

LYNN PIERCE

RECEIVED A B.A. IN RELIGIOUS STUDIES, A B.S.W., AND AN M.A. IN MEDICAL ETHICS FROM MCGILL. SHE IS A THIRD YEAR LAW STUDENT AT THE UNIVERSITY OF BRITISH COLUMBIA.

Raising the Roof on Community Housing for People with Disabilities:

Class Actions in Canada

I. Introduction

Provincial legislation permitting class actions first came into force in Québec in 1979.¹ Legislation in Ontario and British Columbia has permitted class actions since January 1, 1993² and August 1, 1995,³ respectively. Judicial commentary on the British Columbia and Ontario acts suggests that these are favourable to a class of people whose primary common claim is their shared history of being disadvantaged in our society.⁴ This article looks at American civil rights class actions related to deinstitutionalization of people with disabilities, and the right to live in the least restrictive environment, as a possible model for contemporary disability rights advocates in Canada.⁵

Deinstitutionalization is the term used to describe the public policy transformation beginning in the 1970's with regard to traditional asylum systems of care.⁶ Closely aligned with this transformation is the broader concept of community based care.⁷ At this writing, these issues remain very much alive for people with disabilities in British Columbia. Physically disabled, long-term residents of the George Pearson Rehabilitation Centre in Vancouver recently opposed a threatened transfer to a new mega-institution.⁸ Former George Pearson residents, living for some time independently in the community,⁹ now face proposed cutbacks in funding that may force them back into long-term care.¹⁰ In the Greater Victoria Capital Region, long term residents of the community with serious physical disabilities are suffering from drastic reductions in their home care services.¹¹ Revisions to the British Columbia Mental Health Act have expanded the criteria for involuntary admission for people with mental illness to include "prevention" of the person's substantial mental or physical deterioration.¹²

These present realities reflect the crucial role played by political power in determining how well people with disabilities are served by deinstitutionalization.¹³ The following discussion will outline the merits of class action suits as a new forum in which disabled people can exercise their political power in Canadian courtrooms.

II. Class Actions: the Promises and the Pitfalls

As for all plaintiffs, whether it is advantageous for people with disabilities to pursue a

1 Act Respecting the Class Action, Statutes of Quebec 1978, chapter 8; as amended Statutes of Quebec 1992, chapter 57.

2 Class Proceedings Act, Statutes of Ontario 1992, chapter 6; hereinafter cited as "the Ontario Act."

3 Class Proceedings Act, Statutes of British Columbia 1995, chapter 21; hereinafter cited as "the BC Act."

4 John Campion and Victoria Stewart, "Class Actions: Procedure and Strategy" (1997) 19 *The Advocates' Quarterly* at 22. On the disadvantaged and the public interest, see section 31(1) of the Ontario Class Proceedings Act, 1992 and *Edwards v. Law Society of Upper Canada* (1994), 26 *Carswell Practice Cases* (3d) 116 (Ontario Class Proceedings Committee).

5 Mary Hayden, "Class-Action, Civil Rights Litigation for Institutionalized Persons with Mental Retardation and Other Developmental Disabilities: A Review," (1997) 21 *Mental and Physical Disability Law Reporter* 411 at 411. For a recent example of the abuses of asylum care of the mentally disabled in Canada, see Ingrid Peritz, "Abuses uncovered at Montreal 'asylum'" (18 February, 1999) *The Globe and Mail* A1.

