

Lawyered – Episode 78
Class actions Law ft. Sakina Babwani
Episode Transcript

[00:03] HUSEIN: This is Episode 78 of Lawyered. I'm Husein Panju. And on this podcast episode, we will be speaking with Sakina Babwani, about topics in the high-stakes world of class actions Law. First, we will be speaking about the events surrounding the massive shooting in Toronto's Danforth neighborhood. Several victims have filed a class actions matter against the gun manufacturer. And this has sprung some new and novel questions about the duty of care for dangerous products.

[00:32] Next, we speak about some recent cases that shed some new light on the importance of Compensatory Damages and what amounts to proper pleading in the class actions context. And finally, in our Ask-Me-Anything segment, we will cover a bunch of questions including topics like third-party litigation funding, new trends of the industry, and how COVID-19 has impacted recent class actions matters. All that and a lot more is coming up in just a bit. This is Lawyered.

[Music Break]

[01:08] HUSEIN: Hello, welcome to another episode of the podcast. I appreciate you joining us for another episode of Lawyered. I think I say this around this time of every year. But we are nearly done with this season of the podcast, which is Season 8. And I think I say this regularly that it flew by far too quickly, contrary to how I sometimes think it's going to go during the beginning of the year. So, what that means is, at this time, we're not actively looking for guests to close out this current season. But if you are interested in becoming a guest, or know someone else who might be a good fit, it'd be very good to shoot me an email, and we can discuss if it might be a good fit for next season or a bonus episode or something like that.

[01:48] Always hoping to explore new issues, ideally ones we haven't already covered on the podcast. So, the email address is info@lawyeredpodcast.com. Contact information is also on the website as well. I'll be happy to chat, if that is what you would be interested in. Our last episode was easily one of my favorites. I'm not talking about the Season, but of the year, and it was a topic of National Security Law with a friend of mine named Yavar Hameed. And we spoke about some really important and I say important, I mean, like nationally important topics. One reason being the Emergencies Act Public Inquiry that at the time of this episode, it might not have been wrapped up or might still be ongoing. But it started in early to mid-October of 2022, which related to essentially the federal government's response to the convoy protests that were happening in the first few months of 2022.

[02:49] And there are a lot of questions about the appropriateness of that. And so let's say the requirement to be this formal review of it. We spoke about some of the government's use of

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facial recognition, and some proposed oversight of RCMP and CBSA officers through Bill C-20. All these topics are, I would say particularly relevant because it's been, I'd say, as of late heightened attention about the way that our national security and public safety bodies, essentially do their jobs and also interact with us. And I know that some listeners may have found some of these discussions overly critical of our government, but I think about something that Jon Stewart had said years ago... and this is me misquoting but I think he said something like, "You can have great regard for law enforcement bodies and still want them to be held to a high standard." So, these two concepts are not mutually exclusive.

[03:49] And I won't speak for our guest, but I would say that this kind of scrutiny and this kind of dialogue is not only helpful for us, whether you're a lawyer or a non-lawyer, but if you're interested in public policies, I think that understanding of how these bodies operate, is essential for our democracy. I think that conversations like that episode and other ones that are happening in the public forum are really important and really productive for us to know about how these bodies are operating. So, again, really important, some really hot takes about that episode that I really enjoyed. So, if you want to check that out, that's Episode 77 in our archive.

[04:28] The Episode you're going to hear today is also of great importance in the area of class actions Law, which frankly, in some of the more recent episodes, I did not know anything about until the episode began, to be quite candid. But the guest did an excellent job of walking us through some of these issues and breaking down what is a class action lawsuit and what does it look like? And in some ways or similarities but in a lot of ways, there are some very specific aspects that the guest did a great job of walking us through. So, without further ado, here's our class actions Law episode with our guest Sakina. Babwani.

[Music Break]

[05:08] HUSEIN: Sakina maintains a litigation practice at Ben and Jones LLP. Focused on complex commercial disputes, including class actions, International Arbitrations, Professional Regulatory matters, and Privacy Law. And under class actions practice, Sakina defends clients and complex matters relating to product liability, and antitrust laws across a range of industries. She also assists clients with all aspects of a class action from defending a certification motion, to negotiating and implementing complex settlements. She also has experience in resisting the addition of clients to existing class actions matters.

