

Ontario Superior Court Released its Decision in *Green v. The Hospital for Sick Children et al*

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The ruling suggests that class proceedings are not always the best way to achieve access to justice.

On November 1, 2017, the Ontario Superior Court released its decision in *Green v. The Hospital for Sick Children et al*. Justice Perell dismissed the plaintiff's motion to certify a class action related to hair testing performed at the hospital's Motherisk Drug Testing Laboratory.

Justice Perell found that a class action was not the appropriate procedure in the circumstances, that it would impede procedural justice, and that it would fail to achieve substantive justice. Justice Perell rejected the plaintiff's motion on three of the five grounds required under the *Class Proceedings Act*, finding (1) a class proceeding was not the preferable procedure for the claims as they were too individualistic, (2) the proposed class members' claims did not share common issues and (3) the proposed representative plaintiff's litigation plan was inadequate. The ruling suggests that class proceedings are not always the best way to achieve access to justice, especially in circumstances where the issues in the action are inherently individual.

Background

The Motherisk Drug Testing Lab performed hair testing used to confirm exposure to drugs and alcohol in individuals between 1997 and 2015. The test results were used in a variety of contexts, including child welfare proceedings, family law disputes and criminal proceedings.

Concerns were raised in 2014 that the laboratory's test results were unreliable. The proposed class action was commenced in 2015 by one individual whose hair was tested by the laboratory. The action alleges that inaccurate test results contributed to a delay in the plaintiff being granted full access to her son following a Children's Aid Society ("CAS") apprehension. The plaintiff sought to certify the action as a class proceeding on behalf of all individuals who received positive hair tests from the laboratory between

2005 and 2015, arguing they had all suffered similar harm as a result of the impact of hair testing on their family.

The defendants argued that the nature of the proposed class members' claims were too individualistic to be appropriately adjudicated in a class proceeding. Ultimately, in every case the adjudicator would need to examine whether a specific test was accurate, and if not, whether any inaccuracies adversely affected the plaintiff; that question could not be fairly answered without a full exploration of each case on an individual basis.

Decision

The Court accepted the defendants' argument and found that a class proceeding would place obstacles in the way of any plaintiff seeking to recover damages, impeding one of the very goals of a class proceeding: access to justice.

The decision is grounded in section 5 of the *Class Proceedings Act*, which establishes five requirements for an action to be certified as a class proceeding. The Court concluded the action failed to meet three out of the five requirements.

The "most problematic" issue for the Court was that a class proceeding was not the preferable procedure for advancing the proposed class members' claims. The Court found that little could be resolved on a class wide basis and the majority of the litigation would be left to an individual issues trial. Those issues that would remain to be litigated on an individual basis included at least four out of the five elements of a claim in negligence: that a duty of care was owed, that the plaintiff suffered compensable damages, that the damages were caused by a breach of the standard of care and that the damages were not too remote in law. In addition, all individual issues trials would need to address apportionment of liability.

Justice Perell concluded that resolution of the proposed common issues would do little to advance the case of any plaintiff. Even if the common issues trial were to conclude that the test results were generally unreliable, an individual plaintiff would still need to prove that the test in their case was unreliable, was relied on, and caused damage. The necessity of addressing these individual issues meant that a common issues trial would be an unnecessary hurdle for proposed class members with legitimate claims, and that those individuals would be better served by bringing their claims using regular civil procedure.

In addition, the Court found that the action failed to meet the *Class Proceedings Act* requirement that there be common questions shared between the proposed class members and that the representative plaintiff provide a workable litigation plan.

On the former, the Court concluded that while the class members may ostensibly share broad common questions, those questions were not a substantial part of each proposed class member's claim and would not move the action forward in a meaningful manner.

On the latter point, the Court concluded that the litigation plan proposed by the representative plaintiff was both unfeasible and palpably procedurally unfair. The plan ignored the difficult forensic issues applicable to every individual analysis. That flaw further emphasized to Justice Perell why a class proceeding was not the preferable procedure.

The Hospital for Sick Children was represented by [Kate Crawford](#), Logan Crowell and Naveen Hassan of BLG's [Health Law](#) and [Class Actions](#) practice groups, and [Barry Glaspell](#) of Glaspell Class Actions.

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