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**CONSULTATION PAPER**

**ON**

**MULTI-PARTY LITIGATION**

*(CLASS ACTIONS)*

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**(LRC CP 25-2003)**

**IRELAND**

**The Law Reform Commission**

**35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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First Published

The Law Reform Commission 2003  
July 2003

ISSN 1393 - 3140

## THE LAW REFORM COMMISSION

### Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published seventy Reports containing proposals for reform of the law; eleven Working Papers; twenty four Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and twenty three Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in Appendix C to this Consultation Paper.

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## **ACKNOWLEDGEMENTS**

The Commission would like to thank the following people who offered advice and assistance in relation to this Consultation Paper. Full responsibility for this Paper, however, lies with the Commission:

Professor David Gwynn-Morgan, University College Cork  
Professor Brian Carroll, University College Cork  
Brendan Counihan, Office of the Chief State Solicitor  
Christine O'Rourke, Office of the Attorney General  
Margaret Bannon, Office of the Attorney General  
His Honour Judge Alan Mahon  
Michael Cush, SC  
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## INTRODUCTION

1. The objective of the Law Reform Commission's project on multi-party actions is to formulate recommendations for reform of the current procedures governing one form of multi-party litigation, namely, cases involving multiple plaintiffs with similar claims against the same defendant or defendants.<sup>1</sup> The legal contexts in which multi-party actions<sup>2</sup> arise are many and varied and the potential defendants may be State and/or private actors. In recent years there has been a marked increase in the number and range of such cases in Ireland. Typical examples include claims relating to army deafness, contaminated blood products and tobacco-related illnesses. Cases of this kind commonly attract a high level of public interest whether by virtue of the nature of the claims, the size of the potential class or the possibility of State liability.

2. At the current time the Irish legal system lacks a comprehensive procedure that would tackle multi-party actions in a consistent, effective and expeditious manner. The objective of this Paper is to examine the feasibility and desirability of introducing such a procedure.

3. This Consultation Paper sets out the backdrop to reform in this area. Chapter 1 opens with an examination of existing practice and

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<sup>1</sup> The present discussion deals only incidentally with the converse situation, *ie* actions involving multiple defendants, which are far less common and tend not to give rise to the same degree of complexity. A proposal in relation to so-called "defendant class actions" is included in Chapter 5.

<sup>2</sup> Unless otherwise stated, the term "multi-party action" is used in the broad sense to refer to any form of actual or potential litigation involving multiple parties.

procedure. There follows, in Chapter 2, a comparative analysis of class action and representative procedures that have been introduced in other common law countries. Chapter 3 discusses the policy underlying reform of this area. Finally, Chapter 4 examines a tentative model for reform which is then summarised in Chapter 5.

4. The Commission usually publishes in two stages: first, the Consultation Paper and then the Report. The Paper is intended to form the basis for discussion and accordingly the recommendations, conclusions and suggestions contained herein are provisional. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation, including a colloquium attended we hope by a number of interested and expert people (details of the venue and date of which will be announced later). Submissions on the provisional recommendations included in this Consultation Paper are also welcome. Secondly, the Report also gives us an opportunity which is especially welcome with the present subject not only for further thoughts on areas covered in the Paper, but also to treat topics not yet covered. In order that the Commission's final Report may be made available as soon as possible, those who wish to make their submissions are requested to do so in writing to the Commission by **31 October 2003**.

## CHAPTER 1 IRISH LAW AND PRACTICE

### A Representative Actions

1.01 Order 15 rule 9 of the *Rules of the Superior Courts 1986* facilitates a rudimentary form of class action known as a “representative action”.<sup>1</sup> This mechanism enables large numbers of persons to be joined to a legal action as represented parties. The provision states:

“Where there are numerous persons having the same interest in one cause of action or matter, one or more of such persons may sue or be sued, or may be authorised by the court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested.”

1.02 Rule 9 originated as a form of equitable redress in the Court of Chancery in cases where “the parties were so numerous that you never could ‘come at justice’.”<sup>2</sup> The Court relaxed the requirement that all

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<sup>1</sup> See generally: Whyte *Social Inclusion and the Legal System* (Institute of Public Administration 2002) 103-109; Delany and McGrath *Civil Procedure in the Superior Courts* (Round Hall Press 2001) at 6.019; Ó Floinn *Practice and Procedure in the Superior Courts* (Butterworths 1996) at Rule 9; Collins & O’Reilly *Civil Proceedings and the State in Ireland* (Round Hall Press 1990) at 5.16; Hodges *Multi-Party Actions* (Oxford University Press 2001) at Chapter 9; Valentine *Civil Proceedings: The Supreme Court* (Queen’s University of Belfast Institute of Irish Studies 1997) at 3.37; Seymour “Representative Procedures and the Future of Multi-Party Actions” (1999) 62 *MLR* 564.

<sup>2</sup> *Duke of Bedford v Ellis* [1901] AC 1, 8 (*per* Lord MacNaughten) (six persons were allowed to sue on behalf of all other fruit growers in an action against the owner of a market for breach of certain statutory duties); *Moore v Attorney General* [1930] IR 471, 484-86.

parties to an action be present by allowing one or more representatives to conduct litigation on behalf of others.<sup>3</sup> The procedure was later enacted in the *Supreme Court of Judicature Acts of 1873 and 1875*<sup>4</sup> and has featured in several common law jurisdictions.

1.03 In Ireland, the representative action has been used in just a handful of cases. The unwillingness of litigants to invoke the procedure may be explained by several limitations surrounding its operation.

1.04 In the first place, the court must be satisfied that each individual member of the class has authorised the named party to act in a representative capacity.<sup>5</sup> In *Madigan v Attorney General*,<sup>6</sup> one of the plaintiffs sought to challenge the constitutionality of the residential property tax on her own behalf and on behalf of all “assessable” persons within the meaning of section 95 of the *Finance Act 1983*. O’Hanlon J refused the application for a representative action because “no evidence was adduced to suggest that any other persons had authorised the said plaintiff to sue on their behalf”. Moreover, the judge felt that a representative order was inappropriate since the court had no knowledge of the number of persons who wished to challenge the statute or who had instituted independent proceedings.

1.05 At the same time, the rigidity of the rule as to representative proceedings should not be overstated. In keeping with its equitable

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<sup>3</sup> *Commissioners of Sewers v Gellatly* (1876) 3 Ch.D. 610, 615.

<sup>4</sup> *Supreme Court of Judicature Act 1873* 36 & 37 *Vict* 8 c66 Sch Rule of Procedure section 10; *Supreme Court of Judicature Act 1875* 38 & 39 *Vict* 10 c77 Order XVI First Sch section 9; *Wylie Judicature Acts* (2<sup>nd</sup> ed Sealy, Bryers and Walker 1906) at 288-93.

<sup>5</sup> Order 4 rule 9 stipulates that the capacity in which a party sues or is sued must appear on the face of the statement of claim. There is no indication of how numerous the represented persons must be, although it has been suggested that so small a number as five persons will not be so regarded: *Re Braybrook* [1916] WN 74. If the representative plaintiff should “fall out” for any reason, the court may add or substitute any represented person: *Moon v Atherton* [1972] 2 QB 435.

<sup>6</sup> *Madigan v Attorney General* [1986] ILRM 136, 148.

origins, the English courts have come to view it as a flexible tool of convenience in the administration of justice.<sup>7</sup> This pragmatic tone was echoed in *Greene v Minister for Agriculture*.<sup>8</sup> Five farmers purported to sue the State in relation to certain schemes implemented pursuant to an EC directive on their own behalf and on behalf of all farmers in the relevant areas and, in particular, 1,392 farmers named in a list transmitted to the defendants. Although the listed farmers had not signed any specific authorisation, evidence was adduced that:

“the problem was debated in a number of venues throughout the country where interested parties were invited to attend and a general exchange of views took place. Essentially those who were in favour of pursuing the matter further were asked to subscribe to a fighting fund and ... did so on the basis that they would be persons on whose behalf and for whose benefit the proceedings would be brought.”<sup>9</sup>

1.06 Murphy J concluded that the listed farmers had authorised the proceedings on their behalf and in their name.<sup>10</sup> *Greene* suggests that the courts will not insist upon written authorisation. Similarly, authorisation may be implied, for example, where the representative is an office or title holder.<sup>11</sup>

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<sup>7</sup> *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 424; *John v Rees* [1970] Ch 345.

<sup>8</sup> [1990] 2 IR 17.

<sup>9</sup> *Ibid* at 29.

<sup>10</sup> Murphy J thought it unlikely that the listed farmers anticipated that they might render themselves liable for additional costs beyond their subscriptions to the fund. In any event, in light of the court's ultimate conclusion that the plaintiffs were entitled only to declaratory relief, Murphy J's comments were not material for purposes of judgment.

<sup>11</sup> *Bruce v Donaldson & Others* (1918) 53 ILT 24 (three defendants were sued as representatives of the unincorporated Belfast Lodge of the United Operative Plumbers' and Domestic Engineers' Association in relation to a resolution expelling the plaintiff from membership); *Fermoy Gas Co v Sheehan & Others* (1895) 29 ILT 597 (a gas company sued the honorary secretary and two ordinary members of the club to recover the price of a quarter's gas supplied to

1.07 Given the nature of the representative relationship, it is hardly surprising that the action has been reserved largely for situations in which the class is relatively small or has a pre-existing relationship or bond with the representative.<sup>12</sup> Since representation extends to all aspects of the legal proceedings, including settlement, the action presupposes a level of confidence between the representative and the members of the class that may not readily be assumed. The representative has autonomy over the way in which the litigation is conducted, subject to the expectation that he will act in the interests of the class. Generally any judgment or order in the action will bind all persons represented at the direction of the court.

1.08 A second limitation on the representative action, namely the requirement that the members of the class have “the same interest in one cause of action or matter,” has been applied strictly by the courts.<sup>13</sup> As Lord MacNaughten famously stated in *Duke of Bedford v Ellis*, there must be “a common interest, a common grievance and relief in its nature beneficial to all.”<sup>14</sup> The older authorities suggest that the interests of the prospective litigants must be the same, as opposed to merely similar or “common”. Thus, there is sufficient “same interest” where the dispute

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the club). However, a representative defendant will not be appointed against her will: *Firth Finance & General Ltd v McNarry* [1987] NI 125.

<sup>12</sup> See eg *Rafferty v Bus Éireann* [1997] 2 IR 424 (a trade union challenged an employer’s viability plan on behalf of its members); *McMenamin v Ireland* [1996] 3 IR 100 (a district judge challenged pension arrangements for district judges on his own behalf and on behalf of the Association of District Judges); *Brennan v Attorney General* [1984] ILRM 355 (plaintiff farmers challenged a scheme for the valuation of agricultural land on behalf of an unincorporated agricultural association).

<sup>13</sup> *Roche v Sherrington* [1982] 1 WLR 599 (a representative action against a defendant as representing the membership of the *Opus Dei* was not properly constituted since there might be separate defences open to the various classes of members); *Barker v Allanson* [1937] 1 KB 463; *Markt & Co Ltd v Knight Steamship Co* [1910] 2 KB 1021 (representative action was not appropriate where each person relied on a separate contract and where the claim of each depended on its own merits).

<sup>14</sup> [1901] AC 1, 8.

involves joint beneficial entitlement to property, such as customary rights<sup>15</sup> or corporate shareholdings.<sup>16</sup> In contrast, the courts have refused to extend the representative procedure to actions founded in tort, a point emphasised by the Supreme Court in *Moore v Attorney General (No 2)*.<sup>17</sup> This limitation is echoed in Order 6 rule 10 of the *Circuit Court Rules 2001* which expressly excludes representative actions founded on tort. This position is at odds with one of the stated rationales for class action procedures in other jurisdictions, namely the possibility of combining in a single action numerous small tort claims that would not be economically viable standing alone.

1.09 The “same interest” requirement also accounts for a third shortcoming, namely the uncertainty that surrounds the authority of the court to award damages. The traditional view was that the representative plaintiff was entitled only to declaratory and injunctive relief. As Fletcher Moulton LJ explained in *Markt & Co Ltd v Knight Steamship Co Ltd*:

“Where the claim is for damages the machinery of a representative suit is absolutely inapplicable. The relief which he is seeking is a personal relief applicable to him alone, and

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<sup>15</sup> *Wyld v Silver* [1963] Ch 243; *Mercer v Denne* [1905] 2 Ch 538 (action on behalf of parish fishermen alleging right to dry nets on disputed land).

<sup>16</sup> See eg *Smith v The Cork and Bandon Railway Co* (1869) 3 Eq 356 (suit by a preferential shareholder naming one of the ordinary shareholders as defendant to represent the class).

<sup>17</sup> [1930] IR 471. Kennedy CJ relied on “an apparent consensus of judicial opinion in England” in support of the view that rule 9 “does not apply to actions of tort”. *Ibid* at 490. Notwithstanding this pronouncement, courts have occasionally entertained representative actions founded in tort where the relief sought is injunctive. See eg *HP Bollinger Ltd v J Bollinger SA* [1977] 2 CMLR 625 (action on behalf of champagne importers alleging passing off in relation to the word “champagne”); *McGrane v Louth County Council* High Court unreported (action for a *quia timet* injunction to restrain the defendant from committing a nuisance). On the basis of *Moore*, Collins & O’Reilly *Civil Proceedings and the State in Ireland* (Round Hall Press 1990) suggest at 5.17 that there is an analogous prohibition on representative actions against individuals for breach of constitutional rights.

does not benefit in any way the class with whom he purports to be bringing the action.”<sup>18</sup>

1.10 The mere existence of a common wrong will not necessarily suffice if there is no common right or common purpose; representative proceedings presuppose a single claim alleging multiple identical losses by a common cause. In *Markt*, the court held that different owners of cargo shipped in a general ship, could not be represented by one or a few of the cargo owners in an action claiming damages for the loss of the entire cargo. In a case of this kind, issues of liability resolved by a declaratory order are *res judicata* between the members of the class and the defendants. However, each member of the class must bring an independent action for damages.

1.11 Some courts in England have taken a more relaxed approach in recent years. In *Prudential Assurance Co Ltd v Newman Industries Ltd*<sup>19</sup> Vinelott J allowed a representative action on behalf of shareholders of a company alleging conspiracy in relation to a misleading circular that was used to procure the passing of a resolution. Vinelott J held that a representative action seeking damages in tort could proceed subject to certain conditions:

“(i) such an action would not confer a right on a member of the class which he would not have been able to exercise in separate proceedings nor deprive a defendant of a defence on which he or she could rely in a separate action;

(ii) the class possesses a common interest, *ie* a common ingredient in the cause of action of each member of the class, including the representative; and

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<sup>18</sup> [1910] 2 KB 1021, 1040-41.

<sup>19</sup> [1981] Ch 229.



(iii) the interests of the class are served by permitting the action to proceed.”<sup>20</sup>

1.12 In *Irish Shipping Ltd v Commercial Assurance Co*<sup>21</sup> the Court of Appeal applied similar reasoning to claims in contract. A representative action was allowed to proceed against 77 insurance companies, all subject to separate but identical contracts, even though some of the issues raised did not affect all of the defendants equally. Staughton LJ noted that while it was theoretically possible that any one of those represented might raise separate defences, he would disregard theoretical possibilities in favour of practical likelihoods.

1.13 There have also been cases in which the potentially vexing issue of damages has been sidestepped through the expedient of an independent fund. In *EMI Records Ltd v Riley* an injunction and damages were awarded in a representative action for breach of copyright through the sale of pirated cassette tapes.<sup>22</sup> The members of the represented class, each of whom had suffered the same injury, consented to the payment of all pecuniary remedies to the plaintiff.

1.14 To date none of these approaches to multi-party damages actions has been explored in the Irish courts. For the time being at least it seems that the traditional view that the representative plaintiff is entitled only to declaratory and injunctive relief holds sway.

1.15 A fourth limitation is the inability of the representative action to fully exhaust the underlying legal issues. The represented parties are bound by any judgment or court-approved settlement by virtue of the fact that they were “present” by representation.<sup>23</sup> However, the judgment

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<sup>20</sup> This approach was followed in *EMI Records v Riley* [1981] 1 WLR 923 and *M Michael Furriers Ltd v Askew* (1983) 127 SJ 597 (Court of Appeal); but not in *News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2)* [1987] ICR 181.

<sup>21</sup> (“*The Irish Rowan*”) [1991] 2 QB 206, 222-23.

<sup>22</sup> [1981] 1 WLR 923.

<sup>23</sup> *Commissioner of Sewers v Gellatly* (1876) 3 Ch D 610.

does not extend to any members of the class who were not so joined to the proceedings.<sup>24</sup> Thus from a defendant's standpoint, a judgment or settlement in a representative action does not rule out the need to defend similar claims in the future. Moreover, even within the represented class, a member may apply to the court for leave to be exempted from the judgment.<sup>25</sup> This position reflects a compromise between promoting representative actions as an efficient means of litigation and protecting absentees against arbitrary and unfair results. However, allowing members to opt-out of a judgment contradicts the premise of the representative action and has led to considerable uncertainty in practice. Finally, as a matter of law, any represented party will not be bound if there is evidence of fraud or collusion in the conduct of the proceedings.<sup>26</sup>

1.16 A final limitation is the lack of availability of legal aid for representative proceedings. Section 28(9)(a)(ix) of the *Civil Legal Aid Act 1995* states that legal aid shall not be granted where "the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned."

1.17 To summarise, whereas the wording of Order 15 rule 9 suggests a procedure of wide-ranging application, in practice the various limitations outlined above have undermined the representative procedure as a vehicle for potential class claims. In addition, the cases in which the procedure has been invoked provide no general guidance as to its scope or the typical case in which it is used. Each case, it seems, turns on its own facts and more often than not, the representative dimension has been an incidental rather than a defining characteristic of the proceedings.

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<sup>24</sup> *Abrahamson & Others v Law Society* [1996] 1 IR 403, 413-15.

<sup>25</sup> *Moore v Attorney General* [1930] IR 471, 489.

<sup>26</sup> *Ibid.*

## **B Specific Representative Proceedings**

1.18 Aside from Order 15 rule 9, there are several specific instances where the law permits a person or persons to sue in a representative capacity. Most of these proceedings involve multiple parties but numerically do not rise to the level of so-called “class claims”. The following are some common examples.

### **(1) Trusts and Estates**

1.19 Order 15 rules 8 and 10 deal with litigation in relation to the beneficial interest in a trust or estate. Under rule 8 a trustee, executor or administrator may sue and be sued in relation to the trust property and shall be considered as representing the beneficial owner or owners. Rule 10 empowers the High Court to approve a compromise concerning a trust notwithstanding the absence of some of the interested persons. One of the conditions is the presence of “other persons in the same interest before the Court and assenting to the compromise”. An order approving a compromise is binding on the absent persons unless it can be shown that the order was obtained by fraud or non-disclosure of material facts.

1.20 On occasion, trusts have been operated in innovative fashion in order to advance multi-party actions. A topical example is the Omagh Victims Legal Trust which has instituted civil proceedings against suspected conspirators in the Omagh bombing on behalf of victims and their relatives.<sup>27</sup>

### **(2) Fatal Claims**

1.21 Under section 28 of the *Civil Liability Act 1961* an action for damages may be brought where death is caused by a wrongful act, neglect or default. The action may be instituted by the personal

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<sup>27</sup> “Omagh victims raise court case funds” *The Irish Times* 26 July 2002 at 6.

representative of the deceased or by all or any of the dependants “for the benefit of all the dependants”.<sup>28</sup>

### (3) *Consumer Claims*

1.22 The *EC Directive on Unfair Terms in Consumer Contracts*<sup>29</sup> is one of several EU measures designed to protect consumers as participants in the internal market. Article 7 of the Directive requires the Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts including:

“provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the national courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.”

1.23 The Directive was implemented in Ireland by the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995*.<sup>30</sup> Regulation 8 purported to give effect to Article 7 of the Directive by empowering the Director of Consumer Affairs to seek injunctive relief in the High Court against the use of unfair terms in consumer contracts. The omission of *locus standi* for consumer organisations was the subject of infringement proceedings before the Court of Justice for failure to transpose Article 7 of the Directive correctly.<sup>31</sup> The lacuna was filled by

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<sup>28</sup> By virtue of section 1 of the *Civil Liability (Amendment) Act 1996*, the term “dependant” is broadly defined to include a spouse, a former spouse, a co-habitee of three years standing, a parent, grandparent, step-parent, child, grandchild, step-child, brother, sister, half-brother or half-sister.

<sup>29</sup> Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts OJ No L95/29 21 April 1993.

<sup>30</sup> SI 27 of 1995.

<sup>31</sup> A similar provision in the British legislation, Regulation 8 of the *Unfair Terms in Consumer Contracts Regulations 1994* (1994 SI 3159), which vests the right to seek injunctions exclusively on the Office of Fair Trading, was challenged in

the *European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000*.<sup>32</sup> Regulation 8 as amended allows consumer organisations to seek injunctive relief on the same basis as the Director. For the purposes of the Regulations “consumer organisation” is defined as follows:

“(a) a company, the memorandum of association of which states that the company’s main object or objects to be the protection of consumer interests,

or

(b) a body corporate (other than a company) or an unincorporated body of persons in relation to which there exists a constitution or a deed of trust which states the body’s main object or objects to be the protection of consumer interests.”

1.24 Certain other enactments, such as the *Sale of Goods and Supply of Services Act 1980* also give the Director of Consumer Affairs the authority to institute proceedings on behalf of consumers.

#### **(4) Derivative Actions**

1.25 Section 205 of the *Companies Act 1963* provides a representative remedy for shareholders in cases of oppression.<sup>33</sup> Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors are being exercised in disregard of the members’ interests may seek the court’s intervention.

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the High Court by the Consumers’ Association and was the subject of a preliminary reference to the Court of Justice. The reference was withdrawn in May 1996 when the new Labour Government agreed to extend standing to consumer organisations. That undertaking is the subject of reform proposals currently under consideration by the Lord Chancellor’s Department and discussed below in Chapter 3.

<sup>32</sup> SI 307 of 2000.

<sup>33</sup> See Courtney *The Law of Private Companies* (Butterworths 1994) at Chapter 11.

The court may make such order as it sees fit in relation to a specific act or transaction or the general conduct of the company, including the purchase of shares.

## **C           Alternative Approaches**

1.26 As we have seen the Order 15 rule 9 representative action has proved unsuitable as a vehicle for managing multi-party actions. The following are some alternative means whereby the courts have disposed of such actions within the framework of the existing rules and procedures.

### **(1)           Joinder and Consolidation**

1.27 The *Rules of the Superior Courts 1986* contain several provisions, designed to promote efficiency and consistency in the administration of justice, which enable the courts to hear two or more related cases together.<sup>34</sup> An obvious approach to multi-party actions is to accommodate the plaintiff class within a single suit, each class member being a party to the action in his own right. The court simply joins additional parties to proceedings where it is a necessary or desirable means of resolving matters in dispute. Order 15 rule 1 provides:

“(1) All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise; provided that if, upon the application of any defendant, it shall appear that such joinder may embarrass or delay the trial of the proceeding, the Court may order separate trials or make such order as may be expedient.

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<sup>34</sup> See generally Delany & McGrath *Civil Procedure in the Superior Courts* (Round Hall Press 2001) at 6.017-18.

(2) In a case under this rule judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment but the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court shall otherwise direct.”<sup>35</sup>

1.28 Order 15 rule 4 makes similar provision for the joinder as defendants, whether jointly, severally or in the alternative, of all persons “against whom the right to any relief is alleged to exist”.<sup>36</sup> Under Order 16 rule 1 a defendant may seek the leave of the court to join a third-party who shall be a party to the action with the same rights of defence against any claim as if he had been sued by the defendant in the ordinary way.<sup>37</sup> Where a number of parties have been joined in the same action any judgment is binding on all parties so joined.

