Scottish Law Commission

DISCUSSION PAPER NO. 98

MULTI-PARTY ACTIONS: COURT PROCEEDINGS AND FUNDING

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This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this discussion paper were submitted by 30 April 1995. All correspondence should be addressed to:-

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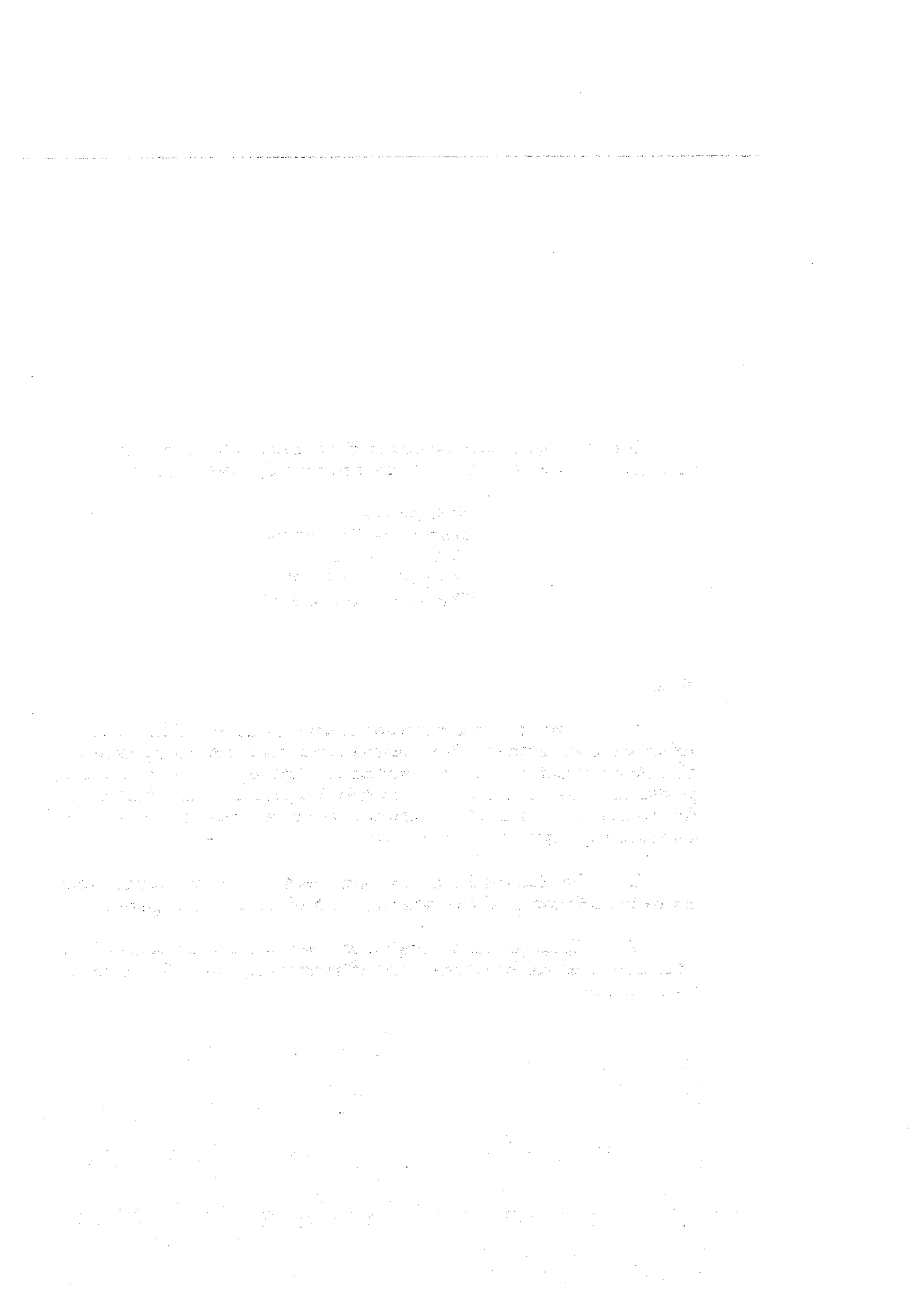
Notes

1. In writing a later report on this subject, with recommendations for reform, the Commission may find it helpful to refer to, and attribute, comments submitted in response to this discussion paper. Any request from respondents to treat all, or part, of their replies in confidence will be respected. If no request for confidentiality is made, the Commission will assume that comments on the discussion paper may be used in this way.

