

## TOXIC TORTS

PAPER 4.1

# Class Actions and Causation in Toxic Torts

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## CLASS ACTIONS AND CAUSATION IN TOXIC TORTS<sup>1</sup>

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### I. Introduction

In a class action, a single representative plaintiff, or a small group of plaintiffs, is permitted to litigate on behalf of a number, usually a large number, of similarly situated claimants who share at least one common issue to be resolved. Success for one on the common issue or issue means success for all.

This would appear to make class actions a natural vehicle for toxic tort claims, where a single event or process has caused widespread exposure to harm. Yet it has proven to be a bumpy ride for toxic tort class actions in Canada. This paper touches on some of the reasons why this has been so, and attempts to provide some insight into the direction of toxic tort class actions in this country.

### II. Class Actions

Class actions are now governed by procedural statutes in all the provinces and in federal legislation. In BC, it is the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (“CPA”).

A class action proceeds in two main phases. The first stage is certification: in this preliminary stage, the proposed representative plaintiff must persuade the court that the case should proceed as a class action, as opposed to an individual claim or series of claims. This requires that certain criteria are met, that are set out in the governing legislation.

Section 4(1) of the CPA provides:

- 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
- (a) the pleadings disclose a cause of action;
  - (b) there is an identifiable class of 2 or more persons;
  - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
  - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
  - (e) there is a representative plaintiff who

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- (i) would fairly and adequately represent the interests of the class,
- (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

Once a class is certified, it proceeds through the remaining familiar stages of civil litigation toward a trial on the common issues. Practically speaking, certification is usually dispositive of the claim; once certified, most class actions settle. When they do, both the settlement and counsel's fees must be approved by the court, in order to ensure that the interests of the class members have been adequately and fairly represented.

This means that certification, which compels a plaintiff to satisfy the court of a *prima facie* substantive case as well as a workable procedural mechanism, has become the principal battleground of the class action, and both plaintiff's and defendant's counsel can be expected to devote enormous resources to what is, at least nominally, a preliminary, interlocutory matter.

Class actions are almost always on an "opt out" basis—that is, anyone who fits within the class definition is included in the suit unless they elect to remove themselves from it. In several provinces, legislation or jurisprudence supports the inclusion of extraprovincial class members in the provincial suit, but a smoothly operating, truly "national class" system has still proven somewhat elusive. In provinces that do not support national opt-out classes, extraprovincial class members may be included only if they actively elect to join, which has proven to be a hindrance, if not a bar, to effective consolidation of national classes in a single jurisdiction.

### III. The Uneasy Relationship Between Toxic Torts and Class Actions

A toxic tort is a tort that results from exposure to a dangerous or harmful substance. This generally happens in one of two ways: either through environmental contamination, in which the "neighbourhood" of victims can usually be defined geographically, or through the placing of a product into the stream of commerce, in which case the harm will often be diffuse and as widespread as the market of the product, which can be national, or even international, in scope.

Toxic torts are generally "mass torts"; that is to say a single negligent act has generated numerous victims. Forcing the victims to litigate individually would not only be judicially inefficient, but it also gives a substantial advantage to the defendants, who can take advantage of an economy of scale to reduce per-claim litigation costs. Class actions, in other words, permit plaintiffs to exploit the same economy of scale in prosecuting claims as defendants enjoy as a matter of course in resisting them.<sup>2</sup>

One would expect, then, as I suggested earlier, that toxic torts are ideal subjects for class proceedings. However, this has not proven to be the case. In one of its early class action decisions, the Supreme Court of Canada rejected a pollution claim on the basis that, while the other elements of certification were made out, a class proceeding was nevertheless not the "preferable procedure."<sup>3</sup> In the years since, the most frequently-raised objection to certification is generally focused on the

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2 See generally Craig Jones, *Theory of Class Actions* [with foreword by David Rosenberg] (Toronto: Irwin Law Book, 2003).

3 *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68.

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commonality requirement: that is, a defendant will say that the plaintiffs' particular circumstances or injuries are too diverse to make aggregate litigation possible, because they will require individual proof of central elements of the tort that cannot be collectively assessed, and in particular causation.

But many causes of action in mass tort cases can be parsed in a way to preserve many, if not most, causation issues as common to all members of the class. If indeed diverse plaintiffs have been harmed by a single defendant or small group of defendants who owed well-established, *general* duties to a broad class of victims, such as consumers of their product or residents near a pollution source, and if they failed to live up to the standard of care associated with that general duty, then at least those aspects are suitable for class adjudication. Similarly with causation—a plaintiff will have to show individual causation, but often only after extensive evidence establishing that the harm they suffered was of a type that can be produced by the toxic substance. Patrick Hayes canvassed this topic in an article entitled *Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification*, 19 J. Env. L. & Prac. 190 at 195:

Proving causation in the context of toxic substances, however, puts the added burden on plaintiffs to establish two types of causation, both general and specific. This is because, unlike the causal connection between being hit by a car and suffering a broken bone, for instance, the causal connection between a toxic substance and a disease is not as easy to decipher. Thus, a plaintiff must first prove “general” or “generic” causation—that a particular substance is capable of causing a particular illness. The issue must be addressed, whether explicitly or implicitly, in **toxic torts** litigation, since it is axiomatic that “an agent cannot be considered to cause the illness of a specific person unless it is recognized as a cause of that disease in general.” Next, a plaintiff must prove “specific” or “individual” causation—that exposure to a particular toxic substance did, in fact, cause the plaintiff’s illness.

