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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Class Actions

This newsletter is designed to bring news of changes to the law, new law, interesting decisions and other matters of interest to our clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Class Actions Group, Mirilyn Sharp at 416.593.3957 or msharp@blaney.com.

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"...unanimous five judge panel of the Ontario Court of Appeal holds that a 'recognizable psychiatric illness' remains the threshold for a plaintiff to recover damages for psychological injury, absent physical injury."

CLASS ACTION SEEKING DAMAGES FOR PSYCHOLOGICAL INJURY TOSSED ON SUMMARY JUDGMENT

Roger Horst

A class action brought on behalf of people claiming that they suffered mental anxiety and distress after receiving notification from the Health Department that they should be tested for tuberculosis ("TB") as a result of possible exposure during a visit to the defendant hospital, received a body blow from the Ontario Court of Appeal on Friday.[1]

Notification of the exposure and the need to be tested was given after large numbers of people were exposed to two patients of the hospital who did have TB. As required by law, the defendant hospital reported the exposure to the public health authorities who subsequently notified over four thousand people, three thousand of whom tested negative for TB. These uninfected class members alleged that receipt of the notices caused them mental anxiety, suffering and distress. "Many of them feared for the health and safety of friends and family, and temporarily disrupted their social and family lives."[2] However, none of them suffered a recognizable psychiatric illness.

A unanimous five judge panel of the Ontario Court of Appeal, including the Chief Justice, upheld the traditional view that to recover for psychological injury, independent of a physical injury, a claimant must have suffered a recognizable psychiatric illness. The large panel of five, a contingent brought out for only the most important cases, dismissed the appeal brought by the uninfected class members and upheld the lower court's decision granting summary judgment to the defendant doctors and hospital.

The Court also discussed the right of the uninfected class members to recover damages on the basis of an aggregate assessment and agreed with the lower court that such an aggregate assessment would not be appropriate where each class member would have to establish a recognizable psychiatric illness before being entitled to damages. This was a particularly hard blow to plaintiff class counsel who can process claims more easily and quickly on an award of aggregate damages rather than having to go through the tedious exercise of proving numerous individual claims.

DAMAGES FOR PSYCOLOGICAL INJURY

The Court held that the claims of the uninfected class members who received the TB notification did not pass the long established threshold test that to recover for psychological injury, independent of a physical injury, the event must have caused a "recognizable psychiatric illness", a phrase first coined by Lord Denning in 1970:[3]

> In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about children, or for the financial strain or stress, or the

"...an aggregate assessment would not be appropriate where each class member would have to establish a recognizable psychiatric illness before being entitled to damages."

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> difficulties of adjusting to a new life. Damages are however recoverable for nervous shock or, to put it in medical terms, for any recognizable psychiatric illness caused by the breach of duty by the defendant.

In Canada appellate courts have mostly applied the threshold test, but lower courts are sometimes inconsistent, especially with sympathetic claims.

In *Mason v Westside Cemeteries Ltd*,[4] the defendants lost the cremated remains of the plaintiff's parents. The plaintiff "lost peace of mind" but did not require psychiatric care. In making a modest damages award, the trial judge stated:

> It is difficult to rationalize awarding damages for physical scratches and bruises of a minor nature but refusing damages for deep emotional distress which falls short of a psychiatric condition. Trivial physical injury attracts trivial damages. It would seem logical to deal with trivial emotional injury on the same basis, rather than by denying the claim altogether.

After reviewing the *Mason* case and many others, including the recent Supreme Court of Canada decision in *Mustapha v Culligan*, [2008] 2 S.C.R. 114, in which the plaintiff found dead flies in an unopened water bottle allegedly causing him to become upset with the idea that he and his family had been drinking tainted water, Justice Sharpe found for a unanimous court that a "recognizable psychiatric illness" remains the threshold for a plaintiff to recover damages for psychological injury, absent physical injury.