6 Jonathan Bach, "Requiring Due Care in the Process of Patient Deinstitutionalization: Toward a Common Law Approach to Mental Health Care Reform," (1989) *The Yale Law Journal* 1153 at 1153; see also Martha Drassinower and Sara Levine, "More Sinned Against Than Sinning: Housing, Mental Illness and Disability" (1995) 6 *Windsor Review of Legal and Social Issues* 91 at 95-98.

class action will depend on the facts and circumstances of the case, as well as on a careful consideration of various litigation alternatives and strategies.¹⁴

A. Advantages of Class Actions

Class actions offer several distinct advantages for plaintiffs. They provide a more powerful litigation posture for the class representative and their counsel.¹⁵ There is strength in numbers.¹⁶ Consider the following institutionalized people with mental disabilities: restrained on their beds or in straight jackets;¹⁷ lying in their own urine and feces on cold floors while staff watched television;¹⁸ beaten or raped by staff.¹⁹ All of these people were plaintiffs in major American class action suits whose members numbered in the hundreds to thousands.

Because of the greatly expanded exposure to liability afforded by class actions, a defendant is much more likely to treat the litigation seriously than would be the case in individual litigation.²⁰ In injunctive suits, the defendants are fully aware that certification of a class will enhance the effective enforcement of any final judgement and may also serve as the legal foundation for damage claims on behalf of the class under further jurisdiction, or even in subsequent litigation by class members.²¹

Another major advantage of class actions, particularly where only injunctive or declaratory relief is sought, is the avoidance of mootness when the representative is no longer able to act as a plaintiff.²² It is not uncommon for an institution-based class action on behalf of people with disabilities to involve plaintiffs “who are, may be, or have been” hospitalized (*Dixon v. Kelly* (1993); *Florida Association for Retarded Citizens (ARC) v. Grabam* (1982)).²³ This generality of class is helpful in institutional reform decrees, where the population of class members is ever changing, and the litigation may drag on for years.²⁴

⁷ In Canada, this concept is represented in the social and political notion of independent living; see *Nothing Personal, The Need for Personal Supports in Canada* (Toronto: The Roeher Institute, 1993) at 10. In the United States, the right to community based care has been represented in the legal notion of the least restrictive alternative; see *Shelton v. Tucker*, 364 US Supreme Court Reports 479 (1960). John Parry, “Mental and Physical Disability Rights: The Formative Years and Future Prospects,” (1996) 20 *Mental and Physical Disability Law Reporter* 627 at 628. See also: *Brenster v. Dukakis*, 544 Federal Supplement 1069 (US District Court for the District of Massachusetts 1982); *Michigan ARC v. Smith*, 475 Federal Supplement 990 (US District Court for the Eastern District of Michigan 1979); *New York ARC v. Carey*, 393 Federal Supplement 715 (US District Court for the Eastern District of New York 1975).

⁸ Bert Forman, M.S.W., Director of Rehabilitation Programs, B.C. Paraplegic Association, in conversation with Lynn Pierce, January, 2000.

⁹ British Columbia, *Creating Housing for Healthy Communities* (Victoria: Social Planning and Research Council, 1993) at 20.

¹⁰ See note 8.

¹¹ See above.

¹² Mental Health Act, Statutes of British Columbia 1999, chapter 288, section 22, see especially section 22(3)(c)(ii).

¹³ Three distinct movements of deinstitutionalization have emerged in Canada around people with developmental disabilities, people with mental illness, and people with physical disabilities (Christine Gordon, B.A., B.Sc., Project Coordinator, B.C. Coalition for People with Disabilities, in conversation with Lynn Pierce, June, 1998).

¹⁴ Herbert Newberg and Alba Conte, *Newberg on Class Actions*, Third Edition, (New York: McGraw Hill, 1992) at 5-4.

¹⁵ See above.

¹⁶ See David Lepofsky, “Equality Rights for Handicapped Persons in the Charter: Putting the Accent on Individual Ability,” *What You Need to Know About Disability Law* (Toronto: Department of Continuing Legal Education, The Law Society of Upper Canada, November 6 1993) at 136-137.