2. The Commission has also published the report of a working party set up by the Commission. (See paragraph 1.15 of this discussion paper.)

3. Copies of the working party report and further copies of this discussion paper can be obtained, free of charge while stocks last, from the above address.



MULTI-PARTY ACTIONS: DISCUSSION PAPER

Contents

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

PART 1 INTRODUCTION

Our reference

1.1 In 1988 we received a reference[1] from the Lord Advocate asking us to consider whether improvements should be made in Scottish civil court proceedings where a number of people have the same or similar rights. The reference 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 In this paper we refer to the "arrangements" mentioned in the Lord Advocate's reference as "multi-party actions". This general term is intended to cover particular procedures such as "representative actions"[2] and "class actions"[3] without implying that any specific procedure is referred to.

The purpose of this discussion paper

1.3 This discussion paper provides information about multi-party actions in other countries and seeks comments on possible improvements in the court and other procedures which govern Scottish

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[1]Under s 3(1)(e) of the Law Commissions Act 1965.

[2]See Part 5 below.

[3]See Part 6 below.

multi-party actions. That involves considering how such litigation is funded. This paper is complementary to other Scottish studies.[1]

1.4 An example of a situation where a number of people have the same or similar rights, which may illustrate the issues with which this paper will be concerned, is a case where many people in a particular area have suffered injury to their health because of atmospheric pollution from a local factory. What legal remedies are open to them?[2] If they want to stop the pollution, they might raise an action against the factory owners for a court order (an interdict) forbidding them to continue to cause the pollution. If, however, they wish, in addition, to be compensated, it might be impracticable, for reasons which we discuss below, for each of them to raise an action for damages on his or her own behalf, and preferable that they should be able to resort to some kind of group action procedure which does not yet exist in Scotland. Such a procedure might have to be relatively sophisticated, dealing separately with issues common to all the cases (for example, was there pollution of a particular kind over a specified period?) and with issues peculiar to individual claimants (for example, to what extent, if any, was his or her health affected by the pollution?). Such a procedure might be complex and therefore expensive. Should the pursuers (the claimants) be entitled to some financial assistance from public funds, since the general public could

[1]In particular the Scottish Consumer Council's Working Party's Report (1982), the Report of our own Working Party (1993) and the recent Dundee University research (1994). For details see Annexe A and paras 1.15 and 1.16 below.

[2]We concentrate in this paper on the private law remedies available to individual aggrieved citizens. There is also a public law regulatory system, based on statute law, including powers to control the operation of processes and criminal sanctions against polluters. (In connection with contaminated land see the recent Scottish Office Environment Department Consultation Paper, "Contaminated land: clean up and control" March 1994.)

be considered to benefit from the stopping of the pollution? Or should the pursuers be left to bear all the usual financial risks and liabilities of litigation? Is public funding justifiable on the ground that there is a public interest in fostering civil litigation against companies which have negligently allowed noxious substances to be emitted? On the other hand, if the pursuers succeed, the damages awarded and the effect of the normal rule with regard to the loser's liability for legal expenses might impose such exceptional financial burdens on the defender company that it might have to cease operation. That would cause loss not only to the shareholders, but to the local community by the loss of employment. Would that be fair?

The problems

1.5 In Parts 2 to 4 of this discussion paper we survey the existing procedures of the Scottish civil courts and conclude that they cannot deal adequately with situations where a number of people have the same or similar rights. Although each of them is entitled to raise a separate action, the result is likely to be unsatisfactory because of the expense, inconvenience and difficulty of using the present procedures.[1] We publish along with this discussion paper the report of a working party which contains proposals for improvements.[2] In Parts 5 to 8 we go on to examine the view that these procedures cannot be sufficiently improved and that what is required is some entirely new procedure to deal with such situations.[3] In both branches of our inquiry our approach is essentially to consider changes in procedure. In some situations changes in substantive law might be helpful: for example, the imposition of strict liability for certain kinds

[1]See para 1.6 below.

[2]See para 1.15 below.

