SCOTTISH LAW COMMISSION
(Scot Law Com No 154)

# Multi-Party Actions

## Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

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Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

*To:* The Right Honourable the Lord Mackay of Drumadoon, QC,
*Her Majesty's Advocate*

We have the honour to submit our Report on Multi-Party Actions: Court Proceedings and Funding.

(Signed) C K DAVIDSON, *Chairman*
E M CLIVE
W A NIMMO SMITH
KENNETH G C REID
N R WHITTY

KENNETH F BARCLAY, *Secretary*
*13 May 1996*

# Contents

# Part I Introduction

**The background to this report**

1.1 This report has been prepared in response to a reference from the Lord Advocate under section 3(1)(e) of the Law Commissions Act 1965. The reference was made in 1988 and invited us:

> "(a) to consider the desirability and feasibility of introducing in Scottish civil court proceedings arrangements to provide a more effective remedy in situations where a number of persons have the same or similar rights;
>
> (b) to consider how such arrangements might be funded; and
>
> (c) to make recommendations".

1.2 Underlying the reference is a concern that the Scottish civil courts are not able to cope adequately where a number of people who have the same or similar rights seek to vindicate those rights in our courts. Typical cases are those arising from sudden mass disasters, such as an aircraft crash, and mass medical claims, such as those concerning allegedly defective drugs. The reference asked us to consider two main matters. The first is: whether, and if so how, court procedures might be improved.[1] The second is: whether the arrangements for funding of the claimants, in the pursuit of these claims through litigation, are satisfactory and, if not, what improvements might be desirable.

1.3 Work on the reference has led or contributed to the preparation and publication of three papers. These are: our Discussion Paper[2]; the Report by the Working Party which we set up[3]; and the Report by Researchers from the Department of Law at Dundee University[4]. We draw on these papers in this report and refer to them as, respectively, "the discussion paper" ("DP" in the footnotes), "the Working Party report", and "the Dundee University research report".

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[1] Discussion had been stimulated by, in particular, the Scottish Consumer Council Report of 1982 which provided details of a class action procedure which might be introduced in Scotland. See DP para 1.11. (The particulars of this report, and other references, are given in Appendix B to this Report.)

[2] *Multi-Party Actions: Court Proceedings and Funding*, Scottish Law Commission Discussion Paper No 98, published by the Scottish Law Commission in November 1994.

[3] *Multi-Party Actions*, Report by Working Party set up by the Scottish Law Commission, June 1993, published by the Scottish Law Commission in November 1994.

[4] Dr Christine R Barker, Professor Ian D Willock and Dr James J McManus, *Multi-Party Actions in Scotland*, published by the Scottish Office Central Research Unit, 1994. This research work was funded by the Scottish Office.

**The Working Party Report**

1.4 We set up this Working Party because we realised[5] that work on the Lord Advocate's reference required us to consider not only broad issues of policy but also a number of technical problems related to court procedures and legal aid. It appeared to us that proposals for dealing with some of these problems might be implemented by subordinate legislation, particularly in the form of rules of court or legal aid regulations. The Working Party included advocates, solicitors and senior officials in the Scottish Office, Scottish Courts Administration and the Scottish Legal Aid Board.

1.5 The Working Party's report includes helpful views on possible reforms. Copies of the report have been widely circulated and have been sent in particular to the Scottish Legal Aid Board and to the Court of Session Rules Council and the Sheriff Court Rules Council. Copies of the report and of our discussion paper have also been made available to Lord Cullen who was requested in June 1995 to carry out a review of business in the Outer House of the Court of Session.[6] The Summary of the Conclusions in the Working Party Report[7] is included in Appendix C to this Report.

**The Dundee University Research Report**

1.6 In the course of our early work we became aware that although there was active debate[8] and public expressions of opinion about the need for some form of court procedure for multi-party actions, systematic information about Scottish cases was largely lacking. In 1990 a six month pilot study on the legal implications of "mass disasters" was funded by the University of Dundee.[9] Following consultation with the Scottish Office Home and Health Department and this Commission a Dundee University Team[10] was commissioned in June 1991 to carry out an empirical study, which ran from November 1991 to March 1993. The Chairman of the Commission's Working Party - who was a member of the Commission's legal staff - also chaired the Steering Group for the Dundee research. The results of the Dundee study are recorded in the research report, published by the Scottish Office Central Research Unit in 1994, and they have been of considerable assistance to us in framing our recommendations. The research report should be read along with this report.

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[5] See particularly para 4 of our Foreword to the Working Party report.

[6] For the terms of Lord Cullen's remit see 1995 SLT (News) 178. Lord Cullen reported in January 1996. (See para 4.76 below).

[7] Part 5 of the Working Party Report. The Report was completed in June 1993 and the Court Rules referred to there have now been superseded by the Rules of the Court of Session 1994 and the [Sheriff Court] Ordinary Cause Rules 1993. See Addendum to the Report as published by this Commission in November 1994.

[8] See in particular: in Scotland, the Scottish Consumer Council Report of 1982; and in England and Wales, the National Consumer Council Report of 1989.

[9] The results of part of this research were published by Professor McBryde and Dr Christine Barker in 1991 New Law Journal 484.

[10] Then consisting of Professor W W McBryde, Professor I D Willock, Dr J J McManus and Dr C R Barker.

**Scope of this report**

1.7 We recorded in 1989[11] that consideration of the Lord Advocate's reference had turned out to be more complex than originally envisaged. We accordingly decided, as explained in Part 3 of our discussion paper, that certain matters should not be dealt with. This was either because they are outwith what we saw as the proper scope of our reference[12] or because an adequate treatment of them would make our discussion paper (and this report) unmanageable. Our conclusion was therefore[13] that we should concentrate on procedural matters in civil court proceedings raised by the aggrieved individuals themselves and not consider proceedings raised by a third party on their behalf. One consultee (the Scottish Consumer Council) regarded our limitation of this discussion paper to "internal pursuer class actions" as disappointing,[14] but we do not think it appropriate that we should embark here on a wider discussion.[15] We also confirmed our earlier conclusion[16] that we should not attempt to consider certain other matters. These are: possible changes in the substantive law; changes devised to meet particular problems (eg dampness in rented local authority housing and sexual or racial discrimination); and any means, other than civil litigation, of resolving disputes[17] or of influencing the conduct of defenders.[18] We appreciate that multi-party litigation may raise questions of private international law[19] but we do not think it appropriate to deal with such matters here.

1.8 This report follows the order of the discussion paper. In Part II we discuss the need for reform and the broad aims of reform and conclude that there is a need for a procedure in the Scottish civil courts which enables effective remedies to be obtained where a number of persons have the same or similar rights. In Part III we discuss the class action procedure, as established in other jurisdictions. In Part IV we consider the possible features of a Scottish

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[11]Twenty-Fourth Annual Report 1988-89, Scot Law Com No 123, para 2.42.

[12]The terms of the reference are given in para 1.1 above.

[13]DP para 3.25.

[14]The Scottish Consumer Council thought that it should be competent for external pursuer actions to be brought by organisations such as the Consumers' Association, the National Federation of Consumers Groups or Citizens Advice Scotland; such actions "could have an important role to play in improving redress in consumer protection". In its Report on *Administrative Law: Judicial Review and Statutory Appeals* (Law Com No 226; October 1994) our sister body, the Law Commission (for England and Wales) recommends that unincorporated associations should, in certain circumstances, be permitted to make applications for judicial review in their own name (Report, paras 5.38-5.41).

[15]Such a discussion would need to take account of European Union and other developments such as the report of The Swedish Commission on Group Actions which was published in January 1995. The Commission considered that it should be possible for "group actions to be brought by private citizens, certain organisations (in consumer and environmental cases) and by representatives of the State or a municipality". (Summary in English p 60). "In the field of consumer law the group action may be instituted by an affiliation of consumers or wage-earners in disputes between consumers and a tradesman relating to goals, services or other utilities which the tradesman offers, in the course of business, to consumers primarily for private use." A condition for a right of standing would be that the organisation had been engaged in the activity for at least three years and have at least 1,000 members. (Summary pp 87-88.) See further para 2.18 fn 49 below. See also para 3.7 below which narrates the provision in the British Columbia Act that a non-class member may be certified as a representative party.

[16]DP para 3.25.

[17]Eg alternative dispute resolution.

[18]Eg criminal law sanctions.

[19]"Multi-party litigation can pose problems for the private international lawyer at each stage of the conflicts process: finding a basis of jurisdiction; deciding whether to decline to exercise jurisdiction; ascertaining and applying the applicable law". J J Fawcett, "Multi-party litigation in Private International Law", 1995 ICLQ 744 at 769. Some issues are discussed in the Law Commissions' Report (Law Com No 193; Scot Law Com No 129), *Private International Law: Choice of Law in Tort and Delict*, 1990.

procedure. Draft legislation to implement our recommendations is provided in Appendix A. This takes the form of a draft Act of Sederunt providing rules for a procedure in the Court of Session. In Part V we discuss the funding of multi-party actions. Part VI contains a summary of our recommendations.

1.9 This Report was completed in April 1996.

# Part II The need for reform

**Introduction: terminology**

1.1 In using the term "multi-party actions" we are referring to those situations, mentioned in the Lord Advocate's Reference,[1] "where a number of persons have the same or similar rights". There are two essentials of a multi-party action for our purposes: a number of possible claimants or pursuers; and a single issue or a number of issues which are common to all the possible claims.[2] It is said that the existence of this core of common issues makes it possible for all the claims to be dealt with in a single litigation and that the advantages[3] of the single litigation outweigh the disadvantages.[4]

2.2 We noted in our Discussion Paper[5] that the terms *multi-party actions* and *group actions* are synonymous. Traditionally, such actions are divided into three categories. These are public actions, organisation actions and class actions. *Public actions* are those brought by a public official who seeks redress for the public at large or for a group. For example, the Director General of Fair Trading has powers under The Unfair Terms in Consumer Contract Regulations 1994[6] to stop misleading advertisements.[7] *Organisation actions* are brought by an organisation, such as a consumer organisation or environmental protection organisation, on behalf of its members and the public at large.[8] *Class actions* are brought by a named plaintiff (pursuer), who is typically the self-appointed representative of a class (or group) of persons, and who seeks redress for himself and for the other class members.[9] Class actions may be

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[1]The text of the Reference is given in para 1.1 above.

[2]These common issues are matters which are similar in all the claims; they are not necessarily the same or identical.

[3]The perceived advantages are listed in the DP para 6.106 and the Dundee University Research Report para 1.3.

[4]The perceived disadvantages are listed in the DP para 6.107 and the Dundee University Research Report para 1.4.

[5]DP para 2.43.

[6]SI 1994 No 3159.

[7]This example is taken from the Scottish Consumer Council Response to our DP.

[8]In the field of public law, compare the judicial review applications brought in England and Wales by Greenpeace in connection with the Sellafield reprocessing plant (*R v Inspectorate of Pollution and Another, ex parte Greenpeace Ltd* (No 2), [1994] 4 All ER 329; Greenpeace held in the circumstances of the case to have "sufficient interest" to be granted standing to seek judicial review) and by the World Development Movement in connection with the Pergau Dam in Malaysia (*R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386). A recent Scottish survey is provided by Professor Colin R Munro in "Standing in Judicial Review", 1995 SLT 279.

[9]"'An Australian working definition of a class action is: 'A class action is a legal procedure which enables the claims of a number of persons against the same defendant to be determined in the one action. In a class action one or more persons ('the plaintiff') may sue on his own behalf and on behalf of a large number of other persons ('the class') who have the same interest in the subject matter of the action as the plaintiff. The class members are not usually named as individual parties but are merely described. Although they usually do not take any active part in the litigation, they may nevertheless be bound by the result. It is, thus, a device for multi-party litigation where the interests of a number of parties can be combined in the suit.' In the Quebec Code of Civil Procedure there is a succinct definition: 'class action' means the procedure which enables one member to sue without a mandate on behalf of all the members'." (DP para 1.7 footnotes omitted.)

regarded as a more sophisticated version of the *representative action* available in England[10] and other countries which have adopted English court procedures.

2.3 As we have mentioned already,[11] we concentrate in this Report on class actions ie private law procedures. In doing so we express no view about the merits of public actions or organisation actions. The Dundee University research report records suggestions that a Fatal Accident Inquiry[12] should be combined with civil litigation to recover compensation.[13] Also, Mr David Tench of the Consumers' Association suggested[14] that where there had been a major disaster, a Disaster Court could investigate the disaster, establish the cause, punish those responsible and award compensation. It is said that such a court would reduce complexity, expense and delay. We regard these matters as outwith the scope of our reference.

**Types and characteristics of multi-party actions**

2.4 There are three situations[15] where a number of persons have the same or similar rights. These are where numerous persons have similar claims:

- arising from a single event ("sudden mass disaster");

- attributable to a single cause but occurring at different times and in different circumstances ("creeping disaster"[16] or product liability claim); or

- arising from transactions as consumers ("consumer claim").

*Sudden mass disasters*

2.5 In such cases a number of people are killed or injured in the same event. The most notorious recent Scottish disasters of this type have been the Piper Alpha oil platform explosion on 6 July 1988 (167 deaths) and the destruction of Pan Am Flight 103 over Lockerbie on 21 December 1988 (270 deaths). All the people share the causal relationship between the event and the resulting loss, injury or damage. There is no doubt about the immediate cause of the event. There may be doubt about who was responsible.

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[10]Under the Rules of the (English) Supreme Court (RSC Order 15, rule 12) proceedings may be begun by or against any one or more of "numerous persons who have the same interest" in the proceedings, as representing all (or some) of these persons. We described the features of this English procedure in paras 5.2-5.8 of the DP. See further para 3.1 below.

[11]Para 1.7 above.

[12]A Fatal Accident Inquiry is held under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. The procurator fiscal presents the case to the Sheriff who determines the circumstances of the death, but the sheriff's determination is not admissible in any other proceedings eg civil proceedings for compensation raised by the deceased's relatives.

[13]Dundee University Research Report para 7.26.

[14]Dundee University Research Report p 99, fn 18.

[15]See further: National Consumer Council Report (1989), which describes the first two categories as, respectively, disaster claims and product liability claims; Working Party Report paras 2.3-2.5; DP paras 2.2-2.5; and Dundee University Research Report, Chapter 3 (Summary of cases sampled).

[16]This was the term used in our DP. Some, particularly defenders, regard the term as emotive and inappropriate.

2.6 Typical cases are claims for damages in respect of allegedly defective drugs, such as tranquillisers. There is likely to be no connection between the claimants other than that they claim to have been injured by the same drug. Their injuries will have occurred at different times and in different circumstances; there will be questions about whether the injury is attributable to the drug or to some other cause peculiar to that claimant[17]. Clearly it would be very much in the public interest if it was possible to determine authoritatively and economically, in a test or leading case or in a class action, whether or not cigarette smoking causes lung cancer. Compare the well known case with regard to the averred risks in the addition of fluoride to drinking water: *McColl v Strathclyde Regional Council*.[18] (In that case it was held that none of the alleged harmful effects of the addition of fluoride to drinking water had been established. The pursuer was legally aided and the tax payer bore the whole expenses of the action. The proof, together with the hearing of evidence, lasted 201 days.) However, issues common to a majority of such cases may be difficult to determine.

2.7 Among the best known such cases are those in respect of the drugs Opren, Ativan, Valium and Halcion where there has been protracted litigation both in Scotland[19] and in England and Wales[20]. The Opren cases were described by Sir John Donaldson (later Lord Donaldson), MR[21] as having features which gave the dispute "a character which is unique in English legal history" because of the number of plaintiffs, their average age (higher than usual), the cost of the litigation, the diversity of side effects and the fact that the concept of the class action is unknown to the English courts.[22] Some 13,000 (93%) of the plaintiffs were legally aided but legal aid was withdrawn after an estimated £30m to £35m of legal aid expenditure had been incurred.[23] Following its experience with these cases, the [English] Legal Aid Board considers that there should be an examination of the court procedures for handling these types of action.[24] It remains to be seen whether similar problems will arise in the Scottish tranquilliser cases which were sisted pending procedure in the English cases.

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[17]A recent case illustrates these difficulties. In the judicial review case of *McTear v Scottish Legal Aid Board* 1995 SCLR 611 (deceased's widow seeking legal aid to continue action of damages against tobacco company which was said to be responsible for her husband's death from lung cancer after smoking their products) the Board was held entitled, in assessing the prospect of success in the proposed action, to have regard to difficult questions of *volenti non fit injuria* (ie voluntary acceptance of risk), after health warnings were given on cigarette packets, and contributory negligence. Also the deceased had smoked the products of two separate manufacturers. (For a discussion of the legal aid aspects of the case see: supplement to 4th Edition of Stoddart and Neilson, para 9-19.)

[18]1983 SLT 616.

[19]See Dundee University Research Report paras 3.11-3.14 (which narrate the origins of the cases involving tranquillisers as well as Myodil dye, Bjork Shiley heart valves and human insulin) and Table 2 (which gives the outcome to date of the litigation with regard to these medical claims).

[20]A general description is given in Geraint G Howells (1994), 604-606. The reported cases include: *Davies v Eli Lilly & Co and Others* [1987] 1 WLR 1136 (unsuccessful appeal to Court of Appeal against order that plaintiff's costs should be borne proportionately by all of some 1,500 plaintiffs; costs of non-legally aided plaintiffs later underwritten by a millionaire benefactor); *Nash and Others v Eli Lilly & Co and Others* [1993] 1 WLR 782 (Court of Appeal allowed certain appeals in respect of limitation of claims and a costs order).

[21][1987] 1 WLR 1136 at 1138D.

[22][1987] 1 WLR 1136 and 1138E-1139C.

[23]Legal Aid Board Report for 1993-94, June 1994, para 8.7.

[24]Report, *Issues Arising for the Legal Aid Board and the Lord Chancellor's Department from Multi-Party Actions*, Legal Aid Board, May 1994, para 1.3(iii) and ch 5.

*Consumer claims*

2.8 These are typically claims by purchasers of defective goods or services for damage to property or financial loss. They may relate to relatively small sums of money which may not be recoverable without undue expense by individual claimants, if they litigate independently.[25] It is argued by the proponents of class actions that a Scottish class action procedure would enable such small sums to be recovered[26] and that, in principle, a sum which is relatively small should not be irrecoverable because of the costs of such a recovery. A recent notorious example of a consumer claim is the offer of free flight vouchers (to Europe and America) which was made to purchasers of Hoover domestic appliances; the offer was "hugely over-subscribed"[27] and applicants for vouchers were offered unsuitable flights or their applications were refused.

**Perceived advantages and disadvantages of class action procedure**

2.9 The perceived advantages and disadvantages of class actions are relevant to the questions of whether a class action procedure should be introduced and, if so, how it should be framed. We repeat here what we said in our Discussion Paper.[28]

2.10 *Advantages*.[29] The perceived *advantages* of class action procedure include the following. It makes available to all the members of a group or class an effective remedy which they could not otherwise obtain. It overcomes "factors which at present may inhibit a ready access to the courts in cases where group interests are involved".[30] These factors include the potential cost of litigating; and the fact that group members may be inarticulate and shy of attempting to express their grievances or may even not know what their rights are. The existence of the procedure might encourage "the use of safer working practices, better quality control and increased research before marketing of new products".[31]

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[25]Such a small claim is sometimes described as "individually non-recoverable". See DP para 4.9. See also the first advantage of a group or class action listed in the Dundee University Research Report para 1.3 (para 2.10 below fn 29).

[26]In the USA it has been said that class actions were intended to assist the recovery of individually non-recoverable claims. (See Fleming (1988) at 247 who remarks that in tort claims however "contingency fees furnish the key to the court house".)

[27]Report in *Scotland on Sunday*, 3 July 1994, which said also: [P]ressure groups have estimated there are at least 20,000 British buyers who are still awaiting their flights, having been wrongly refused, and all are determined to fight for satisfaction. Now they are planning a so-called class action to be brought in the US against Hoover's parent company, Maytag, based in Iowa."

[28]DP paras 6.106 and 6.107.

[29]The Dundee University Research Report lists (para 1.3) the following advantages:

"(i) it would facilitate the pooling of resources and the sharing of costs, thus benefiting both individual claimants and the court system;

(ii) in negotiations for a settlement, it would make the bargaining power of the parties more equal;

(iii) it would avoid different outcomes to different actions arising out of the same dispute;

(iv) it would deter harmful practices by providers of goods and services, encourage compliance with protective legislation and negative the advantages accruing from contraventions."

[30]SCC Report (1982), para 3.5.

[31]SCC Report (1982), para 3.9.

2.11 *Disadvantages*.[32] The procedure's perceived *disadvantages* include the following. It may be abused by the raising of large claims of no substance ("blackmail litigation"). A class litigation may be unmanageable, particularly where damages, rather than a declarator or an interdict, are sought. Successful class actions may lead to suppliers or manufacturers increasing their prices to offset anticipated claims.[33] They may also involve a misuse of civil procedure by, in effect, punishing the defender. They may encourage litigation which ought to be a last resort. They may impose inappropriate duties on judges: for example, problems in the disbursement of a damages fund may raise difficult questions of social policy for the judge and may raise doubts about the ability of the courts adequately to consider all the competing claims. Finally, they may have adverse effects upon the courts and the legal profession if "lawyer entrepreneurs" are allowed to take charge of class litigation.[34]

2.12 In speaking to the Bill to introduce a federal class action procedure the Australian Attorney General said[35] that a procedure to deal with multiple claims was needed for two purposes. First, to provide a real remedy where each person's loss is small and not economically viable to recover in individual actions. Second, to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent.

**Are Scottish reforms needed?**

2.13 *Our provisional views*. We considered in the discussion paper[36] whether reforms are needed in Scottish court procedures. We agreed with the view that consideration of procedural reforms must be accompanied by a consideration of funding arrangements.[37] However for the reasons which we give[38] we provide draft legislation to implement only our recommendations with regard to a court procedure.

2.14 Having described Scottish court procedures[39] we discussed[40] how effective they were in multi-party actions where (a) a single action, such as a test case, raised by one person in a group may benefit others and (b) a number of claims are gathered into a single litigation so that common questions affecting all of a group of claimants may be considered (for example, following conjunction of actions). Our view was that these methods of enforcing a claim were not always satisfactory; in particular there might be difficulty in applying the decision in an action raised by an individual to other similar cases. Our provisional conclusion was that: there is no completely satisfactory procedure in the Scottish civil courts by which

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[32]The Dundee University Research Report lists (para 1.4) the following disadvantages:

> "(i) huge awards of damages could put companies out of business, thereby increasing the numbers of the unemployed;
> (ii) insurance cover against such awards would increase the cost of products and services;
> (iii) persons who felt no sense of grievance might be drawn into the litigation;
> (iv) collective litigation is difficult to reconcile with traditional delictual liability."

[33]SCC Report (1982), para 5.5.
[34]See Kirby (1983).
[35]See DP p 158, fn 4.
[36]Part 4.
[37]Discussed in DP para 8.
[38]In para 5.43, referring to legal aid for multi-party actions.
[39]DP para 2.13-2.25.
[40]DP paras 4.11-4.24.

effective remedies may be obtained in situations where a number of persons have the same or similar rights; some other procedure appears to be necessary.[41]

2.15 *Respondents' views*. The majority of our respondents - and particularly the judiciary and the two main professional bodies (the Faculty of Advocates and the Law Society of Scotland) - agreed that a special procedure should be provided for multi-party actions.

2.16 However the Faculty of Advocates commented that it would be wrong to under-estimate the ability of the legal profession in Scotland "to meet the needs of multiple claims by such existing means as the conventional treatment of claims on the basis of a selected test case - or selected test cases - or conjunction of cases. For example, we have been able to cope broadly satisfactorily with multiple claims for industrial deafness, claims for personal injury damages arising from single event disasters such as Ibrox, and more recently Piper Alpha." This is borne out by the Dundee University research report[42] which indicates that a settlement was the commonest reason for the conclusion of the litigation.

2.17 *Discussion*. It may be asked whether it is worthwhile to devote scarce public resources to the making of reforms, either of procedures or of funding arrangements. Since April 1992 the [English] Legal Aid Board has had power to contract with solicitors for them to provide representation to claimants in those multi-party actions where 10 or more people are making claims.[43] It appears that only two contracts had been awarded by 1994.[44]

2.18 We do not regard the fact that the Scottish legal profession has been able to devise means for dealing with multiple claims[45] and the apparently small use made of the (English) Legal Aid Board's Arrangements of 1992[46] as conclusive arguments against the introduction of a new Scottish court procedure. It is plain that there is a significant gap in existing Scottish court procedures. It is likely to be helpful for there to be an appropriate procedure designed to deal with multiple claims where the claimants have the same or similar rights. This view is shared in other jurisdictions. We noted in the Discussion Paper[47] the establishment in recent years of class actions or similar procedures in Canada (Quebec and Ontario[48]) and Australia (Federal procedure and South Australia). A Commission on Group Actions, appointed by the Swedish Government, has recently recommended the establishment there of group actions.[49] We think that a new Scottish procedure is desirable

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[41]Proposition 1; DP para 4.25.
[42]Chapter 3: Summary of Cases sampled.
[43]See Working Party Report Annexe F and para 5.39 below.
[44]McCool and Day in [1994] The Litigator 37 at 40. But the procedures in the Legal Aid Board Multi-Party Action Arrangements 1992 are invoked only at the discretion of the Legal Aid Board and where the multi-party action involves "significant complexity".
[45]Para 2.16 above.
[46]Para 2.17 above.
[47]DP Part 6.
[48]And in 1995 in British Columbia under the Class Proceedings Act 1995. That Act "establishes the procedures by which a single court proceeding may be brought to resolve factual or legal issues that are shared by 2 or more persons" (Explanatory Note to the Bill). The procedure is broadly similar to that introduced in Ontario which implemented the recommendations of the Ontario Law Reform Commission (OLRC Report, 1982).
[49]The Swedish Commission's Report, published January 1995, contains draft legislation concerning class actions, public actions and actions by organisations in general courts, in land courts (environmental actions) and in the labour court (actions under the Equal Opportunities Act). The proposed group actions would only be permitted if the action "cannot be more effectively or equally well processed in another manner (eg in the form of a test case) and if certain

and would be a useful addition to the range of available procedures.

2.19 *Our recommendation*. Accordingly we recommend:

**1. There should be introduced a procedure for multi-party actions ie those actions where a number of persons have the same or similar rights.**

2.20 *A new procedure not a panacea*. We think it is important, however, not to exaggerate the part that a new procedure might play in dealing with the problems of multi-party litigation. The new procedure, which we recommend later in this report, is not a panacea. If it is introduced it will be necessary also for appropriate arrangements to be made to assist the representative party financially. Test case (and other existing procedures) will continue to be useful in appropriate circumstances.[50] Our new procedure will usefully bring claims together in the same litigation but the conduct of the litigation will continue to require the expertise and ingenuity of the judge and of practitioners.

2.21 *A new procedure does not remove the need for other reforms.* Further the introduction of a new procedure does not render unnecessary other reforms and improvements. The Report of our Working Party[51] contains some suggestions which are worth further consideration. These include the introduction of a new rule allowing pursuers in a number of cases to adopt all or part of the pleadings in a "master summons" to avoid the need for repetition of identical material in all of the summonses. The Dundee University research report devoted a chapter[52] to Solicitors' Groups which play an important part in the co-ordination and management of the claims of group members and in the conduct of group litigation. The organisation of such groups is primarily the concern of the solicitors concerned.[53] (Our recommended rules enable a group member to appeal where the representative party has not done so.[54]) In its discussion of the funding of multi-party actions the Dundee University Report records[55] that officials of the Scottish Legal Aid Board said that they would welcome regulations enabling the Board to fund solicitors groups directly.

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other special conditions for a group action exist." The Swedish Commission recommended that a group should be constituted by an opt-out arrangement. (The Swedish Commission's proposals are narrated in a Summary in English.) See further para 1.7 fn 14 above.

[50]In a recent case it was held that the kinds of claims made by Shetland islanders in actions for physical and personal injuries arising out of the wreck of the oil tanker Braer in 1993 were too various for 77 of them to be delayed while another four proceeded as leading actions. *Anderson v Braer Corporation and Others, Times Scots Law Report*, 18 April 1996.

[51]See Appendix C to this Report. Some of the Working Party's suggestions have been overtaken by Lord Cullen's Report (1996).

[52]Chapter 4.

[53]It has been suggested (Dundee University Research Report para 4.25) that some form of writen "constitution" might be useful to regulate how the group should operate. Such a written agreement might be helpful in reducing possible dissension within the group as to how the litigation should be conducted and what the relationship is among group members.

[54]See rules 14 and 15 in the draft Chap 43A, which we recommend should be inserted in the Rules of the Court of Session, and which appears in Appendix A to this Report.

[55]Para 5.35.

**Our approach to procedural reforms**

2.22 We noted that the absence of a suitable procedure for multi-party actions was exacerbated by other difficulties in the successful vindication of multiple claims.[56] The main deterrent to the vindication of rights in multiple claims (as in individual claims) is expense. Respondents did not dissent from our provisional view[57] that it is necessary to consider, along with special court procedural rules for multi-party litigation, special means by which the expense of such litigation to the litigant may be kept to a minimum. There are other constraints on the vindication of rights such as potential claimants' unawareness of rights and procedures.[58] However it would be wrong for reforms to put the multi-party claimant in a substantially better position than the individual claimant, particularly since the nature of the claim - for example for reparation in respect of the death of a near relative - may be very similar. It may be a matter of chance whether only one person or a number of persons are affected.

2.23 For the same reason we think it appropriate that the function of civil litigation[59] and the broad aims of reform[60] 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 to be brought onto its aircraft - is so abnormal that the court should seek to punish such conduct. In other words, that 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. It has been said by the English Court of Appeal that a claim for damages should not be used as a pretext for what essentially amounts to a public inquiry; the sole proper object of such claims is to obtain compensation.[61] The principal aims of reform remain the traditional aims of reformers of court procedures: the reduction of complexity, delay and expense.[62]

2.24 A traditional feature of civil litigation is that British court procedure is accusatorial (or adversarial) rather than inquisitorial.[63] The litigant is free to conduct his case, broadly speaking, as he wishes. It is not for the judge to initiate new lines of inquiry or generally carry out his own investigation, although the judge is expected to examine critically the evidence and the legal submissions made. The complexity of a multi-party litigation may require the judge to innovate or exercise ingenuity.[64] There may be circumstances in complex multi-party litigation where the concept of a party being *dominus litis*[65] ought to be

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[56]DP para 4.26.
[57]DP para 4.37.
[58]DP paras 4.38-4.40 and Proposition 3 (para 4.41).
[59]DP paras 4.2-4.6.
[60]DP paras 4.42-4.51.
[61]Stuart-Smith LJ in *AB & Others v John Wyeth & Brother Limited (No 2) (1993)* 18 BMLR 38 at 46, cited in Hickinbottom (1995) at 192.
[62]DP para 4.53.
[63]DP para 2.33.
[64] "The courts must be as flexible and adaptable as possible in the application of existing procedures with a view to reaching decisions quickly and economically." Sir John Donaldson, MR in *Davies v Eli Lilly & Co and Others* [1987] 1 WLR 1136 at 1139E.
[65]Ie in sole charge of the conduct of the litigation.

subordinated to case management techniques controlled by the court; the court may have to control the pace of the litigation, subject to preserving the protections offered by the adversarial system.[66] Discussion of perceived defects in the adversarial system in civil litigation has led to suggestions that a more inquisitorial approach would be desirable.[67] We agree that the particular difficulties of multi-party litigation may require more judicial intervention than is usually required or desirable, but we do not recommend the adoption of an inquisitorial approach.[68]

[66]Steyn, J in *Chapman v Chief Constable of South Yorkshire* (1990) 134 SJ 726. He also said that the "sporting theory of justice" ought to have no place in complex multi-party litigation.

