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Variable Insurance Over a Class Period: Does a Substantive Problem have a Procedural Solution?

It is often said that the *Class Proceedings Act, 1992* is a procedural statute, not a substantive statute. What that means in practice is unclear, given that different procedural rules can have an impact on substantive outcomes. However, even a narrow version of that claim—that the *Class Proceedings Act* does not grant the Court jurisdiction to create or extinguish substantive rights beyond what the Court could do in an individual claim—is very much up for debate. There are increasing examples of creative judges using provisions under the *Class Proceedings Act* to take steps that impact substantive rights in a manner that would be impossible in an individual claim. The Court's recent decision in *Cavanaugh v Grenville Christian College* presents such an example.

This case involved allegations of institutional abuse of students by Grenville Christian College which spanned several decades, from the early 1970s to the late 1990s. The class action was certified. Following a five-week common issues trial, the defendant was found liable but there was no award of aggregate damages. As a result, individual issues trials for each student remained to be conducted.

After the common issues trial was completed, the parties requested that Justice Perell approve the litigation plan pertaining to the individual issues. This fact, in and of itself, is noteworthy, as there are relatively few cases where judgment has been granted in favour of the class on the common issues, but where there has not been an award of aggregate damages or settlement, such that individual issues trials are required. The protocol ordered for these trials was in many respects conventional: Justice Perell approved a four-track process with varying procedural rights and obligations for different categories of claimants, depending on the amount of damages claimed.

What makes the decision noteworthy is what Justice Perell described as the "elephant in the room" - the fact that the defendant was judgment-proof and defunct, while the insurance coverage available varied substantially. Between 1973 and 1983, there was no insurance coverage available, except for

$3,000,000 in 1979 and $1,000,000 in 1981. By contrast, from 1984 onward, there was $10,000,000 in insurance available for each year in the class period.

With this variable insurance coverage and policy limits, class members whose claims fell within certain policy years may recover nothing against the judgment-proof defendant; while others whose claims fell in different years might be able to recover. Justice Perell felt that this was unfair, and he developed, as he described, a three-step solution to this problem:

- First, all claimants would contribute their adjudicated recoveries to a distribution fund, which he described as akin to a settlement fund, to be divided amongst all eligible class members in accordance with the distribution plan.
- Second, those claimants for whom there was no insurance coverage would have their claims diverted from the individual issues litigation plan and have their eligibility for compensation determined by a claims adjuster.
- Third, a distribution plan would allocate recovered funds among all class members.

While Justice Perell directed class counsel to propose a distribution plan, the clear intent of his decision is that there would be a *pro rata* equalization of amounts recovered between claims where there was no coverage and those which would benefit from coverage. As Justice Perell noted, anything else would be unfair as between class members:

> The unfairness caused by the erratic insurance coverage is palpable. Visualize, if a Class Member's claim was determined to fall within the policy years 1973, 1974, 1975, 1976, 1977, 1978, 1980, 1982, or 1983, he or she would recover nothing from the judgment proof Defendants. Visualize, if a Class Member's claim was determined to fall within the policy years 1979 or 1981, depending on the number of other claims for those years, there might be insufficient insurance and the insurance might run out before the individual claimant's claim was adjudicated. The flukes of the insurance coverage raise an unfairness issue. How can it be fair that a Class Member whose harm was suffered in 1983 should recover nothing while a fellow Class Member who suffered the same harm in policy year 1984 is fully compensated?

This outcome means that no class member would be denied compensation because their claims fell into a period where no insurance coverage was available. However, it also means that class members whose claims fall into a year for which insurance coverage is available would lose a percentage of the recovery that they would otherwise receive.

Justice Perell's decision is remarkable in pushing the boundaries as to the types of orders that can made under the *Class Proceedings Act*. While decided in the guise of a procedural decision relating to the conduct of individual issues trials, the requirement that individual class members pay their recoveries into a common distribution fund certainly sounds like a creation of new substantive rights and obligations. Had the claims been brought individually, recovery would be paid out individually and based on the existence of any responsive insurance coverage available in a particular year. If there were no responsive insurance coverage available to a particular plaintiff, then they would simply be out of luck. The decision is thus significant in modifying substantive rights of individual class members in the name of fairness as between members of the class.

The motivation for this decision is understandable. As Justice Perell notes, it would be manifestly unfair as between class members if individuals' recoveries were based on the vagaries of insurance coverage in any particular year. Despite the laudable desire to equalize recovery, this presents a significant change, and Courts should tread carefully in imposing these types of solutions to redress substantive differences between class members' claims.