1.29 This basic joinder procedure is routinely used to combine actions involving two or more plaintiffs or defendants. Occasionally, the procedure has extended beyond conventional litigation to multi-party actions involving numerous plaintiffs. For the sake of convenience one or more members of the class are often nominated as first-named plaintiffs. Nevertheless, each class member remains at all times a full party to the proceedings. An example of this practice is *Abrahamson v Law Society*<sup>38</sup> in which hundreds of law students challenged the decision to deny them exemptions from the Law Society’s entrance examination. The plaintiffs were a defined group with identical claims for declaratory and injunctive relief and were represented by a single legal team. Their individual actions were combined in a single action before the High Court.

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<sup>35</sup> Order 6 rule 1 of the *Circuit Court Rules 2001* is identical save for the express proviso that “no one shall be joined as plaintiff without his consent”.

<sup>36</sup> See also Order 6 rule 2 of the *Circuit Court Rules 2001*.

<sup>37</sup> See also Order 9 rule 1 of the *Circuit Court Rules 2001*.

<sup>38</sup> [1996] 1 IR 403.

1.30 Another approach is for the court to order that matters in dispute be consolidated or tried together. Order 18 rule 1 provides that a plaintiff may unite several causes of action in the same proceedings. It goes on to provide that where such causes of action cannot be tried together conveniently, the court may order separate trials or make such other order as may be necessary or expedient to dispose of the matters.<sup>39</sup> Where a plaintiff does not take steps to unite several causes of action in the same proceedings, matters pending in the High Court may be consolidated by order of the court on the application of any party and regardless of whether or not all the parties consent to the order.<sup>40</sup> Aside from the provisions in the Rules, the court has an inherent jurisdiction to order that cases be heard simultaneously.<sup>41</sup> Unlike joinder, consolidation does not involve making all the claimants parties to the proceedings. Rather, the plaintiff litigates the consolidated claims on the premise that he represents the class and any judgment is deemed to bind its members. In this respect consolidation resembles the representative action and, as such, is a less flexible mechanism for the management of large class claims.

## (2) *Test Cases*

1.31 Under current Irish practice, the preferred approach to multi-party actions is the test case. Where several separate claims arising out of the same circumstances are pending against a defendant or defendants, the first case to be litigated becomes the benchmark by which the remaining cases are resolved. Technically, the subsequent plaintiffs and defendants, not being parties to the original litigation, are not bound by the result.<sup>42</sup>

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<sup>39</sup> Order 18 rule 9 provides that where it appears to the court that causes of action are such that they cannot all be conveniently disposed of together, the court may order any of such causes of action to be excluded and consequential amendments to be made and may make such order as to costs as may be just.

<sup>40</sup> Order 4 rule 6; *Duffy v News Group Newspapers Ltd* [1992] 2 IR 369.

<sup>41</sup> *O'Neill v Ryanair Ltd* [1992] 1 IR 160.

<sup>42</sup> Whyte *Social Inclusion and the Legal System* (Institute of Public Administration 2002) at 104; *McDermott Res Judicata and Double Jeopardy* (Butterworths 1999) at 5.08.



However, the resolution of the test case influences the conduct of future litigation in both a formal and an informal sense. The test case has a formal effect by virtue of the doctrine of precedent in that the benefits of the original ruling may be extended to cases involving factual situations that are on all fours. More informally than in practice the subsequent litigation is usually settled on the basis of the result in the original case. The extent to which the test case serves as a benchmark for subsequent proceedings varies depending upon the nature of the action and the prevalence of common claims among the putative plaintiffs. The matter is straightforward where the original ruling declares a legislative or administrative act to be unconstitutional<sup>43</sup> and, at the other end of the scale, considerably more complicated where there is a need for individualised assessments of damages. The test case approach was used to resolve many of the numerous claims filed against the State in relation to army deafness. A more recent example is a successful claim against an obstetrician for negligence in carrying out an unnecessary hysterectomy during childbirth.<sup>44</sup>

1.32 Notwithstanding the significance of the test case in the Irish civil justice system, there are several drawbacks to this approach as a means of resolving multi-party claims. First, because the test case is conducted and adjudicated exclusively on its own merits and without regard to the broader class perspective, it is essentially an individualised means of resolving collective grievances. The test case plaintiff acts solely on his own behalf and without regard to the interests of the plaintiffs in pending or future actions. Potential plaintiffs, for their part, are not notified of the

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<sup>43</sup> By virtue of the ruling, the impugned act ceases to have effect in all situations, including those that are the subject of pending litigation. See *Murphy v Attorney General* [1982] IR 241 (certain provisions of the *Income Tax Act 1967* struck down on the ground that they discriminated against married couples); *Cotter v Minister for Social Welfare* [1987] ILRM 324 (*EC Equal Treatment Directive* held to create rights which could be directly enforced by individuals in the Irish courts); Hogan and Whyte *Kelly's Irish Constitution* (2nd ed Butterworths 1994) at 487-97.

<sup>44</sup> The plaintiff, Alison Gough, recovered €273,000 in a test case which will influence the outcome of some 65 cases pending against the defendant obstetrician. See *The Irish Times* 23 November 2002 *Weekender* at 1.

proceedings and may only learn of their existence, if at all, through media reports of the outcome. Consequently, the ability of subsequent plaintiffs to influence the conduct and resolution of their claims is compromised to a greater or lesser extent.<sup>45</sup> The test case may simply allow the defendant to present subsequent plaintiffs with a settlement offer as a virtual *fait accompli*. Further difficulties ensue where the plaintiff's claims are not typical of the class or do not present a particularly suitable vehicle for the testing of common issues.

1.33 A second and related problem stems from the fact that there is no provision for estimating, much less defining, the size or identity of the class at the outset of the proceedings. Thus, when the court adjudicates a test case or the parties negotiate a settlement, they do so without knowing the global extent of the defendant's liability. The implications for subsequent plaintiffs are particularly ominous in situations where the defendant has limited financial resources to satisfy meritorious claims.

1.34 Thirdly, the test case approach may be less of a boon in terms of judicial economy than popularly imagined. The benchmark provided by a test case clearly reduces the length and cost of subsequent proceedings principally by narrowing the range of disputed issues and promoting settlement. However, the test case does not obviate the need for each subsequent plaintiff to file an action which is then processed by the courts in the conventional way. In other words, although subsequent cases may be simplified, their number is not reduced; in fact, one might argue that the publicity surrounding a test case invites litigation and raises unrealistic expectations on the part of potential litigants.

1.35 Finally, the resolution of multiple claims by way of a test case has certain institutional shortcomings. The *ad hoc* nature of the exercise creates uncertainty and unpredictability in practice. From the perspective of potential plaintiffs it also involves an undesirable lack of transparency with an attendant limitation on access to justice, particularly for economically and socially disadvantaged litigants. This lack of

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<sup>45</sup> Ironically, the lack of autonomy enjoyed by class members is an objection frequently raised against class action procedures. See the discussion below at Chapter 4.

transparency also impacts on society at large. Media reports of the outcome of a test case and the estimated number of outstanding claims may necessarily understate the substantive, cumulative effect of multiple wrongdoing on the part of a defendant. This may explain, albeit only in part, the proliferation of tribunals as a means of vindicating societal interests in the investigation of wrongdoing and compensation of victims.

### **(3) *Public Inquiries and Compensation Tribunals***

1.36 We outline in this section situations, unearthed mainly in the past decade or so, in which death or serious injury have been caused by endemic bad practice, usually for which the State bears some responsibility. This has often been considered sufficiently heinous or wanton to warrant a public inquiry. Later on, at the second stage, there have been claims for compensation by the victims or their families. In principle, such claims may be adjudicated upon in a number of ways, including: ordinary individual litigation, class actions or a compensation tribunal. The question naturally arises as to whether there is a duplication between the public inquiry and the later stage and, to come to the nub, whether a class action could be used to reduce this duplication. An arrangement somewhat analogous to what we have in mind-though it does not involve a class action-is afforded by a combination of a public inquiry followed by a compensation tribunal. The thinking behind this combination, which has been employed on a number of occasions<sup>46</sup> is

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<sup>46</sup> Some examples of the resolution of class claims through the medium of compensation tribunals or schemes established subsequent or further to a public inquiry include: (i) the Stardust Tragedy (see *Report of the Tribunal of Inquiry; Fire at the Stardust Artane, Dublin* (PI 853) chaired by Mr Justice Ronan Keane (as he then was); *Scheme of Compensation for Personal Injuries suffered at the Stardust Artane on the 14<sup>th</sup> February 1981* laid before the Oireachtas on 22 October 1985 and *Report of the Stardust Victims' Compensation Tribunal* (PI 7831 1987)); (ii) child abuse in State-run institutions (the *Commission to Inquire into Child Abuse Act 2000* established a commission under the chairmanship of Ms Justice Mary Laffoy which is expected to complete its findings in 2005. A separate body, the Residential Institutional Redress Board, will evaluate claims by victims and decide on the appropriate levels of compensation) and (iii) the Hepatitis C scandal (see *Report of the Tribunal of Inquiry into the Blood Transfusion Service Board* (Pn 3695) chaired by former Chief Justice Finlay. This led to the establishment of

that because fault has essentially been shown before a public inquiry, it is acceptable to pay compensation through a tribunal, without proof of culpability in each case.

1.37 Against this background it seems useful to consider the ways in which these three legal devices-public inquiries, class actions and compensation tribunals-can either interact with, or replace, each other in order to see whether some fruitful use has been made or may be made in the future of class actions. While we reach no firm conclusion, it seems useful to set out some of the various permutations which having been attempted in the past, dealing first with public inquiries<sup>47</sup> and class actions and then secondly, with compensation tribunals and class actions.

(a) *Public Inquiries and Class Actions*

1.38 At first blush it would appear that public inquiries and class actions have little in common. Conceptually, there are significant differences. The object of a public inquiry is to ascertain the facts in relation to a particular incident or series of incidents of legitimate public interest. In other words, the concern is to determine whether a wrong has been committed against society or against the public interest rather than to adjudicate and determine legal rights. By contrast, in a class action, the object of the litigation is the adjudication on and determination of legal disputes between parties. A court is invited to apply standard

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the statutory compensation tribunal presided over by Mr Justice Egan. See the *Scheme to Compensate certain persons who have contracted Hepatitis C from the use of human immunoglobulin-Anti-D, whole blood or other blood products* laid before the Oireachtas on 15 December 1985.

<sup>47</sup> Some notable examples of public inquiries set up by the State to investigate class claims include the disaster at Whiddy Island (see *Report of the Tribunal of Inquiry: Disaster at Whiddy Island Bantry Co Cork* 1980 PI 8911); the retention of organs by certain hospitals (*Post Mortem Inquiry*, a private, non-statutory inquiry was established under the chairmanship of Ms Anne Dunne SC in April 2000) and child sex abuse by clergy of the Ferns diocese (*Inquiry into the treatment of allegations of child sex abuse by clergy of the Ferns diocese* was set up in October 2002 under the chairmanship of Mr Justice Francis Murphy).

principles of law in respect of a common wrong usually visited upon a number of different plaintiffs by the same defendant or defendants.

1.39 This point of distinction was highlighted by the English Court of Appeal in the context of the benzodiazepine litigation. In *AB v John Wyeth & Brother Limited (No 2)*<sup>48</sup> Stuart Smith LJ, in upholding Ian Kennedy J's decision to strike out the actions against the pharmaceutical companies for abuse of process, held that a claim for damages should not be used as a pretext for what essentially amounts to a public inquiry. In this regard he remarked: "The judge rightly rejected the plaintiff's contention that there was some legitimate purpose to bringing this action other than obtaining compensation."<sup>49</sup> A similar view was taken by the Scottish Law Commission in their *Report on Multi Party Actions*.<sup>50</sup>

"[W]e think it appropriate that the function of civil litigation and the broad aims of reform should be regarded as being substantially the same in multi party litigation and other litigation. We say this because it may be argued that the culpability of a defender- such as the operator of an oil rig which goes on fire causing many deaths or the airline which apparently negligently allows an explosive device onto its aircraft- is so abnormal that the court should seek to punish such conduct. In other words there is a public element in the litigation which requires, or permits, the court to adopt the aim of 'behaviour modification' or punishment. We reject this view of a public element in multi party actions."<sup>51</sup>

1.40 As against this, it may be argued that the public element in certain class actions is given implicit recognition in England with the grant of public funding to cases (including group actions) which are considered to

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<sup>48</sup> Court of Appeal (Civil Division) 13 December 1996.

<sup>49</sup> *Ibid* at page 13 of the judgment.

<sup>50</sup> Scottish Law Reform Commission *Report on Multi Party Actions* (154-1996).

<sup>51</sup> *Ibid* at paragraph 2.23.

be of wider public interest.<sup>52</sup> This is defined by the Funding Code as meaning “the potential of the proceedings to produce real benefits for individuals other than the client”. Such cases attract priority for public funding from the Community Legal Service (CLS).<sup>53</sup> Further, the fact that courts may on occasion incidentally fulfil the role of a public inquiry was also noted by the Commission in the recent *Consultation Paper on Public Inquiries Including Tribunals of Inquiry*.<sup>54</sup>

“[A] court case may also be the means by which information of great public interest is authoritatively established. A conventional civil action, for example, a medical negligence action, may have the effect of publicly bringing home responsibility for a death or serious injury.”

1.41 It is important to note, however, that even in such cases, the main purpose of the litigation remains the determination of the dispute between the parties. Matters of public interest may be determined purely as an *incidental* feature of the hearing of the main action.

(I) *A Mutually Complementary Role?*

1.42 In the light of the above it is clear that a class action procedure would not eliminate the need for public inquiries to investigate matters of public interest. It is possible, however, to envisage a situation in which

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<sup>52</sup> See, for example, Hodges *Multi Party Actions* (Oxford University Press 2001) at 194-6 who argues that the public interest test confuses the role of the courts with that of a public inquiry. As he notes at paragraph 12.56:

“It is said that the function of a civil claim for damages is solely compensatory: it is not a public inquiry into the activities of a manufacturer but a judicial determination of whether money shall be paid to an individual. On this basis, the public’s interest in knowing whether one citizen is liable to pay damages to another or others cannot be intrinsically as significant a matter as the public interest in providing a mechanism for this to be decided, which is the function of the courts.”

<sup>53</sup> Section 8(2)(g) *Access to Justice Act 1999*.

<sup>54</sup> *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (LRC CP22-2003) at paragraph 1.08.

both an inquiry and a class action could usefully coexist and perform their different roles.

1.43 This would certainly be possible where a public inquiry may be able to confine its role purely to a public investigation of the facts surrounding a public “wrong” so that its purpose is essentially “fact-finding” rather than “fault-finding”. This would allow issues of liability to be debated subsequently in the courts. Thus, where a large-scale disaster has occurred, the State could set up a public inquiry to inquire into matters of public interest such as the cause of the incident and to make recommendations to prevent a recurrence; while individual actions arising from the debacle could be processed through the courts by way of a class action if a large number of people have suffered injury and/or loss.

1.44 In other words, the two procedures would interact in the scenario where an inquiry has made findings which point to likely conclusions on the allocation of responsibility for the public wrong. The basic thinking is that if fault has been substantially established before a public inquiry then it should not be necessary to establish it a second time through later civil proceedings.

1.45 Another arrangement is worth mentioning by way of comparison. The findings of an inquiry could be drawn upon as evidence before the civil proceedings, thereby avoiding unnecessary rehearings of certain factual issues. Although the findings of a tribunal are not *res judicata*, as noted in the recent *Consultation Paper on Tribunals of Inquiry*, it would appear that the final report of an inquiry may be admissible in subsequent civil proceedings as an exception to the hearsay rule.<sup>55</sup> However, one could envisage a prospective defendant resisting this on the basis that there has been no adjudication on liability or allocation of culpability between the parties to the case.

1.46 Experience thus far has shown that the prior findings of a public inquiry may exert pressure on a defendant and thus encourage early

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<sup>55</sup> Although the Commission has recommended legislation to similar effect in order to put the matter beyond doubt.

settlement of a case. This is because in practice the investigation of an aspect in dispute often clarifies the situation to the extent that it becomes clear what actually occurred. In the Whiddy Island disaster, to take one example, a tribunal of inquiry was established to investigate the causes of the disaster and to make recommendations as to how such incidents could be prevented from occurring in future.<sup>56</sup> The report of the tribunal, which reached important conclusions on the responsibility for the disaster,<sup>57</sup> was instrumental in facilitating settlements between the families of the victims and the various parties involved.

1.47 A second example is the case history of the litigation over standards of cervical smear testing at the Kent and Canterbury Hospital in England. In 1997, a government inquiry reported that standards of cervical smear testing at the hospital had been deficient for many years and that, as a result, many women were told that their test results were clear when in fact abnormalities should have been detected. This failure in turn led to a deterioration in the condition of many patients and even a number of deaths. In the subsequent civil action, the claimants' cases were bolstered by the damning findings of the earlier government inquiry. While the defendants contested liability, most of the cases settled.<sup>58</sup>

(b) *Compensation Tribunals and Class Actions*

1.48 As with public inquiries, there are important conceptual differences between compensation tribunals and class actions. The scheme setting up compensation tribunals generally provides that liability does not have to be proved; all that is in issue is *quantum*- which we could define fairly widely as whether the tort caused a particular damage or injury or loss and how much this was worth. The exclusion of any

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<sup>56</sup> *Report of the Tribunal of Inquiry: Disaster at Whiddy Island Bantry Co Cork* (PI 8911 May 1980).

<sup>57</sup> *Ibid* Chapter 21.

<sup>58</sup> Three went to full hearing. The plaintiffs won their case with damages ranging from £10,000 to £50,000. See further Bawden "Clinical Negligence" (2000) 7 *Litigation Funding* 4.



contest regarding liability is especially apt in the Irish constitutional scene since a compensation tribunal before which liability would have to be proved might violate Article 34.1 of the Constitution.<sup>59</sup> Frequently in a class action, however, liability will be in dispute and, in such a situation, in view of what has just been said, a compensation tribunal could not be used. However, it is possible to think of a situation in which either a class action or a compensation tribunal could be used because *quantum* and not liability was in dispute.

(I) *What would be the relative advantages and disadvantages of these two alternative procedures?*

1.49 The first thing to be said is that, given that compensation tribunals are usually only established where claims are being brought against the State or State funded institutions or where the State assumes responsibility for ensuring compensation is paid to injured parties, the comparison which follows obviously has no application where the defendant is a private citizen or corporation. Secondly, it is noteworthy that the two devices are not mutually exclusive- one could have a class action being heard by a compensation tribunal. Indeed, given the traditions and formality of a court, it might be easier to introduce an innovative procedure like a class action before a tribunal. Whether a class action is brought before a court or a tribunal, assuming that the evidence relevant to the *quantum* was common as to several plaintiffs, then the class action aspect could be significant in serving to bring judicial economy and consistency of outcome. Further, if it is considered desirable to give some advantage or privilege to some group of plaintiffs, which is not offered to the general civil plaintiff, it may attract less odium to do so where the privileged group is litigating through a tribunal rather than a court, where their distinctiveness from other plaintiffs would be more noticeable.

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<sup>59</sup> Article 34.1 reads “Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

1.50 On the other hand, a class action procedure offers a number of advantages. First, it would have the beneficial effect of placing the impetus for the investigation of wrongdoing more firmly in the hands of those individuals affected by a public wrong. An important aspect of this is costs. Since to date many of the claims in question have been directed solely or partly against the State, the tribunal model is intended to reduce the drain of litigation costs on the Exchequer. In practice, however, the costs of some tribunals have proved contentious. In a compensation tribunal the representation costs of injured parties are normally defrayed by the State, (whether by virtue of it being responsible for the injury or shouldering responsibility for the wrong) with little intervention from the tribunal itself. By contrast, in a class action costs are subject to a much greater degree of control. First, as is usual in a civil action, the issue of costs would be determined by the court which may impose limitations on the amount of costs to be recovered by a plaintiff in particular circumstances such as unmeritorious or unreasonable behaviour. Moreover, as discussed below,<sup>60</sup> class actions require more active supervision from the trial judge than most individual cases. The court assumes a supervisory role over the proceedings, from the certification of an action to any eventual settlement or judgment and accordingly retains considerable discretion in relation to the issue of costs. A further degree of control over costs is brought to bear by a mechanism for the taxation of costs, although admittedly this is also available in respect of tribunal legal fees. The effect of the above considerations is that parties to class proceedings think carefully before taking any steps which may expose them to penalties in respect of costs.

1.51 Secondly, in a class action the injured parties would have more control over the resolution and administration of their claims. By contrast, claimants in a compensation tribunal will normally have only a limited input into the conduct of the proceedings. Further, while under compensation schemes where sums are generally paid on an *ex gratia* basis *ie* without any admission of liability on the defendant's behalf, in a court case plaintiffs are able to secure a public declaration of responsibility.

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<sup>60</sup> See paragraphs 4.17-4.21 below.

1.52 A third important benefit is that a class action before a court would provide finality and cut down on the number of legal layers in the compensation system. The right of access to the courts under Article 34 of the Constitution has the result that individuals cannot be compelled to accept any alternative to the courts that may be made available to them, including compensation tribunals. This in turn has the effect that parties damaged by a public wrong who rejected an offer of statutory compensation would remain free to litigate their claims within the requisite time limits. Although the Supreme Court has recently held that individuals who appeal awards from compensation tribunals must do so within the time specified by the relevant legislation,<sup>61</sup> it is worth emphasising that in this case there was access to a court. The constitutional requirement that there be a right of access to the courts by way of appeal, provided that the time limit has been respected, means that a compensation tribunal is inherently incapable of achieving a final, complete and consistent resolution of the claims of a class of applicants.

1.53 As a final remark, it is noteworthy that an attempt was made to resolve the remaining army deafness cases through an early settlement compensation scheme (established in 2000) after many had been pursued through the courts.<sup>62</sup> It was felt that the legal costs incurred by the Department of Defence in contesting each claim had proved unnecessarily expensive.<sup>63</sup> It is possible, however, that a significant proportion of these costs could have been saved if the claims were brought by means of a single class action. This would also have had the added benefit of increased consistency in that a single finding could have been reached on common issues followed by separate findings on individual issues. Although consistency in these cases was considerably aided by several precedent judgments and the use of a standard scale (the “Green Book”), a class action heard before only one judge would have

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<sup>61</sup> *DB v Minister for Health and Children* Supreme Court 26 March 2003.

<sup>62</sup> The first hearing loss claim was initiated in 1994. The early settlement scheme is now abolished and all new claims are contested in the courts. “New Army Deafness Claims will be fought in the Courts” *Irish Times* 14 December 2002.

<sup>63</sup> According to the Department of Defence payments under the scheme average €10,000 whereas settlements of up to €40,000 have been reached out of court.

identified and resolved these issues at an earlier stage with expedition and economy.

1.54 In sum, compensation tribunals may not provide the best means of addressing multi-party claims in every case. Court proceedings, involving class actions, may prove more economical, allow claimants to assume a bigger role in the resolution of their claims and reduce the number of legal layers in the compensation system.

## CHAPTER 2    COMPARATIVE PERSPECTIVES

### A        The United States

2.01    The United States is the only jurisdiction with long-standing experience in relation to class actions.<sup>1</sup> Before examining class actions practice, it may be helpful to outline the principal features of the US legal system comprising federal and state courts. In the federal court system civil trials are conducted in district courts, each with jurisdiction over a designated territory.

2.02    There are twelve numbered circuit courts of appeals, each geographically defined,<sup>2</sup> and a thirteenth “court of appeals for the federal circuit” with specialised jurisdiction over intellectual property and administrative law cases. The decisions of the courts of appeals may be taken to the US Supreme Court. However, the Supreme Court’s appellate jurisdiction is based on the discretionary writ of certiorari<sup>3</sup> and the Court hears but a small percentage of the cases so appealed.