[05:44] She is also actively involved with the Ontario Bar Association or the OBA, where she represents the Toronto region on the OBA Council for the years 2022 to 2023. And she also sits

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on the OBA's Policy and Public Affairs Committee. Sakina is the National Leader of the Ontario Legal Professionals Alliance, which is a community-based organization designed to improve access to justice within the community. And prior to becoming a lawyer, Sakina was a business journalist with India's largest business daily called the *Economic Times*, where she authored over 150 articles with a special focus on law and finance. And in addition to being called in Ontario, Sakina is also called to the bar in India and has an LLM with a specialization in business law from the UC Berkeley School of Law. So, Sakina, thanks for joining us on the show today.

[06:33] SAKINA: Thank you so much for having me.

[06:34] HUSEIN: Yeah, we're very excited to chat with you. It must be interesting for you to be on the other end, given your journalist background. So, I'm curious to see how this plays out. Can you tell us a little bit about how you went into the field of journalism and how that translates to your law practice?

[06:54] SAKINA: Yeah, sure. So, I got this job to be a copy editor at the *Economic Times* straight out of my undergrad through campus placement. I got the job because I was always interested in writing, and I thought it would be a good platform for me to improve my writing skills. At some point, I had an interest in law and I started writing about important legal decisions, which made me think that maybe I should go to law school and get a law degree. So, I started to study law. Did my LLB back in Mumbai. At the time that I was doing my LLB, I didn't think I would practice but at some point, after having written extensively on key legal judgments, I thought it was time for me to practice law. And I felt like I should get some international experience which prompted me to apply for LLM. And at some point, I decided eventually to move to Toronto and practice here.

[07:53] HUSEIN: Interesting story and it seems to be working out for you so far. So, we have a number of interesting topics to speak about in this area of class actions law. And the first case involves a serious Toronto tragedy, as a mass shooting occurred in the Danforth neighborhood, killing two people and wounding another 13. And later, a series of victims and their families filed a proposed class action, naming the manufacturer of the shooter's gun. And this certification motion introduced an important discussion about negligence. And the outcome may provide some guidance for manufacturers and lawyers alike. I know that the case we're going to speak about involves this preliminary motion for certification. But can you tell us more in simple terms, what is this test?

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[08:40] SAKINA: Basically, a class action doesn't become a class action until the court says, "Yes, okay. This is the class action." So, here the plaintiff needs to show that this issue is worth being tried on behalf of a number of people. Now you will find the requirements to certify a class action are embodied in Section 5(1) of the Class Proceedings Act. There are five things that a plaintiff needs to show. One is the pleadings should disclose a cause of action. Two that there are two or more persons that form a class. Three, that it raises common issues. Four, the class actions is the preferable procedure. And fifth is a representative plaintiff who would fairly and adequately represent the interests of the class. And this test is met through some basis and fact test that is, in other words, the plaintiff leads evidence, some evidence, not all of it, but some evidence that the issue exists. And the issue can be tried, on behalf of an entire class.

[09:48] HUSEIN: Again, this tragic shooting is very well known in the Toronto area at least. I know that there is some additional context here in terms of like, the facts, and there are some specific technologies. Can you tell us a bit more about what is going on here?

[10:01] SAKINA: Yes. So, as we know, this is about the 2018 Danforth shooting that took place. So, what happened here is that the shooter had stolen a semiautomatic gun from a Saskatchewan dealer, and then randomly shot and killed people. So, this stolen gun was not equipped with what is known as smart gun technology. Basically, it's a technology that prevents unauthorized users from being able to use the guns. This is not a new technology, it has existed since the 1970s. And there have been hundreds of patents for this technology across the world. It's an authorized user technology, which allows a weapon to be fired only when it's activated by an authorized user. So, in cases like this, where the gun gets stolen, the person who steals it, can't use it, if that technology exists.

[10:57] HUSEIN: I think that the manufacturer of this gun, Smith and Wesson Corp, do they have guns that had this smart technology in it.

[11:06] SAKINA: So, that's the interesting thing. They actually had seven patents related to this technology. But there was a new legislation that was enacted in the US, which basically protected manufacturers of guns like Smith and Wesson against US civil lawsuits. And once the manufacturer knew that it wouldn't be liable for civil lawsuits in the US, it let its patents expire. So, basically, they did not then have the technology that should have been there, that could have prevented a tragedy like this.

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[11:38] HUSEIN: Okay, so I know that this ended up going to court. I know that the plaintiff, there's a class that waits for post-class that was assembled, and they were suing essentially the gun company for negligent design and some other things. Is that right?

[11:53] SAKINA: Yes, that's right. Basically, they alleged negligence because they didn't install the technology. And if they had installed the technology, this tragic incident wouldn't have occurred. Now the defendant, as in the manufacture of this gun, its point was that it did not owe any duty of care to the plaintiff, in the sense that the plaintiff was suing the manufacturer of the gun and not the person who actually committed the crime.