[67] "There is a strong movement led by the judiciary in [Australia, England and America], to extend the judicial powers of intervention and implement greater control over litigation." The Honourable Mr Justice D I Ipp, "Reforms to the Adversarial Process in Civil Litigation - Part I", 1995 Australian Law Journal 705 at 725. See further para 4.74 below.

[68]Even if adopted, this approach would be subject to the restraints of the written pleadings of parties.

# Part III The class action procedure

**The representative action as a possible model**

1.1 In the previous Part we recommended the introduction of a new Scottish court procedure. In our Discussion Paper[1] we went on to consider whether the English representative action procedure[2] might provide a helpful precedent. We thought that the English rule, like its counterparts in Ontario and Australia[3] (in both of which countries class action procedures have now been introduced) was brief and unhelpful. It was unclear what was meant by "numerous persons" having the "same interest"; there was no requirement for the other members of the class to be informed about the proceedings (and hence the representative plaintiff was likely to play a dominant role); and although others might benefit only the representative plaintiff was responsible for the cost of the proceedings.[4] Accordingly our provisional view[5] was that the representative action procedure does not adequately meet the difficulties of multi-party litigation in Scotland and could not readily be adapted to do so. This view was accepted by our respondents.

**The representative action and the class action compared**

3.2 We therefore need to consider whether experience in those jurisdictions outside Britain which have forms of class action procedure provides helpful precedents for a Scottish class action procedure.[6]

3.3 Class action procedure and the representative action share four basic elements:

- Numerous parties.

  Otherwise it might be preferable to conjoin the actions or to adopt other suitable procedures

- The same or a similar interest in the subject matter of the litigation.

  The main assumption, and the reason for a single litigation combining many claims, is that there is a common core of disputed issues which can be dealt with efficiently and economically in one case. In the class action the process of certification directs attention to whether or not such a common core exists.[7]

- The "representative party" takes the proceedings forward on behalf of all the members of the group without an express mandate from them.

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[1] DP Part 5.
[2] Rules of the Supreme Court, Order 15, rule 12; quoted in para 2.2, fn 10 above.
[3] The Australian Federal Procedure is referred to (in the Federal Court of Australia Amendment Act 1991) as a "representative proceeding" but the procedure is essentially that of the class action. Although certification of the action is not required, decertification (ie an order that the proceedings not to continue as a representative proceeding) is competent and the class is constituted by an opt-out, rather than an opt-in, arrangement.
[4] DP para 5.11.
[5] Proposition 4 (para 5.13).
[6] In para 2.2 above we explained what is meant by a "class action".
[7] See the discussion of the criteria for certification at paras 4.28 to 4.39 below.

Class action procedures typically allow a group member or potential group member to opt out of, or opt into, the proceedings.[8] This may be regarded as, respectively, an implied or express mandate.

- All the members of the class or group are bound by the results of the litigation.

  Although they may have taken only a passive interest in the case they cannot seek to relitigate on their own behalf the particular issues dealt with in the class or group action.

**Class action procedures**

3.4 Class action procedure may be regarded as a sophisticated and improved version of the representative action. In Part 6 of our Discussion Paper we narrated the features of class action (or similar) procedures in other jurisdictions as the basis for a discussion of the possible features in a Scottish class action procedure. Details of five procedures were provided: the US federal procedure under Federal Rule 23;[9] the Quebec class action;[10] the class proceedings in Ontario;[11] the class action in South Australia;[12] and the Australian Federal procedure.[13] Since the preparation of our Discussion Paper a procedure has been introduced in British Columbia. For completeness, we note here the main features of this procedure.

**The British Columbia procedure: class proceedings[14]**

3.5 Legislation providing for class actions in British Columbia was enacted in 1995 and came into force on 1 August 1995.[15] The legislation is based on the Ontario Class Proceedings Act 1992, which we summarised in the Discussion Paper,[16] and we note here only the significant differences.[17]

3.6 *Grounds for certification: a "preferable procedure"*. Under the Ontario procedure one of the five matters on which the court must be satisfied[18] is that the proposed class proceeding would be the "preferable procedure". That legislation does not assist the court by describing what the court has to take into account in this connection. The British Columbia legislation describes the factors to be considered:[19]

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[8] See paras 4.47 to 4.57 below.
[9] DP paras 6.4 to 6.15. The text of Federal Rule 23 is given in Annexe C to the DP. The New York Rules are a clarified version of Federal Rule 23.
[10] DP paras 6.43 to 6.60.
[11] DP paras 6.61 to 6.81.
[12] DP paras 6.82 to 6.91.
[13] DP paras 6.92 to 6.102.
[14] We are grateful to Mr Arthur L Close, QC, the Chair of the Law Reform Commission of British Columbia for providing the text of the legislation and a copy of his commentary on the legislation. We draw on that commentary here.
[15] Class Proceedings Act 1995 (SBC 1995 c 21). The legislation "establishes the procedures by which a single court proceeding may be brought to resolve factual or legal issues that are shared by 2 or more persons" (Explanatory Note) and was preceded by consultation by the British Columbia Attorney General (Consultation Document issued in May 1994). Three class suits were launched shortly after the procedure became available. One suit related to breast implants and another to defective electric radiant heating panels.
[16] DP paras 6.62 to 6.76.
[17] Where different policies have been adopted for British Columbia they have usually been taken from the Ontario Law Reform Commission Report on Class Actions (1982).
[18] See DP para 6.65.
[19] Act s 4(2). Drawn from Ontario Law Reform Commission Report page 416.

"(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members,

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions,

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings,

(d) whether other means of resolving the claims are less practical or less efficient, and

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means."

3.7 *Certification of non-class member as a representative party*. Influenced by a provision in the Quebec Code of Civil Procedure[20] the British Columbia Act allows the certification of a non-member of the class if necessary to avoid a substantial injustice to the class.[21] It has been noted that this British Columbia provision "might allow the certification of an 'ideological' advocate possessing special ability, experience or resources that would allow it to be an appropriate and adequate class representative although the 'substantial injustice' test may be unduly restrictive."[22]

3.8 *Unclaimed residue of monetary award*. The Ontario procedure provides that any part of an award which is unclaimed or undistributed is to be returned to the defendant. The British Columbia procedure[23] allows the court to provide for the distribution of a residue "in any manner that may reasonably be expected to benefit class or sub class members".[24]

3.9 *Provisions on costs and other financial matters*. Unlike the procedure in Ontario[25], British Columbia has adopted a basic no costs rule ie the "American rule", except where the court considers that a party has been vexatious or abusive or made unnecessary or improper applications to the court.[26]

3.10 British Columbia has made no special provision for the funding of class actions.

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[20] Art 1048.

[21] S 2(4) of the Act:

"(4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class."

[22] Mr Arthur L Close in the commentary mentioned in fn 14 above.

[23] Act s 34.

[24] Act s 34(1). The Attorney General in the legislative debate on this provision provided an example: "An example under the breast implant issue could be - and I say could be - that the judge may make a decision, with undistributed moneys, to order that some of those moneys be spent on a screening mammography program, or some other kind of health program that may have to do with breast disease or some other issue relating to a broader class but not directly affecting the specific class." British Columbia Hansard 13 June 1995.

[25] DP para 6.79.

[26] S 37.

**Class action procedures in other jurisdictions: a summary**

3.11 The table[27] which follows on the next two pages enables ready comparison to be made of five procedures.[28]

3.12 The following points may be noted:

*Pre-conditions of entry to the procedure*

With one exception,[29] all the procedures require the court to consider, with reference to prescribed criteria, whether the case is appropriate for the procedure.

*Identification of the class or group for the purposes of the procedure*

All the procedures provide that persons who are ostensibly part of the described class or group will be covered by the litigation, unless they expressly opt-out or request exclusion. The court orders appropriate notices to be given informing ostensible class members of their right to opt-out.

*Aggregate assessment of monetary relief*

With the exception of the US Federal procedure, all the procedures enable aggregate ("global") assessment of monetary awards due to the class as a whole.

*Abandonment or settlement*

All the procedures require the representative party to obtain court approval of proposed abandonment or settlement to prevent prejudice to the other class members.

*Appeals*

(a) Three of the procedures allow an appeal by another class member if the representative party does not appeal.

(b) The Quebec procedure requires leave of the court for an appeal against a certification order (in order to discourage unjustified appeals by defenders).

*Rule on costs (expenses)*

Outside the USA, the normal "costs follow success" rule applies. In the British Columbia procedure, there is a basic no costs rule (with an exception for vexatious actions).

[27] Based on that on pp 166-167 of the DP.
[28] We omit the procedure in South Australia. (See DP paras 6.82 to 6.91.)
[29] Australian Federal Procedure. But "decertification" is competent.

| FEATURE | US FEDERAL PROCEDURE | AUSTRALIAN FEDERAL PROCEDURE | QUEBEC | ONTARIO | BRITISH COLUMBIA |
|---|---|---|---|---|---|
| (1) **Name Relevant legislation** | Class action Federal Rule of Civil Procedure 23 (amended 1966) | Representative proceeding Federal Court of Australia Amendment Act 1991 | Class action Act respecting the Class Action 1978 | Class proceeding Act respecting Class Proceedings 1992; Law Society Amendment Act 1992 | Class proceeding Class Proceedings Act 1995 |
| (2) **Pre-conditions** | Two prerequisites (rule 23(a)) and further conditions (rule 23(b)) | Court must be satisfied on three matters (section 33C(1)) | Court must be satisfied on four matters (article 1003) | Court must be satisfied on five matters (Class Proceedings Act 1992, section 5(1)) | Court must be satisfied on five matters. Criteria for "preferable procedure" included (section 4) |
| **Certification** | Certification (rule 23(c)(1)) | No certification required but "decertification" competent | Court's authorisation needed (article 1002) | Certification (section 5) | Certification (sections 2 and 3) |
| (3) **Opt in or opt-out?** | Notice given: class member may opt-out (rule 23(c)(2)) | Notice given: member may opt-out (section 33J) | Notice given (article 1006): member may request exclusion (article 1007) | Notice given: member may opt-out (section 9) | Notice given; members may opt-out (section 16) |
| (4) **Award** | No provisions | Provision for court to award damages in an aggregate amount | Provisions for collective recovery and individual claims | Provisions for aggregate assessment of monetary relief | Provision for aggregate awards of monetary relief |
| (5) **Abandonment or settlement** | Court approval needed | Court approval needed | Court permission needed | Court approval needed | Court approval needed |
| (6) **Appeals** | No specific provisions in Rule 23 | Appeal competent by group member if representative party does not appeal | Member, other than representative party, may appeal | Leave of court needed for appeal against certification order | Appeal competent by class member if representative party does not appeal |
| (7) **Costs Rule** | Usual American rule applies (no costs order in favour of a successful party) | Normal "costs follow success" rule applies | Normal "costs follow success" rule applies | Normal "costs follow success" rule applies | No costs rule ie American rule applies |
| (8) **Financial assistance** | None (other than by contingency fees) | Court may order reimbursement of costs of representative party from damages awarded | Fonds meets costs of representative party, but not those awarded against representative party | Written agreement between solicitor and representative party may provide for speculative fees; representative party may apply to Class Proceedings Fund for payment of disbursements; Fund may also meet costs awarded against that party | None<br>Agreement between solicitor and representative plaintiff about fees and disbursements not enforceable unless approved by court |

*Financial assistance*

(a) Special arrangements for funding from external bodies (third party funding) are made in Quebec and Ontario only.

(b) Fees agreements between the representative party and his solicitor are subject to court approval in Ontario and British Columbia.

(c) The costs of the representative party are recoverable, by court order, from damages awardable under Australian Federal procedure.

**Proposals with regard to Group Actions in England and Wales**

3.13 We should mention also the interesting proposals made recently in a Report by a Working Party set up by the Civil Litigation Committee of the [English] Law Society. The Report, "Group actions made easier", was published in October 1995. We mention later[30] the Working Party's views on judicial control and case management techniques.

3.14 *A new rule of court proposed*. The Working Party thought that a new rule of court was an essential first step if actions by groups were to "remain viable". The Working Party considered that a discrete rule of the Supreme Court would be helpful in two respects. First, the introduction of a rule should help to avoid multiplicity of proceedings by raising the awareness of practitioners to the need to ensure that their clients join forces as early as possible with others asserting similar claims. Second, the rule would encourage the development of a body of routine practices which "will save time and costs and avoid constant re-invention of the wheel."

3.15 *The new rule*. The proposed rule would enable the court to order the establishment of a group action if certain conditions are met[31]; if a group is established a designated judge (or master) deals with the conduct of the action. A person wishing to join the group action (as plaintiff or defender) would do so by filing a notice with the court; leave of the court would be needed only where the court had ordered a cut-off date (for the lodging of claims). At the hearing of an application for the establishment of a group action, or at any time thereafter, the court would be able to make such directions "as to the further conduct of the group action as it considers necessary for the fair, economic and expeditious disposal of the group action."[32] A settlement of a group action would have effect only after a hearing before the court; express court approval would be required for a settlement involving a global sum. With regard to costs (expenses) the court would be empowered to make such orders as it thinks just and equitable in accordance with prescribed principles.[33] The court would be able, at any stage of the proceedings, to discontinue a group action if it considers that discontinuance is "in the interests of justice".

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[30] Paras 4.78 and 4.79.

[31] These conditions are broadly similar to the certification criteria which we recommend below (Recommendation 9) in our recommended procedure. They are: 10 or more persons have claims which arise out of the same or similar circumstances; a substantial number of claims give rise to common questions of fact or law; and "the interests of justice will be served by proceedings under this rule." Any party may apply at any time for the order and the application must "specify the directions sought for the future conduct of the proceedings."

[32] Rule 4.1. It is also provided (Rule 4.2) "In making directions under this order the Court shall seek to avoid directions that require the investigation of every, or a substantial number of, individual claims unless it is satisfied that such directions are necessary for the fair disposal of the group action."

[33] Rule 11.1. These include: "(a) Unless there are exceptional circumstances any liability of the Plaintiffs for common costs shall be several and not joint and several; (b) Common costs shall usually follow the event on common issues regardless of the decisions in individual claims." ("Common costs" are defined as "costs substantially common to the individual claims.")

3.16 *Case management under the new rule*. The Working Party considered that group actions are particularly appropriate for case management techniques and the designated judge (and master) should take a pro-active role in progressing the action.[34] Key issues should be identified, and a clear time-table laid down, as early as possible. The Working Party suggested[35] that there are three main ways in which (or by a combination of which) liability in group actions can be investigated and determined: by a test case approach (one or a small number of individual claims being litigated to a conclusion[36]); by the selection of lead cases (a number of individual claims are investigated and litigated in selected cases which contain examples of the full range of problems and issues found in the entire cohort of claimants[37]); and by preliminary or common issues being developed either from the entire cohort of claimants or from a selection of lead cases.[38]

3.17 *Case management: the most suitable approach*. The Working Party discussed the suitability of each of these three approaches.[39]

> "The test case approach is clearly the most economic, but will often be inappropriate in "rolling claim" scenarios where there will frequently be a number of different issues on primary liability and causation eg whether the drug is capable of causing some or all of the ill-effects alleged by different claimants, whether the warnings issued to those who prescribed the drug at different stages were adequate, whether the drug should have been withdrawn from the market at a particular time. A test case approach may still require a mechanism for other potential claimants to register and for limitation to be stayed while the test cases are liquidated. Cost sharing can also be a difficulty, although in principle the costs of litigating the test cases should be shared between all registered claimants ...
>
> Members of the Working Party did not completely agree on the circumstances in which a lead case or a common issues approach should be adopted. One school of thought was that in reality there are no "common issues", only individual issues, and that in consequence the majority of individual claims need to be examined and pursued. The Working Party as a whole certainly agreed that the court needed a high degree of flexibility in determining the most appropriate approach in particular cases, and that the court should be satisfied that common issues are not so hypothetical that they would be very difficult to apply to individual cases, once determined."

The majority view of the Working Party was that any party wishing to depart from these approaches - which they described as test case, selection of lead case or investigation of common issues - and requesting that each claim be pursued individually, should have to justify that proposed course of action by evidence.

3.18 *Lord Woolf's Access to Justice Inquiry*. As part of the work currently[40] being undertaken in Stage II of Lord Woolf's review the Inquiry Team is considering changes based on the

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[34] "Part of the judge's role, as we see it, is to persuade the parties, (or to make orders if necessary), to ensure the litigation is not conducted in the same way as might be appropriate for an individual action, and that all parties take a realistic approach to the issue of depth of investigation, to enable the entire action to be disposed of in a cost effective way." (Report para 6.13.7).

[35] Report 6.13.1.

[36] This approach was adopted in the Sellafield litigation.

[37] The Working Party thought that it might be appropriate "to litigate such cases as to both liability and quantum of damages."

[38] The intention being to illustrate all the important issues as to primary liability and causation.

[39] Report paras 6.13.2 and 6.13.3 (cross reference omitted).

[40] April 1996.

Working Party report and on the work done by the Legal Aid Board.[41] It is noted that the case management techniques which the Working Party recommended follow the principles set out in Lord Woolf's Interim Report.[42]

**Conclusion**

3.19 In the previous part of this Report we recommended, following consideration of the views of our respondents, the introduction of a Scottish court procedure for multi-party actions.[43] In this part we have confirmed our previous view[44] that the English representative action could not readily be adapted to meet the needs of multi-party litigation. Also, it does not achieve any of the perceived advantages of other multi-party litigation procedures such as enabling the recovery of small claims which are individually non-recoverable.[45]

3.20 We consider in the next part what the features of a Scottish court procedure should be and what specific provisions are needed, particularly in court rules.[46] In doing so we take into account the procedural provisions and discussion in other jurisdictions and the views of those who responded to our Discussion Paper.

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[41] Woolf Inquiry, *Issues Paper, Multi-Party Actions*, January 1996, para 1.
[42] *Issues Paper, Multi-Party Actions*, para 4.
[43] Para 2.12 above; Recommendation 1.
[44] DP Proposition 4.
[45] We mentioned in the DP (para 4.9) the distinction which has been made (1976 Harvard Law Review 1318) among three types of individual claims which may be aggregated in a class action: the non-viable; the individually non-recoverable; and the individually recoverable.

> "A claim is non-viable if the expenses an individual would incur in asserting a right to a share of a class judgment would be greater than his expected share of the recovery. A claim is individually non-recoverable if it would not justify the expense to an individual of independent litigation but would justify the lesser expenditure required to obtain a share of a class judgment. A claim is individually recoverable if it warrants the costs of separate litigation; that is, if an action to recover the claim would be economically rational regardless of the availability of class action procedures."

[46] Ie the matters discussed in Part 7 of the DP.

# Part IV Rules for a Scottish procedure

**Introduction**

1.1 We now consider what the features of a Scottish procedure should be. The objectives of reform proposed in our Discussion Paper[1] were: that a new procedure should maximise the possible advantages and minimise the possible disadvantages of class litigation; and in particular, that it should be available only in those cases for which it is particularly suitable. We considered a number of issues concerned with the general shape of the Scottish procedure and a further group of subsidiary issues in connection with jurisdiction and procedure.[2]

4.2 These subsidiary issues included:

- in which courts should the procedure be available?[3]

- What form should the implementing legislation take: Act of Parliament, court procedural rules or both?[4]

We make recommendations on these two matters before considering the general shape of our recommended new procedure.

**Jurisdiction: in which courts should a Scottish procedure be available?**

4.3 *The questions posed*. In the discussion paper[5] we noted that many kinds of civil action may be brought either in the Court of Session or in the sheriff court, but some matters are reserved exclusively to one or other court. We discussed whether a class action procedure should be reserved exclusively to the Court of Session. Views were invited on three possibilities: should a Scottish procedure be introduced

(a) in the Court of Session only; or

(b) in both the Court of Session and the sheriff court; or

(c) in the Court of Session initially, and in the sheriff court later?

4.4 *Discussion*. We suggested that parties generally prefer to litigate in the Court of Session when actions are expected to be lengthy, complex or difficult and the actions could competently be brought either in the Court of Session or in the sheriff court. It is clear that some actions which will be taken under the new procedure which we recommend later are

[1] DP para 7.1.
[2] DP para 7.3.
[3] DP paras 7.77-7.84; Proposition 23.
[4] DP para 7.100; Proposition 31.
[5] DP paras 7.77-7.84; Proposition 23.

likely to be lengthy and complex.[6] Further if a new procedure was introduced first of all in the Court of Session, and only later in the sheriff court, the novel issues of practice and procedure which arose could be discussed, and guidance given, in the earliest cases brought.[7] We also noted that they would be handled by a comparatively small body of judges and practitioners (advocates, solicitor-advocates, and instructing solicitors) who would acquire expertise in dealing with cases under the new procedure more readily than their counterparts in the sheriff court, in many of which courts such actions might seldom be brought.

4.5 *Respondents' views*. A majority of those consultees who commented on this matter were of the view that a new procedure should be introduced in the Court of Session in preference to the sheriff court. Some consultees thought that once the new procedure has been established in that court it should be extended to the sheriff court.[8] In support of this view one group of respondents[9] said that the new procedure would be a large change in Scottish civil procedure.

4.6 *Our concluded view*. In principle, we consider it desirable that our recommended procedure should be available in due course in both the Court of Session and the sheriff court. However the cases may be complex and, initially at least, raise novel questions. The procedure which we recommend in this Report allows the bringing together of similar claims which raise common issues; but the procedural rules do not seek to provide - and indeed could not provide - guidance on all the points which will arise for consideration by judges and practitioners. Experience in other jurisdictions[10] indicates that the judge plays a significant role[11] in ensuring that cases are efficiently and appropriately handled. We have no doubt therefore that it would be preferable for our new procedure to be introduced first in the Court of Session and extended to the sheriff court only when the procedure has become established. The monitoring, which we recommend,[12] of the procedure in the Court of Session will enable appropriate amendments of the procedure to be incorporated, in light of experience, in the features of the procedure introduced in the sheriff court.

4.7 *Our recommendation*. Accordingly we recommend

**2. The new procedure should initially be introduced only in the Court of Session.**

4.8 *Related matters*. We deal later with two related matters: remits between the Court of Session and the sheriff court;[13] and the value rule.[14]

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[6] See the Summary of Cases sampled in Chap 3 of the Dundee University Research Report: Group A (Sudden Mass Disasters) and Group B (Medical Claims).

[7] Such guidance might be particularly necessary if relatively few cases were brought initially under the new procedure. We discuss in paras 4.159-4.164 below the likely use to be made of a new group proceedings procedure.

[8] For example the Scottish Consumer Council considered that "only the Court of Session should, at least initially, have jurisdiction to hear class actions .....Given that the members of the class may well be very numerous and distributed throughout Scotland or further afield it would be appropriate to give jurisdiction to a central court rather than one having limited territorial jurisdiction."

[9] The Sheriffs Principal.

[10] See, for example, the approach recommended in the Report ("Group actions made easier") by the [English] Law Society's Civil Litigation Committee which we referred to above (paras 3.13-3.17); see para 4.78 below.

[11] The judge may have to be "pro-active", adopting, as appropriate, case management techniques in what may be heavy or complex litigation.

[12] Recommendation 33 below (paras 4.168 to 4.170).

[13] Paras 4.127-4.132 below.

[14] Paras 4.134 and 4.135.

**The form of the implementing legislation establishing the procedure**[15]

4.9 *Introduction*. Procedure in the Court of Session is generally regulated by Acts of Sederunt which are made by the Court of Session itself and may embody rules submitted to the court by the Court of Session Rules Council.[16] Such secondary legislation has the advantage that it may be readily amended to take account of experience of the operation of the rules. Primary legislation, an Act of Parliament, might be necessary if it was desired to confer new powers on the court. The possible need for such primary legislation would not however prevent the procedure being introduced, possibly in a modified form, by Act of Sederunt.

4.10 *Our provisional conclusion and respondents' views*. The provisional conclusion which we reached in our discussion paper was that, as far as possible, any class action procedure should be regulated by Act of Sederunt rather than by Act of Parliament. The majority of those consultees who responded agreed with this proposition.[17]

4.11 *Our recommendation*. We therefore recommend:

> **3. The new Court of Session procedure which we recommend should be established by Act of Sederunt made by the Court of Session, rather than by Act of Parliament**.

4.12 The text of the Act of Sederunt which we recommend is given in Appendix A to this Report. The Act of Sederunt inserts a new Chapter 43A, entitled "Group Proceedings", into the Rules of the Court of Session, 1994.[18] The term "group proceedings" refers to actions or petitions in respect of which a certification order has been granted. Where a subsequent recommendation in this Report is implemented in the Act of Sederunt the relevant rule in the new Chapter 43A is noted after the text of the recommendation.

**The general shape of the new procedure**

4.13 We now consider the general shape of the new procedure.[19] The main matters to be considered are

- The conditions on which the court will allow a group action to proceed.[20] Should there be a certification procedure; if so, what should the features of the procedure be; and what criteria should be applied by the court in deciding whether to certify? Should the court have a discretion to remove certification?

- The arrangements for the establishment of the group of pursuers.[21] Having established the general description - for example all those who have purchased Stone Age Fax machines which turn out to be defective[22] - the potential members of the group have either to "opt-in" or "opt-out" ie request inclusion in, or

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[15] DP para 7.100; Proposition 31.
[16] Court of Session Act 1988, ss 5, 8.
[17] The Scottish Consumer Council strongly disagreed. Their reasons included: the novelty of the new procedure; the possibility that it might involve large sums of money and issues of general public interest; and, by contrast with the Sheriff Court Rules Council, the lack of any lay members of the Court of Session Rules Council.
[18] Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994 No 1443). The Rules are printed, with annotations, in Division C of the Parliament House Book.
[19] Leaving over for consideration in the next Part the funding arrangements for the procedure.
[20] Paras 4.13-4.46. In referring here, and later, to "the court" we mean the Court of Session.
[21] Paras 4.47-4.57.
[22] An example taken from the Model pleadings in Appendix B to the ALRC Report 1988.

exclusion from, the group. An opting-in arrangement requires the potential group member to state expressly that he or she wishes to participate. In an opt-out arrangement a potential group member who wishes to be included in the group need do nothing. He or she is a member of the group automatically. Only if he or she does not wish to be in the group does something have to be done ie exclusion requested.

- Whether the court needs any special powers, in addition to those available in conventional litigation.[23] In particular, it may be thought that the representative pursuer is acting in the interests of all the group members. Therefore, should the court be required to approve certain proposed actings - such as settlement of the litigation - before they are carried out, possibly to the detriment of absent group members?

4.14 In discussing the general shape of the group proceedings procedure we consider the ways in which an action conducted under the new procedure should differ from a conventional action. The conventional rules of procedure will apply, except where expressly amended or added to.[24] Group proceedings will, so far as possible, follow the procedural progress of an ordinary action[25] with familiar features such as preliminary pleas, an open and closed record, commission and diligence, procedure roll debate, amendment of pleadings and hearing of evidence (proof).

**Certification**

4.15 A basic requirement is a means of determining those proceedings which are eligible for the group proceedings procedure. One approach is to describe the actions eg those where "seven or more persons have similar claims with substantial common issues of fact or law."[26] The alternative approach is expressly to require court approval or "certification".[27] Approval is granted on the basis of prescribed criteria: in effect before the case is allowed to proceed the court has to be satisfied that the claims meet the statutory criteria.[28] Certification involves the court considering whether the criteria are met. If the court considers that they are met, it issues an order which in effect describes the basis on which the action is to proceed.

4.16 The main question is: should there be a certification requirement? If there is to be such a requirement the questions which arise include:

- When should an application for certification be made and considered by the court?[29]

- Should there be prescribed the information which the court needs in support of an application for certification?[30]

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[23] Paras 4.71-4.95 below. By "conventional litigation" we mean litigation, by way of an action or a petition, conducted under the existing rules (ie the Rules of the Court of Session 1994).
[24] See DP para 7.2.
[25] Or where appropriate, petition. Some alterations in these features of conventional litigation will be made on the implementation of the recommendations in Lord Cullen's Report of his Review of the Business of the Outer House of the Court of Session. (See para 4.76 below.)
[26] The Australian Federal procedure is an example of this approach. See DP para 6.93.
[27] A variant is not to require certification at an early stage of the proceedings but to allow "decertification" (see paras 4.43-4.46 below) at a later stage.
[28] This is the approach adopted in US Federal Rule 23, the Quebec Code of Civil Procedure, the Ontario Act and the British Columbia Act (para 3.6 above).
[29] Paras 4.20-4.22 below.

- What is the appropriate procedure?[31]

- What matters should be covered in the court's certification order?[32]

4.17 Whether or not there is a certification requirement, should the court be entitled to decertify?[33]

We consider later what the criteria should be for certification or decertification.[34]

4.18 *Should there be a certification requirement?*[35] The arguments for and against having a certification requirement were discussed in the Discussion Paper. The arguments in favour of certification include: shielding the defender from an unreasonable burden of complex and costly litigation; protecting the interests of absent class members;[36] and the fact that most class action procedures in other jurisdictions control in this manner the raising of such actions. The arguments against certification include: it is unnecessary, particularly if the procedure has an opt-in arrangement;[37] and the same matters can be considered, but at a more appropriate stage in the proceedings, by an application for decertification. Respondents thought that certification was necessary. As we said in the Discussion Paper, we consider that later decertification is not a satisfactory alternative to certification at the earliest convenient stage. We conclude that there should be a certification requirement.

4.19 *Our recommendation*. We accordingly recommend:

> **4. There should be a requirement that an order[38] be obtained certifying that the court is satisfied that the action or petition meets the prescribed criteria[39] and may proceed under the procedure for group proceedings.**
>
> Act of Sederunt, Rules 43A.1(2), and 2

4.20 *At what stage in the case should an application for certification be made?* We discussed[40] whether the application for certification should be made before or after the commencement of the proceedings. Our provisional conclusion was that the application should be made after the case is raised. We saw no significant advantage, and some disadvantages, in applying before the raising of the case.

4.21 *The views of respondents*. Respondents appear to be content with what we proposed. One respondent, the Faculty of Advocates, disagreed. The Faculty argued that it would be advantageous to the representative pursuer, the defender and the other class members to know as soon as possible whether there are to be such proceedings and whether the class members should be raising separate proceedings. (The Faculty acknowledged that prior

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[30] Para 4.22 below.
[31] Para 4.24 below.
[32] Para 4.26 below.
[33] As in the Discussion Paper (DP p 173 fn 3) we use this shorthand expression to mean the process of removing certification and ordering that an action is not to continue as a class action.
[34] Paras 4.28-4.39 below.
[35] DP paras 7.5-7.10; Proposition 5.
[36] As in the DP in this Report we use the term "absent class members" or "absent parties" to refer to those members of the group or class, other than the representative party, who are included in the proceedings because they have opted-in (or not opted-out).
[37] As we recommend. See paras 4.47 to 4.55 below.
[38] We refer to this order as the "certification order".
[39] The criteria which we recommend are given in Recommendation 9 (para 4.37) below.
[40] DP paras 7.13-7.15; Proposition 6.

certification might present difficulties if there were time pressures such as the imminent expiry of a limitation period.)

