CITATION: Green v. The Hospital for Sick Children, 2017 ONSC 6545
COURT FILE NO.: CV-15-543259-00CP
DATE: 20171101

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
REBECCA GREEN Plaintiff	*Robert Gain* and *Jody Brown* for the Plaintiff
– and –	
THE HOSPITAL FOR SICK CHILDREN, GIDEON KOREN and JOEY GARERI Defendants	*Kate A. Crawford, Logan Crowell, Naveen Hassan,* and *Barry Glaspell* for the Defendants The Hospital for Sick Children and Joey Gareri *Darryl A. Cruz, Erica J. Baron, Jessica L. Laham, Jessica Firestone* for the Defendant Gideon Koren
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: October 11 and 12, 2017

PERELL, J.

REASONS FOR DECISION

A. Preface

[1] Sometimes, when a group of individuals is harmed, a class action is the only access to procedural and substantive justice. Sometimes, when a group of individuals is harmed, a class action is the preferred or best access to procedural and substantive justice. However, sometimes when a group of individuals is harmed, a class action sacrifices justice and a class action would not lead the harmed individuals to the substantive justice they deserve, but rather it would impede procedural justice and it would diminish or fail to achieve substantive justice. Sometimes, when a group of individuals is harmed, the only access to procedural and substantive justice is for the individuals to soldier on as individuals to obtain the justice they deserve. The case at bar is one such case.

B. Introduction

[2] Between 2005 and 2015, the Hospital for Sick Children ("the Hospital") operated the Motherisk Drug Testing Laboratory ("MDTL"). During this time, the laboratory tested the hair of 18,463 individuals to screen for the presence of drugs and alcohol. Some of the test results were used by physicians treating patients. Some of the test results were used as evidence in criminal proceedings. Some of the test results were used as evidence in matrimonial disputes to determine custody and access rights. And some of the test results were used as evidence in child protection proceedings under the *Child and Family Services Act*[1] that could result in the loss of the tested individual's parental rights.

[3] One of the individuals tested was Rebecca Green, whose newborn son had been apprehended by the Toronto Children's Aid Society in the summer of 2009. After the apprehension of her baby, Ms. Green agreed to hair testing to regain access and custody. Her test results, however, were positive, and her son remained in foster care between 2009 and 2011, approximately two years, until Ms. Green's test scores reported negative for drug and alcohol use.

[4] Three years later, in October 2014, in *R. v. Broomfield,*[2] Ms. Broomfield was charged with several offences arising from the allegation that she had administered a noxious substance to her two-year-old son. At trial, Crown counsel adduced expert evidence about long-term cocaine ingestion from a pharmacologist/toxicologist and a technician from the Motherisk Program. Ms. Broomfield was convicted and she appealed. On the appeal, new evidence was admitted that revealed that there was controversy among the experts about the use of the testing methods at Motherisk. The Court of Appeal set aside the conviction on one of Ms. Broomfield's charges. The Court of Appeal's decision sparked an uproar and a scandal for the Hospital.

[5] In 2015, a proposed class action, the action now before the court, was commenced. In this action, Ms. Green alleges that all the laboratory's 18,463 tests were unreliable and that she and others suffered harm as a result of the reliance that courts and others placed on the test results. She sues the Hospital, Dr. Gideon Koren, the founder of the Motherisk Program, and Joey Gareri, one of the managers of the laboratory, for the systemic negligence of releasing unreliable test results.

[6] Ms. Green now moves for certification of her proposed class action. The Defendants deny negligence. They also resist certification of the class action.

[7] Collectively, the Defendants submit that none of the criterion for the certification of an action as a class proceeding are satisfied, and, in particular, they submit that: (a) Ms. Green's systemic negligence claim fails the cause of action criterion; (b) her class definition is overbroad; (c) she has not established any meaningful common issues; (d) her action does not satisfy the preferable procedure criteria on both the grounds of unmanageability and also because of alternative preferable procedures; and (e) she does not satisfy the representative plaintiff criterion because she has not prepared a workable litigation plan.

[8] I agree with some, but not all, of the Defendants' challenges, and for the reasons that follow, I dismiss Ms. Green's certification motion.

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[1] R.S.O. 1990, c. C.11.
[2] 2014 ONCA 725.

C. Evidentiary Background

1. Testimonial and Documentary Evidence

[9] Ms. Green supported her certification motion with the following evidence:

- Her affidavit dated November 3, 2016. Ms. Green was cross-examined.
- Affidavits dated November 1, 2016 and July 21, 2017 of Brittany Tovee, a lawyer from Koskie Minsky, LLP, Ms. Green's proposed Class Counsel. Ms. Tovee was cross-examined.

[10] The Hospital and Mr. Gareri resisted the certification motion with the following evidence:

- Affidavit dated May 29, 2017 of Naveen Hassan, a lawyer from Borden Ladner Gervais LLP, counsel for the Hospital and for Mr. Gareri.

[11] Dr. Koren resisted the certification motion with the following evidence:

- Affidavit dated May 30, 2017 of Lifa Jensen-Taillefer, a law clerk from McCarthy, Tétrault LLP, counsel for Dr. Koren.
- An affidavit dated May 24, 2017 from Dr. Alberto Salomone. Dr. Salomone is a forensic toxicologist with a research focus in hair analysis, and, in particular, hair analysis for psychoactive substances and alcohol biomarkers. He holds a PhD in Analytical Chemistry from the University of Turin. He is the Laboratory Supervisor at a laboratory in Turin, Italy that performs over 300,000 biological tests annually, including hair tests for child protection purposes. Dr. Salomone was cross-examined.
- An affidavit dated May 15, 2017 from Jeffrey Wilson, a leading family law and child protection lawyer. Mr. Wilson was cross-examined.

[12] On May 4, 2017, Dr. Koren served a Request to Admit on Ms. Green. The request was to admit 186 facts and the authenticity of 25 documents.

[13] On May 24, 2017, Ms. Green responded to the Request to Admit. She admitted the authenticity of the documents, and she admitted the truth of 32 queries, but she refused to admit or answer 154 queries because she said the requests: (a) sought admissions of fact pertaining to the merits of the action pre-certification; (b) sought admissions in respect of "some cases", "some individuals" and unnamed "individuals" without further clarity; and (c) sought admissions in respect of issues temporally outside of the proposed class period.

[14] Included in the evidentiary record was the *Independent Review of the Motherisk Drug Testing Laboratory at Toronto's Hospital for Sick Children* (the *Independent Review*) authored by the Honourable Susan Lang, the Independent Reviewer.

[15] Many of the queries in the Request to Admit concerned facts found in the *Independent Review*. The parties disagreed about the admissibility and utility of this report for the purposes of the certification motion. The Defendants' position was that the *Independent Review* was inadmissible and could not be relied upon by Ms. Green in support of her motion for certification. I will address the admissibility and the utilization of the report in the next section of my Reasons for Decision.

2. The *Independent Review* of the Motherisk Drug Testing Laboratory at Toronto's Hospital for Sick Children

[16] Relying on *Robb Estate v. St. Joseph's Health Care Centre*,[3] the Defendants submit that *The Independent Review,* which was put into evidence as an exhibit to Ms. Tovee's affidavit, is hearsay evidence. The Defendants submit that the *Independent Review* is inadmissible evidence on this certification motion and inadmissible for any determination of the merits of Ms. Green's action.

[17] The Defendants submit that the *Independent Review* was the product of an *ad hoc*, expeditious, largely voluntary or co-operative inquiry process, but not an adjudicative process with procedural and due process protections. Further, the Defendants submit that the *Independent Review* is not admissible because the Independent Reviewer was not empowered by her Terms of Reference to make findings of liability and indeed expressly indicated in the report that she was not doing so. The Defendants submit that the *Independent Review* was not a public inquiry and, therefore, its report is not admissible pursuant to the public inquiry exception to the hearsay rule.

[18] Moreover, the Defendants submit that in making her findings, the Independent Reviewer did not apply the standards of proof applicable in a civil trial and it would be unfair and prejudicial to the Defendants to be bound by findings based on evidence for which they had no opportunity of cross-examination. They submit that there was nothing to preclude Ms. Green from obtaining expert evidence for the certification motion, as Dr. Koren has done, and it was her own election and peril that she chose not to do so.

[19] Further still, the Defendants submit that the *Independent Review* cannot be used as a form of issue estoppel. Finally, the Defendants submit that Ms. Green cannot rely on the *Independent Review* while at the same time refusing to properly respond to Dr. Koren's Request to Admit, which requested admissions about numerous facts set out in the *Independent Review*.

[20] In response, Ms. Green submits that the *Independent Review* is admissible for the purposes of the certification motion, which she emphasizes is just a procedural motion and not a determination of the merits of her action or of the putative class members' claims. Further, she submits that *Robb Estate v. St. Joseph's Health Care Centre* is distinguishable and the case does not apply in the circumstances of a certification motion.

[21] Ms. Green submits that the *Independent Review* is admissible pursuant to the public document exception to hearsay[4] or as as a principled hearsay exception in accordance with the principles of necessity and reliability.[5]

[22] Moreover, Ms. Green submits that there is no prejudice to the Defendants from admitting the *Independent Review* for the limited purposes of establishing some basis in fact for four of the five certification criteria because: (a) the scope of a certification motion is limited and does not constitute a finding on the merits; (b) many of the documents referred to in the *Independent Review* were the Defendants' documents; and (c) many of the documents referred to in the *Independent Review* were voluntarily produced and authenticated for the purposes of the certification motion.

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[3] [1998] O.J. No. 5394 (Gen. Div.).
[4] *Levac v. James*, 2016 ONSC 7727.
[5] *R. v. Khelawon*, 2006 SCC 57.

[23] For my part, methinks both parties doth protest too much, and for the following reasons, I shall admit the *Independent Review* for the limited purposes of the certification motion.

[24] At the outset, I respectfully say that the submissions of both sides about the use to be made of the *Independent Review* have to be taken with more than a grain of salt of skepticism. Ms. Green's factums did not read as if the culpability of the Defendants was not an issue for the certification criteria, and in this regard, Ms. Green did appear to submit that based on the *Independent Review,* there was proof of systemic negligence perpetuated on a class-wide basis. And in their factums, the Defendants were somewhat two-faced in objecting to the admission of the *Independent Review,* while at the same time asking Ms. Green to admit copious numbers of facts described in the *Independent Review* or found in the Defendants' own documents and forming part of the evidentiary record for the certification motion.

[25] In admitting the *Independent Review* for the purposes of the certification motion, I agree with Ms. Green that it cannot be admitted as proof of the merits of her claim, and I agree with the Defendants that the *Independent Review* cannot be the basis of any issue estoppels. There are, however, for the purposes of the certification motion, facts in the *Independent Review* that are admissible and relevant to the certification criterion.

[26] Many of the facts contained in the *Independent Review* are admissible for the purposes of the certification hearing because: (a) the fact is not contentious and is common ground among the parties; (b) the fact is not hearsay with respect to the issues to be determined on the certification motion; or (c) the fact is admissible pursuant to a recognized hearsay exception such as the hearsay exception for admissions by a party[6] or the exception for business records.[7] The fact of the *Independent Review* having occurred is part of the historical background to Ms. Green's and the putative class members' claims and some of the *Independent Review* is admissible simply for having been said but not necessarily for the truth of what was said.

[27] In these circumstances, it is not necessary for me to determine whether the *Independent Review* is admissible to the public document exception to hearsay or as as a principled hearsay exception in accordance with the principles of necessity and reliability. The *Independent Review* is admissible and the use to be made of it will depend on a contextual analysis of the matter in issue in the discussion that follows.

D. Factual and Procedural Background

1. The Motherisk Program

[28] In 1985, Dr. Koren, who is a physician and clinical toxicologist, founded the Motherisk Program at the Hospital for Sick Children. The program's main function was to offer clinical information on the safety of drugs and other chemical agents used by pregnant and lactating women. The program continues to provide this service today.

[29] Julia Klein was the manager of the Motherisk laboratory from January to May 2005. Mr.

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[6] Subject to the rule in criminal proceedings about confessions made to a person in authority, evidence of an out of court statement of a party is admissible: *R. v. Evans*, [1993] 2 S.C.R. 629.

