

Judicial perspectives on the use of class action litigation as a tool for health policy change

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ABSTRACT

Recent health crises associated with climate change, the opioid epidemic, and CoViD-19 illustrate the pressing need for governments and other pivotal societal actors to engage in efforts to enhance health protections. However, critiques underscore these actors' inability to implement strategies safeguarding health and well-being. Manifesting itself through an increase in class action liability litigation against public authorities, health industries, and healthcare institutions, the "judicialization of health governance" may stem from these shortcomings. We appraise whether judges adjudicating these cases view them as instruments of social change, which we define as transformations of behaviour, decision-making, and/or practices of actors capable of endangering or protecting health. To achieve this objective, we analyzed Canadian class action decisions alleging liability for health-related harms within the domains of healthcare safety, public health, health innovation, and environmental protection. We included decisions most conducive to policy discourse, resulting in a subset of 271 decisions, out of which 40 contained judicial acknowledgment of a societal role for class actions and offered partial insights into this mission. This judicial discourse emerges through the themes of, i) vulnerability, ii) resource, information, and power imbalances, iii) potential to influence behaviour, iv) function of public condemnation, and v) impact on collective rights. However, these themes provide a limited account of the contours of the social mission of health-related class action liability litigation. To assess concretely the extent to which these claims can participate in the protection of human health, it is therefore necessary to conduct a comprehensive analysis of courts' interpretation of procedural and evidentiary requirements at all stages of liability class actions to evaluate whether they effectively enable victims of health-related harm to contribute to the regulation of risk-creating behaviour, and to investigate connections between health and environment-related liability class actions and broader industrial and public policy practices.

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INTRODUCTION

Recent health crises, such as those stemming from climate change, the opioid epidemic, and the CoViD-19 pandemic, underscore society's vulnerability to large-scale health emergencies and emphasize the pressing need for governments and other key actors in society to work collectively to strengthen protections for human health. Concurrently, trust in public authorities is waning, as critiques target their inability to implement measures that preserve the health and well-being of members of society, through direct interventions or by enforcing limitations on the health-related risks that industry and institutions create.^[1-2, 4-6] Possibly as a result, members of society turn to another social actor: the courts. Amid other strategies, they rely on a mechanism of action that is not associated in general with prompting policy changes: civil liability (or "torts"). Increasingly, victims of health injuries pursue liability claims *collectively*, through class actions. This phenomenon leads to a "judicialization of health governance", manifesting through an increase in class action liability litigation against public authorities, health industries, and healthcare institutions that contribute to health-related risks.

Over the next years, our research will ascertain if this tendency turns courts into parallel policy forums by uncovering the role of liability litigation in driving public policy and industrial transformations that support health promotion. The initial step toward this goal is to identify judicial language in health-related liability class action decisions that reflect whether judges themselves view this litigation as aspiring to foster social change. In the context of our research, social change entails modification of the behaviour, decision-making, or practices of those with the ability to endanger health (e.g., healthcare institutions or industries) or protect it (e.g., governments). This paper reports our findings and discusses their policy implications.

METHODS

Our team collected Canadian class action decisions available up to 15 March 2025. We then analyzed them for content that illustrates the views of the judiciary on class action litigation and its role in enacting social change. To include a decision in this study, it had to respond to a claim based—at least partially—on liability for alleged harms to physical or mental health. Moreover, the subject matter needed to fall in one or more of the following four categories: healthcare safety, public health, health innovation (drugs, medical devices, AI, etc.), and environmental protection and climate change. These criteria led us to identify 1,642 decisions, from which we selected those pertaining to procedures more amenable to broader policy discussion, namely motions for certification or authorization, motions to dismiss, trial on the merits, and appeals of these judgments. Our analysis centers on how judges articulate, within their decisions, their views concerning the social function that health-related liability class actions may serve. We seek to determine not only whether judges explicitly acknowledge this social mission, but how they conceptualize it.