2.03    The principal source of litigation in the federal courts are disputes involving “federal questions”, whether constitutional or, more routinely, statutory in origin.<sup>4</sup> Federal courts also adjudicate state law claims in two instances. First, a district court may exercise “supplemental

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<sup>1</sup>        See generally James *et al Civil Procedure* (5<sup>th</sup> ed 2001) at 10.20-24; Harbour *et al* “Class Actions: An American Perspective” in Hodges *Multi-Party Actions* (Oxford University Press 2001) at Chapter 13.

<sup>2</sup>        Each numbered circuit includes anywhere from three to ten states or territories.

<sup>3</sup>        This writ is distinct from the state-side order.

<sup>4</sup>        28 USC §1331.

jurisdiction” over any state law claim that is connected to a federal question.<sup>5</sup> Secondly, even in the absence of a federal question, the district court may adjudicate any case in which the litigants are diverse *ie* citizens of different states.<sup>6</sup> The practical significance of “diversity jurisdiction” is that it allows the federal courts to hear common law claims, such as those founded in contract and tort.<sup>7</sup>

2.04 State court systems resemble the federal system insofar as they generally comprise trial courts, intermediate appellate courts and a supreme court. Like their federal counterparts, state trial courts may adjudicate so-called “mixed cases” *ie* cases involving both federal and state issues. The losing side in any subsequent state supreme court proceeding may petition the US Supreme Court for final review of any federal issue so tried. Again, whether or not to hear and determine such an appeal is a matter within the US Supreme Court’s discretion.

2.05 The relevance of comparative analysis is tempered by certain important differences in the way in which litigation is conducted and financed in the United States and Ireland. In the first place, in the US the right to jury trial in a civil case is constitutionally protected. While litigants may opt for bench trials, plaintiffs in class actions tend to prefer jury trials and the promise of high damage awards. Secondly, in the US the general rule in relation to costs is that each side pays its own way; in other words, the losing side is not liable for the costs of the winning side. Lawyers can, and frequently do, represent clients on a contingent fee basis, whereby the lawyer’s remuneration is contingent on a successful outcome and is calculated as a percentage of any judgment or settlement. While contingency fee arrangements enable plaintiffs to litigate without

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<sup>5</sup> 28 USC §1339.

<sup>6</sup> 28 USC §1332. The outdated rationale for “diversity jurisdiction” is that the federal court protects an out-of-state defendant from local bias by providing a neutral forum for the adjudication of state law claims. Diversity jurisdiction is also subject to a minimum-amount-in-controversy requirement of \$75,000. Thus, in a class action, the claims of each member of the class must exceed that amount. *Zahn v International Paper Co* 414 US 291 (1973).

<sup>7</sup> Although federal law does contain a very limited species of common law, it does not extend to such claims.

running the risk of liability for costs and litigation expenses, contingent fees of thirty percent and above have led to accusations of “entrepreneurial” lawyering.<sup>8</sup> At the other end of the ethical scale, a strong *pro bono* tradition among lawyers in the United States has facilitated many class actions, particularly in the field of civil rights. Thirdly, both the federal and state systems make provision for punitive or exemplary damages.<sup>9</sup> As the term suggests, punitive damages are intended to deter wrongdoing and consequently bear no relation to actual economic damages. The potential for high punitive damage awards in jury trials is said to increase the incentive to bring class actions. Fourthly, strict liability doctrines in tort are also a boon to the plaintiff bar.<sup>10</sup>

2.06 Class action practice in federal courts is governed by Rule 23 of the *Federal Rules of Civil Procedure* which dates back to 1938.<sup>11</sup> The procedure allows one or more representatives to sue on behalf of themselves and the members of a class of persons who are similarly situated. Any settlement reached or judgment secured binds the defendant and all the members of the class. A 1966 revision of Rule 23 removed several of the more technical conditions surrounding its operation. Current practice evolved through the civil rights era, the consumer movement and more recently the trend toward mass tort

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<sup>8</sup> A related phenomenon is the “settlement-value only” action in which a lawyer chooses a nominal plaintiff in the hope that the defendant will settle to avoid litigation.

<sup>9</sup> See Law Reform Commission *Report on Aggravated Exemplary and Restitutionary Damages* (LRC 60-2000) at 46-48.

<sup>10</sup> The American experience is also tempered by a dearth of statistical information and reporting of class action practices. See Hensler *et al Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand Institute March 2000) at 4.

<sup>11</sup> Rule 23 is reproduced at Appendix A. For a brief history of the rule see James *et al Civil Procedure* (5<sup>th</sup> ed 2001) at 10.21-22. Rule 23 is lengthy and arguably overly complex. The elucidation of various types of class action is largely historic.

litigation.<sup>12</sup> While the individual states have distinct class action regimes, most are predicated on the federal model.

2.07 The first step is a court order certifying the proceedings as a class action. The basic thrust of Rule 23(a) is to place a burden on the proponent of the class to show that various requirements are met:

- Numerosity: that the class is so numerous that joinder of all class members is not practicable;<sup>13</sup>
- Commonality: that there are common questions of law and fact;<sup>14</sup>
- Typicality: that the claims of the class representatives are typical of those of the class;
- Representation: that the class representatives will adequately represent the class.<sup>15</sup>

2.08 The requirements of Rule 23(a) are designed to ensure that class treatment is both necessary and desirable in the circumstances with particular regard to the interests of the absent members of the putative class.<sup>16</sup>

2.09 Rule 23(b) imposes additional requirements related to judicial economy. A class action may be commenced if the court is satisfied that one of three circumstances have been met:

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<sup>12</sup> See Miller “Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem” (1979) 92 *Harv L Rev* 664.

<sup>13</sup> Roth “Mass Tort Malignancy: In the Search for a Cure, Courts Should Continue to Certify Mandatory, Settlement Only Class Actions” (1999) 79 *BUL Rev* 577 (noting that numerosity is met when there are 40 or more plaintiffs).

<sup>14</sup> This is probably the most tricky of the Rule 23(a) requirements. The plaintiffs must point to one or more issues of law or fact that affect every class member. Where the class action seeks damages Rule 23(b)(3) requires a further, related showing that the common questions predominate over the individual questions.

<sup>15</sup> The court will examine several factors such as possible conflicts of interest and whether the representatives have the financial and legal means to conduct the litigation.

<sup>16</sup> *Barnes v The American Tobacco Corp* 161 F 3d 127, 140 (3d Cir 1998).



- “1. Separate actions by individual members of the class would create a risk of:
  - a. inconsistent outcomes which would establish contradictory standards of conduct for the defendant;  
or
  - b. prejudicing the interests of absent class members
2. The action involves an injunction or declaratory relief affecting all members of the class
3. The common questions of law or fact predominate over any individual questions and a class action is superior to other available methods of adjudication.”

2.10 Rule 23(b)(1) has formed the basis for a plethora of class actions in the field of civil rights. Class actions seeking damages are generally filed under Rule 23(b)(3). In relation to actions maintained under this subsection, the plaintiffs must notify the members of the class using the best notice practicable under the circumstances, “including individual notice to all members who can be identified through reasonable effort”.<sup>17</sup> Giving notice may prove difficult and expensive particularly where the certification order defines a large class in fairly broad terms. The members of the class must be informed not only that a class action has been instituted but also that they have the right to opt-out of the class and thereby remain free to pursue claims in their own right.<sup>18</sup> Class members who fail to opt-out within a designated time-frame will be bound by any judgment or court-approved settlement. Litigants often choose to side-step the Rule 23(b)(3) notice requirements by proceeding under Rule

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<sup>17</sup> Rule 23(c)(2). This may necessitate notice by mail to all absent members whose addresses are known, particularly in the case of those residing out-of-state: *Eisen v Carlisle & Jacquelin* 417 US 156 (1974).

<sup>18</sup> The opt-out provision was introduced in a 1966 amendment to Rule 23 to replace the previous opt-in provision. Arguably, it has speeded up the initiation of class actions and, at the same time, led to an increase in class sizes. The filing of a class action tolls the statute of limitations on the claims of all class members, even those who opt to bring separate proceedings: *Crown, Cork & Seal Co v Parker* 462 US 345 (1983).

23(b)(2). Specifically, claims for damages may be appended to claims for injunctive relief brought under Rule 23(b)(2).

2.11 Rule 23 gives the trial court considerable powers in relation to the certification and management of class actions. The court may order that a class be recognised for certain purposes but not for others or that certification be conditional. Moreover, the order may be altered or amended at any stage prior to a decision on the merits.<sup>19</sup> The court may also divide the class into subclasses, whose members have claims that raise common issues not shared by all of the members of the class, each of which is treated as a class in its own right.<sup>20</sup> Rule 23(d) makes more general provision for judicial control over the conduct of class proceedings:

“In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined under Rule 16, and may be altered or amended as may be desirable from time to time.”

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<sup>19</sup> Rule 23(c)(1).

<sup>20</sup> Rule 23(c)(4).

2.12 Any district court orders, including the order granting or denying class certification, may not be appealed as of right until the district court delivers a judgment on the merits at the close of the trial.<sup>21</sup> Finally, the court plays an important role in supervising any settlement of a class action. Rule 23(e) requires court approval of any “dismissal or compromise” of the action as well as the provision of notice all members of the class “in such manner as the court directs”. Because the complexity of class actions settlements may hamper close judicial scrutiny, courts sometimes convene special hearings on the fairness of a settlement or even appoint a guardian to report on its adequacy.<sup>22</sup>

2.13 The merits and demerits of class action suits have been the subject of political and social controversy in the US over the years.<sup>23</sup> The following are some of the principal criticisms raised. In the first place, class proceedings tend to be more complex and protracted than conventional litigation and a greater drain of judicial resources.<sup>24</sup> The counterargument is that, however unwieldy, a single class action is more cost effective than multiple individual proceedings. Secondly, class actions are said to increase the risk of arbitrary outcomes. The aggregation of multiple claims, for example, may intensify the pressure

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<sup>21</sup> *Coopers & Lybrand v Livesay* 437 US 463 (1978). Under Rule 23(f), a Court of Appeals has a discretion to permit an appeal from an order granting or denying certification filed within 10 days of the making of the order. Proceedings in the district court will not be stayed pending such an appeal, unless the district court or court of appeals so directs.

<sup>22</sup> James *et al Civil Procedure* (5<sup>th</sup> ed 2001) at 10.23.

<sup>23</sup> Hensler *et al Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand Institute March 2000) at 3.

<sup>24</sup> The Federal Judicial Center *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (17 January 1996) at 9; The Federal Judicial Center *Preliminary Report on Time Study Class Action Cases* (9 February 1995) at 19; Seltzer “Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control” (1983) *LII Ford L Rev* 37, 69.

on defendants to settle, regardless of the merits of individual claims.<sup>25</sup> In addition, settlements may reward plaintiffs with weak claims at the expense of those with strong claims.<sup>26</sup> Thirdly, it is difficult to eliminate potential conflicts between the various class constituencies *ie* the representatives, the lawyers and the absent members. In particular, close judicial supervision is required to safeguard the rights of the absent members of the class.

2.14 The reality is that class actions have proved effective in some but not all of the extraordinarily wide range of legal contexts to which they have been applied. Class suits have been successfully employed to vindicate civil rights against public and private actors.<sup>27</sup> In addition, they have worked reasonably well in single-issue tort cases where common issues predominate over individual issues. For example, liability and causation may be resolved on a class-basis and damages by way of individual “mini-trials”<sup>28</sup> or bifurcated proceedings.<sup>29</sup> In contrast, the deepest levels of dissatisfaction have been registered in “mass tort” class actions, such as product liability actions, which may involve thousands of putative class members with disparate claims.<sup>30</sup> Spearheaded by numerous suits against asbestos manufacturers, these mass tort actions became a prominent feature of American legal practice in the 1970s and

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<sup>25</sup> *In re Rhone-Poulenc Inc* 51 F 3d 1293, 1300 (7<sup>th</sup> Cir 1995) (expressing dissatisfaction with the ability of a single jury to “hold the fate of an industry in the palm of its hand”).

<sup>26</sup> *In re Agent Orange* 818 F 2d 145 (2<sup>nd</sup> Cir 1987).

<sup>27</sup> See *eg General Tel Co v Falcon* 457 US 147 (1982) (employment discrimination); *East Texas Motor Freight v Rodriguez* 431 US 395 (1977) (same).

<sup>28</sup> Harbour *et al* “Class Actions: An American Perspective” in Hodges *Multi-Party Actions* (Oxford University Press 2001) at 13.15 & 13.40.

<sup>29</sup> Federal Rule of Civil Procedure 42(b) provides: “The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim ... or of any separate issue or of any number of claims... ”.

<sup>30</sup> Coffee “Class Wars: The Dilemma of the Mass Tort Class Action” (1995) 95 *Colum L Rev* 1343.

1980s. Courts began to certify class actions simply in order to ease crowded dockets, litigants subsequently settled unmanageable suits and the ensuing publicity increased the number of filings still further.<sup>31</sup> Experience has shown, however, that the very size and complexity of such litigation renders it unsuitable for class treatment.

2.15 In more recent years, courts have retreated to the original premises of Rule 23, refusing to certify mass class actions that may prove unmanageable and ultimately ineffective.<sup>32</sup> Controversy has also surrounded class consumer litigation involving multiple claims for small financial losses. Proponents argue that these consumer actions further an important public interest insofar as they vindicate the rights of under-resourced plaintiffs and have a deterrent effect on defendant manufacturers and distributors. Opponents contend that unmeritorious consumer claims are enhanced by “strength in numbers” and that the only true beneficiaries are class action lawyers. Similar charges have been levelled against securities fraud class actions.<sup>33</sup>

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<sup>31</sup> Harbour *et al op cit* fn 28 at 13.19-22 (with citations); James *et al Civil Procedure* (5<sup>th</sup> ed 2001) at 10.22.

<sup>32</sup> See *Barnes v The American Tobacco Co* 161 F 3d 127 (3rd Cir 1998) (affirming a district court’s refusal to certify a nationwide class of nicotine addicts); *Castrano v American Tobacco Co* 84 F 3d 734 (5<sup>th</sup> Cir 1996) (reversing partial certification of class claims in a similar suit against tobacco manufacturers); *In re American Med Sys Inc*, 75 F 3d 1069, 1089 (6<sup>th</sup> Cir 1996) (reversing certification of a nationwide class consisting of between 15,000 and 120,000 men who had been implanted with penile prostheses manufactured by the defendant); *Valentino v Carter-Wallace Inc* 97 F 3d 1227 (9<sup>th</sup> Cir 1996) (reversing certification of a class of persons who had taken an epilepsy drug). The Supreme Court has endorsed this more conservative trend: *Amchem Prods Inc v Windsor* 821 US 591 (1997).

<sup>33</sup> Reputedly, the worst excesses involved attempts to coerce settlements through spurious fraud class actions based on falls in the price of corporate stock. Congress responded with the enactment of the *Private Securities Litigation Reform Act 1995* 15 USC §§ 77z-1(c), 78u-4(c) and the *Securities Litigation Uniform Standards Act 1998* 15 USC §§ 77p, 78bb(f). See James *et al Civil Procedure* (5<sup>th</sup> ed 2001) at 10.22 (noting that these statutory developments have not reduced the number of securities fraud class action filings).

## B Canada

2.16 Three of the Canadian provinces, British Columbia,<sup>34</sup> Ontario<sup>35</sup> and Quebec,<sup>36</sup> currently operate class action regimes.<sup>37</sup> Proposals have been made to introduce such regimes in the Federal Court of Canada,<sup>38</sup> and in the provinces of Alberta<sup>39</sup> and Manitoba.<sup>40</sup> The existing and proposed procedures are based broadly on the *Uniform Class Proceedings Act*<sup>41</sup> and Rule 23 of the US *Federal Rules of Procedure*. The following discussion focuses on areas where Canadian practice departs from the US model.

2.17 Under the Canadian legislation the requirements for class certification are somewhat less onerous than Rule 23. The proponent of the class proceeding must show:

- that the pleadings disclose a cause of action;
- that there exists an identifiable class of two or more persons;

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<sup>34</sup> *Class Proceedings Act 1995* SBC ch 21 (1995) (Can) (“The British Columbia Act”).

<sup>35</sup> *Class Proceedings Act 1992* SO ch 6 (1992) (Can) (“The Ontario Act”). See also Ontario Law Reform Commission *Report on Class Actions* (Volume III 1982).

<sup>36</sup> *Quebec Civil Code* Book IX. Quebec introduced class actions as early as 1978. However, because it is a civil law jurisdiction its experience is less relevant from an Irish perspective.

<sup>37</sup> See generally Prestage and McKee “Class Actions in the Common Law Provinces of Canada” in Hodges *Multi Party Actions* (Oxford University Press 2001) at Chapter 14 and Watson “Class Actions: The Canadian Experience” (2001) 11 *Duke J Comp & Int’l L* 269. Elsewhere in Canada, multi-party litigation is managed through the historic representative procedure similar to the Irish Order 15 rule 9 and other miscellaneous procedures.

<sup>38</sup> *Class Proceedings in the Federal Court of Canada* Federal Court of Canada Circular No.2/2000 [http://www.fct-cf.gc.ca/bulletins/notices/circular2\\_e.shtml](http://www.fct-cf.gc.ca/bulletins/notices/circular2_e.shtml)

<sup>39</sup> Alberta Law Reform Institute *Report on Class Actions* (85-2000).

<sup>40</sup> Manitoba Law Reform Commission *Report On Class Proceedings* (100-1999).

<sup>41</sup> Adopted by the Uniform Law Conference of Canada in 1996.

- that there are common issues among the claims of the class members;
- that a class action would be the preferable procedure for resolving these common issues;
- that the class representative will fairly and adequately represent the interests of the class on the basis of a workable trial plan.

2.18 A class is “identifiable” where it is possible to determine whether a particular person is a member - the number and identity of the individual class members need not be certain. Although establishing “common issues” is a crucial aspect of the certification motion, neither the Ontario nor the British Columbia legislation insists that the common issues “predominate”. Moreover, it is only in relation to those common issues, and not the entire dispute between the parties, that the class action need be the preferable procedure.<sup>42</sup> Finally, a representative plaintiff need not be typical of the class provided that he has no conflict of interest and can demonstrate that he will advance the class claims fairly and adequately.<sup>43</sup>

2.19 Notwithstanding the relatively low threshold established by these requirements, certification can prove no less contentious than in the United States. As noted by Watson:

“To date, certification has been a major battleground. Defendants have fought hard to avoid certification, with mixed success. Courts, however, have sometimes refused certification for reasons having little to do with statutory criteria – judges identify an action as a “bad class action” (which is never really

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<sup>42</sup> See Prestage & McKee *op cit* fn 37 at 1421, citing *Carom v Bre-X Minerals* (1999) 44 OR (3d) 173 (Gen Div): “A class proceeding is the preferable procedure where it presents a fair, efficient, and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceedings in accordance with the goals of judicial economy, access to justice, and the modification of the behaviour of wrongdoers.”

<sup>43</sup> The Ontario and British Columbia regimes also provide for the certification of subclasses.

defined), and the reasons given for refusing certification may be disingenuous or lack transparency.”<sup>44</sup>

2.20 Notice of certification must be given to the class members as a general rule. The general content of the notice is prescribed by statute and the form of the notice must be approved by the court. In addition, the court has discretion to determine the method of notice and who is to pay the cost. Both Ontario and British Columbia operate “opt-out” regimes: once the proceeding is certified the members of the class are presumptively included and are bound by any judgment or settlement unless they actively “opt-out” within a specified time-frame.

2.21 The settlement of class proceedings must be approved by the court as fair and reasonable and in the best interests of the class. It has been suggested that the Canadian courts are more rigorous in their scrutiny of proposed settlements than their American counterparts.<sup>45</sup> For example, in *Parsons v Canadian Red Cross Society*<sup>46</sup> the trial judge refused to approve an initial proposal for a CAN\$1.5 billion settlement of class claims in relation to Hepatitis C-contaminated blood.

2.22 The Canadian legislation explicitly recognises the possibility of bifurcating common issues and individual issues within a single procedural agenda. Once a proceeding has been certified and notice given, a court will generally deal with the common issues of the class, followed by the common issues of any subclass and finally any issues pertaining to individual class members. For example, in a class action for damages in tort, liability might be established through the resolution of common issues. The court would then go on to make an aggregate award of damages in favour of the class or to conduct further proceedings leading to individualised assessments. Throughout the proceedings the trial judge enjoys a broad discretion to make any order or impose any condition that he considers appropriate to secure fairness and expediency.

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<sup>44</sup> Watson “Class Actions: the Canadian Experience” 11 *Duke J of Comp & Int’l L* 269 at 279-80.

<sup>45</sup> *Ibid* at 281.

<sup>46</sup> [1999] 40 CPC (4<sup>th</sup>) 151 (Ont Sup Ct), 101 ACWS (3d) 694 (Can).



2.23 One of the interesting aspects of Canadian experience is the funding of class actions. In Canada, as in Ireland, “costs follow the event” as a general rule *ie* the losing side must pay the costs of the winning side. The Canadian legislation does not disturb the application of this rule to an unsuccessful defendant in a class action. However, in the event that the class action fails the representative plaintiff is the only class member who is liable for the defendant’s costs. The nature and extent of the plaintiff’s liability varies under the British Columbia, Ontario and Quebec statutes respectively. In Ontario, a representative plaintiff can escape liability for costs only if the court takes the view that the action was a “test case, raised a novel point of law or involved a matter of public interest”. To counter this disincentive to litigate, the Ontario statute expressly exempts class actions from the province’s general prohibition on contingency fees in civil proceedings. However, any fee agreement between a solicitor and the representative plaintiff, whether contingent or not, is enforceable only if approved by the court.

2.24 Ontario also took the innovative step of establishing a Class Proceedings Fund administered by a Class Proceedings Committee under the auspices of the Law Society. The Fund operates in two distinct respects. First, a representative plaintiff may apply to the Committee for sums to cover disbursements related to a proceeding. Funding is awarded on the basis of various factors including the merits of the class action, the representative plaintiff’s efforts to raise funds from other sources and the existence of financial controls to ensure the funds are spent appropriately. Secondly, where funding has been sought and received and the class action subsequently fails, the Fund will relieve the representative plaintiff of liability for the costs of the defendant. In return for these services the Fund imposes a levy on recipients who ultimately win their case: a successful plaintiff who has received funding must pay over 10 percent of any damage award into the Fund. However promising in theory, the success of the Fund has been modest at best in practice. Relatively few litigants have sought funding and fewer still have received it. The failure to attract representative plaintiffs,

particularly in the large, successful class actions,<sup>47</sup> has rendered the levy system virtually redundant as a means of financing the Fund.

2.25 In terms of practice, class actions have flourished in Canada. Indeed, because the Ontario and British Columbia procedures have facilitated several nationwide class actions, the effects have been felt even in those Provinces which have not legislated for class litigation. In terms of numbers, over two hundred class actions have been filed in Ontario and a lesser number in British Columbia. Numerous cases have been settled and only a handful have proceeded to plenary trial.<sup>48</sup> The diversity in the subject matter of Canadian class actions is striking and includes product liability claims (*eg* faulty medical devices);<sup>49</sup> mass torts (*eg* train crash,<sup>50</sup> institutional child abuse);<sup>51</sup> consumer claims (*eg* for illegal credit card charges);<sup>52</sup> employment claims (*eg* for wrongful dismissal);<sup>53</sup> and economic claims (*eg* franchising,<sup>54</sup> breach of copyright).<sup>55</sup>

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<sup>47</sup> For example *Nantais v Telectronics Proprietary (Canada) Ltd* [1995] 129 DLR (4<sup>th</sup>) 110 (Ont Gen Div) (Can), *prob juris noted* 127 DLR (4<sup>th</sup>) 552 (CAN\$23.1 million settlement in heart pacemakers); *Serwaczek v Medical Engineering Corp* [1996] 3 CPC (4<sup>th</sup>) 386 (Gen Div) (Can) (\$29.1 million settlement in breast implants case); *Dabbs v Sun Life Assurance Co of Canada* [1998] 40 OR (3d) 776 (Gen Div) (Can) (multi-million dollar settlement in fraudulent life insurance case).

