Plaintiff must establish existence of class, Ontario Divisional Court reiterates

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In *McGee v Farazli*, the Ontario Divisional Court ordered a motion judge to reconsider a denial of certification. In doing so, the Court reiterated the principle that, while a certification motion should not be a trial of the merits, the plaintiff must present evidence sufficient to establish some basis in fact for the existence of each proposed class or sub-class.

Background

In 2011, investigations by the College of Physicians and Surgeons of Ontario (the CPSO) and Ottawa Public Health (OPH) found that the defendant Dr. Farazli's medical clinic did not follow appropriate infection control and prevention protocols on medical equipment. These breaches created a low, but present, risk of transmission of Hepatitis B, Hepatitis C and HIV.

The plaintiff alleged that the members of the class suffered inconvenience, embarrassment, further medical testing, lost time, travel costs, worry, mental pain and anguish, anxiety, emotional distress and psychological distress or injury. As well, they suffered the knowledge that they potentially were exposed to a communicable disease, and faced the possibility of injury or loss and/or injury resulting from being put at risk of contracting a communicable disease such as HIV, Hepatitis B, Hepatitis C, or other illness, conditions, or injury.

The certification motion

The key issue on the certification motion was whether the plaintiff met the requirement under s. 5(1)(b) of the *Class Proceedings Act, 1992* to demonstrate some basis in fact for the existence of an identifiable class of persons with the same common issues.

The representative plaintiff proposed both a Primary Class consisting of all persons who had a gastrointestinal test performed by Dr. Farazli between April 1, 2002 and June 1, 2011, and sub-class of those patients who acquired an infection from a gastrointestinal test at the clinic.

On the certification motion, only the representative plaintiff and one other member of the proposed class presented direct evidence of having suffered harm. The representative plaintiff, Ms. McGee, had an endoscopy in 2003 and received a notice letter from OPH in 2011. She tested negative for the listed diseases, but alleged that she experienced nervous shock, mental distress and emotional trauma from knowing she may have been exposed to unsanitary conditions and potential diseases.

The other potential class member, Mr. Hopkins, underwent an endoscopy at Dr. Farazli's clinic around 2004. Afterwards, he experienced kidney dysfunction and eventually kidney failure. Prior to receiving a notice letter, Mr. Hopkins's doctors told him that his kidney failure was likely caused by an unknown infection. Following receipt of the notice letter, Mr. Hopkins tested positive for Hepatitis B antibodies.

Mr. Hopkins had a "strong suspicion" that the endoscopy from Dr. Farazli exposed him to Hepatitis B and led to his kidney failure. However, Dr. Farazli produced expert evidence concluding that there was "no conceivable way" Mr. Hopkins' Hepatitis B infection resulted from his endoscopy. Meanwhile, the plaintiff failed to provide any expert evidence to the contrary.

As a result, Charbonneau J. reasoned there was no evidence to suggest that Mr. Hopkins's kidney failure originated from Dr. Farazli's clinic. Charbonneau J. concluded that the plaintiff failed to present evidence that there was an identifiable class of two or more persons and denied certification of the proceeding as a class action.

The Divisional Court appeal

The plaintiff appealed Charbonneau J.'s decision to the Divisional Court. Favreau J., writing for the Court, rejected Charbonneau J.'s finding that there was no identifiable class. Favreau J. cited the Supreme Court of Canada's 2013 decision in *Pro-Sys Consultants Ltd. v. Microsoft*, which emphasized that the certification stage does not involve an assessment of the merits or strength of the claim.

Favreau J. emphasized that the purpose of the class definition is to identify those who have a potential claim for relief against the defendants, define the parameters of the lawsuit to identify those bound by its result, and to describe who is entitled to notice of action. Key to defining a class is not that more than one person has suffered a loss, but rather that more than one person is capable of demonstrating whether they have suffered a loss.

In other words, the class exists as a tool to see whether the defendant harmed members of that class. A judge requiring proof that the defendant caused class members harm at the certification stage would be doing the job of a trial judge.

Favreau J. held that the proposed Primary Class was properly defined. Whether or not someone had attended Dr. Farazli's clinic for gastrointestinal testing was a clear categorization that applied to more than one person. As a result, s. 5(1)(b) was satisfied and the Divisional Court referred the case back to Charbonneau J. to consider whether the plaintiff could meet the remaining criteria for certification (whether there were common issues and whether a class proceeding was the preferable procedure).

However, the Divisional Court upheld Charbonneau J.'s finding that the separate sub-class proposed by the plaintiff could not be certified. The Divisional Court agreed with Charbonneau J. that there was no evidence that any patient had suffered an infection because of the conditions at Dr. Farazli's clinic and that a class can be rejected when there is no evidence it exists.

Takeaways

While the Divisional Court's decision reiterates the established principle that a certification motion should not be a trial on the merits, it also confirms that the plaintiff must establish some basis in fact for the existence of a proposed class or sub-class. A proposed class definition that assumes in its wording that class members were harmed is less likely to be successful than a class definition that does not.

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