[3]See paras 1.7-1.10 below.

of damage might make them less likely to occur and make the recovery of damages less complicated if they did. Changes in substantive law, however, are outside our terms of reference.[1]

Defects in existing procedures

1.6 People may acquire rights to compensation from the same or similar events which affect them all. An explosion and fire on a North Sea oil rig causing deaths and injuries is an example of a "sudden disaster" affecting a number of people.[2] Thousands of people may take a drug prescribed for their particular medical conditions. It is estimated[3] that between 8,000 and 10,000 children were born deformed in Europe as a result of their mothers taking the drug Thalidomide. (This is sometimes called a "creeping disaster".) People who have suffered in a disaster, whether sudden or creeping, may have to go to court to get adequate reparation. Each will have to raise a separate action and, in the last resort,[4] each claimant may have to take his or her case to a hearing of the evidence in order to try to obtain an enforceable award of damages. Separate actions are likely to be unduly complicated, time-consuming and expensive.

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[1]See para 3.12 below.

[2]"The Piper Alpha disaster, which occurred on the evening of 6 July 1988, claimed the lives of 165 of the 226 persons on board and 2 of the crew of the FRC of the *Sandhaven* while it was engaged in the rescue of persons from the installation." Cullen Report, para 2.1. (For detailed citations of reports, books and articles referred to in these footnotes see Annexe A.)

[3]Pamela R Ferguson, "Pharmaceutical products liability: 30 years of law reform?" 1992 Juridical Review 226.

[4]If the individual claims are not settled by agreement or using the test case technique (see paras 2.23–2.25 below).

Absence of appropriate procedures

1.7 Improvements in existing procedures might be helpful but it may be that what are really needed are new procedures. In particular, it may be suggested that Scotland needs a class action procedure. 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."[1] 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".[2] A distinctive feature of such a procedure is that the members of the class may not be individually named but may merely be described, *eg* all the purchasers of a particular model of car during a certain period of time.[3]

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[1]Law Reform Commission of Australia Discussion Paper No 11, *Access to the Courts - Class Actions* (1979).

[2]Art 999.

[3]See the Canadian case of *Naken v General Motors of Canada* discussed in paras 2.7 and 2.8 below.

1.8 Experience in the USA[1] and elsewhere suggests that class actions may be useful in a variety of situations. These include: where there are environmental issues (*eg* atmospheric pollution, or discharge of noxious effluents into rivers); shareholders' actions (*eg* where there has been improper conduct on the part of company directors or those issuing prospectuses inviting investment); consumer claims (*eg* sale of defective software for use with personal computers.[2]); claims by tenants in a local authority housing scheme (*eg* where dampness appears to derive from the defective construction of the houses,[3] rather than from the way the tenants heated or ventilated their houses).

1.9 Other remedies, however, may be more effective than a class action: for example, a successful interdict by one aggrieved person is likely to be beneficial to all those affected. Further, a class action procedure may have disadvantages (*eg* difficulties in the calculation of damages due to the individual claimants) which are greater than the apparent advantages. Again, any form of litigation may be regarded as unduly complex and expensive: in that event other remedies (*eg* enforcement action by a public official such as the Director General of Fair Trading or Her Majesty's Industrial Pollution Inspectorate[4]) may be preferable.

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[1]Where a form of class action was introduced by rule 23 of the Federal Rules of Civil Procedure 1938. The rule, as amended in 1966, is given in Annexe C. Its operation is examined in paras 6.3-6.42 below.

[2]An example drawn from the ALRC Report 1988, para 65.

[3]See *Renfrew District Council v McGourlick* 1987 SLT 538 and para 3.6 below.

[4]Acting respectively under, for example, Part III of the Fair Trading Act 1973 and the Environmental Protection Act 1990. For a discussion of the Director General's powers see Borrie (1984).

1.10 Some argue that the nature of society has changed and that there needs to be a corresponding and radical change in the processes by which an aggrieved citizen may obtain redress for any infringement of his rights. (These processes would include, but would not be restricted to, litigation.) Human activity is now overwhelmingly carried on in collective ways (eg in employment, transport, retailing, leisure) so that many people share the same risks and experience similar harms.[1] Yet the present forms of legal redress presuppose litigation between one pursuer and one defender. The absence of collective forms of redress seems an anachronism.[2]

Discussions in Scotland and elsewhere

1.11 These problems have been recognised in Scotland since at least the Ibrox Stadium disaster in 1971.[3] In 1982 a Working Party of the Scottish Consumer Council produced a report on "Class Actions in the Scottish Courts: a new way for consumers to obtain redress".[4] That report proposed a class action which could be raised by one person on behalf of a group which did not need to be initially identified;[5] such actions would be financed by a Class Action Fund, drawn from a percentage levy on successful litigants. The report suggested that the

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[1]This summary is drawn from the unpublished literature Review prepared by the Dundee University Researchers (see para 1.16 below). This change in contemporary society is sometimes referred to as "massification". (See Cappelletti (1989), pp 270-272).

