COURT OF APPEAL FOR ONTARIO

CITATION: Del Giudice v. Thompson, 2024 ONCA 70
DATE: 20240131
DOCKET: C70175 & M53810

Miller, Paciocco and Coroza JJ.A.

BETWEEN

Rina Del Giudice and Daniel Wood

Plaintiffs (Appellants)

and

Paige A. Thompson, Capital One Financial Corporation*, Capital One Bank (Canada Branch)*, Capital One (Services) Canada Inc.*, Capital One, N.A.*, Capital One Bank (USA), N.A.*, GitHub, Inc., Amazon Web Services Inc.* and Amazon Web Services (Canada) Inc.*

Defendants (Respondents*)

Proceeding under the *Class Proceedings Act, 1992*

John A. Campion, R. Douglas Elliott, Hugh R. Scher, Jeffery Childs, Eli Bordman and Tim Phelan, for the appellants

Laura F. Cooper, Vera Toppings, Alex D. Cameron and Pavel Sergeyev, for the respondents Capital One Financial Corporation, Capital One Bank (Canada Branch), Capital One (Services) Canada Inc., Capital One, N.A., and Capital One Bank (USA), N.A.

Scott M. Kugler, Brent J. Arnold and Kavi Sivasothy, for the respondents Amazon Web Services Inc. and Amazon Web Services (Canada) Inc.

Heard: June 15, 2023

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated August 4, 2021, with reasons reported at 2021 ONSC 5379, and from the costs order dated October 20, 2021, with reasons reported at 2021 ONSC 6974.

B.W. Miller J.A.:

Overview

[1] The Capital One respondents (collectively, “Capital One”) collected data from people applying for Capital One credit cards. Capital One stored its data on servers of the Amazon Web Services respondents (collectively, “Amazon Web”). Amazon Web was hacked, and consequently the personal and confidential information provided to Capital One was exposed or became vulnerable to exposure to the public. This appeal arises from the motion judge’s dismissal of the appellants’ motion to certify a class action against Capital One and Amazon Web for various torts related to data misappropriation and data misuse. The motion judge concluded that the appellants had advanced a case that was “doomed to fail”. Their pleadings were struck without leave to amend, and their certification motion was dismissed.

Factual summary and procedural history

[2] The appellants plead the following. Capital One carried on business in Canada as a financial institution. Issuing credit cards was a significant aspect of that business. In order to determine whether applicants qualified for a credit card, Capital One required applicants to provide personal financial information via an

application form. The information included names, addresses, dates of birth, social insurance numbers, bank account numbers, and credit histories. Regardless of whether applicants were successful in qualifying, Capital One retained their personal financial information. It aggregated the data, plugged the data into its machine learning algorithms to generate inferences for marketing purposes, and sold the data to third parties. It contracted with the respondent Amazon Web to store the personal financial information of applicants on Amazon's servers.

[3] The pleadings allege that on March 22 or 23, 2019, Paige A. Thompson – a former employee of Amazon Web – hacked the database of personal information collected by Capital One and posted it publicly. As a result of the data breach, the personal financial information and other confidential information of 106 million credit card applicants became publicly accessible. Approximately six million Canadians were affected.

[4] Ms. Del Giudice and Mr. Wood commenced a proposed class action with respect to the data breach, and on April 30, 2020, a consortium of Class Counsel was granted carriage of the proposed class action. On August 27, 2020, at a case conference to schedule the appellants' motion to certify the action as a class proceeding, the respondents advised they intended to challenge the appellants' pleading on substantive and technical grounds. The motion judge directed that the certification motion should therefore follow a bifurcated process.

Phase 1 would address the preliminary question of whether the appellants had satisfied the cause of action criterion under s. 5(1)(a) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. The Phase 1 hearing would include the respondents' challenges to the statement of claim, without requiring the respondents to bring a cross-motion. In effect, the Phase 1 hearing subsumed a pleadings motion under r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. If the appellants were successful on the Phase 1 hearing, the balance of the s. 5(1) certification motion would then be heard.

