The Problem with Class Actions for Historical Sexual Abuse Cases

Loretta Merritt

Class Proceedings

In Ontario, class actions are governed by the *Class Proceedings Act*[1], (the "CPA"). Class actions allow an individual to advance a legal claim on behalf of two or more persons where common issues exist. The goals of class actions are judicial efficiency, improved access to justice for those whose claims might not otherwise be pursued, and behavior modification (of those whose actions affect large numbers of people). The CPA came into force in Ontario on January 1, 1993. The CPA outlines the legal requirement for a claim to be certified by the court as a class action: 1) a valid cause of action, 2) an identifiable class of two or more people, 3) common issues, 4) a representative plaintiff and 5) the Court must be satisfied that a class proceeding is a preferable procedure for resolving the common issues. The CPA also provides the procedural framework for the prosecution of these claims including rules regarding notice, settlement, lawyers' fees, etc.

Class action legislation developed as a result of product liability cases. The CPA provides an effective procedure to obtain a remedy for product liability claims that affect many people, particularly where the individual claims are small as compared to the significant cost of legal fees in a lawsuit. For example, if there is a defect in a small car part, a class action may be appropriate and preferable to individual lawsuits. Recently, there have been several cases in which class actions have been certified for claims arising out of historical sexual abuse in institutions and, in particular, claims against private schools, religious organizations, and government run facilities. While there may be some advantages to pursuing historical sexual abuse claims by way of a class action, there are also distinct disadvantages.

[1] *Class Proceedings Act*, 1992, S.O. 1992, c.6

Class Proceedings in Historical Sexual Assault

In a class action, the class members (i.e., the people who have a claim to damages) have a very minor role to play, are not involved in instructing the lawyers or making decisions about how the case proceeds and have no input into settlements. Class members are usually not involved until the last stage of the case where their individual damages are determined. Conversely, if those persons hired a lawyer and brought their own lawsuit the client is the one making decisions and instructing the lawyer. For sexual abuse survivors, legal cases are usually about more than just money. They are about coming forward, being heard and acknowledged and holding people to account, as well as gaining a sense of justice and closure. In a class action these goals can get lost. Also, in sexual abuse class actions the quantum of damages is usually much lower than the recovery in an individual action. So, to the extent that a sexual abuse survivor wants to maximize their financial recovery, an individual action is usually a better option.

The certification of historical institutional abuse cases as class actions began with the *Rumley*[2] case in British Columbia. There, the court certified a class action for abuse survivors from the Jericho Hill School for the Deaf. The government ran the school and had already set up a compensation scheme for those abused at the school. The government's compensation scheme had a maximum payment of $60,000 for each abuse victim. In considering whether or not to certify the case as a class action, the court specifically said that $60,000.00 was too low a cap on damages in 2001. The case was ultimately settled for compensation of up to a maximum of $125,000.00 per class member. Unfortunately, class members in institutional abuse cases in Ontario have not fared nearly as well. For example, in 2010 the *Johnston*[3] case

[2] *Rumley v. BC*, 2001 SCC 69
[3] *Johnston v. The Sheila Morrison Schools*, 2010 ONSC 3334 and 2013 ONSC 1528

settlement caped the abuse victims' compensation **up to** a maximum of $50,000.00 per class member. However, the lawyers were awarded legal fees in the amount of $1,118,499.64.

In the *Huronia*[4] and related cases[5], the maximum compensation to the abuse victims was even lower. In the *Huronia* cases, the settlement agreement arranged by the class's lawyers provided for maximum compensation of **up to** $35,000.00 per class member. However, the average actual payment to survivors was only $3,711.22. The lawyers got legal fees of over $16 million dollars.

In the *Seed*[6] case which involved abuse at the Ross MacDonald School for the Blind (Ontario School for the Blind), the settlement package provided for compensation **up to** $37,500.00 per class member. However, only 181 class members actually received compensation for an average payment of $16,285.00. The lawyers got legal fees of $2,520,000.00 plus disbursements and HST.

One interesting thing about these institutional abuse cases in Ontario is that aggregate damages have never been paid as part of a settlement package in these cases. Although aggregate damages are identified as a common issue to justify certification of the case as a class action, in the Ontario class action settlements, the settlements have provided for individual damages only for those who were physically or sexually assaulted, no aggregate damages. Therefore, one of the principal justifications for certifying the dispute as a class action is undermined in those settlements.