He stated for the court:

> [64] . . .[E]ven if I were to accept the submission that Mustapha did change the law, it is my view that the evidence in this case falls short of demonstrating that the appellants suffered harm of sufficient gravity and duration to qualify for compensation. The harm revealed by the evidence was not "serious trauma or illness" that amounted to more than "upset, disgust, anxiety, agitation or other mental states that fall short of injury" or that was "serious and prolonged and [rising] above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept."
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> [65] As has been repeatedly stated in the case law, there are strong policy reasons for imposing some sort of threshold. It seems to me quite appropriate for the law to decline monetary compensation for the distress and upset caused by the unfortunate but inevitable stresses of life in a civilized society and to decline to open the door to recovery for all manner of psychological insult or injury. Given the frequency with which everyday experiences cause transient distress, the multi-factorial causes of psychological upset, and the highly subjective nature of an individual's reaction to such stresses and strains, such claims involve serious questions of evidentiary rigour. The law quite properly insists upon an objective threshold to screen such claims and to refuse compensation unless the injury is serious and prolonged.

It can be expected that leave will be sought to the Supreme Court of Canada. In the interim, this is a strong statement of law and a building up of the threshold against frivolous claims.

AGGREGATE DAMAGES

It was a bad day all around for the plaintiff class action bar. The appellants had brought their own motion for an award of aggregate damages for the uninfected class members. The availability of an aggregate damages assessment, specifically allowed under the *Class Proceedings Act* in certain circumstances, is a boon to plaintiff class counsel because it eliminates the need to prove small amounts of damages at great cost.

BLANEYS ON CLASS ACTIONS

Sharpe J. reviewed s. 24 of the *Class Proceeding Act* and determined that the uninfected class members had not satisfied the test under s. 24, as each such class member would have to prove that they suffered a recognizable psychiatric illness before being entitled to damages in the first place. As set out in the passage below, s.24 is only available where the quantum of damages is in issue, not where the entitlement to such damages is in issue.

Justice Sharpe stated for the court as follows:

> [71] Given the nature of the claims advanced here, it seems to me apparent that the assessment of damages requires proof of the harm suffered by the individual class members. The appellants concede that not all members of the class suffered compensable harm, even on the relaxed test they advance for psychological injury. Some class members will have suffered no compensable harm and some will have suffered more stress and anxiety than others. The claims are inherently individual in nature and hence fall squarely within the principle identified by Winkler J. in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at paras. 18-19, where the plaintiff class advanced a claim for damage caused by smoke inhalation:
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> > The action advances claims for personal injury, property damage and claims under the Family Law Act. These claims cannot, "reasonably be determined without proof by individual class members" as required by s. 24(1)(c). Furthermore, each individual claim will require proof of the essential element of causation, which, in the words of 24(1)(b), is "a question of fact or law other than those relating to an assessment of damages".
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> > In addition, the assessment of damages in each case will be idiosyncratic. All of the usual factors must be considered in assessing individual damage claims for personal injury, such as: the individual plaintiffs time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness; and other individual considerations. Indeed here, the representative plaintiff was suffering from and experiencing symptoms of food poisoning at the time of the incident. The property damage claims of class members must be assessed individually as the underlying facts will vary from one class member to the next.

See also *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.) at para. 55.

Assuming this decision withstands an appeal to the Supreme Court of Canada, it may also lead to fewer successful certification applications where the bulk of the claims are brought by persons who suffered only psychological injury and thus must individually prove their entitlement to such damages by showing that they have a recognizable psychiatric illness. Time will tell. ■

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[1] Healey v Lakeridge Health Corporation, 2011 ONCA 55

[2] Healey v Lakeridge Health Corporation, 2011 ONCA 55, paragraph 42

[3] Hinz v Berry, [1970] 1 All E.R. 1074 at p 1075 (C.A.)

[4] 135 D.L.R. (4th) 361 (Ont. Gen. Div.) (Molloy J.)

Blaneys on Class Actions is a publication of the Class Actions Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.
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