[5] The appellants' statement of claim was amended four times. Most significant were amendments made after Class Counsel was awarded carriage of the proposed class action, which expanded the scope of the action significantly. Ultimately, the appellants pleaded 19 causes of action, which the motion judge grouped into the following categories: (i) intrusion upon seclusion; (ii) intentional or reckless misappropriation of personality; (iii) breaches of various privacy statutes; (iv) conversion; (v) breaches of confidence, trust, and fiduciary duty; (vi) strict liability; (vii) vicarious liability for the misconduct of Ms. Thompson; (viii) negligence and breach of duty to warn; and (ix) "negligent" breach of contract.

[6] The Phase 1 motion was heard June 7-9, 2021. The motion judge struck the Fresh as Amended Statement of Claim without leave to amend on the basis that: (1) it "egregiously" contravened the rules of pleading; (2) it failed to plead

any viable causes of action against either Capital One or Amazon Web; and (3) the amendments to the statement of claim made after the carriage motion transformed a straightforward data breach claim into a $240 billion action for data misappropriation and misuse. The motion judge dismissed the appellants' motion to certify the action as a class proceeding.

Issues on appeal

[7] On appeal, the appellants advanced three main arguments. The motion judge is said to have erred in:

1. determining that the pleadings did not support any valid cause of action;
2. relying on unsworn documents; and
3. striking out 78 paragraphs of the statement of claim without leave to amend.

Analysis

[8] Section 5(1) of the *Class Proceedings Act* requires a motion judge to certify a class proceeding if the pleadings satisfy its five statutory criteria. The motion judge, in his discretion, directed that the certification motion would proceed in two phases. The first phase was to determine the extent to which the appellants satisfied the first criterion under s. 5(1)(a): that the pleading discloses a cause of action. Only if the appellants were successful during this phase would

the balance of the criteria be addressed in the second phase. No one contests that this process was available to the motion judge.

[9] As noted above, Phase 1 subsumed a r. 21 pleadings motion, meant to weed out claims that are doomed to fail before the expense of discovery has been incurred. On a r. 21 motion, evidence is neither required nor permitted. The facts as pleaded are assumed to be true unless ridiculous or incapable of proof: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.), at p. 6-7. Neither, however, are bald conclusory statements of fact or allegations of legal conclusions unsupported by material facts assumed to be true: *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 74; *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789, 148 O.R. (3d) 115, at para. 11.

[10] The appellants were directed to file their certification motion record and the respondents were, for Phase 1, directed not to deliver responding materials. The respondents delivered materials regardless. The motion judge then struck out the appellants' statement of claim without leave to amend.

[11] As explained below, I am not persuaded that the motion judge erred in determining that the statement of claim was defective and in striking out the claim without leave to amend.

A. INCORPORATING CONTRACTUAL DOCUMENTS BY REFERENCE

[12] The first issue received significant attention both at the hearing of the motion and on appeal: whether it was permissible for Capitol One to have filed a document brief containing four documents that it argued were incorporated by reference into the Fresh as Amended Statement of Claim, and for the motion judge to have considered those documents.

[13] The four documents were the Capital One Privacy Policy, Ms. Del Giudice's Application for Credit, a Credit Card Agreement, and a document entitled "Important Card Information". The documents were pivotal in the motion judge's analysis of the viability of some of the appellants' substantive claims.

[14] The appellants argue that it was improper for Capital One to have filed the documents because the motion judge directed them not to do so. They further argue that the motion judge erred in accepting the documents into evidence given that the documents were not proven through sworn testimony and the appellants contested their authenticity.

[15] I do not agree that the motion judge erred in the use he made of the documents.

[16] As a preliminary matter, I do not agree that the documents filed by Capital One on the motion were either tendered or received as evidence. Nor do I accept

the appellants' related argument that the motion judge used the documents to transform a pleadings motion into a summary judgment motion.

