
> > Counsel defended the amount of this claim by stating that since a Court cannot judge ultra petita it is always necessary to make a sufficient demand to cover any possible claim. I am of the view however that the making of excessive and grossly exaggerated claims is an abuse of the process of the Court, as they tend to indicate a far greater jeopardy for a defendant than the facts justify, with the result that a great deal more will be spent in many cases on legal proceedings than the total amount which could possibly be recovered even if the action succeeded. Such claims are prevalent especially in actions brought before juries in the United States but in my view should be discouraged and only realistic amount should be claimed.
>
> I regret to say that the inference which I draw from these amended pleadings is that they are an abuse of process. No explanation was given in the supporting affidavit as to why the amendments were being sought.

58 It is notable, however, that *National Trust* was a case in which the addition of parties was seen to be particularly abusive, not so much the increase in the amount claimed. Further, the explanation for an increase in this case is quite plain: Mr. Zuber's loss of income claim allegedly exceeds $10 million.

59 Mr. Regan says: "The Plaintiff recently provided an Affidavit, dated November 11, 2009, which includes some financial documentation. However, there is nothing in the financial documentation produced to-date which indicates that the Plaintiff's loss of income claim will exceed the prayer for relief of $10,000,000.00 in the Class Action, or the $1,000,000.00 claimed in the Individual Action." In other words, he implies that the amendment is intended to have an *in terrorem* effect on the defendants to press the settlement advantage, as deplored by Farley J. in *National Trust, supra.*

60 I have real trouble giving weight to this argument. This motion was argued by as accomplished and experienced an array of senior civil and personal injury counsel as might appear in any Superior Court in this province. They are well familiar with the range of personal injury awards and are well able to assess the risk of whether in a judge-alone trial that the award to Mr. Zuber would exceed $10 million. If it did it would be a record breaker.

61 Mr. Regan then adds:

> The following actions of the Plaintiff have been prejudicial to the defence of this action:
>
> 1. The late delivery of and failure to produce the Plaintiff's financial documents;
> 2. The failure to answer undertakings;
> 3. The failure to produce documents referred to in the Baker Tilly report;
> 4. The failure to produce supporting documentation for his tax returns;
> 5. The failure to produce confidential documents despite the endorsement of Justice Ferguson;
> 6. The failure to retain supporting documentation and relevant records, as the Plaintiff was required by Polish law to do;
> 7. The failure to secure and preserve his documents, despite retaining his own class counsel at the commencement of the class proceedings in 1999 and issuing his own individual claim in 2001.

62 These matters are, quite frankly, better the subject matter of a refusals and undertakings motion or a complaint to the trial judge, with the attendant sanctions, than an underpinning for an abuse of process argument.

63 The defendants have not made out prejudice related to the motion to amend. I therefore grant leave to Mr. Zuber to amend the statement of claim to increase the amount claimed to $50 million. This outcome would normally entitle Mr. Zuber to costs from the unsuccessful defendants. But I have in mind Carthy J.A.'s comment in *King's Gate Developments Inc. v. Colangelo, supra*, at para. 8: "This is an exceptional rule, to the extent that it mandates amendments at any stage of the action, and is therefore open to being utilized unreasonably. That is certainly what has happened in this instance and, in the formulation of just terms, there should be no encouragement to others." In this instance it would be fairer to leave the costs to be awarded and assessed by the trial judge after the damages claim has been determined and its true merit made evident.

P. LAUWERS J.