[7] A business record of a fact made in the ordinary course of business at the time of the occurrence of the fact by a person obliged to record the information is admissible: *Ares v. Venner*, [1970] S.C.R. 608; Ontario *Evidence Act*, R.S.O. 1990, c. E.23, s. 35.

Gareri was the manager from May 2005 to 2015. A quality manager was introduced in 2008. Beginning in 2008, the laboratory used graduate students and fellowship recipients to interpret the hair test results. A laboratory supervisor was introduced to the Motherisk program in 2009. A written standardized interpretation guideline was also introduced in 2009.

[30] In the 1990s, the Hospital established and operated the Motherisk laboratory as part of the Motherisk program. This clinical laboratory, which was a significant revenue generator for the Hospital, offered a hair testing service to physicians, hospitals, community health providers, the Crown, child welfare agencies, and to others who requested tests to determine whether an individual was a substance abuser. Child welfare agencies used hair test results when parents sought voluntary access to services, such as assisting a parent manage drug or alcohol use and when the agency was prosecuting a child protection case.

[31] Hair testing is a process by which hair strands are analyzed to detect the use of drugs or alcohol. The science was pioneered in 1978, progressively developed, refined and improved, and is a now an accepted science practiced throughout the world and endorsed by the United Nations. In contrast to urine and blood testing, which can detect only recent drug and alcohol use, hair testing detects historical consumption.

[32] The hair testing process works by detecting metabolites, which are formed by a human body breaking down (metabolizing) drugs or alcohol that have been consumed.

[33] Metabolites remain in hair long after ingestion and hair testing is unaffected by periods of abstinence because the test will detect metabolites in older portions of the hair. Because hair grows at an average of 1 cm per month, a single sample can be cut into smaller segments and a segmental analysis of hair allows for comparison of drug or alcohol use in an individual in different periods of time. In contrast to hair analysis, urine analysis shows alcohol consumption over a much shorter period. Generally, alcohol will only remain in a person's system for 12-36 hours, depending on factors such as level of alcohol consumption and hydration level of the subject.

[34] There are two main metabolites for alcohol that can be found in human hair: fatty acid ethyl esters ("FAEE") and ethyl glucuronide ("EtG"), which is the most sensitive and most specific biomarker for alcohol and a marker not influenced by hairspray, wax, oil, grease, or ethanol-containing hair products, which may yield false results. However, EtG concentrations may be lowered or false reports may be caused by bleaching, perming, or dyeing of hair. A concentration of >30 pg/mg EtG in scalp hair up to 6 cm is strongly suggestive of excessive alcohol consumption.

[35] To test for alcohol, the Motherisk laboratory used FAEE testing which uses gas chromatography – mass spectrometry ("GC-MS") technology.

[36] The Motherisk laboratory used ELISA (enzyme-linked immunosorbent assay) to test for: amphetamine, barbiturates, benzodiazepine, benzoylecgonine (a metabolite of cocaine), cannabis/THC, cocaethylene, cocaine, codeine, hydrocodone, hydromorphone, LSD, MDA, MDMA, meperidine, methadone, methamphetamine, morphine, opiates, oxycodone, PCP, and 6-AM. The details of the various methodologies changed as the test methods were refined and improved from time to time as the science continued to be developed.

[37] From September 2010 to May 2014, the laboratory confirmed the majority of its test results for drugs of abuse using GC-MS. From May 2014 to the end of the class period, the

laboratory confirmed the majority of its test results for drugs of abuse using liquid chromatography – tandem mass spectrometry (LC-MS/MS).

[38] The laboratory's general practice was to collect or receive a hair sample, conduct the hair test, report the results, and provide additional information as requested by the customer of its service.

[39] Sometimes, the Motherisk laboratory collected the hair sample for the test and in other instances the hair sample was collected and sent to the laboratory for testing. Up until September 2010, only some hair samples were washed before testing at the laboratory. After September 2010, all adult hair samples were washed.

[40] The laboratory provided the client with a Results Report, the content of which changed over time, but which always described the concentration of a drug or alcohol metabolite in the sample tested and whether that amount constituted a "positive", "negative", or "trace" result. If asked, the laboratory staff would respond to questions about the test and its interpretation. In some instances, an additional step was taken before the delivery of the Results Report. The additional step was to send the hair sample to a Reference Laboratory, a third-party, for re-testing or confirmation of the results.

[41] Between February 2011 and 2015, the laboratory sent all positive alcohol tests for additional testing.

[42] Ms. Green alleges that: the laboratory did not have standard operating procedures; it did not comply with chain of custody and other forensic standards; its testing did not conform with recognized standards; it did not properly retain data; and it did not properly interpret and report test results.

[43] From 2005-2010 the laboratory used only the ELISA test to test for substance abuse. Ms. Green alleges this was negligent because ELISA is intended to be only a preliminary screening test.

[44] Of the 18,463 individuals who were tested by the Motherisk laboratory, a total of 10,004 were reported as having a positive result. 6,958 of the reported positives were individuals referred from child protection agencies.

[45] A positive result had substantial significance to the life of the person tested because evidence of substance abuse could prompt intervention by child protection agencies and the outcome of the child protection proceedings could be a diminishment or the complete loss of parental rights. A positive result could also have substantial significance in matrimonial disputes over custody and access.

[46] As noted above, the test results were also sometimes used as evidence in criminal proceedings.

[47] Before the commencement of this action, the laboratory's test results were used as evidence in numerous reported court decisions.[8]

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[8] *Catholic Children's Aid Society of Metropolitan Toronto v. D.P.*, [1988] O.J. No. 723 (Prov. Ct.); *R. v. Ruvinsky*, [1998] O.J. No. 3621 (Prov. Div.); *Catholic Children's Aid Society of Metropolitan Toronto v. D.P.*, 1998

2. The Background to Ms. Green's Claim

CarswellOnt 1047 (Prov. Div.); *International Union of Operating Engineers v. Sarnia Cranes Limited*, [1999] OLRD No. 1282 (O.L.R.B.); *Portelance v. Blanchard*, 2005 CarswellOnt 5192 (Sup Ct); *R. v. McCauley*, [2007] O.J. No. 1593 (S.C.J.); *R. v. K.M.*, 2007 CanLII 13937 (ONSC); *R. v. K.M.*, 2007 CanLII 13937 (ONSC); *CAS of Northumberland v. D.P.*, [2008] O.J. No. 2047 (S.C.J.); *Garrity v. Garrity*, [2008] O.J. No 2401 (Sup. Ct.); *CAS of the Region of Halton v. T.G.*, 2008 ONCJ 806; *CAS of Toronto v. Y.B.*, 2008 ONCJ 800; *Catholic CAS of Toronto v. C.S.*, 2008 ONCJ 785; *CAS of Hamilton v. L.V.*, [2009] O.J. No. 1468 (S.C.J.); *CAS of the Regional Municipality of Waterloo v. L.J.A.A.*, 2009 ONCJ 226; *CAS of Pictou County v. A.J.G.*, 2009 NSFC 26; *CAS of the County of Lanark and the Town of Smiths Falls v. S.M.*, [2009] O.J. No. 5713; *CAS of Toronto v. T.L.*, 2009 ONCJ 788; *CAS of Toronto v. R.E.A.*, 2009 CarswellOnt 8380; *Durham CAS v. T.W.*, [2009] O.J. No 4456; *CAS of the County of Simcoe v. S.L.*, [2009] O.J. No. 633; *CAS of Toronto v. D.S.*, [2009] O.J. No. 4605 (S.C.J.); *Children and Family Services for York Region v. H.C.*, [2009] O.J. No. 3527 (Div. Ct.); *CAS of Toronto v. V.L.*, 2009 ONCJ 766; *R. v. T.B.*, 2010 ONSC 1579; *R. v. Broomfield*, 2010 ONCA 558; *Children and Family Services for York Region v. T.B.*, 2010 ONSC 7047; *Nova Scotia (MCS) v. R.M.S.*, 2010 NSSC 177; *R. v. T.B.*, 2010 ONSC 1579; *Catholic CAS of Toronto v. A.V.*, 2010 ONCJ 657; *Catholic CAS of Toronto v. S.S.*, 2010 ONCJ 700; *Lennox and Addington Family and Children's Services v. S.W.*, 2010 ONSC 2585; *CAS of the Niagara Region v. T.B.*, 2011 ONSC 2702; *New Brunswick (MSD) v. J.R.C.*, 2011 NBQB 355; *Nova Scotia (MCS) v N.L.*, 2011 NSSC 369; *CAS of Algoma v. L.G.*, 2011 ONCJ 392; *CAS of Toronto v. R.H.E.*, 2011 ONCJ 650; *CAS of Toronto v. T.G.*, 2011 ONCJ 625; *CAS of Toronto v. T.S.*, 2011 ONCJ 732; *Mattalo v. Perri*, 2011 ONCJ 899; *Catholic CAS of Hamilton v. C.R.P.*, 2011 ONSC 2056; *Mi'kmaw Family and Children's Services v. B.L.*, 2011 NSSC 161; *CAS of Simcoe County v. T.W.*, 2012 ONSC 3635; *Catholic CAS of Toronto v. M.M.*, 2012 ONCJ 369; *CAS of the Region of Halton v. D.K.*, 2012 ONCJ 633; *CAS of Toronto v. B.B.*, 2012 ONCJ 646; *CAS of Toronto v. D.B.*, 2013 ONCJ 405; *R c. G.S.*, 2013 QCCQ 2108; *CAS of Algoma v. R.S.*, 2013 ONCJ 688; *CAS of Toronto v. D.B.-S.*, 2013 ONCJ 8; *CAS of Toronto v. S.N.*, 2013 ONCJ 345; *Catholic CAS of Toronto v. S.S.*, 2013 ONCJ 51; R. c. G.S., 2013 QCCQ 2108; *CAS of Toronto v. C.J.*, 2014 ONCJ 221; *Chatham-Kent Children's Services v. A.K.*, 2014 ONCJ 224; *CAS of Toronto v. B.L.*, 2014 ONCJ 486; *Catholic CAS of Toronto v. A.D.*, 2014 ONCJ 490; *Nova Scotia (MCS) v. N.L.*, 2014 NSSC 201; *CAS of the Niagara Region v. L.P.*, 2014 ONSC 4914; *CAS of Toronto v. B.-L.*, 2014 ONCJ 90; *R. v. Chauhan*, 2014 ONSC 5557; *S.B. v. C.C.*, 2014 ONSC 2903; *White v. Noel*, 2014 ONCJ 555; *Windsor-Essex CAS v. T.B.*, 2014 ONCJ 239; *Halton CAS v. A.M.R.*, 2014 ONCJ 183.

SEALING ORDER

[63] The laboratory's Reference Range again noted that higher concentrations of FAEE could occur in hair in the absence of drinking with the use of high-ethanol content haircare products, and that the laboratory recommended that use of any haircare product containing alcohol be discontinued for three months prior to hair analysis.

[64] On April 28, 2011, Ms. Green began attending for urine tests for drug and alcohol at CML Laboratories and more frequently starting in August 2011. With one exception, the urine tests indicated no alcohol.

[65] Relying on Dr. Salomone's evidence, Dr. Koren challenges the accuracy and the reliability of Ms. Green's urine tests from CML Laboratories. In Dr. Salomone's opinion, notwithstanding the negative reports, the results of Ms. Green's urine tests are consistent with alcohol abuse during the periods of February to May 2011, and August to November 2011, respectively. He explained that since Ms. Green's urine tests were done only on weekdays, it is likely that she consumed alcohol on weekends, and obtained negative results during her weekday urine tests.

[67] The Interpretation Guideline indicated that FAEE results could be falsely elevated in hair by use of ethanol-containing hair products and it was recommended to avoid the use of any haircare product containing ethanol for three months prior to hair analysis and that it was not advisable to use the results of hair testing for alcohol markers in isolation from other evidence pertaining to alcohol consumption to determine recent drinking behaviours.

[68] On August 12, 2011, the laboratory provided an interpretation letter of Ms. Green's test results to George Asare at the Toronto Children's Aid Society. The letter stated that:

> This sample tested positive for EtG at a concentration of 60 pg/mg. The positive test results for both FAEE and EtG provide clear evidence for frequent, heavy alcohol use during the three-month time period represented.