[17] In its factum for the Phase 1 hearing, Capitol One set out the basis for filing the document brief: that the documents had been incorporated by reference into the appellants' pleading. A document incorporated by reference in a pleading is not evidence, and a judge considering a document so incorporated in assessing a pleading is not making findings of fact: *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, 116 O.R. (3d) 429, at para 32; *Darmar*, at para. 44.

[18] It is well established that a statement of claim is deemed to include any document to which it refers, and which forms an integral part of the plaintiffs' claim: *McCreight*, at para. 32. As the appellants had pleaded that they had contracts and a credit application with Capital One (and that Capital One had breached the contracts and exceeded the terms of the application), these documents were incorporated by reference into the Fresh as Amended Statement of Claim. It was therefore permissible to consider those documents in determining whether the appellants had pleaded viable causes of action.

[19] The additional arguments that the appellants advance against permitting the documents to be used on the motion are likewise unpersuasive.

[20] First, the appellants argue that some of the documents pertain only to cardholders, and that the vast majority of class members never became cardholders and have no contractual relationship with Capital One. These documents therefore have no application to the dispute between the respondents and the vast majority of non-cardholder class members who never had contractual relationships with Capital One.

[21] This argument, like the preceding one, is foreclosed by settled law. Whether a pleading discloses a reasonable cause of action is to be determined by reference to the claims of the named plaintiffs and not to potential members of a proposed class: *Darmar*, at para. 8. The appellants pleaded that they are both Capital One cardholders. Accordingly, although the proposed class includes those whose applications for Capital One credit cards were unsuccessful, the motion judge properly assessed the pleadings by reference to the appellants' claims only.

[22] Second, the appellants argue the documents were not incorporated by reference in the claim, because the documents are not "central enough to the claim to form an essential element or an integral part of the claim itself": *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185, at para. 85; *McCreight*, at para. 32. The appellants argue that the primary bases for the claim are the various torts relating to data breach and misuse of data. The breach of contract claim is not only pleaded in the alternative, but with express scepticism:

"alternatively, (iv) breach of contract and negligent breach of contract (if a contract existed at all), (collectively, 'Negligent Breach of Contract')."

[23] This argument is unavailing. Whether the documents were integral to the claim is to be assessed objectively and not according to the plaintiffs' intentions. "Integral to the claim" does not mean "integral to the plaintiffs' dominant theory of liability". The claims to be assessed include theories of liability pleaded in the alternative. The alternative claim that the respondents breached a contract with the appellants puts in play the contractual documents that form the basis of those contracts. The submission made by counsel for the appellants at the hearing of the appeal that the contract referenced in the pleading could be an oral contract is perplexing in the context of a claim arising out of a relationship between a financial institution and its account holders. It would be extraordinary in the 21st century for a relationship between a regulated financial institution and thousands of account holders to be constituted by oral contracts. If it were to be alleged – even in the alternative – that there were oral communications giving rise to unwritten contracts, the appellants would had to have pleaded the fact that such oral communications were made. They did not. This submission fails. (As explained further below, this conclusion has significant consequences for several of the privacy-based tort claims that are predicated on no consent having been provided beyond a single purpose use.)

[24] Third, the appellants argue they were prejudiced by the use of the documents, because they do not admit the authenticity of the documents. At the hearing of the motion, they objected to the documents' production and advised that they were proceeding "under protest".

[25] One would expect that where a party pleads the existence of a contract, and then disputes the authenticity of the contractual documents that a defendant argues are incorporated by reference in the statement of claim, the answer would be to produce the actual contractual documents. In this case, the appellants say they did not do this for two reasons. First, because counsel did not review the motion brief until the eve of the motion and were therefore unaware that the respondents had filed a document brief. Second, because they do not actually believe there were contracts.

[26] With respect to being caught unawares, Capital One filed the document brief in a timely fashion. If the appellants were to object, they needed to do so in a timely fashion. At the very least, they ought to have sought an adjournment in order to locate and produce what they assert to be the authentic contractual documents, or to file evidence establishing the false nature of the documents. The appellants did not do either but instead chose to proceed "under protest". I am left with the conclusion that the protest was groundless.