A related benefit of avoidance of mootness is that satisfaction of the requirements of litigation by a class representative extends to absent class members.²⁵ This is helpful for class members who are too disabled to participate personally²⁶ or who fear publicity of a stigmatizing disability such as mental illness. Encouragement by counsel of alternative participation by these individuals will enhance direct representation of these clients' expressed wishes.²⁷

For some people class actions may be their only way into court. Consider these people with mental illness: patients prohibited from visiting with other patients and discouraged from speaking with staff or outsiders;²⁸ or persons made homeless in New York City after being discharged under a state policy of least restrictive, community care.²⁹ When the plaintiff is poor, marginalized, legally incompetent, ignorant of legal rights, or unable to assert rights for fear of sanctions or otherwise, and these disabilities are shared by others similarly situated, the class action may be the only effective means to obtain judicial relief.³⁰

Class actions also present several procedural advantages for plaintiffs. The court will place greater weight in balancing tests to determine injunctive relief.³¹ When a plaintiff seeks preliminary or permanent injunctive relief, the court will not only determine the likelihood of the plaintiff's success on the merits, but will also weigh the harm to both parties of granting or withholding the injunction sought.³²

In the United States, over the past twenty-five years, injunctive relief has been the primary means of addressing administrative policies, legislative enactments, and clinical decisions that created or perpetuated the injurious conditions and extended institutionalization of disability service systems.³³ Successful declaratory and injunctive class actions may serve as the basis for ancillary damage claims or subsequent actions by class members.³⁴ This is particularly relevant in actions calling for deinstitutionalization and least restrictive care, where plaintiffs may have experienced neglect or abuse directly as a result of institutionally sanctioned decisions or policies.

Injunctions have been used where chronic and persistent overcrowding has led to dangerous living conditions³⁵ (*Woe v. Cuomo*, 1986;³⁶ *Michigan ARC v. Smith*, 1978).³⁷ Courts have also been compelled to order preliminary injunctions to halt physical and sexual abuse of mentally disabled children by staff (*Michigan ARC v. Smith* (1978); *Wyatt v. Poundstone* (1995)).³⁸ Injunctions can also provide a preliminary means of halting institutional "dumping" of people with disabilities into the community.

The use of the class device also provides the plaintiff with a broader base for pre-trial discovery and presents the court with a more complete record on which to reach its decision. Factual records depicting widespread discrimination or other broad violations³⁹ often have been the impetus for legislative reform.⁴⁰ In disability litigation, where the lived reality of the client is often worlds away from that of members of the court,⁴¹ attorneys have an opportunity to provide a sufficiently detailed, vivid, and compelling explanation of the facts so as to bring them alive. Such presentations provide a crucial counteraction to the power of diminishing myths and stereotypes about people with disabilities, and educate the court about the importance of their interests and injuries.

17 "Practice Manual," (1977) 3 Mental and Physical Disability Law Reporter 298 at 306.

18 "Improper Care: Settlement Agreement; Mental Retardation," (1991) 15 Mental and Physical Disability Law Reporter 145 at 145.

19 "Least Restrictive Environment; Contempt," (1994) 18 Mental and Physical Disability Law Reporter 254 at 254.

20 See note 14 at 5-5.

21 See above at 5-5 and 5-6.

22 See above at 5-6 and 5-7.

23 *Dixon v. Kelly*, No. 74-285 (US District Court for the District of the District of Columbia, May 14, 1993); *Florida ARC v. Graham*, No. 79-48-Orl-Civ-Y (US District Court for the Middle District of Florida 1982). "Community Services; M.I.; Special Master; Attorneys' Fees," (1993) 17 Mental and Physical Disability Law Reporter 272 at 272.

24 See note 14 at 5-7.

25 See above at 5-13.

26 Herr, see note 7 at 634.

27 See above at 641.

28 "V.A. Hospital in New Jersey the Subject of a Broad-Based Class Action," (1979) 3 Mental Disability Law Reporter 319 at 319-320.

29 "New York lawsuit for more community services is justiciable," (1984) 8 Mental and Physical Disability Law Reporter 388 at 388.

