CITATION: R.G. v. The Hospital for Sick Children, 2018 ONSC 7058
DIVISIONAL COURT FILE NO.: DC 700/17
DATE: 20181126

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LOCOCO, TRIMBLE, and MYERS JJ.

BETWEEN:	
R.G.	
Appellant	*Kirk M. Baert, Celeste Pollak, and Jody Brown,* lawyers for the appellant
– and –	
THE HOSPITAL FOR SICK CHILDREN, GIDEON KOREN and JOEY GARERI	
Respondents	*Darryl Cruz and Erica Baron,* lawyers for the respondent Gideon Koren
	Kate A. Crawford, Logan Crowell, and Barry Glaspell, lawyers for the respondents The Hospital for Sick Children and Joey Gareri

HEARD at Toronto: November 22, 2018

REASONS FOR JUDGMENT

F.L. MYERS J.

The Appeal

[1] The plaintiff appeals from the order of Perell J. dated November 1, 2017 dismissing her certification motion under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[2] The plaintiff raises several grounds of appeal in her notice of appeal. At the hearing, the plaintiff's counsel fairly conceded that to succeed on the appeal, the she must succeed on both the

"common issue" and the "preferable procedure" grounds. As I find that the plaintiff cannot succeed on the preferable procedure ground of appeal, it is not necessary for me to go further. I make no decision one way or the other on any of the other grounds of appeal.

Jurisdiction

[3] Under s. 30 (1) of the *Class Proceedings Act, 1992*, an appeal lies to this court from an order refusing to certify a proceeding as a class proceeding.

Standard of Review

[4] Generally, on appeals from decisions of a motions judge of the Superior Court, issues of pure law will be reviewed on a correctness standard. However, deference is due to other types of decisions. The standard applicable to reviewing questions of fact was discussed recently by Barnes J. in *Alliance Door Products Canada Inc. v. 2341321 Ontario Inc.*, 2018 ONSC 6703, at para. 13:

> An appeal court is bound to show great deference to findings of fact made by the lower court. The appeal court may allow an appeal based on a factual finding only where the lower court has made a "palpable and overriding error". *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 10 (S.C.C.). Thus an appeal court cannot interfere simply because it takes a different view of the evidence than the trial judge. Where a finding of fact by the trial judge is one, which from the evidence is open for the trial judge to make, the finding is entitled to deference unless it constitutes a palpable and overriding error.

[5] Questions of mixed fact and law are also reviewed on the deferential "palpable and overriding error" standard unless they present extricable questions of law that can be reviewed for correctness: *Housen* at paras. 27 and 28.

[6] Where a judge exercises her judgment to resolve a question for which the law provides her with discretion, the standard of review is also deferential. In *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, the Supreme Court of Canada described the standard of review of an exercise of judicial discretion in this way:

> The principles enunciated in the *Harper* case, *supra*, indicate that an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

[7] Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77. That is, the appellate court must defer to a judge's exercise of discretion unless she makes an error in law - adopting the wrong legal principle or giving insufficient weight to a relevant factor - or if her decision is clearly wrong. The appeal court cannot substitute its own judgment in place of the judgment call made by the judge whose decision is under review unless the judge made such an error.

[8] The standard of review in class actions proceedings is well understood. Appellate courts have recognized the special expertise of class action judges and have held that substantial deference is owed on certification decisions. This deference does not extend to "errors in principle which are directly relevant to the conclusion reached": *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 65; and *Cassano*, at para. 23.

[9] In *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.), the Court of Appeal discussed the particular approach to be adopted on an appeal, like this one, from a decision on the issue of whether a class proceeding is the preferable procedure under s. 5 of the statute. Rosenberg J.A. wrote, at pp. 657-58:

> The decision as to preferable procedure is, in my view, entitled to special deference because it involves weighing and balancing a number of factors. *In Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728, [2005] O.J. No. 842 (S.C.J.), at para. 29, Winkler J. described the consideration of whether a class proceeding is the preferable procedure for determining the common issues as "a matter of broad discretion". As such, the reviewing court will intervene where the judge has made a palpable and overriding error of fact or otherwise erred in principle. Any errors of law are, however, reviewable on the correctness standard.

[10] With these rules in mind, I turn to the facts and the decision under appeal.

Background Facts

Motherisk Drug Testing Laboratory

[11] The background facts that follow are not disputed and are drawn nearly verbatim from the decision under review.