[12:19] HUSEIN: Before we get into the decision, I just wanted to clarify, so this decision that came out in 2021, from Justice Perell, was this the ultimate decision on the whole class action? Or was it like a smaller aspect of this?

[12:32] SAKINA: This was a certification motion again. So, basically, you're the class representative plaintiff was trying to solidify this action as a class action. And the defendant said that that should not be the case, because it is not liable for the actions of the shooter.

[12:48] HUSEIN: Got it. Okay, so how did the court find it in terms of this certification question?

[12:54] SAKINA: So, in essence, the defendant was arguing that it didn't owe a duty of care to the plaintiff. And the whole concept of negligence law is based on duty of care. So, there are certain categories where you owe a duty of care to the other person. For example, a doctor and a patient where a doctor owes a duty of care to his patient. So, the defendant, the manufacturer of the gun was saying that it didn't owe any duty of care to these random plaintiffs. And it couldn't have known that this tragedy would occur. But the court didn't agree with the defendants here, the court actually found two categories under which the defendant did owe a duty of care to the plaintiff.

[13:43] One was the dangerous goods per se category. Basically, the sense of a gun is by itself dangerous. And a manufacturer should have known that if this gun comes into the hands of an unauthorized user, this tragedy could occur. And the second thing was the more modern products liability category, where a manufacturer of a good which has a design defect, owes a duty to people who get injured as a result of that product. So, in this case, because that smart gun technology didn't exist, and because that gun came into the hands of this person – the shooter – and people suffered, there is a possibility that the defendant manufacturer actually owed a duty of care to the plaintiffs.

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[14:35] HUSEIN: Got it. And I imagine the technology itself is quite relevant, because as you were saying that this technology is there to prevent this kind of scenario where a gun gets stolen, and then there's damage or harm that's done as a result. So, I imagine that that factored into the analysis as well.

[14:54] SAKINA: Yes, absolutely. So, to be clear, what the court is doing here is this, it not saying for certainty that these manufacturers do owe a duty of care. What it's saying is that they won't strike the claim because there is a possibility that on trial when there's more evidence that it could be found that these defendant manufacturers do owe this duty of care. So, at this preliminary stage of certification, the court is simply trying to assess whether there is some credibility or some credible case against the defendant.

[15:27] HUSEIN: So, you've done a great job of articulating the scope of this decision. But given that this decision has a limited scope, do you think that this case might have any impact on manufacturers generally, or even lawyers generally?

[15:44] SAKINA: I think for sure it will affect the firearms industry in Canada, because they are producing what would fall under the dangerous goods per se category. It potentially requires them to consider what technology can be implemented to ensure that their products are not misused. I think that's an important consideration for manufacturers. At least what this decision has done is it has opened up the possibility of lawsuits against manufacturers who may not themselves have committed the crime or the conduct by did at least open up the possibility that they could still be on the hook if their products are misused.

[16:27] HUSEIN: Do you think it might have an impact on class actions, lawyers or product liability lawyers,

[16:33] SAKINA: We could potentially see more class actions being issued where these types of tragic incidents occur. Now that the Court has said at least that there is the possibility of liability, it will be interesting to see if more class actions come forward,

[16:52] HUSEIN: For sure. Because, it seems that the way that you described it, that these products that are dangerous in of themselves may have a broader group of neighbors in the sense or people who would fall under the duty of care umbrella. Is that right?

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[17:07] SAKINA: That's right. At least it shows that there are other categories under which people could owe a duty of care to other plaintiffs.

[Music Break]

[17:24] HUSEIN: Now, in October 2016, online hackers had access to the personal information of numerous Uber drivers. And these drivers proposed a class actions matter against Uber based on the same data breach. And the Alberta decision is providing some helpful commentary about compensatory damages and the types of harm that must appear in order to justify the certification of a class. So, Sakina I know that a lot of these case is based on the necessity of establishing what is known as compensable damages, particularly in the privacy conduct. So, can you just start by telling us what compensable damages are and why they're relevant?

[18:04] SAKINA: So, the need to establish this compensable damage actually emerges from the certification test itself. So, basically, a little bit of background. class actions are different from regular actions, in that, they don't become class actions till a court certifies them as such. So, the first step for the plaintiff is to bring a motion for certification, that is to get the court to say that, yes, this is a class action, and in a sense to show that the damages that the plaintiff is seeking can apply to the entire class of people. So, the way the certification test plays out is that it's a two-part test requiring the plaintiff to show some basis, in fact, or in other words, to show some evidence that A, the issue exists, and B that it is common among the entire class. So, basically, the purpose of this test is for the plaintiff to establish one of the elements of a class action which is to show that the class action is the preferable procedure to resolve the issues.