30 See note 14 at 5-12.

31 See above at 5-14.

32 See above at 5-15.

33 Steven Schwartz, "Damage Actions as a Strategy for Enhancing the Quality of Care of Persons with Mental Disabilities," (1989) 17 Review of Law and Social Change 651 at 656.

34 See note 14 at 5-16.

35 "Suit Attacks Conditions at New York MR Facility at Wassaic," (1977) 1 Mental Disability Law Reporter 272 at 272-273.

36 *Woe v. Cuomo*, 638 Federal Supplement 1506 (US District Court for the Eastern District of New York 1986). "Care and treatment in state facilities scrutinized," (1986) 10 Mental and Physical Disability Law Reporter 538 at 539.

37 *Michigan ARC v. Smith*, No. 8-70384 (US District Court for the Eastern District of Michigan March 3, 1978). "Comprehensive Deinstitutionalization Order for Michigan Mental Retardation Facility," (1979) 3 Mental Disability Law Reporter 391 at 391.

The class action also provides an opportunity for people with disabilities to expand their voices beyond the court room.⁴² This increases public awareness of the issues and organizes public support for legal reform.⁴³ Widespread public support and attention focused on a class action may prompt politicians to settle with the plaintiffs, even if it is not clear that the public authority will be found liable. Pursuit of a class action may even be unnecessary, where a test case convinces the government to settle all outstanding actions.⁴⁴

The public relations benefits of class actions are well illustrated in the early 1970's events surrounding Willowbrook, a 5,000 resident New York institution for people with developmental disabilities.⁴⁵ The launching of two parallel class actions in the midst of a series of televised reports brought the atrocities being committed there to the attention of the American public⁴⁶ (*New York State Association for Retarded Children (ARC) v. Carey*⁴⁷ and *New York State ARC v. Rockefeller*).⁴⁸ The decisions of the courts established fundamental civil rights for people in warehouse-like conditions at Willowbrook and similar institutions across the country, and re-created American law related to people with mental disabilities.⁴⁹

A related benefit of class actions is the strengthening of the final judgement, which may stipulate that continuation of the unlawful activity by the defendant would expose it to contempt proceedings or summary liability in subsequent litigation. A class judgement possesses deterrent value of significantly greater impact than that of a judgement in individual litigation under similar circumstances. American civil rights suits have shown that voluntary compliance is encouraged when exposure to effective class action litigation would be the alternative.⁵⁰

III. Disadvantages of Class Actions

A number of significant disadvantages from the plaintiff's perspective must also be considered before embarking on a class action. When a class complaint is filed, the class representative must always act for the best interests of the class, even when these may conflict with individual interests.⁵¹ Delay of individual relief may be a threat to the health, or life, of a person with disabilities whose challenge to egregious living conditions may not be resolved for years.⁵² Prolonged involvement in the action may affect the disabled plaintiff's ability to pursue other important rights and entitlements.⁵³

The ethical challenges of representing such numbers of disabled individuals, while paying adequate attention to individual differences, can be daunting.⁵⁴ Ascertaining the expressed wishes of individuals may involve some interpretation due to varying levels of intelligence, competency, or ability to communicate.⁵⁵ Being faithful to the disabled client's objectives is crucial to their representation.

People with disabilities live largely at or below the poverty line.⁵⁶ The added costs associated with class actions⁵⁷ and reliance on public legal assistance programs limit litigation where state institutions or governments are the defendants.⁵⁸ In BC, a lack of government funding for class actions, combined with an inability to seek costs against the unsuccessful defendant, will likely inhibit future use of declaratory or injunctive class actions.⁵⁹ This

38 *Michigan ARC v. Smith*, No. 8-70384 (US District Court for the Eastern District of Michigan March 3, 1978); *Wyatt v. Poundstone*, 892 Federal Supplement 1410 (US District Court for the Middle District of Alabama 1995). "Personal Safety; Consent Decree; Preliminary Injunction," (1995) 19 Mental and Physical Disability Law Reporter 596 at 596. "Federal Court Issues Preliminary Injunction to Stop Abuse at Plymouth Center," (1978) 2 Mental Disability Law Reporter 551 at 551.