<sup>48</sup> These figures are taken from Watson “Class Actions: the Canadian Experience” 11 *Duke J of Comp & Int'l L* 269 at 278.

<sup>49</sup> *Nantais v Telectronics Proprietary (Canada) Ltd* [1995] 129 DLR (4<sup>th</sup>) 110 (Ont Gen Div) (Can), *prob juris noted* 127 DLR (4<sup>th</sup>) 552.

<sup>50</sup> *Brimner v Via Rail Canada Inc* [2000] 47 OR (3d) 793 (Ont Sup Ct) (Can).

<sup>51</sup> *Lumley v British Columbia* [1999] BCJ No 2633 (BCCA) (Can).

<sup>52</sup> *Smith v Canadian Tire Acceptance Ltd* [1995] 22 OR (3d) 433 (Gen Div) (Can).

<sup>53</sup> *Webb v K-Mart Canada Ltd* [1999] OJ No 2268 (OS CJ).

<sup>54</sup> *Rosedale Motors Inc v Petro Canada Inc* [1998] 42 OR (3d) 776 (Gen Div) (Can).

<sup>55</sup> *Robertson v The Thompson Corp* [1993] 43 OR (3d) 389 (Gen Div) (Can).

## C Australia

2.26 Traditionally, multi-party litigation in Australia was confined to the common law representative action which suffered from the same limitations as its Irish counterpart, notably the “same interest” requirement. In recent years, however, Australian practice has undergone a quiet revolution and it is now commonly accepted that, outside the United States, Australia is the most likely place for a plaintiff to file a class action.<sup>56</sup> Indeed, one of the most unexpected features of the Australian regime are the liberal conditions under which class litigation is permitted to operate.

2.27 Like the US and Canadian legal systems, Australia has both a federal court system and an independent court structure in each of the six states and two self-governing territories. The ultimate appellate court is the High Court of Australia. Practice and procedure follow the English model: civil proceedings are generally heard by a judge sitting without a jury and costs generally follow the event.

2.28 A class action procedure was introduced in the federal courts in 1992.<sup>57</sup> More recently, the Supreme Court of Victoria amended its rules of procedure to facilitate class actions<sup>58</sup> and it is predicted that the other states will follow its lead.<sup>59</sup> To date, class actions have included product

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<sup>56</sup> See generally Clark and Harris “Multi-Plaintiff Litigation in Australia: A Comparative Perspective” (2001) 11 *Duke J Comp & Int’l L* 289; Kellam and Clark “Multi-Party Actions in Australia” in Hodges *Multi-Party Actions* (Oxford University Press 2001) at Chapter 15.

<sup>57</sup> Part IVA of the *Federal Court of Australia Act 1976* as inserted by the *Federal Court of Australia Amendment Act 1991* No 181 sec 3.

<sup>58</sup> See *Supreme Court (General Civil Procedure) Rules 1996*, Or 18A (Vict). Both the federal and Victoria class actions procedures have survived constitutional challenges. See *Femcare Ltd v Bright* (2000) 172 ALR 713 (Austl); *Schutt Flying Academy (Austl) Pty Ltd v Mobil Oil Austl Ltd* (2000) VSCA 103 (Vict).

<sup>59</sup> Clark and Harris “Multi-Plaintiff Litigation in Australia: A Comparative Perspective” (2001) 11 *Duke J Comp & Int’l L* 289 at 292.

liability claims,<sup>60</sup> shareholder litigation<sup>61</sup> and claims against government agencies<sup>62</sup> and public utilities.<sup>63</sup>

2.29 The principal characteristics of the Australian class actions procedure are as follows. In the first place, unlike the US and Canadian regimes, there is no requirement that the proceedings are judicially certified. A class action filed by a plaintiff will proceed as such provided:

- (1) the class comprises at least seven persons;
- (2) the claims of the class members arise out of the same, similar or related circumstances; and
- (3) those claims give rise to at least one substantial common issue of law or fact.<sup>64</sup>

2.30 Thus, in contrast to US Rule 23, there is no requirement that the claims of the representative parties are typical of those of the class nor that the common issues predominate over the individual issues. Once a class action has been commenced, the onus is on the defendant to convince the trial court that the proceedings should be terminated, for example, on the ground that the action is frivolous or oppressive or that the procedure is not the most efficient and effective means of disposing of the claims in question.<sup>65</sup>

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<sup>60</sup> See eg *Philip Morris (Austl) Ltd v Nixon* (2002) 170 ALR 487 (action against tobacco manufacturers).

<sup>61</sup> See eg *King v GIO Australia Holdings Ltd* (2000) FCA 1649.

<sup>62</sup> See eg *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 284 (action against a State minister).

<sup>63</sup> See eg *John Tiles Pty Ltd v Esso Australia Ltd & Anor* (2001) FCA 421 (action against suppliers of Melbourne's gas).

<sup>64</sup> FCA Section 33C.

<sup>65</sup> FCA Sections 33C & 33N.

2.31 Secondly, the plaintiff need only describe the class in general terms and is not obliged to name, identify or even specify the number of class members.<sup>66</sup> Consequently, the consent of the class members is not a prerequisite to the commencement of a class action. Rather, the Australian rules give the court broad discretion to direct the manner in which the class members are to be notified of the proceedings<sup>67</sup> and, furthermore, permit any individual member to opt-out by written notice within a specified period.<sup>68</sup> As mentioned, the Australian procedure contemplates the determination of individual issues in addition to common issues and makes provision for the use of subclasses if appropriate.

2.32 Thirdly, any judgment will bind all members of the class (*ie* those persons who fall within the class description who have not opted-out in writing).<sup>69</sup> The court has a broad discretion in relation to damages. If the class action is successful, the court may award damages to the class as a whole, to any subclass or to individual members. Damages may consist of specified amounts, amounts calculated in a particular manner or an aggregate amount to be divided among the class.

2.33 Fourthly, in relation to costs the Australian procedure follows its Canadian counterpart insofar as it reverses the traditional rule that costs follow the event. If a class action is unsuccessful, only the class plaintiffs and not the individual class members are liable for costs. Plaintiffs' lawyers have sought to sidestep this dilemma by nominating a "man of straw" – a person without assets – as the class plaintiff. Defendants in turn have responded by seeking an order for security for costs whereby the plaintiff is required to pay into court an amount equal to the estimated costs of the proceedings. An increased willingness on

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<sup>66</sup> FCA Section 33H.

<sup>67</sup> FCA Section 33X & 33Y.

<sup>68</sup> FCA Section 33J.

<sup>69</sup> FCA Section 33Z.

the part of the courts to grant such orders has probably deterred at least some class plaintiffs.<sup>70</sup>

2.34 Finally, a class action may not be settled or discontinued without the approval of the court.<sup>71</sup> A prerequisite to court approval of any settlement is evidence that the members of the class have been adequately notified of its terms.

## **D England and Wales**

### **(1) Group Litigation**

2.35 Although multi-party actions are an established phenomenon in England and Wales, the legal system does not contain any class actions mechanism of the kind found in the US, Canada or Australia. Traditionally, English courts and litigants have combined several approaches commonly used here in Ireland: the representative procedure, joint proceedings, consolidated proceedings, the test case and the assignment of several similar cases to a single judge. Nevertheless, a new procedure for handling multi-party actions was introduced in 1999 as part of a far-reaching overhaul of the civil justice system.<sup>72</sup> The Group Litigation Order (GLO) is a form of case management whereby a number of similar claims are formally co-ordinated under the auspices of the same judge.<sup>73</sup> It differs fundamentally from the class action insofar as it

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<sup>70</sup> Clark and Harris “Multi-Plaintiff Litigation in Australia: A Comparative Perspective” (2001) 11 *Duke J Comp & Int’l L* 289 at 302.

<sup>71</sup> FCA Section 33V.

<sup>72</sup> The reforms of the civil procedure rules were the result of a comprehensive report completed by Lord Woolf in 1996. See Lord Woolf *Access to Justice: Final Report* (1996) at 223-48; Lord Chancellor’s Department *Access to Justice: Multi-Party Situations: Proposed New Procedures* (1997).

<sup>73</sup> See generally Hodges *Multi Party Actions* (Oxford University Press 2001) at Chapters 2-8; Andrews “Multi-Party Proceedings in England: Representative and Group Actions” (2001) 11 *Duke J Int’l & Comp L* 249; Koch “Non-Class Group Litigation under EU and German Law” (2001) 11 *Duke J Comp & Int’l L* 355.

involves not a single suit but rather multiple distinct suits which are administered together. GLOs are now governed by a regimen of rules, practice directions and subordinate legislation.<sup>74</sup>

2.36 Either a plaintiff or a defendant may apply for a GLO or, alternatively, the court may make the order *sua sponte* (on its own initiative). An application may be made at any time before or after any relevant claims have been issued. Before applying for a GLO the solicitor acting for the proposed applicant contacts the Law Society which operates a Multi-Party Action Information Service. As the Practice Direction indicates, the Law Society's role is designed to facilitate a measure of co-ordination among prospective applicants:

“It will often be convenient for the claimants’ solicitors to form a Solicitors’ Group and to choose one of their number to take the lead in applying for the GLO and in litigating the GLO issues. The lead solicitor’s role and relationship with the other members of the Solicitors’ Group should be carefully defined in writing and will be subject to any directions given by the court.”

2.37 The following information should be included in the application:

- a summary of the nature of the litigation;
- the number and nature of the claims already issued;
- the number of parties likely to be involved;
- the common issues of fact or law that are likely to arise;
- any matters distinguishing small groups of claims within the wider group.

2.38 Regardless of whether the impetus for a GLO comes from a party or from the court, no order may be made without the consent of the Lord Chief Justice (in the case of proceedings in the Chancery Division) or of the Vice-Chancellor (in the case of proceedings in a county court).

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<sup>74</sup> Section III of the Civil Procedure Rules 19.0.10 – 19.15; Practice Direction 19B – Group Litigation.

2.39 The GLO specifies the issues that characterise the cases coming within its reach. It may also direct the manner in which the order is to be publicised. Once a GLO has been made a Group Register is established containing details of the cases subject to the order. Persons wishing to join the group may apply to have cases entered on the register before a deadline specified by the court. Thus, group litigation requires a litigant to take the positive step of opting-in. A litigant's claims may also be consolidated to a group action by the court, but even here, the group action presupposes a positive decision to litigate.<sup>75</sup> This is in marked contrast to representative actions, where no decision on the part of those represented is necessary and class actions, which generally employ opt-out mechanisms.

2.40 A judge is appointed with overall responsibility for the management of the litigation and may be assisted by a master or district judge to deal with procedural matters as well as a costs judge. The managing judge has broad discretion to issue case management directions which include: varying the GLO issues; providing for one or more claims on the register to proceed as test claims; applying the results of the settlement of a test claim to other claims; appointing a solicitor as the lead solicitor for the plaintiffs or defendants; setting a cut-off date for the entry of additional claims on the register; and removing a party from the register.

2.41 A judgment or order on a GLO issue binds all parties on the register at the time the judgment or order is given, unless the court orders otherwise. The court may also extend any judgment or order to any late claimants. A party who is adversely affected by a judgment or order may seek leave to appeal. The resolution of a test claim, so nominated by the court, is binding on all similar claims on the register and any subsequent claims if the court so directs.

2.42 In relation to costs, group litigants will normally be subject to an order for common costs which will impose on each group litigant several

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<sup>75</sup> Andrews "Multi-Party Proceedings in England: Representative and Group Actions" (2001) 11 *Duke J Int'l & Comp L* 249 at 260.



liability for an equal proportion of those common costs. The general rule that costs follow the event applies to group litigation. Thus, group litigants will incur liability for the other side's costs in the event that the group loses the action. Individual group litigants are liable for costs in relation to their own individual claims.

**(2) Representative Claims – Proposed New Procedures**

2.43 In 2001 the Lord Chancellor's Department published a consultation paper on proposed new procedures for representative claims.<sup>76</sup> The initiative was born out of the Government's commitment to give various bodies such as public enforcement authorities, consumer groups and environmental organisations, the right to bring representative actions.<sup>77</sup>

2.44 The proposals, which have been sketched only in general form, may be summarized as follows:

- there should be a pre-action protocol to the commencement of representative claims setting out the steps which should be taken by parties or their legal advisers before proceedings are issued;
- a person or entity wishing to sue in a representative capacity would require the permission of the court to issue proceedings;
- the application should be in writing and served on the defendant
- the membership of the represented group should extend to unnamed persons as well as named persons who would have a direct cause of action;
- individuals should be given an opportunity to opt-out of the proceedings.

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<sup>76</sup> Lord Chancellor's Department *Representative Claims: Proposed New Procedures* (Consultation Paper) (February 2001).

<sup>77</sup> Some of these steps are required by European measures, such as the *EC Directive on Unfair Terms in Consumer Contracts* which has been implemented in Ireland by the *European Communities (Unfair Terms in Consumer Contracts) Regulations*, as amended. See the discussion above in Chapter 1 paragraph 1.22 *et seq.*

- applicants should be required to satisfy the court that they can adequately represent the group and that the representative claim is an appropriate way to proceed;
- organisations should be able to apply to the court for a determination that proceedings in the public interest should be conducted on a no costs basis or on the basis that if the action fails, the body will not be liable for costs.

2.45 The Department's proposals have been welcomed for the most part. However, reservations have been expressed about the need for such a procedure in England and Wales, particularly given the relative success of group litigation and the risks of opening the floodgates to American-style class actions.<sup>78</sup>

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<sup>78</sup> Lord Chancellor's Department *Representative Claims: Proposed New Procedures* (Consultation Response) (April 2002).

## CHAPTER 3    GENERAL CONSIDERATIONS

### A            The Need For Reform

3.01    A preliminary issue is whether there is a need for reform *ie* whether the Commission should recommend changes in this area or endorse the *status quo*.<sup>1</sup>

3.02    The phenomenon of multiple suits involving the same or similar claims against one or more defendants is no longer rare or exceptional in modern society. Ireland, no less than the countries discussed in the previous chapter, has become the forum for multi-party actions in a wide range of cases. On the basis of Irish and comparative experience, the courts can expect further challenges in the number and complexity of such cases.

3.03    The basic social policy underlying the civil justice system is the provision of legal remedies for legal wrongs. Whether the legal wrong is grounded in contract, tort or some other cause, the intended outcome for a person who has been wronged is compensation, usually in the form of money damages and a consequential deterrent effect on future injurious conduct. For a person who has been accused of a legal wrong but whose conduct has been lawful, litigation offers vindication and an opportunity to restore one's good name or business reputation. In pursuing these objectives the civil justice system is guided by certain fundamental principles: adequate access to the courts, fair treatment for all parties, efficient procedures, judicial economy and legal certainty. The task of balancing these potentially conflicting concerns is particularly

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<sup>1</sup>        For a discussion of policy issues in relation to class actions see generally Alberta Law Reform Institute *Report on Class Actions* (85-2000) at Chapter 3.

challenging in the context of multi-party actions. Nevertheless, in this area as much as any other, the Irish system must strive to be fair, efficient and consistent. Plaintiffs should be able to bring meritorious claims and defendants to defend against unmeritorious claims. Above all, the system should have the means at its disposal to deal with these claims in an effective and expeditious manner.

3.04 At the current time, the Irish legal system lacks a comprehensive procedure that would tackle class claims in a uniform and consistent fashion. The problems stemming from the absence of such a procedure were discussed in Chapter 2 and may be summarised as follows:

- The plaintiffs in a multi-party action may opt for one of several procedures, each of which has its own limitations from the standpoint of both the litigants and the courts;
- In light of this diversity, the manner in which multi-party actions are instituted is uncertain and unpredictable;
- The representative action, theoretically the most appropriate procedure, has proved virtually redundant, at least in modern practice;
- Representative proceedings in tort are not available in the Circuit Court;
- The vast majority of multi-party actions are dealt with individually which involves needless duplication of legal proceedings in relation to common issues;
- This “individual claim” approach increases the amount of litigation and the overall cost of proceedings and is a considerable drain on court time and resources;
- The test case, the most popular route in practice, operates in an *ad hoc* fashion without regard to the suitability or typicality of the lead case and is premised on an individual rather than collective resolution of common claims;
- Settlement – the most common means of resolving multiple claims – is negotiated on an individual basis without any need for court approval or cross-referencing to other similar claims;
- From the standpoint of plaintiff and defendant alike, litigation is unpredictable in terms of its conduct, duration, cost and outcome;

- For defendants, further vagaries include uncertainty over the finality of claims tried or settled and the absence of an estimated cut-off point for the commencement of new claims;
- The courts have no special powers in relation to multi-party actions (although some courts have introduced informal case management techniques);
- The relationship between tribunals and litigation is uncertain and has resulted in the duplication of proceedings;
- The defence of high profile multi-party actions by the State has involved enormous expense to the Exchequer in compensation payments and legal costs.

3.05 These shortcomings in current Irish practice combine to create a powerful argument in favour of reform of this area of the law. They suggest that existing procedures should be improved or new procedures established to provide a more uniform and efficient way to deal with multi-party actions.

3.06 As against the case for reform, there are cogent grounds for contending that the current practice should remain unchanged:

- Multi-party actions are still a relatively recent phenomenon in Ireland and neither the range nor number of cases to date warrant radical reform;
- Current practices are still evolving;
- Unwritten conventions have emerged: the courts have introduced informal case management techniques and practitioners have adapted methodologies to multi-party actions;
- The test case approach, particularly as a benchmark for settlement, has emerged as a useful and potentially cost-effective means of resolving multiple claims;
- Introducing a new procedure would create more fragmentation and uncertainty in the resolution of multi-party actions;
- Any reform which emphasises litigation would detract from the existing and potential role of tribunals.

3.07 On balance, the Commission considers that the arguments in favour of reform are the more compelling. The case against reform

centres on two objections: that reform may be premature and that it may frustrate efforts to resolve multiple claims through the medium of tribunals. As regards the first objection, the Commission accepts that multi-party litigation is a modern reality and believes that the civil justice system should be equipped to tackle these cases, however infrequently they arise. Nevertheless, the Commission's provisional recommendations are also premised on the need for flexibility in this area to meet with the wide-ranging needs of society regarding present and future litigation.

3.08 In relation to the second objection, the Commission recognises that tribunals provide a unique form of social and political redress in Ireland which should not be thwarted by reform of the civil justice system. The impact which the proposed procedure would have on the role of tribunals is an open question. The willingness of class claimants to invoke the procedure might reduce the need for tribunals in so far as high profile class litigation vindicates the public interest. It might also have the beneficial effect of placing the impetus for the investigation of wrongdoing more firmly in the hands of the class claimants and removing some of the uncertainty, unpredictability and inefficiency associated with current compensatory tribunal practice. At the same time, the Commission is not of the view that litigation should eclipse the role of tribunals; a class actions procedure might reduce but not remove the periodic need for independent investigations established and administered by the State. Even in the United States, a jurisdiction far less disposed to non-litigious means of resolving public grievances, tribunals and compensatory schemes surface from time to time.<sup>2</sup> The Commission's provisional recommendations seek to remedy the vagaries

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<sup>2</sup> A topical example is the programme established by federal statute to dispense with claims relating to death and physical injury arising out of the events of 11 September 2001. See Title IV ("Victim Compensation") of the *Air Transportation Safety and System Stabilization Act* (HR 2926). Administered by the Attorney General through a special master, the programme is open to individuals who suffered physical harm at the World Trade Center, the Pentagon or the site of the Pennsylvania crash; members of flight crews and passengers onboard the various aircraft; and personal representatives of the decedents.

of the current interaction between courts and tribunals and, ultimately enhance their respective, complementary roles.

## **B Options for Reform**

3.09 Comparative experience demonstrates that the management of class litigation must address the needs of the society it serves and be tailored to the characteristics of the particular legal system. The quest for appropriate procedures must be guided by the core objectives of the civil justice system outlined above, namely fairness, efficiency and legal certainty.

3.10 The options for reform are essentially threefold: improving the existing representative action, introducing a modern class actions procedure or implementing a system of case management/group litigation.

### **(1) *The Representative Action***

3.11 The first option involves working within the current system to upgrade and improve the traditional common law representative action. In Chapter 2 we outlined the various deficiencies in the existing procedure which have combined to reduce its practical significance. A possible solution would be to devise means of curing these deficiencies so as to enable litigants to realise the procedure's full potential.

3.12 There are several objections to this method of reform. In the first place, any demonstrable change in practice would necessitate a thorough overhaul of the existing procedure. A range of difficult issues would have to be addressed, such as authorisation to conduct representative proceedings, the "same interest" requirement and the authority of the court to award damages. Secondly, given the extent of the challenge, any suggestion that altering the existing procedure would be less dramatic than introducing a new procedure would likely not hold true. Thirdly, regardless of any new guise that the representative action might take, it may be difficult to overcome the historical reluctance of litigants and practitioners to embrace the representative action. The Commission

recognises that the success of reform in this area lies in the willingness of individuals to invoke the procedure in question. Thus, there may be some psychological benefit to introducing a new procedure to cater for a modern phenomenon.

**(2) A Class Action Procedure**

3.13 The second option is to introduce a new procedure along the lines of the class action procedures currently operating in the US, Canada and Australia.

3.14 There are potential benefits to a modern class actions procedure:

- judicial economy – a decrease in the number of actions and a reduction in the overall cost and length of proceedings;
- avoiding unnecessary and costly duplication (*eg* a class action obviates the need for the testimony of witness to be re-heard in several cases);
- consistency - a unified, class-wide resolution of issues;
- efficiency - enhanced access to justice, particularly for plaintiffs with deserving but uneconomical claims;
- a formal opportunity for defendants to influence the conduct of proceedings;
- greater emphasis on settlement and greater provision for speedy settlement;
- increased deterrence of wrongdoing.

3.15 At the same time, there are potential drawbacks:

- a single set of complex and lengthy proceedings;
- multiple, separate proceedings (*eg* certain individual claims may have to be left over to another day);
- loss of autonomy and individual representation for class members;
- arbitrary results from the standpoint of both plaintiffs and defendants;
- high costs including legal fees;
- a litigious climate and the targeting of “deep-pocket” defendants;



- a superficial sense of closure of legal claims.

3.16 The Commission takes the view that the advantages of the class action provide a persuasive argument in favour of the introduction of this form of procedure. The concept of a single multi-party action has the potential to cure the deficiencies in the current system and at the same time further the legal system's objectives of fairness, efficiency and legal certainty. Nevertheless, legitimate criticisms have been levelled at class action practice in other jurisdictions; the negative factors listed above, for example, are based principally on US practice. Some of the more extreme aspects of US experience, however, are explained by the quirks of the American legal system, such as contingent fee arrangements, civil jury trials and punitive damages. Accordingly, the Commission emphasises that its provisional recommendations are designed to ensure that the proposed Irish procedure avoids these shortcomings as far as possible. The optional or voluntary nature of the proposed procedure is a case in point. The Commission takes the view that, by virtue of certain in-built incentives, the procedure may encourage but not compel litigants to mount or join class actions. This issue is discussed in Chapter 4 in the context of a substantive overview of the procedure.