[69] It was Dr. Salomone's opinion that this letter was accurate.

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[72] On November 16, 2011, Ms. Green attended at the laboratory for another hair test. Her test scores were reported on December 14, 2011 and indicated that her hair was washed for all analysis. The test scores were: (a) positive for FAEE at 1.385 ng/mg (GC/LC-MS analyzed); (b) positive for EtG at 173 pg/mg (determined by LC-MS/MS at USDTL); and (c) negative for all drugs.

[73] On January 4, 2012, the laboratory provided another interpretation letter of the November test to Mr. Asare at the Society. The letter concludes that the elevated levels of both FAEE and EtG provide clear evidence of frequent, heavy alcohol consumption during the three-month period represented by the test.

[74] It was Dr. Salomone's opinion that this letter was accurate.

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[76] On January 23, 2012, Ms. Green wrote to the Society and alleged that the laboratory's test results were not accurate and that she intended to obtain a second opinion. However, she did not do so on the advice of a person whose name she cannot recall.

[77] On February 24, 2012, Ms. Green attended the laboratory for another hair test. Her test scores were reported on March 16, 2012. The test scores were negative for all substances tested.

SEALING ORDER

[79] On May 14, 2012, with the Society's consent, the child was placed in the custody of Ms. Green and her boyfriend. The terms of the court supervisory Order included the condition that the parents abstain from drugs and alcohol entirely, enroll in a relapse prevention program, and not expose the child to any form of violence.

[80] On November 29, 2012, the supervision order of May 14, 2012 was terminated.

[81] In April 2013, the Society closed its file on Ms. Green and her boyfriend.

3. The Internal Review, the *Independent Review*, and the Motherisk Commission

[82] In October 2014, in *R. v. Broomfield*,[9] the Ontario Court of Appeal sparked a controversy and a public outcry about the reliability of the hair analysis opinions provided by the Motherisk laboratory. As a result of the public outcry, the Hospital ordered an Internal Review.

[83] The Province of Ontario also responded to the scandal. On November 26, 2014 by Order in Council, the Province established the Independent Review of the Motherisk Drug Testing Laboratory at Toronto's Hospital for Sick Children. The government appointed the Honourable

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[9] *Ibid.*

Susan Lang as Independent Reviewer.

[84] The Motherisk laboratory ceased operating in March 2015 and closed permanently in April 2015, for all purposes except research.

[85] On December 17, 2015, the Independent Reviewer released a report. Her principal findings were that: (a) the laboratory's test results were unreliable for use in child protection and criminal proceedings; (b) the procedures used were negligently managed; (c) the laboratory never met forensic as opposed to clinical standards for testing; (d) from 2005 to 2010, contrary to recognized forensic standards, the laboratory did not routinely wash hair samples to remove contamination of the sample; (e) the laboratory did not apply or properly apply chain of custody protocols; (f) the laboratory staff were not adequately supervised; (g) the laboratory staff did not have the expertise to give forensic interpretations of the test results; and (h) the use of MDTL hair-testing evidence in child protection and criminal proceedings has serious implications for the fairness of those proceedings and warrants an additional review.

[86] In her report, the Independent Reviewer cautioned that she had not made any determination of civil liability or negligence and she specifically warned against using her findings for that basis. The report contained the following caution:

> Consistent with the terms of the order in council, in this Report I do not express any conclusion or recommendation regarding professional discipline matters involving any person or the civil or criminal liability of any person or organization. Nothing in this Report should be interpreted as suggesting otherwise.

[87] On December 17, 2015, Dr. Michael Apkon, the CEO of the Hospital, issued the following statement:

> We deeply regret that the practices in the Motherisk drug testing laboratory didn't meet the high standard of excellence that we have here at SickKids, and we extend our sincere apologies to the children, families and organizations who feel that they may have been impacted in some way.

[88] On January 15, 2016, by Order in Council, the Government of Ontario established the Motherisk Commission led by Commissioner Justice Judith Beaman with a mandate that included reviewing all individual cases where a request is made by a person who may have been affected by the hair testing at the Motherisk laboratory. The Commission's mandate also included offering support and assistance to families affected by flawed hair testing.

[89] On January 22, 2016, an article in the *Toronto Star* reported that in an interview Dr. Apkon had stated: "We apologize deeply … and acknowledge responsibility for the hospital's role. We appreciate that in some cases, we may need to participate in compensating impacted families."

[90] Under the Commissioner's leadership, the Motherisk Commission established a Case Review and Remedy Determination Process, under which, based on its own assessment of priorities or upon request from a member of the public, commission legal counsel would review files in which a positive testing result had been made by the laboratory in order to make a recommendation to the Commissioner that she determine that: (a) Motherisk testing did not have a substantial impact on the outcome of the proceedings; (b) Motherisk testing had a substantial impact on the outcome; or (c) it was unclear what role the Motherisk testing played in the

outcome, in which case, further information would be gathered.

[91] If the Commissioner determined that a substantial impact had occurred, the Commission would notify the affected parties. A substantial impact was defined to mean that the test materially affected the outcome of the case having regard to one or more of the following factors: (a) the creation of a status quo with respect to the child's living arrangements; (b) the position of the Children's Aid Society respecting the direction of the case; and, (c) the decision of the court.

[92] Where the Commissioner determined that a test did have a substantial impact on the outcome of a child protection case, the Review Process sets out services that would be offered to the affected persons including: (a) counselling assistance; (b) a meeting with the Commissioner and/or review counsel to discuss the outcome; (c) legal referral; (d) funding for legal services; and (e) any other services the Commissioner deems appropriate, having regard to the fundamental principles set out in the Terms of Reference.

[93] The Commissioner also offers services where a test is determined not to have had a substantial impact on a case, including: (a) counselling assistance; (b) a meeting with the Commissioner and/or review counsel to discuss the outcome; (c) a reconsideration of the file review; and (d) any other services the Commissioner deems appropriate, having regard to the fundamental principles set out in the Terms of Reference.

[94] In a June 3, 2016 letter posted on the Motherisk Commission webpage, Commissioner Beaman reported on the status of the Commission's work and findings to Executive Directors and Legal Counsel to Children's Aid Societies. In her letter, Commissioner Beaman noted that the Commission had received approximately 425 files that were considered high priority and had reviewed about one-third of them. Seven files were found to reveal a substantial reliance on the Motherisk hair test results, and in those cases, the Commission was working with the agencies, parents, children and others to move them forward so that the children in these cases were not caught in limbo.

[95] According to posts made by the Motherisk Commission on its Facebook page in February 2017: (a) the Motherisk Commission had reviewed 545 cases and had identified 24 cases in which tests were a key factor in the removal of children; (b) 146 individuals had contacted the Motherisk Commission; and (c) 29 people have received counselling services.

4. Mr. Wilson's Evidence

[96] In Ontario, the child protection system is governed by the *Child and Family Services Act*.[10] Mr. Wilson's evidence was proffered for a summary judgment motion brought by Dr. Koren in Ms. Green's individual action, but his evidence was used for the certification motion.

[97] I did not allow the summary judgment motion to proceed, pre-certification. For present purposes, it is not necessary to set out Mr. Wilson's evidence, which was largely directed at explaining the child protection regime and the associated court proceedings in child protection matters.

[98] Mr. Wilson explained the role and relevance of substance abuse evidence in those proceedings but for the present purposes of a certification motion, I need not explicate his

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[10] *Ibid.*

evidence.

5. Ms. Green's Proposed Class Action

[99] On December 22, 2015, Yvonne Marchand, the then proposed representative plaintiff, filed a Notice of Action against the Hospital, Dr. Koren and Mr. Gareri. Ms. Marchand later withdrew to become a putative class member and to bring her own individual action.

[100] On January 20, 2016, Ms. Marchand filed a Statement of Claim.

[101] On June 17, 2016, Dr. Koren delivered a Statement of Defence.

[102] On June 20, 2016, the Hospital and Mr. Gareri delivered a Statement of Defence.

[103] The Defendants issued Third Party Claims against 47 Children's Aid Societies.[11]

[104] On November 16, 2016, Ms. Green delivered an Amended Statement of Claim and became the proposed representative plaintiff.

[105] On December 2, 2016, Dr. Koren delivered an Amended Statement of Defence.

[106] On December 9, 2016, the Hospital and Mr. Gareri delivered an Amended Statement of Defence.

[107] In light of Ms. Green confining her damages to the several liability of the Defendants, the Defendants discontinued their Third Party Claims against the 47 Children's Aid Societies.

[108] In her Statement of Claim, Ms. Green claims the following relief:

> (a) an order certifying this action as a class proceeding and appointing her as representative plaintiff for the Class and the Family Law Class;
>
> (b) a declaration that the Defendants were negligent in the operation and

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[11] (1) Akwesasne Child and Family Services; (2) Anishinaabe Abinoojii Family Services; (3) Brant Family and Children's Services; (4) Bruce, Grey Child and Family Services; (5) Children's Aid Society of Hamilton; (6) Catholic Children's Aid Society of Hamilton; (7) Children's Aid Society of Toronto; (8) Catholic Children's Aid Society of Toronto; (9) Jewish Family and Child; (10) Native Child and Family Services of Toronto; (11) Chatham-Kent Children's Services; (12) Children's Aid Society of the District of Nipissing and Parry; (13) Children's Aid Society of Algoma; (14) Children's Aid Society of London and Middlesex; (15) Children's Aid Society of Oxford County; (16) Simcoe Muskoka Family Connexions; (17) Dilico Anishinabek Family Care; (18) Family Care, Dufferin Child and Family Services; (19) Durham Children's Aid, Society; (20) Family and Children's Services of Frontenac; Lennox and Addington; (21) Family and Children's Services of Lanark, Leeds and Grenville; (22) Family and Children's Services of Guelph and Wellington County; (23) Family and Children's Services Niagara; (24) Family and Children's Services of Renfrew County; (25) Family and Children's Services of St. Thomas and Elgin County; (26) Family and Children's Services of the Waterloo Region; (27) Halton Children's Aid Society; (28) Highland Shores Children's Aid; (29) Huron-Perth Children's Aid Society; (30) Kawartha-Haliburton Children's Aid Society; (31) Kenora-Rainy River Districts Child and Family Services; (32) Kunuwanimano Child & Family Services; (33) North Eastern Ontario: Family and Children's Services; (34) Payukotayno James and Hudson Bay Family Services; (35) Peel Children's Aid Society; (36) Sarnia-Lambton Children's Aid Society; (37) The Children's Aid Society of Haldimand and Norfolk; (38) The Children's Aid Society of Ottawa; (39) The Children's Aid, Society of the District of Thunder Bay; (40) The Children's Aid Society of the Districts of Sudbury and Manitoulin; (41) The Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry; (42) Tikinagan Child and Family Services; (43) Valoris for Children and Adults of Prescott-Russell; (44) Weechi-it-te-win Family Services Inc.; (45) Windsor- Essex Children's Aid Society; (46) Kina Gbezhgomi Child & Family Services; and (47) York Region Children's Aid Society.

supervision of MDTL;

(c) a declaration that the Defendants are liable to the Plaintiff, the Class and the Family Law Class for damages for their negligence in the operation and supervision of MDTL;

(d) a declaration that the Defendants are liable to the Family Class for damages resulting from the injuries to members of the Family Class;

(e) damages for negligence in the amount of $200,000,000, or such other sum as this Honourable Court may find appropriate;

(f) damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 and/or the equivalent legislation in other provinces;

(g) punitive damages in the amount of $250,000,000;

(h) prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

(i) costs of the action on a substantial indemnity basis or in an amount that provides full indemnity to the plaintiff;

(j) the costs of notice and of administering the plan of distribution of the recovery in this application, plus applicable taxes, pursuant to section 26 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6; and,

(k) such further and other relief as this Honourable Court may deem just.