[19:18] HUSEIN: And you were talking earlier about these compensable damages. However, I think there must be a quantifiable amount. So, why is that principle in place in the class actions contracts?

[19:29] SAKINA: Well, it's in place because the plaintiff needs to show that actual harm occurred and that harm occurred across the class.

[19:38] HUSEIN: I mentioned that the case we're going to be speaking about is called *Setoguchi v. Uber*. Can you start by walking us through just the relevant facts that took place in terms again this case, all the way up to the Alberta court?

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[19:50] SAKINA: Sure. So, this concerns a 2016 incident, where Uber was hacked by some outside actors who had accessed the names, telephone numbers, and email addresses of a number of users and drivers globally. We're talking about some 800,000 customers in Canada alone. Now, Uber paid these outside actors in exchange for an assurance that the data would be destroyed and not circulated. But Uber did not notify the customers and the regulators in Canada as required under the relevant legislation of Canada that this data breach had occurred. But this matter eventually only came to light through a media leak in November 2017. So, in that context this proposed representative plaintiff Satoguchi brought a nationwide class action alleging that these defendants were negligent. And they breached the contract to keep the data that was provided to Uber confidential, by allowing this third party to access it.

[20:57] HUSEIN: Got it. When he got to the highest court in Alberta, how did the court find on this issue?

[21:04] SAKINA: So, this is basically a certification motion, which was brought to certify this class action. If the plaintiff cannot show that an issue exists, then the entire action is tossed. And that's what happened here.

[21:23] HUSEIN: So, this was a privacy breach case, which may not be the conventional type of class action. But I know for this privacy case, there was some discussion the courts have had in terms of their ability to identify whether there was actual harm at play. Can you tell us a bit more about that issue?

[238] SAKINA: By the certification levels, the court is not conducting a full trial or full evidence, and the plaintiff does not need to come and show proof of every claim that it's making. But it needs to lead some evidence that the claim that they're making is actually rooted in actual evidence. It's not just speculation. So, here, the plaintiff, even four years had passed from when the incident occurred to when a certification motion had been brought. There was just no evidence that actual harm had occurred, except for the fact that this third party had access to this information. For one the information itself was not confidential. For example, the names of people or the email addresses themselves, the court found that it was not confidential information. And two, that there was no proof that that information had actually been used in any way, shape, or form to harm the plaintiffs.

[22:36] HUSEIN: Did the court provide any guidance on what kinds of harm would have to be present in order for it to meet this threshold of being real harm or actual harm?

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[22:48] SAKINA: The court did not discuss what type of harm needs to be shown. But it did say that, without any evidence of compensable harm, the court would not certify a case. Because if the court started doing that, where there was no evidence of harm suffered, then every case that has been pleaded or that alleges damages would get certified. And that is not the test for certification.

[23:16] HUSEIN: Now that we have this decision, does this provide any guidance for class actions lawyers or perhaps Privacy lawyers in terms of how they conduct their work?

[23:27] SAKINA: Yes, because the court requires proof of Compensable damages, that any class action lawyer who's considering a breach of privacy action has to look into whether it is just that the data was accessed by a third party. Or whether that harm actually occurred? The other aspect of this is also a lot of lawyers have considered instead of alleging a breach of privacy, relying on the tort of intrusion upon seclusion. Basically, this tort allows a plaintiff to seek damages where a defendant who has possession of the data, intentionally or recklessly misappropriated that data in some form, such that the person who actually provided the data would suffer harm or humiliation, or anguish.

[24:25] Now, unfortunately, what happens in these cases is that the plaintiffs sue the database defendants, in other words, Uber, just maintains a database of all the information. The data was actually accessed by this third party. So, it was not Uber who unintentionally or intentionally circulated the data, it was a third party who access that data. And that causes the tort of intrusion upon seclusion to sort of fail against Uber because Uber did not access the data unlawfully. So, a lot of class action plaintiffs are now finding themselves in a bit of a bind in the sense that the breach of privacy actions don't succeed because they aren't able to show harm on a class-wide basis. And they're not able to succeed on the tort of intrusion upon seclusion, because the database defendants are not the ones that unlawfully accessed the data.

