

COURT OF APPEAL FOR ONTARIO

CITATION: Head v. 859530 Ontario Inc., 2026 ONCA 231

DATE: 20260331

DOCKET: COA-25-CV-1236

Tulloch C.J.O., Lauwers J.A. and O'Marra J. (*ad hoc*)

BETWEEN

George Head by his Litigation Guardian Marcella Lambie, Marcella Lambie, the Estate of Janet Martin, deceased, by her Estate Representative Scott Martin, and Scott Martin

Plaintiffs (Respondents)

and

859530 Ontario Inc., Barrie Long Term Care Centre Inc., Jarlette Holdings Inc., Jarlette Ltd., and Roberta Place Retirement Lodge Inc.

Defendants (Appellants)

Deborah Berlach, Gaetana Campisi, Thomas Russell and Zachary Sherman, for the appellants

Gayle T. Brock, Nicholas A. Fleming, Robert Durante and Ben Irantalab, for the respondents

Heard: March 16, 2026

On appeal from the order of Justice Susan E. Healey of the Superior Court of Justice, dated August 21, 2025, with reasons reported at 2025 ONSC 4817, and from the costs order, dated November 27, 2025, with reasons reported at 2025 ONSC 6642.

Lauwers J.A.:

A. OVERVIEW

[1] This is an appeal of a certification motion in a class action against Roberta Place, a long-term care residence, by residents who contracted COVID-19 there, the estates of those residents who died of COVID-19, and their families. The claimants, the respondents in this court, claim systemic gross negligence by those responsible for Roberta Place, the appellants, for failing to properly plan for and respond to the COVID-19 pandemic and for failing to properly implement institutional policies and procedures to prevent the mass spread of COVID-19. This decision will refer to the appellants collectively as “Roberta Place”. The classes of claimants are the Residents Class, the Estates Class and the Family Class.

[2] The motion judge certified this as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (“CPA”). Roberta Place agreed that, if the action is certified, the following common issues should be certified: duty of care, standard of care, and whether the breaches amounted to gross negligence. The claimants also sought certification of causation, aggregate damages, and punitive damages. While she declined to certify aggregate damages, the motion judge certified causation and punitive damages.

[3] Paragraph 6 of the motion judge’s certification order set out the common issues:

THIS COURT ORDERS that the certified common issues are as follows:

a. Did the Defendants owe a duty of care to the members of the Classes related to COVID-19 outbreaks at Roberta Place Long Term Care Home?

b. If the answer to (a) is “yes”, what was the standard of care applicable to the Defendants relating to their duty?

c. Did the Defendants breach the applicable standard of care?

d. If the answer to (c) is “yes”, did any of the breaches amount to gross negligence or a failure to make good faith efforts to act in accordance with laws and public health guidance relating to COVID-19?

e. If the answer to (c) is “yes”, did the Defendants’ breaches of the standard of care cause or contribute to the harms suffered and/or losses incurred by the Classes?

f. Does the conduct of the Defendants warrant an award of punitive, exemplary or aggravated damages if the prerequisites of such awards are satisfied?

g. If the answer to (f) is “yes”, in what amount, and who should pay it to the Classes?

[4] Roberta Place brought a limited appeal.

B. ISSUES ON APPEAL

[5] Roberta Place appeals only the certification of causation and certification of punitive, exemplary or aggravated damages as common issues. The issues on appeal are as follows:¹

- (1) Did the motion judge err in certifying causation as a common issue?
- (2) Did the motion judge err in certifying punitive, exemplary or aggravated damages as a common issue?
- (3) Did the motion judge err in her award of costs for the certification motion?

[6] I address these issues after a brief description of the factual background.

C. FACTUAL BACKGROUND

[7] From January 8, 2021 to February 18, 2021, Roberta Place experienced a COVID-19 outbreak during which over half of the residents who tested positive for COVID-19 died. In all, 129 residents and 105 staff members tested positive for COVID-19. A total of 73 residents died, 71 of whom tested positive for COVID-19 prior to their passing.

[8] Roberta Place did not dispute owing a duty of care to the claimants to mitigate infectious outbreaks by ensuring compliance with public health and

¹ The first two issues on appeal are adopted from the appellants' factum, at para. 38.

infection prevention and control (“IPAC”) measures in the long-term care home. The motion judge found that the record provided some basis in fact for determining the standard of care in common for members of the Residents Class and the Estates Class. She found that the claimants had met the onus of showing some basis in fact for the conclusion that there had been a breach of the standard of care and that it amounted to gross negligence or a failure to act in accordance with public guidelines and laws on COVID-19.