[109] Ms. Green proposes the following class definition:

(a) All persons who reside in Canada who tested positive from a hair-strand drug and/or alcohol test administered by the Motherisk Drug Testing Laboratory between January 2005 and April 2015 (the "Class" or "Class Members")

(b) All parents, grandparents, children, grandchildren, siblings and spouses (within the meaning of section 61 of the *Family Law Act*, R.S.O. 1990, c. F-3, as amended) of a Class Member (the "Family Law Class" or the "Family Law Class Members")

[110] Ms. Green's Statement of Claim pleads a claim of so-called systemic negligence. In her Statement of Claim, Ms. Green alleges that the Defendants were negligent in that: (a) the laboratory staff were not qualified to interpret the hair test results; (b) the laboratory negligently relied on the unconfirmed test results of its enzyme-linked immunosorbent assay ("ELISA"), which should only be used as a preliminary screening test; (c) the laboratory had no written standard operating procedures for the hair tests it carried out and did not keep reliable contemporaneous documentation; (d) the laboratory technicians who were assigned to carry out the ELISA tests were not properly supervised resulting in reporting anomalies or errors; (e) the laboratory failed to wash hair samples routinely before analysis; (f) the laboratory had inadequate chain-of-custody procedures; (g) the laboratory had inadequate record keeping practices; and (h) after 2010, the laboratory used gas chromatography-mass spectrometry ("GC-MS") to purportedly confirm test results, but the procedure was flawed.

[111] Ms. Green claims compensatory damages for: (a) pain and suffering; (b) impaired ability

to participate in normal family affairs and relationships; (c) loss of custody, be it temporary or permanent, on false pretenses, resulting in loss of dignity and interference with familial relations; (d) unnecessarily protracted and more complex legal proceedings, resulting in increased legal costs, including the need for expert responding evidence; (e) requirement of supervised visitation on false pretenses, resulting in loss of dignity and interference with familial relations; (f) exacerbation of depression, anxiety, emotional distress and mental anguish, leading to impairment of mental and emotional well-being; (g) destruction of credibility, character and trustworthiness; (h) loss of friendship and companionship; and (i) an impaired ability to obtain and sustain employment, resulting either in lost or reduced income and ongoing loss of income.

[112] I pause here to note that all of the various heads of damages are intensely individualistic and idiosyncratic as is the quantification of the entitlements to compensation. As the discussion below will reveal, the individual nature of both the causation and the quantification of the damages is a critical factor in the analysis of whether Ms. Green's proposed class action satisfies the criteria for certification as a class action.

[113] Ms. Green proposes six common issues; namely:

> 1. By its operation or management of the Motherisk Drug Testing Laboratory between January 2005 and April 2015, did the Defendants breach a duty of care it owed to the Class?
>
> 2. If the answer to Common Issue No. 1 is "yes", are the Family Class members entitled to damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F-3?
>
> 3. If the answer to Common Issue No. 1 is "yes", can the court make an aggregate assessment of damages suffered by all class members as part of the common issues trial?
>
> 4. If the answer to Common Issue No. 3 is "yes", in what amount?
>
> 5. If the answer to Common Issue No. 1 is "yes", does the Defendants' conduct justify an award of punitive damages?
>
> 6. If the answer to Common Issue No. 5 is "yes", what amount of punitive damages ought to be awarded against the Defendants?

[114] In their Statements of Defence, the Defendants raise factual defences and legal defences about the duty of care, standard of care, general causation, specific causation, the heads of recoverable damages, the apportionment of liability and also defences based on the class members' claims being: (a) statute-barred under the *Limitations Act, 2002*;[12] (b) precluded by issue estoppel; or by the Defendants being protected by: (c) expert witness immunity; and (d) statutory immunity under s. 142 of the *Courts of Justice Act*,[13] which provides that a person is not liable for any act done in good faith in accordance with an order or process of a court in Ontario.

[115] Ms. Green's litigation plan sets out a proposed scheme to manage the action from pre-certification, certification, discovery, the common issues trial, and for the steps following a

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[12] S.O. 2002, c. 24, Sched. B.
[13] R.S.O. 1990, c. C.42.

favourable disposition of the common issues. For present purposes, it is adequate to set out only the portion of the plan that describes the steps prescribed for after the common issues trial. The litigation plan states:

> *LITIGATION STEPS FOLLOWING THE DETERMINATION OF COMMON ISSUES FAVOURABLE TO THE CLASS*
>
> ....
>
> *Valuation of Damages*
>
> 24. Assuming that one or more of common Issues (a) and (c) are resolved in favour of the plaintiff, the plaintiff proposes three (3) methods for assessing and distributing damages for the class members as follows: (a) global punitive damages (to be determined as Common Issue (b) and (I) to be distributed on a pro rata basis; (b) aggregate damages for the individual claimants and their family law claimants (to be determined as Common Issue (e) to be distributed on a pro rata basis); and/or (c) Claims Forms damages of individual claimants and their family law claimants to be determined in individual assessments.
>
> 25. The Claims Form will ask each claimant to establish their membership in the class by setting out their allegations and the damage they claim to have suffered.
>
> 26. The Claims Form must be filed with the Administrator within six (6) months of the Notice of Resolution, failing which the claimant will be deemed to have waived his or her claim.
>
> 27. The Administrator shall, after a review of the Claims Forms and all supporting documentation, determine if the claimant qualifies as a class member (the "Approved Claimant").
>
> *Resolution of the Individual Issues*
>
> 28. The plaintiff has requested an aggregate assessment of monetary relief as a common issue. Even with that assessment, it may still be necessary to establish a procedure in accordance with section 25 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 to determine the individual damages of Class Members. A simplified process for such claims is set out below.
>
> *Individual Damage Assessments*
>
> 29. The plaintiff proposes the following process for individual damages and causation assessments:
>
> (a) Within a time prescribed by the court, each Approved Claimant will be invited to attend in a place designated by the Court for an impact interview (the "Impact Interview"), to be conducted by a multidisciplinary panel of three (3) practitioners with experience dealing with adoption, custody, access, and related issues (the "Interview Panel");
>
> (b) The members of the Interview Panels will be chosen by the plaintiffs' counsel in consultation with the defendants and the court, to ensure the appropriate make up and experience of the Interview Panels;

(c) The Interview Panel will conduct an Impact Interview with each Approved Claimant and will prepare, within thirty (30) days of the Impact Interview, a joint report setting out the Claimant's experiences and the Interview Panel's conclusions as to the impact of the Approved Claimant's experiences (the "Joint Impact Report");

(d) Within thirty (30) days of the Joint Impact Report, plaintiffs' counsel and defendants' counsel will meet to determine the damages associated to each Approved Claimant (the "Damages Meeting"), if any;

(e) If the parties are able to agree on the appropriate level of damages for an Approved Claimant, the defendants shall, within thirty (30) days of such agreement, make payment to the class member;

(f) If the parties are unable to agree on the appropriate level of damages for an Approved Claimant, within thirty (30) days of the Damages Meeting, plaintiffs' counsel and defendants' counsel will attend before a referee designated by the Court to determine causation and the damages attributable to each Approved Claimant (the "Damages Hearing");

(g) No further evidence is permitted at the Damages Hearing save for the Joint Impact Report and three (3) page statement from the parties' own designated damages/causation expert;

(h) The time and place of the Damages Hearing will be set by the referee, but all Damages Hearings are to be scheduled within thirty (30) days of the Joint Impact Report;

(i) The procedures and conduct of the Damages Hearing will be set by the referee subject to the following:

(i) All evidence and submissions shall be presented at the Damages Hearing which shall not take more than two (2) hours in total;

(ii) Offers to settle are permitted up to one (1) week prior to the scheduled Damages Hearing;

(iii) Two (2) weeks prior to the Damages Hearing, each party shall serve and file with the referee a three (3) page statement from the parties' own designated damages expert, if the party so chooses;

(iv) The referee may also make requests for further documentation from the parties at any time;

(v) Each party shall have an opportunity to provide oral submissions, not to exceed forty-five (45) minutes per party;

(vi) The conduct of the Damages Hearing and all procedures shall be determined by the referee having regards to the purposes and goals of the *Class Proceeding Act, 1992*, subject to any order of the Court providing otherwise;

(vii) The referee shall render a decision, with reasons, within sixty (60) days after the Damage Hearing;

(viii) The referee's decision is final and binding on the parties;

(ix) Should the referee's decision be in favour of the Approved Claimant, the defendants shall pay any damages awarded to the Approved Claimant within thirty (30) days of the referee's decision.

Individual Issues Resolution

30. For the resolution of any individual issues, aside from issues of damages and causation, the plaintiff proposes the following process:

(a) Within thirty (30) days of the Joint Impact Report, the defendants shall serve on plaintiffs' counsel a statement of dispute of each Approved Claimant setting out what individual issues the defendants are asserting, aside from damages issues, which would limit the Approved Claimants' recovery of damages (the "Statement of Dispute");

(b) Within thirty (30) days of the Statement of Dispute, a referee appointed by the Court shall convene an individual issue hearing (the "Individual Issue Hearing"), with the following process:

(i) The time and place of the Individual Issue Hearing shall be set by the referee, but all Individual Issue Hearings are to be scheduled within thirty (30) days of receiving the Statement of Dispute;

(ii) In advance of the claims process, the referee, in consultation with plaintiffs' counsel, defendants' counsel and the Court, shall establish procedures for the determination of the Individual Issue Hearings, in a manner having regard to the purpose and goals of the *Class Proceedings Act, 1992*, subject to any order of the Court providing otherwise;

(iii) The referee shall render a decision, with reasons, within sixty (60) days after the Individual Issue Hearing;

(iv) The referee's decision is final and binding on the parties;

(v) Should the referee's decision be in favour of the claimant, a Damages Meeting will take place within thirty (30) days of the referee's decision and the damages will be made in accordance with the Individual Damages Assessments procedure set out above.

6. Other Actions Commenced against the Hospital

[116] In addition to the proposed class action, civil actions against the Defendants and others have been commenced with respect to what occurred at the Motherisk laboratory. The plaintiffs include: Frederick Barham, Kera Barnes, and Krista Lee Barnes, Tamara Broomfield, Christopher Hewitt, Jeffrey Hudson and C.H.H., Yvonne Marchand (she also commenced a judicial review proceeding), Ashley Simon Mason, William McIntyre and Natacha LeRoy, Andrew Ross Rebagliati, Christine Rupert (she also brought a judicial review proceeding), Jessica Symanek, Chastity Timmons (hers is a judicial review application), and Tammy Whiteman.

[117] Ms. Mason's action joins 101 co-plaintiffs. Mr. Rebagliati's action joins 58 co-plaintiffs.

Ms. Symanek's action joins 106 co-plaintiffs.

[118] In all, there are 328 plaintiffs proceeding with individual or joinder actions outside of the proposed class action.

E. Discussion and Analysis

1. Overview

[119] The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) 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 (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[120] As the discussion below will explain, in my opinion, Ms. Green's action satisfies the cause of action criterion for a class action, and with some revision, her action technically satisfies the identifiable class criterion. However, while some of her proposed common issues manifest commonality, they do not satisfy the common issues criterion. And, her action fails the preferable procedure criterion and the representative plaintiff criterion.

[121] Thus, although a group of claimants has allegedly been wronged, Ms. Green's proposed class action is not suitable for certification and her certification motion must be dismissed.

[122] As I shall explain, the major deficiency in Ms. Green's proposed class action is its failure to satisfy the preferable procedure criterion. This deficiency is related to what I shall describe as a design failure that ripples through all the certification criteria. Ms. Green's class action, which is based on systemic negligence, misses the target of providing access to justice and compensation for the injuries actually suffered by the class members and the design of her action impedes achieving genuine access to justice.

[123] In the case at bar, procedural and substantive access to justice will inevitably require individual issues trials for the class members with a significant enough injury to justify the expense of complex individual trials about liability. In the case at bar, hundreds of putative class members are already pursuing individual claims and the putative class members should not suffer the disappointment of a class action that will not take them far enough on the path to substantive justice.

[124] To explain why I am dismissing Ms. Green's certification motion, I shall: first, outline the general principles about certification of an action as a class action; second, consider the admissibility and adequacy of the evidence in the case at bar; third, analyze the preferable procedure criterion and the representative plaintiff criterion; and, lastly, address the other certification criterion.

[125] As I shall explain below, the design failures in the immediate case are similar to the

problems in *Dennis v. Ontario Lottery and Gaming Corp.*[14], which problems led the court to refuse to certify the action as a class action.