[27] With respect to the argument that there was no contract, an available remedy – again – would have been to adjourn to seek leave to amend the pleadings to remove the contractual claim and all aspects of the claim that relied on a commercial relationship that could only be established by contract. The appellants did not do so and accordingly were left with no basis to complain of the impropriety of Capital One filing the document brief on the basis that the claim incorporated the documents by reference.

[28] The appellants further argued that the motion judge erred in considering the documents in his determination of whether the causes of action pleaded were viable because the contracts between the appellants and Capital One were invalid and unenforceable. Again, on a pleadings motion what is in the pleadings and what is not in the pleadings matters. This submission founders on what was not pleaded: invalidity or unenforceability of the contracts. To the contrary, the appellants pleaded in the alternative that Capital One had failed to live up to contracts that were enforceable against it.

[29] In summary, the documents were properly filed for the purposes of the s. 5(1)(a) hearing and the motion judge made no error in referencing them as though they were included in the pleadings.

B. THE HOLDING THAT THE PLEADINGS DISCLOSED NO VIABLE CAUSE OF ACTION

[30] The motion judge held that none of the causes of action that the appellants pleaded were viable. On appeal, the appellants separate the causes of action pleaded into two groups: data misuse claims and data breach claims. The data misuse claims are comprised of intrusion upon seclusion; misappropriation of personality; conversion; and breach of confidence, trust, and fiduciary duty. The data breach claims are negligence and failure of a duty to warn; strict liability; negligent breach of contract; and breach of statutory causes of action. I address each in turn.

(1) Data Misuse

i. Intrusion upon seclusion

[31] The appellants advance a claim of intrusion upon seclusion against Ms. Thompson, Capital One, and Amazon Web. The elements of this cause of action were set out in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241, at para. 71, and recently reiterated in the trilogy of *Owsianik v. Equifax Canada Co.*, 2022 ONCA 813, 164 O.R. (3d) 497, at para. 54; *Obodo v. TransUnion of Canada, Inc.*, 2022 ONCA 814, 164 O.R. (3d) 520, at paras. 22-23; and *Winder v. Marriot International, Inc.*, 2022 ONCA 815, 164 O.R. (3d) 528, at paras. 20-21:

> (i) The defendant without lawful justification intrudes physically or otherwise into the seclusion of the plaintiff in his or other private affairs or concerns;
>
> (ii) The defendant's intrusion is intentional or reckless; and
>
> (iii) The invasion would be highly offensive, causing distress, humiliation or anguish to a reasonable person.

[32] The motion judge found it plain and obvious that there is no viable claim for intrusion upon seclusion against either Capital One or Amazon Web. He reasoned that:

1. the failure to prevent the intrusion by Thompson could not itself be an intrusion;
2. even if the failures of Capital One or Amazon Web to prevent an intrusion could be considered an intrusion, then the intrusion was authorized by the terms of the application form, credit agreement, and privacy policy, which were incorporated by reference into the pleading;
3. the alleged misconduct of Capital One and Amazon Web was neither intentional nor reckless; and
4. Capital One and Amazon Web's alleged mistakes in safeguarding the appellants' data did not give rise to the requisite degree of offense.

[33] After the motion was decided, this court released its judgments in *Owsianik*, *Obodo*, and *Winder*, which established that a hack of a database by a

third party does not constitute intrusion upon seclusion by the database operator. That disposes of the question that was before the motion judge.

[34] However, the appellants now seek to distinguish the trilogy on the basis that their claim is not based in negligent custodianship, but concerns the improper retention and misuse of data, which includes its improper aggregation and ultimate migration to a third-party platform.

