

Mass Torts and Class Actions: Separating the Wheat from the Chaff

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Mass torts and class actions have in common a numerosity of victims. The wrongdoer may be one or several. The wrong may be a single event, such as a train wreck, or a creeping wrong, such as a lung disease caused by asbestos or tobacco. Class actions are a legislative response (and after *Western Shopping Centres*, a judicial response) to the challenge of providing procedural solutions to the problems presented by numerosity of claims. The competencies required of plaintiff counsel in mass tort are the same as those required to represent single victims, plus the capacity to handle a volume of cases arising from the same wrong. The same competencies are required by class action practice, plus knowledge of a large body of specific procedural law, and skill in motion and appellate practice. Both mass torts and class actions may be characterized as complex litigation.

In considering what separates the wheat from the chaff, the first issue, at least for plaintiff counsel, is whether to accept the case. The next issue concerns how you conduct yourself during the life of the case. Not only do you want to separate the wheat cases from the chaff cases, you want to be a wheat lawyer, not a chaff lawyer. With some humility, I offer the following Seven Rules of Self Preservation in Mass Tort and Class Actions, or to paraphrase the title of the book by Stephen Covey, *Seven Habits of Highly Effective Plaintiff Counsel*.

Rule 1 – Stick to your bush and pick it clean

The best advice about plaintiff class action practice may be: don't do it. You may already have a practice which you enjoy and which provides a good income. Think about staying with it. As a wise Newfoundland judge once said: "Stick to your bush and pick it clean." Well known Ontario trial lawyer and author John McLeish, ventured into the class action field a few years ago. One of his cases concerned auto deductibles. He handed off the case well before the Ontario Court of Appeal constituted a special five judge panel and reversed itself in *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, 2005 CarswellOnt 2500, destroying the cause of action in the process. Mr. McLeish decided to stick to his bush, and continues to pick it clean.

If a case or cases are viable as part of a mass tort claim, then avoid the uncertainties of class proceedings. Don't overreach. Don't sue whole industries, and remember that interjurisdictional class actions are riskier than actions with a purely provincial scope.

Rule 2 – Don't do anything your grandmother wouldn't approve of

This is the grandmother test. Since your grandmother already doesn't approve of class actions, and probably doesn't approve of any other type of lawsuit either, this is a hard hill to climb. You don't want to die on this hill.

The CBA *Code of Professional Conduct* sums it up by stating:

The lawyer must discharge with integrity all duties owed to clients, the court or tribunal or other members of the profession and the public.

Commentary

Guiding Principles

1. Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession. If the client is in any doubt about the lawyer's trustworthiness, the essential element in the lawyer-client relationship will be missing. If personal integrity is lacking the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.
2. The principle of integrity is a key element of each rule of the Code.

Members of the Nova Scotia Barristers' Society are aware of the ethical rule which the CBA *Code* puts first before all other rules, but the primacy of integrity in class action practice can hardly be overemphasized. Class action practice is rife with opportunities to get ourselves and the whole area of practice into difficulty. The rule of conduct must truly be to behave like Caesar's wife – above suspicion. The reasons are several.

The role of class action counsel is often high profile and public. It gets reported in the press. Our conduct has enormous impact on the public perception of the legal profession, and on the public perception of the administration of justice. Class members and the T.V. watching public are primed to think the worst of lawyers, particularly plaintiff trial lawyers. Conduct of class counsel has enormous impact on the future of civil justice in Canada – a future which is insecure. I have attached an opinion piece which I placed in *The Lawyers Weekly* on the stealth war against civil justice. This war is crossing Canada's borders from America even now.

Plaintiff counsel in class actions and mass torts have an opportunity which has not existed in Canada before, to hold corporations and government bureaucracies to account. As we get better at our craft and corporate Canada realizes it is being more frequently held accountable for its actions, we should expect a public relations counterattack on plaintiff lawyers. We have a responsibility to our clients and to the overriding value of access to justice, to conduct class action practice with total integrity. This means, as a general rule, avoiding cases in which there is a perception that there are no real or deserving victims or that appear to be driven by lawyers, avoiding claiming time for which there are no dockets, avoiding the “coupon” settlements which are so notorious in the United States, and avoiding settlements in which the plaintiff lawyers could end up being paid more than, or even anything close to, the amount taken up by the class. Use the class action tool for achieving access to justice and deterrence of wrongdoing wisely, with integrity, and with an eye to public perception, or lose it.