[2]See further the discussion in Cappelletti and Garth (1983).

[3]An accident on one of the stairways led to the death of a number of the spectators leaving the ground. See *Dougan v Rangers Football Club Ltd* 1974 SLT (Sh Ct) 34.

[4]Hereafter referred to as "the SCC Report (1982)": for a detailed citation see Annexe A.

[5]But it would be essential that "each have a similar interest in the subject matter of the action though the interest need not be identical" SCC Report (1982) para 9.3.

Fund should be started with public money supplied by the Government. No action has been taken to implement the report. In 1988, in reply to Parliamentary Questions,[1] it was announced that Scottish Ministers had received representations from the Consumers' Association and that a reference had been made to the Scottish Law Commission.[2] It was also announced that the Secretary of State for Scotland considered that his regulation-making powers under the Legal Aid (Scotland) Act 1986 were sufficiently wide to allow legal aid for multi-party actions without the need for primary legislation.[3]

1.12 Similar discussions have taken place in England and Wales. The litigation in connection with the drug Opren[4] led the National Consumer Council to produce a report[5] on "Learning from Opren" in January 1989. The Lord Chancellor introduced amendments to English legal aid legislation[6] to enable legal aid to be provided, particularly on generic issues,[7] by a single firm of solicitors under contract to the

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[1]134 HC Official Report (6th Series) Written Answers col 188; and 138 HC Official Report (6th series) Written Answers col 181.

[2]See para 1.1 above.

[3]134 HL Official Report (6th Series) Written Answers col 192; see also SLC Working Party Report, para 4.10.

[4]See particularly the judgments in the Court of Appeal in *Davies v Eli Lilly & Co* [1987] 1 WLR 1136, [1987] 3 All ER 94 and the comments by Sir John Donaldson MR (at pp 1139, 96-97) on the fact that the concept of the "class action" is unknown to the English courts.

[5]Details in Annexe A.

[6]Now the Legal Aid Act 1988.

[7]*Ie* matters common to all the related cases.

Legal Aid Board.[1] In June 1994 the Legal Aid Board published a report to the Lord Chancellor calling for wide-ranging reform of multi-party litigation in England and Wales.[2] The following are some of the main recommendations in the report:

(i) a new approach is needed in the courts with a greater emphasis on progressing the central issues in the action, rather than on investigating every individual claim in detail;

(ii) new rules of court are needed which are tailored to regulate modern multi-party litigation;

(iii) consideration should be given to setting up specialist investigative tribunals to deal with certain types of disputes outside the existing court system;

(iv) there needs to be a review of the basis on which public funding is available in multi-party actions and the statutory tests which should be applied in such cases; and

(v) new procedures should be established for legal aid decision-making in these exceptional cases.

1.13 Neither in Scotland nor in England and Wales have there been substantial amendments of court procedures specifically to attempt to remove the problems involved in multi-party litigation. One of the matters which the Law Commission in England and Wales intends to

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[1]These arrangements were introduced on 1 April 1992. (See further SLC Working Party Report Annexe F.) In Scotland the view was taken that the Legal Aid (Scotland) Act 1986 allowed the Scottish Legal Aid Board ("SLAB") to make, if it wanted to do so, similar provision for Scotland (see para 1.11 above).

[2]*Issues arising for the Legal Aid Board and the Lord Chancellor's Department from Multi-party actions.*

consider as part of its examination of Damages[1] is:

> "(vi) the effectiveness of the present remedy of damages in multi-party litigation, examining in particular whether awards of damages should be assessed for the class as a whole and the means for determining their allocation to individual parties."