3.17 The elective nature of the proposed procedure also has a bearing on the discussion of reform methodology insofar as it implies that litigants should not be restricted in their freedom to avail of any of the existing procedures, *eg* the representative action, the test case or the compensatory tribunal. Consequently, the Commission is not proposing the abolition of any of the procedures that currently service multi-party litigation. The co-existence of several procedures may limit the ability of any one (and notably, the proposed class action procedure) to secure the uniformity and consistency to which it aspires. It is difficult to predict the strategic preferences of future litigants and practitioners; if experience in Canada and Australia is any guide, they may be more willing to pursue class actions than current practice might suggest. In any event, notwithstanding the inevitability of at least some procedural disparity in future practice, the Commission considers that the proposed procedure would mark an improvement on current multi-party practice in terms of fairness, efficiency and consistency.

**(3) Group Litigation**

3.18 Finally, the third option is to make provision for a system of case management in relation to multi-party litigation, similar to group litigation in England and Wales. There are many attractive features to the English approach:

- the maintenance of a system of separate actions rather than a single action, thereby preserving the traditional approach to litigation including full party autonomy;
- the consolidation of information relating to multi-party actions through the group register;
- judicial powers to conduct single proceedings in relation to similar cases and thereby avoid needless duplication;
- flexibility in the conduct of proceedings and, in particular, in the resolution of common and individual issues.

3.19 These and other features render group litigation an attractive option. However, English experience also points to certain drawbacks:

- no clear guidelines as to how group litigation is commenced;
- the possibility of multiple, fractured proceedings;
- undue reliance on the test case procedure;
- ultimately, limited savings for litigants.

3.20 Moreover, certain key differences in English and Irish practice limit the utility of the comparison. In the first place, the group litigation order was introduced as part of a wholesale reform of the English civil justice system. In particular, the case management approach lies at the heart of a cultural shift within the English system and applies not only to multi-party litigation but across the board. Here in Ireland there is no such comprehensive system of case management, although some judges have applied its techniques to multi-party actions. While the Commission applauds these judicial efforts as a sensible, practical response to the problem, the Commission feels that any formal recommendation to follow the English lead should be made in the context of a broader examination of the Irish civil justice system.

3.21 Secondly, civil legal aid is available for multi-party actions in the UK and exerts a considerable influence on the conduct of such actions.<sup>3</sup> In particular, legal aid will only fund the services of a limited number of lawyers in any given case. The availability of legal aid provides an incentive for solicitors to consult with their colleagues through the offices of the Law Society. Moreover, the legal aid decision provides a natural cut-off point for determining the threshold issue of whom should lead the litigation and whether litigants should join the group register. Because the funding of multi-party actions in Ireland is wholly private, these decisions lie exclusively in the hands of the parties. Thus, there may be less of an incentive to collaborate in the manner of group proceedings.

3.22 Thirdly, on a related point, the Commission questions how such a system of voluntary collaboration among solicitors would work in the Irish system and whether it would inspire the necessary degree of confidence among litigants and practitioners.

3.23 *The Commission recommends the introduction of a class actions procedure.*

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<sup>3</sup> See Hodges *Multi-Party Actions* (Oxford University Press 2001) at 16.05-16.09.



## CHAPTER 4 PROPOSALS FOR REFORM

### A General Considerations

#### (1) *The Beneficiaries of the Procedure*

4.01 It is important to emphasise at the outset that the proposed procedure is not intended to benefit plaintiffs over defendants or *vice versa*. The Commission's recommendations are designed to strengthen the civil justice system and ultimately to redound to the benefit of all participants in the legal process.

#### (2) *Optional or Elective Nature of the Proceedings*

4.02 One of the fundamental objections to a class action is the possibility that it will undercut the principle of party autonomy that characterises our adversarial system. In particular, there is the concern that litigants would lose the right to represent themselves or to secure legal representation of their choice. The contention is that members of a class are compelled to join the class and, in so doing, must compromise rights that they would otherwise enjoy in the litigation process.

4.03 In response the Commission points out that the proposed procedure is not compulsory but voluntary or elective. Members of a class would have the option to commence or to join a class action but they would not be compelled to do so. The principal way in which the voluntary nature of the class action procedure is secured is the opt-out mechanism. Any member of the class who objects to the commencement of a class action or any aspect of it, such as class or legal representation, retains the right to dissociate from the class and to institute proceedings in their own right. In addition, even after the end of the opt-out period,

the court could dismiss a disgruntled class member from the suit invoking its residual authority to issue any appropriate order.

4.04 The class action procedure is designed to encourage class rather than individual resolution of multi-party actions. For prospective litigants there are obvious benefits to joining the class. These include the pooling of resources and sharing of costs; enhanced bargaining strength in settlement negotiations; the luxury of a passive role in the proceedings; and, ultimately, a cost-effective resolution of the underlying claims. These and other benefits combine to create a significant incentive for prospective litigants to join the class. In this sense, while litigants who opt out of a class action are free to seek their own form of legal redress, it must be conceded that they may find themselves at a considerable disadvantage to their class counterparts. Where similar claims form the basis of class and individual actions, the centre of gravity is likely to rest with the class action.

4.05 The conduct of a class action also involves compromises for the members of the class who refrain from opting-out. The procedure is essentially a trade-off: the members of the class forsake autonomy over the conduct of proceedings and the legal representation of their choice and in return they are guaranteed a passive role in proceedings, the benefit of any resolution in favour of the class, and protection from an award of costs against them individually on the common issues. In addition, the procedure incorporates certain safeguards to protect the interests of class members, notably, a strong judicial presence. In addition, subclasses facilitate a clearer delineation of interests within the class and allow for tiers of representation.

4.06 To summarise, the Commission recognises that a class action procedure involves certain limitations on the freedom that litigants may enjoy in conventional litigation. However, the overall benefits of the procedure, both to the litigants themselves and to the system as a whole, justify the compromises inherent in the conduct of a class action. In particular, the Commission takes the view that the opt-out mechanism provides a sufficient safeguard against compulsory inclusion in class proceedings.

4.07 Finally, while the Commission sees “voluntariness” as an essential characteristic of a class action regime, it is inclined to the view that the proposed procedure will extend rather than reduce the options of prospective litigants. There is a danger that practice will become even more procedurally fragmented and therefore uncertain and unpredictable. However, the benefits of the procedure provide persuasive grounds for believing that this will not be the case. In making these provisional recommendations, the Commission is particularly encouraged by experience in Australia and Canada - jurisdictions with which Ireland has a great deal more in common than the United States. Notwithstanding domestic and international reservations about the US class action, Australia and Canada have enacted regimes that place even less constraints on class action practice than US Rule 23. In both jurisdictions, the class action has become by far the most popular procedure for the resolution of multi-party actions.

### **(3) Jurisdiction**

#### *(a) The Forum for a Class Action*

4.08 The Commission recommends that jurisdiction over class actions should be shared by the Circuit Court and the High Court in the first instance.

4.09 It is likely that the majority of class actions would come within the jurisdiction of the High Court. Nevertheless, a complementary jurisdiction for the Circuit Court would be important for at least two reasons. First, experience in other countries has shown that class action practice can be extremely diverse, encompassing suits in multifarious legal contexts, involving a variety of legal remedies on both large and small scales. There will undoubtedly be situations where the nature and size of the claims point to the Circuit Court as the more appropriate forum.

4.10 Secondly, one of the objectives of class action legislation is to provide a mechanism whereby collective redress may be sought in situations where individual redress is impractical. For example, a social welfare recipient who has been deprived of a small percentage of his

entitlements due to government mismanagement may lack the legal assistance and financial resources to bring an individual suit. However, if the same grievance is shared by a class of social welfare recipients, the collective weight of the class claims may create a viable suit that could lead to a resolution of the underlying grievance. This same rationale could also be applied to consumer claims against private sector defendants. The danger in this approach is that it could invite litigation where there would otherwise be none, thereby hindering rather than helping the smooth running of the courts. A social policy response is that a class action procedure could operate to secure greater access to justice for low-income members of society. In addition, the use of the procedure in these types of cases would vindicate society's interest in deterring wrongdoing on a small as well as large scale. Finally, from a practical perspective, the legal system contains safeguards against the filing of unmeritorious claims and in the case of a class action the class plaintiff would face the additional hurdle of persuading the court of the propriety of the procedure.

4.11 The assessment of which of the two courts is the appropriate forum in any given case is based on the claims of the class plaintiff (or plaintiffs) as opposed to that of the entire class. In other words, the claims of the class plaintiff are deemed to be typical of the class for jurisdictional purposes. Provided the class plaintiff would be entitled to bring an action individually in the High Court, he would be entitled to commence a class action in the High Court based on the same claims. Conversely, where the claims of the class plaintiff do not satisfy the High Court's jurisdiction in monetary terms, then the action must be commenced in the Circuit Court, notwithstanding that the sums sought by the class as a whole or, indeed, the sums sought by individual members other than the class plaintiffs, satisfy the monetary amount.

4.12 In the case of the Circuit Court, the enabling measure should go on to specify that litigants may file class actions in the field of tort. A precautionary provision of this kind is necessary to exclude the bar on the bringing of representative actions in tort that currently exists in Order 6 rule 10 of the *Circuit Court Rules 2001*.



4.13 The internal organization of the High Court and Circuit Court in the administration of class actions is a matter for the courts and the Courts Service. However, the Commission emphasises the need for special measures to ensure that class actions are dealt with in an efficient and consistent fashion. These measures might include a system for the assignment of class actions among courts and judges, the creation of a special list and the provision of judicial training.

4.14 *The Commission recommends that jurisdiction over class actions should be shared by the High Court and the Circuit Court in the first instance. The Commission further recommends that the bar to the bringing of representative actions in tort in Order 6 rule 10 of the Circuit Court Rules 2001 should not be extended to class actions.*

(b) *Conflict of Laws*

4.15 The suggestion is occasionally made that class action procedures encourage forum-shopping tendencies among litigants. Comparative experience, however, is somewhat deceptive in this regard. In federations such as Australia and Canada, the constituent states or provinces that have class action legislation have served as springboards for national class actions. It is far less likely – though not impossible – that Ireland would attract European or perhaps global class actions.

4.16 In any event, any suit filed in the Irish courts would have to satisfy the Irish conflict of laws rules in relation to jurisdiction. For example, in a class action arising out of an airplane crash, the High Court might exercise jurisdiction based on the domicile or presence of the defendant, or the occurrence of the crash within the jurisdiction, in accordance with the *Brussels Regulation and the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1998* as amended and Order 11 rule 1 of the *Rules of the Superior Courts 1986*. In addition, the common law doctrine of *forum non conveniens* allows an Irish court to decline jurisdiction in favour of another, more appropriate forum.<sup>1</sup>

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<sup>1</sup> Binchy *Irish Conflicts of Law* (Butterworth 1988) at 164-68.

**(4) *The Role of the Court in Class Proceedings***

4.17 The proposed procedure must be sufficiently flexible to cater for the eclecticism of class action practice. Excessive procedural flexibility, however, can lead to inconsistency and uncertainty in practice. A prominent judicial role can provide a vital counterbalance to the flexibility inherent in any active class actions regime.

4.18 The Commission believes that the courts should exercise a measure of supervision over class proceedings, from the certification of an action to any eventual settlement or judgment. The need for judicial supervision is twofold. First, to protect the interests of absent class members and secondly, to ensure the smooth running of the proceedings.

4.19 The proposed regime will include provision for judicial involvement in the following aspects of the procedure:

- certification – the commencement of a class action;
- notice of various aspects of the proceedings to absent class members;
- discovery;
- settlement or discontinuance of a class action;
- damages – the apportionment of any award among class members.

4.20 In addition, the Commission recommends that the court be vested with a residual power to make any order it deems appropriate during the course of the proceedings.

4.21 *The Commission recommends that the court should exercise a supervisory role over class proceedings.*

**(5) *Flexibility – Common Issues and Individual Issues***

4.22 The utility of a class actions regime would be greatly undermined if the procedure were limited to instances in which claims of the class raised exclusively common issues. A significant number of class actions, indeed possibly the majority, involve a mix of common and individual issues. A classic example would be a claim in tort comprising common

issues of liability and individual issues relating to damages. Recent examples drawn from Irish practice include claims in relation to Army deafness<sup>2</sup> and contaminated blood products. In both instances, the resolution of multiple claims would have benefited from a system whereby a single finding could have been reached on common issues followed by separate findings on individual issues.

4.23 An overriding characteristic of the proposed regime is its flexibility in dealing with common and individual issues. In particular, the Commission recommends that the courts be given a broad discretion to establish an appropriate framework for the resolution of the full spectrum of issues in any given case. Various mechanisms might be employed to this end. In the first place, the procedure should specify that the existence of individual issues is not a bar to the commencement of a class action. Secondly, provision should be made for the possibility of bifurcated proceedings. Thirdly, subclasses should be used to facilitate the collective determination of some of the individual issues.

4.24 *The Commission recommends that under the new procedure the courts should have authority to deal with common issues and individual issues within the framework of a single proceeding.*

## **B The Procedure**

4.25 The Commission recommends that the proposed class actions procedure comprise the following key elements.

### **(1) Criteria for Class Actions**

4.26 A class action procedure may be an efficient and effective way of dealing with certain cases but may be inappropriate in other cases *eg* by virtue of the nature of the claims or the possibility of unfairness to either side. A starting point is the development of criteria to determine the suitability of a class action procedure in any given circumstance.

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<sup>2</sup> See Chapter 1 paragraph 1.52 above.

(a) *Cause of Action*

4.27 As with any other suit, a fundamental precondition to the institution of a class action is the requirement that the pleadings disclose a cause of action. The test would be the same as for an order for a pleading to be struck out under Order 18 rule 28 of the *Rules of the Superior Courts 1986* on the grounds that it is “frivolous or vexatious” or “discloses no reasonable cause of action or answer”.<sup>3</sup>

4.28 *The Commission recommends a requirement that the pleadings disclose a cause of action.*

(b) *Numerosity*

4.29 Order 15 rule 9 refers to the existence of “numerous persons” with the same interest as a precondition to mounting a representative action. The term “numerous persons” has not been judicially defined although it has been suggested that the number may be as low as six.<sup>4</sup> The Australian class action legislation calls for a class of at least seven persons,<sup>5</sup> whereas in Canada the class may be as small as two.<sup>6</sup> By effectively abolishing a numerosity requirement, the Canadian draftsmen hoped to avoid needless debate over the number of persons required to mount a class action. In reality, however, a class of two is unlikely to satisfy a separate threshold requirement *ie* that the class action is a preferable procedure in the circumstances.

4.30 A low numerical threshold runs the risk that litigants will commence class actions with undue haste and in circumstances better suited to conventional litigation. Notwithstanding that such suits would be unlikely to survive the “desirable procedure” requirement (discussed

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<sup>3</sup> Delany and McGrath *Civil Procedure in the Superior Courts* (Round Hall Press 2001) at Chapter 12.

<sup>4</sup> *Re Braybrook* [1916] WN 74.

<sup>5</sup> FCA Section 33C.

<sup>6</sup> Section 5(1)(b) of the *Class Proceedings Act 1992* (Ontario); section 4(1)(b) of the *Class Proceedings Act 1995* (British Columbia).

below), the result would be a needless drain on court time and resources. Moreover, inappropriate filings could create an unwarranted impression of a flood of class actions. At the same time, the absence of a large number of potential class members should not be a bar to a class action. There may be circumstances in which the interests of all parties are best served through a class-wide resolution of the claims of even a relatively small class.

4.31 A further issue is how much information is required about the putative class. At the time of the commencement of proceedings the class plaintiffs may have only vague information regarding the number and identity of class members. Indeed, one of the virtues of a class action procedure is that it draws out potential class members and encourages a uniform and timely resolution of class claims which redounds to the benefit of plaintiffs and defendants alike. Accordingly, it is important not to tie the class plaintiffs' hands by insisting on proof of the number and identity of the class members. In this regard, the use in the Canadian legislation of the requirement of an "identifiable class" is helpful. The term does not presuppose that the number or identity of the members is ascertainable but rather that the class may be defined in such a way that a court may determine objectively whether a particular individual comes within its scope.<sup>7</sup>

4.32 *The Commission recommends a requirement of an identifiable class of ten or more persons at the time of certification.*

(c) *Common Interest*

4.33 Order 15 rule 9 requires that the claimants in a representative action have "the same interest in one cause of action or matter." As we have seen, the "same interest" requirement has diminished the utility of representative actions and is chiefly responsible for the confusion

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<sup>7</sup> *Bywater v Toronto Transit Commission* [1998] OJ No 4913 (Gen Div) cited by Prestage and McKee "Class Actions in the Common Law Provinces of Canada" in Hodges *Multi-Party Actions* (Oxford University Press 2001) at 14.10.

surrounding the application of the procedure to tort claims as well as the ability of courts to award damages.

4.34 In formulating the criteria for a class action procedure, the Commission recommends the introduction of a requirement that the class action disclose “common issues”. The emphasis on “issues”, whether of fact or law, is preferable to the more imprecise and potentially problematic reference to “interest” in rule 9. In addition, Irish and comparative experience suggests that the requirement of sameness should be reduced to one of commonality. Indeed, the term “common issues” should be clearly defined so as to make it plain that the class action should raise common but not necessarily identical issues of fact or law.

4.35 US Rule 23 requires not only that the class members share a common interest but also that the common issues in a case predominate over the individual issues. In contrast, neither the Canadian nor Australian procedures require a showing of predominance. There are sound reasons against including a strict predominance requirement. For example, in complex cases it may be difficult to gauge at the outset whether common issues will predominate over individual issues or *vice versa*. In general, the Commission believes that the courts should take a flexible approach to cases involving a mix of common and individual issues. As we shall see, the Commission envisions the possibility of bifurcated proceedings whereby class proceedings on common issues are followed by individual proceedings on individual issues. Consequently, the Commission feels that the issue of predominance as a criterion for a class action is best addressed under the rubric of the next requirement, namely, that the class action is a “desirable procedure” in the circumstances. A poor showing of the likelihood of predominance may diminish an argument that the class action is the preferred approach.

4.36 *The Commission recommends a requirement that the claim or defence of the class members raises common issues of fact or law.*

(d) *Adequate Class Representation*

4.37 A necessary pre-condition to the commencement of a class action is the appointment of an individual as class representative. The

appointment need not be limited to one individual as, depending upon the nature and complexity of the class claims, it may be desirable to have more than one class representative. However, the Commission takes the view that there should be no more than three class representatives in any given case.

4.38 As the title suggests, the class representative plays a crucial, all-embracing role in the conduct and resolution of class proceedings. Accordingly, it is clear that an individual should not be appointed as a class representative unwillingly. In most cases, the application for certification of the proceedings as a class action will come from the putative plaintiff, so no issue of consent will arise. However, any defendant may also apply to have existing proceedings certified as a class action, regardless of whether the plaintiff or plaintiffs wish to proceed on that basis. In such a situation, the defendant may nominate one or more individuals, whether a named plaintiff or a member of the putative class, to act as class representative. A named plaintiff would be entitled to oppose this or any other aspect of the certification application. Similarly, any other individual nominated as a class representative would be free to object to this nomination. A situation might arise in which a defendant's certification application is fiercely resisted by the plaintiffs and the court is unable to find a willing class representative. While in theory a class action could be certified and a class representative appointed, it is hard to see how in practice a court would be satisfied that in such circumstances a class action was a desirable procedure, or that class representation would be fair and adequate.

4.39 The class representative must not only be present and willing to take on the task - but must also demonstrate to the court a capacity fairly and adequately to represent the interests of the class. This determination might rest on several factors:

- the absence of any conflict with the interests of other class members, at least in relation to the common issues of law or fact;
- a plan or scheme for the proceedings and a methodology for presenting and advancing the class interests;
- a means of notifying class members of the existence and conduct of the proceedings;

- adequate legal representation for the class.

4.40 The certification of a class action under US Rule 23 requires a showing of typicality, *ie* that the claims of the class representative are typical of the class. This condition stands separate to the condition of adequate representation. Strict interpretation of the requirement has allowed judges unsympathetic to class actions to reject certification on this ground. This is one of the reasons that neither the Canadian nor the Australian regimes include a typicality requirement.

4.41 In the Commission’s view, typicality should not be an iron-clad pre-condition to the commencement of a class action. The real value of the criterion lies in its influence on the ability of the class representative to represent the class adequately. Accordingly, the Commission recommends that typicality be included in a list of factors that may be taken into account in assessing the adequacy of the proposed class representation.

4.42 *The Commission recommends a requirement of a class representative who will fairly and adequately represent the interests of the class.*

*(e) An Appropriate, Fair and Efficient Procedure*

4.43 The Canadian and Australian procedures include a requirement that the class action be the “preferable procedure” in any given case. The term “preferable procedure” may be somewhat misleading insofar as it implies an onus on the proponent to show that the class action is superior in all respects. In fact, the courts in those jurisdictions have been more liberal in their interpretation of the term. In Canada, for example:

“[a] class proceeding is the preferable procedure where it presents a fair, efficient, and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial



economy, access to justice, and the modification of the behaviour of wrongdoers.”<sup>8</sup>

4.44 The merit of such a requirement is that it provides a sounding board for any serious objections to the use of the class action procedure. In many instances, there will be policy arguments on both sides. In the absence of any such serious objections class action proceedings should proceed presumptively. Thus, the requirement should not be that the applicant for certification must show that the class action is the only viable option or indeed that it is a preferable option in all respects. The proponent need only establish that the class action is a suitable option in the circumstances of the particular case. The Commission takes the view that this concept is better encapsulated in a requirement that the class action be “an appropriate, fair and efficient procedure”.

4.45 The determination whether or not the class action is an appropriate, fair and efficient procedure should be based on a non-exhaustive list of factors as follows:

- whether a class action will promote fairness among the parties;
- whether it will involve the efficient use of judicial resources;
- whether the class action will secure access to justice for potential class members or whether a significant number of them have a valid interest in individually controlling the prosecution of separate actions;
- whether the class action procedure will be manageable from the administrative standpoint of the court;
- whether the common issues of fact or law will be amenable to uniform resolution and whether those issues predominate over any individual issues;
- whether the issues raised have been the subject of any previous or pending legal proceedings or tribunal investigations;
- whether other procedural avenues of redress are available and, if so, whether they would prove less practical or efficient.

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<sup>8</sup> Prestage and McKee “Class Actions in the Common Law Provinces of Canada” in Hodges *Multi-Party Actions* (Oxford University Press 2001) at 14.21 citing *Carom v Bre-X Minerals* (1999) 44 OR (3d) 173 (Gen Div).

4.46 *The Commission recommends a requirement that the class action be an appropriate, fair and efficient procedure.*

**(2) Subclasses**

4.47 A subclass is generally defined as an identifiable group with common issues that are not shared by the class as a whole. It functions in much the same way as a class and has its own representative plaintiff. The creation of subclasses can be a convenient means of streamlining class actions thereby facilitating the definition and resolution of issues. This is particularly so in complex class actions characterized by a multiplicity of both common and individual issues of law or fact. For example, in an action for injuries arising out of a hotel fire a court might resolve issues of liability in a single class-wide determination. In relation to damages, the class members might be divided into subclasses, based on common features among the range of injuries sustained across the class. Thus, class members who suffered no physical injury would be placed in a different subclass to those who did. Of course, the method of identifying subclasses may vary from case to case. For example, in an action involving creeping as opposed to sudden damage, such as the exposure of employees to unseen but hazardous conditions at work, the time-frame in which the alleged damage occurred might prove a useful barometer for the creation of subclasses.

4.48 A further rationale for the creation of subclasses is the need to protect the defendant against unfairness. Given the complexity of class proceedings, the defendant may be at a considerable disadvantage in mounting a defence to a large and unwieldy class. Finally, subclasses can provide a structure for the gathering of evidence and conduct of settlement negotiations, which is beneficial to both sides.