2. General Principles: Certification

[126] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.[15] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.[16] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) providing access to justice for litigants; (2) encouraging behaviour modification; and (3) promoting the efficient use of judicial resources.[17]

[127] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim.[18] However, the plaintiff must show "some basis in fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action.[19] The "some basis in fact" test sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.[20] In particular, there must be a basis in the evidence to establish the existence of common issues.[21] To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.[22] The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification.[23] Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.[24]

[128] On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the

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[14] 2010 ONSC 1332, aff'd 2011 ONSC 7024, aff'd 2013 ONCA 501, leave to appeal refused [2013] S.C.C.A. No. 373.

[15] *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[16] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.

[17] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29; *Hollick v. Toronto (City), supra*, at paras. 15 and 16.

[18] *Hollick v. Toronto (City), supra*, at paras. 28 and 29.

[19] *Hollick v. Toronto (City), supra*, at paras. 16-26.

[20] *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57; *McCracken v. CNR Co.*, 2012 ONCA 445.

[21] *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) at para. 21; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140.

[22] *Pro-Sys Consultants v. Microsoft, supra*, at para. 110.

[23] *Hollick v. Toronto (City), supra*, at para. 22.

[24] *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).

basis of a balance of probabilities but rather on that of the much less stringent test of "some basis in fact".[25] The evidence on a motion for certification must meet the usual standards for admissibility.[26] While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest.[27] In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge.[28]

3. Admissibility and Adequacy of the Evidence

[129] The Defendants submitted that Ms. Green has adduced no expert report and rather relies on the *Independent Review,* which they submit is inadmissible. The Defendants submit that Ms. Green has not satisfied the evidentiary threshold required for certification of her proposed class action.

[130] I disagree. Save as noted below, there was ample evidence to satisfy the some basis in fact standard for the certification criteria. I have already addressed the admissibility of the *Independent Review*. Based on its appropriate use and the Defendants' own documents and admissions, there is ample evidence for an analysis of the certification criterion.

[131] The Defendants also submit that Ms. Green does not demonstrate that there is a group of similarly situated individuals, as is required by the *Class Proceedings Act, 1992*, for the certification of a class action.

[132] I disagree. There is ample evidence from Ms. Green's evidence and from the Defendants' documents that there are numerous individuals that have potential claims against the Defendants about the Motherisk test results. And, I note that Ms. Green is the substitute for Ms. Marchand and that Ms. Marchand and Mr. Barham, Ms. Broomfield, Ms. Mason, Mr. McIntyre, Mr. Rebagliati, Mr. Rupert, Mr. Symanek, and Mr. Whiteman are potential class members if they do not opt out to pursue their individual actions.

4. Preferable Procedure Criterion

(a) Introduction

[133] As noted above, in the case at bar, the most problematic criterion for Ms. Green is the preferable procedure criterion, which is the fourth of the five criteria. To analyze this criterion, I will assume that the cause of action, the identifiable class, and the representative plaintiff criteria have been satisfied. I will also assume that proposed Common Issue No. 1 satisfies the common issues criterion. That question asks: "By its operation or management of the Motherisk Drug Testing Laboratory between January 2005 and April 2015, did the Defendants breach a duty of care it owed to the Class?" With these assumptions and based on the factual background set out above, I shall describe the general principles of a preferable procedure analysis and then apply

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[25] *Hollick v. Toronto (City), supra*, at paras. 16-26; *Cloud v. Canada* (2004), 73 O.R. (3d) 401 at para. 50 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

[26] *Martin v. Astrazeneca Pharmaceuticals PLC,* 2012 ONSC 2744; *Williams v. Canon Canada Inc.,* 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Ernewein v. General Motors of Canada Ltd., ibid*; *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 at para.13.

[27] *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at para. 76.

[28] *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057, aff'd 2012 BCCA 260.

those principles to the circumstances of the immediate case.

(b) General Principles: Preferable Procedure

[134] Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.[29]

[135] In *AIC Limited v. Fischer*,[30] the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell for the Court stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.[31] Arguments that no litigation is preferable to a class proceeding cannot be given effect.[32] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[33]

[136] Relevant to the preferable procedure analysis are the factors listed in s. 6 of the *Class Proceedings Act, 1992*, which states:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> 2. The relief claimed relates to separate contracts involving different Class Members.
>
> 3. Different remedies are sought for different Class Members.
>
> 4. The number of Class Members or the identity of each Class Member is not known.
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all Class Members.

[137] To satisfy the preferable procedure criterion, the proposed representative plaintiff must

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[29] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, *ibid.*

[30] 2013 SCC 69 at paras. 24-38.

[31] *Cloud v. Canada (Attorney General) Cloud v. Canada*, *ibid.*

[32] *1176560 Ontario Limited v. The Great Atlantic and Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), at para. 45, aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[33] *Markson v. MBNA Canada Bank, supra*; *Hollick v. Toronto (City)*, *ibid.*

show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.[34]

[138] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s) and their importance in relation to the claim as a whole; (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the *Act*; and (g) the rights of the plaintiff(s) and defendant(s).[35]

[139] The court must identify alternatives to the proposed class proceeding.[36] The proposed representative plaintiff bears the onus of showing that there is some basis in fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative.[37] It is not enough for the plaintiff to establish that there is no other procedure which is preferable to a class proceeding; he or she must also satisfy the court that a class proceeding would be fair, efficient and manageable.[38]

[140] In *AIC Limited v. Fischer,* Justice Cromwell pointed out that when the court is considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiff's claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case?; (2) What is the potential of the class proceeding to address those barriers?; (3) What are the alternatives to class proceedings?; (4) To what extent do the alternatives address the relevant barriers?; and (5) How do the two proceedings compare?[39]

[141] And in light of the Supreme Court of Canada's directives in *Hryniak v. Mauldin*[40] and *Bruno Appliance and Furniture, Inc. v. Hryniak,*[41] one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures. The proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the focus on judicial economy and with the part of the preferable procedure analysis that considers manageability and whether the claimants will receive a just and effective remedy for their claims.

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[34] *AIC Limited v. Fischer, supra*; *Hollick v. Toronto (City), ibid*; *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901.
[35] *Cloud v. Canada (Attorney General) Cloud v. Canada, ibid*; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.).
[36] *AIC Limited v. Fischer, ibid* at para. 35; *Hollick v. Toronto (City), ibid*at para. 28.
[37] *AIC Limited v. Fischer, ibid*at paras. 48-49.
[38] *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 at para. 62; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (S.C.J.) at para. 62-67.
[39] *AIC Limited v. Fischer, supra* at paras. 27-38; *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp., supra* at para. 125.
[40] 2014 SCC 7.
[41] 2014 SCC 8.

[142] In cases, particularly cases where the individual class members' respective harm is nominal, or cases where an aggregate assessment of damages in whole or in part is possible, a class action may more readily satisfy the preferable procedure criterion because the common issues trial may be the only viable means for remedying the wrong and for calling the wrongdoer to account because individual litigation may be prohibitively expensive.[42]

[143] In undertaking a preferable procedure analysis in a case in which individual issue trials are inevitable, it should be appreciated that the *Class Proceedings Act, 1992* envisions the prospect of individual claims being litigated and sections 12 and 25 of the *Act* empowers the court with tools to manage and achieve access to justice and judicial economy in those circumstances, and, thus, the inevitability of individual issues trials is not an obstacle to certification. In the context of misrepresentation claims, numerous actions have been certified notwithstanding individual issues of reliance and damages.[43]

[144] That said, in a given particular case, the inevitability of individual issues trials may obviate any advantages from the common issues trial and make the case unmanageable and thus the particular case will fail the preferable procedure criterion.[44] Or, in a given case, the inevitability of individual issues may mean that while the action may be manageable, those individual issue trials are the preferable procedure and a class action is not the preferable procedure to achieve access to justice, behaviour modification, and judicial economy. A class action may not be fair, efficient and manageable having regard to the common issues in the context of the action as a whole and the individual issues that would remain after the common issues are resolved.[45] A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action.[46]

(c) Analysis: Preferable Procedure

[145] As noted by Justice Cromwell in *AIC Limited v. Fischer*,[47] access to justice has both a substantive and procedural dimension. In the case at bar, I shall begin the analysis of the preferable procedure criterion by focusing on substantive justice where, in my opinion, there is a design defect in Ms. Green's systemic negligence class action as a means to obtaining substantive justice. Then I shall analyze whether Ms. Green's proposed class action satisfies the

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[42] *Markson v. MBNA Canada Bank, ibid*; *Marcantonio v. TV/ Pacific Inc.*, [2009] O.J. No. 3409 (S.C.J.) at para. 9; *Silver v. IMAX Corp.*, [2009] O.J. No. 5585 (S.C.J.) at paras. 215-216, leave to appeal to Div. Ct. refused, 2011 ONSC 1035 (Div. Ct.).

[43] *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at paras. 48-49, rev'g (1999), 44 O.R. (3d) 173 (S.C.J.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 660; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Div. Ct.) at para. 35; *Lewis v. Cantertrot Investments Ltd.*, [2005] O.J. No. 3535 at para. 20 (S.C.J.); *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.); *Murphy v. BDO Dunwoody LLP*, [2006] O.J. No. 2729 (S.C.J.); *Silver v. Imax Corp.,ibid*; *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 at para. 103 (S.C.J.); *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 at paras. 340, 350-351, leave to appeal to Div. Ct. refused, 2012 ONSC 6101 (Div. Ct.); *OPA v. Ottawa Police Services Board*, 2014 ONSC 1584 (Div. Ct.) at para. 59; *Fantl v. Transamerica Life Canada*, 2016 ONCA 633.

[44] *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.); *Arabi v. Toronto-Dominion Bank*, [2006] O.J. No. 2072 (S.C.J.), aff'd [2007] O.J. No. 5035 (Div. Ct.).

[45] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp., supra.*

[46] *Fantl v. Transamerica Life Canada, supra*, at para. 26.

[47] 2013 SCC 69 at paras. 24-38.

procedural, managerial, and judicial efficiency aspects of the preferable procedure criterion.

[146] The analysis of access to substantive justice begins with the constituent elements of a negligence claim, including a systemic negligence claim; those elements are: (1) the defendant owes the plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and, (5) the damages are not too remote in law.[48]

[147] In the case at bar, assuming the action was certified as a class action and assuming Ms. Green was successful at the common issues trial that established that there was a class-wide breach of a duty of care, the remaining four elements of the five constituent elements of the systemic negligence claim, plus the matters of the apportionment of liability and the various defences of the Defendants, would have to be resolved by individual issues trials.

[148] Also left for an individual issues trial – and this is the fatal design flaw of Ms. Green's proposed class action - is the class member's individual negligence claim which arises not from the circumstance that Motherisk's tests and reports were commonly unreliable but rather arises from the circumstance that Motherisk's particular test and report about the individual was all of unreliable, false and adversely influential to the outcome of the individual's court proceedings. The design defect in the immediate case is that compensable damages for the interference to and loss of parental rights and the associated personal agony do not follow from the representative plaintiff proving that the hair test reports were generally unreliable but rather follows from the individual class member proving that his or her test specific test results were all of unreliable, false and adversely influential. Describing the design defect somewhat differently, in the case at bar, if a class member took the benefit of a finding at the common issues trial that because of the Defendants' systemic negligence the results of all the hair tests at the Motherisk laboratory were unreliable, that judgment leads to little or no compensatory damages.

[149] This truth about the causation of the harm explains why the Motherisk Commission established a Case Review and Remedy Determination Process to identify the cases where the Motherisk testing had "a substantial impact" on the outcome and why primarily in those cases the Commission notified the affected persons. The Motherisk Commission recognized that an unreliable test that did not influence the result of the court proceedings does not occasion a harm for which there might be compensatory damages. In the case at bar, Ms. Green's focus on the systemic negligence of unreliable hair tests misses the point that the significant damages are caused not by the common unreliability of the tests, but by an individual's test being wrong with sometimes tragic consequences.