[12] In 1985, Dr. Koren, a physician and clinical toxicologist, founded the Motherisk Program at SickKids. In the 1990s, the Motherisk Drug Testing Laboratory was established. Between 2005 and 2015, Motherisk tested the hair of 18,463 individuals to screen for the presence of drugs and alcohol. Test results were used for multiple purposes: by physicians treating patients, as evidence in criminal proceedings, as evidence in matrimonial disputes to determine custody and access rights, and as evidence in child protection proceedings that could result in the loss of parental rights.

[13] In October 2014, in *R. v. Broomfield*, 2014 ONCA 725, 123 O.R. (3d) 316, evidence was admitted revealing a controversy among the experts about the testing methods used at the Motherisk lab. The Court of Appeal for Ontario set aside a conviction obtained on evidence from Motherisk. The decision sparked a public outcry about the reliability of the hair analysis opinions provided by Motherisk. On November 26, 2014, the Province retained the Honourable Susan Lang to conduct an independent review of the Motherisk lab.

[14] Motherisk ceased operating in March 2015 and closed permanently in April 2015 for all purposes except research.

[15] On December 17, 2015, Ms. Lang reported the outcome of her independent review. Justice Perell summarized the principal findings as follows at para. 85 of his decision:

> (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 [Motherisk] hair-testing evidence in child protection and criminal proceedings has serious implications for the fairness of those proceedings and warrants an additional review.

[16] The report cautioned expressly that the independent review did not make any determinations of civil liability or negligence:

> 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.

This Lawsuit

[17] On December 22, 2015, plaintiff Yvonne Marchand filed a notice of action against the defendants. She later withdrew from this class proceeding to bring her own individual action. R.G. delivered an Amended Statement of Claim and became the proposed representative plaintiff on November 16, 2016.

[18] In this lawsuit, R.G. alleges that from 2009 to 2012, her access to her only child was repeatedly and wrongly interfered with as a result of incorrect Motherisk hair test results. While she admits that she had a prior addiction to cocaine that was reflected in Motherisk hair test results, she alleges that the lab incorrectly reported that she was a chronic alcoholic. She alleges that she also took daily urine tests during the relevant period which found no alcohol in her system (expect on one occasion). Moreover, she says that she used hair products that contained alcohol that could lead to false positive outcomes if not handled correctly in the testing process.

[19] R.G. 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, 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 enzyme-linked immunosorbent assay 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 to purportedly confirm test results, but the procedure was flawed.

[20] R.G. claims various heads of compensatory damages including: pain and suffering, impaired ability to participate in normal family affairs, loss of custody, unnecessarily protracted and more complex legal proceedings, requirement of supervised visitation on false pretenses, exacerbation of mental health challenges, destruction of credibility and character, loss of friendship and companionship, and impaired ability to obtain and sustain employment.

[21] It is apparent that the heads of negligence advanced by the plaintiff all relate to systemic issues within the Motherisk facility rather than alleging specific one-off issues that affected her in particular. Counsel has chosen to frame the case on a systemic basis to better structure the case for a class action. That was a proper strategic choice for a plaintiff to make. However, Justice Perell found that the choice had consequences.

[22] It is apparent that the plaintiff has drawn her allegations of systemic negligence from the independent review report. Ignoring for this motion or appeal any admissibility issue relating to the use of the report at trial, the plaintiff has chosen to approach the case based on the findings in a report that were not intended to be a statement of civil liability. Nor were they intended to state a cause of action (a right to sue) for any individual or group. Despite the different purpose of the report, the plaintiff says that she can rely on its findings to establish her entitlement to sue the defendants and to mount a class action on behalf of all those who received positive test reports from Motherisk from 2005 to 2015.

[23] There are other lawsuits outstanding against the defendants and others relating to Motherisk. There are approximately 90 patients with over 300 co-plaintiffs in total who are advancing their own individual or joined claims outside of this proposed class action.

The Decision under Appeal

Perell J. Instructed himself on the Law

[24] Justice Perell set out the principles relating to the analysis of whether a class proceeding is the preferable procedure for plaintiffs to seek relief in paras. 134 to 144 of his reasons. He properly noted that in *Fischer*, at paras. 24-38, the Supreme Court of Canada directed that the analysis is to be conducted through the lens of judicial economy, behaviour modification, and access to justice – the three goals of class proceedings generally. He correctly summarized the holding of the Court of Appeal in *Cloud v Canada (Attorney General)* (2004), 73 O.R. (3d) 401, that a preferable procedure "must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims."

[25] Justice Perell set out the legal tests as follows:

> [137] To satisfy the preferable procedure criterion, the proposed representative plaintiff must 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.
>
> [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).
>
> [139] The court must identify alternatives to the proposed class proceeding. 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. 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. [Footnotes omitted.]