4.49 *The Commission recommends that provision be made for the creation of subclasses where appropriate.*

**(3) Non-Disqualifying Factors**

4.50 The procedure should include a list of factors that do not automatically disqualify an action from being conducted as a class action, namely:

- the number of class members or the identity of each class member is not known;
- the class includes a subclass whose members have claims that raise common issues not shared by all class members;
- the relief claimed relates to separate contracts involving different class members;<sup>9</sup>
- different remedies are sought for different class members;
- the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

4.51 The inclusion of a provision of this kind was recommended by the Alberta Law Reform Institute.<sup>10</sup> The thinking, which is equally apposite in the Irish context, was that given the restrictive interpretation the courts had traditionally applied to the common law representative action, specifying that none of the above matters would necessarily bar a class action would provide additional protection to any proposed regime.

4.52 *The Commission recommends the inclusion of specified factors which do not automatically disqualify a class action.*

**(4) Certification**

*(a) Judicial Certification*

4.53 There is also a procedural dimension to the criteria for a class action *ie* who should determine whether the criteria have been met in any given case and how the determination should be made. In the United States and Canada a class plaintiff must seek and obtain judicial

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<sup>9</sup> *Irish Shipping Ltd v Company Assurance Ltd plc ("The Irish Rowan")* [1991] 2 QB 206, 222-23 discussed above at paragraph 1.12.

<sup>10</sup> Alberta Law Reform Institute *Report on Class Actions* (85-2000) at 76.

certification that the various requirements have been met. In the US district court, for example, a certification decision is usually based on substantial written briefs, sometimes supplemented by oral argument. The Australian legislation adopts a considerably more pro-plaintiff stance in that a plaintiff who can point to a class of at least seven persons, with at least one substantial common issue of law or fact, may proceed with a class action. The defendant must bring a motion to have the case dismissed on certain limited grounds, such as oppression.

4.54 The Commission recommends the inclusion of a requirement of judicial certification. A judicial determination that the criteria for a class action have been met is an important means of ensuring fairness among the parties to an individual case and consistency in class action practice across the board. The motion for class certification can be brought by a plaintiff or a defendant. Alternatively, the issue may be raised by the court *sua sponte*. In any event, the court should have at its disposal representations from the various parties, including members of the class where possible. The inclusion of class members may be problematic at this embryonic stage in the proceedings. However, the court should have the power to issue notice requirements in relation to the certification process if the judge deems it appropriate.

4.55 If a court refuses to certify the proceedings as a class action, it may nevertheless permit proceedings to be commenced or continued in some other form. In so doing, the court may make any order it deems appropriate *eg* an order adding, deleting or substituting parties or amending the pleadings.

4.56 *The Commission recommends that the point at which an action becomes a class action should be subject to judicial certification.*

(b) *The Certification Order*

4.57 Whether the action should be certified is determined by the court applying the criteria set out in the class action procedure. The procedure should expressly state that the court should decline certification where the criteria for a class action are not met.

4.58 A certification order establishes the parameters of the class action. The court gives its permission for the action to go forward as a class action and for one or more named individuals to be appointed as class plaintiffs. The order should define the class and any subclasses, name the defendants and briefly outline the nature of the class claims. This information will form the basis of the notice that will be distributed to members of the class.

(c) *The Applicant*

(I) *Plaintiffs or Putative Plaintiffs*

4.59 Any person who can otherwise commence an action and who is a member of the proposed class should be entitled to apply for certification. The paradigm involves a class plaintiff who seeks certification at the outset of the proceedings. But the application could also be brought after proceedings have been instituted, for example, by a plaintiff or by a third party who can show that the proceedings involve class claims and that they come within the proposed class.

4.60 The Commission does not consider that the court should have a residual power to appoint a person outside the class to act as representative plaintiff.

(II) *A defendant*

4.61 Any defendant who has been named in existing proceedings should be able to bring a motion to have the proceedings certified as a class action.

(d) *Timing of the Application*

4.62 A time-period should be specified for the bringing of a certification motion *eg* 90 days from the close of pleadings. Provision should be included for the bringing of a motion after the expiry of this time-period but subject to the leave of the court.

(e) *Decertification and Amendment*

4.63 *The Commission recommends that the court should have the power to amend the certification order or to decertify the proceedings on the application of any party or of its own motion at any time during the course of the proceedings.*

(f) *Appeal*

4.64 The Commission does not recommend an immediate right of appeal against a certification order, an order refusing certification or a decertification order. However, any party may seek leave to appeal. This is a requirement designed to ensure that appeals are not filed as a matter of course, thereby delaying proceedings and increasing costs. A member of the class other than the class plaintiff should not be entitled to seek leave to appeal.

(5) *Limitation Periods*

4.65 In a conventional action, the issue of the first summons in a matter suspends the relevant limitation period as against the plaintiff. In a class action, the same principle would clearly apply to the class plaintiff. However, it is necessary to clarify the exact point at which a limitation period is suspended as against the members of the class. Is it from the date that the application for class certification is filed or the date that the proceeding is actually certified? The majority of foreign jurisdictions favour the former approach,<sup>11</sup> whereas in British Columbia the limitation period continues to run until the class proceeding is certified.<sup>12</sup>

4.66 The Commission takes the view that limitation periods should be tolled as against class members on the filing of the application for

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<sup>11</sup> See section 33ZE of the *Federal Court of Australia Act 1976*; section 28 of the *Class Proceedings Act 1992* (Ontario); Manitoba Law Reform Commission *Report on Class Proceedings* (100-1999) at 72; and Alberta Law Reform Institute *Report on Class Actions* (85-2000) at 167.

<sup>12</sup> Section 39 of the *Class Proceedings Act 1995* (British Columbia).

certification, regardless of whether the proceeding is ultimately certified. This approach has the merit of certainty and obviates the need for class members to initiate individual actions if the limitation period is likely to expire during the certification process. Because membership in the class may be an open question at the time proceedings are commenced, the suspension of the limitation period should apply to any person who may reasonably assume they are a member of the class.

4.67 A limitation period may resume running against a class member in several situations:

- the court refuses to certify the proceeding as a class action;
- the court certifies part but not all of the class and the class member does not come within the certified class;
- the class member opts out of the proceedings;
- the class proceeding is decertified, discontinued or dismissed without an adjudication on the merits;
- an amendment to the certification order excludes the class member from the proceeding.

4.68 *The Commission recommends that limitation periods should be suspended as against class members on the filing of an application for certification of a class action, regardless of whether the proceeding is ultimately certified.*

#### **(6) Opting-In or Opting-Out**

4.69 An important issue is how membership in a class should be determined. There are two principal options to be considered: whether potential class members should be automatically included in the class but given an opportunity to opt-out of the proceedings or whether they should be required to take positive action to join in the proceedings.

##### *(a) Option 1: An Opt-out Requirement*

4.70 Under an opt-out regime, any individual who falls within the class is presumptively included in the class action unless he avails of an opportunity to disassociate himself from the proceedings. Once an individual has been notified of the proceedings (whether individually or

generally), he must signal his intention to opt-out of the proceedings before a specified deadline. Otherwise, he will be included in the class and will be bound by the outcome of the action.

4.71 There are several arguments in favour of an opt-out (as opposed to an opt-in) requirement. In the first place, by virtue of its simplicity, opting-out reduces costs and increases efficiency in determining the membership of the class. In particular, it avoids the risk that class members will be inadvertently excluded from the action. Consequently, it reduces court time in dealing with motions by class members to be included in an action after the expiry of an opt-in period. Secondly, it encourages common resolution over individual resolution of multi-party litigation. Thus, it tends to result in larger classes and a more cohesive resolution of proceedings overall. As such, an opt-out requirement vindicates the core objectives of a class action regime more effectively than its opt-in counterpart.<sup>13</sup> At the same time, an opt-out requirement preserves the right of class members to disassociate from the class proceedings and pursue individual actions or decline to litigate altogether. In this way, it also assists the defendant and the court in ascertaining the number of individual suits that may follow in the wake of class proceedings. Finally, from the standpoint of social policy, the automatic inclusion of an opt-out regime increases access to justice, particularly for disadvantaged litigants.

4.72 These significant advantages perhaps explain the dominance of the opt-out approach in existing class actions practice. Each of the class actions jurisdictions discussed above in Chapter 3 *ie* the United States,<sup>14</sup> Canada (Ontario and British Columbia)<sup>15</sup> and Australia<sup>16</sup> incorporate the opt-out method of determining class membership. In contrast a litigant in

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<sup>13</sup> The advantages of the class action are discussed above in Chapter 3.

<sup>14</sup> *Federal Rule of Civil Procedure* 23(c).

<sup>15</sup> Section 9 of the *Class Proceedings Act 1992* (Ontario); section 16(1) of the *Class Proceedings Act 1995* (British Columbia). Under section 16(2) of the 1995 Act a person who is not a resident of British Columbia may opt in.

<sup>16</sup> Section 33J of the *Federal Court of Australia Act 1976*.



England and Wales is required to take the positive step of opting-in to group proceedings.<sup>17</sup>

4.73 From an Irish perspective, the most prescient objection to the opt-out requirement is the radical departure it would signal to the principle that the decision to sue is a matter of personal choice. The notion that an individual could be joined in proceedings without his knowledge, much less express approval, would likely prove controversial. A second detriment is the inclusion within the class of individuals who may not otherwise be motivated to sue; the system may reward a lazy or passive claimant at the expense of an earnest defendant.<sup>18</sup>

*(b) Option 2: An Opt-in Requirement*

4.74 There are notable attractions to an opt-in regime. First, the opt-in mechanism affirms the principle of party autonomy that underpins the Irish civil justice system and, as such, is more in keeping with ordinary litigation. In particular, there can be no question of an individual being associated with a class action, whether inadvertently or otherwise, against his wishes. Secondly, the opt-in requirement encourages class members to decide, early in the proceedings, whether to pursue their right to litigate and, if so, whether to do so through class or individual proceedings. More importantly, in contrast to the opt-out regime, the size and identity of the class are clearly determined, a factor that will likely simplify the conduct and resolution of the proceedings.

4.75 The most notable disadvantage of an opt-in regime is its potential to undermine the very objectives of the class action procedure. First, an opt-in requirement is far less likely to secure a single, cohesive resolution of potential class claims than an opt-out and is far more likely to lead to fractured proceedings. This could seriously undermine the projected

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<sup>17</sup> Although a litigant's claims may be consolidated to a group action by the court.

<sup>18</sup> The opt-out may also result in the inadvertent inclusion of individuals who do not wish to sue. However, there are means of addressing this eventuality, such as the provision of adequate notice and, exceptionally, liberty to make an application to opt-out after the deadline.

savings of a class action procedure in terms of judicial economy, cost, length and efficiency. Indeed, a truly optional class action runs the risk of becoming little more than a permissive joinder device.<sup>19</sup> Secondly, an effective opt-in regime presupposes relatively stringent provisions for notice to potential class members. Indeed, notwithstanding provision for notice, an opt-in requirement would almost invariably result in additional proceedings at the behest of individuals who fail to opt-in within the designated time frame. Thirdly, an opt-in requirement may frustrate the important class action objective of securing access to justice, particularly for economically and socially disadvantaged class members.

(c) *Option 3: Judicial Discretion*

4.76 A third option is to allow the court to decide whether opting-in or opting-out is more appropriate in the particular case. The discretion could be exercised, for example, when an action is certified as a class action. This approach would have the advantage of flexibility as it would enable a court to tailor the procedure to fit the characteristics of the particular class action. For example, an opt-in requirement might be preferred where the class was clearly defined or identifiable or the assessment of damage claims was likely to prove particularly complex. Nevertheless, this flexibility would also bring an undesirable degree of uncertainty to class proceedings. In any given case, the parties and potential class members would not be aware of the governing procedure at the outset of the proceedings. This uncertainty could act as a disincentive to the bringing of class actions and hamper both the class plaintiff and defendant in devising litigation strategy. It might also unnecessarily burden judges and invite litigation over the judicial determination. Moreover, from an institutional or systemic standpoint, judicial discretion could create uncertainty in the minds of the public over the class action procedure itself. The willingness and ability of litigants to invoke the procedure would surely depend in part on the clarity of its terms and consistency of its application. The Commission takes the view that on balance the court should not be given the power to

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<sup>19</sup> A point emphasised by the Alberta Law Reform Institute *Report on Class Actions* (85-2000) at 97.

decide whether opting-out or opting-in is most appropriate in a particular case.

4.77 This issue is clearly related to the question of costs and funding. It is clearly unfair for individuals to be fixed with liability for costs where they have not consented to the proceedings. However, if the “costs follow the event rule” were to be partially abrogated to the extent that only the class plaintiff, not class members, were liable for costs, there would be less objection to an “opt-out” procedure, at least on grounds of individual choice. To this extent, the two issues should be considered together. While the Commission considers that on balance the arguments in favour of an opt-out system outweigh those favouring an opt-in procedure, the Commission does not seek to make a recommendation on this critical issue at this juncture.

4.78 *Accordingly, the Commission seeks views as to whether class members who wish to join a class action should be required to opt-into the proceedings or, alternatively, whether class members who do not wish to join a class action should be given an opportunity to opt-out of the proceedings.*

**(7) Notice**

4.79 As the previous discussion indicates, a vital prerequisite to the ability of class members to exercise their right to opt-in or, alternatively, opt-out of class proceedings is the provision of adequate notice. Under either an opt-in or opt-out regime, class members must be notified of the filing of an application for class certification and the subsequent certification of class proceedings. Where individuals are required to opt-into class proceedings, notification of the certification of a class action might require individual attention. In fact, the commencement of a class action is just the first of several developments of which class members should be notified, so that they may take steps to protect their interests. For example, class members should also receive adequate notice of any proposed settlement or judicial resolution of the common claims in the action. The notice requirements in relation to each of these developments should be subject to judicial approval. In addition, the court should have

residual power to order notice of any other matter that arises during the course of the proceedings eg a change in legal representation.

4.80 *The Commission recommends that the class plaintiff should be required to notify all class members of:*

- *the filing of an application for class certification and the subsequent certification of class proceedings;*
- *a proposed settlement of any common issues;*
- *a judicial resolution of any common issues;*
- *any other matter, notice of which the court deems necessary.*

*The form and method of notice should be subject to the approval of the court.*

### **(8) Evidence**

4.81 Under the ordinary rules of evidence, a party may discover certain documents and information in the hands of other parties, tender interrogatories to any other party and examine any other party (or an agent or employee of any other party) under oath. In addition, where information is outside the possession or procurement of the other side, a party may apply to the court for an order of non-party discovery.<sup>20</sup> Applying these rules to class actions requires a balance between competing policy objectives, namely, furnishing the defendant with information necessary to the conduct of his case and maintaining manageable and cost effective proceedings. The specific concern that arises is the extent to which defendants may compel evidence from class members (*ie* class members who have opted in or failed to opt-out) other than the class plaintiff.

4.82 While there may be circumstances where defendants will need to acquire evidence from a class member, the Commission believes that they should not have an unlimited right to do so. As a general rule, the exchange of evidence on common issues should be limited as far as

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<sup>20</sup> Order 31 rule 29 of the *Rules of the Superior Courts 1986*. Delany and McGrath *Civil Procedure in the Superior Courts* (Round Hall Press 2001) at 198-204.

possible to the class plaintiff, the plaintiff-representative of any subclass and the defendant. Accordingly, the Commission recommends that after discovery by the class plaintiff has been completed the defendant should be able to apply to the court for leave to seek discovery from any non-party class members. Similarly, the defendant should be free to make an application to examine any non-party class member after the examination of the class plaintiff. In responding to any such application, the court should impose any terms it considers appropriate on the scope of any discovery and/or examination and the use of any evidence obtained.

4.83 The factors that a court should take into account in hearing an application for leave to obtain evidence from a non-party class member should include:

- the stage in the proceedings;
- the defences on which the defendant is basing his case;
- whether any of the relevant issues will be determined through the use of subclasses or the resolution of individual issues;
- the evidence that has been tendered by the class plaintiff;
- whether granting the motion would result in oppression or undue expense for the non-party class member concerned.

4.84 The court's gate-keeping role in relation to the evidence is a prominent aspect of its broad powers over the conduct of class proceedings.

4.85 The Commission emphasises that these recommendations relate solely to the gathering of evidence on common issues. Defendants remain free to compel the evidence of class members on individual issues. This is one of the pragmatic justifications for resolving common issues in advance of individual issues.

4.86 *The Commission recommends that, as a general rule, the ordinary rules of evidence should apply to class actions. With the leave of the court, non-party class members (ie class members who have opted in to the proceedings or, alternatively, failed to opt-out of the proceedings) may be subject to discovery and examination, after discovery and examination of the class plaintiff respectively.*

**(9) Settlement**

4.87 Experience in other jurisdictions has shown that the majority of class actions are resolved by way of settlement. While the class plaintiff has the power to settle or, indeed, discontinue a class action, any such resolution fundamentally affects the rights of the class. The need to protect class members from a settlement that is imprudent or unfair necessitates some modification of the general rules that pertain to settlement. Whereas settlement is a private matter between the parties to conventional litigation, the Commission recommends that any settlement or discontinuance of a class action be made subject to the approval of the court. The procedure would operate in a similar fashion to the existing practice of court approval of settlements involving minors.

4.88 The determination whether or not to approve the settlement should be based on several factors such as:

- the terms and conditions of the settlement, including provision for the distribution of compensation to the members of the class;
- the amount offered in relation to the likelihood of success in the proceeding;
- the likely duration and expense of the litigation;
- any opinions expressed by members of the class.

4.89 *The Commission recommends that the settlement or discontinuance of a class action be subject to the approval of the court.*

**(10) Monetary Awards**

4.90 The ultimate objective of a class action regime is a class-wide resolution of all common issues whether by way of settlement or judgment. Where the remedies sought are declaratory or injunctive, the matter is relatively straightforward. Most class plaintiffs, however, seek some form of monetary relief for the members of the class. Damages class actions may vary considerably in terms of subject-matter and complexity. It may be feasible to resolve some class actions through a global award of damages to be divided among the class. In other cases individual damage assessments, conducted after the resolution of common issues, may be the only fair and effective solution.

4.91 The Canadian and Australian class action regimes allow a court to make an order for an aggregate award of damages with respect to the defendant's liability on common issues. The merit of an aggregate award is that it limits the inquiry to a single determination of a defendant's total monetary liability as opposed to multiple assessments of the impact of the defendant's conduct on each individual class member. Opponents object that the system is unfair to defendants. The reality is that aggregate awards are appropriate in certain circumstances *ie* where the class members can be identified and the amount of their individual claims easily determined without their assistance. In such cases, the costly and time-consuming process of individual assessment seems unjustified.

4.92 The Commission recommends that the courts have the authority to make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members, subject to certain conditions. These are listed below:

- (i) monetary relief is claimed;
- (ii) no questions of law or fact remain to be determined other than those relating to assessment;
- (iii) the defendant's partial or total liability can be determined with reasonable accuracy without proof by individual class members.<sup>21</sup>

4.93 In determining whether the third condition has been met, the court should consider:

- whether the class members can be identified and the amount of their individual claims easily determined without their assistance;
- whether the defendant's partial or total liability can be established without determining each member's share;
- whether the defendant's partial or total liability can be determined with reasonable accuracy by some other means.<sup>22</sup>

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<sup>21</sup> This recommendation echoes section 24 of the *Class Proceedings Act 1992* (Ontario) which was subsequently endorsed by the Manitoba Law Reform Commission *Report on Class Proceedings* (100-1999) at 98 and the Alberta Law Reform Institute Alberta Law Reform Institute *Report on Class Actions* (85-2000) at 139.

4.94 Where an aggregate award has been made, the next step is the application of a method or procedure for distributing the award among the members of the class. This is a matter in which the defendant need play no part. Again, the most appropriate method will vary depending upon the nature of the case.

4.95 The Commission is guided by experience in other jurisdictions which suggests that the court should play a decisive role in determining the most appropriate means of distribution in the particular case. In fact, the Canadian courts enjoy an extraordinarily broad discretion to order distribution by any means including direct payment, abatement or credit, the administration of a fund or the application of the award to an end reasonably expected to benefit the class.<sup>23</sup> The Commission sees certain risks in providing the court with such an open-ended flexibility in distributing damages awards. Clearly the method of distribution should benefit the class members in a fair, efficient and economical fashion. However, methods of distribution that depart radically from conventional models may frustrate the expectations of class members and the public at large. At worst, the distribution of aggregate awards may invite further litigation within the class. Accordingly, the Commission recommends that the court's authority to order distribution of aggregate awards be limited to the following methods:

- (i) the payment of amounts directly to the members of the class;
- (ii) the creation of a fund to administer and distribute the award.

4.96 The Commission also recommends that the court be given a residual power to order that any undistributed residue may be put to any purpose the court deems appropriate. Those purposes might include:

- a *cy-près* distribution *ie* a purpose that will benefit the class generally;

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<sup>22</sup> Australian Law Reform Commission *Report on Grouped Proceedings in the Federal Court* (46-1988) at 95.

<sup>23</sup> See the discussion of Manitoba Law Reform Commission *Report on Class Proceedings* (100-1999) at 100.



- payment of the costs of the class action;
- re-distribution to the defendant;
- forfeiture to the government.

4.97 *The Commission recommends that the court should be authorised to make an order for an aggregate award of damages in respect of all or a part of the defendant’s liability, subject to certain conditions.*

**(11) Costs**

4.98 One of the most important and difficult issues to be addressed is the funding of class actions. The success of the proposed regime requires a fair and equitable method of allocating among the various parties the legal fees and disbursements that accrue during the course of class proceedings. Indeed, as the Ontario Law Reform Commission has noted, “the matter of costs will not merely affect the efficacy of class actions, but in fact will determine whether this procedure will be utilized at all.”<sup>24</sup> The issue is intrinsically linked to the controversial question of how lawyers should be compensated for their efforts.

4.99 In Ireland, the cost of legal advice or assistance and the method of payment are matters between lawyer and his client. A client is generally responsible for the payment of whatever fees are agreed. Where the legal assistance extends to litigation, a party may be relieved of the obligation to pay the lawyer if responsibility for costs shifts to the other side. In litigation, costs follow the event, as a general rule. Thus, a successful plaintiff will recover the costs of the litigation from the defendant in addition to any award of damages, whereas an unsuccessful plaintiff will be obliged to cover the defendant’s litigation costs as well as their own. There are exceptional cases where, in the interests of justice, the parties are ordered to pay their own costs. The final tally of costs in a particular case may be subject to the approval of the taxing master.

4.100 These conventional rules would operate as a considerable disincentive to the bringing of a single combined class action. In a class

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<sup>24</sup> Ontario Law Reform Commission *Report on Class Actions* (Volume III 1982) at 647.

action, the plaintiffs' lawyers are effectively representing more than one person. Class proceedings also tend to last longer and be more complex than individual suits. Further, as we have seen, the class action rules require a number of special procedures, such as class certification and court approval of the settlement, that impose significant additional expense. For lawyers on both sides therefore, the proceedings will invariably involve a great deal more time and effort – and consequently higher costs – than the average case. In the absence of an agreement between class members to share the cost of legal fees and disbursements on the plaintiff's side, the class plaintiff would effectively shoulder the burden. In addition, the class plaintiff would be liable for the defendants' costs if the class action were unsuccessful. These risks would create a formidable disincentive to a person taking on a representative role and therefore a significant economic barrier to the development of class litigation in Ireland.

4.101 There are various ways in which the current rules might be modified to remove or reduce these barriers to the bringing of class actions: a “no-way” costs rule; a “one-way” costs rule; contingency fee arrangements; the provision of legal aid; the establishment of a class action fund; and the imposition of liability on class members. The Commission recognises that the need for flexibility in a class action regime to cater for cases of every stripe and hue is particularly prevalent in the area of costs.