[9] The motion judge found that proceeding by class action is superior to other reasonable options of determining the entitlement of the classes to relief and therefore was the preferable procedure within the meaning of s. 5(1)(d) of the *CPA*.

D. ANALYSIS

[10] I address each issue in turn. In doing so I note that nothing turns on the standard of review, so I do not address it.

(1) Did the Motion Judge err in certifying causation as a common issue?

[11] Based on the evidentiary record, the motion judge concluded that the claimants had met the criteria to certify causation as a common issue. The test is that the claimants must put forward a workable methodology. They had offered some evidence of the availability of data collected by an objective agency, and a basis (the “risk ratio approach”) to draw the rebuttable inference of causation from numerical data together with the documented deficits in Roberta Place’s infection

control practices. The applicable law is most clearly set out in *Levac v. James*, 2023 ONCA 73, 89 C.C.L.T. (4th) 27. The risk ratio approach for determining causation on a class basis was used in *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660, and has been used since then. The motion judge did not err in saying, at para. 134, “I see no basis to distinguish the facts before me from *Levac* and believe that the Plaintiffs have advanced the same methodology, with some basis in fact, as presented in *Levac*.”

[12] Roberta Place argues that, unlike in *Levac*, the claimants have not shown that there is a norm to which to compare the infection rate at Roberta Place. The claimants’ expert, Dr. Abdu Sharkawy, did not provide epidemiological evidence. The outbreak occurred just as vaccines were beginning to be made available, and the Roberta Place outbreak involved the B.1.1.7 (or “UK”) variant of COVID-19 which affects the rate of transmission. They argue that only an outbreak with those same conditions could be used for comparison. Since the claimants did not show that such data is definitively available, and they did not calculate the risk ratio itself, the approach has not been shown to be a workable methodology.

[13] Definite proof that there is an available norm to compare to in the risk ratio analysis should not be necessary at the certification stage. Roberta Place’s argument that the UK variant and the lack of vaccines could have caused the increased infection rate will likely be relevant to proving causation at trial. These factors could conceivably be “viable, non-negligent explanation[s] for the outbreak

as a whole”: *Levac*, at para. 66. However, the motion judge accurately captures the problem with Roberta Place’s arguments when she states, at para. 147:

Dr. Sharkawy may not be the expert who can ultimately provide the statistical analysis, but in my view, his evidence has adequately laid the groundwork. He has pointed to the link between the failure to observe both the precautionary principle and adequate IPAC measures and the Outbreak. And he has provided evidence that the experience at Roberta Place was significantly disproportionate to any other long-term care home. The task is ultimately a numbers game, focused on the period of the Outbreak. Dr. Loeb admits that the database contains the necessary information to compare cases between homes, subject to controls, to ensure an "apples to apples" approach. Whether the Plaintiffs can adequately do this while factoring in the more contagious variant at issue, or whether that even must be done to arrive at a final number for the risk ratio approach, is yet to be seen, but in my view is a matter that goes directly to the merits and should not attempt to be determined on this motion. (Emphasis added.)

[14] Roberta Place’s own expert, Dr. Mark Loeb, effectively admitted that the approach was workable. The motion judge quite properly resisted Roberta Place’s effort to turn the certification motion into a determination of the merits: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 15-16 and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 99-103. I also resist that effort on this appeal.

[15] Roberta Place, not having appealed the motion judge’s finding that a class action was the preferable procedure, attempted in oral argument to revive that

issue and apply the analysis to the argument against certification of causation as a common issue. Roberta Place argued that, since the *CPA* was amended in s. 5(1.1)(b) to require that the common issues “predominate”, the rebuttable presumption would undermine their predominance. I reject this argument. The preferability analysis is not to be repeated in determining a single common issue. In determining preferability, the common issues are considered together after each individual issue has already been found to advance the litigation.

(2) Did the Motion Judge err in certifying punitive, exemplary or aggravated damages as a common issue?

[16] The motion judge certified punitive, exemplary, or aggravated damages as a common issue, based on evidence in the inspection reports that demonstrated Roberta Place’s non-compliance with IPAC policies and standards. Both the entitlement to punitive damages, and the quantum of said damages were certified. However, the motion judge did not certify determination of damages on an aggregate basis as a common issue.

[17] Roberta Place makes two arguments. The first is that its conduct was in no way “malicious or reprehensible” or “deliberate” so as to justify punitive damages. I reject this argument. The types of conduct that might justify punitive damages are not closed. Punitive damages might well, depending on the specific facts, extend to gross negligence, as Belobaba J. noted in *Robertson Estate v. Ontario*, 2022

ONSC 5127, 165 O.R. (3d) 528, at para 93, aff'd 2024 ONCA 86, 170 O.R. (3d) 721, leave to appeal refused, [2024] S.C.C.A. No. 122.