[150] An analogy may be helpful in understanding the design problem. Imagine that the Motherisk laboratory took blood samples to test for the presence of drugs and it was discovered, after the fact, that the laboratory's tests were unreliable and that the technicians had used unsterile equipment for testing the 18,000 patients. Based on those facts, a systemic negligence class action based on the fact that the blood tests were unreliable misses the point that the compensable damages are for those individual class members who were infected or who, individually, upon receiving notice, suffered an emotional shock of sufficient intensity to qualify for damages. In the analogous case, the unreliability of the test results would be neither here nor there in providing access to justice for the actual harm caused by the hospital's negligence in

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[48] *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.

spreading disease.

[151] This point can also be illustrated by Ms. Green's case. Assuming she was successful in showing that on a class-wide basis that the Defendants breached a duty of care by producing unreliable tests, Ms. Green, as a class member, would then have an individual issues trial to prove causation of damages from an unreliable test result. Ms. Green would have to prove causation of harm from an unreliable blood test and the quantum of the damages from that harm. However, there are little damages caused simply by an unreliable test result. She could also, of course, - at the individual issues trial – prove that she had been harmed by a false and adversely influential test result. The hard work of proving that the unreliable test actually adversely influenced the result of the court proceedings is a matter that Ms. Green would have to prove at her individual issues trial and the burden of that hard work is not lightened by the results of the common issues trial that established that the Defendants' tests were generally unreliable.

[152] *Dennis v. Ontario Lottery and Gaming Corp.*[49] demonstrates how design defects in the theory of the common issues of a proposed class action may cause the action to fail one or more of the certification criterion even if the cause of action and identifiable class criterion are satisfied. In that case, the Ontario Lottery and Gaming Corp. ("OLGC"), which is a crown agency that operates gambling establishments to raise revenues for the province of Ontario, offered a "self-exclusion" program to gamblers who had self-identified themselves as having an addiction to gambling. Over 10,000 gamblers signed up for the program, including Mr. Dennis, who suffered from a personality disorder known as "problem gambling." Under the program, OLGC indicated that it would use its best efforts to deny the self-excluded person entry to all of its gaming venues in the province. Notwithstanding having entered into the program, Mr. Dennis was not denied admission to OLGC's venues, and he continued to gamble. He incurred devastating losses, which in turn led to the loss of his job, the loss of the family's home, strained family relations, and serious mental and physical health issues for Mr. Dennis, his wife, and his children. After he sought psychiatric help and received treatment for his disease, Mr. Dennis brought a proposed class action on behalf of all the persons who had signed up for the program. He sued for breach of contract, negligence, occupier's liability, and waiver of tort. He claimed damages including punitive damages of $3.5 billion for the class period.

[153] Justice Cullity heard the certification motion, and although he had doubts about Mr. Dennis' various causes of action, he concluded that it was not plain and obvious that Mr. Dennis had not pleaded tenable causes of action. Justice Cullity also concluded that the identifiable class criterion and the representative plaintiff criterion had been satisfied. However, he concluded that the common issues and preferable procedure criteria were not satisfied. For present purposes the heart of Justice Cullity's reasons are found at paragraphs 191-193, 221, 231, and 234-238, which state:

> 191. In my opinion, the vulnerability of class members is essential to the validity of their claims. Persons who were not problem gamblers would have no tenable claims and there could be no question of certifying the proceeding in respect of such persons. The evidence is that the disorder is progressive and that there is a range of its severity. There is nothing in the class definition or the formulation of the common issues to confine the claims asserted to members of the class who were vulnerable to any particular degree, if at all, and, in my judgment, the class

[49] *Ibid.*

definition is to that extent objectionably over-inclusive, and the proposed common issues lack commonality. While it can no doubt be presumed that most self-excluded persons were at least apprehensive about their vulnerability, the degree of their addiction, if any, and the significance to be attributed to the concept of personal autonomy could only be determined on an individual basis.

192. If Mr. Dennis, or any of the other class members, had advanced the same claims in individual actions, OLGC would have been entitled to raise issues relating to personal autonomy and degrees of vulnerability in connection with elements of liability such as reasonable foresight of harm; proximity; unconscionability; a willing assumption of risk for the purposes of s. 4(1) of the *OLA*; causation of proven losses; contributory negligence; and punitive damages. The right of OLGC to pursue such issues on an individual basis is not, in my opinion, excluded by pursuing the claims under the procedure of the *CPA* and defining the class, and the common issues, without reference to the vulnerability of the class members. Nor, for the reasons I will give, can the issues be resolved by reference to statistical probabilities.

193. In *Hollick*, at para. 21, it was accepted that over-inclusive classes can be permitted where the class "could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue". I do not understand this principle to permit an over-inclusive class to be accepted if the reason why it could not be drafted more narrowly is the inability to provide a limiting class criterion that will establish the rational link with the proposed common issues on which commonality depends. In such a situation, instead of common issues determinable on a class-wide basis, there will be individual issues affecting liability to each member of a diverse group. In my judgment, that is the case here.

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221. In short, if, as I believe, the degree of vulnerability of members of the primary class is relevant to such other elements of liability, it is not permissible to conclude on the basis of statistical sampling, or a five-minute labelling test, that any of the class members was a vulnerable problem gambler to any particular degree. Individual inquiries would be necessary for this purpose and this would then be an example of the situation referred to by the Chief Justice in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 (at para. 29), where a determination of the proposed common issues would degenerate into a consideration of the claims of each of a potentially diverse group of individuals. There would have to be an inquiry into the personal circumstances, the gambling history, the extent of the addiction or compulsion to gamble of each class member at particular times, and, if the approach to causation in *Calvert*, [citation omitted in original[50]] his or her likely behaviour if OLGC had exercised its best efforts or exercised reasonable care. An attempt to avoid problems of class definition and commonality at the certification stage by relying on statistical evidence at trial for the purpose of narrowing the class is not, in my opinion, acceptable.

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[50] *Calvert v. William Hill Credit Ltd.*, [2008] All E.R. (D) 170 (Ch. Div.), affd. [2009] Ch. 330 (C.A.).

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231. For the reasons given, I am of the opinion that the attempt to define the common issues in a manner that would avoid an inquiry into the status of each class member as a "problem gambler" has not been successful. I am satisfied that a proceeding that requires a consideration of the nature, degree and consequences of each class member's gambling propensities is individualistic to an extent that it is not amenable to resolution under the procedure of the *CPA*. The common issues would have to be so truncated that their resolution would not sufficiently advance the claims of the class members. They would, for the most part, be limited to the interpretation of the forms and the adequacy of OLGC's efforts to enforce self-exclusion.

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234. I agree with counsel for OLGC that these individual issues do not lend themselves to a summary determination as is contemplated by s. 25 of the *CPA*. I am satisfied that they cannot be dealt with fairly and adequately without evidence, and a detailed consideration, of the degree of vulnerability, and the circumstances, of each class member. As I have indicated, the attempt to avoid the individual issues by pleading that all class members were problem gamblers in a severe, or pathological, sense must be rejected. Evidence is required for each of the requirements for certification other than that in s. 5(1)(a).

235. Similarly, the excessively individualistic aspects of the claims asserted by the plaintiffs are not avoided by their counsel's characterization of the claims as "systemic". Where, in cases such as *Rumley v. British Columbia, supra*, such a characterization has been found to be appropriate and helpful, it has been predicated on a material lack of diversity among the members of the class. That is not the case here.

236. The evidence does not support a conclusion that all class members were pathological problem gamblers, and the omission to refer to problem gambling in the formulation of the common issues does not alter the fact that the identification of the class members as vulnerable is fundamental to the plaintiffs' case for certification as well as, in the ultimate analysis, the tenability of their individual claims.

237. This is a situation in which, in my opinion, the procedure under the *CPA* would have disadvantages rather than any significant advantages over individual actions in which the focus would be entirely on the circumstances and experience of a particular individual rather than simultaneously on those of a potentially large class of persons with diverse backgrounds and gambling histories for whom liability could only -- but could not properly -- be established by the use of statistical evidence.

238. In view of the nature of the individual inquiries, and the difficulties of proof relating to the existence of losses, I am not persuaded that certification would appreciably advance the legislative objective of judicial economy. The procedure under the *CPA* has its own associated special costs -- including but not limited to

> those of giving notice. In view of these costs, and the uniqueness of the personal circumstances and gambling history of each of the class members, I am of the opinion that the expense and complexity of attempting to dispose of all their claims in one inevitably protracted proceeding is likely to outweigh any economy achieved by a resolution of the questions of interpretation, and the adequacy of OLGC's efforts to perform its obligations, in a single trial.

[154] The circumstances of the putative class members in the immediate case are similar to the circumstances of the putative class members in *Dennis v. Ontario Lottery and Gaming Corp.* where certification of a class action was refused. Ms. Green's proposed class action requires an individualistic consideration of the influence of the false test results on the predicament of each class member. Those individual issues trials are not amenable to any summary determination as contemplated by s. 25 of the *Class Proceedings Act, 1992.* The determination of the proposed common issues would degenerate into a consideration of the claims of each of a potentially diverse group of individuals. The common issues would not sufficiently advance the claims of the class members and combining a common issues trial with individual issues trials makes the proceeding unmanageable and disadvantageous in comparison to the alternative of individual actions. And there is no appreciable advance in the objective of judicial economy by interposing a common issues trial. The Defendants at the individual issues trials are entitled to raise the defence that the unreliable test results caused no injury in the particular case. They are also entitled to raise other defences and issues associated with the apportionment of damages to the Children's Aid Societies. Falsity and an adverse impact are essential to the validity of the class members' claims and thus the class definition, while technically sufficient, is over-inclusive and the proposed common issue lacks the commonality to connect to a meaningful claim to compensation for the class. None of these problems in the case at bar are avoided by characterizing the class members' claims as systemic.

[155] Justice Cullity's decision was affirmed by the Divisional Court and by the Court of Appeal. In the Court of Appeal on the crucial issue of whether a class action was preferable to going directly to individual issues trials, Justice Sharpe stated at paras. 53 and 71:

> 53. There are certainly cases in which a class action will be an appropriate procedure to deal with a "systemic wrong", a wrong that is said to have caused widespread harm to a large number of individuals. When a systemic wrong causes harm to an undifferentiated class of individuals, it can be entirely proper to use a class proceeding that focuses on the alleged wrong. The determination of significant elements of the claims of individual class members can be decided on a class-wide basis, and individual issues relating to issues such as causation and damages can be dealt with later on an individual basis, especially when the assessment of damages can be accomplished by application of a simple formula.
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> ....
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> 71. Even if the class definition and common issue requirements were satisfied, it is my view that a class action is not the preferable procedure. A general finding of "systemic wrong" would not avoid the need for protracted individualized proceedings into the vulnerability and circumstances of each class member. A more efficient and expeditious way to adjudicate these claims would be to proceed directly by way of individual actions as it is inevitable that a class

proceeding will break down into individual proceedings in any event.

[156] It may be noted that Justice Cullity in refusing certification in *Dennis v. Ontario Lottery and Gaming Corp.* referred to *Rumley v. British Columbia*,[51] which is a famous example of a systemic negligence case that was certified as a class action. Notwithstanding the *Rumley* decision and other systemic negligence cases, Justice Cullity and the appellate courts did not certify Mr. Dennis's systemic negligence claim. In the case at bar, Ms. Green also relies on the *Rumley* decision, and she very heavily relies on an application of *Rumley* by the New Brunswick Court of Appeal in *Gay v. New Brunswick (Regional Health Authority 7)*.[52] It is, therefore, necessary to consider these cases and compare them to the circumstances of Ms. Green's proposed class action.

[157] Ms. Rumley was a student at the Jericho Hill School, a residential school for the deaf and blind operated by the Province of British Columbia. The Ombudsman investigated the school, and in a 1993 report, he concluded that sexual, physical, and emotional abuse of children was prevalent at the school throughout its history. In 1995, Thomas Berger, Q.C., the Attorney General's special counsel, issued a report that concluded that sexual abuse had been rampant at Jericho Hill School. After the report was issued, the Attorney General of British Columbia acknowledged that the province was responsible for the care and well-being of the children at the school and that the province was responsible for the abuse that had occurred there. Ms. Rumley commenced a class action on behalf of the abused children.

