Class actions

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In any scenario, deciding a legal product liability dispute between two people should be a straight forward matter. The disgruntled consumer would simply meet with the manufacturer in a meeting room before a third party acting as a judge a few days after the complaint is first made. They should just be able to tell their stories to the judge, who would then apply the law and render a decision.

Instead, however, such a civil lawsuit is a highly intricate, formal, expensive, and time-consuming procedure. There are years of pre-trial maneuvers and machinations that cost thousands of dollars. The wrenching process is one which emphasizes legal strategy and victory, even over truth. It is rarely a fair fight. Some who have participated in the civil litigation system have lamented that this is a legal system, but not a justice system. Large corporate defendants, concerned about legal precedents, can be expected to expend a great deal of resources, and exploit any procedural advantage, in order to defeat any consumer claim made against their products.

The Implausibility of Individual Product Liability Litigation

Our world is complex and interdependent. The decisions and activities of large businesses manufacturing food, vehicles, clothes, electronic appliances, drugs, and the like affect millions of Canadians simultaneously. The information and resources of each individual consumer in the marketplace cannot begin to match the advertising and big business power. The same applies for the concentrated manufacturer's defence of any product liability lawsuit, regardless of how big it may be.

The clich says that everyone should have one's day in court to resolve disputes, but we know that the process of getting to and through court is fraught with high risks, costs, and anxieties. Many people have relatively small claims in dispute. These include bank customers certain of overcharges, tenants in an apartment building complaining of poor maintenance, air travellers' dissatisfaction about the chronic delays of airlines, people distraught about technically inaccurate computer chips or over-zealous claims made about the value of their vocational training.

Each of these might only seek a few hundred dollars in compensatory relief.

These are small wrongs inflicted upon many people by one person. The cost, commitment, and exasperation to each complainant to have that day in court would quickly outweigh success in a judgment for modest compensation. They would not on their own likely advance their claims, even where their claims would have been well-founded in law and the collective recovery by all consumers equally affected, would have been large.

This would be even more true if the case was difficult to prove, such as product liability arising from smoking or asbestos hazards or fraud in an overseas gold mine stock play. Each individual

party would have to come forward to mount a full evidentiary prosecution of the matter. Few lawyers would be interested in taking an individual small damages case against a manufacturer on a contingency fee basis. This is today an impractical litigation model since it focuses solely on an individual determination of rights against the power of big capital. Business would not necessarily be chastened by their wrongdoing; there need not be any corporate lessons learned and corrective action taken.

Not only would deserving plaintiffs not likely be inclined to vindicate their legitimate interests, but alternatively the courthouses might be overrun with hundreds or thousands of similar cases which are fought out on an individual basis. A multiplicity of actions for essentially the same factual and legal concern would inevitably occur when the quantum of damages may be the only true issue in dispute. An example would be where the product was clearly defective; the only issue remaining being the injury each consumer suffered by it.

The one party which would appear to benefit from this divide and conquer arrangement would be the defendants, often large mass market corporations or insurers who have no direct personal relationship with each individual plaintiff in any case. From their point of view, they maintain that they should not have to defend against parties who, alone or together, do not have sufficient resources to pay their legal costs if they successfully defend the action.

Enter the Class Action

To address these problems of many small meritorious claims not being pursued due to the civil litigation burdens of individual lawsuits, and to meet the spectre of a multiplicity of actions overtaxing scarce judicial resources, the class action for civil proceedings was created.

The concept originated in the United States in 1966, where punitive damages in civil cases, jury trials, and the use of tort law to bring about social change has always been more marked than in Canada. The American legal system also does not embrace the civil litigant "loser pays some of the winner's costs" rule. Being involved in civil litigation in the United

States has always been a riskier proposition.

Nevertheless, this is a topic in civil procedure which is quickly developing in Canada, but one which has been limited to North America. Few jurisdictions outside of the United States and Canada have such elaborate rules on this. Such special rules of procedure which structure a class action would never be the outgrowth of the common law. It represents such a departure from the classical form of civil litigation, that it requires special legislation in each province.

Class action legislation is that body of rules of procedure, usually contained in one statute, that permit one or more persons to pursue a legal action on behalf of a class of similarly situated persons. Such legislation makes lawsuits against powerful wrongdoers, who may have injured many people only a little bit, economically feasible, where otherwise individual lawsuits would not have been practical.

