The Law Reform Commission

Launch of the Report on Multi-Party Litigation

27th September 2005

By Mrs Justice Susan Denham, Supreme Court

President, Commissioners, Ladies and Gentlemen

It gives me great pleasure this evening to launch the Report on Multi-Party Litigation. In my view it is one of the most important reports presented by the Law Reform Commission.

The Report may be viewed from two aspects:

(a) Case Management, and

(b) Access to Justice.

(a) Case Management

First of all case management; in considering multi-party litigation we find ourselves confronting two practices and procedures of the old common law:

(a) The individualism of the common law, and

(b) The laissez faire attitude to management of cases.

It is only in recent times that Irish courts have been developing case management. The old common law concept of laissez faire continued into the latter part of the 20th century. Under that approach the judge sat in court and heard cases as they presented themselves before him, and he gave a decision on the facts and law. It was a leisurely, gentlemanly, approach. For example, it was relatively recently that the Supreme Court stopped the practice of having counsel read out the entire

transcript of the proceedings in the High Court, before presenting legal arguments on the appeal. This leisurely approach to hearing a case reflects an 18th century way of thinking and is entirely inappropriate in an Irish court system of the 21st century.

Gradually, since the middle of the 1990's, case management has been introduced in our courts. An efficiently managed system is essential for the State. Such a legal system provides an improvement of service to the public with the minimum waste and effort. It is critical to have an efficient system as it is the means by which the pubic obtain justice. An inefficient system impedes justice. Also, commerce and the business community of the State are at a disadvantage if the legal system is inefficient or ineffective.

The immense growth in the volume of litigation over the last decade illustrates the need for developing such efficiencies. For example, in 2004 there were 531 appeals lodged in the Supreme Court of Ireland, and in 2003 and 2004 the Supreme Court dealt with approximately 300 appeals each year[1] Contrast this to the House of Lords in London and the Supreme Court in Washington, who gave judgments in approximately 80 appeals in each of those years.

The volume and range of the work of the High Court has grown dramatically. This may be illustrated simply by noting examples of the lists in the High Court which include Personal Injuries (Dublin), Personal Injuries (Provincial), Bail, Bankruptcy, Chancery, Chancery Summon, Commercial, Common Law Motions (1&2), Circuit Appeals (Dublin), Circuit Appeals (Provincial), Examiner's Court List, Examiner's Office List, Family Law, Garda Compensation, Judicial Review, Jury, Non-Jury, Probate, Proceeds of Crime Act, Wards of Court, Asylum, Admiralty,

[1] The Official figure for 2003 is 304 appeals dealt with and for 2004 722 apeals dealt with of which 432 were disposed of in the review of uncertified cases: Courts Service Annual Report 2004

Solicitors Act, Medical Council, Nursing Council, Dental Council and the Central Criminal Court.

It is transparent that the volume of work in the courts has increased immensely, as has the complexity of the cases, over the last two decades.

In addition there has been an increase in similar case litigation. This important report addresses the issue of private multi-party actions. While analysing this issue in a practical manner, from the procedural case management aspect, it is essential to recognise that in fact we are addressing the fundamental concept of access to justice.

(b) Access to Justice

Constitutional justice incorporates the rule of law as a concept at the core of our legal system. It incorporates the principle that everyone is subject to the law, which should be public, and determined by an independent court system. Within this Constitutional structure is the right of access to courts, access to justice. Access to justice should not be denied solely on the issue of costs. Concern has been expressed by the Courts recently at the high cost of litigation. While those on legal aid and the very rich have access, what about the rest of the community?

The right of access to the courts, a Constitutional right, has been recognised in **Mccauley v. Minister for Posts and Telegraphs.**[2] In that case Kenny J. held:

> "That there is a right to have recourse to the High Court to defend and vindicate a legal right and that it is one of the personal rights of the citizen included in the general guarantee in Article 40.3, seems to me to be a necessary inference from Article 34.3.1 of the Constitution . . . if the High Court has this full original jurisdiction . . . it must follow that the citizens have a right to have recourse to that Court . . ."

[2] 1966 IR 345

In **State (McCormack) v. Curran**[3] Finlay C.J. stated:

> "The right of access to the courts, stated in its broadest fashion, is the right to initiate litigation in the courts".