In their Consultation Paper on Aggravated, Exemplary and Restitutionary Damages[2] that Commission seeks views on whether, and how, exemplary awards of damages should be shared among a class of victims.[3] An "important publication"[4] has been the production by a Working Party of the English Supreme Court Procedure Committee of a "Guide for Use in Group Actions".[5]

1.14 Innovations have been made in Canada, Australia and, particularly, the United States of America.[6] A class action procedure was introduced in America[7] in 1939 and amended in 1966. Experience with this procedure, and discussion of its merits and demerits, has prompted considerable debate in America and elsewhere. Discussion, fostered by law reform bodies, has led to the introduction of new court procedures. In Ontario, the Law Reform Commission produced an

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[1]Item 11 of the Fifth Programme of Law Reform (Law Com No 200) adopted in June 1991.

[2]Law Commission Consultation Paper No 132.

[3]Consultation Paper para 6.22.

[4]"Recent developments in multi-party actions", (1992) 11 Civil Justice Quarterly 345.

[5]Our Working Party thought that a similar guide should be prepared for Scottish use. (SLC Working Party Report, para 3.60).

[6]Discussed in detail in Part 6 below.

[7]Federal Rule of Civil Procedure 23, referred to in this paper as "US Federal Rule 23" and printed in Annexe C. See paras 6.3-6.42 below.

exhaustive three-volume Report[1] in 1982 which was implemented, with some amendments, by the passing in 1992 of an Act setting up a class action procedure.[2] Similar developments have taken place in Australia, where the Law Reform Commission reported in 1988[3] and legislation[4] now provides for"representative proceedings".[5]

Our Working Party

1.15 It seemed to us that certain improvements might be made relatively readily in court procedures and the funding of litigation by legal aid[6] and that it might not be necessary to seek views on such improvements in this discussion paper. We had in mind, particularly, detailed changes which could be made without an Act of Parliament, by alterations in civil court rules[7] or in legal aid regulations[8] made by the appropriate authorities. Accordingly, following consultation with

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[1]Details in Annexe A.

[2]An Act respecting Class Proceedings (c 6).

[3]Details in Annexe A.

[4]Federal Court of Australia Amendment Act 1991. (No 181 of 1991.)

[5]In practice, a clear distinction is not made between class actions and representative actions (see para 2.43 below).

[6]Ie "civil legal aid" (Legal Aid (Scotland) Act 1986 Part III): assistance from public funds for legal representation in civil proceedings. In addition "advice and assistance" (1986 Act Part II) may be available for the taking of appropriate steps to do things before beginning formal court proceedings.

[7]Made by the Court of Session, for the Court of Session and the sheriff court, in the form of Acts of Sederunt under powers in the Court of Session Act 1988 and the Sheriff Courts (Scotland) Act 1971.

[8]Made by the Secretary of State for Scotland under powers in the Legal Aid (Scotland) Act 1986. Legal aid is now administered by the Scottish Legal Aid Board which, under the 1986 Act, has the power to give to the Secretary of State "such advice as it may consider appropriate in relation to the provision of legal aid and advice and assistance in accordance with" that Act (section 2(2)(e)).

the Faculty of Advocates, the Law Society of Scotland and the Scottish Legal Aid Board, we set up a Working Party to make recommendations for such relatively modest improvements. The Working Party reported to us in June 1993 and their report contains useful information, which is not readily available elsewhere, about Scottish court procedures and practices and legal aid in connection with multi-party actions. The report makes suggestions for improvements in these matters.[1] We consider that the report makes a helpful contribution to the public discussion about multi-party actions and we have arranged for the report to be published along with this discussion paper.

Research and acknowledgments

1.16 The preparation of this paper has been assisted by work done by members of the Department of Law of Dundee University. The formation of solicitors' groups in order to pursue claims arising from mass disasters (such as the Chinook helicopter crash in 1986 and the Piper Alpha oil rig explosion in 1988) was studied by Professor William McBryde and Dr Christine Barker.[2] A wider and longer study has now been carried out by Dr Barker along with Professor Ian D Willock and Dr J J McManus.[3] This study complements this paper and consultees should find it helpful to read together the Dundee research report, this paper and the report of our working party.

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[1]See Part 5 of the Report (Summary of Conclusions).

[2]Professor William W McBryde and Dr Christine R Barker, "Solicitors' Groups in Mass Disaster Claims" (1991) 141 New Law Journal 483.

[3]This study has been funded by The Scottish Office. The report of the study is to be published in 1994.