39 See note 14 at 5-17.

40 Herr, see note 7 at 635.

41 David Ferleger, "Civil Rights Disability Practice: Expediting Institutional Mistreatment Litigation," (1988) 12 Mental and Physical Disability Law Reporter 309 at 309.

42 See note 14 at 5-18.

43 See above at 5-25.

44 David Cohen, "Government Liability and Class Action Legislation" *Class Action Suits*, (The Continuing Legal Education Society of B.C., Vancouver, November 1995) 6.3 at 6.3.04.

45 *New York State ARC v. Rockefeller*, 357 Federal Supplement 752 (US District Court for the Eastern District of New York 1973), *consent decree approved sub nom. New York State ARC v. Carey*, 393 Federal Supplement 715 (1975). Parry, see note 7 at 627.

46 Parry, see note 7 at 627.

47 *New York State Association for Retarded Children (ARC) v. Carey*, N 393 Federal Supplement 715 (US District Court for the Eastern District of New York 1975) (Memorandum and Order of March 10, 1976, No. 72 c-356); 551 Federal Supplement 1165 (1975); 706 Federal Reporter 2d 956 (1983), *cert. denied* 464 US Supreme Court Reports 915 (1983), 7 Mental and Physical Disability Law Reporter 226 at 460.

48 357 Federal Supplement 752 (1973).

49 Parry, see note 7 at 627.

50 See note 14 at 5-24.

51 See above at 5-26.

52 See note 41 at 309. See also Hayden, note 5 at 421-423.

53 See note 14 at 5-27.

54 Herr, see note 7 at 633.

55 See above at 621 and 633.

56 Hayden, see note 5 at 420.

57 See note 14 at 5-28-5-29.

58 Hayden, see note 5 at 421.

59 Ward Branch, *Class Actions in Canada Release No. 2*, (Vancouver: Western Legal Publications, November 1997) at 5-7.

suggests that if the BC statute is to provide an effective means of access to justice, the BC Government should follow the lead of Québec and Ontario and provide funding for class actions.⁶⁰

A further disadvantage of class actions is the potential exposure to a broader array of defence tactics, slowing the progress of litigation.⁶¹ The defendants in institution-based litigation are bureaucracies with the financial and legal resources to indulge their inherent tendencies to resist laws and policies that they do not want to implement. A now infamous example of bureaucratic intransigence is found in *Dixon v. Weinberger* (1975).⁶² In this case, involving St. Elizabeth's Hospital in Washington, D.C., a 1975 class action decree mandating less restrictive alternatives for patients with mental illness was yet to be implemented in 1999.⁶³ Such inability or unwillingness to comply with judicial decrees has been widespread.⁶⁴

The common history of inadequate decrees that do not vindicate a right to placement outside of an institution or provide effective monitoring of rights related to institutional conditions, suggests that courts may need to engage in powerful, sweeping enforcement mechanisms to assure that decrees are both just and effective.⁶⁵ This will also serve to compensate for the disparities in power and control between establishment defendants and disabled plaintiffs, which lie at the heart of such intransigence.

Finally, a potential disadvantage of class actions is their possible reception in some courts.⁶⁶ Consideration should be given not only to the judge's demonstrated position on human rights and disability issues, but also to his or her receptivity to an institutional reform class action. The judge must be prepared to implement and monitor major changes in the law and in the relations among governmental bodies.

Sweeping and detailed orders typically require ongoing judicial monitoring of compliance that may span years.⁶⁷ Structural injunctions also establish the courts as a new source of authority and accountability for the managers of public institutions.⁶⁸ Given the onerous burdens and uncertain results of conventional class action enforcement mechanisms, judges (and plaintiffs) may wish to engage alternative dispute resolution resources and ombudsmen to ensure settlement and enforcement after judgement of the class action has been given.⁶⁹ These alternative methods could also ensure that the action serves the plaintiffs' goals, rather than those of their lawyer, or the court.