[35] Regardless, the claim cannot succeed. Some of the flaws identified by the motion judge are easily transposed onto the new argument. One in particular is dispositive. Whether the alleged misdeeds of Capital One and Amazon are characterized as mistakes in safeguarding information or improper retention and misuse of that information, neither characterization satisfies a key element of intrusion on seclusion: that the conduct be of a highly offensive nature causing distress, humiliation, or anguish to a reasonable person. In the specific circumstances of this case, the aggregation and sale of the financial information obtained by Capital One – even on the generous assumption that the appellants could succeed on the argument that they did not consent to its use – is not highly offensive and could not be considered humiliating by a reasonable person. Unlike genuine intrusion claims, there is nothing into which the Capital One can be said to have intruded. It solicited information and that information was given. The data was aggregated and inputted into algorithms to be used for marketing purposes. Nowhere, in any of this, is anything of an individual's biographical core exposed

to public or private view. No individual is placed in a spotlight. Whatever may be objectionable with what Capital One did, it is not aptly described as an intrusion into seclusion.

ii. Misappropriation of personality

[36] The motion judge held that it was not appropriate to extend the tort of misappropriation of personality to the circumstances alleged. As developed in Ontario, misappropriation of personality protects against the usurpation of a plaintiff's right to control or market his or her personality for commercial purposes: *Wiseau Studios, LLC v. Harper*, 2020 ONSC 2504, 174 C.P.R. (4th) 262, at paras. 212-13.

[37] Again, the interests protected by the tort do not arise from the facts as pleaded. No party is alleged to have lost any commercial interests in the exploitation of their own personality as a result of the alleged data misuse. What the appellants have proposed is not a principled extension to an existing tort, but rather the creation of an entirely new cause of action with entirely different elements. The motion judge was justified in not allowing the claim to proceed.

iii. Conversion

[38] The motion judged held that it was "plain and obvious the claim for conversion is untenable and bound to fail." He made no error in so holding.

A claim for conversion "involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession": *Tar Heel Investments Inc. v. H.L. Staebler Company Limited*, 2022 ONCA 842, at para. 18; *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, at p. 746.

[39] The appellants argue that the conception of conversion used by the motion judge is too narrow, and the motion judge erred by not allowing for the tort of conversion to be developed to encompass intangible property as well as tangible property and thus fill a gap in the law.

[40] I do not agree that the motion judge erred. Even assuming that the appellants had an intangible proprietary interest in their data to which conversion could apply, the misconduct they allege is adequately addressed by existing causes of action. The appellants allege that the respondents misused information that the appellants imparted on the respondents in confidence. Such conduct, if anywhere, fits within the framework for breach of confidence: *Tar Heel*, at para. 26. This case does not implicate a gap in the common law that warrants a change to the tort of conversion.

iv. Breach of confidence, trust, and fiduciary duty

[41] The appellants argues that the motion judge erred in concluding that: (1) Capital One did not owe the appellants any trust or fiduciary duty, (2) most of the appellants' hacked data was not confidential, and (3) there was no unauthorized use of that information.

[42] The first two arguments can be summarily rejected. As the motion judge found, the facts pleaded do not establish a fiduciary relationship between Capital One and the putative class members. A financial institution acting as a lender does not ordinarily owe its borrowers a fiduciary duty: *Baldwin v. Daubney* (2006), 83 O.R. (3d) 308, at para. 15 (C.A.). The rationale for this principle is apposite: *ad hoc* fiduciary duties only arise where "the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary": *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, 331 D.L.R. (4th) 257, at para. 30. A lending financial institution ordinarily gives no such undertaking. The relationship of a lender-borrower is "a typical commercial relationship in which the interests of the parties are not the same and each party seeks to ensure its own interest": *Baldwin*, at para. 15. The appellants do not allege facts that distinguish this case from the ordinary lender-borrower scenario. The appellants' argument that Capital One is a regulated bank is of no moment. The *Bank Act*, S.C. 1991, c. 46 imposes no fiduciary duty on Capital One and the

mere practice of lending in Canada does not, as the pleadings suggest, constitute an undertaking of fiduciary responsibility.

[43] Furthermore, on appeal, the appellants do not strenuously renew the argument that there was a trust, which argument must also be dismissed.

[44] I turn to the breach of confidence claim. The motion judge's rejection of this claim rested on the conclusion that the appellants did not properly plead the material facts needed to establish that information provided by the appellants was used by Capital One or Amazon Web for an unauthorized purpose. This is an essential element of the tort and must be adequately pleaded.