1.17 At an early stage in our recent work we had helpful discussions with some solicitors experienced in multi-party actions. We are grateful for their assistance.

1.18 This paper was completed at the end of August 1994. We have, where appropriate, provided references to the Rules of the Court of Session 1994,[1] which comes into force on 5 September 1994.

[1]Schedule 2 to Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994 No 1443) made on 31 May 1994.

PART 2: BACKGROUND

Introduction

2.1 In this Part we provide factual information as a background to later discussion. The following matters are dealt with:

- Situations in which multi-party actions may be appropriate;
- Cases in other jurisdictions which illustrate the inadequacy of conventional court procedures for dealing with multi-party actions;
- Scottish court procedures;
- Traditional features of civil litigation: procedures;
- Traditional features of civil litigation: how it is paid for; and
- Terminology

Situations in which multi-party actions may be appropriate[1]

2.2 Our reference is concerned with the provision of "a more effective remedy in situations where a number of persons have the same or similar rights".[2] In the following paragraphs we distinguish three categories of situations of that kind: where a number of persons have similar claims for damages arising from a single event or "sudden disaster"; or similar claims for losses attributed to a single cause but occurring at different times and in different circumstances, sometimes called a "creeping disaster"; or similar claims arising from their transactions as consumers.[3]

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[1]The material in this section is drawn from SLC Working Party Report paras 2.2-2.5. For further information see summary of cases sampled in chapter 3 of the Dundee Research Report.

[2]See para 1.1 above.

[3]For a similar categorisation see National Consumer Council, *Group Actions: Learning from Opren* (January 1989).

2.3 *(a) Sudden disasters.* In this type of case a number of people are killed or injured in the same occurrence. There is an identical causal relationship between the event and the resulting loss, injury or damage. The claims are typically for damages in respect of death or injury. Such cases arise where people are gathered together as: workers (*eg* the Piper Alpha North Sea oilrig explosion in July 1988), travellers (*eg* the bomb explosion on Pan Am flight 103 over Lockerbie in December 1988 and the train crashes at Bellgrove Junction in March 1989 and Newton Junction in July 1991), spectators (*eg* the Ibrox disaster of January 1971 when spectators leaving a football ground were killed or injured) or residents (*eg* the gas explosion in a tenement at Guthrie Street, Edinburgh in 1987). There is no doubt in these cases as to the immediate cause of the damage: in this respect they differ from the "creeping disaster" cases considered in the following paragraph, where a causal link between the facts complained of and a particular patient's subsequent condition may be difficult to establish. Some sudden disaster cases may involve only Scottish defenders (*eg* the Ibrox disaster) or relatively few claimants (*eg* the Guthrie Street explosion). In other cases, however, there may be a large number of potential claimants (*eg* the relatives of the 259 passengers and crew and 11 Lockerbie residents who were killed in the Lockerbie disaster) or the claims may have to be directed against parties based outside Scotland (*eg* the American manufacturers of the Chinook helicopter which crashed in Shetland in November 1986).

2.4 *(b) Creeping disasters.* Typical cases of this kind 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. Liability may be difficult to determine. For example, is the injury of

which a particular claimant complains attributable to the drug prescribed or to the ailment for which it was prescribed? It may be difficult to identify issues common to a majority of cases so as to enable parties to agree on a test case[1] which can be taken forward on its own in order to establish liability. Recent Scottish cases have included those involving: tranquilliser drugs, in the family of related compounds called benzodiazepines which are prescribed for anxiety and insomnia; and Myodil dye, inserted as a contrast medium into the spine before an X ray is carried out and said to have produced adhesive arachnoiditis. In such drug cases it is common for similar claims against the manufacturer to be made elsewhere, and particularly in England and Wales. Questions then arise as to whether the Scottish cases should be sisted to await the determination of the English cases (or *vice versa*); and if so whether there should be a financial contribution (and if so how much) by the Scottish litigants to the costs of the English cases eg towards the expense of obtaining medical reports.

2.5 *(c) Consumer claims.* 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 by individual claimants litigating independently without

[1]See paras 2.23-2.25 below.

undue (and possibly irrecoverable) expense.[1] In the *Eurocopy* cases[2] allegedly dubious sales methods were used to sell photocopiers and photocopying services and these sales methods are at issue as defences to actions for payment. (Commonly, however, the multiplicity of parties is on the side of the claimants rather than that of the defenders.)