[26] Mr. Baert argues that this recitation reveals that Perell J. made an error of law i.e. that he got the test wrong. Mr. Baert points to the last sentence of para. 139 and says that Perell J. put too high a burden on the plaintiff in holding that she must "satisfy the court" on this issue. Rather, the burden on the plaintiff is simply to show "some basis in fact" why the process would be preferable as defined in the case law. Showing "some basis in fact" he argues, is a lighter burden than the obligation to "satisfy the court" on a balance of probabilities. This latter point is correct. However, Mr. Baert is putting words in Justice Perell's mouth in his submission. Justice Perell never wrote that the plaintiff must meet the standard of proving anything on the balance of probabilities. Rather, Perell J. correctly noted the burden of showing "some basis in fact" in both paras. 137 and 139 as quoted above. It is not a fair reading of the last sentence of para. 139 to assume that Perell J. forgot the words he wrote two sentences before and two paragraphs before and imposed a different and more exacting burden of proof on the plaintiff. One should not assume. On a fair reading, Justice Perell's reference to a plaintiff satisfying the court is simply a recognition that the plaintiff must show some basis in fact to say that a class proceeding would be "fair, efficient, and manageable".

[27] The principal concern raised by Perell J. is that, in his judgment, in this case, the proof of each class member's entitlement to compensation is so idiosyncratic and individualized that there is no real advantage to using a class action. In Justice Perell's judgment, resolution of the common issues proposed by the plaintiffs would do very little to advance the proof of each class member's claim to entitlement to compensation from the defendants. I will consider the pros and cons

presently. But first, it is important to show that Perell J. appreciated the applicable law and, especially, the proper approach to balancing the relative importance of the resolution of common issues in the context of the case as a whole.

[28] Justice Perell rightly appreciated that ss. 12 and 25 of the *Class Proceedings Act, 1992* contemplate individual claims being litigated as part of a class proceeding. The court is provided with tools to manage the individual claims process so as to try to promote access to justice and judicial economy. In para. 143, he instructed himself expressly that:

> ...the inevitability of individual claims 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."

[29] Justice Perell concluded his recitation of the applicable general law by noting:

> [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. 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. 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.

[30] Mr. Baert argues that Perell J. erred in law by referring to remaining individual claims as "individual claims trials" as if the only process that is available to resolve individual issues after a common issues trial is under the *Rules of Civil Procedure* rather than a simpler, alternative process. Section 25 of the *Class Proceedings Act, 1992* provides the trial judge with a discretion to determine any individual issues that remain after any common issues are resolved in further hearings or to refer the hearings to another judicial officer, or, with consent of the parties, to direct that the issues be determined in another manner. Mr. Baert argues that in considering the issues that arise in "individual claims trials" Perell J. overlooked the trial judge's entitlement to customize a process that might reduce the difficulties arising from determining multiple individual claims in formal trial settings. Once again however, Mr. Baert assumes that Perell J. forgot words that he wrote just a few sentences above. Justice Perell expressly discussed the trial judge's entitlement to access tools to manage the process to achieve access to justice and judicial economy under ss. 12 and 25 of the statute. These tools will be exercised in a proceeding subject to the *Rules of Civil Procedure* unless the parties all consent to a different process. As an experienced judge of this court, Perell J. is well aware of the breadth of case management powers to design hearings to meet the needs of a case. At para, 141, he made specific mention of the emerging role of the principle of proportionality that he sees applying to modify and guide questions of whether claimants will receive a just and effective remedy for their claims.

[31] Whether the descriptor "trial", "hearing", or "alternative process" is used, Mr. Baert acknowledged that any process for resolving individual issues under s. 25 will have to be fair to all parties. Whether the procedure is more or less formal, the defendants will be entitled to put the plaintiffs to their ultimate burden of proof and to raise their own legal and factual defences.[1] In light of his references to the case management tools in s. 25 and the importance of proportionality in pursuing access to justice and judicial economy, I do not see an error of law in Perell J. referring to the remaining individual issues under the rubric "individual issues trials."

Perell J. applied the Law to the Evidence

[32] Justice Perell next turned to assessing the procedural and substantive elements of the preferability criteria. Although he later found that the common issues proposed by the plaintiff did not meet the statutory requirements of "common issues," for the purpose of this analysis both he and I treat the plaintiff's proposed common issues as meeting the applicable legal standard. The analysis is not being conducted in the abstract. Rather, the common issues to be weighed are those asserted by the plaintiff. As set out at para. 113 of the decision, the common issues essentially look at whether the defendants breached any duty of care owed to the proposed class and, if so, whether aggregate and punitive damages are appropriate in this case. The last two issues require that the first issue - breach of a duty of care – be found in favour of the class. And it is principally that issue on which the plaintiff's case foundered.