RESULTS

Following the definition described above, judicial language pertaining to social change appears in a small proportion of the analyzed cases. While we examined a total of 190 decisions within our selection criteria from provinces other than Quebec, only 22 of them contained relevant language. Given that its civil liability principles stem from a distinct legal tradition compared to the rest of Canada, Quebec litigation is analyzed separately. Only 18 of the 81 Quebec cases contained relevant language. Most of the relevant judicial discourse arises from reasoning connected to procedural requirements related to authorization in Quebec and certification in the rest of Canada. Certification and authorization decisions form filter stages during which the tribunal decides whether the claim meets a set of legislation-prescribed procedural requirements and may move on to trial. As this procedural stage is when judges most often reflect on the goals of class action litigation when rendering judgment, it provides an ideal opportunity for judges to address their broader social role.

Do judges believe that health-related liability class actions may pursue a social mission?

They do, and this result fits with what one would expect, given that the Supreme Court of Canada openly acknowledges three policy goals of class action litigation: access to justice, behavioural modification, and judicial economy.^[19, 32, 37] It explicitly links these goals to evolving societal needs, describing class action as an answer to the rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs.^[37] Decisions specifically addressing health harms also acknowledge that class actions serve a broader social function within Canadian society.^[e.g., 10]

Behaviour modification naturally links with health policy and industrial changes. However, health-related liability class action judgments reference social change almost exclusively in relation to the goal of access to justice.^[9–10, 12, 25] Judges do not develop the extent of this social role and rarely go beyond a cursory recognition that it exists. One exception involves a 2012 case for a class action alleging physical and sexual abuse. After describing the legal provisions concerning class actions as a “*loi à caractère social*” (“social legislation”), the Quebec Superior Court emphasizes that “(i)n this case, the social scope aimed at promoting access to justice, especially for poor and disabled people, must play an important if not critical role.” [Translated].^[13]

What themes related to the social role of health-related liability class actions do judges focus on?

Our analysis identifies five themes in judges’ explicit reasoning that provide partial insights into how they perceive the social mission of health-related liability class actions.

Vulnerability of class members.

The first theme concerns the judges’ emphasis on the vulnerability of class members, which they link to the promotion of access to justice. The typical rationale is that vulnerable plaintiffs encounter significant barriers when bringing individual claims, which justifies allowing them to resort to class action litigation to obtain meaningful access to legal remedies. A source of vulnerability judges commonly identify in health-related cases is, unsurprisingly, health. For example, they note that plaintiffs’ precarious health can impede their ability to pursue individual litigation, as in cases where class members suffer from Parkinson’s disease—a condition that courts associate with emotional and financial vulnerabilities.^[8, 33] In a case commenced by Deaf people—many of them children—alleging sexual abuse during their stay at a community centre, another court emphasizes that other procedures than a class action would prove “extremely difficult” and “of little use” [translations]. This is because the group members can’t hear or speak, struggle to communicate, may not know how to read, and lack the necessary resources for individual litigation.^[13; see also 30] The court also insists generally on society’s duty to ensure the protection of vulnerable children, and, where that protection has not been offered, to enable them to have access to justice in the simplest and least expensive way.^[13; see also 14]

Finally, other decisions underline vulnerability flowing from marginalization or exclusion. Issues at the intersection of mental health and criminal law raise judicial concern. Courts emphasize the particular vulnerabilities of individuals facing psychological and

psychiatric health challenges within the criminal justice system and recognize that without the availability of a class proceeding, they would not be able to pursue a claim.^[11, 36] Another case recognizes vulnerabilities linked to unfamiliarity with Canadian norms, language, documentation, and culture.^[31] Finally, judges acknowledge that vulnerability—whether financial or related to age, psychological, and physical health—combined with the prolonged nature of complex class proceedings can justify approving an out-of-court settlement of a class action.^[8, 22–23]

Imbalances between class members and defendants.