Cases in Canada and Australia which illustrate the inadequacy of conventional court procedures

2.6 The problems raised by multi-party actions and by the inadequacy of conventional court procedures as a means of dealing with them can be illustrated by cases in Canada and Australia.[3] The judges' general observations in these cases are instructive.

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[1]In the English litigation in connection with Ativan and other benzodiazepine drugs the Court of Appeal upheld a decision to strike out actions by the users of the drugs against the prescribers of the drugs - claims which were alternative to their claims against the drug manufacturers - on the grounds that any benefit to the plaintiffs would be extremely modest compared to the "astronomical expense" to the prescriber defendants in defending the claims. (It may be doubted whether a Scottish court would consider itself entitled to dismiss an action on such grounds.) However the Court of Appeal observed that as a general rule it would not be appropriate for the court to enter upon a cost benefit analysis to determine whether to strike out actions in group litigation. That could only be done at the trial of an action. *AB and Others v John Wyeth & Brothers Ltd and Others (No 2), The Times*, 1 December 1993.

[2]Reports of those cases include: *Eurocopy Rentals Limited v Walker, Laird, Herron & Harper and Eurocopy (Great Britain) PLC* 1992 SCCR 815; and *Eurocopy Rentals Limited v Knowles* 1993 GWD 9-652.

[3]These cases are referred to because they are likely to be unknown to British readers. Scottish cases are referred to below (paras 2.12 ff) and are discussed in the Dundee Research Report, chapter 3. The English cases concerning Opren and certain tranquilliser drugs are well known and reported: see in particular *Davies v Eli Lilly & Co* [1987] 1 WLR 1136, [1987] 3 All ER 94 and subsequent reports.

2.7 *(a) Canada.* In the Canadian case of *Naken v General Motors of Canada Ltd*[1] four people sued for themselves and for all the other people who purchased new Firenza cars in 1971 and 1972. Over 4,600 people had bought these cars. Various defects were alleged and these were said to be in breach of warranties given in advertisements that the cars were "durable", "tough" and "reliable". The sum of $1,000 was claimed for each member of the class of claimants.[2] In giving the Court of Appeal judgment[3] Mr Justice Arnup said:[4]

> "In these days of mass merchandising of consumer goods, accompanied as it often is by widespread or national advertising, large numbers of persons are almost inevitably going to find themselves in approximately the same situation if the article in question has a defect that turns up when the article is put to use. In many instances the pecuniary damages suffered by any one purchaser may be small, even if the article is useless. It is not practical for any one purchaser to sue a huge manufacturer for his individual damages, but the sum of the damages suffered by each individual purchaser may be very large indeed. In such cases it would clearly be both convenient and in the public interest if some mechanism or procedure existed whereby the purchasers could sue as a class, with appropriate safeguards for defendants, who ought not to be

[1](1979) 92 DLR (3rd) 100 (Ontario Court of Appeal) and (1983) 144 DLR (3rd) 385 (Supreme Court of Canada). The particular rule under discussion in *Naken* was Rule 75 of the Rules of Practice of the Supreme Court of Ontario which read: "Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all." Rule 75 was derived from, and is virtually identical with, the equivalent Rule in the Rules of the Supreme Court (of England and Wales), *ie* Order 15, rule 12 (see para 5.3 below). There is no equivalent rule in the Rules of the Court of Session or of the sheriff court.

[2]The standardised sum of $1,000 (in respect of loss of resale value) was chosen in order to attempt to meet the view that representative action procedure is not appropriate where individual damages are claimed.

[3]Dismissing an appeal from an order striking out the statement of claim on the grounds that there was not the necessary common interest or identity of situation (for the purposes of Rule 75), since the defined class included purchasers who had not seen the advertisements.

[4]92 DLR (3d) 100 at p 104.

subjected to expensive law suits by class action plaintiffs who cannot pay costs if they lose."

