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Quit stalling: Ontario Court of Appeal calls for culture shift around delay in civil actions

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In *Barbiero v. Pollack*[1], the Court of Appeal for Ontario upheld a motion judge's decision dismissing a 21-year-old certified class action for delay. The Court's decision clarifies when dismissal for delay is appropriate, including in the class actions context, as well as what constitutes "inordinate delay".

What you need to know

- **Delay alone constitutes prejudice.** The Court was critical of a "tolerant attitude toward delay" by judges and litigants alike, making it clear that the passage of time alone can constitute prejudice sufficient to dismiss an action for delay.
- **Five-year delay starts becoming "inordinate".** If an action has not been set down for trial within five years of being commenced, it begins to veer into the realm of 'inordinate' delay.
- **Dismissal for delay applies to class actions.** Certified class actions are not exempt from the consequences of inordinate delay and may be dismissed for delay in the same manner as single plaintiff claims.

Background

In 2003, the representative plaintiff, Anna Barbiero, brought a class action against the defendant, Dr. Pollack, on behalf of a class of 369 individuals alleging that the defendant breached the standard of care through his injection of injectable liquid silicone products into class members' lips between 1990 and the early 2000s. The action was certified on consent at the end of 2003.

Between 2006 and 2012, class counsel took no steps to advance the action, other than to request a new case management judge and to attend mediation, which was unsuccessful. Following the mediation through to 2019, class counsel took no substantive steps to advance the action. At the end of 2019, class counsel advised that they would seek to test a sample of injectable liquid silicone product and bring a motion to amend the class order. The defendant advised in 2022 that he would be seeking to dismiss the class action for delay. The dismissal motion was heard and ultimately granted by the motion judge. The Court of Appeal upheld the result.

Delay alone constitutes prejudice

The Court of Appeal affirmed its prior analysis given in *Langenecker v. Sauvé*, 2011 ONCA 803, that an action will be dismissed for delay where the delay is (i) inordinate, (ii) inexcusable, and (iii) results in a substantial risk that a fair trial of the issues in the litigation will not be possible because of the delay, including because of prejudice to the defendant.

The Court, however, held that *Langenecker*'s approach to delay—which held that delay alone was insufficient to show prejudice—was "out of step with the contemporary needs of the Ontario civil court system". The Court of Appeal further criticized "indifference to delay" in the bench and bar as an "unhealthy characteristic", calling for the need to change not only the "entrenched culture of indifference to delay manifested by far too many litigants and their counsel" but also "those judge-created rules or interpretative glosses that do not promote—and in some cases impede—the 'prompt judicial resolution of legal disputes'." Accordingly, the Court recognized that the passage of time on its own is sufficient to show prejudice supporting the dismissal of an action for delay.

Five-year delay moves into the ream of "inordinate"

The Court of Appeal also provided guidance as to what constitutes "inordinate" delay. It agreed with the motion judge's conclusion in this case, characterizing as "irreproachable" his finding that a delay of 21 years was inordinate. The Court explained that inordinate delay must be "unusually large or excessive" relative to a benchmark setting against the normal amount of time it should take an action to move from its initiation to being set for trial. That benchmark, it said, exists in Rule 48.14(1)1 of the *Rules of Civil Procedure*, which provides that an action shall be administratively dismissed for delay where it has not been set down for trial within five years of being commenced. An action that has not been set down for trial within those five years "crosses the line and begins to move into the realm of 'inordinate' delay." The Court further clarified that the starting point for assessing the length of that delay is the commencement of the proceeding—not some other, later point in the litigation.

No special treatment for class actions

Neither party was able to point the motion judge to any precedents where dismissal for delay had been considered in the context of a certified class action. The motion judge nonetheless held that the Court could make such an order either pursuant to Rule 24.01 (Dismissal of Action for Delay) or the court's inherent jurisdiction to dismiss an action for delay. The Court of Appeal implicitly agreed, finding no error with this reasoning.

The Court of Appeal rejected the plaintiff's argument that dismissal of a class action would be contrary to the goals of the *Class Proceedings Act* of achieving access to justice, judicial economy, and behaviour modification, and held that class proceedings are not exempt from the operation of the general principle that the goal of civil litigation is the obligation to secure the "most expeditious" determination of the proceeding on its merits. The Court also confirmed that the party-prosecution nature of Ontario's civil justice system places the burden to move an action forward on the plaintiff. Therefore, absent procedural resistance from a defendant to having the adjudicated claim on its merits, any delay in a civil action is the fault of the plaintiff. This principle applies to all civil proceedings, including class actions.

Implications

The Court of Appeal for Ontario's decision in *Barbiero* signals an express culture shift in the Court's tolerance for delay in class actions. Plaintiffs and their counsel who fail to pursue claims expeditiously risk having them dismissed for delay, even after certification. In this regard, the Court has clearly signaled that when it comes to delay, class actions should be treated no differently than individual civil claims.

Although the length of delay in *Barbiero* was exceptionally long (having "strayed deep into the dark wood of 'inordinate' delay" 21 years after the claim was commenced), the Court was clear to indicate that the passage of time alone can constitute sufficient prejudice to dismiss an action for delay, and that a five-year delay may be sufficiently inordinate to justify a dismissal order. This is a welcome development for defendants to historical and dormant litigation, and is consistent with similar developments in other provinces[2].

FOOTNOTES

1. 2024 ONCA 904.
2. See for example, *Allison v Janssen-ortho Inc*., 2023 SKKB 283 where the Court of Kings' Bench dismissed a 13-year-old proposed class action after seven years of inactivity.

To discuss these issues, please contact the author(s).