4.102 The Commission considers that devising a satisfactory strategy for costs in class actions involves a policy choice between two alternative options. The choice turns on the feasibility and desirability of removing the rule that costs follow the event in relation to class actions and replacing it with a “no-costs” rule. The US legal system employs such a rule whereby each party is expected to pay their own costs *ie* neither party is normally entitled to contribution from the other side regardless of the outcome of the proceedings. An interesting debate over the merits of these respective rules has ensued in the various common law jurisdictions that have introduced, or proposed the introduction of, class action regimes.

(a) *Option 1: The Costs Follow the Event Rule*

4.103 The Ontario Law Reform Commission recommended the introduction of a no-costs rule<sup>25</sup> but, ultimately, Ontario opted to retain the costs follow the event approach and to establish a class action fund.<sup>26</sup> The Australian regimes have also adhered to the costs follow the event rule and practice has adapted accordingly. It is important to note however, that in both Ontario and Australia only the representative plaintiff is liable for the costs of the losing party, not the other class members. As noted above, this acts as a disincentive to victims of a mass wrong to assume the role of representative plaintiff.<sup>27</sup>

4.104 In Australia, the answer to this problem in practice has been for the applicant's solicitors to select a "man of straw" to act as the representative applicant so that if the case fails there will be nothing for the respondent to pursue.<sup>28</sup> Inevitably, this has caused defendants to

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<sup>25</sup> Ontario Law Reform Commission *Report on Class Actions* (Volume III 1982) at 704.

<sup>26</sup> A similar approach was taken in the civil law province of Quebec. See Manitoba Law Reform Commission *Report on Class Proceedings* (100-1999) at 74.

<sup>27</sup> This problem was discussed in the case of *Woodlands & Anor v Permanent Trustee Co Ltd & Ors* (1995) 58 FCR 139:

"The problem that has arisen in this case comes as no surprise to me. It is a problem inherent in representative proceedings. In a nutshell, the problem is that a representative party is exposed to the risk of an order to pay the costs of a respondent or respondents (the amount of which will usually be increased by the very fact that the proceeding is a representative one), without gaining any personal benefit from the representative role. So there is little incentive for a person to act as a representative party. Unless the person's potential costs are covered by someone else, there is a positive disincentive to taking that course."

<sup>28</sup> The comments of an Opposition spokesman in the House of Representatives, Mr Costello, in the debate preceding the enactment of Part IVA, are prescient in this regard:

"[The legislation] does not make it clear how costs are to be apportioned amongst group members for unsuccessful claims. As I have already outlined it is to be assumed that costs will fall on the representative party. This means that if one is going to bring a class action, one would be wise to choose an impecunious representative party. If the claim should fail and an award of costs is made against the applicant, the applicant will have no assets from

class actions to seek orders for security for costs against representative parties. Initially, the courts have been reluctant to make such orders, save in exceptional circumstances, as it is felt that it would be contrary to the intention of the class actions legislation if an order for security for costs forced group members to contribute to a pool of funds, abandon their claims or continue them as separate proceedings.<sup>29</sup> More recently, however, the courts have appeared more willing to accede to applications by defendants for costs. For example, an order for security for costs was recently made against an incorporated organisation that was specifically established to commence a class action against the tobacco industry.<sup>30</sup>

4.105 In Ontario, a similar situation to that in Australia pertains. Watson<sup>31</sup> makes the following comments on how the rule operates in practice:

“[I]t is not clear what is happening ‘out in the field’, possibly plaintiff class counsels are not properly advising representative plaintiffs of the risks involved, are choosing judgment-proof plaintiffs, or are agreeing to indemnify the representative plaintiff for the costs of the action. If the former- if plaintiff class counsels are not informing their clients of the risks- a malpractice action might be necessary to clear the air.”

4.106 This solution is clearly unsatisfactory. Considering the issue in an even-handed way - taking into account the need to achieve a fair balance between defendant and plaintiff- it would be unfair to assume or allow the nomination of a person of straw as the representative plaintiff. Further, notwithstanding any future difficulties which may arise in the courts in relation to applications by defendants for security for costs, the class plaintiff should ideally be selected for reasons other than his

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which to pay the costs.” *Hansard* House of Representatives 26 November 1991 at 3286.

<sup>29</sup> *Grant Ryan v Great Lakes Council* (1998) 154 ALR 584.

<sup>30</sup> *Tobacco Control Litigation v Philip Morris (Austl) Ltd* (2000) FCA 1404.

<sup>31</sup> Watson “Class Actions: the Canadian Experience” 11 *Duke J of Comp & Int’l L* 269.

impecuniosity. The Australian Law Reform Commission drew attention to this practice in their recent review of federal proceedings, recommending that the Federal Court should consider drafting guidelines for lawyers and parties to representative proceedings relating to “the choice of the representative party, who should not be chosen primarily as a ‘man of straw’”.<sup>32</sup>

4.107 Despite these difficulties, there are powerful arguments in favour of retaining the practice that costs tend to follow the event in the context of class actions:

- multi-party actions are not so different from conventional litigation to justify such a dramatic reversal in the normal practice in relation to costs;<sup>33</sup>
- a change in the practice would unfairly penalise successful parties and unduly benefit unsuccessful parties;
- the change would be particularly unfair to defendants who successfully defend unmeritorious class actions.

4.108 Retaining the practice that costs follow the event, at least in its pure form, would discourage potential plaintiffs from commencing class actions. If this option is preferred, steps should be taken to temper the impact of the practice on class plaintiffs. In particular, it will be necessary to devise various alternative sources of funding for class plaintiffs. The following are some of the more obvious potential sources.

(I) *Liability of Class Members*

4.109 One possible method of relieving the financial pressure on class plaintiffs is to make provision for the sharing of costs across the class. There are at least three objections to the notion of class liability for costs. In the first place, it is by no means clear that members of the class would be adequately protected against the risk of liability for costs by the opt-

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<sup>32</sup> Australian Law Reform Commission *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89-2000) at 492 Recommendation 78.

<sup>33</sup> A view taken by Lord Woolf *Access to Justice: Final Report* (1996) at paragraph 58.

out and notice provisions of the proposed procedure. There would be a real danger that members would be inadequately informed of their potential liability for costs or of the extent of that liability. Secondly, as a practical matter liability for costs would act as a strong disincentive to members to remain in the class. Any class action would ultimately unravel in the face of an excessive number of opt-outs. The success of a class action regime turns on the participation of the members of the class, no less than the class plaintiff.

4.110 Thirdly, even if the members of the class were liable for costs, the class plaintiff in an unsuccessful suit would face a formidable obstacle in attempting to collect the requisite contributions from the individual members of a sizeable class.

4.111 *The Commission seeks views as to whether class members, other than the class representative, should be liable for the costs of the class.*

(II) *Contingency Fee Arrangements*

4.112 In the United States, lawyers are permitted to take on class and other proceedings on a contingency fee basis whereby the lawyer receives payment only in the event that the suit is successful. The lawyer's fee is then calculated as a percentage of the amount recovered, whether by way of a settlement or award. Indeed, the contingent fee is now firmly entrenched as an integral part of the American legal system and is justified on the basis that it enables an indigent with a meritorious cause of action to obtain access to the courts.<sup>34</sup> As noted above in Chapter 2, however, contingent fees of thirty percent and above have led to accusations of "entrepreneurial" lawyering.<sup>35</sup> Class action lawyers in particular are viewed by some as "bounty hunters" motivated solely by the profits to be made by the litigation.

4.113 It is questionable whether this perception is entirely correct. Although there is a dearth of statistical information on class action

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<sup>34</sup> *Gair v Peck* 360 US 374.

<sup>35</sup> See paragraph 2.05 above.

practices in general, a recent case study by the RAND Institute for Civil Justice presents a more textured view.<sup>36</sup> Having studied ten class actions in detail, the Institute reported that “[t]he wide range of outcomes that we found in the lawsuits contradicts the view that damage class actions invariably produce little for class members, and that class action attorneys routinely garner the lion’s share of settlements.” In 8 out of 9 cases studied, class counsel received one-third or less of the total settlement value.<sup>37</sup> When fees were considered as a percentage of the *actual* settlement value, however, only 6 out of the 9 cases studied fell into this category.<sup>38</sup> Significantly, the Institute recommended that judges should take responsibility for determining fees rather than simply rubber-stamping previously negotiated settlements. The authors further recommended that they should award fees in the amount actually disbursed in the litigation and also award less proportionally when the total actual value of the award is very large. Such studies point to the importance of close judicial scrutiny of fee arrangements. Limited contingency arrangements are also permitted in other jurisdictions such as Australia and Canada, which will now be examined in turn.

4.114 Contingency fees are prohibited by legislation and/or professional conduct rules in New South Wales, Victoria, South Australia and Western Australia. In other Australian jurisdictions the operation of the rule against champerty<sup>39</sup> renders such agreements unenforceable. However, “no foal, no fee” arrangements are permitted in all jurisdictions

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<sup>36</sup> The written product of the RAND group’s research is contained in Hensler *et al Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand Institute March 2000). For a summary of the research results see Hensler “Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation” (2001) 11 *Duke J of Comp & Int’l L* 179. See also <http://www.rand.org/publications>.

<sup>37</sup> In the tenth case there was no public estimate of aggregate public benefit.

<sup>38</sup> The amount negotiated and the amount actually awarded may differ as class members do not always come forward to claim the full amount that defendants make available for compensation.

<sup>39</sup> The rule against champerty condemns, as contrary to public policy, any agreement where a person maintains an action in consideration of a promise to give the maintainer a share in the subject matter of proceeds thereof.

whereby clients pay lawyers' normal fees on success, provided that lawyers believe that clients have a reasonable cause of action, do not bargain for an interest in the case and do not seek to recover more than their ordinary fee upon success.<sup>40</sup> Further, uplift or speculative fees, whereby the fee payable will normally be the ordinary fee plus an agreed percentage or uplift of that fee, are expressly permitted by statute in the four major Australian jurisdictions of New South Wales, Queensland Victoria and South Australia. Indeed, it is noteworthy that one of the most high profile class actions in Australia in recent times, the *Esso*<sup>41</sup> case, (resulting from an explosion at Longford Gas Plant) was financed by means of such uplift fee agreements.

4.115 The *Esso* case merits further examination in that it serves to highlight the need for judicial supervision of contingent fee agreements. In the *Esso* case the Federal Court (in the absence of specific legislative provisions) exercised the supervisory jurisdiction which superior courts generally possess in relation to fee arrangements to review the fairness of fee agreements reached in that action. The facts were that the applicant solicitors had entered into "no win, no fee" costs agreements with some group members which included a 25% uplift fee if the proceedings were successful. Details of the costs agreements had not been included in the opt-out notice sent to class members. Merkel J found that the "court had a responsibility to be satisfied that the group members are not being unfairly or unreasonably exposed to costs." The failure to alert group members to their potential liability as to costs meant that the agreements could not be deemed fair and reasonable and the Court exercised its supervisory jurisdiction under section 23 of the *Federal Court Act 1976* to prevent the lawyers enforcing the agreements.

4.116 As Morabito<sup>42</sup> has persuasively argued, the *Esso* case highlights the need for legislative intervention in relation to the issue of fee arrangements, particularly the question of contingency fees. In his

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<sup>40</sup> *Clyne v New South Wales Bar Association* (1960) 104 CLR 186.

<sup>41</sup> *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) FCA 1363.

<sup>42</sup> Morabito "Contingency fees in federal class actions" (1999) 73(12) *Law Institute Journal* 86.



opinion, these are matters which raise “fundamental policy issues and as such should be tackled by the legislature.”<sup>43</sup> He describes as “fundamentally flawed” the present system which relies on class members to ensure, without judicial intervention, that the fee arrangements drafted by the lawyers acting on behalf of the class do not prejudice their interests.<sup>44</sup> Further, Morabito’s arguments find a resonance in a recent review by the Australian Law Reform Commission of the federal justice system, which included the class action procedure.<sup>45</sup> In its review, the Commission reiterated its earlier recommendation that specific provisions should be enacted enabling the Court to approve fee arrangements between the representative party and/or group members with the representative party’s lawyer.<sup>46</sup>

4.117 In Canada, the provinces differ in respect of the type of fee arrangements permitted. In British Columbia contingency fees were permissible before class proceedings legislation was introduced and therefore no special rules were adopted in that regard. However, such agreements are subject to court approval and are only enforceable if approved by the court. Quebec also allows for contingency fees in respect of all proceedings, not simply class actions. In Ontario class proceedings are specifically excepted by statute from the general prohibition on contingency fees in civil proceedings. Section 33 of the *Ontario Class Proceedings Act 1992* permits an agreement between a solicitor and a representative party providing for payment of fees only in the event of success in the class proceeding. While the 1992 Act explicitly indicates that such agreements may permit class counsel to increase their fees by a multiplier to be determined by the Court, this has been interpreted broadly by the lower courts of Ontario which have approved other types of fee arrangements, including those based on a percentage of the amount recovered. It is notable that to date, Canadian

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<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid* at 89.

<sup>45</sup> Australian Law Reform Commission *Report on Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89-2000) paragraphs 7.87-7.128.

<sup>46</sup> *Ibid* paragraph 7.126.

courts have avoided fees on the scale of US awards based on 33-40% of the settlement amount. In the Hepatitis C litigation, for example, which settled for €1.5 billion, plaintiff's counsel have received awards in the 2-4% range, which still netted them \$53 million nationwide.<sup>47</sup> This may be attributable to the rule that all fee agreements are enforceable only if approved by the court.

4.118 Finally, notwithstanding traditional aversion to the concept in the United Kingdom, Conditional Fee Arrangements or CFAs, whereby a lawyer agrees to forego his/her fee in the event of failure on the condition that s/he will receive a basic fee as well as an uplift or success fee if the action is successful, have been permitted in England since 1995.<sup>48</sup> The maximum uplift fee currently permitted is 100%<sup>49</sup> although the Law Society recommends that increased fees do not absorb more than 25% of the client's damages. A significant number of group litigation claims, particularly personal injury actions, which are generally not legally aided, are funded through conditional fee agreements in tandem with a legal insurance policy.<sup>50</sup> Moreover, the attractiveness of the CFA-plus-insurance scheme has been greatly enhanced since 1 April 2000 and the coming into effect of legislation which permitted the court to include in any costs order it may make against defendants both the successful lawyer's success fee and any insurance premiums taken out against costs.<sup>51</sup> Generally speaking, it is fair to say that fears of abuse by

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<sup>47</sup> *Parsons v Canadian Red Cross Society* [1999] 40 CPC (4<sup>th</sup>) 151; *Kreppner v Canadian Red Cross* [1999] OJ No 3572.

<sup>48</sup> Section 58 of the *Courts and Legal Services Act 1990*.

<sup>49</sup> Conditional Fee Agreements Order 2000 SI 2000/823.

<sup>50</sup> Hickman "Class of their own-the UK's growing use of group action litigation and will it be as commonly used over here as it is in the US?" (2001) 98(43) *Law Society Gazette* 24 at 25. The Commission is also indebted to Mr Malcolm Mourant of the Multi Party Action Unit for his helpful observations on how multi party actions are funded in practice.

<sup>51</sup> Opponents must receive notification of the existence of a CFA and of an insurance policy in order for same to be recoverable, but not of the level of the fee or the price of the policy: *Civil Procedure Rules* Rule 44.3B(1)(c). The court retains a discretion on costs not to award the success fee or insurance premium in full.

lawyers have not materialised.<sup>52</sup> There have also been calls for the introduction of a contingency fee system.<sup>53</sup>

4.119 Contingency fee arrangements are controversial not least because they are perceived by some as improper incentives to lawyers to instigate litigation. It is argued that the introduction of a contingency fees system along the US model will result in the proliferation of unmeritorious claims. Hence, the Scottish Law Commission strongly opposed their introduction in that jurisdiction.<sup>54</sup> However, in the light of comparative analysis with other common law jurisdictions, a number of arguments present themselves in favour of the introduction of some form of contingent fee arrangement:

- Speculative fees and “no foal, no fee” agreements have to date financed the majority of class actions brought in Australia. Contingency fees have also proved to be the main source of financing in Canadian class actions outside of Quebec;
- In these jurisdictions the “costs follow the event” practice remains a huge financial disincentive to plaintiffs to bring weak or unmeritorious claims. Very often such cases are screened by applicant legal firms who cannot run the risk of financing unsuccessful claims;
- Contingency fee arrangements help to vindicate the right of access to justice to individuals who otherwise would be denied a remedy;
- As noted by the Australian Law Reform Commission in its 1988 Report<sup>55</sup> any possible conflicts between lawyer and client (for example, it is sometimes argued that lawyers may encourage clients to settle in order that they may receive their fee) are

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<sup>52</sup> Hodges *Multi Party Actions* (Oxford University Press 2001) at 168.

<sup>53</sup> Mildred “Cost-Sharing in Group Litigation: Preserving Access to Justice” (2002) 65 *Mod L Rev* 597 at 602.

<sup>54</sup> Scottish Law Commission *Report on Multi-Party Actions* (154-1996) at paragraphs 5.12-5.14.

<sup>55</sup> *Report on Grouped Proceedings in the Federal Court* (ALRC 46-1988) at paragraph 279..

largely overcome by preventing fees from being calculated as a proportion of the amount recovered and by the requirement that all settlements be approved by the court;

- Close judicial scrutiny of fee arrangements would act as a check on any abuse of representative actions by lawyers;
- Economic analysis in the US indicates that a system where lawyers' fees are based on a controlled percentage of time work is preferable to one based on a percentage of the total damage award in ability to encourage claims with low probability of success;<sup>56</sup>
- All in all, it is arguable that the special factors at play in class actions, such as the substantial outlays involved at the start of the litigation and the need to alleviate disincentives to group, rather than individual, litigation, justify a modification of the rules in relation to these types of action.

4.120 In the event that a class action procedure was introduced in Ireland, particular consideration should be given to the enactment of legislative provisions which would allow the court to approve speculative or uplift fee arrangements in class actions. If the court approved such agreements statute could provide that they would not be unenforceable merely because they relate to conduct which constitutes maintenance or champerty.<sup>57</sup> Indeed, the role of the court would be all-important in preventing the award of excessive fees.

4.121 In any event, the Commission notes that although contingent fees are not a feature of Irish practice, lawyers do occasionally take on cases on a "no foal, no fee basis." In this informal arrangement, a lawyer agrees that he will only charge his client in the event that the action is successful. The Commission considers that this type of arrangement, conducted within the framework of the new Law Society Regulations,

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<sup>56</sup> Dewees Prichard and Trebilcock "An Economic Analysis of Costs and Fee Rules for Class Actions" (1981) 10 *Journal of Legal Studies* 155-185.

<sup>57</sup> The rule against champerty which condemns, as contrary to public policy, any agreement where a person maintains an action in consideration of a promise to give the maintainer a share in the subject matter of proceeds thereof still operates in Ireland. See *Fraser v Buckle* [1994] 1 ILRM 276.

could prove to be an important source of financing for some class actions.

*4.122 The Commission recommends that restrictions should not be placed on the ability of lawyers to represent class plaintiffs on a “no foal, no fee” basis within the framework of the Law Society Regulations. The Commission seeks views as to the enactment of legislative provisions which would allow the court to approve contingency, speculative or uplift fee arrangements in class actions.*

*(b) Civil Legal Aid*

4.123 A significant limitation on the Order 15 rule 9 representative action is the lack of availability of legal aid. The Commission’s recommendations are premised on the notion that the class action procedure should be available to all potential class litigants, regardless of economic means. Indeed, in the United States, class actions have served as a vibrant source of civil rights and public interest litigation. The Commission believes that the inclusion of class actions within the civil legal aid framework is central to achieving this goal of equality of access to justice.

4.124 There is a strong argument to be made for extending the civil legal aid system and making aid widely available for class actions. Aside from the social justice considerations, English experience demonstrates that the legal aid regime provides a helpful framework for important decisions in multi-party actions, such as the selection of counsel and the creation of a ceiling on costs. The Commission recognises that the feasibility of such an extension to the civil legal aid system is beyond the scope of the current discussion. However, at a minimum, class plaintiffs who would otherwise meet the criteria for legal aid, should be able to receive such aid in the context of a class action. Thus, the Commission recommends that the bar that currently exists on the provision of legal aid to representative actions<sup>58</sup> not be extended to class actions and that

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<sup>58</sup> Discussed above at paragraph 1.16.

positive provision be made for the provision of legal aid to class representatives.

4.125 *The Commission recommends that class plaintiffs who are otherwise eligible should be entitled to apply for civil legal aid.*

(c) *Class Action Fund*

4.126 In an innovative approach to the issue of class action funding, the Ontario Government established a class action fund in 1992 with the adoption of the *Class Proceedings Act*. A class plaintiff receives the necessary support to cover the cost of disbursements and, in addition, is indemnified against any award of costs in the event the class action is unsuccessful. If the class action is successful, the class plaintiff must reimburse the fund for the amount it paid out, plus 10% of the court award or settlement. Although promising in theory, the fund concept has not lived up to expectations in practice. Few litigants have sought the assistance of the fund and all of the high profile class actions have been privately-funded.

4.127 The merits of a class action fund may be summarised as follows:

- it provides access to justice for those who might otherwise be prevented from pursuing their rights;
- it removes liability for costs as a barrier to the commencement of class actions;
- it promotes judicial economy by encouraging group rather than individual resolution of multi-party actions;
- it may render the matter of class action costs more open and transparent;
- through the use of monetary ceilings, it may reduce excessive class action costs.

4.128 On the other hand, there are both philosophical and practical objections to the institution of a special fund:

- financial responsibility for the conduct of litigation should be assumed by private citizens and not by the government – class actions are no exception;

- it would create an artificial and discriminatory distinction within the legal system between class actions and conventional individual actions;
- it would encourage the hasty and frivolous filing of class actions;
- the establishment and operation of the fund would require considerable financial and administrative resources;
- regulating access to the fund would be controversial;
- it would require the introduction of a procedure distinct from the class action procedure which would in itself involve additional time and expense for all concerned;
- it is debatable whether representatives of the fund would have a say in the matter of costs during the course of the proceedings.

4.129 The concept of a special fund is an attractive solution to the funding dilemma in the abstract. In particular, it would be a desirable means of ensuring access to legal remedies for impecunious class plaintiffs. However, the Commission takes the view that, in the Irish context, this goal would be better achieved through reform of the current system for civil legal aid. In addition, the Commission is persuaded that the philosophical and practical objections to a possible fund exclude it as a viable option.<sup>59</sup> At the very least, it is unlikely that the necessary government commitment would be forthcoming; indeed, if the civil justice system were to benefit from an infusion of resources, it is by no means clear that they should be directed exclusively towards class actions. Finally, experience in other jurisdictions would suggest that private arrangements, such as “no foal, no fee” agreements, are more likely to encourage class proceedings.

4.130 *The Commission does not recommend the creation of a class action fund.*

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<sup>59</sup> Ironically, this was the view of the Ontario Law Reform Commission in its *Report on Class Actions* (Volume III 1982) at 713 which preceded the introduction of a fund in that province. For a similar conclusion see Manitoba Law Reform Commission *Report on Class Proceedings* (100-1999) at 84-86. Notwithstanding proposals favouring the concept, funds have not been included in other class action regimes.

(d) *Option 2: The No-Costs Rule*

4.131 British Columbia is the only of the three Canadian class action regimes to have followed the American lead. Parties to a class action are not entitled to costs, regardless of the outcome, except in certain limited circumstances.<sup>60</sup>

4.132 There are various advantages to the introduction of a “no-costs” rule in relation to class actions:

- the special character of class action proceedings warrants a special rule on costs;
- the no-costs rule is a necessary incentive for class plaintiffs to litigate given the absence of adequate external sources of funding;
- the no-costs rule is fairer to all parties in the circumstances.