[33] As mentioned above, the duty of care proposed by the plaintiff in this case is a systemic one. The negligence that the plaintiff alleges is that the lab as a whole used inappropriate tests and that its methods, reporting, and supervision were seriously lacking. The plaintiff's goal is to show that none of the tests performed by the plaintiff were correct or reliable when viewed from a system-wide basis so that no individual plaintiff would then have to show that his or her tests were performed improperly. At para. 148 of his decision, Justice Perell discussed the systemic grounds asserted and held:

> ...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.

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[1] I note that in her proposed litigation plan, the plaintiff did not accord the defendants even these minimal procedural rights. Perell J. found the litigation plan to be wanting. I need not say anything more about it in light of the resolution of this appeal on the preferability analysis alone.

[34] One need not prove all elements of liability in a class action common issues trial, of course. Justice Perell's concern was that proof of the general, systemic failings of the lab did not relieve the plaintiff from proving individually that her hair tests were wrong and that the wrong tests were a but-for cause of some further wrong such as a wrongful removal of a child by a Children's Aid Society. He described the burden on the plaintiff as follows, at para 151:

> The hard work of proving that the unreliable test actually adversely influenced the result of the court proceedings is a matter that Ms. R.G. 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.

[35] In essence, by adopting the systemic findings set out in Ms. Lang's independent review, the plaintiff picked issues that might be easier for her to prove but which do not contribute much, if at all, to her ultimate claim for liability and damages. Ms. Lang was clear that she did not purport to be finding liability. The plaintiff is free to focus her claim on Ms. Lang's systemic findings, but Perell J. found that doing so did nothing to advance her claim for damages.

[36] Mr. Baert puts particular emphasis on the *Cloud* decision and Justice Goudge's discussion of how to weigh the relative importance of the resolution of proposed common issues against individual issues. The question to be asked, as Goudge J.A. wrote at para. 77, is whether, in the context of the entire claim, the resolution of the common issues will "significantly advance the action". One need consider the proposed common issues and weigh their "relative importance." At para. 76, Goudge J.A. set the test as follows:

> In Ontario it is nonetheless essential to assess the importance of the common issues in relation to the claim as a whole. It will not be enough if the common issues are negligible in relation to the individual issues...the critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action.

[37] The test therefore involves a balancing of relative importance of the common issues to the remaining individual issues in the plaintiff's overall quest for compensation. The judge is required to consider if the resolution of the common issues will significantly advance the lawsuit or, by contrast, whether it will have a negligible effect on advancing the parties' rights while perhaps subjecting them to other disadvantages (like a very expensive trial that accomplishes little of substance). It is perfectly clear that this balancing is an exercise of judicial discretion. It calls upon the judge to reflect on his or her understanding of the substantive causes of action at play, the design of complex litigation, and the specialized processes available in class proceedings. This is the "broad discretion" that Winkler C.J.O. referred to in *Caputo* as the basis for the "special deference" noted by Rosenberg J.A. in *Pearson* above.

[38] Justice Perell discussed several leading authorities, including *Rumley v British Columbia,* 2001 SCC 69, [2001] 3 S.C.R. 184, which Mr. Baert relies upon in particular. Mr. Baert argued that Justice Perell never articulated a reason why *Rumley* should not apply in this case. That submission was not correct. Justice Perell discussed in para 159 how in *Rumley*, a finding of systemic negligence eliminated the need for every class member to prove that he or she was

assaulted by a particular individual. That is, resolution of the common issues significantly advanced each class member's proceeding. He found that R.G.'s position in this case "is the exact opposite." In this case, the class members were not harmed by the tests being systemically unreliable. Rather, only class members who can show that they received a false test result and that the false test result caused them to suffer an adverse outcome in legal proceedings will have compensable claims.

[39] Justice Perell concluded his assessment of the outcome of the application of the legal standards in light of the facts and evidence as follows:

> [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. [Emphasis added.]

[40] In other words, in the judgment of the experienced class actions judge, the resolution of the common issues proposed by the plaintiff would not "significantly advance the action." By definition, "infinitesimal" is smaller than any finite number and therefore it is even less than the "negligible" importance postulated by Goudge J.A. Regardless of semantics, it is apparent that Perell J. made a judgment call based on his analysis of the common issues, in light of the evidence, and in the context of the case as a whole.