4.22 *Our recommendation*. We remain of the view that certification should be applied for after the proceedings have been raised. Accordingly our recommendation is:

> **5. The application for a certification order should be made (a) after, and not before, proceedings have been raised and (b) at the earliest appropriate stage in the proceedings.**
>
> Act of Sederunt, Rule 43A.2 (2) and (3)

4.23 *Should the Act of Sederunt prescribe the information which the court requires in support of an application for certification?* The applicant[41] will be seeking to persuade the court that the prescribed criteria for certification are met. It should therefore be readily apparent what matters need to be covered in the applicant's written and oral submissions.[42] Accordingly we do not regard it as necessary for these matters to be prescribed in the Act of Sederunt.

4.24 *Procedure in connection with the application for certification*. We consider that the application for certification should be made as soon as reasonably possible after the lodging of defences to the action (or answers to the petition). It would be helpful for there to be a minute identifying the class and the questions of law or fact common to the class and specifying why it is considered that the criteria for certification are satisfied. The defender would be entitled to lodge answers in reply to the motion. It would be necessary that all relevant documents in the possession and control of either the representative party or the defender should be lodged in court.[43] The judge would reach his decision after hearing parties on the minute and the defences (or the answers).

4.25 *Our recommendations*. Accordingly, we recommend:

> **6. The representative party should apply for a certification order within 14 days after the date on which defences to the action (or answers to the petition, as the case may be) have been lodged.**
>
> Act of Sederunt, Rule 43A.2(2) and (3)

> **7. The representative party should lodge with the application all relevant documents; if he founds on a document not available to him he should provide information about the person who possesses, or who has control over, the document. A similar obligation should be imposed on the defender.**
>
> Act of Sederunt, Rule 43A.2(4),(5),(6) and (7)

4.26 *Content of certification order*.[44] We suggested that the certification order might describe the class or group, the nature of the claim and the questions of fact or law which are common to the class and, as in other jurisdictions[45], that the order should appoint the applicant as representative pursuer (or petitioner). The order would also narrate the period

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[41] We refer to the pursuer, or petitioner, who seeks and obtains a certification order as the "representative party".
[42] We assume that it is likely that applications will be opposed by defenders and that the court will consider a hearing necessary.
[43] Compare the requirements in Judicial Review Procedure (R.C.S. r 58.6(2)).
[44] DP para 7.16; Proposition 7.
[45] See eg Ontario Act s 2(2).

of time within which persons who were within the description of the group would be required to opt-in[46] or opt-out.

4.27 *Our recommendation*. We recommend:

> **8. The certification order should:**
>
> **(a) describe the class or group of claimants on whose behalf the action or petition is brought, the question or questions of law or fact which are common to the class, the remedy sought, and any counter-claim made;**
>
> **(b) appoint the applicant as representative party (pursuer or petitioner, as the case may be); and**
>
> **(c) stipulate the arrangements in accordance with which a member of the group may signify that he or she wishes to participate in the proceedings as a member of the group.**
>
> Act of Sederunt, Rule 43A.4

**Criteria for certification**[47]

4.28 *Introduction*. The criteria on which an action may qualify as a class or group action constitute one of the most important and distinctive feature of rules regulating a class action procedure.[48] These conditions are the prerequisites for an action to be maintained as a class action.[49]

4.29 *Background*. From our discussion of class actions in other jurisdictions[50] we noted[51] that the criteria for certification include the following:

(i) the existence of a particular number, or a large number, of potential class members ("numerosity");

(ii) the fact that other procedures are unavailable or impracticable;

(iii) a class procedure would be preferable or superior, on grounds of efficiency, to any other procedure;

(iv) there exists an identifiable class of claimants;

(v) there are one or more questions of fact or law common to the class;

(vi) the facts averred seem to justify the remedy or remedies sought; and

(vii) the proposed representative party is a satisfactory person to act on behalf of the class.

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[46] As we recommend later, see para 4.55 below.
[47] DP paras 7.18-7.26; Propositions 9, 10 and 11.
[48] Another is whether the scheme requires opt-in or opt-out. See paras 4.47-4.55 below.
[49] To adopt the wording of US Federal Rule 23.
[50] See DP Part 6 and paras 3.4-3.12 above.
[51] DP para 7.18.

These criteria can be treated in four groups:

(a) general suitability: criteria (i), (ii) and (iii);

(b) "commonality" (the existence of a core of issues which the class members wish to bring before the court): criteria (iv) and (v);

(c) a favourable preliminary view of the merits: criterion (vi)[52];

(d) a satisfactory representative party: criterion (vii).

4.30 *The matters on which we sought views*. Our provisional view[53] was that the criteria for certification should be:

(a) that there are so many potential pursuers that it would be impracticable for all of them to sue together in a single conventional action;

(b) that the potential pursuers are an identifiable class whose claims give rise to similar or common issues of fact or law;

(c) that a class action is preferable or superior to any other available procedure for the fair and efficient determination of the similar or common issues; and

(d) that the representative pursuer will fairly and adequately protect the interests of the class in relation to those issues which are common to the class.

We also asked two related questions which we consider later. First, should there be a further criterion that the legal advisers of the representative pursuer will fairly and adequately protect the interests of the class?[54] Second, should the court have a discretion to decline to grant certification even if it considers that the criteria are satisfied?[55]

4.31 *General suitability and an identifiable group raising claims with a common basis*. Respondents agreed with our view that a court considering whether to grant certification should assess the general suitability of the intended litigation for the new procedure but the court should not be required to undertake a preliminary assessment of the merits of the applicant's proposed case. It is clearly an essential requirement that there should be an identifiable group whose members raise claims with a common basis. The group might for example consist of all those who have purchased a particular model of motor car or who have suffered personal injuries arising from a single event.[56] A related requirement is "commonality": the existence of questions of fact or law common to the identifiable class of persons. It is implied that such common questions will "predominate over any questions affecting only individual members" but we see no need to follow US Federal Rule 23(b)(3) by making such predominancy an express requirement.[57] We confirm our provisional view that a criterion for certification should be that the potential pursuers (or petitioners) are an identifiable group whose claims give rise to common or similar issues of fact or law.

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[52] DP paras 7.22 and 7.23.
[53] DP para 7.26; Proposition 9.
[54] DP para 7.26; Proposition 10. See paras 4.38-4.39 below.
[55] DP para 7.26; Proposition 11. See paras 4.40-4.46 below.
[56] Ie a sudden mass disaster. For our discussion of the types and characteristics of multi-party actions see paras 2.4 to 2.8 above.
[57] Contrary to the views of one respondent (Miss Marsali Murray) who considered that common issues of fact (only; not fact and law) must predominate both in number and significance over individual issues.

4.32 *Numerosity*. Respondents agreed with our view[58] that the group of potential pursuers (or petitioners) need not consist of a specified number of litigants. The precise number of the litigants is not necessarily directly related to the complexity of the litigation and whether it deserves a special procedure. However numerosity is one of the matters to be taken into account in considering whether conventional procedures - such as the conjunction of actions or the selection of a test case - would be inappropriate or impracticable. Accordingly we confirm our provisional view that in deciding whether to grant certification the court should be required to consider whether there are so many potential pursuers (or petitioners) that it would be impracticable for all of them to sue together in a single conventional action.

4.33 *A preferable procedure*. One of the reasons for instituting a group action is that for certain cases it is likely to be a better means of handling the cases than other available procedures. We consider it necessary to make clear that a class action should be resorted to only where it is likely to be the most satisfactory method of adjudication. We think that this should be described as one which is "preferable"[59] or "to be preferred" to any other available procedure. It is desirable to indicate also the nature of the aim of the procedure. One formula is that the procedure will provide "an efficient and effective means of dealing with the claims of group members".[60] We prefer the wording: "for the fair, economic and expeditious determination" of the common issues.[61] Accordingly a further criterion for certification should be that the adoption of a group proceedings procedure is preferable to any other available procedure for the fair, economic and expeditious determination of the similar or common issues.[62]

4.34 *A satisfactory representative party*. The representative party takes the action forward on behalf of all the group members: he is looking after his personal interests and the similar interests of the other members of the group.[63] A class or group action is likely to be complex. The judgment will bind not only the representative pursuer but also the members of the group on whose behalf he sues.[64] The quality of the representative party matters therefore both to the court and to the absent class members.

4.35 The relationship between the representative party in a group proceeding and the other group members would be treated by law as fiduciary in character, at least in relation to the money (or other property) recovered in the group proceedings for which he has to account to the other group members. An agent collecting a payment due to his principal is under a fiduciary obligation to account to the principal for the money.[65] Likewise a joint venturer is liable to account to the other joint venturers.[66] The representative's position would be that of an agent, or analogous to that of an agent or joint venturer, acting for the other group members. A solicitor is also under a fiduciary obligation to account to his

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[58] DP para 7.20.
[59] This is the term which is used in the Ontario Act s 5(1)(d).
[60] In the Australian Act s 33N(1)(c).
[61] Adopting the words of Rule 1 in the draft Rules provided in the Report the Working Party of the [English] Law Society; see para 4.79 below.
[62] Ie the "certified questions". See our proposed Rule 43A.4(a)(ii).
[63] It is suggested in the Dundee University Research Report (para 4.25) that group members should enter into an agreement regulating these relationships and that a style of constitution for solicitor's groups would be helpful.
[64] We mentioned in the DP (page 185 fn 3) that in actions where there are both common issues and issues special to individual class members the judgment will bind only on common issues. See our Rule 43A.9.
[65] See eg Gloag, *Contract* (2d edn;1929) pp 520 - 524; *Stair Memorial Encyclopaedia* vol 1 (1987) sv "Agency" para 634; *Style Financial Services Ltd v Bank of Scotland* 1996 SLT 421.
[66] *Huisman v Soepboer* 1994 SLT 682(OH).

client.[67] If the representative were to gain a personal advantage by virtue of his fiduciary position, the money recovered in the group proceedings would be subject to a constructive trust.[68] It would be excluded from the representative's sequestration in bankruptcy and from the diligence of his creditors. There would be additional safeguards for the other group members.[69]

4.36 It is important to ensure that the representative party "will fairly and adequately protect the interests of the class".[70] The requirement of "fairly" promoting the interests of the class or group implies that the person concerned should be independent of the defenders, that there should be no apparent conflict of interest with other group members and that one member of the group is not likely to be favoured at the expense of another. The requirement that the representative party should protect the interests of other class members "adequately" implies that he (or she) has the financial resources likely to be necessary to support the litigation and the determination to pursue the litigation to a conclusion. However, the duty of the representative party is to protect or represent the class interests only in relation to those issues which are common to the class as a whole. (Any issues special to individual members of the class will be litigated separately after the common issues have been decided, and each member would be responsible for the conduct of his own case on such issues.) Accordingly the final criterion for certification should be that the proposed representative party, having regard in particular to his financial resources, will fairly and adequately represent the interests of the group in relation to those issues which are common to the group. (We prefer to refer to the representative party as "representing" rather than promoting or protecting the interests of the group.)

4.37 *Our recommendation.* We accordingly recommend:

**9.(1) In considering whether to grant a certification order the criteria with regard to which the court is to be satisfied should be:**

**(a) that the applicant is one of a group of persons whose claims have a common basis in that they give rise to common or similar issues of fact or law;**

**(b) that the adoption of the group proceedings procedure, which we recommend, is preferable to any other available procedure for the fair, economic and expeditious determination of the similar or common issues; and**

**(c) that the applicant is an appropriate person to be appointed as representative party, having regard in particular to his financial resources, and it can be expected that he will fairly and adequately**

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[67] Gloag, *Contract* (2d edn;1929) pp 524 - 526; *Stair Memorial Encyclopaedia* vol 1 (1987) sv "Agency" para 613; *Brown v Inland Revenue* 1964 SC (HL) 180; *Law Society of Scotland v McKinnie* 1993 SLT 238; 1991 SCLR 850; *Law Society of Scotland v McKinnie (No 2)* 1993 SLT 880.

[68] W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (2d edn, 1995) para 6-61.

[69] eg (1) the representative would be bound to keep the money in a separate bank account. But if he mixed it with his own funds, or bought other property with it, or disbursed it to others, the group members would be entitled to trace it into the mixed fund or substituted property, or into the hands of a donee or recipient in bad faith. (2) The representative would have to account for and pay over any secret profits made with the money. (3) His obligation to account would be imprescriptible: Prescription and Limitation (Scotland) Act 1973, Sch 3, paras (e),(f). (4) If he unwarrantably retained the money, he could be held liable in compound interest or interest at the highest legal rate: *Roxburgh Dinardo & Partners' J F v Dinardo* 1993 SLT 16; *Stair Memorial Encyclopaedia* vol 12, para 1027.

[70] US Federal Rule 23(a)(4).

**represent the interests of the group in relation to those issues which are common to the group.**

**(2) In deciding whether it is satisfied that the group proceedings procedure should be adopted (in accordance with the criterion mentioned in Recommendation 9(1)(b) above) the court should have regard to whether the members of the group are so numerous that it would be impracticable for them to sue together in a single conventional action.**

Act of Sederunt, Rule 43A.3.

4.38 *Court to enquire into the adequacy of representative party's legal advisers?* We sought views on whether the court should be required to consider the adequacy of the representative pursuer's legal advisers, whether the procedure was to be "opt-out" or "opt-in".[71] We noted that a formal examination of the fitness of a lawyer to conduct a particular litigation would be an unfamiliar duty for a Scottish court. Further, under our recommended opt in procedure[72] the representative pursuer appears on his own behalf and on behalf of those members of the class who have voluntarily and expressly associated themselves with the group by signifying that they consent to be bound by the judgment. Those who have opted in may be assumed to have satisfied themselves of the fairness and competence of the representative pursuer's legal advisers. Our respondents (with one exception) did not consider that such a further criterion was necessary.

4.39 *Our recommendation*. Accordingly we recommend:

**10. It should not be a criterion for certification that the court should satisfy itself as to the adequacy of the representative party's legal advisers.**

**Court discretion to refuse certification**

4.40 *Can the court withhold certification?* We asked[73] whether the court should have a discretion to decline to grant certification even if the criteria for certification are satisfied.

4.41 *Respondents' views*. Those respondents who gave us their views on this matter thought that such a discretion was desirable. One respondent commented that flexibility demanded such a power especially when experience of the new procedure is being developed.

4.42 *Our concluded view and recommendation*. On reconsideration, we think that it is inherently unsatisfactory that although an applicant may satisfy the court, the court is able (without assigning any reason) to decline to certify. The criteria should be drafted in a manner which directs the court's attention to all relevant matters, without the need to rely on an unspecific residual discretion to withhold certification. We accordingly recommend:

**11. The court should not have a discretion to decline to grant certification even if it is satisfied that the criteria are met.**

[71] Proposition 10.
[72] Recommendation 13, paras 4.47-4.55 below.
[73] Proposition 11.

**Revocation of certification (Decertification)**[74]

4.43 *What can the court do if the criteria are no longer met, after certification has been granted?* We suggested in the Discussion Paper that it is possible that a case which has been certified as suitable for the procedure may subsequently cease to satisfy one or more of the criteria. It may therefore be necessary for the court to be able to order that a case be decertified as being no longer appropriate for the procedure.

4.44 *Respondents' views*. Those respondents who commented on this matter agreed. One respondent[75] commented that the certification of an action as a class action is perceived as a means of facilitating the pursuit of remedies by parties through the courts and should not be an irreversible process if, in the course of proceedings, it becomes apparent that the classification as a class action is inappropriate.

4.45 *Our concluded view*. We confirm our provisional conclusion that this discretion should be conferred on the court. We think the discretion should be exercisable either on the motion of a party or on the court's own initiative.[76]

4.46 *Our recommendation*. The proposition in the Discussion Paper is confirmed and we recommend:

> **12. At any time after a certification order has been granted the court should be entitled to order that the action should no longer proceed as a class action because the criteria for certification, or any of them, are no longer satisfied.**
>
> Act of Sederunt, Rule 43A.7.

**Group membership: opting-out or opting-in**[77]

4.47 *Introduction*. The main perceived justification for a class or group action procedure is that it readily[78] enables a binding determination to be obtained on issues common to the members of a group. But how is group membership determined? Is it proper that a person's rights may be determined without his express consent to participate in the litigation? Do the arguments in favour of aggregation in a class action - such as access to justice and judicial economy and efficiency - outweigh the absence of an express mandate from each of the group members?

4.48 This has been described as "one of the most controversial issues in the design of a class action procedure".[79] It involves a choice between an opt-out scheme or an opt-in scheme. This choice requires a view to be taken on the relative importance of (a) the advantages of aggregating claims in a single litigation and (b) the freedom of the individual class member to decide whether he wishes to vindicate his own claim and if so, in the way he wishes.

4.49 *An opt-out scheme*. Under an opt-out scheme, a claimant will automatically be included in the group. The arguments in favour of an opt-out scheme include:

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[74] DP para 7.17; Proposition 8.
[75] The Faculty of Advocates.
[76] After, as appropriate, hearing parties.
[77] DP paras 7.27-7.31; Proposition 12. For discussions in other jurisdictions see particularly: OLRC Report, 1982, chap 12, Opting out and opting in; and ALRC Report, 1988, Part 4, Group membership.
[78] Ie with the minimum of cost, delay and trouble to group members and the defenders.
[79] OLRC Report p 467, quoted in DP para 7.27.

- it ensures a single decision on all the issues on which the members of the group have the same interest;

- costs are reduced and efficiency increased for all concerned;

- the defender is likely not to have to deal with any claims other than those made in this action;

- it contributes to access to justice ie it enhances "access to legal remedies for those who are disadvantaged either socially, intellectually or psychologically, and who would be unable for one reason or another to take the positive step of including themselves in the proceedings"[80]; and

- it provides a remedy in those cases where a claim is "individually non-recoverable".[81]

The arguments against an opt-out scheme include:

- it is objectionable that someone can put himself forward and pursue an action on behalf of others without an express mandate;

- actions may be raised by busy-bodies, encouraged by unprincipled lawyer entrepreneurs[82];

- those who are absent class members may know about the litigation too late to opt-out; and

- it may be unfair to defenders by creating an unmanageably large group in which the members are not identified by name and it is very difficult to undertake negotiations for a settlement.

4.50 *An opt-in scheme*. Under an opt-in scheme a person must take some prescribed step within a prescribed period before he is a member of group and bound by the result of the litigation. The arguments in favour include:

- it preserves the liberty of the individual to choose whether to bring an action;

- a person who desires not to litigate should not find himself willy-nilly "roped in" to a class action[83];

- it reduces the possibility of the litigation becoming unmanageable.

The arguments against an opt-in scheme include:

- the group procedure may achieve little more than multi-party litigation under existing Scottish court procedures;

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[80] ALRC Report para 107.
[81] See para 3.19 fn 45 above.
[82] Particularly if contingency fees are to be permissible in Scotland, allowing fees (and the lawyers' profit) to be directly related to the amount of any monetary award made by the court.
[83] He should be free to decide that he cannot tolerate the anxiety and inconvenience which litigation would involve (DP para 2.27).

- the need to opt in is an unnecessary barrier to participation in the litigation;

- it is undesirable in principle since it does not sufficiently promote necessary access to justice; and

- it may be unworkable in practice since someone may not learn, until too late, of his right to opt-in.[84]

4.51 *Our provisional view*. We said in the Discussion Paper[85] that the primary consideration appeared to us to be the preservation of the liberty of the individual to participate in litigation only if he or she wishes to do so: a person should not be required to dissociate himself or herself from a litigation which he has done little or nothing to promote. Litigation, as a means of resolving a dispute, should be undertaken only as a last resort, after mature consideration of the advantages and disadvantages of doing so. Our preference accordingly was for an opt-in procedure.[86]

4.52 *Respondents' views in favour of an opt-in scheme*. The majority of our respondents agreed with our provisional view. Reasons given included the following. It is, in principle, unattractive that the citizen should have placed on him the burden of dissociating himself from a litigation brought by another without his prior approval or else be bound by the results - whatever they may be - of that litigation. It is also unattractive that the court should effectively foster disputes by enforcing claims against the defending party at the instance of claimants who are entirely passive and may have no desire to prosecute any claim. If a claim is to be advanced on behalf of a class member the member should be required to take at least the minimal positive action of completing some administrative step before being admitted to the possible benefits and liabilities of the litigation. It was also thought that the "opting-out" approach generally presented much greater practical problems.[87] It was also argued that because the decision made is binding on the class this is a matter which must be made clear to the litigant. The litigant who opts-in thereby signifies that he or she understands the consequences of doing so.

4.53 *Respondents' views in favour of an opt-out scheme*. A minority of respondents favoured an opt-out scheme. The arguments were put, in particular, by the Scottish Consumer Council and Mr Cowan Ervine. The Scottish Consumer Council said:

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[84] Particularly if the amount of money available to meet claims was exhausted by the award in the class action or where his own claim was so small that a separate action would be unduly expensive relative to the amount likely to be recovered.

[85] Para 7.31.

[86] Proposition 12.

[87] The Faculty of Advocates instanced the following. (a) The definition of the class would inevitably require greater precision and clarity of language otherwise individuals may be in doubt as to whether they are included. (b) Opting-out presupposes knowledge of the proceedings and therefore calls for extensive (and expensive) advertisement and service on class members who may sometimes be difficult to identify and locate. (c) Opting-out presents the difficult issue of laying down the stage or stages up to which a class member may be permitted to "opt-out". (d) There are difficulties posed in relation to prescription and limitation of actions in connection with an opt-out scheme. An opt-in scheme would not appear to need departure from the ordinary rules on time bar and prescription. (Cf Damages (Scotland) Act 1976, s 5; *Marshall v Black* 1981 SLT 228.) (e) An opt-out system appears to present particular problems if it is desired to settle or abandon the action. The agreement of all the class members cannot be obtained and the court would therefore be called upon to perform the difficult, if not invidious, task of approving settlement or abandonment which in turn means that the representative pursuer must disclose the perceived strength and weaknesses of his case to the court in advance of any proof which may result if judicial approval is withheld. (Conversely, in an "opt-in" regime, the claimants are known and identified and their authority can be obtained either specifically in respect of a particular settlement offer or *ab ante* by a general authority to the representative pursuer to settle at his discretion). The Faculty of Advocates therefore expressed a preference for an "opt-in" procedure "whereby the class member effectively constitutes the representative pursuer as his agent, but with wide authority as to the conduct of the litigation."

"While acknowledging the force of the argument that participation in litigation should normally be a conscious decision we consider that the circumstances of class actions dictate that a different approach be taken. As we said in our report, ***Class Actions in the Scottish Courts***, "... if opting-in is made a pre-requisite for the class action then the whole procedure becomes of little more worth than a means of obtaining advertisement for potential litigants. If the class action is only available to people who choose to sue together very much of its purpose is lost" (p 29). The point of advocating class actions is to improve access to justice as well as improving the efficiency of the judicial process. Those objectives are better served by adopting the opt-out procedure.

We believe that the potential disadvantages of the opt-out approach have been over-stated. As with other aspects of class actions, the potential harm that has been predicted in some of the literature does not seem to be evidenced in any of the jurisdictions which have adopted the opt-out procedure. It should also be borne in mind that in those cases where most is at stake for the individual such as personal injury claims arising from mass disasters the claimant is least likely to be unaware of the existence of a class action and most likely to give the question of opting-out serious consideration. Conversely, in those where there is greater likelihood of becoming a member of a class without being aware of the fact, the amounts at stake and the possibility of individual action are more likely to be less significant. We have in mind here class actions arising from consumer frauds.

We cannot agree with the [Commission's] provisional view that an opt-in scheme is preferable or that the primary consideration is the preservation of the liberty of the individual to participate in litigation only if he or she wishes to do so. The opt-out scheme does not force people to participate in litigation if they do not wish to do so; and it is [our] view that the most important consideration about the availability of a class actions procedure is the removal of unnecessary barriers to litigation, and the overall improvement of access to justice.

It should also be borne in mind that there would be safeguards. The certification order would require adequate notice to be given to members of the class explaining how they might opt-out. In addition, we would advocate that even after judgment had been given in the action it should still be open to a member of the class to apply to be excluded."

4.54 *Our concluded view*. This is an important issue. We have therefore repeated here the arguments for and against requiring the claimant expressly to take some prescribed step to elect to be a member of the group and have narrated the views of respondents. Having considered carefully the views of respondents - the majority of whom agreed with our provisional view - we remain of the view that an opt-in scheme is preferable for the reasons explained above.[88] Moreover a class or group action procedure is potentially very burdensome, particularly where the group is likely to be large. The burdensome nature of the litigation may be exacerbated by the presence of weak claims which might not otherwise have been made.[89] It is of course not possible to estimate how many cases are likely to be raised

[88] See particularly paras 4.50 and 4.51.

[89] Some indication of the large number of claims, and the proportion of weak claims, which may be made in multi-party litigation is given in the [English] Legal Aid Board's Report (1994) on the *Issues arising ... from Multi-Party Actions*. The Board notes that in the Benzodiazepine litigation: 17,000 applications for legal aid were received; 13,000 legal aid certificates were issued; and "proceedings were only issued in just over 5,000 cases of which, subsequently and on further examination, many were found to have little or no prospect of success." (Report para 2.26). The Board lists the factors whaich appear to contribute to the raising of "weak or hopeless cases" (Report para 2.27). These include: publicity; a "bandwagon effect" with claimants and their legal advisers losing sight of the viability of individual cases; solicitors' fear of professional negligence claims; and the medical nature of these cases in which it

under the group proceedings procedure which we recommend[90] or to anticipate how successful the procedure may be. It seems to us prudent that the new procedure, as initially introduced, should seek to avoid problems which may render the litigation unmanageable. Accordingly we remain of the view that claimants who wish to join the representative party in pursuing the proceedings should be required to elect to join the group (as described in the certification order).

4.55 *Our recommendation*. We confirm our provisional view and recommend:

> **13. Persons, other than the representative party, who wish to be group members, should be required, within a prescribed period and in a prescribed manner, to elect to be members of the group.**

Act of Sederunt, Rule 43A.4(c)

4.56 *Provision for persons who join the group late or leave early*. There may be circumstances in which a person wishes, after the expiry of the election period, to elect to join the group. For example, a person may not have seen the notice of the certification order. It would be wrong not to enable such a person to join the group late. Similarly, a person who has opted in may later wish to dissociate himself from the group proceedings. For example, in a personal injuries case a group member's medical condition may alter and that person may consider that the certified questions are no longer applicable to his or her case. Hence the court needs to have discretion - exercisable only on cause shown - to allow persons to join the group after the election period or to leave it before the conclusion of the proceedings. (It would be open to the court to find such an "early leaver" liable for payment of expenses.[91])

4.57 *Our recommendation*. We accordingly recommend:

> **14. The court should be entitled, on cause shown, to allow persons (a) to join the group after the expiry of the election period and (b) to leave the group before the conclusion of the proceedings**.

Act of Sederunt, Rule 43A.10

**Notices to group members**[92]

4.58 *Introduction*. It is crucial to the effective operation of a class or group action procedure that potential members of the group know of the existence of the proceedings so that, as we have recommended,[93] they may be able to elect to join the group of pursuers or petitioners. Notices to group members may also be necessary at later stages of the litigation. Notices should be effective but, ideally, their cost should not be disproportionate either to the other costs of the litigation or to the benefits of a successful result so that the expense of the notice may even discourage the raising or continuation of the litigation.

4.59 *Our provisional view*. We suggested in the Discussion Paper[94] that if a new procedure was introduced by Act of Parliament, matters of procedural detail might be dealt with in

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cannot be assumed that a claimant's medical condition is solely attributable to the use of a particular drug or medical product.

[90] See further paras 4.159-4.164 below.

[91] In exercise of the power in our draft Rule 13 which applies to persons who have elected to be members of the group.

[92] DP paras 7.32-7.37; Proposition 13.

[93] Recommendation 13 above.

[94] DP para 7.36.

court rules made by the Court of Session. We thought that a desirable discretion might be a power to dispense with notice where there is little that an absent group member might competently do; for example where the remedy sought does not include damages and an interdict was sought. Our provisional view[95] (which assumed that primary legislation would be needed to implement our recommendations) was that: any legislation implementing a class action procedure should confer on the Court of Session power to prescribe by rules of court when, by what means and in what terms notice should be given to class members.

4.60 *Respondents' views*. Those respondents who commented agreed in general with our provisional view. The Law Society of Scotland was concerned that solicitors "might raise proceedings without proper enquiry simply to be first in the field" with an action. The Law Society's Working Party therefore suggested that notice should be given both before and after the raising of the action. The notice before the action was raised would advise prospective claimants to contact the Law Society to be given the names of solicitors accredited by the Society to handle multi-party actions. We do not consider that such a two stage notice procedure is necessary.[96] The Society's regular advertisement in the Journal of the Law Society of Scotland of multiple claims which are being made (and inviting solicitors to work together on behalf of their clients) should serve to reduce the apparent need for a two stage formal notice procedure.

4.61 *Matters to be dealt with in the rules*. A number of questions of detail arises in connection with the provisions about notices to be included in the procedural rules:

- On what occasions, and of what matters, should notice be given?
- What should be the form or manner of the notice and what should it say?
- How should the cost of the notice be paid for?

4.62 *Notice of certification*. In all cases it will be necessary for the court to consider whether notice should be given to all persons eligible to elect to join the group of the making of the certification order and of its provisions.[97] Such a notice will be particularly desirable where the benefits of successful litigation will be available only if persons elect to join the group eg where damages are sought.

4.63 *Notices on other occasions*. In addition it seems desirable that the court should have a general discretionary power to order that notices be given. Occasions when this power might be exercised include[98] when the court decides that group members should be given notice that common issues have been decided in favour of the group and individual group members then need to take up (either in the same litigation or separately) the resolution of individual issues.

4.64 *The content of the notice of certification*. The purpose of the notice informing possible group members that the court has granted certification is to enable each of them to reach an informed decision about whether or not to elect to become a group member. We consider that the information which should be provided should include:

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[95] Proposition 13.
[96] We express no view on the Law Society's suggested accreditation of multi-party action solicitors.
[97] We have recommended (para 4.27 above) that the certification order should (a) describe what the case deals with (b) appoint the representative party and (c) lay down the arrangements under which group members may elect to opt in.
[98] See DP para 7.33.

- the salient features of the litigation (the group, the common questions at issue, the claims made and the remedies sought, and any counter claims);

- the identity of the representative pursuer or petitioner appointed by the court;

- the arrangements to be followed if a person wishes to elect to opt-in;

- the consequences of opting-in (and in particular that group members will be bound by any court orders made and that such an order may include a finding that the group is liable for the expenses of the proceedings and an apportionment of these expenses among group members); and

- the identity of a person, either the clerk of court or the solicitor for the representative party, from whom further information may be obtained.

4.65 *Provision of further information*. Those who receive the notice of certification may not be aware that the case has been raised and will not necessarily have legal advice readily available. They will have a relatively short period of time in which to decide whether to join the group; that decision may have significant financial and other consequences for them. We therefore consider that the notice should indicate that further information about the case can be obtained either from the solicitor for the representative party or from the clerk of court. By clerk of court we mean the clerk who will have framed the court's interlocutor granting certification, rather than a clerk in the General Department of the Court of Session.[99] We think that the clerk of court is the most appropriate member of the court staff to provide information[100] both about the procedure in general and about the particular case. We appreciate that such a role is unusual in the Court of Session[101] but consider it to be necessary to enable the election procedure to operate effectively.