Our changing society has brought with it a change in litigation. An aspect of our mass producing and mass consuming society was succinctly described by the British National Consumer Council in its submission to the Woolfe Inquiry. It stated:

> "As we become an increasingly mass producing and mass consuming society, one product or service with a flaw has the potential to injure or cause other loss to more and more people. Yet our civil justice system has not adapted to mass legal actions We still largely treat them as a collection of individual cases, with the findings in one case having only limited relevance in law to all of the others."

The issue of multiple, similar, claims in Ireland and the lack of multi-party procedures to enable efficient access to the courts may be illustrated by several examples of recent litigation.

Social welfare equality cases.

The 1978 Directive on Equal Treatment in Social Welfare[4] required the State to ensure social welfare payments contained no discrimination on grounds of gender or marital status. In Ireland some parts of the social welfare code provided for payment to married men only and not to married women, and some parts of the social welfare code provided for higher payments to married men than to married women.

The issue of access to justice is illustrated by the Law Reforms examination of this area.

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[3] 1987 ILRM 225 See also **Murphy v. Greene** [1990] 2 IR 566 McCarthy J.

[4] Directive 79/7/EEC, 19th December 1978

The Law Reform Commission has noted in its report that in the aftermath of the failure to implement the 1978 Directive on Equal Treatment In Social Welfare, only 11,200 married women, out of a total of 69,000 instituted proceedings claiming to be entitled to benefits which, prior to December 1984, had only been payable to married men[5]. The cases of **Cotter and McDermott v. Minister for Social Welfare (No. 1)**[6] and **Cotter and McDermott v. Minister for Social Welfare (No. 2)**[7] were test cases for those 11,200 women. The State settled these two cases without admission of liability as well as a further 2,700. However this still left approximately 8,500 claims to be dealt, with as well as the potential claims of the remaining 58,000 married women who had not yet initiated proceedings. In the later test case of **Tate v. The Minister for Social Welfare**[8] involving 70 of these women, Carroll J. in the High Court held that they too were entitled to the relief sought. Furthermore, as a result of the decision in **Tate**, the Government announced that all relevant payments, totalling approximately £265m, would be made to the entire group of 69,000 women.

Army Deafness Claims.

Perhaps the best illustration of the issue may be found in the Army Deafness cases. For years hundreds of individual Army Deafness Cases were before the Courts. As the Commission notes, the Department of Defence has revealed that between 2001 and 2003 awards and settlements totalling €60m were paid in relation to hearing loss claims[9]. The total legal fees for that period amounted to €32.2m. The Department of Defence has recently released a breakdown of the Defence Forces

[5] LRC Report at p. 13.
[6] 1987 ECR 1453
[7] 1991 1 ECR 1155
[8] 1995 I IR 418
[9] LRC Report at p. 15 footnote 29.

hearing loss claims statistics[10]. The total amount spent on all presently finalised claims stands at €278,592,566.00 with €184,520,585.00 of that being spent on awards or settlements and €94,151,576.00 going in legal costs. These examples illustrate clearly what occurs when there is no appropriate multi-party procedure.

It is in the State's interest, and in the interest of litigants, to embrace a form of multi-party procedure.

The report does not recommend removing the current private multi-party procedures, the representative action and the test case. Rather it recommends providing an alternative, additional approach. The Report while considering the matter practically is imaginative.

The Commission recommends introduction of a multi-party procedure to be called a Multi-Party Action. The Commission has set out a scheme to provide a fair and efficient procedure, under judicial supervision.

The benefits of such multi-party litigation are manifold, including:

- The overall outlay on litigating an issue is reduced
- The overall costs of achieving a resolution is reduced
- Scarce Court resources are used more efficiently
- Access to justice is available to many people who would otherwise be excluded.

As Lord Donaldson MR said[11]:

> "Trying 1,500 cases together is much cheaper that trying 1,500 cases separately, so the plaintiffs as a group can spend more before the reach the economic limit."

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[10] Available at http://www.Defence.ie/WebSite.nsf/Sub+Document+ID/6994676377249664802 56c6100397EB5?open document

[11] **Davies v. Eli Lilly & Co**. (1987) 3 All ER 94

It is probable that the less well off, those disadvantaged in our society, would be the main beneficiaries of a new procedure enabling multi-party litigation.