[25:24] HUSEIN: So, if you're a lawyer in this situation, you're in the bind. Are there any considerations that you would take into account to identify which route to go in?

[25:32] SAKINA: I think at this point, it seems that the law is favoring defendants, it just seems that these types of actions are being set up for failure. But some of these matters have been appealed. And it will be interesting to see how the Court of Appeals decides on these issues. And perhaps that might give some guidance to the plaintiff's lawyers on what to do.

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[26:02] HUSEIN: Now, one of the most fundamental principles of class actions Law involves proving that there is a basis in fact, for common issues in the allegations. However, a recent federal court decision from this test isn't always a given. For one, this case appears to confirm that this certification threshold is more than just a speed bump. And this may be instructive for other competition class actions to come. Sakina, I know that this certification process you explained in the last segment has this two-part analysis. And so, tell us a bit more about how this plays out in the competitive landscape.

[26:38] SAKINA: So, competition class actions are sort of uniquely situated in the sense they typically allege a conspiracy among multiple defendants to either manipulate the price or fixed the price or supply of a product. So, here, what the plaintiff needs to show on certification is some evidence that that conspiracy actually existed or in other words, that there was actually an agreement among defendants to manipulate the price of a product. Typically, what happens is, plaintiffs will plead that some or all these defendants conspired, but then they struggle to lead the evidence that that conspiracy actually existed.

[27:28] HUSEIN: I know that there was this competition law matter in the class action space, involving *Jensen v. Samsung Electronics Co. Ltd.* Can you just walk us through the relevant facts of what happened in that matter?

[27:41] SAKINA: Here, there was an allegation of a conspiracy among defendants to manipulate the price of this product called DRAM. DRAM is basically a type of semiconductor, it is a memory chip that is found in computers and laptops and smartphones and virtually every electronic product. And the claim here emerges from some investigation that Chinese regulatory authorities undertook, where those Chinese authorities alleged that there was this conspiracy amongst all of these producers of DRAM. Based on those investigations and some public statements the plaintiffs commenced a class action here, alleging that these defendants had conspired to restrict the supply of DRAM and to increase the prices of the product.

[28:34] HUSEIN: So, when it started in the Court, how did the Court find this certification question?

[28:40] SAKINA: So, here, the plaintiff had a bigger hurdle than they probably imagined it started with their pleading itself. So, as I said, they pled basically that some or all of these defendants have conspired to restrict supply and to manipulate the price. But the Court found that the pleading did not have what is known as material facts. That means there were no

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actual details of what this conspiracy was. In other words, it's not sufficient to just say that a conspiracy took place, the plaintiff needs to provide some detail of where the conspiracy took place, who was involved, how did that result in liability to the plaintiffs, etc?

[29:21] HUSEIN: And I imagine that part of that is to give them a chance to respond in kind, is that right?

[29:26] SAKINA: Exactly. The defendants need to know how to defend themselves, they need to know what the case against them is. And they can't do that if it's just a general allegation that you conspired. So, basically, the Court refused to certify this class action because it found for one that the pleadings did not disclose any material facts. So, basically, the plaintiff needed to show that a cause of action and conspiracy existed against the defendants. And that can be done by first pleading all the elements of conspiracy and then having the material facts to support those elements.

[30:03] So, for one, the plaintiffs pleaded that there was this investigation in China, about the conspiracy in China. But the court found that an investigation of some conspiracy in China did not translate into a conspiracy here in Canada. The second thing that the plaintiffs did is that they allege that a few years ago, these same defendants had also admitted to conspiracy for the same product. But the court said that the admission of a conspiracy a few years back, does not mean that those same defendants have again, conspired now. And the plaintiffs also alleged that you could see that the price of DRAM increased steadily over the years. But just because two competitors do the same thing, does not mean that they conspired. They kind of just mirrored each other's conduct without actually conspiring.

[31:03] HUSEIN: I know, that's a common issue in terms of art as well, like jokes, about who thought of something first. And sometimes you could have independently thought the same thing, without having known of the other.

[31:11] SAKINA: Absolutely.

[31:12] HUSEIN: So, it sounds like the issue here is that the allegations or the pleadings were not specific enough. But is there any guidance about how specific that claim has to be in terms of getting past this, this threshold?

[31:27] SAKINA: Right. As we discussed before, the whole idea of a pleading is to give the defendant an opportunity to defend themselves. The defendant needs to know what the claim

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against them is. So, at a minimum, the plaintiff's claim should tell the defendant who was involved, how they were involved, and when they were involved. And this can get a bit challenging in conspiracy cases because it's basically claimed that a conspiracy was done in secret. But how does a plaintiff get those details? As the Court said, they may not have every detail, they may not know every secret meeting that was held. But it cannot also be so superficial when you make a general allegation that some or all defendants have conspired.