4.133 In the Irish context, the limited sources of funding that would be available to class plaintiffs constitute a persuasive argument in favour of a “non-costs” approach. The Commission is not recommending the establishment of a class action fund and it recognises that civil legal aid will only be available to a limited range of class plaintiffs. In the absence of such external funding, the current costs regime is a significant disincentive to class plaintiffs and threatens to seriously undermine the utility of the proposed class action regime.

4.134 At the same time, preventing a successful party from claiming his costs would involve a significant departure from conventional practice. Requiring the parties to shoulder their own costs in class proceedings would necessitate an element of compromise on both sides. The class plaintiff would be shielded from the risk of being ordered to pay the defendant’s costs in the event that the class action fails. However, the class plaintiff would be liable for the costs incurred by the class, even where the class action is successful. There are at least two ways in which a class plaintiff could seek protection against paying own costs. First, by persuading lawyers to take the case on a “no foal, no fee” basis and secondly, by attempting to secure a court-approved agreement for the

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<sup>60</sup> Section 37 of the *Class Proceedings Act 1995* (British Columbia).



sharing of costs among the class *eg* through disbursement from any award. Where each party shoulders their own costs, payment or non-payment is ultimately a matter between the class plaintiff and the lawyers. Thus, a further implication of this regime would be that lawyers would assume the risk of non-payment of legal fees.

4.135 A more serious objection to this recommendation is the possibility that it might operate unfairly against defendants. Clearly, the rule would be a boon to defendants who are unsuccessful in their defence of a class action. But what of the successful defendant who takes on the considerable cost of defending an unmeritorious class claim? The victorious defendant, it seems, is unduly penalised by the “no-costs” rule. One possible justification are the benefits the defendant gleans from a single class-wide resolution of all outstanding claims. The defence of a class action should signal the closure of all underlying legal issues; even if some class members have opted to pursue their claims individually (by failing to opt-into the proceedings under an opt-in regime or opting-out of the proceedings under an opt-out regime), the class action is likely to set a precedent that will resolve any outstanding individual claims. In this light, the legal costs incurred by the defendant during the course of the class action must be balanced against the benefits of a certain, comprehensive resolution and corresponding savings in time and effort.

4.136 If the Commission were to recommend a “no-costs rule”, it would be necessary to attach two important provisos. The first is a measure adopted in British Columbia whereby a party who has engaged in improper behaviour is exposed to liability for the costs of the other side. Specifically, although unsuccessful parties would not liable for the costs of the other side as a general rule, they would be liable to pay costs in certain specified, exceptional circumstances:

- where there has been vexatious, frivolous or abusive conduct on the part of any party;
- where there has been an improper or unnecessary application or other step taken for purpose of delay, increasing costs or any other improper purpose;

- where exceptional circumstances make it unjust to deprive the successful party of costs.<sup>61</sup>

4.137 The determination whether these conditions have been met would be a matter for the court. In particular, the last of the conditions would enable the court to ensure that the “no-costs” rule did not operate unfairly in any particular case. Thus, it would seek to protect a successful defendant who was unfairly prejudiced by the “no-costs” rule.

4.138 The second proviso emerges from the practical reality that the bulk of class actions are resolved by settlement as opposed to trial and judgment. In keeping with conventional practice, the Commission believes that the parties should be free to negotiate the payment of costs on terms of their choosing as part of any settlement. Any such resolution of the matter of costs would, of course, be subject to the approval of the court as part of the settlement package.

4.139 Finally, the Commission recognises that the court’s role in supervising certain aspects of class proceedings should include monitoring the costs of the litigation.<sup>62</sup>

4.140 *The Commission seeks views as to liability for costs in class proceedings.*

## **(12) Appeals**

4.141 The Commission recommends that appeals against decisions in class proceedings should follow the ordinary rules of appeal as far as possible. The proposed regime should allow for three distinct forms of appeal.

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<sup>61</sup> Sections 37 & 50 of the *Class Proceedings Act 1995* (British Columbia). The Manitoba Law Reform Commission recommended the inclusion of a similar provision in that province’s proposed class action regime. See Manitoba Law Reform Commission *Report on Class Proceedings* (100-1999) at 76.

<sup>62</sup> See Lord Woolf *Access to Justice: Final Report* (1996) at paragraph 74.

4.142 First, any party (but not any class member) may seek leave to appeal a certification order, an order refusing certification or a decertification order. The requirement of leave to appeal is essential to ensure that appeals are not filed as a matter of course, thereby delaying proceedings and increasing costs. Secondly, any party (but not any class member) may appeal a judgment on common issues, as of right. Where the class plaintiff fails to exercise his right to appeal a decision relating to certification or a judgment on common issues, any class member may seek the leave of the court to act as the class plaintiff for purposes of appeal. Finally, any party or class member may seek leave to appeal a judgment on, or order dismissing, an individual claim. These provisions are designed to strike a balance between vindicating the appellate rights of all interested parties and ensuring a speedy, certain and cost-effective resolution of the action.

4.143 *The Commission recommends a system of modified rights of appeal.*

**(13) Defendant Class Actions**

4.144 The paradigm class action is one in which a large number of plaintiffs with similar claims mount a collective action against the same defendant or defendants. On rare occasions, however, a plaintiff or plaintiffs may assert rights that raise common issues against a large number of defendants. The issue to be addressed is whether provision should be made for so-called “defendant class actions” and, if so, whether any modifications of the proposed class action procedure are required.

4.145 The common law representative action allows the court to authorise one or more representative defendants to act on behalf of others similarly situated. In the words of Order 15 rule 9 of the *Rules of the Superior Courts*:

“Where there are numerous persons having the same interest in one cause of action or matter, one or more of such persons may sue or be sued, or may be authorised by the court to defend, in

such cause or matter, on behalf of, or for the benefit, of all persons so interested.”

4.146 An apt example of a defendant representative action is *Irish Shipping v Commercial Union Assurance*.<sup>63</sup> A shipowner, who was entitled to an indemnity from a bankrupt charterer, sought to recover from the charterer’s liability insurers. As was customary in the industry, the insurance coverage was provided by numerous different insurers. The Court of Appeal allowed the shipowner to proceed by way of a representative action against the lead underwriter on behalf of the 77 insurance companies concerned.

4.147 The Commission sees no reason in principle why similar provision should not be made for defendant class actions. Certainly, on the rare occasions where the need arises, the arguments based on fairness, efficiency and judicial economy are no less compelling than those that pertain to plaintiff class actions. Indeed, the principle of equality within the civil justice system suggests that a class action procedure should be available to cater for multiple common claims, regardless of whether they surface on the plaintiff or defendant side. The rarity of the phenomenon of defendant class actions is not a persuasive justification of their omission from the procedure; the civil justice system should be poised to resolve such proceedings in an effective and efficient manner, however infrequently they arise.<sup>64</sup>

4.148 At the same time, the Commission recognises that defendant class actions pose certain challenges such as:

- the criterion of “common issues” may necessarily be more strictly applied;

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<sup>63</sup> [1991] 2 QB 206.

<sup>64</sup> Most of the class action regimes are silent on the subject of defendant class actions. However, section 4 of the Ontario statute provides: “Any party to a proceedings against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.” A similar but more detailed provision was recommended by the Alberta Law Reform Institute *Report on Class Actions* (85-2000) at 92-93.

- it may be more difficult to find a defendant willing to represent the class;
- the utility of the procedure may be lost if large numbers of defendants opt-out;
- there must be adequate notice of the proceedings in order that class members are aware of the possibility of judgment being awarded against them.

4.149 The Commission believes that a single procedure should generally govern plaintiff and defendant class actions alike. In exercising their broad powers under the proposed class action regime, the courts should be mindful of the unique challenges posed by defendant class actions. In particular, the factors cited above may influence the court's determination as to whether a class action is a "desirable procedure" in any given case.

4.150 *The Commission recommends that the proposed procedure should make provision for defendant class actions.*



## CHAPTER 5 SUMMARY OF PROVISIONAL RECOMMENDATIONS

5.01 The provisional recommendations contained in this Paper may be summarised as follows:

5.02 The Commission recommends the introduction of a class actions procedure. [Paragraph 3.23]

5.03 Jurisdiction over class actions should be shared by the High Court and Circuit Court in the first instance. [Paragraph 4.14]

5.04 The bar to the bringing of representative actions in tort in Order 6 rule 10 of the *Circuit Court Rules 2001* should not be extended to class actions. [Paragraph 4.14]

5.05 The courts should exercise a supervisory role over class proceedings. [Paragraph 4.21]

5.06 Under the new procedure, the court should have the authority to deal with common issues and individual issues within the framework of a single proceeding. [Paragraph 4.24]

5.07 The point at which an action becomes a class action should be subject to judicial certification. [Paragraph 4.56]

5.08 Before issuing an order certifying class proceedings, a judge must be satisfied that the following criteria have been met:

- The pleadings disclose a cause of action; [Paragraph 4.28]
- There is an identifiable class of ten or more persons at the time of certification; [Paragraph 4.32]

- The claims or defences of the class raise common issues of fact or law; [Paragraph 4.36]
- There is a class representative who will fairly and adequately represent the interests of the class; [Paragraph 4.42] and
- The class action is an appropriate, fair and efficient procedure. [Paragraph 4.46]

5.09 Provision should be made for the creation of subclasses where appropriate. [Paragraph 4.49]

5.10 The procedure should specify that the following factors will not be a bar to certification of a class action:

- The number of class members or the identity of each class member is not known;
- The class includes a subclass whose members have claims that raise common issues not shared by all class members;
- Different remedies are sought for different class members;
- The relief claimed relates to separate contracts involving different class members; and
- The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues. [Paragraphs 4.50 and 4.52]

5.11 The court should have the power to amend the certification order or to decertify the proceedings at the application of any party or of its own motion at any time during the course of the proceedings. [Paragraph 4.63]

5.12 Limitation periods should be suspended as against class members on the filing of an application for certification of a class action, regardless of whether the proceeding is ultimately certified. [Paragraph 4.68]

5.13 The Commission seeks views as to whether class members who wish to join a class action should be required to opt-into the proceedings or, alternatively, whether class members who do not wish to join a class action should be given an opportunity to opt-out of the proceedings. [Paragraph 4.77]



5.14 The class representative should be required to notify all class members of:

- The filing of an application for class certification and the subsequent certification of class proceedings;
- A proposed settlement of any common issues;
- A judicial resolution of any common issues;
- The discontinuation or abandonment of the class action;
- Any other matter, notice of which the court deems necessary. [Paragraph 4.80]

5.15 As a general rule, the ordinary rules of evidence should apply to class actions. With the leave of the court, non-party class members (*ie* class members who have opted in to the proceedings or, alternatively, have failed to opt-out of the proceedings) may be subject to discovery and examination, after discovery and examination of the class plaintiff, respectively. [Paragraph 4.86]

5.16 The settlement or discontinuance of a class action should be subject to the approval of the court. [Paragraph 4.89]

5.17 The court should have the authority to make an order for an aggregate award of damages with respect to all or a part of the defendant's liability, subject to certain conditions. [Paragraph 4.97]

5.18 The Commission seeks views as to whether class members, other than the class representative, should be liable for the costs of the class. [Paragraph 4.111]

5.19 The Commission seeks views as to the enactment of legislative provisions which would allow the court to approve contingency, speculative or uplift fee arrangements in class actions. No restrictions should be placed on the ability of lawyers to represent class representatives on a "no foal, no fee" basis within the framework of the Law Society Regulations. [Paragraph 4.122]

5.20 Class representatives who are otherwise eligible should be entitled to apply for civil legal aid. [Paragraph 4.125]

5.21 The Commission seeks views in relation to liability for costs of class proceedings. [Paragraph 4.140]

5.22 The court should have a residual authority to make any order it considers appropriate at any stage during the course of class proceedings. [Paragraph 4.20]

5.23 There should be a modified system of appeals in relation to class actions. [Paragraph 4.143]

5.24 The proposed procedure should make provision for defendant class actions. [Paragraph 4.150]

**APPENDIX A    RULE 23 OF THE FEDERAL RULES OF CIVIL  
PROCEDURE (UNITED STATES OF AMERICA)**

*(a) Prerequisites to a Class Action*

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representatives will fairly and adequately protect the interests of the class.

*(b) Class Actions Maintainable*

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or

substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interests of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against the members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

*(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances,

including individual notice to all members of the class who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

*(d) Orders in the Conduct of Actions*

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step

in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined under Rule 16, and may be altered or amended as may be desirable from time to time.

*(e) Dismissal or Compromise*

A class action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

*(f) Appeals*

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

## APPENDIX B ONTARIO CLASS PROCEEDINGS ACT 1992

### Definitions

1. In this Act,
  - 'common issues' means,
    - (a) common but not necessarily identical issues of fact, or
    - (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; ('questions communes')
  - 'court' means the Ontario Court (General Division) but does not include the Small Claims Court; ('tribunal')
  - 'defendant' includes a respondent; ('défendeur')
  - 'plaintiff' includes an applicant; ('demandeur')

### Plaintiff's class proceeding

- 2.(1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.
- (2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceedings and appointing the person representative plaintiff.
- (3) A motion under subsection (2) shall be made,
  - (a) within ninety days after the later of,
    - (i) the date on which the last statement of defence, notice of intent to defend or notice of the appearance is delivered, and
    - (ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or

(b) subsequently, with leave of the court.

### **Defendant's class proceeding**

3. A defendant to two or more proceedings may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceedings as a class proceedings and appointing a representative plaintiff.

### **Classing defendants**

4. Any party to a proceedings against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.

### **Certification**

5.(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of the application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceedings, and



(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceedings that sets out a workable method of advancing the proceedings on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

#### **Certain matters not bar to certification**

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

**Refusal to certify: proceeding may continue in altered form**

7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,
  - (a) order the addition, deletion or substitution of parties;
  - (b) order the amendment of the pleadings or notice of application; and
  - (c) make any further order that it considers appropriate.

**Contents of the certification order**

- 8.(1) An order certifying a proceeding as a class proceeding shall,
  - (a) describe the class;
  - (b) state the names of the representative parties;
  - (c) state the nature of the claims or defences asserted on behalf of the class;
  - (d) state the relief sought by or from the class;
  - (e) set out the common issues for the class; and
  - (f) specify the manner in which class members may opt-out of the class proceedings and a date after which class members may not opt-out.

(2) Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, subsection (1) applies with necessary modifications in respect of the subclass.

(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding.

### **Opting-Out**

9. Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order.

### **When it appears conditions for certification are not satisfied**

10.(1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5(1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings with different parties.

(3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7(a) to (c).

### **Stages of class proceedings**

11.(1) Subject to section 12, in a class proceeding,  
(a) common issues for a class shall be determined together;

- (b) common issues for a subclass shall be determined together; and
- (c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25.

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

**Court may determine conduct of proceeding**

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

**Court may stay any other proceeding**

13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

**Participation of class members**

14.(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

### **Discovery of parties**

15.(1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding.

(2) After discovery of the representative party, a party may move for discovery under the rules of court against any other class members.

(3) In deciding whether to grant leave to discover other class members, the court shall consider,

- (a) the stage of the class proceeding and the issues to be determined at that stage;
- (b) the presences of subclasses;
- (c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;
- (d) the approximate monetary value of individual claims, if any;
- (e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and
- (f) any other matter the court considers relevant.

(4) A class member is subject to the same sanctions under the rules of court as a party for failure to submit to discovery.

### **Examination of class members before a motion or application**

16.(1) A party shall not require a class member other than a representative party to be examined as a witness before the hearing of a motion or application, except with leave of the court.

(2) Subsection 15(3) applies with necessary modifications to a decision whether to grant leave under subsection (1).

### **Notice of certification**

17.(1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

- (a) the cost of giving notice;
- (b) the nature of the relief sought;
- (c) the size of the individual claims of the class members;
- (d) the number of class members;
- (e) the places of residence of class members; and
- (f) any other relevant matter.

(4) The court may order that notice be given,

- (a) personally or by mail;
  - (b) by posting, advertising, publishing or leafleting;
  - (c) by individual notice to a sample group within the class;
- or
- (d) by any means or combination of means that the court considers appropriate.

(5) The court may order that notice be given to different class members by different means.

(6) Notice under this section shall, unless the court orders otherwise,

- (a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;

- (b) state the manner by which and the time within which class members may opt-out of the proceeding;
- (c) describe the possible financial consequences of the proceeding to class members;
- (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;
- (e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
- (f) state that the judgment, whether favourable or not, will bind all class members who do not opt-out of the proceeding;
- (g) describe the right of any class member to participate in the proceeding;
- (h) give an address to which class members may direct inquiries about the proceeding; and
- (i) give any other information the court considers appropriate.

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

#### **Notice where individual participation is so required**

18.(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.

(2) Subsections 17(3) to (5) apply with necessary modifications to notice given under this section.

(3) Notice under this section shall,

- (a) state that common issues have been determined in favour of the class;

- (b) state that class members may be entitled to individual relief;
- (c) describe the steps to be taken to establish an individual claim;
- (d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;
- (e) give an address to which class members may direct inquiries about the proceeding; and
- (f) give any other information that the court considers appropriate.

### **Notice to protect interests of affected persons**

19.(1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

(2) Subsections 17(3) to (5) apply with necessary modifications to notice given under this section.

### **Approval of notice by the court**

20. A notice under section 17, 18 or 19 shall be approved by the court before it is given.

### **Delivery of notice**

21. The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical.



### **Costs of notice**

22.(1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties.

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

### **Statistical evidence**

23.(1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

(2) A record of statistical information purporting to be prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity.

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

- (a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;
- (b) complied with subsections (4) and (5); and
- (c) complied with any requirement to produce documents under subsection (7).

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

(a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;

(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or

(c) was derived from reference material generally used and relied on by members of an occupational group.

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

(a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and

(b) described any documents prepared or used in the course of preparing the statistical information sought to be introduced.

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information.

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

#### **Aggregate assessment of monetary relief**

24.(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

- (a) the use of standardized proof of claim forms;
- (b) the receipt of affidavit or other documentary evidence;
- and
- (c) the auditing of claims on a sampling or other basis.

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.

(9) The court may give leave under subsection (8) if it is satisfied that,

- (a) there are apparent grounds for relief;
- (b) the delay was not caused by any fault of the person seeking the relief; and
- (c) the defendant would not suffer substantial prejudice if leave were given.

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

### **Individual issues**

25.(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may:

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and

determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

(6) Subsection 24(9) applies with necessary modifications to a decision whether to give leave under subsection (5).

(7) A determination under clause (1)(c) is deemed to be an order of the court.

### **Judgment Distribution**

26.(1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is

entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.

(3) In deciding whether to make an order under clause (2)(a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined.

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms it considers appropriate.

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate.

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

### **Contents of judgment on common issues**

27.(1) A judgment on common issues of a class or subclass shall,

(a) set out the common issues;

(b) name or describe the class or subclass members;

(c) state the nature of the claims or defences asserted on behalf of the class or subclass; and

(d) specify the relief granted.

(2) A judgment on common issues of a class or subclass does not bind,

(a) a person who has opted out of the class proceeding; or

(b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

- (a) are set out in the certification order;
- (b) relate to claims or defences described in the certification order; and
- (c) relate to relief sought by or from the class or subclass as stated in the certification order.

### **Limitations**

28.(1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

- (a) the member opts out of the class proceeding;
- (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
- (c) a decertification order is made under section 10;
- (d) the class proceeding is dismissed without an adjudication on the merits;
- (e) the class proceeding is abandoned or discontinued with the approval of the court; or
- (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(2) Where there is a right of appeal in respect of an event described in clauses (1)(a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.



### **Discontinuance and abandonment**

29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

(2) A settlement of a class proceeding is not binding unless approved by the court.

(3) A settlement of a class proceeding that is approved by the court binds all class members.

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

### **Appeals**

30.(1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding.

(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Ontario Court (General Division) as provided in the rules of court.

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determined individual claims made by class members.

(4) If a representative party does not appeal or seek leave to appeal as permitted by subsection (1) or (2), or if a representative party abandons an appeal under subsection (1) or (2), any class member may make a motion to the court for leave to act as the representative party for the purposes of the relevant subsection.

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3).

(6) A class may appeal to the Divisional Court from an order under section 24 or 25 determining an individual claim made by a class member and awarding more than \$3,000 to the member.

(7) A representative plaintiff may appeal to the Divisional Court from an order under section 24 determining an individual claim made by a class member and awarding more than \$3,000 to the member.

(8) A defendant may appeal to the Divisional Court from an order under section 25 determining an individual claim made by a class member and awarding more than \$3,000 to the member.

(9) With leave of the Ontario Court (General Division) as provided in the rules of court, a class member may appeal to the Divisional Court from an order under section 24 or 25,

(a) determining an individual claim made by the member and awarding \$3,000 or less to the member; or

(b) dismissing an individual claim made by the member for monetary relief.

(10) With leave of the Ontario Court (General Division) as provided in the rules of court, a representative plaintiff may appeal to the Divisional Court from an order under section 24,

- (a) determining an individual claim made by a class member and awarding \$3,000 or less to the member;
- (b) dismissing an individual claim made by a class member for monetary relief.

(11) With the leave of the Ontario Court (General Division) as provided in the rules of court, a defendant may appeal to the Divisional Court for an order under section 25,

- (a) determining an individual claim made by a class member and awarding \$3,000 or less to the member; or
- (b) dismissing an individual claim made by a class member for monetary relief.

### **Costs**

31.(1) In exercising its discretion with respect to costs under subsection 131(1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court.

### **Agreements respecting fees and disbursements**

32.(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;

- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

- (4) If an agreement is not approved by the court, the court may,
- (a) determine the amount owing to the solicitor in respect of fees and disbursements;
  - (b) direct a reference under the rules of court to determine the amount owing; or
  - (c) direct that the amount owing be determined in any other manner.

#### **Agreements for payment only in the event of success**

33.(1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

(2) For the purpose of subsection (1), success in a class proceeding includes.

- (a) a judgment on common issues in favour of some or all class members and
- (b) a settlement that benefits one or more class members.

(3) For the purposes of subsections (4) to (7), 'base fee' means the result of multiplying the total number of hours worked by an hourly rate; ('honoraires de base')

‘multiplier’ means a multiple to be applied to a base fee.  
(‘multiplicateur’)

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

(5) A motion under subsection (4) shall be heard by a judge who has,

- (a) given judgment on common issues in favour or some or all class members; or
- (b) approved a settlement that benefits any class member.

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

- (a) shall determine the amount of the solicitor’s base fee;
- (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
- (c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totaled at the end of each six month period following the date of the agreement.

(8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee.

(9) In making a determination under clause (7)(b), the court may consider the manner in which the solicitor conducted the proceeding.

## **Motions**

34.(1) The same judges shall hear all motions before the trial of the common issues.

(2) Where a judge who has heard motions under subsection (1) becomes unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

(3) Unless the parties agree otherwise, a judge who hears motions under subsection (1) or (2) shall not preside at the trial of the common issues.

## **Rules of court**

35. The rules of court apply to class proceedings.

## **Crown bound**

36. This Act binds the Crown.

## **Application of Act**

37. This Act does not apply to,  
(a) a proceeding that may be brought in a representative capacity under another Act;  
(b) a proceeding required by law to be brought in a representative capacity; and  
(c) a proceeding commenced before this Act comes into force.

## **Commencement**

38. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

**Short title**

39. The short title of this Act is the *Class Proceedings Act, 1992*.





**APPENDIX C LIST OF LAW REFORM COMMISSION PUBLICATIONS**

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984)	€0.13
Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No 3-1977, Civil Liability for Animals (November 1977)	€3.17
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Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27
Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (December 1978)	€1.27

Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harboursing of a Child (February 1979)	€1.90
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Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54
Seventh (Annual) Report (1984) (Pl 3313)	€1.27
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