IV. Conclusions

American institution-based class actions have at times provided stunning, but essentially pyrrhic, legal victories that ultimately failed to have any meaningful impact on the lives of the plaintiffs they were intended to serve. Furthermore, the impact might have been highly questionable from the perspective of equality rights. Class actions often work too slowly, may be incapable of making the precise decisions necessary for institutional change, and are often ineffective in implementing court orders.⁷⁰ The interests of the disabled plaintiff can be lost in the consequent legal wrangling.

Class actions have also been the sole forum for justice, providing the impetus for

60 Campion and Stewart, see note 4 at 31.

61 See note 14 at 5-30.

62 *Dixon v. Weinberger*, 405 Supplement 974 (US District Court for the District of Columbia 1975).

63 Herr, see note 7 at 633.

64 Roy Reynolds, Jeanne Dooley, and John Parry, "Court Monitors and Special Masters in Mental Disability Litigation: Variables Affecting Implementation of Decrees," (1998) 12 *Mental and Physical Disability Law Reporter* 322 at 322. Also see Melissa Warren and Robert Moon, "Dixon: In the Absence of Political Will, Carry a Big Stick," (1994) 18 *Law and Psychology Review* 329-359.

65 Michael Lottman, "Enforcement of Judicial Decrees: Now Comes the Hard Part," (1976) 1 *Mental Disability Law Reporter* 69 at 69-75.

66 See note 14 at 5-34.

67 Donald Horowitz, "Decreeing Organizational Change: Judicial Supervision of Public Institutions," (1983) 1983 *Duke Law Journal* 1265 at 1267.

68 See above at 1268. Horowitz also discusses the implications of judicial supervision of public institutions.

69 Roger Fisher and William Ury. *Getting to Yes* (Second Edition) (Toronto: Penguin Books, 1991).

70 John Parry, "Executive Summary and Analysis," (1980) 4 *Mental and Physical Disability Law Reporter* 3 at 3.

important changes in practice, policy, and legislation that have had lasting effects on the lives of disabled people. These actions have resulted in systemic improvements in the quality and quantity of care offered to people with disabilities. Many of these actions served to enforce equality rights. Ultimately, it is the rights and interests of the individual plaintiffs that must remain at the forefront when considering the merits of embarking on a class action.

Disability rights advocates in Canada have traditionally divided their time between pursuing cases of discrimination to ensure equality rights of people with disabilities and on developing critiques and building broad support for systemic change.⁷¹ Often missing in the court's analysis has been the history of institutionalization and segregation experienced by people with disabilities, specifically because of their disability and because they are often poor and unable to afford appropriate housing.⁷² Class actions appear to provide a viable, uniquely high profile, forum from which to shape political will to enforce the rights of a greater number of people with disabilities.

71 See note 16 at 330. For community living, see *Alcoholism Foundation of Manitoba v. Winnipeg (City)* (1990), 69 Dominion Law Reports (4th) 697 (Manitoba Court of Appeal), leave to appeal to Supreme Court of Canada refused (1991), 77 Dominion Law Reports (4th) vii (note) (Supreme Court of Canada); *Fernandes v. Director of Social Services (Winnipeg Central)* (1992), 93 Dominion Law Reports (4th) 402 (Manitoba Court of Appeal), leave to appeal to Supreme Court refused (1993), 99 Dominion Law Reports (4th) vii (note) (Supreme Court of Canada). See for health services: *Eldridge v. British Columbia (Attorney General)* (1997), 218 National Reporter 161 (Supreme Court of Canada).

72 Sandra Goundry and Yvonne Peters, *Litigating for Disability Equality Rights: The Promises and the Pitfalls*, (Winnipeg: The Canadian Disability Rights Council, April 6, 1994) at 30.