[45] Finally, the appellants argue that the motion judge erred by improperly using the contractual documents filed in the motion brief to make factual findings and essentially convert the Phase 1 hearing to a summary judgment motion.

[46] I do not agree that this is what the motion judge did. What the pleadings allege is that the appellants provided confidential data to Capital One for a "Single Purpose Use" (i.e., assessing creditworthiness) and that Capital One exceeded that use. The appellants argue that the motion judge was required to assume, for the purposes of the motion, that the allegation is true.

[47] The problem for the appellants is that, on a pleadings motion, a motion judge is not required to assume the truth of allegations that are "patently ridiculous or incapable of proof": *Nash*, at p. 7. The appellants' "Single Purpose

Use" allegations are belied by the documents that their pleadings incorporate by reference, documents that I have concluded were properly before the motion judge. Those documents authorized multiple uses. The conflict between the former allegations and the documents incorporated by reference could be addressed without converting the hearing into a summary judgment motion: the motion judge neither found nor needed to find that either set of allegations were true in the face of their apparent conflict. Rather, what the motion judge found was that by incorporating conflicting allegations into the same pleading, the appellants created a narrative that was "patently ridiculous", with allegations that were mutually "incapable of proof". The motion judge was not required to favour one set of allegation at the expense of the other. The pleadings were equivocal on whether the alleged misuse was authorized and were therefore defective.

(2) Data Breach

i. Negligence and duty to warn

[48] The appellants advance a claim against Capital One and Amazon Web for negligence and breach of a duty to warn. A claim of negligence requires that a claimant establish not only that the defendants owed a duty of care and that they breached the standard of care, but that the breach caused compensable damage. With respect to the damage component, the appellants pleaded: (a) loss from the risk of future identity theft or fraud; and (b) actual losses from: (i)

past identity theft and fraud, (ii) lost time and inconvenience; and (iii) distress, humiliation, and anguish.

[49] The motion judge struck the claim on the principal basis that the appellants had not succeeded in pleading a compensable loss. First, a claim in negligence for a future loss from the risk of future identity theft and fraud is not sustainable. The vast majority of class members would only have suffered a risk of future loss, and per *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 33: "[t]here is no right to be free from the prospect of damage; there is only a right not to suffer damage that results from exposure to unreasonable risk." The motion judge made no error in his application of *Babstock*.

[50] With respect to those aspects of the claim grounded in a claim of actual damage, the motion judge did not accept the pleading that 6 million class members had suffered pecuniary loss from identity theft and fraud. He held as much because no material facts were pleaded to support the claim that any class member had been defrauded and suffered pecuniary loss as a result. The appellants argue that this was an error, as the motion judge was required to accept the pleading as true. I do not agree that the motion judge erred. On a pleadings motion, a motion judge is not required to accept as true bald pleadings that are patently ridiculous in their scope and not supported by material facts: *Darmar*, at para. 11.

[51] With respect to the claim of psychological damage, the motion judge noted that “negligence law does not recognize as compensable harm upset, disgust, anxiety, agitation or mere psychological upset that does not cause a serious and prolonged injury and that does not rise above the ordinary annoyances, anxieties and fears that people living in a society routinely experience”, drawing support from *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 37 and *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 9.

[52] The appellants do not take issue with this statement of law, but argue that the motion judge erred in refusing to accept at face value the pleading that the class members had suffered mental anguish to such a degree as to be compensable. Further, they point to *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, at paras. 66, 68, 341, *Obodo v. Trans Union of Canada, Inc.*, 2021 ONSC 7297, at paras. 75, 117, 119, 124-160, and *Campbell v. Capital One Financial Corporation*, 2022 BCSC 928, at para. 54 as examples of negligence claims that were certified with claims of mental anguish being the loss caused by the breach of the duty of care.