Analysis of the Exercise of Discretion

[41] As discussed above, absent an error of law, or being "clearly wrong," Justice Perell's decision is entitled to deference. I see no error of law in Justice Perell's reasons or in his consideration of the applicable factors.

[42] I am unable to conclude that Justice Perell was wrong, let alone clearly so. The burden on the plaintiff and class members to prove causation is a very difficult one to meet. While some class members may be aided by the lab's systemic lack of record keeping, they still need to prove that they were not taking the drugs or alcohol attributed to them. These are very individualistic cases. As Mr. Baert notes, many of the proposed class members will have complex backgrounds, often disadvantaged. Like R.G., many may have had comorbidities. R.G. concedes, for example, that her tests for cocaine were correct. For people who may have been in vulnerable circumstances, suffering physical or mental health challenges, educational deficits, language barriers, possible victimization at the hands of others, and who may have taken one or more illicit drugs or alcohol recreationally or abusively at times, marshalling evidence to prove that a drug test was wrong many years ago presents litigation and evidentiary challenges, to be sure. Then, layered onto that is proof that a false test was a cause of an unjust outcome in a proceeding. Undermining subsisting orders based on fresh evidence is no small task. Moreover, given comorbidities and other vulnerabilities that may have been at play, there may be any number of reasons why a legal or extra-legal outcome was reached in individual cases. Each case may well have to be subjected to

a review of multiple, complex, and competing factors. Whether subsisting court orders can even be challenged in civil proceedings before the orders are actually set aside is an interesting issue in itself. But as a litigation structural challenge, these two elements of causation – proof that a test was wrong and proof that a wrong result caused a further unjust outcome - are daunting and are not aided at all by the resolution of the common issues proposed.

[43] By contrast, in light of the findings of Ms. Lang's independent review, to the extent that a plaintiff thinks that proof of systemic negligence may help prove her claim, I doubt that proof of the systemic issues will be a particularly difficult piece of the litigation. The defendants' knee-jerk denials in their statements of defence do not aid them in this analysis. However, ultimately, they cannot ignore the reality that regardless of whether Ms. Lang's report is admissible for the truth of its contents, a party will be able to point to the evidence unearthed very publicly on these points if they arise.

[44] Justice Perell also noted in passing that in individual claims, the plaintiffs will not be limited to the suing the three defendants named in this case. Moreover, in this case, the plaintiff has limited her claims against each defendant to that defendant's own several share of liability. If the defendants show that any class member's losses were caused or contributed to by the wrongful conduct of another person (an ex-spouse, a CAS worker, a doctor, or a lawyer for example), the plaintiff is left with the prospect of a further, separate, individual lawsuit against that person or those people.

[45] Furthermore, limiting class members' claims to several liability against the three named defendants also has the potential to greatly increase the complexity and expense associated with proof of each class member's loss. In most tort cases, the plaintiff sues the defendants jointly and severally so that all the plaintiff needs to prove is that one defendant is liable for 1% of her loss and then that defendant can be required to pay 100% of the plaintiff's damages. It is the nature of a holding of joint liability that the defendants are left to battle out their respective shares of contribution among themselves. In this case, the plaintiff decided to structure the claim as advancing only several liability, ostensibly to prevent the defendants from claiming over and adding a huge number of parties to the proposed class action. But one effect of that decision is that each class member must now prove and quantify each defendant's personal share of liability. To do this requires each class member to quantify the shares of liability of all possible defendants who would have been found liable had they all been sued. The individual claims portion of the proposed class action will therefore be much more difficult, complex, and expensive than if individual actions were utilized. Like Perell J., I remain aware that the court would have tools available to try to make the hearing of individual claims more proportionate and manageable so as to make relief more accessible. But these are fundamental structural arguments that will have to be addressed, more or less formally, no matter what process may be engaged.

Outcome

[46] Justice Perell was called upon to conduct a balancing process leading to a discretionary exercise of his experienced judgment. I see no error of law in how he directed himself or in his application of factors. I do not find that Perell J. was clearly wrong. Therefore, Justice Perell's exercise of discretion is entitled to deference.

[47] As a result, the appeal is dismissed.

[48] The parties advised that they can be left to their own devices to agree upon costs. In the event that this does not come to fruition, they may contact the registrar.

FL Myers J.

I agree

Lococo J.

I agree

Trimble J.

Release Date: November 26, 2018

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REASONS FOR JUDGMENT

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