As Gerry White has pointed out in his book Social Inclusion and the Legal System:[12]

> "Even where access to the legal system is obtained certain types of party can make more effective use of such access than others. Litigants with considerable financial resources can engage more readily in litigation than other parties and may be able to present their arguments more effectively."

Persons seeking to use a multi-party procedure may individually seek a small sum of money. But such sum would be of great importance in a household of low income, it could make an enormous increase in the standard of living.

To the poor and disadvantaged a small sum of money may make an incredible difference to their life. Yet they are often unable to claim their right successfully. They are often unable to take the first step into Court.

As **Cappelletti and Garth** have pointed out in their book on '**Access to Justice**'[13]:

> "The obstacles to (access to legal services) created by our legal systems are most pronounced for small claims and for isolated individuals, especially the poor, at the same time, the advantages belong to the 'haves', especially to organised litigants adept at using the legal system, to advance their own interests.
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> Reflecting on this situation, we would expect that individuals would have most trouble asserting their rights when the vindication of those

[12] Social Inclusion and the Legal System, Public Interest Law in Ireland, Gerry White, Published by IPA, at p. 282

[13] Cappelletti and Garth, Access to Justice Vol. 1, Book 1 (Sijthoff/Gioffe, 1978) at p. 20

> rights entails legal actions for relatively small amounts of damages against powerful organisations. The new substantive rights which are characteristic of the modern welfare state however, have precisely those features: on the one hand, they involve efforts to bolster the power of citizens against governments, consumers against merchants, people against polluters, tenants against landlords, and employees against employers (and unions), and, on the other hand, the monetary interest of any one individual . . . is likely to be small. To turn these new and . . . very important rights into concrete advantages for ordinary people is evidently no easy task."

It is no easy task - the challenge is to find a just balance in multi-party litigation between procedural efficiency and fairness. The Law Reform Commission have met this challenge successfully. Implementation of this Report would bring us a step closer to succeeding in this task.

Conclusion

In 1996 in his famous "Access to Justice" report, Lord Woolf, then Master of the Rolls, later to be Chief Justice of England and Wales, identified problems in their legal system as including:

> ". . . too expensive in that the costs often exceed the value of the claim; too slow in bringing actions to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under-resourced litigant".

The Woolf Report's primary recommendation was the introduction of case management by the courts. It was also specifically recommended that there be new provisions for multi party litigation.

I believe that any similar inquiry in Ireland would probably make similar findings. Whereas we may not seek to take exactly the same procedural approach to such problems, we have a similar concern at a legal system being:

- Too expensive
- Too slow
- Too unequal

An Irish judge in the 19th century, Sir James Mathew (1830-1908)[14] said:

"In England, justice is open to all – like the Ritz Hotel."

The recommendations of this Report are very relevant to such a problem.

The Law Reform Commission, its President, Commissioners, Researchers, and all who have worked on this Report, are to be complemented on its thoughtful, principled and practical approach. It is a Report of great importance as it addresses an area of the Constitutional issue of access to justice, which is of special relevance to the disadvantaged and vulnerable.

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[14] The issue of whether this famous remark can in fact be attributed to him is still debated. It has been noted o the Supreme Court of New South Wales' website (see http://www.lawlink.nsw.gov.au/sc%5Csc.nsf/pages/ipp_100203 that:

> "Some 50 years ago the great English barrister and judge, Lord Birkett, remarked that 'the courts are open to all – like the Ritz Hotel'. This aphorism was uttered as part of a critical comment concerning the costs of litigation and the fees earned by barristers. Lord Birkett was later asked if the aphorism was his own. He said that he was compelled to answer that it had been attributed to Mr. Justice Matthew but, in fact said Lord Birkett, before that it had been attributed to Lord Bowen, and indeed, before that, to Lord Justice Chitty. Subsequent research, however, has revealed that words to the same effect were spoken by John Horne Tooke, a radical British politician who was prominent towards the end of the 18th century. Who knows when they were first spoken. They remain as fresh as ever."

This Report, if implemented, would assist the development of the Irish legal system so that an Irish judge in the 21st century could say; to paraphrase Sir James Matthew,

> "In Ireland, justice is open to all – a Constitutional service of democratic republic."

I have great pleasure in launching the Report on Multi-Party Litigation.