In one recent class action for institutional abuse, the judge has expressed his concern about the settlements and legal fees. In the *Welsh*[7] case, Justice Perell expressed great disappointment and disapproval of proposed settlement which provided that ninety percent (90%) of the class members would get no

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[4] *Dolmage v. Ontario and Slark v. Ontario* 2010 ONSC 1762 and 2013 ONSC 6686) (*Huronia Regional Centre*)
[5] *Clark v. Ontario and McKillop v. Ontario*, 2014 ONSC 1282 (*Rideau Regional Centre*), *Bechard v. Ontario* 2014 ONSC 1282 (*Southwestern Regional Centre*)
[6] *Seed v. Ontario*, [2017] O.J. No 2958 (Sup. Ct.)
[7] *Welsh v. Her Majesty the Queen*, 2016 ONSC 5319 and 2018 ONSC 3217

compensation, no apology, or anything at all (even indirectly). The lawyers basically conceded that aggregate damages to those who were not abused were not available in law and only those who were actually physically or sexually assaulted could receive compensation. Perell. J approved the settlement reluctantly because he felt the alternative of forcing the case to trial would be even worse for the survivors. He also disapproved of the legal fees. In fact, he ordered that lawyers donate $1.5 million dollars of their $3.75 million legal fee to a charity or charities for the deaf. The case was appealed and the court's order that the lawyers contribute to a charity was set aside.

Individual Actions for Sexual Assault

On the other hand, if survivors of historical institutional abuse sue in individual actions with their own lawyer, the damages are much greater and can be in the six-figure range. In several cases compensation of between $100,000.00 and $200,000.00 or more was awarded at trial[8]. In individual cases, personal injury lawyers often work on a contingency basis taking a percentage of the damages recovered. This means abuse survivors do not have to pay legal fees up front or as they go along.

There are other even bigger problems with class action for abuse institutional cases; namely notice and opting out. Class actions are commenced by a representative plaintiff bringing a motion to the court to have the class action certified. Once this is done, the court sets a procedure to ensure that all people who are members of the class and who are entitled to compensation get notice and are given the right to "opt out" in order to maintain the right to pursue an individual lawsuit at some future time. Class member "opt out" by coming forward and saying they do not want to be part of the class action. A time limit is set and if class members do not opt out by the specified date, they are deemed to be included in the class. Next, there is a

[8] D.W. v. Canada (Attorney General) [1999], S.J. No.: 742 and E.B. v Order of the Oblates of Mary Immaculate in the Province of British Columbia, [2001] B.C. J. No.: 2700 and T.W.N.A. v. Clarke, [2001] B.C.J. No.: 1621 and W.R.B. v. Plint, [2001] B.C.J. No.:1446.

trial of the common issues (often "liability" or legal responsibility is a common issue) and after the trial of the common issues, there are individual damages trials. It is at this point class members need to come forward and pursue their individual claims for damages. If they fail to come forward, they are forever prohibited from pursuing compensation. The only way they can pursue an individual lawsuit is if they come forward before the "opt-out" deadline and follow the procedures set out by the Court for opting out within the opt-out deadline at the beginning of the class action. If they do neither, they get nothing.

Sexual abuse survivors usually suffer serious psychological problems as a result of their abuse in childhood. There are also well-established links between childhood sexual abuse and substance abuse problems, problems with education and employment and criminal activity in later life. Many abuse survivors become homeless, move around the country or are "off the grid". In addition to the long passage of time in historical abuse cases, these other problems can make it difficult, if not impossible, to reach significant numbers of victims when the judicial notice of the class action is given. If a class member does not receive notice he or she has no opportunity to "opt-out" and his/her right to seek compensation, or to be heard and acknowledged will be forever lost.

Even if class members do get notice of the class proceeding, the "opt out" procedure in class actions is especially troublesome in historical sexual assault cases. It often takes abuse survivors 20, 30, or 40 years or even longer to come forward. There are many reasons why sexual abuse survivors do not come forward including misplaced shame, guilt and fear of coming forward, or simply a desire to avoid thinking about and confronting the horrendous pain they suffered. The importance of allowing abuse survivors to come forward in their own time was recently acknowledged by the Ontario government when it enacted Bill 132 amending the *Limitations Act*, 2002 to eliminate limitation periods for cases based on sexual assault. This amendment is a clear message to abuse survivors that their claims are important and that justice should not be rendered unavailable to them simply because it has taken them time to be ready to address the issue

legally. The elimination of limitation periods provides more access to justice for abuse survivors. Conversely, class actions for historical sexual abuse claims require survivors to come forward and opt out or risk forever having their claims extinguished. In my view, any law or rule that requires an abuse survivor to come forward at a specific time is potentially harmful and contrary to the public interest expressed by the Ontario government in amending the *Limitations Act*.