4.66 *The procedure for giving notice of certification*. The circumstances of cases will, of course, differ. We consider that the court should have discretion to lay down in each case the appropriate procedure for giving notice of certification. That discretion should include the power to dispense altogether with the giving of a notice; for example where damages are not sought. The notice should be given by the representative party. The means of the giving of the notice - personally, by post or by a television or radio broadcast or any combination of these means - should be entirely at the court's discretion.[102]

4.67 *Our recommendations*. Our recommendations with regard to the notice of a certification order are:

**15. (1) Notice of the granting of the certification order should be given by the representative pursuer or representative petitioner;**

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[99] In the RCS 1994 Rule 1.3 "clerk of court" is defined as clerk of session (ie depute clerk of session or assistant clerk of session) "acting as such".

[100] He would not be expected to provide advice.

[101] But not in the sheriff court. The Court of Session authorities may prefer that the relevant rule (43A.6(c)) should lay the duty of providing advice on the Deputy Principal Clerk of Session.

[102] In the DP p 195, fn 1 we noted the terms of the Ontario Act, s 17: "(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."

**(2) The notice is to be given in such manner, by such means and within such period after the granting of the certification order as the court may direct;**

**(3) The notice should, unless the court otherwise directs,**

**(a) describe or narrate the content of the certification order including, in particular, the arrangements by which a person included in the order's description of the group may opt-in and elect to be a member of the group;**

**(b) describe briefly the consequences, and in particular the financial consequences, of electing to be a member of the group; and**

**(c) specify a person (either the clerk of court or the solicitor for the representative party) from whom further information about the group proceedings may be obtained; and**

**(4) The court should have discretion to dispense with the giving of notice of certification and to give directions for different notices to be given to different persons or groups of persons.**

Act of Sederunt, Rule 43A.5 and 6

4.68 *Other notices*. As we have already mentioned[103] we think that the court should also have a general discretionary power to order that notices be given to all or some members of the group. Such notices would usually be given by the representative party but we see no need to restrict the court's power to order that notices may be given by whomever seems appropriate, and as and when, seems necessary.

4.69 *Our recommendation*. Our recommendation with regard to notices other than a notice of the making of a certification order[104] is:

**16. The court should have a general power to direct at any time that notice be given of any matter to any member, or all members, of the group.**

Act of Sederunt, Rule 43.A12(2)

4.70 *The cost of giving notice*. As indicated in the Discussion Paper[105] there seems no need to make express provision about the expenses of notification. We would expect these to be treated as outlays in the usual way and it is therefore unnecessary for a provision to be included in the rules for group proceedings.

**Court's power to control the conduct of the proceedings**

4.71 *Introduction*. As we said earlier,[106] the progress of group proceedings after certification by the court and the expiry of the election period will be broadly similar to that

[103] Para 4.63 above.
[104] As to which see the immediately preceding paragraphs.
[105] DP para 7.53.
[106] Para 4.14 above.

of a conventional case. However the complexity of the litigation may produce unusual difficulties and require judicial control and the adoption of case management techniques.[107] The question therefore arises whether the procedural rules for group proceedings need to confer special powers on the judge to make orders (a) controlling the general conduct of the proceedings or (b) regulating particular matters. We consider in the following paragraphs what specific general powers the rules should confer on the judge. We consider later[108] the possible need for rules regulating the following particular matters: a proposal by the representative party that he abandon or settle the proceedings;[109] the appointment of another group member to replace the representative party;[110] the competency of an aggregate monetary award;[111] and, if an aggregate award is competent, whether any unclaimed residue of the aggregate award should be returned to the defenders.[112]

4.72 *What powers might be needed*? A number of questions arise in considering whether the rules need to confer on the judge special powers to control the conduct of the group proceedings. These include:

- if a general power is to be conferred to regulate the proceedings does it need to be accompanied by a statement of the purposes for which the powers should be exercised?

- if powers are to be conferred in terms of the rules for group proceedings should the judge be entitled to exercise them on his own initiative or only on the application of the representative party, the defenders or another group member?

4.73 *Special provisions in class action procedures in other jurisdictions*. We noted in the Discussion Paper[113] that United States procedural rules commonly list the various "appropriate orders" which the court may make in the conduct of class actions.[114] The comment on section 9 of the Uniform Law Commissioners model legislation notes that while the rules governing civil procedure in the courts of the state will normally govern procedure in class actions that section covers certain matters which deserve special consideration. The section provides that the powers conferred are exercisable either on the motion of a party or of the court's own accord. The relevant provision in the Ontario legislation[115] states the purpose for which the power is to be exercised (to ensure the "fair and expeditious determination" of the class proceeding) and allows terms (conditions) to be imposed on parties but does not expressly provide that the court may make an order on its own initiative.

4.74 *Change of attitudes in Britain to court control of litigation*. The traditional role of the judge in conventional litigation in Britain is a relatively passive one.[116] This traditional role is increasingly being questioned both by the provisions inserted in court rules and by reform

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[107] See the views of the Working Party of the [English] Law Society recorded at paras 4.78 and 4.79 below.
[108] Para 4.86 onwards.
[109] DP Propositions 14-17.
[110] DP Proposition 18.
[111] DP Proposition 20. An aggregate or "global sum" award is an award of damages without specifying the amounts awarded in respect of individual group members.
[112] DP Proposition 21.
[113] DP para 7.39.
[114] US Federal Rule 23(d) (DP pp 298-299); New York Rule 907 (DP pp 302-303) and Uniform Law Commissioners model legislation (DP para 7.39).
[115] See DP para 7.40. There is a very similar provision in s 12 of the British Columbia Class Proceedings Act 1995.
[116] DP paras 2.26-2.34; 6.25; and 7.38 (see particularly the quotation from Sheriff Macphail's *Sheriff Court Practice* (1988)).

proposals.[117] Recent developments should be mentioned before considering what special rules may be needed for group proceedings.

4.75 *Court of Session Commercial Actions.* Following the report by the Working Party on Commercial Causes,[118] special rules[119] have been introduced in the Court of Session to govern the conduct of disputes of a business or commercial nature. All proceedings in the Outer House in a commercial action are brought before a judge nominated by the Lord President as a "commercial judge". The rules give that judge wide powers to regulate procedure in commercial actions.[120] The rules also provide the judge "with the sanctions open to him as the means of imposing discipline on parties in pursuit of the aim to achieve speedy determination of commercial actions".[121]

4.76 *Review of Business of Outer House of the Court of Session.*[122] In his recent Report Lord Cullen detailed various features[123] of the existing system which may lead to undue delay and unnecessary expense.[124] Having considered questions such as the stage or stages at which case management should be introduced,[125] Lord Cullen described the system of judicial control by case management which he recommends.[126] The securing of the "wholehearted understanding and co-operation of both branches of the legal profession"[127] is one of the factors which is regarded as essential to the success of case management. The implementation of the Cullen Report can be expected to achieve a considerable advance in the "pro-active" management of cases which is perceived in other jurisdictions as essential for the more efficient conduct of litigation and particularly of heavy, complex or multi-party litigation.[128]

4.77 *Developments in England and Wales.* There has been a similar recognition in England and Wales of the need for greater court control in order to reduce the cost and delay of civil litigation. We have recently noted the following in particular: the High Court Practice Direction issued in January 1995 with regard to case management of civil litigation;[129] Lord

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[117] "I think it is right to say that in England and Wales a momentum is gathering behind the proposition that there should be some measure of court intervention so that the progress of the case should no longer depend only upon the parties to the action and their representatives." Lord Mackay of Clashfern, Lord Chancellor, "The Administration of Civil Justice in Northern Ireland", 1995 Northern Ireland Law Quarterly 273 at 283.

[118] Chaired by Lord Coulsfield; report published in November 1993.

[119] Now RCS ch 47 Commercial Actions.

[120] "Subject to the provisions of this Chapter, the procedure in a commercial action shall be such as the commercial judge shall order or direct." RCS Rule 47.5. See also para 5 of the Practice Note No 12 of 1994. (Parliament House Book p C 2033).

[121] General note in Green's Annotated Rules of the Court of Session on Rule 47.16 (Failure to comply with rule or order of commercial judge.)

[122] Report by Lord Cullen, published in January 1996; the terms of his remit are given in 1995 SLT (News) 178.

[123] Eg no effective sanctions for non-compliance with court rules; delays caused by relatively late amendment; no system for time-tabling actions; and no system for considering the scope of the inquiry.

[124] Cullen Report, paras 3.30-3.37; and paras 6.1 and 6.2.

[125] Cullen Report, paras 6.17-6.25.

[126] Exercised in particular through a case management hearing (after the end of the adjustment period) and a pre-proof review. The compliance of parties with the Rules of Court and the court orders would be monitored; the court would have the power to deal with any non-compliance. (See the recommendations under heading C in the Summary of Recommendations in Chapter 11 in the Cullen Report.)

[127] For our recommendation with regard to the promotion of the new procedure which we recommend see paras 4.165-4.167 below.

[128] The Cullen Report, if implemented, would also render unnecessary further consideration of some of the suggestions of our Working Party with regard to court practices and procedures. See further Annex C to this Report.

[129] [1995] 1 WLR 262. The Practice Direction announced (paragraph 2) that the court would exercise its discretion to limit: (a) discovery; (b) the length of oral submissions; (c) the time allowed for the examination and cross examination of witnesses; (d) the issues on which it wishes to be addressed; (e) reading aloud from documents and authorities. "Failure by practitioners to conduct cases economically will be visited by appropriate orders for costs [expenses]" (para 1).

Woolf's Interim Report to the Lord Chancellor on the civil justice system in England and Wales;[130] and the Report on Group Actions by a Working Party of the Law Society.[131]

4.78 *English Law Society's Report on Group Actions*. The Working Party considered ways of improving the efficiency with which multi-party actions are conducted. The Working Party's approach had four corner-stones.[132] These included the following:

> "(a) Judicial control from the outset is essential. ... [T]he key to getting group actions moving is to inject discipline (procedural and otherwise) into such cases - for the benefit of all involved. A judge is in by far the best position to do that.
>
> (b) Case management techniques could do much to eliminate the time-consuming and expensive "strategic moves" (or inactivity) which all too often bedevil modern litigation: let us see timetables established *and enforced* - lawyers will soon enough confine themselves to essential work when they understand that they will get no extensions of time.[133]
>
> (c) A new rule is needed, not only to create a more practical framework for such cases, but also - and we think this an equally important function - to act as a point of focus for the establishment of a body of best practice in relation to group actions ..."[134]

4.79 The Working Party proposed that a new rule of court should be introduced,[135] including a provision[136] dealing with the directions which the court may give. It is provided that the court "may at the hearing of an application brought under Rule 1 [which sets out the conditions for establishment of a group action] or at any time thereafter makes such directions as to the further conduct of the group action as it considers necessary for the fair, economic and expeditious disposal of the group action."[137]

4.80 *Our provisional view*. We said in the Discussion Paper that it seemed to us to be difficult, in advance of the introduction of a new procedure, to envisage any particular problems which might arise and thus to specify what special powers the judge might require. We thought it helpful to confer a general power to make appropriate orders at any

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[130] "*Access to Justice*"; published in June 1995. A Summary of the main recommendations is given in 1995 NLJ 927-929 and 932. In particular Lord Woolf recommends that there should be a fundamental transfer in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts. The courts must: decide what procedure is suitable for each case; set realistic timetables; and ensure that the procedures and time-tables are complied with.

[131] "*Group actions made easier*", a Report by the [English] Law Society's Civil Litigation Committee, published in October 1995. A summary of the Report is given in the Law Society's Gazette for 22 November 1995, p 16. See also paras 3.13-3.18 above.

[132] *Group actions made easier*, para 8.1.2.

[133] The Working Party commented that "the lack of interest in case management techniques apparent from the Scottish Law Commission's [discussion] paper was ... unfortunate."

[134] The fourth cornerstone is:

> "(d) Practical limitations in areas in which, historically, excesses have generated huge costs, must be imposed wherever appropriate - at the risk of offending traditions and sensibilities alike. This means cutting down the number of lawyers who get involved and are entitled to be paid, the extent of investigation of individual plaintiff claims which the defendant may undertake and for which he may be entitled to recover the cost in due course, and the ambit of discovery undertaken at any given stage of the action by any party."

The terms in which this cornerstone are expressed illustrate the possible difficulty for the court in finding an appropriate approach which while robustly avoiding undue delay and cost is fair to legal advisers and does not unduly abridge their proper presentation of their client's case.

[135] The draft Rule on Group Actions is given in Part 9 of the Working Party's Report.

[136] Draft Rule 4.

[137] The Rule then lists various matters which may be the subject of directions.

stage for the purpose of ensuring that the litigation is conducted fairly and with no avoidable delay,[138] but doubted whether a judge would wish to make such an order without being asked to do so, at least in the early days of the new procedure.[139] Our provisional view was that the judge should have power to make such orders as might be appropriate to ensure that the litigation is conducted fairly, and with no avoidable delay, on the motion of (a) the representative pursuer, (b) another class member or (c) the defenders.

4.81 *Respondents' views*. Those respondents who commented on this matter agreed it was desirable that an express power should be conferred on the judge to make appropriate orders to ensure that the litigation is conducted fairly and expeditiously. One respondent[140] questioned whether another class member should be entitled to make a motion to the court on the conduct of the litigation.[141]

> "First, having elected to have his claim prosecuted on his behalf by the representative pursuer, it is not easy to see why, in a question with the defender, a class member should be given this power to intervene and seek orders against a defender. That would, with respect, be contrary to the purpose of a class action. Questions arising between the representative pursuer and other (discontented) class members are likely to involve issues of tactics and approach and [the] general conduct of the litigation from the point of view of a pursuing party. Those issues are essentially very different from the de quo of the actual action and it seems to [us] that it would be wholly inappropriate that the judge concerned in the class action should have any knowledge of the matters relevant to the quarrel between the representative pursuer and the discontented class members. In [our] view, having joined the coach, the now unhappy passengers must either (i) privately persuade the driver to select a different route or (ii) get off and hire another coach or take a private taxi-hire."

4.82 *Our concluded views*. Multi-party actions are more likely than other litigation to be complicated and protracted. Accordingly powers for the court to intervene to facilitate the progress of litigation are equally, if not more, necessary than they are with regard to conventional litigation. The express conferment of such powers in court procedural rules will also foster the recognition and acceptance by lawyers and their clients that, in the public interest, the court may wish to intervene. We consider that the provision in the rules should be expressed in general terms so as to allow the court - either on its own initiative or on application to it - to make whatever orders or directions are appropriate having regard to the particular circumstances of the individual litigation. We noted earlier the relevant provision in the rules for commercial actions.[142] We consider that there should be a similar provision in the rules for group proceedings.

4.83 It is important to make clear in the rules that the power of the court to regulate proceedings relates not only to the common questions[143] but to any other matters which are relevant to the resolution of the matters in dispute between the defenders and the members of the group. For example, in group proceedings for reparation, the common questions might relate only to the liability of the defenders and, when those questions have been determined, the judge might wish to make orders with regard to the determination of the amount of damages due to each (or some) of the individual members of the group. The legislation in other jurisdictions regulating class or group proceedings sometimes makes

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[138] We expressly preferred "no avoidable delay" to "expeditiously".
[139] We thought that if experience suggests that further powers are necessary these may be conferred by amendment of the Rules by Act of Sederunt.
[140] The Faculty of Advocates.
[141] As we proposed in (b) of Proposition 14.
[142] RCS rule 47.5 quoted in fn 15 to para 4.75.
[143] Ie those matters which are "certified questions" in terms of our recommended Rule 43A.4(a)(ii).

express and detailed provision with regard to the determination of "individual issues".[144] The [English] Law Society's Report notes[145] the view that "in reality there are no "common issues", only individual issues,[146] and that in consequence the majority of individual claims needs to be examined and pursued."[147] We think that detailed provision is not necessary, provided that the court's general power to regulate proceedings extends to such matters.

4.84 We think it would also be helpful, as proposed in the discussion paper,[148] for there to be a rule specifically empowering the judge (either on his own initiative or on the motion of a party) to make orders to ensure that the litigation is conducted fairly and without avoidable delay and in this connection to draw up a time-table within which steps must be taken.[149] Such orders could be sought on the motion of either the representative party or the defenders. On reconsideration we agree with the view of the Faculty of Advocates that an absent group member should not be entitled to intervene in the conduct of the litigation. This would be an undesirable and avoidable complication. Any difference of view within the group should be settled privately without recourse to the court.[150]

4.85 *Our recommendations*. We accordingly recommend:

**17. In group proceedings the judge should have a general power, similar to that conferred on the commercial judge, to regulate procedure as thought fit with regard to both certified questions and any other matters at issue.**

Act of Sederunt, Rule 43A.12(3)

**18. In addition, and without prejudice to that general provision and the judge's general power to control the conduct of litigation, the judge should have power, at his own instance or on the motion of the representative party, or of the defenders (but not of any member of the group), to make such orders (including the drawing up of a time-table specifying periods within which steps must be taken) as may be appropriate to ensure that the group proceedings are conducted fairly and without avoidable delay.**

Act of Sederunt Rule 43A.12(1)

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[144] See for example the British Columbia Class Proceedings Act. Section 27 deals with the determination of individual issues. Subsection (1) provides:

> "(1) When the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under section 32, that are applicable only to certain individual members of the class or subclass, the court may
>
> (a) determine those individual 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 including, without limitation, one or more independent experts, to conduct an inquiry into those individual issues under the Rules of Court and report back to the court, or
>
> (c) with the consent of the parties, direct that those individual issues be determined in any other manner."

[145] *Group actions made easier*, para 6.13.3.

[146] For a counter view see Martyn Day and Sally Moore, "Multi-Party Actions: a plaintiff's view" in *Shaping the Future: new directions for legal services*, Legal Aid Group 1995. Day and Moore comment (pages 189-190): "Defendants oppose the generic issues approach for the simple reason that investigation of individual claims drives up costs. This is a classic defence tactic. The generic issues approach would probably save the defendant's legal costs ... All the different ways of handling [multi-party actions] represent, to a certain extent, a compromise for both parties. The generic issues approach is the only practical answer for the successful resolution of these cases."

[147] The proposed draft Rule on Group Actions, included in that Report, provides for the adoption of a "lead case" ie" an individual action agreed, or ordered, to be tried to assist in the determination of a common issue". (A "common issue" is defined as an issue "substantially common to individual claims.")

[148] Proposition 14.

[149] Compare s 25A of the Adoption (Scotland) Act 1978, which lays a duty on the court to draw up a time-table for resolving questions as to whether agreement to an adoption order etc should be dispensed with.

[150] It is suggested in the Dundee University Research Report (para 4.25) that a "model constitution" should be available for adoption by solicitors' groups.

4.86 We now consider whether particular judicial powers may be necessary. Matters considered are:

- whether abandonment or settlement of the action should be subject to the prior approval of the court;[151]

- the substitution of a new representative party;[152]

- aggregate assessment of monetary awards;[153]

**Abandonment or settlement to be subject to court's approval?**[154]

4.87 *Introduction*. In conventional civil litigation, the pursuer is entitled to abandon or settle[155] the action at any time before the final decree or judgment is pronounced, without obtaining the prior approval of the court.[156] The theory of class action procedure, however, is that the representative party conducts the litigation both on his own behalf and on behalf of all the other members of the class who have opted in. The object of the class action is to determine the rights of all the members of the group (ie those who have opted-in or not opted-out); therefore it is argued that it is wrong for the representative pursuer to be entirely free to abandon or settle the litigation as he wishes.[157]

4.88 *The provisions in other jurisdictions*. We mentioned in the Discussion Paper how this matter is dealt with in other jurisdictions.[158] The procedural rules generally provide that before the action is disposed of, the class members must be given notice of the terms of the proposed arrangement and other relevant information; and the approval of the court must be obtained.

4.89 *Some difficult questions likely to arise*. In the Discussion Paper we instanced[159] some of the difficult questions which were likely to arise in Scotland if the court was required to approve proposed abandonment or settlement. These questions include:

- If a class member objected to the proposed amount of a settlement, how is the court to satisfy itself that it should grant approval?

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[151] Paras 4.87-4.92 below.
[152] Paras 4.93-4.95 below.
[153] Paras 4.96-4.103 below.
[154] DP paras 7.44-7.55; Propositions 15-17 (which are questions inviting the views of consultees rather than provisional conclusions).
[155] The issues raised are broadly similar in connection with both abandonment and settlement.
[156] We set out in paras 7.45 and 7.46 of the DP the court's very limited powers in conventional Scottish civil procedure with regard, respectively, to abandonment and settlement. In particular: a pursuer may abandon his action at any stage (subject to conditions as to the payment of expenses) and the court is not concerned with his reasons for doing so and cannot refuse to allow him to abandon; the court has no formal power or duty to initiate, promote or approve the settlement of actions and parties may settle their differences as they please.
[157] The representative pursuer might wish to abandon the action for reasons with which the other class members did not agree. The defenders might seek to "buy him off" by making an offer designed to have particular attractions for him. It is said that in the absence of some constraint (for example a formal requirement to consult other class members) the representative pursuer could ignore the interests of other class members.
[158] DP para 7.48. We referred to: the US Federal Rule 23; the US Uniform Law Commissioners' Model Legislation; the Quebec Civil Code; the Ontario Act; and the Australian Federal Act. See also the table following para 3.11 above. The procedure recently introduced in British Columbia provides that a class proceeding may be settled, discontinued or abandoned only with the approval of the court and on the terms the court considers appropriate. See Class Proceedings Act 1995 s 35(1). Also the British Columbia court in dismissing a class proceeding or in approving a settlement, discontinuance or abandonment must consider whether notice should be given to the members of the class or sub-class and whether the notice should include: an account of the conduct of the proceedings; a statement of the result of the proceedings; and a description of any plan for distributing any settlement funds (s 35(5)).
[159] DP paras 7.49-7.51.

- What kinds of settlement offer should the defender be entitled to make?

- Would there be a separate offer to each class member or would it be a lump sum offer to the representative pursuer on behalf of the class as a whole? If the latter how would the sum be allocated among the class members?

- What happens if a minority of the class members do not wish to accept the offer?

- What information, relative to proposed abandonment or settlement, would be supplied to the judge?

- Would the judge have to assess both the prospect of success on the merits and the amount of any likely awards, if liability had been established?

- What happens if the judge refuses approval? Are the class members obliged, against their will, to continue the litigation?

4.90 *Our provisional view*. We noted that the rules in other jurisdictions did not attempt to deal with questions of the type which we have mentioned in the preceding paragraph. The points raised may not be dissimilar to those arising in conventional litigation. In principle, it seems difficult to impose a requirement that the courts should approve settlements in group proceedings but not in actions brought under conventional procedure. We accordingly thought that it is preferable to leave it to class members to agree amongst themselves how to manage negotiations with the defenders and the disposal of the action or individual claims by abandonment or settlement. Such arrangements should be devised to suit the particular circumstance of each case.

4.91 *Respondents' views*. A majority of those respondents who commented on these matters considered that special rules were necessary to ensure that abandonment or settlement required the prior approval of the court. It was suggested that the court should take into account the views of other class members. A minority of respondents argued that settlement or abandonment raises complex and important issues, and thought that nothing should hinder settlement and that there was no need to depart from current practice.[160]

4.92 *Our conclusion and recommendation*. We have considered these matters carefully. It seems anomalous to impose on the judge a special and onerous task which he does not have in conventional litigation. Problems are likely to arise because the judge may not have adequate information to assess whether the proposed abandonment or settlement is reasonable. We appreciate the possibility that some or all of the absent group members may be prejudiced by abandonment or settlement. However, members of the group gain advantages from using the procedure which they would not enjoy if they sued individually in a conventional action. They should allow for corresponding disadvantages inherent in group proceedings. The potential disadvantages underline the importance of ensuring the competence of the class representative and his legal advisers. Accordingly we recommend:

**19. The rules for the new procedure should (a) not require the court to consider proposals for the abandonment or settlement of a class action and (b) not make abandonment or settlement competent only with the court's prior approval.**

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[160] For the views of the Faculty of Advocates see (e) in fn 87 to para 4.52 above.

**The substitution of a new representative party**[161]

4.93 *Introduction*. We instanced in the discussion paper a number of situations where it might be necessary or desirable to substitute a new representative party. For example: where the original representative pursuer has died or settled his own claim; or where his ability to represent the interests of the class is one of the criteria for certification and the court is satisfied, on the application of the defenders or one or more class members, that the representative pursuer is no longer able to do so.[162] In ordinary civil litigation[163] such substitution requires the leave of the court. Where it is made by amendment the court may, in accordance with the relevant rules, attach conditions and make an order for the expenses occasioned by the substitution.

4.94 *Our provisional view*. We thought that analogous rules should be introduced for the substitution of a new representative pursuer. We therefore proposed:[164]

(1) It should be competent for another person to be substituted for the representative pursuer only with the approval of the court; and

(2) the court in disposing of an application for approval should be entitled to attach such conditions, including such orders as to expenses, as appear to it to be just.

4.95 *Respondents' views and our recommendation*. Few consultees commented on this matter. All those who did agreed with what we proposed. Accordingly we confirm our provisional view and recommend:

**20. (1) It should be competent for another member of the group to be substituted for the representative party only with the approval of the court.**

**(2) An application to the court for the removal of the representative party and the appointment of another named group member in his place may be made by the representative party, another member of the group or by the defender.**

**(3) In disposing of such an application the court should be entitled to attach such conditions, including such orders as to expenses, as appear to be appropriate.**

Act of Sederunt, Rule 43A.14

**Aggregate assessment of monetary awards**[165]

4.96 *Introduction*. In class or group actions for the payment of money the question of liability will normally be a common question. If the court finds the defenders liable it will have to determine how much is due to the group members in respect of the defenders' breach of their obligation to the group members. Are there circumstances in which it is

[161] DP paras 7.56 and 7.57; Proposition 18.
[162] In relation to those issues ("certified questions") which are common to the class as a whole. Issues special to individual class members would be litigated separately after the common issues had been decided; each member would be responsible for the conduct of his own case in connection with individual issues.
[163] See DP para 7.57 and the court rules referred to in fn 6 on p 209 of the DP.
[164] Proposition 18.
[165] DP paras 7.64-7.74; Propositions 20 and 21.

appropriate for the court to calculate the total amount due but to leave it to other arrangements (such as negotiation among the group members) to determine what amount each member of the group should receive? We gave as an example of such "aggregate assessment" a consumer claim where a public utility has overcharged its customers for services over a specified period: the court may be able to calculate the total amount which the defenders should repay to their customers, but it may not be able to quantify how much would be paid to each since the size of the class and the identity of its members (other than the representative pursuer) are not known.[166]

4.97 *Our provisional view on whether aggregate assessment is in principle acceptable*. Our provisional view was that such assessment was acceptable if the evidence tendered in a particular case is reliable. The reliability of the evidence has to be weighed by the court. We therefore thought that the court should be entitled, but not bound, to make an aggregate award.

4.98 In assessing the aggregate award what is the appropriate test for the court to apply and does the court have a discretion as to whether to make such an award? We thought that the court should consider itself able to make such an award if a reasonably accurate assessment could be made of the amount due. The reasonableness test was thought to be acceptable since a more stringent test might prevent any award being made and that would be unfair.

4.99 Also, if there is an undistributed residue of the amount of the award what should be done with it? We suggested that one possibility was that any residue should be repaid to the defenders. Another possibility would be to pay it into a fund which might be set up for the financial assistance of class action litigants.

4.100 To foster discussion we asked:[167]

(1) Should it be competent for the court to make an aggregate monetary award in a class action with

  (a) an opt-in scheme; or

  (b) an opt-out scheme?

(2) If so, should the court

  (a) be obliged to do so; or

  (b) have a discretion to do so,

  if certain conditions are satisfied?

(3) Should it be a condition that, without proof by individual class members, the amount of the award can be assessed

  (a) reasonably; or

[166] DP para 7.65 where we noted that aggregate assessment is more likely to be useful in a class action procedure with an opt-out scheme than in one with an opt-in scheme. But as noted in the DP (p 215 fn 2) there have been remarkable cases in the USA where individual awards would be made to a large number of class members on the basis of the defendants' computerised records.

[167] Points (1) to (3) were Proposition 20; point (4) was Proposition 21 of the DP.

(b) with reasonable accuracy; or

(c) with the same degree of accuracy as in an ordinary action?

(4) Should any residue of the aggregate award, which remains after all the claims of class members have been satisfied, be returned to the defenders?

4.101 *Respondents' views*. Respondents were not unanimous. One legal consultee[168] was in favour of a discretionary power to make an aggregate monetary award in an opt-in scheme class action; another legal consultee[169] thought that such awards would lead to conflicts of interest. The Scottish Consumer Council was in favour of a discretionary power to make such awards and agreed that the appropriate test should be that the award can be made with reasonable accuracy; "while it may be argued that there is an element of rough justice in such a facility, in appropriate cases it may allow justice to be done without undue delay or expense to either the consumers or the defender". Respondents were similarly divided with regard to whether an undistributed residue of an aggregate award should be returned to the defenders. (Some of those opposing such a return suggested that any residue could be used to finance a class action fund.)

4.102 *Our concluded view*. In the opt-in arrangement which we recommend there should be less need for such collective recovery: all the class members will be identified and their number is likely to be fewer than in a similar case dealt with under an opt-out arrangement. We note that a provision on this matter was not included in the original version of US Federal Rule 23 and it may therefore be regarded as not being an essential feature of a class action procedure. On balance, we do not consider that there should be a provisions about collective recovery in the rules for group proceedings. The absence of such a provision removes the need for a further provision dealing with the disposal of any undistributed residue.

4.103 *Our recommendation*. Accordingly we recommend:

**21. The rules for group proceedings should not contain an express provision with regard to (a) the aggregate assessment of monetary awards and (b) the disposal of any undistributed residue of an aggregate award.**

4.104 We now consider three further matters relating to the general shape of the group proceedings procedure.

These are:

- The liability of all group members to contribute to the expenses of the representative party[170];

[168] The Faculty of Advocates.
[169] The Law Society of Scotland.
[170] Paras 4.105-4.109 below.

- arrangements under which sums due by defenders to the group should be paid into court and disbursed to individual group members under deduction of any sums due in respect of the expenses of the representative party[171]; and

- the binding effect on group members of an interlocutor which disposes of certified questions.[172]

**Contribution by group members towards the expenses of the representative party[173]**

4.105 *Introduction*. The representative party acts on behalf of the group as a whole. It is therefore reasonable that the other group members should be required to help to meet the financial liabilities incurred by the representative party on their behalf. We therefore proposed that in a class action with an opt-in scheme the court should determine the liability of each class member for the expenses incurred by the representative pursuer. We also proposed (and discuss below) that there should be a mechanism to enable the court readily to recover from each class member what he or she is due to the representative party.

4.106 *Background*. The court has an inherent common law discretionary power to award expenses ie to determine, generally at the end of the litigation, whether to make an award of expenses, and if so, by whom, on what basis and to what extent.[174] The representative party has liability for his or her own legal fees and outlays and to meet any award of expenses in favour of the defenders.[175]

4.107 *Our provisional views on determination of liability of the individual class members*.[176] In an opt-in procedure, which we have recommended,[177] a person who has decided to opt-in and thus to become a member of the group may be assumed to have made a considered decision to join in the litigation in the hope that he or she will benefit from the result. He or she should therefore bear some share of the financial liabilities incurred by the representative party who is conducting the action on his or her behalf. We suggested in the discussion paper that the extent of that share should be determined by the court since there may be circumstances in which an equal division of liability among all the class members might not be appropriate. We also suggested that the court should be entitled, as in the Opren litigation,[178] to make an order for the apportionment of expenses in advance of the final judgment.