[32:13] There needs to be at least something that indicates where the conspiracy took place or how it took place. As an example, one of the things that the plaintiff said was these defendants met at industry association meetings and conspired there. But industry association meetings are perfectly legal. So, if a conspiracy took place there, there has to be some more level of detail on how that happened.

[32:38] HUSEIN: But I guess you'd have to prove that or at least alleged that as part of this process. Is that right?

[32:43] SAKINA: Right. So, some level of specificity. I mean, the plaintiff cannot obviously be expected to know everything beforehand. But the plaintiff also cannot do a bald pleading or just a conclusory statement, and then expect that eventually, more facts will emerge to fill that out.

[33:00] HUSEIN: Are there any takeaways for class actions lawyers generally like plaintiff or defense, in light of a case like this? I'm curious to know what guidance this provides.

[30:10] SAKINA: As a starting point, Jensen helps you establish what the role of a pleading is in a class action. We are seeing a lot of Competition class actions that make these general allegations where they would name all the top industry players and they will say that these industry players got together and conspired, but they do not provide any other details. Or they would rely on, for instance, newspaper articles that talk about some investigation without again giving any details. And I think Jensen is very instructive in the sense that it guides plaintiffs on how to prepare a proper pleading that can survive a certification motion or a motion to strike.

[33:56] I think what is happening in some cases is that because the bar for certification is low, the same basis and fact test it's not a very high standard, you don't have to prove your entire case. You just have to show some evidence. A lot of plaintiffs misconstrue what some evidence is. For example, they think a couple of news articles that talks about an investigation as

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sufficient evidence to get a class action certified, and in Jensen, the court has said no, that is not the case. You have to give a little bit more than that to the court.

[Music Break]

[34:37] HUSEIN: And before we wrap up, we're going to do our Ask-Me-Anything segment with Sakina about this area of class actions Law. And as listeners of our show will know, one of the bonus rewards for members of our crowdfunding patron community is the opportunity to submit questions that they want to hear answered on the show. They can be anything at all within the guest's area of expertise, as long as they're not asking for legal advice. We used to do a call for these questions a couple of days or a couple of weeks before the episode. So, if you want to find out how you can become a patron and get rewards like this and others, you can check out our crowdfunding website, which is www.lawyeredpodcast.com/patreon.

[35:15] Okay, so Sakina we've got some great questions for this episode, about class actions Law. The first question is one that I am actually interested to get the answer to. The question is: Other than the obvious, what are some ways in which a class actions Lawsuit differs from a "regular lawsuit"?

[35:35] SAKINA: **class actions** are different from individual lawsuits in the sense that they make claims on behalf of people who may not even know that such action exists. For example, if there is a claim that users for certain products suffered harm, and let's say you and I are users of that product, it is not necessary that we would know that some law firm has commenced an action of this sort.

[36:00] HUSEIN: Right. Until maybe afterward, when you get notified that there's this award or something that you may be eligible for, right?

[36:07] SAKINA: Exactly. Once it settles, and then there's a notice of it, then you might discover that this actually exists. But typically, at the stage of where it is started, you might not know, the average consumer will not know that this class action exists. And because of that, the courts take on a different type of role in the sense that they're still adjudicators. But they also heavily monitor the class action to ensure that whatever steps are being taken by the class counsel and the class representative, are still in the best interests of the class. So, as an example, if a class counsel decides to discontinue an action, he or she cannot do stuff on his own, they have to go to court and get court approval for it.

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[36:53] HUSEIN: Right. Because they're acting on behalf of a larger group.

[36:57] SAKINA: Absolutely. Same way, when a settlement if a class counsel or a class representative, enters into a settlement, they need to go to court and get the court to approve that settlement. At that stage, the court will ensure that the class members have been notified of the settlement. And people who don't agree with the settlement can come to court and object. That's different from the way the regular action can unfold.

[37:23] HUSEIN: And then can you explain how that impacts the preparation stage? Like if you're defending a class actions matter, as opposed to defending a regular matter, but only one plaintiff or one other party, does it change the calculus of it in a sense?

[37:37] SAKINA: On the defense side is not a lot of change in the sense that we still take instruction from that one client who we act for. But things do change when it comes to settling the matter. Because even if you and the class counsel have come to a settlement, and you have an agreement, and you've signed the agreement, things are still in the hands of a Court. There have been cases where the Court has said no, we're not approving this, or we will approve a settlement subject to these changes, and then the entire deal can actually fall apart. So, to that extent, I think that we all remain in the hands of the court, even after a matter settles, and there are certain reporting obligations that arise from those settlements.