The second theme emerging from the analysis of judicial discourse pertains to resource, information, and power imbalances between class members and defendants, which decisions also mention in discussions surrounding access to justice. For example, one judge highlights the imbalance of resources in a lawsuit involving a global leader in the design and manufacture of medical devices having greater access to resources for a case that will demand expert evidence and the determination of complex legal issues at trial.^[29] Another judge notes it when admonishing defendants for attempting to use their advantageous resources to undermine the plaintiffs' ability to bring claims by raising "complex and protracted issues".^[38]

As for information asymmetry, one judge relies on this imbalance when stressing the existence of a lower evidentiary threshold at the certification stage and refusing to require a "'gold standard' randomized, double-blind, clinical trial over a lengthy period" establishing the manufacturer's drugs caused the persistence of sexual dysfunction following the cessation of treatment.^[26] Another judge raises the argument that without a class action, the class members would fail to "obtain the benefit of the collection of medical and scientific data and research" concerning diseases suspected as resulting from a weight loss drug.^[38] One decision implies the necessity of rebalancing the parties' positions considering evidential and scientific complexities and the substantial evidence costs that typically arise in environmental cases.^[7]

Furthermore, one decision emphasizes that class actions address power imbalances^[10] and another certifies a class proceeding, noting that class members struggling with mental health issues—allegedly exacerbated by their employer, the defendant—may feel deterred from pursuing individual claims due, in the court's view, to fear of employer reprisal.^[35] Finally, judges also state that class actions may allow class members to be of "equal strength" to the government or municipalities in environmental matters.^[17, 28]

Impact on behaviour modification.

The third theme emerging from our analysis of judicial discourse is the impact on a defendants' behaviour when a class action leads to legal consequences. Judges link social justice to the imposition of legal consequences to wrongdoers who cause harm^[18] and comment on the impact of certifying or authorizing a class action in promoting preventive behaviour by key actors. For example, they view the class action as a mechanism to ensure that pharmaceutical industries properly disclose medication risks to consumers and take the appropriate precautions in the manufacturing and marketing of drugs.^[33] Additionally, they consider its beneficial effects on the way healthcare professionals are hired, and on the operation of hospital laboratories and the delivery of laboratory services.^[15] Finally, judges associate class actions with encouraging the pharmaceutical industry to exercise greater care in the development and testing of new products to ensure their safety before marketing.^[20]

Inclusion of language publicly condemning defendants.

The fourth theme concerns the way in which judges utilize their decisions to condemn defendants' behaviour publicly. This occurs particularly in cases that involve many people affected egregiously by outrageous behaviour on the part of defendants. In an Ontario decision against Apotex Inc., the judge uses condemning language when extensively and negatively detailing its active role in the opioid epidemic.^[16] A similar approach transpires in the successful Quebec class actions against Canadian tobacco companies, allowing both the Superior Court and the Court of Appeal of Quebec, in judgments on the merits, to critique at length the defendants' role in causing smoking-related diseases and addiction.^[21] Finally, in an Ontario decision, the judge condemns the serious and inhumane treatment detainees face in provincial prisons, illustrating their lived experiences with significant quotes obtained from the evidence.^[31]

Effect of class action litigation on collective rights.

The final theme that emerges from our analysis of judicial discourse concerns the positive effect of class action litigation on bolstering collective rights or solidifying communities. In one case, despite denying certification for a class action alleging that a chemotherapy drug caused respiratory illness, the judge underscores how class actions can emphasize legal obligations owed to class members collectively by those whose actions affect large numbers of people and, ultimately, a sense of obligation to the public.^[27] One judge positions a class action as a means for society to fulfill its duties to vulnerable groups^[13] and another considers that the resolution of a class action through a settlement may help achieve social reconciliation.^[24]

DISCUSSION AND POLICY IMPLICATIONS

Canadian judges recognize that class action liability litigation in the health and environmental sectors plays a social role. However, our work reveals limited judicial accounts of what this mission entails in terms of health protection. Thus, the precise judicial parameters of said social role remain undefined. Beyond the oft-cited objective of promoting access to justice, judges offer no comprehensive articulation of their perspective on this societal function. They often only briefly mention the themes we identify, typically within the framework of procedural analysis. While judges may privately appreciate the potential impact of liability class actions on health protection, their reasoning does not prominently reflect such consideration. However, judicial discussions of barriers to access to justice reveal judges' views on the functions of liability class actions, and the underlying focus of access to justice on empowerment could be *indirectly* tied to the goal of equipping members of society with tools to provoke change.