Unimpeachable integrity is also the best redoubt for surviving the potential viciousness of class action practice. This is a practice in which whatever you say to opposing counsel can find its way into an affidavit, and how you conduct the case can get you sued, not by your own client (although this is possible), but by the defendant.

The defendant in a criminal interest rate case recently concluded a settlement agreement. Counsel for a competing class action in another province launched a vigorous intervention, and several days before the fairness hearing, plaintiff’s counsel for the settling class withdrew the motion for approval. The defendant subsequently sued him for the considerable cost of working up a financial formula for the settlement, and any future fees, pleading essentially a bad faith failure to complete the settlement. Or think of *Caputo v. Imperial Tobacco Ltd.*, 2005 CarswellOnt 856 (S.C.J.), the Ontario sick smoker case, in which the defendant unsuccessfully sought enormous costs against plaintiff counsel personally. Class action defendants feel that their market position, the respect of their stakeholders or constituencies, and even their existence is at stake. This arena of practice is tough and sometimes vindictive, and defendants and their counsel are never your friend.

Although unimpeachable integrity will not immunize you from the potential viciousness of class action practice, it will minimize your risk and grant you a serene conscience. And if you come to it to do good – to represent deserving clients with meritorious cases and do it with integrity – you may also do well.

Rule 3 – Chance favors the prepared mind

This maxim is attributed to Louis Pasteur. He meant that by study, preparation, and focus, you make your own luck. When the deserving and meritorious case meets the prepared mind, it will be recognized. The best luck is the kind you make for yourself.

Rule 4 – You can tell the pioneers by the arrows in their backs

Don’t be a pioneer. Don’t count on winning close cases. Rather, stick to the golden mean of class action cases. This golden mean would be easier to identify if class action practice were

mature and certain, but it is still developing in many areas. All the same, don't venture outside the established pattern. Let someone else, a better lawyer than you, establish the precedents.

Rule 5 – Work with experienced class counsel

One definition of an expert is someone who has lost a lot of money in a small area. By this definition, I am not yet an expert in class actions. Class action law is a complex and ever expanding specialty area with a considerable body of caselaw behind it. Far better to consult or partner with an expert in class action law and divide a good fee, than to have 100% of nothing.

Rule 6 – Think win/win

The only sure winners in class action practice are the defence lawyers. Sure, they preach about litigation getting out of hand, but they love it. The only certain beneficiary of class action practice is the defence lawyer. Expect lots of motion practice, lots of trial practice, lots of appellate practice. For the defence lawyers, everything is win/win.

For the clients, defendants and plaintiffs both, the outcome at best is win/lose, or even lose/lose, if the action goes to trial and judgment. The only win/win outcome available to clients is through settlement, and through settlement the wider community can benefit too. Class action practice is the closest a trial lawyer can get to making social policy. By way of example, the payday loan class actions seek a money remedy for the victims of criminal interest rate loans, but they have also prompted the federal and provincial governments to better regulate this financial market place. Or by way of another example, in a settlement with a hospital over use of unsterilized instruments, improvements to infection protocols and quality assurance may be agreed, to the benefit of the wider public served by the hospital.

For plaintiff counsel, the old maxim applies: if you want peace, prepare for war. For war, you need a war chest and a prospect of sufficient reward for success. This means that to do a class action feasibly, a conservative settlement value should be at least \$1 million, and probably more. But the only sure way to win is to settle.

Rule 7 – Enjoy the ride

In the end, we all love our craft. Class action practice requires us to exercise our craft at its highest levels. If you have a good class action, enjoy it. You may never achieve these heights of professionalism again.

Rule 8 – Never refuse luck or prayer

I said seven rules, but this eighth rule deserves to be mentioned. Even Stephen Covey came up with an eighth habit for highly effective people. All the usual risks of trial lawyering – issues no one foresaw, witnesses who inexplicably reverse their evidence, temperamental and erratic judges – apply, but Winkler, J. (as he then was) expressed well an additional risk inherent in class action practice in *Caputo, supra*, para. 29, in relation to the five factors that legislation requires must be satisfied in order to obtain class certification:

All but one of these elements is objective and lends itself to an analytical approach. The element of preferable procedure is another matter entirely, however. A consideration of whether a class proceeding is the preferable procedure for determining the common issues is a matter of broad discretion. Thus counsel to the proposed representative plaintiffs can do everything right and still be unable to predict with certainty the outcome when it comes to this criterion.

Counsel can do everything right and still lose. No less an authority than Winkler, J. (now Winkler, C.J.O.) says so. Never refuse luck or prayer.