[38:19] HUSEIN: If there is a settlement process, if there is a class of people, like is the defendant negotiating with still the representative counsel? Or do they end up having conversations with other members of the class as well?

[38:34] SAKINA: It will always be with the class counsel, not even so much with the class representative. But after the settlement is entered into and you go to court for approval, before you go for the approval stage, the class counsel will normally send a notification to all potential class members, that we've agreed to the settlement. And this is the date of the hearing when the court will approve the settlement. So, this gives class members a chance to either show up in court and say, "No, we don't agree with a settlement," or give them a chance eventually to opt out of the settlement and say, "We still want to pursue our individual actions against the defendant."

[39:16] HUSEIN: Okay, so the next question we have is one that I think is timely for a lot of other practices, not just class actions. And the question is: Given the high expense, what role

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does third-party litigation funding play in the class actions landscape? And before we get into this, maybe can you define what this term means for people who may be unfamiliar.

[39:37] SAKINA: Sure. So, basically, third-party financing or third-party litigation financing is to get a third party that's not part of the lawsuit, to step in and tell the plaintiff that okay, we will cover your cost of disbursements, that is the costs incurred in issuing the claim and filing motion records, etc. And in return, give us a percentage of the eventual settlement, or if it goes to trial, and damages are awarded, then give us a percentage of that. So, again, similar to what I talked about before, because it's a class action because this is being done on behalf of the entire class, when such an agreement is arrived at between the representative plaintiff and the third-party financing company, that agreement again needs to be approved by the court.

[40:27] HUSEIN: Do you know why that is?

[40:30] SAKINA: The court wants to ensure that, this third-party financing company is not unduly influencing the litigation because the purse strings are in the control of this third-party company, they might, for example, rush into a settlement to just get their money back without really keeping the best interests of the class in mind.

[40:49] HUSEIN: Right. I mean, like with a lot of high-value items, money talks, I imagine will impact the direction of how things play out.

[40:58] SAKINA: Yes, because the investment into a class action can be very, very high. And some of these class actions are pretty long-drawn, it can be years before they see a return. There may be times when the third-party funding company gets impatient and wants to rush into a settlement. Or sometimes the demand for a return can be unreasonable or so high that it deprives the class members of a legitimate settlement. So, keeping in mind that to ensure fairness of the agreement and fairness to class members, the court will review the agreement and approve it if it's reasonable.

[41:37] HUSEIN: And is that something that the plaintiff and defense will argue about, the appropriateness of getting this third-party funding? Or is that just for the court to decide on its own?

[41:47] SAKINA: Defendants are served the motion, and defendants have an opportunity to make submissions. But typically, defendants will not interfere because it really does not affect them. Unless there is something out there that really affects them.

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[42:01] HUSEIN: I imagine that it's more to protect the person who is being funded rather than the opposing party. Is that right?

[42:08] SAKINA: Yes, absolutely. Yes, that's correct. It's really to protect the class, not so much the defendant, but also needs to ensure that the proceeding remains fair to the defendant.

[42:18] HUSEIN: And from your experience, are you seeing a rise in third-party litigation funding in class actions. I know that, by virtue of its nature, it can be quite an expensive matter.

[42:30] SAKINA: A lot of class actions, especially the ones that are being pursued against a number of defendants, and where it is obvious that this is not going to be a quick settlement, the plaintiffs will try to secure some kind of funding. It isn't just about the costs of disbursement but also the costs that they may have to pay to the defendant. So, for example, if there is a motion that is brought and these motions can cost hundreds of thousands of dollars, and the plaintiff loses then who pays the defendant? So, in Ontario, we have a loser-pays-cost policy.

[43:00] So, typically, it would be the plaintiff who pays for it. But you're asking a representative plaintiff who is just doing a good thing by representing the class to pay for it, which is usually not appealing. Typically, plaintiff-side class action lawyers would indemnify the plaintiff and say that the class action lawyer themselves will pay for it. But again, where costs can run into even some cases, millions, no class action lawyer would want to take on that liability. And this is where litigation funding helps because they will indemnify instead of the class action lawyer indemnifies himself.

[43:39] HUSEIN: Next question we have is: Are there any class actions lawsuits that are being advanced toward Canadian businesses for their failure to prevent the spread of COVID-19?