[53] The cases cited by the appellants are of limited use in this case. None of them constitute an example of a standalone negligence claim anchored by a psychological harm. Although *Equifax* is factually similar to the appellants’ action in that a claim in negligence causing psychological harm was certified, the

certification was conceded at the certification motion and there was no adjudication on this point by the Divisional Court. Neither was the issue raised on appeal to this court. Of the several cases that have certified negligence claims based in part on emotional distress, all of them have done so on the basis that where a pecuniary loss has been alleged, damages for emotional distress can be claimed as well: *Evans v. Bank of Nova Scotia*, 2014 ONSC 2135, 55 C.P.C. (7th) 141, at para. 52; *Campbell*, at para. 54; *Obodo* (Ont. S.C.), at para. 143. None of these cases are authority for the proposition that a claim of emotional distress resulting from a breach of a duty of care in a data breach case is, on its own, a sufficient loss to ground a claim in negligence. The appellants' claim is more ambitious, and the motion judge found the material facts needed to support it were not pleaded. He did not err in doing so.

[54] With respect to pure economic loss, the appellants argue that the motion judge erred in his conclusion, in applying *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, that the appellants' claim did not come within any of the established categories of proximity where recovery in a negligence claim for pure economic loss is permitted. They argue that the motion judge overlooked their claim that their relationships with both Capital One and Amazon Web brought their claims within the category of "negligent performance of a service", which is sufficient to ground a claim in pure economic loss.

[55] I agree with the respondents' submission that the appellants' claim does not satisfy the factors the Supreme Court identified in *1688782 Ontario Inc. v. Maple Leaf Food Inc.*, 2020 SCC 35, 155 O.R. (3d) 544, at paras. 33-35, as determining sufficient proximity under this category: (1) whether the defendant undertook to provide a service to the plaintiff; and (2) whether the plaintiff reasonably relied on the defendant's undertaking, altered its position, and forewent more beneficial courses of action as a result.

[56] With respect to Capital One, the appellants' pleading does not identify any service Capital One is thought to have performed for the appellants that concerns the appellants' data. At most, the pleading alleges that Capital One offered some of the plaintiffs credit services. The pleading does not assert that Capital One performed its credit services negligently. Accordingly, neither does the pleading identify any detrimental reliance as a result of that service. There is simply no basis in the pleadings to find proximity under this category.

[57] Similarly, with respect to Amazon Web, the pleadings do not allege any service provided by Amazon Web to the appellants, who did not know of the existence of Amazon Web. The motion judge made no error in refusing the analogy to products liability cases flowing from *Donoghue v. Stevenson*, [1932] A.C. 562. Products liability cases have an additional degree of proximity flowing from the existence of a physical product that is manufactured with the intention that it be consumed or used by an ultimate user who is then injured by the

product. That line of authority has no application to proximity analysis in a pure economic loss allegation.

[58] This is sufficient to dispose of the negligence and duty to warn claims, and accordingly it is not necessary to address the further arguments advanced by the appellants under these grounds of liability.

ii. Negligent breach of contract

[59] The appellants pleaded breach of contract as part of the cluster of data misuse claims, and negligent breach of contract as part of the data breach claims. The breach of contract claim was struck by the motion judge and the appellants did not strenuously argue for that claim to be restored. In fact, they reiterated their position that there was no enforceable contract. Similarly, the motion judge struck the "negligent breach of contract" claim on the basis that it was a "doctrinal fantasy", and the appellants have not advanced any argument as to why he was wrong to do so.

iii. Statutory causes of action

[60] The appellants also argue that the motion judge erred in dismissing their claims brought under various privacy and consumer protection statutes. Once again, the motion judge made no error in dismissing these claims as doomed to fail. The appellants have done little more than set out an extensive list of statutes and advance the bald claim that Capital One and Amazon Web have infringed

them. No explanation is provided as to which sections have been infringed or how.

[61] Some of the privacy statutes are on their face inapplicable as they either do not establish civil causes of action or concern freedom of access to government information, an issue that has no bearing on these proceedings: see e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

[62] Furthermore, of the remaining privacy statutes that do provide a cause of action, most require that the defendant "wilfully … violate the privacy of another" to ground liability: see e.g., *Privacy Act*, R.S.B.C. 1996, c. 373, s. 1(1); *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 3(1); *The Privacy Act*, R.S.S. 1978, c. P-24, s. 2 (emphasis added). While the appellants plead that the respondents were negligent or reckless with respect to their alleged failure to safeguard data, nowhere do they plead that the respondents wilfully violated their privacy.