[18] Roberta Place's second argument is that the motion judge failed to recognize that punitive, exemplary, or aggravated damages are ancillary to compensatory damages. Roberta Place argues that punitive, exemplary, or aggravated damages are not free standing; any assessment of the quantum requires a close look at whether the award of compensatory damages itself reflects sufficient "punishment", citing *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para 94. Since the issue of compensatory damages was not certified but was left to individual trials, there is no base against which punitive, exemplary, or aggravated damages can be referred. This position appears to be based on the assumption that quantification of punitive damages will occur before individual trials for compensatory damages. However, this court has noted that, "Any concern about quantifying punitive damages before compensatory damages can usually be addressed by sequencing trials so that punitive damages are assessed after compensatory damages have been determined": *Carcillo v. Ontario Major Junior Hockey League*, 2025 ONCA 652, at para. 48, citing *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 463, 89 C.P.C. (6th) 91, at paras. 57-61, leave to appeal refused, 2010 ONSC 1899, 262 O.A.C. 148 (Div. Ct.).

(3) Did the motion judge err in her award of costs for the certification motion?

[19] Roberta Place seeks leave to appeal from the motion judge's costs order awarding the claimants \$339,000 all-inclusive in costs following their successful motion for certification. They had sought \$523,965.52 all-inclusive. Roberta Place makes two arguments. First, there was divided success on the outcome, which the motion judge did not account for. Second, the claimants incurred unnecessary costs in pursuing certification.

[20] The governing principles are well known. Appellate deference is owed to discretionary cost awards made by first instance judges: *Barry v. Anantharajah*, 2025 ONCA 603, 178 O.R. (3d) 742, at para. 28. Leave to appeal a costs order is only granted in obvious cases where the party seeking leave demonstrates "strong grounds upon which the appellate court could find that the judge erred in exercising his discretion": *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218 O.A.C. 315 (C.A.), at para. 21, leave to appeal refused, [2007] S.C.C.A. No. 92; see *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

[21] The motion judge's costs award is detailed and addresses the legal principles, including the obligation to consider the paying party's reasonable expectations and the sheer size of the award. She makes the terse and accurate observation, at para 24: "This is a claim for millions of dollars, understandably

rigorously prosecuted and defended. It is no surprise that the costs award will be substantial.”

[22] On the divided success issue, the motion judge noted, at para. 35, that the claimants “did not achieve total success” because she did not certify aggregate damages as a common issue. She pointed out that this did not merit much reduction because “it was not a complex issue, there was no evidence to substantiate it, and the issue did not consume a significant portion of the time or submissions.” The motion judge also reduced costs to account for the fact that Roberta Place had already prepared to respond to a claimant expert on aggregate damages, whose evidence was ultimately not relied upon in the hearing. While Roberta Place might have preferred a larger reduction, it has not pointed to a reviewable error. The main live issues before the motion judge were whether causation and the claim for punitive, exemplary, or aggravated damages should be certified as common issues. She noted, at para. 125: “Causation is the most fiercely contested of the proposed common issues.” Indeed, it occupied almost 30 paragraphs in her reasons and she noted, at para. 40 of the costs reasons: “Establishing some basis in fact for causation was a complex matter.”

[23] On the issue of unnecessary costs, a major complaint was the fee charged by Dr. Sharkawy, the claimants’ infectious disease expert. The motion judge set out the argument at para. 27:

The disbursement incurred by the plaintiff for his reports is \$83,850. They contrast this with the \$14,375.75 spent on the responding report of their own expert, Dr. Loeb. Further, the defendants make the point that much of his reports were recycled from other COVID-19 class actions in which he offered expert evidence, in which their counsel was likewise involved.

[24] There is some irony in Roberta Place's substantive argument that the claimants failed to prove a workable methodology because Dr. Sharkawy did not provide sufficient epidemiological evidence and the complaint that the claimants spent too much on the main issue in the certification motion.

[25] I see no strong grounds upon which to find that the motion judge erred in exercising her discretion in fixing costs in the amount she did and therefore deny leave to appeal costs.

E. DISPOSITION

[26] The appeal is dismissed and leave to appeal costs is denied with costs for the appeal fixed at \$25,000 all-inclusive and costs for the motion for leave to appeal the costs award fixed at \$10,000 all-inclusive.

Released: March 31, 2026 "M.T."

"P. Lauwers J.A."
"I agree. M. Tulloch C.J.O."
"I agree. A. O'Marra J. (*ad hoc*)"