4.108 *Respondents' views*. Those consultees who commented on this proposition agreed with what we proposed.

4.109 *Our recommendation*. We confirm our provisional view and recommend that:

**22. (1) In group proceedings (with the opt-in scheme which we recommend) the court should be entitled to determine the liability of each group member for payment of a share of any taxed expenses incurred by the representative party.**

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[171] Paras 4.110-4.113 below.
[172] Paras 4.114-4.118 below.
[173] DP paras 8.53-8.57; Propositions 39 and 40.
[174] DP para 2.39; Maclaren p 3; Macphail (1988), para 19-3.
[175] See DP paras 2.36-2.40 and 8.6-8.9.
[176] See Proposition 39 paras (1) and (2).
[177] Para 4.55 above.
[178] See DP para 8.53, fourth footnote, referring to *Davies v Eli Lilly & Co* [1987] 1 WLR 1136; [1987] 3 All ER 94.

**(2) The court should be entitled to make such a determination before or after the conclusion of the action.**

Act of Sederunt, Rule 43A.13

**Sums due by the defenders to the group to be paid into and disbursed by the court**

4.110 *Our provisional view.* We suggested that where the representative party has obtained a decree for the payment of money, it might be useful to provide that a group member's share of the expenses of the action could be deducted from his share of the proceeds. Our detailed proposal[179] was as follows:

> Where the representative pursuer in a class action procedure with an opt-in scheme has obtained a decree for the payment of money,
>
> (a) the court should be entitled to require the defenders to pay the total sum awarded into court;
>
> (b) the clerk of court should administer the sum paid into court and pay to each member of the class such sum as the court may direct; and
>
> (c) the court should be entitled to direct the clerk of court
>
> (i) to deduct from the amount otherwise payable to any member of the class such sum as the court considers to represent his share of the liability for payment of any taxed expenses incurred by the representative pursuer which are not covered by an award of expenses in his favour, and
>
> (ii) to pay these expenses to the representative pursuer's solicitor.

4.111 *Respondents' views*. A majority of those consultees who commented on this matter did not agree with what we proposed. The Faculty of Advocates considered that the administration of an award of money in a class action is better entrusted to the solicitors of the pursuers than to the clerk of court. The Law Society of Scotland thought that the amount of any monetary award should not be paid into court; this "would involve extra expense on the public purse and would create enormous practical difficulties."

4.112 *Our concluded view*. The arrangement which we proposed was merely discretionary: there would be no obligation on the court to order in every case that sums due to the group should be paid into court and disbursed to group members under deduction of their share of the expenses. We remain of the view that if the court thought that such an arrangement would be helpful it should have the appropriate powers so to order. It would appear to be appropriate that this arrangement should be administered by the Accountant of Court,[180] who already has powers to manage money payable to children,[181] on payment to him of appropriate fees.[182]

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[179] Proposition 40.
[180] Under the Court of Session Consignations (Scotland) Act 1895, ss 2 and 3, the Accountant of Court is custodian of all sums lodged by order of the court or under any Act of Parliament. (*Green's Annotated Rules of the Court of Session*, para 33.4.3.)
[181] See RCS r 43.16.
[182] The Court of Session etc Fees Order 1984 (SI 1984 No 256) would need to be appropriately amended.

4.113 *Our recommendation*. Accordingly we recommend:

> **23. (1) Where the representative party in group proceedings has obtained a decree for the payment of money, the court should be entitled to require the defenders to pay the sum awarded to the Accountant of Court;**
>
> **(2) the part of the sum mentioned in paragraph (1) to be paid to each group member will be such amount as the court may direct after deducting such sum as the court considers to represent that group member's appropriate share of the liability for payment of any expenses incurred by the representative party which are not covered by an award of expenses; and**
>
> **(3) the total sum made up of the amounts deducted under paragraph (2) is to be paid to the representative party.**
>
> Act of Sederunt, Rule 43A.16

**The binding effect of the judgment**[183]

4.114 *Introduction*. The court's judgment in a class action binds all the members of the class. If any of them brings a further action against the defenders in regard to the same subject matter and raising the same questions, the court will dismiss the action on a plea by the defenders of *res judicata*, that is, that the action is excluded by the judgment in the class action.

4.115 *Our provisional view*. We therefore suggested that a court interlocutor which gives effect to a judgment on the common questions (ie the certified questions) in group proceedings should (a) identify the members of the class or group who are bound by the judgment and (b) define the questions which have been decided.

4.116 *Respondents' views*. No comments were received on this suggestion. We assume therefore that consultees were content with what we proposed.

4.117 *Our concluded view*. It is necessary to deal with two matters separately. The first is the general principle that a decision of the court on a certified question will bind all the members of the group ie the representative party and all those who have opted in and have not been permitted to withdraw from the group.[184] The second is a requirement that on appropriate occasions the court names (or otherwise identifies) those who are members of the group. These occasions are: immediately after the expiry of the election period; and after the court has permitted a person either to join a group later or to withdraw from it. We see no need to delay the identification of the group until the court issues a judgment on any of the certified questions.

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[183] DP para 7.75; Proposition 22.

[184] Early withdrawal from the group may be allowed under draft Rule 43A.10(1)(b) and the court in allowing withdrawal may impose conditions eg payment of a share of the expenses incurred to the date of withdrawal.

4.118 *Our recommendation*. We therefore recommend:

> **24. (1) All persons who are members of the group should be bound by an interlocutor (or interlocutors) which disposes (wholly or partly) of a certified question;**
>
> **(2) The court should identify the members of the group in the first interlocutor issued after: the expiry of the election period; the granting of permission to a person to join the group at any later time; and the granting of permission to a person to cease to be a member of the group before the conclusion of the proceedings.**
>
> Act of Sederunt, Rule 43A.9 and 11

4.119 Having considered the general shape of our recommended procedure we now turn to consider the following subsidiary questions:[185]

- Ministerial or official participation[186]
- Remits to, and from, the sheriff court[187]
- The value rule[188]
- The prescription of obligations and the limitation of actions[189]
- The competency of group proceedings initiated by defenders[190]
- Appeals[191]

**Ministerial or official participation in group proceedings[192]**

4.120 *Introduction*. The Lord Advocate is authorised by statute to appear, in the public interest, in certain civil proceedings.[193] Should the Lord Advocate, or another Government Minister, or some public official have a statutory right (or duty) to intervene in group proceedings?[194]

4.121 *When might intervention be desirable?* There are various situations in which intervention might be desirable in the public interest. These include:

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[185] Listed in DP para 7.3. We have already considered two subsidiary matters: jurisdiction (Proposition 23; para 4.7 above) and the form of implementing legislation (Proposition 31; para 4.11 above).
[186] Paras 4.120-4.126 below.
[187] Paras 4.127-4.132 below.
[188] Paras 4.134 and 4.135 below.
[189] Paras 4.136-4.140 below.
[190] Paras 4.141-4.144 below.
[191] Paras 4.145-4.157 below.
[192] DP paras 7.58-7.62; Proposition 19.
[193] DP para 2.21 provides examples. "Other important functions discharged by the Lord Advocate include that of acting in the public interest, intervening if necessary in a court action for the purpose." Lord Fraser of Tullybelton and Others, "Constitutional Law", 5 *Stair Memorial Encyclopaedia*, para 509.
[194] We leave out of account here such common law powers as the Lord Advocate may rely on in intervening in civil court proceedings.

- Where the representative party is no longer qualified to act as such, a suitable substitute cannot be found and there are general issues of public importance on which it is desirable that representations should be made to the court; and

- Where the representative party cannot be replaced and there are specific issues of public importance eg the disposal of any undistributed residue of a damages award made to the group as a whole.

4.122 *Arguments against intervention*. The arguments against intervention include:

- A representative party is entitled to conduct the litigation in whatever way he or she thinks fit, without interference by a Government Minister or public official;

- such interference might protract or unduly complicate the litigation and lead to avoidable expense; and

- the intervener might have an interest in conflict with that of the group members.

4.123 *Our provisional view*. Although we acknowledged[195] that it may be helpful, in the public interest, for intervention to be specifically provided for, we doubted the need for it. Our provisional view was that a provision about this matter should not be included.

4.124 *Respondents' views*. Few respondents commented and those who did agreed with our provisional view. One respondent[196] commented that it is conceivable that in the context of the subject matter of certain multi-party actions the Lord Advocate might exercise an additional supervisory role on behalf of the public interest, apart from the court, and it might be desirable that such actions should be intimated to him for information only.[197]

4.125 *Our concluded view*. Those respondents who dealt with this point have not persuaded us to depart from our provisional view.

4.126 *Our recommendation*. Accordingly we recommend:

**25. There should be no statutory provision for the appearance in group proceedings of the Lord Advocate, any other Government Minister or any public official.**

**Remits[198]**

4.127 *Introduction*. We have recommended[199] that the new procedure should initially be introduced only in the Court of Session. If that recommendation is accepted the question of whether group proceedings should be remitted from the Court of Session to the sheriff or from the sheriff to the Court of Session, does not arise. However, if in due course, the procedure is introduced in the sheriff court appropriate remit provisions will be necessary.

[195] DP para 7.62.
[196] The Faculty of Advocates.
[197] We consider that the court's existing powers would, in any event, enable such intimation to be made.
[198] DP para 7.81; Proposition 24.
[199] Para 4.5 above.

4.128 *The present law: remits from the Court of Session*.[200] The Court may, at its own instance or on the application of a party, remit the action to the sheriff within whose jurisdiction it could have been brought where, "in the opinion of the court, the nature of the action makes it appropriate to do so."[201]

4.129 *The present law: remits to the Court of Session*.[202] Provision for such remits is made in general statutory provisions and in provisions relating to particular proceedings (family proceedings, action of declarator of death and proceedings against the Crown). The latter provisions are unlikely to be relevant to group proceedings. The main general provision[203] empowers the remit of an ordinary cause[204] provided: (1) that the value of the cause exceeds the limit of the privative jurisdiction of the sheriff (currently £1,500); (2) that the sheriff is moved to do so by any of the parties; and (3) that he "is of the opinion that the importance or difficulty of the cause" make a remit to the Court of Session "appropriate".

4.130 *Our provisional views*. We noted in the Discussion Paper that two provisions might be desirable if there was a procedure introduced in both the Court of Session and the sheriff court. First, there might be a provision for the remit of actions from one court to the other, comparable to the provisions for the remit of ordinary causes to the Court of Session and for the remit from the Court of Session to the sheriff court of actions which could competently have been brought in that court. Second, the Court of Session might be empowered to order that cases be remitted from the sheriff court to that Court.[205]

4.131 *The questions posed*. We accordingly asked[206] whether there should be provisions for the remit of cases

(a) from the sheriff court to the Court of Session

(i) as in the Sheriff Courts (Scotland) Act 1971, section 37(1)(b);

(ii) by order of the Court of Session;

(b) from the Court of Session to the sheriff court?

4.132 *The views of respondents and our recommendation*. A majority of those respondents who commented agreed that there should be such provisions. We accordingly recommend:

**26. In the event of the introduction of a group proceedings procedure in the sheriff court consideration should be given to the enactment of appropriate statutory provisions with regard to the remit of proceedings from the Court of Session to the sheriff and from the sheriff to the Court of Session.**

4.133 We do not think it appropriate to make detailed recommendations with regard to the amendments which might be required in primary legislation and in the procedural rules of the Court of Session and the sheriff court. The current statutory provisions are expressed in

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[200] See: Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 14; RCS 32.1; *Greens Annotated Rules of the Court of Session*, para 32.1.1; and Macphail, *Sheriff Court Practice*, para 13-70.
[201] 1985 Act, s 14.
[202] See Macphail, *Sheriff Court Practice*, paras 13-59 to 13.69.
[203] S 37(1)(b) of the Sheriff Courts (Scotland) Act 1971.
[204] S 37 of the Sheriff Courts (Scotland) Act 1971 provides for a summary cause to be remitted to the ordinary roll and treated as an ordinary cause.
[205] Cf Presumption of Death (Scotland) Act 1977, s 1(6).
[206] DP Proposition 24.

detailed terms with reference to "the nature of the action" and "the importance or difficulty of the cause". It may be considered that this wording is inappropriate for group proceedings or that the remit provisions should be reconsidered as a whole in connection with all types of actions. In view of the possible complexity of group proceedings it may be considered necessary to enable the Court of Session to order that sheriff court proceedings be remitted to the Court of Session, whether or not there are concurrent similar or contingent[207] proceedings in that Court.

**The value rule**[208]

4.134 We mentioned in the Discussion Paper that the "value rule" reserves to the sheriff court those cases which do not exceed £1,500 in value (exclusive of interest and expenses). These actions are brought in the sheriff court as summary causes, either conventional summary causes or small claims. We considered[209] that the value rule would not cause any special difficulty because there is authority for the view that the "value" of a cause is not necessarily the sum sued for, where something of greater value is at stake.[210] We would not expect the court to determine the "value" of a class action by the apparent value of the remedy claimed by the representative party for himself or herself alone; the court would generally conclude that its "value" exceeded £1,500.

4.135 *Respondents' views and our conclusion*. Respondents agreed with our view that the value rule would not cause any difficulty. We do not need to make a formal recommendation on this matter.

**Prescription of obligations and limitation of actions**[211]

4.136 *Introduction*.[212] The general principle is that after a specified period of time a right or obligation either ceases to exist (prescription; a rule of substantive law) or becomes unenforceable by court proceedings (limitation; a rule of procedure).[213] The question which we raised in the Discussion Paper was whether the aggregation of claims in a class action procedure is compatible with the efficient operation of the rules of prescription and limitation. If not, some provision[214] would be needed. Most class action legislation in other jurisdictions does not contain provisions that deal expressly with limitation periods.[215] It has

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[207] For a definition of "contingency" see *Green's Annotated Rules of the Court of Session*, para 32.2.1.
[208] DP paras 7.82 and 7.83; Proposition 25.
[209] Para 7.83.
[210] See cases cited in Macphail (1988), paras 2.29 to 2.32.
[211] DP paras 7.85-7.87; Proposition 26.
[212] See Prescription and Limitation (Scotland) Act 1973, as amended; and our (unimplemented) Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (Scot Law Com No 122, 1989). There are three statutory schemes or regimes currently in operation under the 1973 Act providing rules of prescription or limitation in relation to an obligation to make reparation. The three statutory regimes may be summarised as: the five-year short negative prescription which applies to an obligation to make reparation for damage sustained (other than, for example, damage involving personal injury or death); a three-year limitation period for the bringing of a reparation action where the damages claimed consist of damages in respect of personal injuries or death resulting from such injuries (not caused by a defective product); and the scheme concerning defective products under the Consumer Protection Act 1987 (which inserted a new Part IIA into the 1973 Act).
[213] In the DP we gave as an example the general rule of limitation in Scotland that a person who has been injured in an accident is required to raise an action of damages for his injuries within three years after the date of the accident, in terms of s 17(2) of the Prescription and Limitation (Scotland) Act 1973. The right or obligation subsists if the person holding the right makes a claim by raising court proceedings before the expiry of the prescribed period.
[214] Probably in Act of Parliament rather than Court of Session rules.
[215] DP para 6.75.

however been suggested[216] that class actions require some modification of the rules regarding limitation of actions.

4.137 *Our provisional view*. Our provisional view was that there might need to be statutory rules with regard to the limitation of actions. We thought that so far as the representative party is concerned the limitation period applicable to a class action should be interrupted upon the commencement of the action. So far as any other class member was concerned it would be interrupted, under an opt-in scheme, from the date when he or she opted in. The limitation period would remain interrupted so long as the representative pursuer or the absent class member remained a member of the class and the action remained in dependence.

4.138 *Respondents' views*. Only two of our respondents commented on this matter. It may be that silent consultees were satisfied with our general approach ie that the introduction of a Scottish class action procedure should not disrupt the current operation of the rules of prescription and limitation. One consultee[217] commented that in the context of a single event disaster-type of multi-party action (and a class action with an opt-in arrangement) there should be no need to depart from the normal rules relating to limitation of actions. Also, a party seeking to opt-in outwith the limitation period would be able to avail himself of the existing remedial provisions of section 19A of the Prescription and Limitation (Scotland) Act 1973.[218]

4.139 *Our concluded view*. Our recommendation of an opt-in arrangement removes the difficulties that there might have been with an opt-out scheme, particularly where the class members are not individually identified. In advance of the introduction of a Scottish class action procedure we are not convinced that the application of the rules of prescription and limitation in a class action would produce difficulties.

4.140 *Our recommendation*. We accordingly recommend:

> **27. The statutory rules of prescription of obligations and limitation of actions need not be amended to cope with the introduction of the group proceedings procedure which we have recommended.**

**Certification on the application of the defenders[219]**

4.141 *Introduction*. We noted in the Discussion Paper that the Ontario legislation provides for "defendants class proceedings": a defendant to two or more proceedings may at any stage of the proceedings ask the court to certify the proceedings as a class proceeding and to appoint a representative plaintiff. We did not favour such a provision. We thought that pursuers who have chosen to bring a competent form of action should not be required by the court, on the application of the defenders, to adopt a different form of action. Also, when two or more actions have been raised against defenders in relation to the same subject matter they are entitled to move the court to conjoin the actions.

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[216] See the views of the Law Reform Committee of South Australia quoted in para 7.85 of the DP.
[217] The Faculty of Advocates.
[218] S 19A of the 1973 Act allows an application to the court to override the time limits with regard to the limitation of actions.
[219] DP para 7.88; Proposition 28.

4.142 *Our provisional view*. Accordingly we suggested that the court should not be entitled to certify as a class action two or more actions which have been raised against them under the conventional rules of procedure.

4.143 *Respondents' views*. Those respondents who commented on this matter agreed with our view.

4.144 *Our recommendation*. We accordingly recommend:

> **28. The Court of Session should not be entitled, on the application of the defenders, to grant a certification order in respect of two or more proceedings (in the form of actions or petitions) which have been raised against the defenders.**

**Appeals**[220]

4.145 *Introduction*. We said in the Discussion Paper that we thought that a class or group action should proceed in the same way as a conventional action for the same remedy raised by a single pursuer subject only to such modifications as were considered appropriate. It should therefore be competent to appeal against interlocutors, or orders, pronounced by the court to the same extent as against interlocutors pronounced in an ordinary action brought under the existing rules.[221]

4.146 **Two policy questions in connection with group proceedings in the Court of Session**. Two questions arise in connection with our recommended procedure. These are:

- are specific reclaiming provisions needed? In particular: is it necessary specifically to provide which interlocutors of a kind pronounced only in group proceedings are appealable?; should they be appealable with, or without, leave?

- if the representative party fails to reclaim, should it be competent for another member of the group to do so?

*Specific appeal provisions*

4.147 *Introduction*. In the Discussion Paper we discussed whether it should be competent to appeal without leave against interlocutors granted at four stages. Two of these stages are relevant in connection with our proposed procedure: certification (and decertification); and the identification of the common questions.[222]

4.148 *Our provisional view.* We proposed that leave to appeal should not be required.[223] We considered that interlocutors granting certification (or decertification) and identifying the common issues were of sufficient importance to justify allowing an appeal without leave. In connection with certification orders we noted that the Ontario legislation (contrary to the recommendations of the Ontario Law Reform Commission) requires a defendant who

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[220] DP paras 7.89-7.99; Propositions 29 and 30.

[221] We have recommended above that our recommended new procedure should initially be introduced in the Court of Session only. In that court, reclaiming is the term used for the review of an interlocutor pronounced by a Lord Ordinary. See: Court of Session Act 1988 s 28; and RCS 1994 Ch 38. The Rules of the Court of Session provide that some interlocutors may not be reclaimed against and others may only be reclaimed against with the leave of the Lord Ordinary.

[222] The "certified questions" (Rule 43A.1(2)).

[223] Proposition 29.

wishes to appeal against a grant of certification to obtain leave. The view was apparently taken that defendants (who may have resources superior to those of the representative party and of the class or group as a whole) should be discouraged from delaying the progress of the action by appealing the grant of certification.

4.149 *Respondents' views*. Those respondents who commented generally agreed that leave should not be required. One consultee[224] noted the experience in the United States where, as a delaying tactic, defenders are apt to appeal against a decision to certify an action as a class action; it was accordingly suggested that it would be appropriate to permit an appeal against the decision on certification only with the leave of the court.

4.150 *Our recommendation on the competency of an appeal without leave*. On balance, we think it appropriate to confirm our provisional view and accordingly recommend:

> **29. It should be competent for the representative party to reclaim (appeal) without leave against an interlocutor pronounced in group proceedings in the Court of Session and in particular an interlocutor (a) disposing of an application for certification or decertification and (b) identifying the common questions.**

There is no need for a provision implementing this recommendation; a provision would be necessary only if leave was required.

*Appeal by another group member*

4.151 *Introduction*. An interlocutor pronounced in group proceedings binds each member of the group who has opted in. If the representative party fails to appeal, or intimates an appeal and afterwards abandons it, should another member of the group be entitled to appeal? This question raised issues of principle and practice. In principle, should another class member be entitled to appeal? In practice, by the time it was clear that the representative party had not appealed or had abandoned his appeal, the time for appealing might have expired; therefore there might have to be a provision for an extension of time.

4.152 *Our provisional view*. After narrating the arguments[225] we recorded our provisional view[226] that the arguments in favour of allowing another group member to appeal are stronger than the counter arguments.

4.153 *Respondents' views and discussion*. One respondent was of the view that where the procedure incorporates an opt-in scheme it would lead to uncertainty, confusion and prolongation of proceedings if individual parties were permitted to take appeals individually; it was thought that consideration of appeal points is a matter for determination within the class or group pursuing the action in which context individual views and representations can properly be made. We agree that it is important that differences of view within the group should be resolved, if at all possible, within the group. However we think that it would be wrong not to provide suitable arrangements to enable a group member to appeal either after the expiry of the appeal period or if the representative party does not proceed with an appeal.

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[224] The Scottish Consumer Council.
[225] DP para 7.97 and 7.98.
[226] DP para 7.99.

4.154 *Our recommendation on whether it should be competent for another group member to reclaim*. We accordingly confirm our provisional view and recommend:

> **30. If the representative party does not reclaim (appeal), or does not proceed with a reclaiming motion, it should be competent for another member of the group to do so**.

4.155 *The arrangements for another group member to reclaim*. We noted[227] that in devising the arrangements to enable another group member to reclaim, the overall considerations must be fairness to the interests of the group as a whole[228] and avoiding unfairness to the defenders in the form of unnecessary proceedings. We think that the most suitable arrangement would be for the group member who wishes to reclaim to invoke the procedure which we have recommended[229] which enables the appointment of the representative party to be rescinded by the court and another group member appointed as the representative party for the purposes of reclaiming. The court may need to exercise ancillary powers, for example to extend the reclaiming days to enable the new reclaiming motion to be enrolled or to continue a reclaiming motion which has not been proceeded with.

4.156 *Reclaiming by another group member where certification refused or revoked*. The mechanism allowing a group member to be substituted for the representative party in order to pursue a reclaiming motion is not appropriate where the court has either refused certification or revoked certification. If the court makes either of these orders the pursuer or petitioner has not become, or has ceased to be, the representative party and the substitution procedure (provided by our draft Rule A.13(1)(a)) cannot be invoked. Special provision is therefore needed.

4.157 *Our recommendations on the arrangements to enable another group member to reclaim*. We accordingly recommend:

> **31. (1) A member of the group, other than the representative party, who wishes to reclaim when the representative party has not done so, or to proceed with a reclaiming motion which has not been proceeded with, should apply to be appointed as representative party, for that purpose;**
>
> **(2) special provision should be made to enable a person within the description of the group, other than the pursuer or petitioner, to reclaim against an order refusing or revoking certification; and**
>
> **(3) the procedural rules should contain appropriate provisions to enable the court to make such ancillary or other orders as may be necessary.**
>
> Act of Sederunt Rules 43A.14 and 15

**Matters relevant to the introduction of our recommended procedure**

4.158 Finally we consider matters which relate to the possible introduction in the Court of Session of the procedure which we have recommended in this Part.

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[227] DP para 7.98.
[228] Compare the Quebec provision: DP p 235, fn 1.
[229] Para 4.93-4.95 above; Recommendation 20.

*Resource implications: how many cases likely?*

4.159 Before making changes in court procedures it is necessary for the court authorities to attempt to estimate what the implications will be for judges, court staff and court resources generally.

4.160 *Recent multi-party actions*. The Dundee University research report[230] provides a narrative and tabular summary[231] of the cases sampled. These are grouped as: sudden mass disasters (including large scale disasters such as the Piper Alpha Oil platform explosion, and the destruction of Pan Am Flight 103 over Lockerbie and the lesser scale disaster of the gas explosion at Guthrie Street, Edinburgh); medical claims (tranquilliser drugs), Myodil dye, Bjork Shiley heart valves and synthetic human insulin); and consumer claims (Lothiansure signal life bonds (money misappropriated) and Eurocopy (unacceptably high payments under photocopier contracts)). It would appear that all these cases contained common issues which might have been the subject of a class or group action procedure. Some general comments may be made on the cases sampled in the Dundee research:

- each case is likely to involve a relatively large number of claimants (and their solicitors) and corresponding complexity. For example, the Chinook Helicopter case: the claimants were the two survivors and the families of 39 of the 45 deceased; and there was a solicitors group of 24 firms with a steering committee.

- The number of claimants is likely to be much larger (and possibly not readily quantifiable) in the medical claims. In the tranquilliser cases there were some 860 claimants represented by some 200 firms of solicitors in Scotland.[232]

- Cases raised may be settled before proof eg the claims arising from Guthrie Street gas explosion and from the Chinook Helicopter crash. (The majority of cases involving personal injuries claims are settled and discussions about a possible settlement can be expected to proceed in parallel with litigation.)

- Cases raised may be disposed of without court adjudication eg arbitration was used in the Piper Alpha cases to determine the amounts due to individual claimants.

- Scottish cases raised may be sisted to await the outcome of cases raised in England and Wales eg as has occurred in the tranquilliser cases (the Ativan, Valium and Halcion drugs).

4.161 The Dundee research was, in any event, not designed to produce a systematic statistical analysis of cases studied. The research confirms, however, that claims which are litigated will follow a variety of paths. It appears that the majority of cases will not go to a proof or debate requiring a large number of continuous court days.

4.162 *The likely use to be made of a new group proceedings procedure*. Several factors will influence the number of cases which might be taken under the new procedure which we

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[230] Referred to in para 1.6 above. The study ran from November 1991 to March 1993.
[231] Dundee University Research Report Chap 3.
[232] In England and Wales in the Benzodiazepine litigation there were some 17,000 applications for legal aid. Legal Aid Board Report to the Lord Chancellor ("*Issues arising for the Legal Aid Board and the Lord Chancellor's Department from Multi-Party Actions*") of May 1994.

have recommended. If the procedure is perceived to be helpful, more claimants may want to litigate. However, the aggregation of claims in a single litigation should contribute to the efficiency with which the cases are dealt with and lessen the court (and judicial) time needed. Further, admission to the new procedure is at the court's discretion. The court has to be satisfied that the certification criteria are met. These criteria oblige the court to consider, among other things, whether the adoption of our recommended procedure, in preference to the other available procedures, will contribute to economy and expeditiousness. It would be open to the judge to refuse certification on the ground that if the particular claims were aggregated in group proceedings they would be more, rather than less, unmanageable.

4.163 A further factor is that of the funding available to the representative party. We considered the funding arrangements for a Scottish procedure in our Discussion Paper[233] and discuss them further in the next part of this Report. It seems realistic to assume that public funding will not be available in the near future for a Scottish contingency legal aid fund or a class actions fund. Legal aid will remain the only source of public funding.[234] Difficulties in England and Wales in connection with the tranquilliser litigation have led the Legal Aid Board to recommend a review of the basis on which public funding is available in multi-party actions.[235] It appears that neither the Secretary of State for Scotland nor the Scottish Legal Aid Board proposes any significant reforms in the Scottish legal aid system, although the Secretary of State has invited the Law Society of Scotland to put forward proposals for changes.[236] The cost of sustaining a litigation in the form of the group proceedings which we recommend may be very high. It would appear that the present legal aid arrangements will not encourage the raising of litigation under our recommended procedure.

4.164 *Conclusion*. For the reasons given we regret that it is not possible to provide a helpful estimate of the likely resource implications of the adoption of the new procedure which we recommend. However, we think it unlikely, particularly if the legal aid arrangements remain unchanged, that significant additional[237] court resources will be required in the period immediately after the introduction of the procedure.

**Promoting the new procedure: legal education**

4.165 *Introduction*. It is recognised that if a new court procedure is to achieve its potential usefulness the introduction of the procedure must be accompanied by appropriate publicity, the issue of guidance and instructional material and the provision of training.

4.166 *The Ontario recommendation*. The need for legal education in this connection was noted by the Ontario Attorney General's Advisory Committee in their Report on Class Action Reform:

> "The Committee noted that a more accessible and useful class proceeding would require legal education for the legal profession, the judiciary and the public.

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[233] DP Part 8.
[234] "Although some group actions are primarily funded privately ... the majority of major group actions in the courts at present are funded at public expense through Legal Aid." Report by [English] Law Society, "*Group actions made easier*" (1995), para 7.51.
[235] Report on "*Issues Arising for the Legal Aid Board and the Lord Chancellor's Department from Multi-Party Actions*", May 1994.
[236] Council Report, Law Society of Scotland, December 1995.
[237] Some cases will be taken under the new procedure rather than under present procedures; the net increase in the number of cases may be small.

> The legal profession in Ontario has a solid reputation for providing quality continuing legal education and can be expected to move quickly to educate lawyers once the new procedure is available. Proclamation should accommodate the bar's needs in this respect.
>
> Reaching the judiciary can be more difficult. To avoid any misunderstanding about the purpose and function of a new class proceeding the Committee recommends that specific efforts be made to provide the Ontario judiciary with quality legal education on this matter, as well as sufficient lead time to understand the new procedure.
>
> Finally, the public at large has a considerable stake in the new procedure and special efforts should be made to produce quality public legal education materials. Consumers, business people, unions, women's groups, to mention only a few, will have a need for understandable information about class proceedings. The Committee recommends that the Ministry of the Attorney General co-ordinate public legal education on this issue in co-operation with the legal profession and other providers of public legal education in the province."[238]

4.167 *Our views*. We agree with the approach recommended by the Ontario Committee and suggest that the introduction of the procedure which we recommend should be accompanied by appropriate publicity and the issue of guidance and other material, together with training as necessary.