C. STRIKING OUT THE CLAIMS WITHOUT LEAVE TO AMEND

[63] A motion judge's decision to strike out a pleading under r. 25.11 without leave to amend is discretionary and should not be interfered with on appeal unless the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable conclusion: *Resolute Forest Products Inc. v. Greenpeace*, 2016 ONSC 5398, 133 O.R. (3d) 167 (Div.

Ct.), at para. 13; *Huachangda Canada Holdings Inc. v. Solcz Group Inc*., 2019 ONCA 649, 147 O.R. (3d) 644, at para. 30.

[64] The motion judge found that the claim "egregiously contravene[d] the rules of pleading". The reasons for decision are careful and comprehensive and explain the bases on which each of the 78 problematic paragraphs were found to have violated the rules of pleading and were struck. The appellants have not established that the motion judge erred in this exercise of discretion.

[65] Having concluded that the action could not succeed as pleaded, the motion judge struck out the claim in its entirety, without leave to amend. The appellants argue that it was an error not to grant leave to amend, given the motion judge's acceptance that "if difficulties in commonalities could be overcome, the Plaintiffs might have had a straightforward, reasonably strong, and possibly certifiable data breach case for breach of contract against Capital One for the 2019 data breach."

[66] I would defer to the motion judge's decision not to grant leave to amend. The appellants were provided with repeated opportunities to amend the statement of claim, by which they only compounded their problems. The motion judge did not believe that there were any facts that could be pleaded that would support the causes of action that the appellants wished to advance. It is of no use to the appellants that the motion judge entertained the thought that the

appellants could have pleaded a straightforward claim for breach of contract against Capital One. Not only were these straightforward claims not advanced in the statement of claim, they would have also hampered the claims the appellants chose to advance. At this stage of the proceeding, the motion judge saw no purpose to be served in allowing the appellants another opportunity to recast its theory of liability. The appellants were given ample opportunity to advance a viable claim and are now out of runway.

Costs appeal

[67] The respondents were awarded costs of the Phase 1 hearing in the amount of $1.225 million. The appellants argue that these costs were grossly excessive and beyond their reasonable expectations of what they could have been ordered to pay. They argue that a reasonable figure would have been between $100,000 and $300,000.

[68] In order to consider the costs appeal, it is necessary that the court first grant an extension of time to appeal costs, and then grant leave to appeal costs. The motion for leave to appeal costs was filed a month after the deadline. The respondents take the position that this failure to appeal in a timely fashion should be viewed as part of a pattern of conduct by counsel for the appellants of constantly raising new issues and reformulating positions at the last minute,

including at oral hearings. The respondents ask that either the extension of time should not be granted, or that if it is, leave should not be granted.

[69] I would not grant the extension of time to seek leave to appeal costs. The merits of the cost appeal are weak, and the interests of justice are against hearing the appeal. This motion was argued over three days, and although the respondents were not required to prepare a motion record, responding to a complex and high stakes motion required significant resources. Furthermore, the motion judge was sharply critical of the appellants' conduct of the litigation, in particular false and unwarranted allegations of professional misconduct against counsel for the respondents, particularly with respect to the use of the document brief. When the delay in seeking leave to appeal costs is considered in the context of an overall history of lax conformity with the *Rules of Civil Procedure*, and weak grounds of appeal, I do not believe it is in the interests of justice to grant the extension of time.

Disposition

[70] I would dismiss the main appeal and dismiss the motion for an extension of time to seek leave to file an appeal from the costs order. The respondents are each entitled to costs of the appeal in the amount of $50,000, all inclusive, as agreed by the parties.

Released: January 31, 2024 “B.W.M.”

“B.W. Miller J.A.”
“I agree. David M. Paciocco J.A.”
“I agree. Coroza J.A.”