[43:50] SAKINA: There actually have been a number of class actions that have come out in relation to COVID-19. Some of the most prominent ones are the ones related to long-term care and retirement facilities, where they have alleged that these facilities fail to take appropriate health and safety measures to protect their residents. We're also seeing a rise in claims by policyholders with business interruption seeking insurance coverage for loss of business during the time when they were forced to shut down their businesses. And there was also going to be a rise in class actions relating to entitlement for refunds of canceled flights, or other holiday

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packages, etc. So, definitely, we're seeing that COVID-19 has brought in a spate of fairly new and different types of class actions it is really interesting to see how those unfold.

[44:46] HUSEIN: That's very interesting. I'm sure we'll see some developments to comment on as to how these matters are playing out. The last question we have and maybe related to the previous one, but the question is: Have there been any noticeable trends in terms of the numbers and/or types of class actions matters that have gone through the courts?

[45:04] SAKINA: I think it's really the law that is evolving rather than the type of cases. In privacy, we're seeing how this law is now favoring institutional defendants so much. But it's interesting to see how that would unfold when these matters go to the Court of Appeal. Even in Competition class actions, we are seeing that there has been an increase in the number of actions that have come out. But these actions are probably set up for failure because they're not able to plead the level of detail that is required. And in some other cases, very recently, there has been a Federal Court of Appeal case related to a major Competition class action, where the court clarified that these section 45 conspiracies do not apply to by-side agreements.

[45:49] HUSEIN: When you say by-side, what do you mean exactly?

[45:51] SAKINA: So, section 45, basically says that competitors cannot conspire to fix prices, or to restrict the supply of goods. So, typically, if there are two competitors who are selling a particular product, they cannot come together and say, this is the price we will set for this product. They have to let competition in the market decide the price. But when it comes to by-side, for example, two businesses have an agreement that they will not poach employees of each others. So, in this case, what happens is that the business is the one that is purchasing the labor. And now they have an agreement to not purchase the labor. That becomes a by-side agreement.

[46:34] HUSEIN: As opposed to selling the goods, right?

[46:37] SAKINA: Absolutely. Yes, you got that right. That's exactly what it is. So, in essence, there have been a few class actions where plaintiffs have alleged that there is a wage-fixing agreement among defendants or a no-poach agreement. And the court has found that these types of agreements come under the category of by-side, and therefore typically, they are not covered under Section 45. There is going to be a change in the Competition Act in 2023. And so it will be interesting to see how that could affect Competition class actions. But the law is constantly evolving.

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[47:14] HUSEIN: So, given this trend in terms of his competition matters, what impact will this have on businesses and lawyers as well?

[47:22] SAKINA: At least for the little next little while, businesses can take comfort in the fact that any by-side agreement is not covered under Section 45. So, any actions that alleged conspiracy to fix a by-side sort of thing will not fly. But as I said in 2023, the Competition Act is going to be amended, and it is going to criminalize by-side agreements, as well. So, we will have to see how that impacts businesses and the next year.

[47:52] HUSEIN: Got it. Sakina, thanks so much for talking to us about these important issues in the class action space. A lot of us hear about these big lawsuits on the news and whatnot. But I think it's very rare for us to get an insider's look at how these matters are actually proceeding. It seems there's a lot of case law developing on this matter a lot of coming legislation, so we need to learn about how these matters are evolving and the impacts that they may have on other areas of law as well. So, thanks again for your time, and we look forward to staying in touch in the future.

[48:24] SAKINA: Thank you so much for having me over. It was a pleasure to speak with you and talk more about class actions. Thank you so much.

[Music Break]

[48:36] HUSEIN: All right. And that's a wrap on this episode of Lawyered. Thanks for listening. On today's episode, our guest was Sakina Babwani. You can learn more about her practice on her law firm's website, which is www.bennettjones.com. And for more about today's show and links to all the cases that we spoke about today. You can find those on our website, which is www.lawyeredpodcast.com. On our next episode, in two weeks' time, I will be speaking about the era of insurance law with our guest, Dennis Ong. In addition to being an established insurance defense lawyer, Dennis is also a small claims court judge, and also the chair of the OBS Insurance Law Group. So, needless to say, we will have plenty to say in terms of this discussion of these topics. We will be speaking about jury trials, we will be speaking about content interpretation, and also some very recent case law in that area, about third-party litigation funding, and a lot more topics as well. So, be sure to check that one out as well.

[49:35] If you want to help make the show even better and get some neat and affordable legal rewards, including the opportunity to submit some questions for this show as part of our Ask-

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