**Analysing the new procedure in operation: monitoring**

4.168 It will be necessary to study systematically how the new procedure operates. Reasons for such studies include: maintaining the knowledge available to judges, court officials and practitioners of the experience of the operation of the procedure; and keeping under review the procedure to consider how it might be improved or extended.[239]

4.169 *The Ontario Recommendation*. The recommendation of the Ontario Attorney General's advisory committee is worth quoting in this connection also:

> "The Committee recommends that the Ministry of the Attorney General establish a method by which class proceedings instituted in Ontario are identified and monitored. This system would be established with a view to developing an information base from which the new procedure's performance can be evaluated. In the early years of such a procedure it will be important to know what sorts of substantive claims are advanced within a class proceeding, how numerous are the classes, what effect does certification (and each element of the test) have on advancement of claims, how long does a proceeding take, at what rate and point are cases settled and on what terms, whether a judicial attitude about the procedure has emerged, the role of the legal profession and contingency fees and so on. This type of information will allow a balanced review of the procedure and will form the basis of discussions around fine tuning the procedure or any possible need for more significant change."[240]

4.170 *Our recommendations on legal education and monitoring*. Our recommendations on these matters are:

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[238] Report of Attorney General's Advisory Committee, pp 74-75.
[239] In particular by introducing the procedure into the sheriff court.
[240] Report of Attorney General's Advisory Committee, pp 76-77.

**32. The introduction of the group proceedings procedure should be accompanied by (a) the issue of appropriate publicity and guidance material designed to meet the needs of the general public and of legal practitioners and (b) the provision of information and instruction, as appropriate, for legal practitioners, court staff and judges.**

**33. The operation of the new procedure should be systematically studied to enable experience of the operation of the procedure to be readily available, particularly to practitioners, and as the basis for making such changes in the procedure as may be necessary.**

4.171 The detailed arrangements for implementing these two recommendations would be a matter for discussion among the relevant Government departments (the Scottish Office Home Department, which has responsibility for legal aid, and the Scottish Courts Administration) and the Court of Session.

# Part V Funding

**Introduction**

1.1 Some form of financial assistance is essential[1] if a Scottish class or group action procedure is to meet its perceived objectives. "It is important in considering [funding arrangements] to keep in mind the fact that class actions are designed to achieve economies of both time and cost for the judicial system and for litigants, and also to provide access to justice where otherwise it would not be possible. While they may provide more economical means of pursuing claims than would be the case were individuals to do so on their own they involve much greater expense than traditional actions."[2] Further, funding arrangements need to have regard to the main features of the procedure which we have recommended: issues common to a number of claimants are determined in a single litigation which is raised and conducted by one person on behalf of all the people who have elected to form a group for this purpose.[3]

5.2 In the discussion paper we invited views on various arrangements by which class actions might be funded. In this Part we conclude that the "expenses follow success" rule should be retained[4] and that contingency fees should not be adopted.[5] Of the three methods of third party funding which we discussed in the discussion paper we conclude that the preferred system is likely to be one based on legal aid, and neither a contingency legal aid fund (CLAF) nor a class action fund.[6]

5.3 We do not consider it appropriate for us to consider here a number of wider policy issues which would otherwise influence views on funding arrangements.[7] Some[8] may consider that the promotion of a class action procedure is of social importance[9] and should be publicly funded. Others, whose main concern is the prevention of an increase in public expenditure, may prefer that public funds to assist those who wish to participate in group proceedings should be obtained from the existing civil legal aid budget.[10] Others again may consider such an arrangement to be unfair to those who wish to rely on legal aid in pursuing the other forms of civil litigation. They may prefer a fund which would assist litigants with their legal expenses at no cost to the tax payer. These are important issues but they cannot

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[1] We quoted in the DP (p 242 fn 2) the remarks of the Ontario Law Reform Commission. "If the anticipated gain of the class plaintiff does not exceed the cost for which he may be personally liable, there is little hope that a rational person will choose to be a representative plaintiff. In our view, to make the use of the class action procedure depend on the presence of such selfless zeal would cause it to be neglected." (OLRC Report 1982, p 663, arguing that the present cost rules in Ontario should not continue to apply.)

[2] Scottish Consumer Council Response to our DP. The Council, therefore considered that "this justifies adopting radically different approaches to funding".

[3] Hence the possible appropriateness of a scheme similar to the [English] Legal Aid Board's Multi-Party Action Arrangements 1992; see para 5.39 below.

[4] Para 5.10 below.

[5] Para 5.14 below.

[6] Paras 4.46-5.50; Recommendations 36-39.

[7] As we noted in the DP para 8.3.

[8] Eg the Scottish Consumer Council. See the Council's views quoted in para 5.1 above.

[9] In affording "access to justice" to the aggrieved or deterring negligence on the part of potential defenders.

[10] Also, if it is argued that more public resources should be devoted to legal aid the still wider question is raised about how Government Ministers should allocate scarce public resources.

usefully be discussed only with reference to group proceedings and in isolation from civil litigation as a whole.

5.4 As we said in the Discussion Paper[11] we consider here the funding of group proceedings only so far as the procedure determines questions common to the class members as a whole. We do not concern ourselves with expenses rules or funding arrangements in connection with the resolution of issues special to individual class members, after the common questions have been decided. Also, in our discussion of a special fund we concentrate, for convenience, on actions for the payment of money since some part of the proceeds of successful class actions of that kind might be allocated to a fund.

**The general rule that expenses follow success[12]**

5.5 *Introduction*. We noted in the Discussion Paper[13] that a litigant is required to meet various court and professional fees and disbursements. If the litigant is successful, the court may make an award of expenses in his favour which will entitle him to recover part of his expenses from the other side.[14] A Scottish court, when exercising its discretion to award expenses, generally applies the rule (or convention) that "expenses follow success", that is, that the cost of the litigation should fall on the loser, who is regarded as the party who has caused the litigation by pursuing a claim, or maintaining a defence, which the court has declined to sustain.

5.6 *The application of the general rule in class or group actions*. The broad effect of the application of the general rule that "expenses follow success" in class or group proceedings is shown in the following table.[15] The table shows how the liability for expenses differs depending on whether the action succeeds or fails. It also shows that, in the absence of an arrangement to the contrary (a rule of law or a court discretion to award expenses), the class members will have no entitlement to, or liability for, the expenses of the action.

[11] Para 8.5.
[12] DP paras 8.6-8.17; Proposition 32.
[13] DP paras 2.36-2.40; para 8.6.
[14] But he will still have to pay his solicitor the difference between the amount of his solicitor's bill and the amount of the award.
[15] Table taken from DP p 241. The table is drafted with reference to group actions. The position with regard to group petitions is, of course, the same.

**The Incidence of Liability for Expenses where Expenses follow Success**

| Result of Action | Representative Pursuer | Other members of class | Defenders |
|---|---|---|---|
| *Action succeeds* (Class wins) | *Entitlement*: to "party and party" expenses from defenders. | *Entitlement*: None. | *Entitlement*: None. |
| | *Liability*: for own solicitor's fees ("solicitor and client"). | *Liability*: None. | *Liability*: for (a) own solicitor's fees ("solicitor and client") and (b) representative pursuer's expenses ("party and party"). |
| *Action fails* (Class loses) | *Entitlement*: None. | *Entitlement*: None. | *Entitlement*: to "party and party" expenses from representative pursuer. |
| | *Liability*: for (a) own solicitor's fees ("solicitor and client") and (b) defenders' expenses ("party and party"). | *Liability*: None. | *Liability*: for own solicitor's fees ("solicitor and client"). |

5.7 In the Discussion Paper we expressed the view that the degree of financial risk a *representative party* in a class action would be required to undertake would be unreasonably high. The risk might be reduced by means other than a modification of the "expenses follow success" rule. On the other hand, *other class members* would be over-protected: entitled to benefit from the action without assuming any financial responsibilities at all. So far as the *defenders* are concerned, the particular risk which they bear is that even if they win the action they may be unable to recover the expenses awarded in their favour because the representative pursuer has no funds.

5.8 *Our provisional view.* Our provisional view was that we doubted whether class or group actions are so very different from other actions that the "expenses follow success" rule should not be applied to them. We noted that those jurisdictions with a rule corresponding to the "expenses follow success" rule have not abolished it when introducing a class action procedure.[16] We considered, and rejected, a number of alternatives to the rule which have been examined in other jurisdictions: a "no expenses rule"; a "no expenses election"; a

[16] See references in DP p 243, fn 2. In their recent Working Paper the South African Law Commission noted that the Ontario legislation provided that in exercising its usual discretion in respect of costs 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 (Ontario Class Proceedings Act 1992 s 31(1)) and recommended that a similar provision should be included in the proposed South African legislation.

"discretionary no expenses rule"; and a "one-way expenses rule". Our provisional conclusion was that the court should retain its traditional discretion to apply the general rule that expenses follow success.

5.9 *Respondents' views*. The Scottish Consumer Council noted that it was suggested in their 1982 Report[17] that one way in which the financial obstacles might be overcome would be by departing from the traditional "expenses follow success" rule. "This would remove a major obstacle to raising an action in that the pursuers would know that in the event of losing they would not have to meet the defender's costs as well as their own. It can be argued that it is large companies who are likely to be defenders in class actions and that they can absorb the burden of having to pay their own expenses." However the Council acknowledged that departing from the traditional rule would not by itself provide sufficient encouragement to initiate class actions as the expenses of the pursuer will often be very considerable. Only one respondent was in favour of the adoption of the American rule that parties bear their own expenses; he thought that the current position serves only to deter the use of the courts. We note that the Australian Law Reform Commission has recently recommended the retention of the general rule in civil and judicial review proceedings that the loser pays the winner's costs.[18]

5.10 *Our concluded view and recommendation.* We accordingly confirm our provisional conclusion and recommend:

> **34. In awarding expenses in group proceedings the court should retain its discretion to apply the general rule that expenses follow success.**

5.11 This recommended retention of the traditional rule with regard to the liability for expenses, as between the representative party and the defenders, renders unnecessary a provision in our draft Rules. So far as the liability of the other group members is concerned we have already recommended[19] that the court may find a group member liable to pay a share of the taxed expenses.

**Contingency fees[20]**

5.12 *Introduction*. In the Discussion Paper we distinguished a *contingency fee* agreement between solicitor and client and a *speculative fee* agreement. Under a *speculative fee* the lawyer is paid only if the client is successful in the litigation and the fee payable may now be the normal fee and an agreed percentage (up to 100%) of that fee. Under a *contingency fee* agreement the amount payable on success is calculated as a percentage of the amount recovered. It is argued that since the lawyer has a stake in winning the case he will be more committed and diligent.[21] Contingency fees are not permitted in Scotland. Our provisional view was that it should not be lawful for the representative pursuer to enter into a contingency fee agreement.

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[17] Para 8.2.1.

[18] Report, "*Costs shifting - who pays for litigation*", Canberra 1995. The Commission's inquiry arose from a concern that the costs indemnity rule may adversely affect access to justice.

[19] Paras 4.105-4.109; Recommendation 22.

[20] DP para 2.38 and paras 8.18-8.22; Proposition 33. In October 1995 a consultation document on Contingency Fees prepared by a Working Party of the Professional Practice Committee of the Law Society of Scotland was issued by the Society seeking comments on "what changes, if any" should be made.

[21] We narrated the perceived advantages and disadvantages of contingency fees in, respectively, paras 8.20 and 8.21 of the DP.

5.13 *Respondents' views*. Those respondents who commented on this matter agreed. One consultee "strongly opposed" the introduction of contingency fee arrangements in class actions.

5.14 *Our recommendation*. We accordingly confirm our provisional view and recommend:

> **35. It should not be lawful in group proceedings for the representative party to make a contingency fee agreement with his or her legal advisers by which they would receive a share of the proceeds.**

5.15 No provision is needed in our draft Rules.

**Third party funding**

5.16 We now discuss various means by any of which, or by a combination of which, a group litigation might be financed by funds made available by a third party: a contingency legal aid fund;[22] a class action fund;[23] and legal aid.[24] We conclude that legal aid is the most suitable means of providing financial assistance.[25]

**A Contingency Legal Aid Fund (CLAF)[26]**

5.17 *Introduction*. A contingency legal aid fund, as we explained in the Discussion Paper,[27] is essentially a fund which takes a proportion of the money received by a successful pursuer to meet claims on the fund by unsuccessful pursuers. It may be seen as a form of mutual insurance. The initial funding[28] would need to be provided by the Government. The administration costs of the scheme would be met by charging a registration fee to all applicants. A successful applicant would have to pass a test, as in legal aid, of "*probabilis causa*" ie that he has an apparently good case. In theory, the fund would become self-financing in due course. In practice, it is open to doubt whether this would happen. We narrated in the Discussion Paper the perceived advantages[29] and the perceived disadvantages[30] of a CLAF and noted that the only working example of a CLAF is in Hong Kong.[31]

5.18 *The Government's view in relation to England and Wales*. The most recent expression of the Government's view is in the Lord Chancellor's Legal Aid Consultation Paper issued in May 1995.[32]

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[22] Paras 5.17-5.20.
[23] Paras 5.21-5.31.
[24] Paras 5.32-5.45.
[25] Paras 5.46-5.50.
[26] DP paras 8.29-8.42; Proposition 35. We continue to use the well-established term "contingency legal aid fund" but it should be noted that such a fund has nothing to do with contingency fees or with legal aid provided under the Legal Aid (Scotland) Act 1986. Also a contingency legal aid fund should not be confused with the somewhat similarly entitled class action fund.
[27] DP para 8.29.
[28] "Pump priming".
[29] DP para 8.31.
[30] Para 8.32.
[31] DP para 8.33.
[32] *Legal Aid - Targeting Need*, Consultation Paper issued by the Lord Chancellor, May 1995. The proposals in this Green Paper relate only to England and Wales. "The arrangements for legal aid in Scotland, which are the responsibility of the Secretary of State for Scotland, are broadly similar to those applying in England and Wales but reflect Scottish circumstances, and in particular the separate Scottish courts and justice systems. Many of the issues covered in this Green Paper apply equally to the Scottish situation: in the light of this, the Secretary of State for

> "A Contingency Legal Aid Fund would have certain attractions in that it would widen access to justice in the areas in which it applied. However, the Government's overall view is that such a scheme would be unlikely to help significantly in resolving the deep problems which exist in the current legal aid scheme. The most serious drawback is that the scheme could only be really effective in cases where substantial sums of money are involved. Even there, the evidence is that the proportion of the winnings that would be payable to the fund to make it viable would have to be very high. There is also a difficult problem of principle where successful litigants are effectively financing unsuccessful cases out of the award of damages which have been judged fair."[33]

5.19 *Our provisional view*. The conclusion we reached in the Discussion Paper was[34] that the various arguments in favour of a CLAF were stronger than the counter-arguments. It appeared to us, however, that it would not be prudent to assume that a CLAF whose scope was restricted to class actions (which might be relatively few in number) would be financially viable. We accordingly invited comments on our qualified view that: in principle, a financially viable contingency legal aid fund for class actions would be a suitable source of third party funding for class litigation.[35] Notwithstanding the successful Hong Kong Contingency Legal Aid Fund it is open to doubt whether a Scottish contingency legal aid fund restricted to class litigation would be financially viable.

5.20 *Respondents' views*. A majority of respondents appear to be content with our proposition - that in principle a financially viable contingency legal aid fund would be a suitable source of third party funding - but doubted whether such a fund would be financially viable. For example the Faculty of Advocates said:

> "Whatever the theoretical benefits may be of a financially viable contingency legal aid fund for class actions it is difficult to conceive that in Scotland there would be a sufficient throughput of successful multi-party actions to keep the fund financially viable."

The Scottish Legal Aid Board (SLAB) thought that it would be sensible to plan from the outset that such a fund would be dependent on public funding for years, and possibly indefinitely. SLAB thought that if a contingency legal aid fund was established it should not be compulsory and that "those who were presently entitled to legal aid could (and, it is suggested, should) apply for it, so that the CLAF operated solely for the benefit of those who would not otherwise be entitled to any assistance." One respondent[36] was of the view that SLAB should administer the Contingency Legal Aid Fund with the mandatory requirement that when the Court of Session certified the action as a class action "normal" legal aid would cease. Thereafter the pursuer and those who have opted in would have their legal fees paid from the contingency fund.[37]

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Scotland is considering what proposals might be brought forward to improve the legal aid arrangements in Scotland." (Para 1.17.) It now appears that the Secretary of State for Scotland has no immediate plans to bring forward proposals for improving the Scottish civil legal aid arrangements; see para 5.38 below.

[33] Lord Chancellor's Green Paper (preceding footnote), para 3.34.

[34] DP para 8.42.

[35] DP Proposition 35.

[36] The Faculty of Procurators, Paisley.

[37] It was suggested that the solicitors acting would ultimately be in a position to render their account to SLAB covering both the initial pre-certification legal aid work and the post-certification contingency legal aid work.

**A Class Action Fund**[38]

5.21 *Introduction*. The term "class action fund" denotes simply an arrangement for third party financial assistance to class action litigants, other than legal aid or a contingency legal aid fund. All the features of such a fund can be adjusted to suit the policy requirements of the body which sets it up whether that body is the Government, another public body or a private body. There is no self-evidently appropriate form of class action fund, if it is decided to set up such a fund. We invited consultees' views on the questions which we set out in the Discussion Paper[39] and we record here the responses we received. We express no concluded view as to whether such a fund should be set up or what its characteristics should be. Public resources would almost certainly be necessary in order to set up a class action fund and in order to justify the allocation of public resources to such a fund it would be essential to establish not only that it is necessary but also that the fund could not otherwise be satisfactorily established.

5.22 *Class action funds in Quebec*[40] *and Ontario*[41]. We described[42] the main features of the Quebec Fonds[43] and the Ontario Class Proceedings Fund[44] to foster discussion of whether such a fund would be useful in Scotland. From that description we drew conclusions which we regarded as helpful.[45] These may be summarised as:

- The criteria for the granting of financial assistance can be made discretionary; for example to exclude those with access to other sources of funding;

- the fund need not meet all the financial liabilities of the assisted party; for example if the representative pursuer's fees and outlays are met under a speculative fee agreement, a successful defenders' expenses can be met from the fund if the representative pursuer cannot pay them;

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[38] DP paras 8.43 to 8.52; Propositions 36, 37 and 38.

[39] Propositions 36, 37 and 38.

[40] An unpublished paper on "Access to Justice: Innovation in North America" by Mr Roger Smith, the Director of the Legal Action Group, dated 17 October 1995, provides recent information about the Quebec Fonds:

> "The Fonds, if it accepts the case, agrees a budget to cover judicial fees, disbursements, notice costs and lawyers' costs up to $100 an hour (roughly £50). In return, the Fonds is subrogated to the lawyers' right to costs in the event of success. It is also liable for costs in the event of failure but the level of these is set at the lowest possible tariff (the one applicable for cases with a value of $1-3,000). Lawyers can agree an uplift on their normal costs with their clients but court approval is required...

The Fonds operates on a small budget with what appears to be a creditable success rate. Its budget in 1993 was only a little over $750,000 (£375,000): its total cost over 15 years has only been around $14m. As the largest cases begin to settle or are decided so the percentage of recovered costs rises: it is currently around 12 per cent. Between 1979 and 1994, it assisted in 313 cases, the numbers rising as the procedure has become established and overcome judicial conservatism. 163 cases have come to a conclusion: 67 of these were successful. They covered an impressively wide range of different matters." (Footnotes omitted)

We are grateful to Mr Smith for providing a copy of his paper.

[41] The Ontario Fund will meet disbursements and provide protection from liability for costs if the case is unsuccessful. To recoup itself, the Fund will take 10% of damages recovered in settlement or at trial. The Fund's current assets are $500,000 donated by the Law Foundation. "The most striking result of Ontario's experience is that no-one actually uses this procedure. There have to date been only five applications for certification. To some degree, this may be due to judicial conservatism and inconsistency." Roger Smith, "Managing in the Down Cycle", Legal Action, August 1995.

[42] DP paras 8.45 to 8.50.

[43] The Fonds (Fonds d'aide aux recours collectifs) was established under the Act Respecting Class Action (Loi sur le Recours Collectif) 1978, Title II, Assistance to Class Actions. The legislation is reproduced in Ducharme and Lauzon, *Le Recours Collectif Quebecois*, 1988. Detailed information about the operation of the scheme is given in the Annual Reports of the Fonds.

[44] The Fund was established under the Law Society Amendment Act (Class Proceedings Funding), 1992.

[45] DP para 8.51.

- the fund's financial commitment to an assisted person can be limited; for example it can be for a specific maximum sum which could be varied, if thought fit, later;

- it need not be assumed that all the resources needed to set up a fund would come from public funds.

5.23 *The matters on which we invited views.* Consultees were invited for their views on these questions:

- Should a class action fund be set up?

- If a fund was set up, how should it be financed and should it be entitled to reimbursement from assisted parties?

- If there was a class action fund: Who should be entitled to apply for assistance?; what liabilities should the fund cover; and on what ground should assistance be provided?

5.24 *The views of respondents on whether a class action fund should be set up.*[46] Of the respondents who commented on this matter only the Scottish Consumer Council and Mr Cowan Ervine were unequivocally in favour of the establishment of a class action fund. (The Council expressed a preference for a class action fund on the lines of that operating in Quebec.) A number of other consultees were opposed to the establishment of such a scheme. The Scottish Legal Aid Board commented that if legal aid could cater for the majority of litigants, a separate fund would only be required for those who could not obtain legal aid (such as private companies, and partnerships, and those individuals who did not qualify financially for legal aid). It was suggested that this would keep the number of applicants manageably small, impose the least administrative burden on the managing authority and help to keep expenditure and forecasting of expenditure reasonably controllable.[47]

5.25 *The views of respondents on how a class action fund should be financed and whether it should be entitled to reimbursement.*[48] On the assumption that a class action fund was set up we asked consultees:

(1) if the Fund should be financed by

  (a) public funding;

  (b) some other means of funding; or

  (c) a combination of (a) and (b)?

(2) To what extent should the Fund be entitled to reimbursement from assisted parties?

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[46] Proposition 36.

[47] The Scottish Legal Aid Board also suggested that if the Fund was for those who did not qualify for legal aid the provisions which currently apply to the rights of legally aided litigants to apply for modification of expenses and non-legally aided opponents' rights to seek award of expenses out of the Fund, should be imported into the arrangements for the Fund.

[48] Proposition 37.

5.26 On the first question, a number of respondents thought that some form of public funding would be necessary. Suggested means of supplementing public funding were: a percentage taken from damages awarded to a recipient of assistance from the Fund; the transfer to the fund of the otherwise undistributable residue of any class damages fund established by the court; assistance from the Millennium Fund or the National Lottery; and the interest on monies held for clients by solicitors which is not paid to the clients.

5.27 On the second question some respondents agreed that some form of reimbursement was proper. The Scottish Legal Aid Board said that it would seem appropriate that the Fund should be entitled to recoup its outlay from any money or property recovered or preserved on behalf of successful applicants, subject to a discretionary power to waive that requirement where it might cause hardship or distress.

5.28 *The views of respondents on how the class action fund might operate*.[49] On the assumption that a class action fund was established we asked consultees:

(1) Who should be entitled to apply for assistance?

(2) What liabilities should the fund cover?

(3) On what grounds should assistance be provided?

Few consultees provided views on these questions.

5.29 With regard to question (1), it appears to be agreed that a scheme, if established, should be on a discretionary basis, possibly only for those who did not qualify for legal aid.

5.30 With regard to question (2), one respondent suggested that the class action fund should meet any expenses incurred by the representative pursuer which were not recovered from the defender and, in the event of the action being unsuccessful, any expenses awarded to the defender.

5.31 With regard to question (3), it was suggested that in exercising its discretionary power to grant financial assistance the fund should have regard to both the likelihood of the action succeeding (ie a merits test) and the availability of financial assistance from other sources (ie a means test). It was suggested that the merits test might be the same as for the grant of civil legal aid.[50]

**Legal aid**[51]

5.32 *Introduction*. In the Discussion Paper[52] we noted the relevant features of legal aid. These included:

- Legal aid is not available if the applicant fails to meet the financial conditions. It is therefore unlikely that all the group members in group proceedings would be legally aided.

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[49] Proposition 38.

[50] See Part III of the Legal Aid (Scotland) Act 1986 ("1986 Act"). In general civil legal aid is made available if (a) the Scottish Legal Aid Board is satisfied that the applicant has a *probabilis causa litigandi* and (b) it appears to the Board that it is reasonable in the particular circumstances of the case that he should receive legal aid. (1986 Act s 14(1).)

[51] DP paras 8.24-8.27; Proposition 34. For a general account of legal aid see: Stoddart and Neilson (4th edn).

[52] DP para 8.25 (footnotes omitted in this Report); see also the Summary in Annex E to SLC Working Party Report.

- Legal aid is not available for certain types of proceedings, in particular "small claims"[53] where the sum sued for in the sheriff court does not exceed £750.

- For a successful assisted party (a person receiving legal aid) legal aid is in many situations a loan, not a grant: if the amount of the legal fees cannot be recovered from the other side it will be deducted from the proceeds of the litigation (through the mechanism of the statutory charge).[54]

5.33 *Our provisional view.* Our provisional view was that the amendment of the legal aid legislation would not be a suitable way of providing for the third party funding of class litigation. In arriving at that view we took account of the fact that the scope of legal aid is not universal.[55] Also, we thought that it would probably be awkward satisfactorily to amend the statutory legal aid scheme.[56]

5.34 *Views of respondents*. The majority of those respondents - and in particular the Scottish Legal Aid Board - who commented either rejected the Commission's provisional views, or implied that legal aid was not unsuitable or might be relied on along with other sources of public funding.

5.35 *The views of the Scottish Legal Aid Board*. The Scottish Legal Aid Board ("SLAB") made a number of general points in their helpfully detailed response. SLAB thought that it was likely that many cases which were subsequently dealt with under a class action or similar procedure would be preceded by advice and assistance. If there was a choice between legal aid and another source of funding, some litigants would prefer legal aid. In practice therefore some litigants would be in receipt of legal aid and this would need to be recognised by any special funding scheme for a class action procedure. "Additionally, legal aid is an existing system with an established legislative framework. If it can be adapted to meet the needs of class actions then it will almost certainly be easier to do that than to set up an alternative Fund for which no legislative framework exists, and which would require to be created *de novo*. It is a system with which the administering body and legal practitioners are familiar whereas there is no familiarity with the alternatives. ... Alternative systems may offer the possibility of becoming self-financing but there can be no guarantee that that would ever happen; they would undoubtedly require some degree of public funding at least for the purposes of setting up."

5.36 *Amendments suggested by SLAB*. SLAB thought that the legislation could be appropriately amended to suit a class or group action procedure and to cope with some of the disadvantages of legal aid mentioned in the Discussion Paper.[57] The Board made the following detailed comments.

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[53] The proceedings which are small claims are defined in art 2 of the Small Claims (Scotland) Order 1988 (SI 1988 No 1999).
[54] See Paterson (1991).
[55] DP para 8.25.
[56] DP para 8.26.
[57] DP para 8.25; para 5.32 above.

*Financial conditions: disposable capital: upper limit*

The upper limit prescribed[58] can be increased.[59] Also, the 1986 Act confers a discretion on the Board to grant legal aid if the applicant's disposal capital exceeds the prescribed limit provided it appears to the Board that he cannot afford to proceed without legal aid.

*Financial conditions: disposable income: upper limit*[60]

The Board does not have a similar discretion with regard to the upper income limit. The Board has suggested[61] to the Secretary of State for Scotland that the 1986 Act should be amended to give the Board such a discretion.[62]

*"Excepted proceedings" in which legal aid not available*

Although the proceedings in which legal aid is not available include small claims,[63] that statutory exception is removable by regulations.[64]

*Obligation on Board to recoup its expenditure from money or property recovered or preserved*[65]

The Board notes that in expensive long running litigation the expenses recovered from the opponents "may be considerably less than agent and client expenses, perhaps to the point where the whole of the principal sum is exhausted." Such difficulties could be met either by specific statutory exceptions[66] relating only to class or group proceedings or by a general power enabling the Board to waive the obligation where it might cause hardship or distress. (The Board noted that such a power is available to the Board in respect of recoveries under advice and assistance.)

5.37 *Legal aid in Scotland and in England and Wales.* The arrangements for legal aid in Scotland[67] are broadly similar to the arrangements in England and Wales.[68] Many of the issues considered in recent Government consultations and public discussion arise in both jurisdictions,[69] although the court structures are different. It is therefore helpful to take account of developments in England and Wales in the provision of legal aid for multi-party actions. Developments in Scotland have been comparatively few. This may be because "few cases have reached an advanced stage."[70]

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[58] 1986 Act s 15(2).
[59] By Regulations made by the Secretary of State under s 36 of the 1986 Act.
[60] 1986 Act s 15(1).
[61] In the Board's Responses to the Scottish Office 1991 Paper on the *Eligibility for Civil Legal Aid in Scotland*.
[62] The Board commented: "Such a discretion would provide a solution to the problem of those who are out of scope but are nonetheless involved in proceedings [of any type, not only multi-party actions] which they could not afford to fund privately."
[63] Ie claims up to £750 made as summary causes in the sheriff court; "excepted proceedings" are defined in Part II of Schedule 2 to the 1986 Act.
[64] Made by the Secretary of State under s 36 of the 1986 Act.
[65] 1986 Act s 17(2B).
[66] By Regulations made under s 17 of the 1986 Act.
[67] Which are a ministerial responsibility of the Secretary of State for Scotland.
[68] Which are a ministerial responsibility of the Lord Chancellor.
[69] As noted in para 1.17 of *Legal Aid - Targeting Needs*, Consultation Paper issued by the Lord Chancellor, May 1995.
[70] In their response to the Commission the Scottish Legal Aid Board noted that: "Although the Board for a number of years has been involved with a number of solicitor groups in claims involving numerous pursuers, few cases have reached an advanced stage. The Board cannot, therefore, claim to have an extensive experience in relation to such cases and the approach to the issues raised about funding by the [Scottish Law Commission] must necessarily be tentative, in places."

5.38 *Provision in Scotland of legal aid for multi-party actions*. In June 1988, the Secretary of State "concluded that his existing regulation-making powers are sufficient to enable him to provide for legal aid for multi-party actions without further amendment of the primary legislation."[71] The view was taken by the Scottish Home and Health Department that Regulations[72] could be made providing essentially the same arrangements as proposed by the Lord Chancellor[73] for England and Wales. No regulations making provision for legal aid in multi-party actions have been made. As part of the Government's review of financial conditions for the grant of legal aid consultation papers issued in 1991 by the Secretary of State for Scotland and the Lord Chancellor sought views on various alternatives to "non-matrimonial civil legal aid".[74] (These alternatives included a contingency legal aid fund[75].) Following these consultations the Government has not announced any proposed changes. It is understood that substantial reforms in the provision of civil legal aid in Scotland[76] are unlikely in the near future.[77]

5.39 *Provision in England and Wales of legal aid for multi-party actions*. The Legal Aid Board has power to arrange for the provision of representation under Part IV (Civil Legal Aid) of the Legal Aid Act 1988 by means of contracts.[78] The standard contract terms are set out in the Board's Multi-Party Action Arrangements 1992.[79] The Board will consider contracting only if satisfied that the action is a multi-party action[80] and the action involves significant complexity.[81] The contract need not cover all representation in the action and may cover representation with regard to generic work.[82]

5.40 *Recent developments in England and Wales: the views of the Legal Aid Board*. Developments in the Benzodiazepine litigation have stimulated the Legal Aid Board to examine the problems raised by large multi-party decisions.[83] (This litigation involved

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[71] Letter from Scottish Home and Health Department of June 1988, reproduced in Annex G of the SLC Working Party Report.

[72] Made under s 36(3)(c) of the 1986 Act which provides that the Act can be modified by Regulations where applicants have a "joint interest".

[73] In exercise of the power in the Legal Aid Act 1988.