Judges find that vulnerabilities of a class—related to physical health, mental health, resources, marginalization, and position vis-à-vis the Canadian state—support allowing class action litigation to proceed, as individual plaintiffs are often unable, or significantly less able, to pursue their claims without this procedural mechanism, thereby impeding access to justice. However, they do not explicitly link vulnerabilities to broader notions of empowerment or societal change. Knowing that vulnerability also constrains the capacity of affected groups to achieve meaningful societal change that safeguards their health through other forms of advocacy (such as lobbying governments, pressurizing industries, or arguing with regulators), the judicial avenue class actions offer becomes particularly useful as an additional tool available to these groups for provoking social transformation. Although the connection between heightened needs for access to justice among vulnerable individuals or groups and social change remains indirect, judicial attentiveness to vulnerability may nevertheless reflect an implicit recognition that class action litigation can serve as a mechanism for empowering these groups within society.

Canadian courts also show concern for the imbalances that exist between class members and defendants, such as disparities in resources, ability to access relevant information and scientific knowledge, and power dynamics. Once more, judges frame these imbalances in relation to access to justice, viewing them as obstacles that hinder prospective class members from pursuing individual claims. Judicial reasoning expresses this concern most emphatically when the defendants consist of large, well-resourced, sophisticated entities, and where individual plaintiffs experience difficulties in proving they possess the means to demonstrate essential elements—such as causation. The relationship between these imbalances and social change remains indirect, but it illustrates a preoccupation with equipping members of society with the necessary tools to face large risk-creating industries.

More directly relevant is the courts' recognition of liability class litigation as an instrument for influencing behaviour in the health sector. Courts have long established this ability but surprisingly judicial discourse in health and environmental liability cases lacks a clear and developed articulation of the exact role played. Judges only sporadically acknowledge the relationship between liability class actions, behavioural change, and broader social aims. Some judges in high-profile cases also use their decisions to underline and detail the egregious nature of a defendant's behaviour, thereby helping inform the public, drawing attention to events warranting social condemnation and lessons learned for the future. Information media becomes a useful partner in prompting awareness of these situations, as decisions drafted in this manner attract their interest. Finally, a few decisions display judicial discourse emphasizing the broader function that liability class actions can play in bolstering public rights, holding defendants accountable for their obligations to the public, and reinforcing communities. These final themes illustrate how class actions, as institutional mechanisms, contribute to education, awareness, and prevention of harm—all important components of change.

CONCLUSION

Judges recognize the social role of liability class actions in the health and environmental sectors but appear constrained in their ability to offer extensive justifications for this role. Procedural requirements, which mandate the courts to consider the goals of class actions as the Supreme Court of Canada defines them, provide opportunities to discuss this social function. However, judges may perceive themselves as lacking the institutional capacity or legitimacy to engage more substantively, limiting their interventions to brief allusions. Therefore, it is for academic commentators to establish the concrete effect that liability class actions may have on protecting human health and regulating risk-generating activities. As a result, the next steps in our research include a thorough analysis of courts' handling of procedural and evidentiary requirements at all stages of class action procedures to determine whether liability class actions effectively enable victims of health-related harm to participate in the regulation of risk-creating behaviour. Moreover, we will investigate potential links between health and environment-related liability class actions and modifications in industrial practices and regulatory behaviours. These next steps will be undertaken remembering that class actions in general, as well as those addressing health and environmental harms, have significant drawbacks in terms of their use as indirect health policy drivers. That law firms typically lead them, with the possibility of benefitting financially from them, may result in class members losing control of the action and lead to the neglect of non-profitable public interest litigation. Class actions may also subject class members to an overly administrative process rather than empowering them.^[3] Finally, class actions' delays and costs may hinder access to justice rather than promoting it.^[34]

Nevertheless, it is crucial to develop a clearer comprehension of the broader social role that liability class actions can play in health-related matters, particularly with respect to their deterrence mission. This requires an open discussion of whether the judiciary can legitimately participate as a meaningful actor in health governance through its decisions in liability class actions. An understanding of judges' institutional capacity to address complex societal harms to health and the environment through principled legal intervention requires a more clearly defined social role for class action liability litigation.

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