

Common Ground? Class Action Updates

Class Action Certified Against the MLTC Respecting COVID-19 Deaths/Illnesses in Long-Term Care Homes

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In [Robertson v. Ontario](#), Justice Belobaba of the Ontario Superior Court of Justice recently certified a class proceeding against the Ontario Minister of Long-Term Care (MLTC). The case relates to the deaths or serious illness due to COVID-19 of thousands of residents in provincially regulated long-term care (LTC) homes. Although the class proceeding was certified, the outcome of the motion was mixed for both parties.

The plaintiffs' argument was that the government of Ontario knew early on in 2020 that residents of LTC homes were the most vulnerable to COVID-19 and yet allegedly failed to act soon enough to prevent the rapid spread of COVID-19 in these environments. The plaintiffs argued that this outcome would have been prevented, but for the government's alleged delay in its pandemic response. The plaintiffs' claim rested on three asserted grounds: breach of fiduciary duty, breach of s. 7 of the *Charter of Rights and Freedoms*, and negligence/gross negligence.

At the certification motion, Justice Belobaba rejected two of the plaintiffs' three proposed causes of action. His Honour decided that the claims for breach of fiduciary duty and for breach of s. 7 of the *Charter* had no reasonable prospect for success.

With respect to the claim for negligence/gross negligence and the alleged acts or omissions, Justice Belobaba stated that it would be challenging, at best, for the plaintiffs to pursue this claim against a public authority due to the issue of proximity. The "proximity analysis" asks "whether there is a relationship of "sufficient closeness" between the government actor and the impacted individual or group of individuals that it would be "just and reasonable" to impose an obligation on the government actor to take reasonable care not to injure the individual or group of individual." Prior case law states that, because most statutes are aimed at a public good, it may be difficult to infer that the legislature intended to create private law tort duties owed to individuals by a government actor. However, the motion judge ultimately concluded that it was not possible to say that the claim would have no reasonable chance for success at the certification stage.

Because the Crown cannot be sued directly in tort, the plaintiffs identified the following agents (or officer) of the Crown whose actions might give rise to vicarious liability on the part of the Crown: the MLTC, the Chief Medical Officer of Health (CMOH), and the Minister of Health (MOH).

After analyzing the language of the guiding statutes of the named parties, Justice Belobaba concluded that the plaintiffs' claim could only potentially succeed against the MLTC. His Honour held that there was no reasonable possibility that the CMOH and MOH could potentially be found vicariously liable for negligence/gross negligence against the residents of LTC homes. Justice Belobaba therefore restricted the plaintiffs' class action further based on that conclusion.

Justice Belobaba noted that, to succeed on the merits on the cause of action of negligence/gross negligence, the plaintiffs would have to eventually establish the existence of a private duty of care owed by the MLTC to the plaintiffs.

Finally, Justice Belobaba considered the plaintiffs' proposed class definition. The plaintiffs had sought to certify the class action with a resident class, a visitor class and a family class. Once again, Justice Belobaba narrowed the scope of the proposed class, restricting this class to only LTC residents and surviving family members. On that point, the decision noted at paragraph 63:

The possible imposition of a private law duty of care on the MLTC in these circumstances is already tenuous given the issues



and arguments discussed above. I am not persuaded on the statutory language before me that the reach of the private law duty of care analysis can or should go beyond the LTC residents to include visitors.

In sum, Justice Belobaba allowed the class proceeding to proceed, but in a much-reduced form as compared to the original claim. The key question as to whether or not the MLTC's alleged inaction or delay to implement protective measures in LTC homes amounted to gross negligence which caused the deaths and illnesses of thousands of LTC residents, and if so, whether that delay attracts legal liability, remains to be decided.