[74] The Scottish paper was: *Review of Financial Conditions for Legal Aid, Eligibility for Civil Legal Aid in Scotland*", Consultation Paper issued by the SHHD, July 1991.

[75] Consultation Paper, Chap 5.

[76] One possibility would be to consider for Scotland reforms on the lines suggested for England and Wales. (See next paragraph of this Report.)

[77] News item in *Scotsman* newspaper 17 November 1995 ("Scottish legal aid shake-up scrapped"). The Secretary of State for Scotland, Mr Michael Forsyth, has invited the Law Society of Scotland to provide suggestions on how to contain legal aid expenditure; the Law Society, in its Response, has made proposals with regard to criminal legal aid (Council Report of the Law Society of Scotland, March 1996.)

[78] See: Legal Aid Act 1988 s 4(5); and Civil Legal Aid (General) Regulations 1989 (SI 1989 No 339, as amended by, most recently, SI 1994 No 1822 which inserts a revised Part XVII (Representation by Means of Contracts) into the 1989 Regulations. The Board's power to contract is no longer, as it initially was, exercisable with regard only to claims in respect of personal injuries.

[79] Legal Aid Board Multi-Party Action Arrangements 1992 ("Arrangements") as amended. (The Arrangements are printed in the Legal Aid Board's (Annual) Handbook.) See, further, Annexe F to the Report of our Working Party.

[80] Ie "an action or actions in which 10 or more assisted persons have causes of action which involve common issues or fact or law arising out of the same cause or event." Arrangements, para 3.

[81] "In terms of assembling statements, undertaking research, obtaining expert evidence, examining and processing large volumes of documentation, or otherwise." Arrangements, para 10.

[82] Generic work means "representation in respect of the issues common to all claimants or to a particular group of claimants and includes: (i) the selection, preparation and trial of lead issues and lead cases; and (ii) any work determined to be generic work by the Board." Arrangements, para 3.

[83] Legal Aid Board, *Issues* Report, June 1994. One comment on this Report was: "We desperately need, as the Board cogently argues, a procedural way in which the underlying issues in a case can be identified and determined without being submerged in the plethora of individual claims that will surround it." Roger Smith, 1994 NLJ 642. Mr Smith's comment is relevant also in Scotland.

complaints about tranquilliser drugs in the Benzodiazepine family of drugs; some 13,000 claimants received legal aid and £30-£35m of legal aid expenditure was incurred; the Board has now withdrawn legal aid from the majority of claims because it considered that the statutory conditions for the grant of legal aid were no longer satisfied.)[84] The Board reached three conclusions. These were: the Lord Chancellor's Department should consider the purpose of legal aid in multi-party actions;[85] the Board could make changes in the way it handled these actions; and the Lord Chancellor's Department should "address the procedures for handling these actions in the courts".[86] With regard to the purpose of public funding in multi-party actions[87] the Board noted that an applicant for legal aid in England and Wales has to satisfy[88] two statutory merits tests[89] - of legal merits and reasonableness - which are the so-called private client test ie would a solicitor advise a client of adequate but not super-abundant means to proceed with the action.[90] The Board was criticised for either granting legal aid to actions which subsequently "failed" or withholding legal aid from cases which had legal merit. The Board thought that to answer these criticisms the Board would need power to ignore the two merits tests. Whether the Board should have such a power raised "quite fundamental issues which go to the heart of the purpose of the legal aid scheme"[91] and was a matter for political decision by the responsible Government Department (Lord Chancellor's Department). The Board considered that "there are some cases which are simply unlitigible due to the complexity of the issues".[92] The Board concluded as follows. "The expense of litigation already means that assisted persons are far more able to contemplate proceedings than a large proposition of the population outside of the scope of legal aid. We do not believe that imbalance should be worsened by extending legal aid to "public interest" cases as that merely goes to paper over the fundamental problem which is the extraordinary cost of actions of this type. It is that fundamental problem that needs addressing."[93]

5.41 *Discussions in England and Wales in 1995*. In a consultation paper issued in May 1995[94] the Lord Chancellor produced proposals for dealing with very high cost cases which, in the civil legal aid scheme, would include multi-party actions. It was suggested that there would be a need for a central budget retained by the Legal Aid Board to cover such cases of unforeseen and urgent need; the cases would be the subject of individual contracts which would be individually granted.[95] At the time of writing (March 1997), the Lord Chancellor's proposals, following consideration of the Responses to his Consultation Paper, have not yet

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[84] For the position in similar Scottish cases see para 2.7 above, last sentence.
[85] "Should it be to fund cases that might be considered more widely important in the public interest even though a privately paying client would not, or could not, fight such a case [?]" *Issues* Report para 1.3(i).
[86] "In our view the range of measures available to the judge and the general arrangements for dealing with these cases are inadequate. They do not facilitate the manageable disposal of such claims and do not give the judge sufficient control over the action." *Issues* Report para 2.15.
[87] Chap 3 of the *Issues* Report.
[88] Leaving aside the financial eligibility tests.
[89] Legal Aid Act 1988 ss 15(2) and 15(3). The similar Scottish tests are provided in the Legal Aid (Scotland) Act 1986 s 14(1) ie civil legal aid "shall be available" to a person who applies for it if (a) the Board is satisfied that he has a *probabilis causa litigandi* and (b) it appears to the Board that it is reasonable in the particular circumstances of the case that he should receive legal aid.
[90] *Issues* Report para 3.2.
[91] *Issues* Report para 3.10.
[92] Issues Report para 3.14. But the Board's view that there are issues which are "unlitigible" has been questioned. "The court was well able to cope with the issues" in the Sellafield childhood leukaemia trial: Day and Moore in *Shaping the Future* (ed Roger Smith), 1995 at p 191.
[93] *Issues* Report para 3.14.
[94] *Legal Aid - Targeting Need*, Consultation Paper issued by the Lord Chancellor, May 1995.
[95] *Legal Aid - Targeting Need*, Summary, para 24 (dealing with ch 11).

been announced.[96] The Report by the Law Society's Civil Litigation Committee,[97] to which we have already referred,[98] was not primarily concerned with the principles of funding litigation.[99] However the Committee acknowledged that there was no point in proposing a new rule of procedure, unless cases under the procedure could be adequately funded. Since the majority of English group actions are funded at public expense through legal aid, the Committee considered that reform of legal aid had to be considered.[100] Although the Committee regarded the Legal Aid Board's proposals as outside their terms of reference they were clear that reforms are needed. "The *status quo* is not an option. Unless systems can be devised which will allow the important issues raised in a group action to be brought to trial at a reasonable cost and within a reasonable time, the issues will not be brought to trial at all. Put simply, legally-aided group actions as we know them are no longer viable: if the procedure is not successfully reformed, such actions will disappear."[101]

5.42 *Our Working Party's views*. Our Working Party made certain comments on legal aid. These are printed in Appendix C to this Report, together with observations which take account of developments since the completion of the Working Party's Report in June 1993.

5.43 *Legal aid for multi-party actions: discussion*. It is necessary to discuss separately the provision of legal aid in connection with our recommended group proceedings procedure[102] and in connection with other multi-party actions.[103] However we do not think it would be appropriate for us to make detailed recommendations. In Scotland, as in England and Wales,[104] large and political questions are raised in the discussion about public funding for multi-party actions. Are the normal criteria for the grant of civil legal aid appropriate in actions which may involve very high expenditure? A possible approach might be to regard some multi-party actions as being "public interest" actions which should be funded separately outwith the legal aid schemes.[105] If the Government's policy is to contain legal aid

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[96] For a summary of the Legal Aid Board's Response to the Lord Chancellor's Consultation Paper see Law Society Gazette for 29 November 1995 at p 12.

[97] *Group actions made easier*, September 1995.

[98] Paras 3.13-3.17 above.

[99] *Group actions made easier*, para 7.5.1.

[100] A particular point made by the Committee relates to the reasonableness test for the grant of legal aid. (Legal Aid Act 1988 s 15(3)). "The reasonableness test embraces a number of factors, the most important of which is likely to be cost/benefit ..." In a group action the common costs will normally be far greater than the likely damages awarded to any one claimant. "A single action proceeding alone would not meet the cost/benefit test but the test would be met where there are sufficient plaintiffs sharing the common costs to reduce sufficiently the individual's share. The test has the effect of encouraging as many plaintiffs as possible to come forward and share the costs. This increases expenditure by the Legal Aid Fund. Hence it is understood that the Legal Aid Board (1) "is attracted to the idea of having wider powers to refuse Legal Aid, on an overall view of the likely costs and outcome of the action" and (2) "interested in the wider use of test cases to resolve key issues rather than grand multi-party actions". *Group actions made easier*, paras 7.5.2-7.5.4. (The Law Society's Working Party included a legal adviser to the Legal Aid Board.)

[101] *Group actions made easier*, para 7.5.12.

[102] Para 5.44 below.

[103] Para 5.45 below. If our recommended procedure is not introduced it remains, of course, for consideration whether improvements can be made in the provision of legal aid for multi-party actions raised under current procedures.

[104] See Legal Aid Board's *Issues* Report 1994, para 3.10. Also, the Board suggest that the arrangements for the provision of legal aid for conventional litigation are not necessarily suitable for multi-party litigation. "At present area [legal aid] offices are having to make what amount to major public policy decisions involving the expenditure of millions of pounds on the basis of tests [for the grant or withholding of legal aid] essentially unchanged since the legal aid system was introduced and which were designed for ordinary, every day, cases costing relatively minor amounts of money."

[105] "Multi-party actions often raise issues of significant public interest ... As a result state assistance should be available in cases which raise issues of public concern but where those affected may not meet usual legal aid criteria." The authors argue that the following matters should be relevant in considering whether a case is in the public interest: "(a) the widespread use of the product/environmental exposure; or (b) the seriousness of the injury, even though numbers injured may be small; or (c) the issues raised in terms of the delivery of health care, consumer safety, or

expenditure, increasing the scope of the availability of legal aid for multi-party actions only would reduce the funds available for other litigation. These matters do not raise issues of legal policy on which we should provide a view. To arrive at a concluded view it would be necessary to make recommendations on matters relating to the allocation of scarce public resources.

5.44 *Legal aid for group proceedings.* The procedure which we have recommended is intended to provide a framework to enable the resolution in one litigation of issues common to a number of litigants. The litigation is likely to be complex, time consuming and therefore costly. The present civil legal aid arrangements are not specifically designed to apply to such litigation. (For example when expert reports are obtained on generic issues are these reports to be regarded as the property of the Legal Aid Board, the individual litigant on whose behalf they were obtained or the whole group or class?) The general principle should be that all legally aided multi-party litigants should share the cost although one litigant takes the proceedings forward, as representative pursuer or petitioner. Further, it is likely that legal aid authorities may consider it necessary to have powers to select the solicitor who will act for the representative party and to supervise the progress of the action. The Multi-Party Action Arrangements[106] introduced by the [English] Legal Aid Board in 1992 contain a number of apparently desirable features. The selected firm of solicitors are chosen by the Board on the basis of tenders. The contract specifies the work covered eg generic work[107] only (the assisted person can be represented by one firm for generic work and by another (eg a local firm) for non-generic work). The Arrangements provide for the apportionment, subject to any cost-sharing order made by the court, of costs among all claimants in the group (whether or not legally aided). A similar scheme promoted by the Scottish Legal Aid Board would seem to be an appropriate and feasible[108] means of making legal aid available for group proceedings in Scotland and we suggest that it should be considered further by the Scottish legal aid authorities if group proceedings are introduced on the lines we have recommended.

5.45 *Legal aid for other multi-party actions.* It would be for consideration whether a Scottish scheme on the lines of the Legal Aid Board's Arrangements should cover both group proceedings and other multi-party actions. The alternative approach to a comprehensive scheme is to make piecemeal changes, as discussed by our Working Party.[109] These changes might extend the Board's powers. The powers might be available in all cases but would be particularly useful in multi-party actions. The following changes were suggested:

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prevention of injury in the future." Martyn Day and Sally Moore, "Multi-party actions: a plaintiff's view" in Roger Smith (Ed), *Shaping the Future: New Directions in Legal Services*, 1995.

[106] See para 5.39 above.

[107] The term "generic work" is defined as meaning:

> "..representation in respect of the issues common to all claimants or to a particular group of claimants and includes:
>
> (i) the selection, preparation and trial of lead issues and lead cases; and
>
> (ii) any work determined to be generic work by the Board."

Legal Aid Board Multi-Party Action Arrangements 1992 (as amended), para 3.

[108] In their Response to our DP the Scottish Legal Aid Board , in discussing possible changes applicable only in multi-party actions, said that it was open to question whether regulations could competently be made (by the Secretary of State for Scotland) in respect of such actions under s 36 of the Legal Aid (Scotland) Act 1986. In describing a Scottish version of the Legal Aid Board's Arrangements as "feasible" we recognise that it may be necessary to amend s 36 (or other provisions) of the 1986 Act to enable the necessary subordinate legislation to be made. (We express no view as to the scope of the Secretary of State's powers under s 36.)

[109] See Part II of Annexe C to this Report. See para 5.36 above for amendments suggested by the Scottish Legal Aid Board.

(a) enabling the Scottish Legal Aid Board to grant civil legal aid at an earlier stage than is at present competent;

(b) enabling the Scottish Legal Aid Board to have discretion to grant a limited legal aid certificate; and

(c) extending the Scottish Legal Aid Board's powers to attach conditions to a grant of civil legal aid.

**Our conclusions and recommendations on third party funding**

5.46 There is a potential overlap among the three means of funding which we have discussed. For example a contingency legal aid fund might be supplemented by making legal aid available for those not eligible for assistance from a contingency legal aid fund.

5.47 *Contingency Legal Aid Fund*. In principle it seems clear that such a fund would be a suitable means of providing funding (either for group proceedings or multi-party actions generally). However it suffers from two disadvantages: it is doubtful whether the fund would be financially viable; and, by definition, the fund is of no assistance where damages or a monetary award are not sought. For example a successful petitioner for an interdict against environmental pollution could not make any reimbursement to the fund.

5.48 *Class Action Fund*. The class action funds which have been established in Quebec and Ontario illustrate how such a fund might operate in Scotland. In particular: the grant of financial assistance might be discretionary and might be limited to those who are not eligible for legal aid; the fund need not necessarily meet all the outlay of assisted persons (eg the assistance might be limited to a maximum sum); and public funds might be supplemented by other funds. It would be for consideration whether such a fund might be managed by the Scottish Legal Aid Board. In practice it seems clear that such a fund would be reliant on public funding. It would appear that there is not a clear case for such public funding which might be seen as unfairly discriminating against litigants in conventional cases for whom only legal aid is available.

5.49 *Legal aid*. In practice, therefore, legal aid is the only feasible means of third party funding if additional funds are not available for a contingency legal aid fund and it is desired to provide public financial assistance. The existing provisions with regard to civil legal aid should, ideally, be amended to cope with the characteristics of our recommended group proceedings procedure and of multi-party actions generally. The legal aid authorities[110] should consider whether a scheme on the lines of the Legal Aid Board's Multi-Party Action Arrangements 1992 should be introduced in Scotland.

5.50 *Our recommendations*. Accordingly our recommendations with regard to third party funding are as follows:

> **36. In view of the doubt as to whether a contingency legal aid fund would be financially viable and the fact that such a fund would only be of assistance where damages or a monetary award are sought, such a fund would be appropriate to provide financial assistance for group proceedings only in supplement to legal aid.**

[110] The Secretary of State for Scotland, advised by the Scottish Office Home Department, and the Scottish Legal Aid Board.

**37. In the absence of any indication that public funding would be available to establish a class action fund in connection with group proceedings we do not recommend the establishment of such a fund.**

**38. Legal aid is the most suitable means of providing financial assistance for group proceedings and other multi-party actions.**

**39. The Scottish legal aid authorities should consider whether a scheme on the lines of the Legal Aid Board's Multi-Party Action Arrangements 1992 should be introduced in Scotland.**

# Part VI Summary of recommendations

1. There should be introduced a procedure for multi-party actions ie those actions where a number of persons have the same or similar rights.

(Paragraphs 2.13-2.19. Draft Act of Sederunt Chap 43A. )

2. The new procedure should initially be introduced only in the Court of Session.

(Paragraphs 4.3-4.7. Draft Act of Sederunt Chap 43A. )

3. The new Court of Session procedure which we recommend should be established by Act of Sederunt made by the Court of Session, rather than by Act of Parliament.

(Paragraphs 4.9-4.11. Draft Act of Sederunt Chap 43A. )

4. There should be a requirement that an order be obtained certifying that the court is satisfied that the action or petition meets the prescribed criteria and may proceed under the procedure for group proceedings.

(Paragraphs 4.15-4.19. Draft Act of Sederunt Chap 43A.1(2), and 2)

5. The application for a certification order should be made (a) after, and not before, proceedings have been raised and (b) at the earliest appropriate stage in the proceedings.

(Paragraphs 4.20-4.22. Draft Act of Sederunt Chap 43A.2(2) and (3))

6. The representative party should apply for a certification order within 14 days after the date on which defences to the action (or answers to the petition, as the case may be) have been lodged.

(Paragraphs 4.23-4.25. Draft Act of Sederunt Chap 43A.2(2) and (3))

7. The representative party should lodge with the application all relevant documents; if he founds on a document not available to him he should provide information about the person who possesses, or who has control over, the document. A similar obligation should be imposed on the defender.

(Paragraphs 4.23-4.25. Draft Act of Sederunt Chap 43A.2(4),(5),(6) and (7))

8. The certification order should:

(a) describe the class or group of claimants on whose behalf the action or petition is brought, the question or questions of law or fact which are common to the class, the remedy sought, and any counter-claim made;

(b) appoint the applicant as representative party (pursuer or petitioner, as the case may be); and

(c) stipulate the arrangements in accordance with which a member of the group may signify that he or she wishes to participate in the proceedings, as a member of the group.

(Paragraphs 4.26 and 4.27. Draft Act of Sederunt Chap 43A.4)

9. (1) In considering whether to grant a certification order the criteria with regard to which the court is to be satisfied should be:

(a) that the applicant is one of a group of persons whose claims have a common basis in that they give rise to common or similar issues of fact or law;

(b) that the adoption of the group proceedings procedure, which we recommend, is preferable to any other available procedure for the fair, economic and expeditious determination of the similar or common issues; and

(c) that the applicant is an appropriate person to be appointed as representative party, having regard in particular to his financial resources, and it can be expected that he will fairly and adequately represent the interests of the group in relation to those issues which are common to the group.

(2) In deciding whether it is satisfied that the group proceedings procedure should be adopted (in accordance with the criterion mentioned in Recommendation 9(1)(b) above) the court should have regard to whether the members of the group are so numerous that it would be impracticable for them to sue together in a single conventional action.

(Paragraphs 4.28-4.37. Draft Act of Sederunt Chap 43A.3)

10. It should not be a criterion for certification that the court should satisfy itself as to the adequacy of the representative party's legal advisers.

(Paragraphs 4.38 and 4.39)

11. The court should not have a discretion to decline to grant certification even if it is satisfied that the criteria are met.

(Paragraphs 4.40-4.42)

12. At any time after a certification order has been granted the court should be entitled to order that the action should no longer proceed as a class action because the criteria for certification, or any of them, are no longer satisfied.

(Paragraphs 4.43-4.46. Draft Act of Sederunt Chap 43A.7)

13. Persons, other than the representative party, who wish to be group members, should be required, within a prescribed period and in a prescribed manner, to elect to be members of the group.

(Paragraphs 4.47-4.55. Draft Act of Sederunt Chap 43A.4(c))

14. The court should be entitled, on cause shown, to allow persons (a) to join the group after the expiry of the election period and (b) to leave the group before the conclusion of the proceedings.

(Paragraphs 4.56 and 4.57. Draft Act of Sederunt Chap 43A.10)

15. (1) Notice of the granting of the certification order should be given by the representative pursuer or representative petitioner;

(2) The notice is to be given in such manner, by such means and within such period after the granting of the certification order as the court may direct;

(3) The notice should, unless the court otherwise directs,

(a) describe or narrate the content of the certification order including, in particular, the arrangements by which a person included in the order's description of the group may opt-in and elect to be a member of the group;

(b) describe briefly the consequences, and in particular the financial consequences, of electing to be a member of the group; and

(c) specify a person (either the clerk of court or the solicitor for the representative party) from whom further information about the group proceedings may be obtained; and

(4) The court should have discretion to dispense with the giving of notice of certification and to give directions for different notices to be given to different persons or groups of persons.

(Paragraphs 4.58-4.67. Draft Act of Sederunt Chap 43A.5 and 6)

16. The court should have a general power to direct at any time that notice be given of any matter to any member, or all members, of the group.

(Paragraphs 4.68 and 4.69. Draft Act of Sederunt Chap 43A.12(2))

17. In group proceedings the judge should have a general power, similar to that conferred on the commercial judge, to regulate procedure as thought fit with regard to both certified questions and any other matters at issue.

(Paragraphs 4.71-4.85, Draft Act of Sederunt Chap 43A.12(3))

18. In addition, and without prejudice to that general provision and the judge's general power to control the conduct of litigation, the judge should have power, at his own instance or on the motion of the representative party, or of the defenders (but not of any member of the group), to make such orders (including the drawing up of a time-table specifying periods within which steps must be taken) as may be appropriate to ensure that the group proceedings are conducted fairly and without avoidable delay.

(Paragraphs 4.71-4.85. Draft Act of Sederunt Chap 43A.12(1))

19. The rules for the new procedure should (a) not require the court to consider proposals for the abandonment or settlement of a class action and (b) not make abandonment or settlement competent only with the court's prior approval.

(Paragraphs 4.87-4.92)

20. (1) It should be competent for another member of the group to be substituted for the representative party only with the approval of the court.

(2) An application to the court for the removal of the representative party and the appointment of another named group member in his place may be made by the representative party, another member of the group or by the defender.

(3) In disposing of such an application the court should be entitled to attach such conditions, including such orders as to expenses, as appear to be appropriate.

(Paragraphs 4.93-4.95. Draft Act of Sederunt Chap 43A.14)

21. The rules for group proceedings should not contain an express provision with regard to (a) aggregate assessment of monetary awards and (b) the disposal of any undistributed residue of an aggregate award.

(Paragraphs 4.96-4.103)

22. (1) In group proceedings (with the opt-in scheme which we recommend) the court should be entitled to determine the liability of each group member for payment of a share of any taxed expenses incurred by the representative party.

(2) The court should be entitled to make such a determination before or after the conclusion of the action.

(Paragraphs 4.105-4.109. Draft Act of Sederunt Chap 43A.13)

23. (1) Where the representative party in group proceedings has obtained a decree for the payment of money, the court should be entitled to require the defenders to pay the sum awarded to the Accountant of Court;

(2) the part of the sum mentioned in paragraph (1) to be paid to each group member will be such amount as the court may direct after deducting such sum as the court considers to represent that group member's appropriate share of the liability for payment of any expenses incurred by the representative party which are not covered by an award of expenses; and

(3) the total sum made up of the amounts deducted under paragraph (2) is to be paid to the representative party.

(Paragraphs 4.110-4.113. Draft Act of Sederunt Chap 43A.16)

24. (1) All persons who are members of the group should be bound by an interlocutor (or interlocutors) which disposes (wholly or partly) of a certified question;

(2) The court should identify the members of the group in the first interlocutor issued after: the expiry of the election period; the granting of permission to a person to join the group at any later time; and the granting of permission to a person to cease to be a member of the group before the conclusion of the proceedings.

(Paragraphs 4.114-4.118. Draft Act of Sederunt Chap 43A.9 and 11)

25. There should be no statutory provision for the appearance in group proceedings of the Lord Advocate, any other Government Minister or any public official.

(Paragraphs 4.120-4.126)

26. In the event of the introduction of a group proceedings procedure in the sheriff court consideration should be given to the enactment of appropriate statutory provisions with regard to the remit of proceedings from the Court of Session to the sheriff and from the sheriff to the Court of Session.

(Paragraphs 4.127-4.133)

27. The statutory rules of prescription of obligations and limitation of actions need not be amended to cope with the introduction of the group proceedings procedure which we have recommended.

(Paragraphs 4.136-4.140)

28. The Court of Session should not be entitled, on the application of the defenders, to grant a certification order in respect of two or more proceedings (in the form of actions or petitions) which have been raised against the defenders.

(Paragraphs 4.141-4.144)

29. It should be competent for the representative party to reclaim (appeal) without leave against an interlocutor pronounced in group proceedings in the Court of Session and in particular an interlocutor (a) disposing of an application for certification or decertification and (b) identifying the common questions.

(Paragraphs 4.145-4.150)

30. If the representative party does not reclaim, or does not proceed with a reclaiming motion, it should be competent for another member of the group to do so.

(Paragraphs 4.151-4.154)

31. (1) A member of the group, other than the representative party, who wishes to reclaim when the representative party has not done so, or to proceed with a reclaiming motion which has not been proceeded with, should apply to be appointed as representative party, for that purpose;

(2) special provision should be made to enable a person within the description of the group, other than the pursuer or petitioner, to reclaim against an order refusing or revoking certification; and

(3) the procedural rules should contain appropriate provisions to enable the court to make such ancillary or other orders as may be necessary.

(Paragraphs 4.155-4.157. Draft Act of Sederunt Chap 43A.14 and 15)

32. The introduction of the group proceedings procedure should be accompanied by (a) the issue of appropriate publicity and guidance material designed to meet the needs of the general public and of legal practitioners and (b) the provision of information and instruction, as appropriate, for legal practitioners, court staff and judges.

(Paragraphs 4.165-4.170)

33. The operation of the new procedure should be systematically studied to enable experience of the operation of the procedure to be readily available, particularly to practitioners, and as the basis for making such changes in the procedure as may be necessary.

(Paragraphs 4.165-4.170)

34. In awarding expenses in group proceedings the court should retain its discretion to apply the general rule that expenses follow success.

(Paragraphs 5.5-5.10)

35. It should not be lawful in group proceedings for the representative party to make a contingency fee agreement with his or her legal advisers by which they would receive a share of the proceeds.

(Paragraphs 5.12-5.14)

36. In view of the doubt as to whether a contingency legal aid fund would be financially viable and the fact that such a fund would only be of assistance where damages or a monetary award are sought, such a fund would be appropriate to provide financial assistance for group proceedings only in supplement to legal aid.

(Paragraphs 5.17-5.20, 5.47 and 5.50)

37. In the absence of any indication that public funding would be available to establish a class action fund in connection with group proceedings we do not recommend the establishment of such a fund.

(Paragraphs 5.21-5.31, 5.48 and 5.50)

38. Legal aid is the most suitable means of providing financial assistance for group proceedings and other multi-party actions.

(Paragraphs 5.32-5.45 and 5.49-50)

39. The Scottish legal aid authorities should consider whether a scheme on the lines of the Legal Aid Board's Multi-Party Action Arrangements 1992 should be introduced in Scotland.

(Paragraphs 5.32-5.45 and 5.49-5.50)

# Appendix A

## Draft Act of Sederunt

STATUTORY INSTRUMENTS

# 1996 No. 00 (S.00)

# COURT OF SESSION, SCOTLAND

## Act of Sederunt (Rules of Court Amendment No. [ ]) (Group Proceedings) 1996

*Made* _ _ _ _ [ ] 1996

*Coming into force* [ ] 1996

The Lords of Council and Session, under and by virtue of the powers conferred on them by section 5 of the Court of Session Act 1988(**a**) and of all other powers enabling them in that behalf, do hereby enact and declare:

**Citation and Commencement**

**1.**-(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of Court Amendment No.0) (Group Proceedings) 1996 and shall come into force on [00th 1996].

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

**Amendment of the Rules of the Court of Session**

**2.**-(1) The Rules of the Court of Session 1994(**b**) shall be amended in accordance with the following sub-paragraph.

(2) After Chapter 43, insert the following Chapter-

## "Chapter 43A

## Group Proceedings

*Application and interpretation of this Chapter*

**43A.1.**-(1) This Chapter applies to group actions and to group petitions, that is to say to actions and petitions in respect of which a certification order has been granted (and not subsequently revoked) under this Chapter; and group actions and group petitions are together referred to in this Chapter as "group proceedings".

(a) 1988 c.36.
(b) S.I. 1994/1443.

(2) In this Chapter-

"certification order" means an order certifying that the court is satisfied that the criteria mentioned in rule 43A.3(1) are met as respects proceedings in relation to which the order has been sought;

"certified question" means a question described by virtue of rule 43A.4(a)(ii);
"election period" shall be construed in accordance with rule 43A.4(c); and
"reclaiming days" has the same meaning as in Chapter 38.

(3) For the purposes of this Chapter a person has elected to be a member of a group if-

(a) he has done so in accordance with-

(i) a certification order; or

(ii) a permission under rule 43A.10(1)(a); or

(b) he is, or has at any time been, the representative pursuer or representative petitioner.

**Obtaining certification**

**43A.2.-**(1) In any proceedings (the "relevant proceedings"), a pursuer or petitioner averring-

(a) that he is one of a group of persons (the "group") the others of which might each, severally, bring an action against or as the case may be each, severally, present a petition seeking an order against the person who is the defender, or as the case may be the respondent, in the relevant proceedings; and

(b) that each action which might be so brought or petition which might be so presented would raise at least one question (whether of fact or law) having a common basis with, directly related to or the same as a question raised in the relevant proceedings,

may, in accordance with this rule, apply to the court for a certification order so that the procedures in this Chapter may be adopted as respects the relevant proceedings.

(2) A pursuer seeking a certification order may apply for it by motion in the action within fourteen days after defences are lodged.

(3) A petitioner seeking such an order may apply for it by motion in the petition within fourteen days after answers are lodged.

(4) The pursuer or petitioner shall lodge with the application all relevant documents in his possession and within his control.

(5) Where the pursuer or petitioner founds in his application on a document not in his possession or within his control, he shall append to the application a schedule specifying the document and the person who possesses, or has control over, the document.

(6) Where defences or answers are lodged the defender, or as the case may be the respondent, shall lodge with them all relevant documents in his possession and within his control.

(7) Where the defender founds in his defences, or the respondent in his answers, on a document not in his possession or within his control, he shall append to the defences or

answers a schedule specifying the document and the person who possesses, or has control over, the document.

**Criteria for certification**

**43A.3.**-(1) The criteria as to which the court must be satisfied are that, taking the averment required of the pursuer or petitioner by sub-paragraph (a) of paragraph (1) of rule 43A.2 to be true-

(a) the averment required of him by sub-paragraph (b) of that paragraph is true;
(b) for reasons of fairness, economy and expeditiousness, the adoption of those procedures is to be preferred to the adoption of such procedures as might otherwise be available to the members of the group; and
(c) the pursuer or petitioner is an appropriate person to be appointed as representative pursuer or representative petitioner for the group and, having regard in particular to his financial circumstances, the group will fairly and adequately be represented by his being so appointed.

(2) In deciding whether it is satisfied as is mentioned in criterion (b) of paragraph (1), the court shall (without prejudice to the generality of that criterion) have regard to how numerous the persons who constitute the group appear to be.

**Content of certification order**

**43A.4.** A certification order shall, as respects the proceedings certified-

(a) describe-
  (i) in terms of the applicant's averment under rule 43A.2(1)(a), the group;
  (ii) each question by reference to which the court is satisfied as is mentioned in criterion (a) in rule 43A.3(1);
  (iii) the remedy sought; and
  (iv) any counterclaim lodged;
(b) appoint the applicant to be the representative pursuer, or representative petitioner, for the group; and
(c) specify-
  (i) a period (the "election period") within which; and
  (ii) the manner (whether by the lodging of a document or otherwise) in which,

  persons included in the order's description of the group may elect to be members of the group for the purposes of the proceedings.

