

Class Actions

Survivors seeking redress: A common issues trial

By Janelle O'Connor and Angela Bospflug



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(April 1, 2020, 12:43 PM EDT) -- There have been several class actions for institutional abuse in Canada since *Rumley v. British Columbia* 2001 SCC 69. Given the individual nature of abuse, a significant hurdle in these actions is satisfying the court that a class proceeding is the preferable procedure for the resolution of the common issues.

The preferability inquiry should be conducted through the lens of the three principal advantages of class actions: access to justice, behaviour modification and judicial economy: *Hollick v. Toronto (City)* 2001 SCC 68 at para. 27. In our view, these advantages — coupled with the practical realities and human elements of pursuing claims for abuse — make class actions the preferable vehicle for addressing historical abuse claims, despite any individual issues that may need to be addressed following a common issues trial.

The case of *Cavanaugh v. Grenville Christian College* 2012 ONSC 2995 considered the issue of preferability in the context of institutional abuse. The litigation involved claims of historical sexual, physical and psychological abuse of students at Grenville Christian College. Justice Paul Perell denied the plaintiffs' motion for certification, holding that a class action was not the preferable procedure for the litigation. On appeal in *Cavanaugh v. Grenville Christian College* 2014 ONSC 290, Justice Helen Rady for the court, held that the preferability requirement had been satisfied; the court set aside Justice Perell's order and certified the action as a class proceeding:



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The court noted the numerous benefits of proceeding by way of a class action and accepted that the resolution of the common issues, including whether systemic abuse existed, would move the litigation forward in a significant way for all class members and would avoid the risk of inconsistent outcomes. Justice Rady noted that proceeding as a class action would streamline the litigation, with a discrete set of examinations for discovery and documentary disclosure and the need for expert witnesses to testify only once. Perhaps most importantly, Justice Rady acknowledged that there were powerful economic barriers to access to justice in the case which could be redressed through a class proceeding:

"... most individuals cannot afford to pursue litigation on this scale ...": at para. 20.

Although numerous class actions alleging systemic institutional abuse have been advanced, *Cavanaugh* is the first common issues trial to deal with these issues in this context. In a common issues trial, a court makes findings on legal or factual questions that are common to the class. In *Cavanaugh et al. v. Grenville Christian College et al.* 2020 ONSC 1133, the following common issues were determined:

- Did the defendants owe a duty of care to the plaintiffs?
- Did the defendants breach the duty of care owed to the plaintiffs?
- Did the defendants owe fiduciary obligations to the plaintiffs?
- Did the defendants breach their fiduciary obligations to the plaintiffs?

- Does the conduct of the defendants merit an award of punitive damages?

Ultimately, the court held that the representative plaintiffs had established Greenville's liability and answered all of the common questions in the affirmative. In the thoughtful decision by Justice Janet Leiper, the court found the defendants liable for systemic departures from the standard of care of educational institutions in the province: at paras. 364-367. As with many cases of this nature, the abuse was said to be classwide and decades-wide. The court remitted individual issues to the case management judge.

This case is an important win for survivors who suffered as a collective at the hands of the institution. It is also an important decision in the developing body of law where systemic negligence is the basis for institutional liability for harm. As noted by Margaret Hall in *Institutional Tort Feasors: Systemic Negligence and the Class Action*, "through the class action for systematic negligence, the common law is filling in those conceptual gaps that had made the alternative redress system seem a more complete and appropriate response to abusive institutionalisation. Legal theories of institutional responsibility also explain the phenomenon of abusive institutionalisation, not as an unpredictable aberration but as a preventable organisational disaster."

On March 26, 2020, the defendants in *Cavanaugh* appealed Justice Leiper's decision. As a result, the determination of the compensation owed to individual *Cavanaugh* class members will remain unaddressed for the foreseeable future. This is especially so given the current COVID-19 pandemic and the suspension of timelines for appeals of this nature.

For *Cavanaugh* survivors, this means more uncertainty and angst in this litigation, which has already been proceeding for over a decade.

Janelle O'Connor and Angela Bessflug are plaintiffs' counsel at Klein Lawyers in Vancouver. They practise class actions and civil sexual abuse. They are not counsel in this action, which is led by two other smart women who practise in the same areas (Sabrina Lombardi and Loretta Merritt).

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