In order to exercise the right to opt-out and preserve their right to bring an individual claim for damages, the abuse survivor must do all the following:

1. They must receive the notice;

2. They must understand the notice;

3. They must be ready to admit to themselves that they have been abused and be willing to admit to strangers that they have been abused;

4. They should get legal advice on whether an individual action or a class action settlement is a better option for them;

5. They must make the decision about which is a better option before they know what the settlement will actually be; and

6. They must send a letter or complete a form to be sent to the class action lawyer to exercise their right to opt-out.

For the average person, being told they are part of a lawsuit they knew nothing about and having to follow this process is bewildering. Imagine the distress for an abuse survivor who is not ready to admit to themselves that they are a survivor of childhood sexual abuse, yet alone tell anyone else about it.

One of the goals of class actions is judicial economy. Now that the law of vicarious liability is clear, we know institutions are liable for assaults committed by employees in residential care facilities. This is not a significant common issue. Where there are significant common issues such as whether the Government or the school is the proper defendant, a class action may be appropriate to determine that discrete issue. However, where it is clear who ran the institution, then really the issue comes down to whether a particular individual was abused, the amount of their losses and damages. In such cases, there is no significant judicial economy achieved by certifying the case as a class action.

It is usually in an institutional defendant's interest to have a class action. In Ontario, if a historical institutional abuse class action is certified, the defendant will enjoy the opportunity to pay pennies on the dollar for those who come forward and collect damages under the class proceeding. To extent that the money they have put up as settlement fund is not actually paid out, it is usually returned back to the defendant. As well, for all the other abuse survivors who have not come forward to collect their money under the class action and have not already opted-out, the defendant enjoys the benefit of having all those claims extinguished and minimizes their liability to pay what would otherwise be valid claims.

On October 1st , 2020 the amendments to the CPA contained in Bill 161 came into force and effect and courts may now have increased power to address these problems. The provisions relating to the certification test and requiring a report after distribution of settlement funds may help to address some of the concerns. The existing CPA requires that a class proceeding be the preferable procedure for the resolution of the common issues. The amended CPA will require that: (i) the proposed class proceeding be a superior means of determining the rights or entitlement of the class members, as compared with, inter alia, any quasi-judicial or administrative proceedings; and, (ii) that questions of fact or law common to the class members predominate over the individual issues. Most of the historical abuse cases certified to date involve abuse in residential institutions. Where the common issue is vicarious liability it may not predominate over

individual issues since the law establishing vicarious liability in residential care settings was settled in **Bazley v. Curry**, [1999] 2 S.C.R. 534.

The Amended CPA will require the administrator distributing settlement funds to file a report with the court no more than 60 days after the settlement funds are fully distributed setting out the particulars of the distribution. The amended CPA sets out the specific information the report must contain. This public accountability for the actual payments to sexual abuse survivors and the information derived therefrom may cause courts to think twice before certifying cases involving sexual abuse.

A better way to reconcile the difficulty presented by the “opt out” provision with the benefit of a class proceedings would be to have an “opt-in” provision for historical institutional abuse cases. In this way, potential class members who are notified of the class proceeding would have the choice of either coming forward, opting in and becoming part of the class action or staying silent and not having their claims extinguished. If the abuse survivor was not ready to come forward, he or she could stay silent and still preserve their right to pursue an individual action at a future time should they become ready to do so. However, an “opt-in” procedure is unlikely to be popular with defendants who seek finality and closure and may result in fewer “consent” certification motions but maybe this is a good thing.

Arguably, a further legislative amendment is necessary to provide for an "opt-in" provision. In the interim, at a minimum class counsel should be required to advise potential class members to get independent legal advice (ILA) before deciding whether or not to "opt-out". The notice should contain a statement that most personal injury lawyers work on contingency and give free consultations. Adding such a provision to the notice will not help abuse survivors who do not receive the notice or those who get the notice but are still as yet unable to speak about the abuse, but it may help people who are ready to come forward to better understand the advantages and disadvantages of class actions vs. individual lawsuits. The notice should also

provide information about the new program whereby sexual abuse survivors who are 16 years of age, were assaulted in Ontario and live in Toronto, Ottawa or Thunder Bay are eligible for a certificate for 4 hours of free legal advice.

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