Ontario Court of Appeal affirms success in solitary confinement class action

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The Ontario Court of Appeal in *Francis v. Ontario* has recently affirmed a summary judgment ruling in a class action arising out of the solitary confinement of class members in Ontario's correctional facilities between April 20, 2015 and September 18, 2018, which awarded class members $30 million in aggregate damages for breaches of the *Canadian Charter of Rights and Freedoms*.

Background

The representative plaintiff, Conrey Francis (Francis), filed a class action against Her Majesty the Queen in Right of Ontario (Ontario) following his two plus years of incarceration at the Toronto South Detention Centre. During his time in custody, Francis, who was experiencing mental health issues, was placed in administrative segregation on two occasions. The class action sought declarations that class members' *Charter* rights were infringed by Ontario's system of administrative segregation and that Ontario was liable in negligence.

The class action was certified on a consent basis, and the class consists of two groups: those inmates who are seriously mentally ill (SMI Inmates), which included the plaintiff, and those inmates who were left in segregation for 15 or more consecutive days, regardless of mental health status (Prolonged Inmates).

Superior Court Decision

In the Superior Court of Justice, the motion judge granted summary judgment in favour of the class. In doing so, the motion judge found that the system of administrative segregation breached class members' s.7 and s.12 *Charter* rights, which protect "life, liberty and security of the person", and "the right not to be subjected to cruel and unusual treatment or punishment", respectively. The motion judge found further that Ontario owed a duty of care to the class members in the circumstances, and they fell below the standard of care. On the latter point, much turned on the differentiation between policy and operational decisions, the former attracting Crown immunity through statute.

Court of Appeal

While Ontario appealed the motion judge's decision on numerous grounds, this alert will focus on the challenge to the finding of systemic negligence. Ontario argued that its decisions at issue relating to administrative segregation were policy decisions, for which no liability could be found. In doing so, Ontario relied on the Court of Appeal's previous decision in *Brazeau v. Canada (Attorney General)* (Brazeau), a similar class action brought by mentally ill inmates in federal jails.

In Brazeau, the Court found that the claim in systemic negligence could not succeed because the primary negligence claim was "negligence at the policy-making level". In differentiating the present case from Brazeau, the Court of Appeal focused on the pleadings in the action. Specifically, the judge focused on the fact that the present class did not include all individuals who had been subjected to administrative segregation in Ontario. Further, the Amended Statement of Claim focused on the implementation of administrative segregation in Ontario institutions, and explicitly pled instances of Ontario's responsibility for the "operation" of its correctional facilities.

In the result, the Court of Appeal upheld the motion judge's finding that the present claim was founded in operational decisions that the Superintendent of a correctional institutions must make on a day-to-day basis. The Court ultimately dismissed the appeal in its entirety.

Takeaways

This case certainly adds to the jurisprudence that addresses the distinction between policy and operational decision-making and the distinction's effects on the viability of claims, particularly as against the Crown. Further, this case reinforces that a claim may be won or lost at the pleadings stage, and care should be taken when drafting a claim. The direct language in the pleadings in this case framed this claim as operational in nature, which assisted the Court of Appeal in coming to its conclusion.

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