[158] In *Rumley v. British Columbia,* the Supreme Court of Canada agreed with the decision of the British Columbia Court of Appeal that the action could be framed as a systemic negligence action and class members would not have to prove a sexual assault by a particular individual; rather, there was a common issue based on the systemic negligence of the school's failure to have in place procedures that would have prevented sexual abuse. Justice McLachlin, as she then was, wrote the judgment of the Supreme Court. She agreed with Justice MacKenzie of the British Columbia Court of Appeal that all class members shared an interest in the question of whether the school was systemically negligent in failing to have systems in place to prevent sexual abuse, which alleged failure could be determined without reference to the circumstances of any individual class member.

[159] Ms. Green's case, however, is to the opposite effect of a systemic negligence claim like *Rumley v. British Columbia,* and the class members' claims cannot be determined without reference to individual circumstances. Ms. Green submits that she can rely on the "but for" test or in the alternative the "material contribution" test for causation to move from a finding that the Defendants breached a duty of care to produce a reliable test to causation of harm across the class.[53] The fallacy in this argument, however, is the harm is caused by the unreliable test being both individually false and individually influential to an adverse outcome in the individual's court proceedings, which are matters to be proven at the individual issues trial.

[160] Although there are substantial similarities in some of the factual circumstances of Ms. Green's proposed class action and the certified class action in *Gay v. New Brunswick (Regional Health Authority 7), supra*, there are fundamental differences in the two cases that make the *Gay*

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[51] [2001] 3 S.C.R. 184.
[52] 2014 NBCA 10.
[53] *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 11; *Chen v. Ross* 2014 BCSC 374; *Clements v. Clements*, 2012 SCC 32.

decision, about which I have no criticism, distinguishable. The New Brunswick decision is ultimately of no assistance to Ms. Green.

[161] The facts of *Gay v. New Brunswick (Regional Health Authority 7)* were that a hospital was opened in Miramichi, New Brunswick, in 1995. Dr. Menon was hired as its Chief of Pathology, Director of Clinical Laboratory Services, and anatomical pathologist. From the outset of his appointment, there were complaints about the quality of his work, but the complaints were not taken seriously. It was not until 2006, when there was an external peer review, that the hospital took remedial steps. The results of the independent review also prompted the provincial government to have all specimens handled by Dr. Menon from 1995 to 2007 reviewed by experts at an independent laboratory in Ontario. The hospital notified the 15,000 implicated patients and their personal physicians or referring surgeons and recommended consultation, which in turn entailed retesting and travel and incidental expenses for the patients and attendant emotional distress and alarm from the news. The province also ordered a Commission of Inquiry that produced a comprehensive report. The Commission found serious and alarming deficiencies in Dr. Menon's work over the years and a pattern of errors that, arguably, should have been detected and corrected sooner.

[162] In these circumstances, Albert Gay, Kimberley Doyle, and James Wilson commenced a proposed class action as a hospital-based medical malpractice case founded on systemic failures with class wide effects. The plaintiffs sued for medical malpractice in tort, breach of contract, breach of fiduciary duties, and equitable fraud. In their Statement of Claim, the plaintiffs alleged that all the class members had suffered out-of-pocket expenses and compensable mental distress and anxiety. The Statement of Claim also alleged that some patients had been misdiagnosed because of Dr. Menon's negligence in examining their particular specimens and these members of the class sustained even greater harm, losses and expenses. The class action, however, did not pursue claims for negligence in the assessment of particular specimens, which claims could be pursued by individual class members.

[163] Reversing the motions judge,[54] the New Brunswick Court of Appeal certified the action as a class action.[55] In certifying that action, the majority of the Court of Appeal was satisfied that all of the certification criteria were satisfied. In reaching their decision to certify, they noted that some members of the proposed class, such as Mr. Wilson, required additional liability and quantum-related procedures in order to achieve a just result for them, but that this work for individual trials did not constitute a valid reason to deny certification. The majority also noted that every putative class member had a cause of action for the recovery of out-of-pocket expenses that required adjudication and that there were indications that some putative class members had actually suffered particularly severe non-physical harm, in addition to physical injury from the systemic negligence. The majority said that these claims should stand and be processed by way of class action even if it were concluded that damages were not recoverable for so-called every-day mental distress and anxiety on a class-wide basis. The majority concluded that access to justice for the out-of-pocket expenses of all class members and for the genuinely serious emotional harm suffered by some class members would be impossible without a class action and to close the door on recovery for those claims was untenable.

[164] In my opinion, the example set by the precedent of *Gay v. New Brunswick (Regional*

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[54] 2012 NBQB 88.

[55] Drapeau C.J.N.B. and Deschênes, J.A with Robertson, J.A. dissenting.

Health Authority 7) does not assist Ms. Green in the immediate case. Unlike the plaintiffs in the New Brunswick case, she cannot connect the alleged systemic negligence of unreliable test results to the damages for which compensation is sought by the class members and the door to recovery that needs opening is success at individual issues trials. Unlike the plaintiffs in the New Brunswick case, who would substantially advance their case by success at the common issues trial, for the reasons set out above the same is not true for Ms. Green and the putative class members. Unlike the plaintiffs in *Gay v. New Brunswick (Regional Health Authority 7)*, a finding that there had been systemic negligence would not connect the dots to compensable damages.

[165] The circumstance that while there may be a duty of care to provide reliable tests and to interpret them reliably but that the compensatory damages are individual to the person whose test results are false and adversely influential is also demonstrated by other cases relied on by Ms. Green. In *Elliot v. Laboratory Specialists, Inc.*[56] the Louisiana Court of Appeal stated: "The risk of harm in our society to an individual because of a false positive drug test is so significant that any individual wrongfully accused of drug usage by his employer is within the scope of protection of the law" [my emphasis added]. In *Stinson v. Physicians Immediate Care Ltd.*,[57] the Illinois Court of Appeal noted that the rationale for imposing a duty of care on a testing laboratory was oriented to individual claims of harm:

> The drug testing laboratory is in the best position to guard against the injury, as it is solely responsible for the performance of the testing and the quality control procedures. In addition, the laboratory, which is paid to perform the test, is better able to bear the burden financially than the individual wrongly maligned by a false positive report. [Emphasis added]

[166] A point to emphasize in the analysis of preferable procedure is that to whatever degree the common issues trial would advance the claims of a class member to substantive access to justice, *i.e.*, to compensation for his or her injury, that progress will be infinitesimal compared to what the class member must establish at his or her inevitable individual issues trial, where the class member would be exposed to an adverse costs award if he or she were unsuccessful. In my opinion, a class action is not the preferable procedure for access to substantive justice.

[167] For many of the same reasons, I also conclude that a class action is not the preferable procedure for access to procedural justice. In this regard, I note again that if Ms. Green is successful at the common issues trial, then complex individual issues trials are inevitable for the class members. In this regard, I disagree with Ms. Green's litigation plan that aborts the Defendants' procedural rights to defend themselves from a $450 million systemic negligence claim. As I shall discuss further below, the individual issues trials are beyond the resources of sections 12 and 25 of the *Class Proceedings Act, 1992* to tailor and trim the individual issues trials.

[168] In the case at bar, in my opinion, the circumstance that complex individual issues are inevitable takes the case into the territory where the individual issues would completely overwhelm the common issues and make the case unmanageable.[58] A costs benefits analysis indicates that little benefit is added by subjecting the individual claims to the delay of a class

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[56] 588 So. 2d 175 (La. Ct. App. 1991) at p. 176.
[57] 646 N.E.2d 930, (Ill. App. Ct. 1995) at p. 934.
[58] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp., supra.*

action's common issues trial. This harsh truth also reveals that the current class actions regime is not a panacea for all access to justice barriers.

[169] Moreover, it is already apparent that a significant number of putative class members who may have substantial claims that are economically viable to litigate in the Superior Court are likely to opt out. Ms. Green submits, however, that while this might be a reason to decertify the action, it is not a reason to refuse to certify the action. I agree with Ms. Green's submission as a general proposition, but in the case at bar, the submission misses the points that regardless of whether or not the class members with substantial claims opt out, the remaining class members who have modest claims will still be confronted with individual issues trials that are not economically viable to litigate. In other words, a class proceeding would only delay matters and not remove the barriers to access to justice for perhaps the overwhelming majority of class members who could establish that the test results were unreliable but who could not prove that the test results were false and adversely influential to the outcome of their own court proceedings.

[170] In the case at bar, in my opinion, given the problems confronting substantive access to justice and the problems of efficiency and productivity, discussed above, and given what little will be accomplished by the common issues trial, a more efficient and expeditious way to adjudicate these claims would be to proceed directly by way of individual actions. Moreover, in individual issues trials, class members would not be limited to recovery for the several liability of the Hospital, Dr. Koren, and Mr. Gareri and other potential defendants could be joined, thus enabling the plaintiff to recover completely for his or her injuries.

[171] Sometimes a class action rather than removing obstacles to access to justice introduces new ones that impede the goals of access to justice, behaviour modification and judicial economy. The case at bar is one such case. I conclude that the preferable procedure criterion is not satisfied.

5. Representative Plaintiff Criterion

(a) Overview

[172] Dr. Koren, but not the Hospital and Mr. Gareri, challenge Ms. Green's qualifications to be a representative plaintiff. All the Defendants submit that the proposed litigation plan does not satisfy the representative plaintiff criterion.

(b) General Principles: Representative Plaintiff Criterion

[173] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[174] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members

as against the defendant.[59]

[175] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact.[60]

[176] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim.[61]

[177] While a litigation plan is a work in progress, it must correspond to the complexity of the particular case and provide enough detail to allow the court to assess whether a class action is: (a) the preferable procedure; and (b) manageable including the resolution of the common issues and any individual issues that remain after the common issues trial.[62] The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed.[63]

[178] For managing the class proceedings and in particular the individual issues phase of the proceeding, the litigation plan and the court has the resources of s. 12 and s. 25 of the *Class Proceedings Act, 1992*, which state:

> *Court may determine conduct of proceeding*
>
> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> ....
>
> *Individual issues*
>
> 25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,
>
> (a) determine the issues in further hearings presided over by the judge who

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[59] *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).

[60] *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 2, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.) at paras. 71-7 ; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[61] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 41.

[62] *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (C.A.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 95; *Caputo v. Imperial Tobacco Ltd.* [2004] O.J. No. 299 (S.C.J.) at para. 76; *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at para. 100.

[63] *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299, *supra*, at paras. 62-67; *Griffin v. Dell Canada Inc.*, *ibid.*.

> determined the common issues or by another judge of the court;
>
> (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
>
> (c) with the consent of the parties, direct that the issues be determined in any other manner.
>
> *Directions as to procedure*
>
> (2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.
>
> *Idem*
>
> (3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,
>
> (a) dispense with any procedural step that it considers unnecessary; and
>
> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.
>
> [...]

(c) Analysis: Representative Plaintiff Criterion

[179] There is no merit to Dr. Koren's argument that Ms. Green is not qualified to be a representative plaintiff. There, however, is merit to the Defendants' argument that the proposed litigation plan does not satisfy the representative plaintiff criterion.

[180] Ms. Green's litigation plan contemplates a common issues trial and, if that trial is successful, an Interview Panel would report on all of the complex issues of causation and damages, based on an interview with the claimant and without the defendants having any rights of disclosure or to be heard. Thereafter, if a settlement is not reached, a Damages Hearing will determine all of the causation and damages issues based only on the report of the Interview Panel and statements from one expert on each side, limited to three pages. The Damages Hearing is to take not more than two hours.

[181] I agree with the Defendants that this litigation plan is both unfeasible and palpably procedurally unfair. As the above analysis of the preferable procedure criterion reveals, in the case at bar, very difficult, if not the most difficult, forensic work is assigned to the individual issues phase of the proposed class action. Ms. Green's litigation plan ignores this circumstance.