In a prescient decision in *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, Huddart J.A. wrote:

[40] ... As Professor Boodman noted in an article entitled *The Malaise of Mass Torts*, (1994) 20 Queen’s Law J. 213 at 242, modern methods of mass production and distribution often make it difficult or impossible to identify the exact source or sources of injury, to link a particular victim to a particular defendant, and to demonstrate accurately the harmful effects of a defendant’s act other than on the basis of epidemiological studies and statistical probabilities. *Class proceedings were designed with precisely these uncertainties in mind.* (emphasis added)

She then went on to explain how the common and individuals might be addressed in the course of the case:

[42] At the risk of oversimplifying a complex decision-path, I venture to suggest the first step in every products liability case alleging negligent design, manufacture, or marketing is the determination of whether the product is defective under ordinary use or, although non-defective, has a propensity to injure. Some American authorities refer to this step as “general causation”, whether a product is capable of causing the harm alleged in its ordinary use.

[43] The second step is the assessment of the state of the manufacturer’s knowledge of the dangerousness of its product to determine whether the manufacturer’s duty was not to manufacture and distribute, or to distribute only with an appropriate warning. It may be prudent to refer to this as an assessment of the state of the art; it may be that a manufacturer did not but should have known of its product's propensity for harm.

...

[45] If the value of the product’s use outweighed its propensity to injure such that distribution with a warning was appropriate, the third step will be an assessment

of the reasonableness of the warning (whether direct or by a learned intermediary) given the state of the art and the extent of the risks inherent in the product's use.

[46] The final step will be the determination of individual causation and damages. The difficult question will be whether the individual's knowledge of the risks would have prevented the injury. If the product should not have been manufactured or distributed, the determination of whether the product caused the injuries to the individual seeking damages and the assessment of those damages will be the last step. At this stage, the risks created by the product will be used to determine whether a defendant caused the alleged injury to an individual plaintiff. They may also be used in the determination of the date of discoverability for the purposes of any limitation defence, and for the allocation of fault, if that becomes necessary.

But despite in Huddart J.A.'s insightful analysis and the subsequent similar decision in the *Knight* tobacco class action,<sup>4</sup> while "general" causation might be a common issue, "specific" or "individual" causation could not be, in the traditional view. But class actions not only present a challenge for causation analysis, they also present an opportunity, because it is in the nature of indeterminate harm based on exposure risks that it might be possible to determine specific causation in a population of persons far more readily than it can be confidently determined in individuals, using statistical and epidemiological models. The courts have not readily embraced this proposal, which Jamie Cassels and I advocated over a decade ago in the *Canadian Bar Review* and a follow up text,<sup>5</sup> and which I have continued to press.<sup>6</sup> However, at least one Canadian judge has acknowledged that proof of causation in the aggregate can be a useful tool in the resolution of large scale toxic torts.<sup>7</sup>

Indeed, in the recent (individual) causation case of *Clements v. Clements*, 2012 SCC 32, the Supreme Court of Canada seems to be inviting the argument to be made. In emphasizing the central role of the but-for causation requirement in negligence, and in sharply restricting the application of various exceptions to the rule, the Court wrote:

[44] This is not to say that new situations will not raise new considerations. I leave for another day, for example, the scenario that might arise in mass toxic tort litigation with multiple plaintiffs, where it is established statistically that the defendant's acts induced an injury on some members of the group, but it is impossible to know which ones.

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4 *Knight v. Imperial Tobacco*, 2006 BCCA 235 at para. 26 (holding that the common question of whether there was deception or no deception in the marketing of light cigarettes can be determined without regard to that individual circumstances of the plaintiff or class members).

5 Jamie Cassels and Craig Jones, "Rethinking Ends and Means in Mass Tort: Probabilistic Causation and Risk-Based Mass Tort Claims after *Fairchild v. Glenhaven Funeral Services*" (2003) 82 *Can. Bar. Rev.* 597; Jamie Cassels & Craig Jones, *The Law of Large Scale Claims: Products Liability, Toxic Torts and Complex Litigation in Canada* (Toronto: Irwin Law Book, 2005). See also Craig Jones, *Theory of Class Actions* [with foreword by David Rosenberg] (Toronto: Irwin Law Book, 2003).

6 Craig Jones, "Reasoning Through Probabilistic Causation in Individual and Aggregate Claims: The Struggle Continues" (2011) 39 *Adv. Q.* 18.