By now, three Canadian provinces have passed class action legislation: Qu bec (1978), Ontario (1992) and British Columbia (1995). This legislation presents daunting challenges for both plaintiffs and defendants. One is its extra-provincial reach. According to an Ontario case, Nantais v. Telectronics Proprietary (Canada) Ltd., 1995, it appears that class members outside of these three provinces can be non-resident class members. Yet, the two systems of private law in Canada will have to work out how a national case might proceed. The interest and growth in class action legislation responds to a desire to shift power from defendants to plaintiffs, in the same way that collective bargaining legislation shifts power from employers to groups of employees. Already there are Canadian actions against municipalities and other governments, teachers' unions, subway transit authorities, and many other private and public organizations unused to this type of litigation.

How a Class Action Works

Each legislative framework is different, but essentially a person injured hires a lawyer, who files the lawsuit on behalf of that client on behalf of all people injured. There are many checks and balances in the legislation that allow defendants to avoid and control class actions. For example, the class must be certified as representative by a judge in order to proceed as a class action. This is one of the most critical stages, and one which is invariably appealed. The number of injured parties and approximate amount of damages are determined, even if each class member does not authorize or join in the lawsuit personally.

The law may allow for a pot of money to be set aside by the defendant for the plaintiffs' disbursements and other costs, along the lines of an order for the corporation to pay the costs of a derivative action. There is a trial of common issues (of facts and law) and individual assessments as to causation and damages. Peculiar issues or members should not detract from or overwhelm the common ground in the overall case. And, obviously, there will be no undeserved jackpot.

We await the development of class action jurisprudence in Canada to see if it delivers on its promise to vindicate the rights of consumers and others with small, fragmented claims, often against defendants in other jurisdictions and countries. Experience with the Qu bec procedure, already 20 years old and no runaway freight train, suggests that there may not be much to fear. In the recent Ontario class action against the teachers' unions on behalf of parents who claimed damages for the unlawful province-wide strike in 1997, lawyers found it difficult to attract a parent willing to serve as the representative plaintiff. The representative plaintiff must risk costs, participation in the trial process itself, and media scrutiny, for the possibility of a small financial gain a few years down the road.

Class action suits are attractive to lawyers because of the extraordinary publicity that usually attends them, and the likelihood and size of contingency fee payouts on such collectively large suits (although this varies from province to province). The procedural device furnishes lawyers with considerable financial incentive to take on, indeed seek out and structure, these kinds of cases. One might recall that the Canadian civil litigation model did not make the class action as imperative here as it may have been in the United States, which has always been more favourable to the large socialized injury form of lawsuit with punitive damages, than the Canadian legal system.

We will have to wait to see if society benefits from the class action in the two ways that are expected. Will the social interest be advanced by actually ensuring that all wrongdoers are held accountable for all the harm they cause to all people? Second, will this device be an effective substitute for ongoing government regulation that would otherwise be required to protect the individual's interests?

We can expect, based on American and early Canadian experience, that this balancing of countervailing power, this leveling of the playing field between injured persons and their large corporate and governmental defendants, will precipitate settlements from defendants. Faced with the prospect of defending in the public domain a formidable class of aggrieved persons for a substantial sum of money, settlements might be expected to be numerous and quick. This is more than we can say for government regulatory agencies.

On the other hand, this development of class actions may only be a boon for lawyers as long as they control access to, and conduct, of this procedure.

Even for lawyers, dedicating most or all of one's effort to a few of these kinds of suits, which call for a lawyer's dedication, is a strategic risk for one's law firm.

Business and government may be held hostage to the threat of the class action, stifling innovation and risk-taking. Some have likened the procedure to a form of extortion. More corporate resources will be spent on dealing with all facets of class action exposure. Large settlements and damage awards will invariably be passed on to all people, making products and activities more expensive. We see that in our automobile insurance premiums which increase each year. The procedure may be just in time for the burgeoning securities and corporate shareholder litigation.

The scales involved in class action mega-damage claims and awards are substantial enough to bankrupt companies, which can, in turn, create negative ripple effects against employees, pensioners, stockholders, suppliers and taxing authorities. Not every large judgment will be collectible for the class members.

Ultimately, the procedure, which is ironically just now being curtailed by federal courts in the United States, may facilitate adoption of other features of the American legal system which we have prudently and heedfully resisted to date. For example, in the class context of regulating social wrongs by the civil lawsuit, there will be a greater temptation to seek, and receive, large punitive damages awards.

To adapt the saying the more laws, the more criminals, it is clear that new lawsuits will be brought that would not have seen the light of day before this legislation. The question is whether the efficiency of grouping costly individual claims - giving them their day in court together rather than separately - will exceed the long term cost of the class action procedure to society.

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