[182] The deficiency in the litigation plan is a manifestation and illustration of the failure of Ms. Green's action to satisfy the preferable procedure criterion. The litigation plan presupposes that there are meaningful and efficient common issues and that s. 12 and s. 25 of the *Class Proceedings Act, 1992* would empower the court to devise suitable means to make the class action manageable and to introduce efficiencies for the individual issues trials. In this last regard,

Ms. Green relies on my decisions in *Lundy v. VIA Rail Canada Inc.*[64] The *Lundy* case and the case at bar, however, are not remotely comparable. The *Lundy* case involved a very small class of persons who were passengers on a derailed train, none of whom suffered serious injuries and some of whom walked away with no injuries. It also involved a defendant who had admitted liability, who was not disputing causation, and who was disputing only the quantum of the individual claims after making offers to settle.

[183] The *Lundy* case was very suitable for the exercise of the tools of s. 12 and s. 25 of the *Class Proceedings Act*. Ms. Green's case is not comparable and section 12 and section 25 are not meant to sacrifice a defendant's rights to due process when confronted with a billion-dollar damages claim.

[184] I conclude that the representative plaintiff criterion is not satisfied.

6. Cause of Action Criterion

[185] Without conceding that there was in law a cause of action against them, the Defendants did not dispute that Ms. Green's action satisfies the cause of action criterion.

[186] While they did not dispute that the first criterion for certification had been satisfied, there were aspects of the Defendants' arguments about the other certification criteria that raised, either directly or indirectly, issues about the soundness in law of Ms. Green's and the putative class members' claims. To the extent necessary, I will address these cause of action issues in the discussion below about the other certification criterion.

[187] For immediate purposes, I conclude that Ms. Green's action satisfies the cause of action criterion.

7. Identifiable Class Criterion

(a) Overview

[188] In submitting that Ms. Green's action did not satisfy the identifiable class criterion, the Defendants' arguments were that: (1) the Family Law Class did not have any cause of action under the family law statutes and should not be included as class members; (2) the putative class members could not be identified together as a class because each putative class member had an individual relationship with the Defendants; and (3) the class definition was overbroad because it included persons who had no claim or who suffered no injury.

(b) General Principles: Identifiable Class Criterion

[189] The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice.[65] In defining class membership, there must be a rational relationship between the class, the cause of action, and the

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[64] 2015 ONSC 1879; 2015 ONSC 3531; 2015 ONSC 7063; and 2016 ONSC 425.

[65] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

common issues, and the class must not be unnecessarily broad or over-inclusive.[66]

[190] In *Western Canadian Shopping Centres v. Dutton*,[67] the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

(c) Analysis: Identifiable Class Criterion

[191] It may be the case that the Family Law Class do not have any cause of action under the family law statutes, but this is not plain and obvious and, therefore, I do not agree with the Defendants' arguments that these claimants should not be included as class members

[192] While I agree with the premise of the Defendants' argument challenging the class definition that putative class members have an individual relationship with the Defendants, I view this premise as in the first instance more significant to the arguments discussed above that Ms. Green's action does not satisfy the common issues and preferable procedure criterion. In other words, Ms. Green's proposed class definition satisfies the technical requirements of the identifiable class criterion and avoids the sin of a merits-based definition; however, using her proposed definition creates problems for her in satisfying the commonality and preferable procedure criterion.

[193] The result, however, of this analysis (as was the case in *Dennis v. Ontario Lottery and Gaming Corp., supra*) is that it can be said that the class definition is overbroad and fails the identifiable class criterion. While it may be just a matter of semantics with no difference of meaning, I rather conclude that subject to a revision to be discussed next, that Ms. Green has satisfied the second criterion for certification at peril of failing the third and fourth criterion.

[194] The revision is to Ms. Green's class definition which is manifestly overbroad to the extent that it includes persons who have no claim or who suffered no injury because their tests had nothing do with court proceedings in which personal liberties or parental rights were imperiled. The class definition can and should be revised to exclude these persons.

[195] Subject to the above revision, I conclude that Ms. Green's action satisfies the identifiable class criterion.

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[66] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

[67] 2001 SCC 46 at para. 38.

8. The Common Issues Criterion

[196] For the purposes of determining whether Ms. Green's proposed common issues severally satisfy the common issues criterion, I shall initially assume, notwithstanding the analysis above, that Ms. Green's proposed class action satisfies the other four certification criteria.

(a) General Principles: Common Issues

[197] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[68] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[69] All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.[70] In *Pro-Sys Consultants v. Microsoft*,[71] the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

[198] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[72] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[73]

[199] The common issue criterion presents a low bar.[74] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[75] A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance

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[68] *Hollick v. Toronto (City), supra*, at para. 18.
[69] *Western Canadian Shopping Centres Inc. v. Dutton, supra*, at paras. 39 and 40
[70] *Western Canadian Shopping Centres Inc. v. Dutton, supra*, at para. 40; *Ernewein v. General Motors of Canada Ltd., ibid.* at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *McCracken v. CNR, supra*, at para. 183.
[71] 2013 SCC 57 at para. 106.
[72] *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Div. Ct.) at paras. 3, 6.
[73] *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at paras. 50-52; *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 (B.C.S.C.) at para. 51, varied on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.); *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), varied 2011 ONSC 3882 (Div. Ct.).
[74] *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 52, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348.
[75] *Cloud v. Canada (Attorney General), supra.*

the litigation.[76]

[200] The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another.[77] Even a significant level of individuality does not preclude a finding of commonality.[78]

(b) Common Issue No. 1

[201] The first proposed common issue is:

> 1. By its operation or management of the Motherisk Drug Testing Laboratory between January 2005 and April 2015, did the Defendants breach a duty of care it owed to the Class?

[202] Based on the assumption that the other certification criteria are satisfied, I agree that Common Issue No. 1 is certifiable as a common issue.

[203] However, based on the analysis above, I conclude that Common Issue No. 1 does not satisfy the common issues criterion because: (a) it is not a substantial ingredient of each class member's claim; (b) its resolution will not avoid duplication of fact-finding or legal analysis; (c) its answer is not capable of extrapolation, in the same manner, to each member of the class; and (d) its determination will not diminish what will need to be determined in a multitude of individual proceedings.

[204] Further, with respect to Dr. Koren and Mr. Gareri, the duty of care issue would appear to be individual and not common across the class. The precise argument advanced by Dr. Koren is that there is no direct patient and medical practitioner relationship between any of the class members and the individual defendants and thus any duty of care would arise from the circumstance that the Hospital was retained by Children's Aid Societies and others to provide evidence for use in individual court proceedings.[79] These novel circumstances, it is submitted, do not give rise to a common duty of care across the class. I agree with this argument.

[205] I, therefore, conclude that Common Issue No. 1 does not satisfy the common issues criterion.

(c) Common Issue No. 2

[206] The second proposed common issue is:

> 2. If the answer to Common Issue No. 1 is "yes", are the Family Class members entitled to damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c.

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[76] *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[77] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 44–46.

[78] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton, supra*, at para. 54.

[79] See the analysis in *K. (H.V.) v. Children's Aid Society of Haldimand-Norfolk*, [2003] O.J. No. 1572 (S.C.J.); *X (minors) v. Bedfordshire County Council*, [1995] UKHL 9.

F-3?

[207] For the above reasons applicable to Common Issue No. 1, I conclude that Common Issue No. 2 does not satisfy the common issues criterion.

(d) Common Issue No. 3

[208] The third proposed common issue is:

> 3. If the answer to Common Issue No. 1 is "yes", can the court make an aggregate assessment of damages suffered by all class members as part of the common issues trial?

[209] For the above reasons applicable to Common Issues No. 1 and No. 2 and also for the following reason, I conclude that Common Issue No. 3 about aggregate damages does not satisfy the common issues criterion.

[210] Section 24(1) of the *Class Proceedings Act, 1992* stipulates when the court may assess aggregate damages. Section 24(1) states:

> *Aggregate assessment of monetary relief*
>
> 24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[211] For an aggregate assessment of damages to be available "no questions of fact or law other than those relating to the assessment of monetary relief" must "remain to be determined in order to establish the amount of the defendant's monetary liability." An antecedent finding of liability is required before resorting to the aggregate damages provision of the *Class Proceedings Act, 1992*, and if liability cannot be established through the common issues, then an aggregate damages common issue cannot be certified.[80]

[212] In the case at bar, there inevitably will be individual issues trials to determine both liability and damages. There is no general experience of damages arising from the unreliable tests. For some putative class members, the unreliable tests may have been coincidentally correct. For other putative class members, the unreliable tests may have been irrelevant to the outcome of the court proceedings because there was reliable probative evidence to justify the outcome. I, therefore, conclude that aggregate damages may not be certified as a common issue.

[213] The case at bar is not a case in which any part of the class member's damage claim can be aggregated. The case at bar is a systemic negligence action and there is no base amount of

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[80] *Pro-Sys Consultants Ltd. v. Microsoft Corporation, supra,* at para. 131; *Kalra v. Mercedes Benz*, 2017 ONSC 3795.

damages that each member of the class may be entitled to from the fact that it is proven that in general the Motherisk laboratory tests were unreliable for use in court proceedings. As noted above, the entitlement to damages for which compensation is sought must be determined at individual issues trials. No part of the entitlement to damages can be determined at the common issues trial because major constituent elements of the tort of negligence remain to be determined as do the merits of the Defendants' defences to liability, one of which is that the unreliability of the tests caused no harm to the individual class member.

[214] I conclude that Common Issue No. 3 does not satisfy the common issues criterion.

(e) Common Issue No. 4

[215] The fourth proposed common issue is:

> 4. If the answer to Common Issue No. 3 is "yes", in what amount?

[216] Since I shall not certify Common Issue No. 3, it follows that the ancillary Common Issue No. 4 also shall not be certified.

(f) Common Issue No. 5

[217] The fifth proposed common issue is:

> 5. If the answer to Common Issue No. 1 is "yes", does the Defendants' conduct justify an award of punitive damages?

[218] In cases where individual issues trials are inevitable, it has become *de rigueur* to certify the common issue of whether the defendant's conduct would justify an award of punitive damages but not to certify the issue of determining the amount of those damages. It is also normative that punitive damages alone cannot justify the certification of an action as a class proceeding.[81]

[219] In the case at bar, I shall not certify Common Issues No. 5 (and No. 6) for two reasons.

[220] First, Common Issue No. 5 is peripheral to the fundamental common issues and it stands alone as the only question that, technically speaking, is certifiable. Punitive damages alone cannot justify the certification of an action as a class proceeding.

[221] Second, I find remote to the extreme that after awarding the class members the full compensation they deserve and awarding Class Counsel the fees they deserve, a court would go on to make a multi-million-dollar punitive award against the Hospital for Sick Children. However egregious the conduct of Dr. Koren and Mr. Gareri in increasing the Hospital's not-for-profit revenues and however egregious the failures of the administration of the Hospital to supervise its Motherisk laboratory, and, however tragic and heartbreaking the outcomes in individual cases, a punitive award would ultimately not be visited on the Defendants but rather would be inflicted on the sick children at the Hospital who depend upon taxpayers and philanthropists to provide the financial resources for the otherwise good and necessary work of the hospital.

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[81] *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766 (S.C.J.) at para. 75, aff'd [2004] O.J. No. 5309 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at para. 104.

[222] I conclude that Common Issue No. 5 does not satisfy the common issues criterion.

(g) Common Issue No. 6

[223] The sixth common issue is:

> 6. If the answer to Common Issue No. 5 is "yes", what amount of punitive damages ought to be awarded against the Defendants?

[224] Since I shall not certify Common Issue No. 5 and since Common Issue No. 6 is normally not certifiable in actions where individual issues trials are inevitable, it follows that the ancillary and periphery Common Issue 6 also shall not be certified.

(h) Conclusion - Common Issues

[225] For the above reasons, I conclude that the common issues criterion is not satisfied.

F. Conclusion

[226] For the above reasons, I dismiss Ms. Green's certification motion.

[227] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' submissions within 20 days from the release of these Reasons for Decision, followed by Ms. Green's submissions within a further 20 days.

Perell, J.

Released: November 1, 2017

CITATION: Green v. The Hospital for Sick Children, 2017 ONSC 6545
COURT FILE NO.: CV-15-543259-00CP
DATE: 20171101

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

REBECCA GREEN

Plaintiff

– and –

THE HOSPITAL FOR SICK CHILDREN, GIDEON KOREN and JOEY GARERI

Defendants

REASONS FOR DECISION

PERELL J.

Released: November 1, 2017