7 Of the "aggregate action" described in BC's *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, which provided for proof of tobacco-related damage in a population, rather than in individuals, Holmes J. in *B.C. v. Imperial Tobacco Ltd.*, 2003 BCSC 877 wrote:

157 There is nothing inherently unfair about an aggregate action. In fact, it may often balance unfairness of proceeding either by individual actions or by other forms of collective proceeding. Neither is the use of statistical or epidemiological evidence itself evidence of an unfair trial. They are aids to the resolution of issues in a unique but appropriate form of action.

In the meantime, Canadian courts have remained reluctant to certify environmental toxic tort class actions, as with claims arising from pollution of the Sydney Tar Ponds<sup>8</sup> and Inco Ltd.'s nickel refinery in Port Colborne, Ontario.<sup>9</sup>

These failures might have more to do with the fact that the plaintiffs advanced traditional torts claims and did not advocate for an overhaul of causation requirements to the negligence rule. In the one instance where the Supreme Court's *dicta* in *Clements* was invoked, in the Paxil class action in BC, certification was granted and survived appeal.<sup>10</sup> Like the similar and almost simultaneous decision of the BC Court of Appeal in *Stanway v. Wyeth Canada Inc.*, it seems as though plaintiffs have received a more generous reception on questions of general causation in products liability cases than in environmental torts,<sup>11</sup> perhaps because of the cold water thrown early by the Supreme Court of Canada in *Hollick*.

#### IV. The Future of Toxic Tort Class Actions in Canada

Plaintiffs' counsel will, and should, keep trying. Last year, a class action was filed on behalf of beekeepers who attribute "colony collapse disorder" to the use of pesticides. As concerns over the environmental harms of industry multiply, and as the "internalization" of harm within polluting industries gains wider acceptance as the principal tool of regulating such damage,<sup>12</sup> the courts' receptiveness to such claims can be expected to increase.

Tobacco-related class actions still continue to work their way through the courts, both in the form of tort actions by government pursued on behalf of injured citizens or as class actions such as those underway most prominently in BC and Quebec. However, these, even more than previous waves of "mega cases" resulting from products such as asbestos and Agent Orange, are something of *sui generis* claims, predicated on a particular history. Nevertheless, it is useful to remember that, only a decade or two ago, tobacco companies were able to boast of being virtually immune to suit.

If there is a next wave of 'mega suits' in Canada, it may well emerge as a result of carbon-related climate change. These cases will emphasize causation problems, not only with respect to "indeterminate plaintiffs," but also indeterminate defendants (that is, where a defendant has contributed to pollution which has co-mingled with other toxins).

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8 *MacQueen v. Sydney Steel Corp.*, 2013 NSCA 143.

9 *Smith v. Inco Ltd.*, 2011 ONCA 628 (Ont. C.A.), rev'd 2010 ONSC 3790 (Ont. S.C.J.), leave to appeal denied, [2011] S.C.C.A. No. 539 (S.C.C.).

10 *Bartram (Litigation Guardian of) v. GlaxoSmithKline Inc.*, 2012 BCSC 1804 at para. 32, aff'd 2013 BCCA 462.

11 In *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260, Kirkpatrick J.A. wrote for the court:

[55] However, as has been stated many times, on a certification hearing, the court is not to weigh the competing evidence. Here there is evidence that, if accepted at the trial of the common issues, may answer the general causation question as to whether there is a causal connection between hormone therapy and breast cancer. A positive answer would obviously move the litigation forward, although individual class members may face formidable challenges in establishing causation specific to themselves.

12 It was recently announced that Ontario and Quebec have just adopted "carbon cap-and-trade" programs that, like other forms of "carbon tax," seek to incorporate the costs of environmental harm within polluting industries, both for regulatory and, perhaps, compensatory purposes.

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But however thorny, these issues might also be resolved with novel judicial approaches. In its report on the potential for climate change litigation in Canada,<sup>13</sup> the Canadian Centre for Policy Alternatives points to the decision in *Methyl Tertiary Butyl Ether (MTBE) Prods Liab Litig*, 379 F Supp 2d 348 (SDNY 2005). In that case, the court modified the previously-established “market share liability” theory in a case involving a dangerous gasoline additive, at 377–78.

When a plaintiff can prove that certain gaseous or liquid products ... of many suppliers were present in a completely commingled or blended state at the time and place that the risk of harm occurred, and the commingled product caused a single indivisible injury, then each of the products should be deemed to have caused the harm.

I have been able here to provide only a cursory introduction to the challenges and opportunities presented by the adjudication of toxic torts through class actions. The courts seem to be cautiously willing to innovate in order to resolve the problems presented by the litigation of mass toxic tort claims, but they are at the mercy of the arguments brought before them. Until counsel make the arguments forcefully, and unless at least one of these cases goes to trial (or at least has a thorough hearing on a motion to strike), tort law will be unable to fulfill its regulatory function, the “behaviour modification” which has been central to its development, and is one of the principal aims of class proceedings legislation.

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13 Andrew Gage and Michael Byers, *Payback Time: What the Internationalization of Climate Litigation Could Mean for Canadian Oil and Gas Companies*, 2014: Canadian Centre for Policy Alternatives, online: [https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/10/Payback\\_Time.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/10/Payback_Time.pdf)