**Giving notice of certification**

**43A.5.**-(1) Subject to paragraph (2), notice of the granting of a certification order shall be given-

(a) by the representative pursuer or representative petitioner;
(b) in such manner, and by such means, as the court may direct; and
(c) within such period after the order is granted as the court may direct;

and different directions may be given as respects notice to different persons or classes of person.

(2) In making a direction under paragraph (1), the court shall have regard in particular to-

(a) the probable number of persons included in the certification order's description of the group; and

(b) whether the cost, or effort, attributable to any manner of giving notice would be disproportionate, or as respects certain persons or classes of person would be disproportionate, having regard to the remedy sought;

and if the court determines that the circumstances of the case are such that notice need not be given, or need not be given to certain persons or classes of person, the direction may so provide.

(3) A direction under paragraph (1)(b) may, without prejudice to the generality of that paragraph, provide that a television programme service (as defined in section 2(4) of the Broadcasting Act 1990), a sound broadcasting service (as defined in section 126(1) of that Act), a cable programme service (as defined in section 2(1) of the Cable and Broadcasting Act 1984) or some other telecommunication system (as defined in section 4(1) of the Telecommunications Act 1984) be used as a means of giving notice.

**Content of notice of certification**

**43A.6.** Notice given under rule 43A.5(1) shall, unless the court otherwise directs-

(a) provide a brief description of the content of the certification order, explaining in particular the provision made by it as respects election and giving the election period;

(b) provide a brief description of what the consequences might be expected to be, and in particular of what the financial consequences might be expected to be, for the persons notified should they elect to be members of the group (broadly summarising in the description the provision made by rules 43A.8, 43A.9 and 43A.13); and

(c) specify either the clerk of court, or the solicitor for the representative pursuer or for the representative petitioner, as a person from whom further information about the proceedings may be obtained.

**Revocation of certification**

**43A.7.** If, at any time after a certification order has been granted in respect of an action or petition, the court considers that any of the criteria in rule 43A.3(1) is no longer met as respects the action or petition, it may revoke the order.

**Consequence of non-election**

**43A.8.** Without prejudice to rule 43A.10(1), after the election period has expired, those persons who have not, in accordance with the certification order (or by virtue of their being, or having been, the representative pursuer or representative petitioner), elected to be members of the group shall not be treated as being members of it.

**Effect of interlocutor on persons treated as members of group**

**43A.9.** An interlocutor which, either by itself or taken along with a previous interlocutor, disposes wholly or partly of a certified question shall bind all persons who, having elected to be members of the group described in the certification order, have not thereafter been permitted to withdraw from the group.

**Late election or early withdrawal**

**43A.10.**-(1) At any time after the election period has expired, the court may, on cause shown, permit-

(a) a person to elect to be (and accordingly to be treated as) a member of the group;

(b) a person who, other than by virtue of his being, at that time, the representative pursuer or representative petitioner, is treated as a member of the group to withdraw from it (and accordingly to cease to be so treated).

(2) Any such permission may be granted subject to such conditions, if any, as to expenses or otherwise as the court thinks fit to impose.

**Identification of group in certain interlocutors**

**43A.11.** The first interlocutor pronounced by the court in group proceedings after the election period has expired shall identify, in such manner as the court considers appropriate, the persons who for the time being are treated as members of the group; and so also shall the first interlocutor after-

(a) each election permitted under paragraph (1)(a) of rule 43A.10; and

(b) each withdrawal permitted under paragraph (1)(b) of that rule.

**Regulation of group proceedings by court for avoidance of delay etc.**

**43A.12.**-(1) In any group proceedings the court may, at its own instance or on the motion of any party-

(a) draw up a timetable specifying periods within which certain steps must be taken in relation to the proceedings and give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that the timetable is adhered to; or

(b) make such other order or direction as may appear appropriate to ensure that the proceedings are conducted fairly and without avoidable delay.

(2) The court may from time to time direct that notice of any matter as respects the proceedings (other than notice of certification) be given to any member of the group, or to the defender or respondent, in such manner and by such means as the court may direct; and paragraph (3) of rule 43A.5 shall apply to a direction under this rule as that paragraph applies to a direction under paragraph (1)(b) of that rule.

(3) Subject to the provisions of this Chapter, the procedure in any group proceedings shall be such as the court may from time to time order or direct; and without prejudice to the generality of this paragraph, special provision may be so made in relation to questions which are not certified questions.

**Liability as respects expenses**

**43A.13.**-(1) Without prejudice to rules 43A.10(2) and 43A.14(2), in any group proceedings the court may (whether or not the cause is still depending before it) apportion, among persons who have elected to be members of the group, liability for payment of expenses.

(2) The court need not assign a share in the apportionment to each member of the group.

**Substitution of representative pursuer or representative petitioner**

**43A.14.**-(1) In any group proceedings, the court may-

(a) at any time while the cause is depending before it, on the motion of-

(i) the representative pursuer or representative petitioner;

(ii) any other member of the group; or

(iii) the defender,

rescind the appointment of the representative pursuer or representative petitioner and appoint a member of the group to be, in place of him, representative pursuer or representative petitioner;

(b) at any later time before final judgment, on the motion of-

(i) the representative pursuer or representative petitioner; or

(ii) any other member of the group,

rescind the appointment of the representative pursuer or representative petitioner (whether or not he has already marked a reclaiming motion as respects the final decree or final interlocutor) and appoint a member of the group to be, in place of him, representative reclaimer for the group.

(2) A motion under paragraph (1) may be granted subject to such conditions, if any, as to expenses or otherwise as the court thinks fit to impose.

(3) Where a motion under sub-paragraph (a) of paragraph (1) is at least partially founded on the failure of the representative pursuer or representative petitioner to reclaim, within the reclaiming days, against an interlocutor (or, though he has so reclaimed, on his failure to insist in the reclaiming motion) the court may, if it makes an appointment under that sub-paragraph, make such provision as appears to it to be requisite for allowing the appointee a further period within which to reclaim against that interlocutor.

(4) Notwithstanding rule 43A.1(1), a motion under paragraph (1)(a) may be made even after the certification order has been revoked provided that the motion-

(a) is at least partially founded on a failure such as is mentioned in paragraph (3) (being a failure by reference to the interlocutor which revoked the certification order); and

(b) is made within five days after the reclaiming days as respects that interlocutor have expired (or within five days after they would have expired but for a reclaiming motion not insisted in).

**Special provision as respects reclaiming where certification refused**

**43A.15.**-(1) If an applicant for a certification order -

(a) does not, within the reclaiming days, reclaim against an interlocutor refusing the order; or

(b) having so reclaimed, is not insisting in the reclaiming motion,

any person averring that he would have been included in a description of the group had the order been granted may, within five days after the reclaiming days have expired (or within five days after they would have expired but for the motion not insisted in), reclaim against the interlocutor as reclaimer for the group.

(2) If a person reclaims successfully under paragraph (1), the court may treat him, for the purposes of rule 43A.4(b), as the applicant for the certification order.

**Payments by defender or respondent**

**43A.16.**-(1) Where in any group proceedings the defender or respondent is required to make a payment (or interim payment) to the representative pursuer or representative petitioner, the court may order the money to be paid instead to the Accountant of Court.

(2) The Accountant of Court shall administer any sums paid to him by virtue of paragraph (1); and he shall when directed to do so by the court distribute them, in accordance with that direction, to the members of the group.

(3) The court in making a direction under paragraph (2) shall take into account any apportionment under rule 43A.13(1) as respects the action.".

Edinburgh Lord President
[ ] 1996 I.P.D.

*Note*: (1) For the sake of brevity these Notes are written in the present tense on the assumption that the Act of Sederunt has been made.

(2) The reference to rules are to the rules in the new Chapter, which we recommend for insertion in the Rules of the Court of Session.

(3) Reference in brackets to paragraphs are to paragraphs in our Report.

**Paragraph 1**
These are the usual form provisions with regard to citation, commencement and insertion in the Books of Sederunt of the Court of Session.

**Paragraph 2**
This paragraph provides for the amendment of the Rules of the Court of Session by the insertion of the new Chapter providing for Group Proceedings. It implements Recommendations 1, 2 and 3.

**Rule 1**
This rule provides (a) that Chapter 43A, to be inserted in the Rules of the Court of Session, applies to group proceedings ie actions and petitions in respect of which a certificate order has been granted (see Rules 2 and 3) and not revoked because the court is satisfied that the prescribed criteria have been met and (b) definitions of terms used in this Chapter.

*Paragraph (1)*
This paragraph provides that this Chapter applies to certain proceedings; these are "group proceedings".

*Paragraph (2)*
This paragraph defines the following terms: "certification order"; "certified question"; "election period" and "reclaiming days".

*Paragraph (3)*
This paragraph explains who those persons are to be regarded as having elected to be a member of the group referred to in Rule 43A.2(1)(a). They include the representative pursuer and the representative petitioner.

**Rule 2**
This rule implements Recommendations 4, 5, 6, 7 and 9(1)(a) and sets out (a) the procedure under which a certification order may be applied for by a pursuer or a petitioner and (b) certain requirements to make available, or provide information about, relevant documents.

*Paragraph (1)*
This paragraph provides that a certification order may be sought by a pursuer or a petitioner averring (a) that he is one of a group of persons who might each individually raise proceedings against the same defender or respondent respectively and (b) that those proceedings would raise at least one common question of fact or of law. It implements Recommendation 9(1)(a). (See paragraph 4.33.)

*Paragraphs (2) and (3)*

These paragraphs allow a certification order to be applied for within 14 days after defences or answers have been lodged. They implement Recommendations 5 and 6.

*Paragraphs (4) and (5)*

These paragraphs implement Recommendation 7 and require the person applying for certification either to lodge all relevant documents or to specify who has any documents which he does not possess.

*Paragraphs (6) and (7)*

These paragraphs also implement Recommendation 7 and impose a similar obligation on the defender and the respondent.

**Rule 3**

This rule also implements Recommendation 9 and sets out the criteria which the court has to consider are satisfied before it grants the application for certification. The criteria in paragraph (1) are: (a) there are common questions of fact or of law (Rule 2(1)(b); (b) the adoption of the procedure set out in this Chapter is, for reasons of fairness, economy and expeditiousness, preferable to the adoption of other available procedures; and (c) the pursuer or petitioner is an appropriate person to be the representative party and can be expected to represent the group fairly and adequately. Paragraph (2) of the rule requires the court to take into account the number of persons there appear to be in the group. (See paragraphs 4.32 to 4.36.)

**Rule 4**

This rule implements Recommendation 8 and requires the certification order to: (a) describe the group, the common questions, the remedy sought and any counter claims; (b) appoint the applicant as representative pursuer or representative petitioner; and (c) specify the arrangements by which a person may elect to be a member of the group. (See paragraphs 4.26 and 4.27.)

**Rule 5**

This rule implements Recommendation 15(1), (2) and (4) and requires the giving of notice in order that those eligible to elect to join the group may decide whether to do so. It sets out the arrangements by which, unless the court determines that notice need not be given, notice of the granting of certification is given. (See paragraphs 4.58 to 4.67.)

*Paragraph (1)*

This paragraph sets out who is to give the notice and gives the court discretion to determine the detailed arrangements.

*Paragraph (2)*

This paragraph sets out certain matters to which the court is to have regard in deciding the detailed arrangements. The court may dispense with the giving of notice.

*Paragraph (3)*

This paragraph enables the court to order that television of another similar medium of telecommunication be used as a means of giving notice.

**Rule 6**

This rule implements Recommendation 15(3) and prescribes the content of the notice of certification to be given under Rule 5, unless the court orders otherwise. The notice is to: (a) describe briefly what the certification order says (and in particular the arrangements by which a person may elect to be a group member); (b) describe the consequences (in particular the financial consequences) of electing to join the group; and (c) specify a person (either the clerk of court or the solicitor for the representative party) from whom further information about the proceedings can be obtained, for example, by someone considering whether to elect to join. (See paragraph 4.64.)

**Rule 7**

This rule implements recommendation 12 and provides that the court may revoke the certification order if it considers that the criteria (set out in Rule 3) are no longer being met. (See paragraph 4.46.)

**Rule 8**

This rule makes clear that, after the election period, persons who have not elected to join the group are not members of it.

**Rule 9**

This rule implements Recommendation 24(1) and provides that an interlocutor which (itself or with a previous interlocutor) disposes of a certified question binds all the then members of the group. (See paragraphs 4.114 to 4.118.)

**Rule 10**

This rule implements Recommendation 14 and enables the court, after the election period has expired, to allow a person to elect to be a member of the group or to cease to be a member (by withdrawing from the group). The court may, in terms of paragraph (2), attach conditions in granting such a permission. (See paragraphs 4.56 and 4.57.)

**Rule 11**

This rule implements Recommendation 24(2) and requires the court to identify the group members in the first interlocutor granted after (a) the expiry of the election period and (b) after later allowing a person to join the group or to leave it.

**Rule 12**

This rule implements Recommendations 16, 17 and 18 and confers special powers on the court to regulate group proceedings.

*Paragraph (1)*

This paragraph enables the court, on its own initiative or at the request of a party, (a) to draw up a time-table specifying the periods within which certain steps are to be taken and to give directions to ensure that the timetable is adhered to and (b) to make appropriate orders to ensure that the proceedings are conducted fairly and without avoidable delay. It implements Recommendation 18. (Paragraphs 4.71-4.85.)

*Paragraph (2)*

This paragraph enables the court to order that notice of any matter be given to any member (or members) of the group or to the defender or the respondent. It implements Recommendation 16. (Paragraph 4.69.)

*Paragraph (3)*

This paragraph has two provisions. The first provision confers a general power enabling the court to order what the procedure in any group proceedings is to be. The second provision makes clear that this power is exercisable with regard to both certified questions (as defined in Rule 1(2)) and other questions or matters. These other matters might, for example, include matters relating to the determination of the claims of individual group members. It implements Recommendation 17. (Paragraphs 4.71-4.85.)

**Rule 13**

This rule implements Recommendation 22 and enables, but does not require, the court to apportion liability for payment of expenses among persons who are, or have been, members of the group. (See paragraphs 4.105 to 4.109.)

*Paragraph (1)*

This paragraph contains the general provision. The court's power is exercisable whether or not the case is still depending. (A case is depending from the time it is commenced until final decree. See note 6.3.3 in Greens Annotated Rules of the Court of Session.) The power is exercisable with regard to a person who has been allowed (under Rule 10(1)(b)) to leave the group because he or she is a person "who has elected" to be a member of the group.

*Paragraph (2)*

This paragraph permits the court to apportion liability among some members only of the group.

**Rule 14**

This rule, together with Rule 15, implements Recommendations 20, 30 and 31 and provides for the substitution of the representative party. It enables the court to rescind the appointment of the representative pursuer or petitioner and to appoint another member of the group in replacement of that person. (See paragraphs 4.93-4.95; 4.151-4.154; and 4.155-4.157.)

*Paragraph (1)*

Sub-paragraph (a) contains the general provision allowing substitution at any stage of the proceedings (including for the purpose of a reclaiming). It implements Recommendation 20. Any part (including any member of the group other than the representative party) may move the court, at any time before final decree, to exercise its power to substitute another representative party.

Sub-paragraph (b) specifically enables the appointment of a substitute reclaimer (appellant) in the period between final decree and final judgment. It does not matter if the representative party, by marking a reclaiming motion, has begun the appeal process.

*Paragraph (2)*

This paragraph enables the court, in granting a motion for the replacement of the representative party, to impose such conditions as it thinks fit.

*Paragraph (3)*

This paragraph makes clear that the substitution procedure provided in paragraph (1)(a) of this rule may be invoked either where the representative party has not reclaimed or where a reclaiming motion has been marked but not proceeded with. The court is given an ancillary power to extend the period allowed for reclaiming.

*Paragraph (4)*

This paragraph makes clear that the substitution procedure may be invoked in the circumstances mentioned in this paragraph and after the revocation of the certification order. (The effect of revocation is that the proceedings may no longer proceed as group proceedings; were it not for this provision the substitution procedure would not be available.) It implements, in part, Recommendation 31(2). (See paragraph 4.156.)

**Rule 15**

*Paragraph (1)*

This paragraph makes special provision for reclaiming where certification has been refused and the person who applied for the certification order has not reclaimed (or has not proceeded with the reclaiming): a person who avers that he or she would have been within the description of the group, if certification had been granted, may reclaim within the period of time specified in this rule. It implements, in part, Recommendation 31(2). (See paragraph 4.156.)

*Paragraph (2)*

If such a reclaiming motion is successful, the court may treat the reclaimer as the applicant for the certification order.

**Rule 16**

This rule implements Recommendation 23 and enables the court to order that payments (eg of damages) by the defender or respondent may be paid into court and administered by the Accountant of Court; the Accountant in making payments to individual group members may deduct any sum found due by that particular member in respect of the expenses of the proceedings. (See paragraphs 4.110 to 4.113.)

*Paragraph (1)*

This paragraph enables the court to order that sums due by the defender or the respondent be paid to the Accountant of Court.

*Paragraph (2)*

This paragraph requires the Accountant to administer any such sums and, at the court's direction, make a distribution to group members.

*Paragraph (3)*

This paragraph enables the court to direct that such a distribution is to take into account any party's liability for expenses under Rule 13(1).

## EXPLANATORY NOTE

*(This Note is not part of the Act of Sederunt)*

This Act of Sederunt amends the Rules of the Court of Session to insert a new Chapter providing for group proceedings, being actions and petitions in respect of which the Court is satisfied that prescribed criteria are met and that the procedures in the Chapter should be adopted.

# Appendix B

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# Appendix C

## SUMMARY OF CONCLUSIONS OF SCOTTISH LAW COMMISSION WORKING PARTY[1]

This Appendix reproduces the suggestions and comments of the Working Party given in Part V of the Working Party's Report. We have provided some observations (in square brackets) which take account of developments since the completion of the Working Party's Report in June 1993. The report was published by the Scottish Law commission in November, 1994.

### I. Court procedures and suggestion: suggestions

**Allocation of Cases**

1. The Court of Session Rules and the Sheriff Court Ordinary Cause Rules need not make express provision with regard to the allocation of cases, where there is contingency. (Working Party Report, paragraph 3.5.)

**Remits**

2. (a) The Sheriff Court Ordinary Cause and Summary Cause Rules should be amended to state expressly that contingency (defined in the Rules) is a ground on which cases may be remitted from one sheriff court to another and

   (b) Consideration should be given to whether the Court of Session should have a power to order a sheriff court case to be transferred to the Court of Session where the importance and difficulty of the case justify the remit (and whether or not there is contingency). (Working Party Report, paragraph 3.6.)

**Conjunction**

3. The Court of Session Rules and the Sheriff Court Ordinary Cause Rules should be amended to provide expressly for conjunction where there is contingency; the Rules should define contingency and provide an opportunity for parties to be heard on the proposal to conjoin. (Working Party Report, paragraph 3.7.)

   [The definition of "contingency" is discussed in Green's Annotated Rules of the Court of Session in connection with transmissions to that court from the sheriff court (Rule 32.1.3). The circumstances in which a contingency may be said to exist are described in paragraph 32.3 of the Annotated Rules.]

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[1] See paras 1.4 and 1.5 above of our Report.

**Leading Action or "test case"**

4. No amendment should be made to Court of Session Rule 91(6) but a counterpart rule should be added to the Sheriff Court Ordinary Cause Rules. (Working Party Report, paragraphs 3.8 to 3.11.)

   [The relevant rule in the Rules of the Court of Session ("RCS") 1994 is rule 23.3(6).]

**Master Pleadings**

5. There should be a rule in the Court of Session and the Ordinary Cause Rules which makes express provision for reliance by a number of parties on a single master summons or defences. To suit the various circumstances of multi-party actions the rule should be discretionary, and flexible as to time limits. (Working Party Report, paragraphs 3.12 to 3.16.)

**Split Hearings**

6. Amendments should be made to clarify and extend the scope of the Court of Session Rule (RC 108) about separate parts of proof and a counterpart Rule should be introduced into the Sheriff Court Ordinary Cause Rules. (Working Party Report, paragraphs 3.17 and 3.18.)

   [The relevant rule is Rule 36.1 in the RCS 1994. It is discussed in paragraphs 3.34 and 3.35 of the Cullen Report.]

**Nominated Judges**

7. Practice Notes (or a similar document) should describe the preferred arrangements by which an application may be made for a judge or sheriff nominated, respectively, by the Lord President or by the Sheriff Principal to be allocated to take charge of all the stages of a particular multi-party litigation. (Working Party Report, paragraphs 3.19 to 3.21.)

   [In England and Wales, it has been recommended that in each group action (ie multi-party action) there should be one designated judge who should take a pro-active role in progressing the action; but an alternate judge may be needed for potentially compromising hearings. See paragraphs 6.2.1 to 6.5.2 of the Report, "*Group actions made easier*" by the [English] Law Society's Civil Litigation Committee, September 1995].

**Cut-off date for claims**

8. A Court of Session Rule and a Sheriff Court Ordinary Cause Rule should be made expressly permitting the court to impose a cut-off date by which actions intended to join in the multi-party litigation should be commenced. (Working Party Report, paragraphs 3.22 to 3.24.)

   [The use of cut-off dates (ie dates by which various steps have to be taken) is discussed in the Report by the [English] Law Society's Civil Litigation Committee. (See paras 6.12.1 to 6.12.7.) The Committee notes that cut-off dates have been regarded by the

[English High] Court, notwithstanding the doubts of the [English] Legal Aid Board, as an essential disciplinary tool in group actions and also necessary to "ring fence" the group in terms of the identity of parties and of the issues. (Report para 6.12.1.)]

**A separate Section for Multi-Party Actions in the Rules**

9. Consideration should be given to devoting a separate Section of the Court of Session Rules and of the Sheriff Court Ordinary Cause Rules to provisions relating to multi-party actions including a definition of such actions or other means for determining the actions to which the Section might apply. (Working Party Report, paragraphs 3.25 to 3.26.)

   [We have recommended above (Report paragraphs 4.11 and 4.12) that a chapter in the Rules of the Court of Session should be devoted to the rules for our recommended procedure with regard to group proceedings.]

**A Procedural Hearing before Proof**

10. Experiments should be carried out to devise suitable procedures (and appropriate Rules or Practice Notes as necessary) for pre-proof hearings in both the Court of Session and the sheriff court. (Working Party Report, paragraphs 3.35 to 3.42.)

11. The Court of Session Practice Note No 3 of 1991, designed to reduce the number of cases being appointed to the procedure roll unnecessarily, should be redrafted in the form of a Rule of Court.

    [Suggestions 10 and 11 have now been overtaken by Lord Cullen's recommendations about judicial control and case management (Cullen Report, Chapter 6). See the Recommendations under heading C in the Summary of Recommendations in Chapter 11 to that Report.]

**Notices to Admit and Notices of Non-Admission**

12. Consideration should be given to whether a general rule in terms similar to Rule 253 of the Rules of the Court of Session, dealing with notices to admit and notices of non-admission, should be introduced for ordinary actions in the Court of Session and the sheriff court. (Working Party Report, paragraphs 3.54 and 3.55.)

    [This procedure was extended to ordinary actions in 1994 (RCS 1994, rule 55.4). Lord Cullen has recommended its further extension; see paragraphs 4.36 and 4.37 of his Report.]

**A Guide to Multi-Party Actions**

13. Consideration should be given to the preparation of a Guide for solicitors to the conduct of multi-party litigation in the Scottish courts. (Working Party Report, paragraphs 3.59 and 3.60.)

    [In his Report Lord Cullen writes: "During the course of my review I have become convinced of the value of the preparation and publication of a guide to the business of the Outer House for the use of practitioners. This would give practical guidance on the

conduct of cases, indicating on the one hand what is expected of practitioners and on the other hand the approach which the court is likely to take." (Cullen Report paragraph 10.16.) Lord Cullen recommends the production of such a guide. A general guide to all Outer House business would cover our recommended procedure, if introduced, and would overtake the Working Party's suggestion.]

**Masters in the Court of Session**

14. Further consideration should be given to the establishment in the Court of Session of the post of a judicial officer who might be assigned by the Lord President to deal with all procedural (interlocutory) matters which might arise in a particular multi-party litigation. (Working Party, paragraphs 3.61 to 3.66.)

[Lord Cullen considered this suggestion and, for the reasons given, he is not in favour of the appointment of Masters. (Cullen Report, paragraphs 6.23 and 6.24.) See also the comments by Mr Nigel Morrison, QC in his article on the Cullen Report, 1996 SLT (News) 93 at 98.]

## II. Legal Aid: Comments

[Included below are the comments by the Scottish Legal Aid Board ("SLAB") in their Responses dated 14 June 1995 to the Report of the Working Party.]

### A. Possible Changes applicable in all cases

(1) Should the Scottish Legal Aid Board be enabled to grant legal aid earlier? (Working Party Report, paragraphs 4.26 to 4.28.)

(2) Should SLAB's power to grant a limited certificate be clarified and/or extended? (Working Party Report, paragraph 4.29.)

[SLAB regards questions (1) and (2) as inextricably linked. In practice in order to satisfy SLAB as to the existence of probable cause (and that it is reasonable that the applicant should receive legal aid) the applicant's legal advisers need to undertake some preliminary work.

> "For those applicants who qualify for advice and assistance, expenditure can be authorised to enable this to be done. However, because the financial limits for advice and assistance and civil legal aid are not the same, there are a number of people who do not qualify for advice and assistance but would qualify for civil legal aid. Those persons are put in the position of having to meet the expenses of preparatory work privately. That work, which may involve obtaining expert reports, may be exceedingly costly and beyond their ability to finance. Effectively speaking, such persons may be excluded from the benefit of obtaining civil legal aid because they are not eligible for advice and assistance. This does not appear to be equitable and for that reason alone it would seem appropriate for the Board to be able to grant civil legal aid at an earlier stage, before the requirements of establishing probable cause have been met and for whatever limited purpose is required to establish probable cause.
>
> Apart from the cases of these individuals, it is probably fair to say that the combination of advice and assistance and civil legal aid does enable most cases to be catered for, but there can be circumstances where the power to grant a limited

certificate would allow greater flexibility (eg in circumstances where it would be undesirable to have to attach a specific ceiling on expenditure, as is required by the Advice and Assistance Regulations [SI 1987 No 382] (Regulation 11)). The Board would always wish to be able to refuse a limited certificate, however, where it appeared that advice and assistance would be more appropriate.

Section 14(1) of the Act would have to be amended or added to, as indicated in the Working Party papers. It is not likely that this would be *intra vires* of the Secretary of State's powers under [section 36 of the Legal Aid (Scotland) Act 1986] and in any event the Board has not considered that persons who have received injuries in a common calamity are persons having the "same interest" (each individual's interest being associated with his own injuries)."

(3) Should the statutory power to prescribe "distinct proceedings" (civil legal aid) and "distinct matters" (advice and assistance) be used to enable SLAB to grant legal aid for part only of the work involved in formulating or pursuing a claim? (Working Party Report, paragraphs 4.30 and 4.31.)

[SLAB considers that such a power would not be useful. It would be cumbersome and would limit the Legal Aid Fund's entitlement to recoup its outlay from property recovered or preserved on behalf of the assisted party. It would be more appropriate to exercise control through conditions attached to the grant of legal aid or to an increase in authorised expenditure under advice and assistance.]

(4) Should SLAB's powers to attach conditions to a grant of civil legal aid be extended? (Working Party Report, paragraphs 4.32 and 4.33.)

[SLAB would wish to see its powers extended at least to the extent provided to it in advice and assistance cases by Regulation 11(2)(b) of the Advice and Assistance (Scotland) Regulations 1987.]

(5) Should SLAB's power to require prior approval (of particular steps or certain expenditure) be enlarged? (Working Party Report, paragraphs 4.34 and 4.35.)

[SLAB considers that if the Board's powers to attach conditions - see (4) above - were enlarged it is doubtful whether there would be any need to enlarge its powers to require prior approval of particular steps or of expenditure.]

**B. Possible Changes applicable only in multi-party actions**

(6) The suggestions mentioned above could be applied to multi-party actions only (Paragraph 4.43); two further possibilities would be (a) giving statutory recognition to solicitors' groups (Paragraph 4.44) and (b) changes with regard to the cost of a multi-party action or the incidence of the statutory charge (Working Party Report, paragraph 4.45).

(7) Changes made applicable to multi-party actions only would make it necessary to define, for these purposes, a multi-party action; the basis of such a definition is discussed (Working Party Report, paragraphs 4.37 to 4.39).

## C. A Comprehensive Scheme for multi-party actions as an alternative to piecemeal changes

(8) If it was decided that a comprehensive scheme was needed, comparisons with the arrangements now introduced in England and Wales, prompt the following conclusions (Working Party Report, paragraph 4.55):

(a) The types of action to be covered would be specified by the Scottish Legal Aid Board if the Board exercised its powers under section 31(8) of the Legal Aid (Scotland) Act 1986 to make a solicitor available;

(b) if section 31(8) was invoked it would appear to be necessary for the Secretary of State to make Regulations under section 31(9) to disapply section 31(1) (which enables the assisted person to select the lawyer he wishes to act for him);

(c) it appears that, contrary to earlier discussions, the matters which would need to be covered in Regulations are relatively few; and

(d) on the basis of the SHHD paper of 1988 and the Arrangements now introduced in England and Wales it is likely that the relationship between SLAB and a solicitor selected to act in connection with generic issues would be contractual.

[SLAB makes two comments:

(a) The Board doubts whether Regulations could competently be made by the Secretary of State under section 36 of the Legal Aid (Scotland) Act 1986. (This is contrary to the view expressed by the Scottish Home and Health Department in June 1988; see Annexe G to SLC Working Party Report.) Section 36(3)(c) applies where a person "is concerned jointly with or has the same interest as" other persons. The Board takes the view that persons injured in a common calamity or as a result of the same alleged fault have separate interests (in their own loss).

(b) If a solicitor is under contract to SLAB, he would not be providing legal aid and the legal aid legislation would not apply. If the relationship between SLAB and the solicitor was to be contractual, rather than governed by the legal aid legislation, primary legislation (ie the Legal Aid (Scotland) Act 1986) would need to be amended.]

(9) However in deciding whether to make changes the Scottish legal aid authorities will no doubt wish to take account of wider policy considerations in connection with legal aid for civil proceedings and whether the severity of problems encountered in the relatively few multi-party actions in Scotland justifies the making of formal changes. (Working Party Report, paragraph 4.57.)

# Appendix D

**LIST OF THOSE WHO SUBMITTED COMMENTS ON DISCUSSION PAPER NO 98**

**Organisations**

Committee of Scottish Clearing Bankers
Council of Mortgage Lenders
Faculty of Advocates
Faculty of Procurators, Paisley
Law Society of Scotland
Scottish Consumer Council
Scottish Legal Aid Board
Sheriffs' Association
Sheriffs Principal

**Individuals**

Mr Cowan Ervine, University of Dundee
Professor W M Gordon, University of Glasgow
Lord Hope of Craighead, Lord President of the Court of Session, and Lord Johnston
Miss Marsali Murray, Messrs W & J Burness, WS, Edinburgh