2.8 The Ontario Court of Appeal's dismissal of the action was upheld by the Supreme Court of Canada. The court said that the rule of practice relied on,[1] "consisting as it does of one sentence of some 30 words, is totally inadequate for employment as the base from which to launch an action of the complexity and uncertainty of this one".[2] The headnote to the report of the case in the Supreme Court of Canada catalogues the various perceived defects of the rule and explains how the complexity and diversity of a large number of similar claims may make it difficult satisfactorily to gather all the claims together on the basis of shared or common interests:

> "The proceedings would require at least three stages, namely a trial on the issue as to whether there was a cause of action, and, if so, whether it sounded in damages: second, a reference to the Master to conduct hearings to determine what persons, if any, qualified for inclusion in the class; and third, receipt of the Master's report by the trial judge and computation of the total damages to be awarded. The rule made no provision for this nor for other important matters such as the rights of those owners of the vehicles unwilling to be represented in the action, the costs to be awarded against unsuccessful owners seeking admission in the representative group, discovery, production or other pre-hearing stages in connection with proceedings before the Master, or for the deprivation of the right to have the issue fully tried in the High Court. The present action required a procedure or determinative process to identify those entitled to claim and would require the master to try up to 4,932 claims and the particular damages suffered by each claimant. Such hearings would be complex and all the techniques and machinery of the adversary system would come into play. The rule made no provision for discovery or costs in such proceeding, nor was there provision for the manner in which the trial judge would review the Master's report. The

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[1]Rule 75, quoted in footnote 2 on the preceding page.

[2]Mr Justice Estey delivering the judgment of the court, 144 DLR (3rd) 385 at p 410.

> defendant could be put to the active defence of several thousand claimants for membership in the class in the absence of any authority to award costs against unsuccessful claimants. Moreover, the judgment in favour of a class member might be *res judicata* and bar subsequent or additional claims for personal injury suffered by reason of the deficiencies in the automobile. While the requirement for the same interest is not to be read narrowly so as to require all members of the class to have the same property interest in the same vehicle, it is not enough under Rule 75 that the group share a 'similar interest' in a sense that they have varying contractual arrangements which give rise to different but similar claims in contract. It is difficult to extend the rule beyond a more conventional case where the action involves a discernable fund or asset, and there only remains to be determined the right of the plaintiffs to the asset in whole or part, and the right of the individual members of the plaintiff class to a part of the total class entitlement."

The Supreme Court's conclusion[1] was that the case was a "further illustration of the need for a comprehensive legislative scheme for the institution and conduct of class actions".

2.9 *(b) Australia.* The Australian Federal Court case of *E v Australian Red Cross Society and Others*[2] concerned AIDS (acquired immune deficiency syndrome) contracted by the recipient of a post-operative blood transfusion. This was one of a large number of AIDS claims against three respondents: the New South Wales Division of the Australian Red Cross Society ("NSW Division"), the Australian Red Cross Society and the Central Sydney Area Health Service ("CSAHS)". It was alleged that the Australian Red Cross was responsible for the blood collection activities of the NSW Division and that the NSW Division distributed blood to the relevant hospital (for which the

[1]At p 410.

[2](1990-91) 99 ALR 601.

CSAHS was responsible). Some of the claims were based on the Trade Practices Act 1974.[1]

2.10 In his judgment, the judge commented:

> "If there were in force in this court provisions relating to grouped proceedings, such as those recommended by the Australian Law Reform Commission in its report 'Grouped Proceedings in the Federal Court' (ALRC 46), it would have been possible for the court to determine all common questions of fact or law at a single hearing in such a manner as to make the result binding on all applicants and all respondents. Those questions could have included not only the Trade Practices Act issues but also, with very little additional evidence, the issues regarding screening and surrogate testing at dates after October 1984. The result would have been to avoid the repetition in each of the later cases of most of the evidence in this case, with consequential savings in costs and the earlier finalisation of the whole litigation. But that recommendation has not become law. So it will be necessary to deal with each of the cases separately."[2]

2.11 In a more recent case[3] the New South Wales Court of Appeal had to consider whether a representative action was appropriate in proceedings of a "marathon character"[4] about the arrangements made for a loan from a finance company (the appellant) to the respondents. They were engaged in wheat farming and wished to purchase agricultural equipment. The respondents based their assertion that a

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[1]The claimant alleged: negligent misrepresentation; misleading conduct regarding suitability for purpose; and breaches of implied warranties of fitness. The respondents questioned whether any of the persons argued to be in breach of the statutory provisions was a corporation as defined in the Act.

[2]Wilcox J, 99 ALR 601 at 605. The judgment was delivered in February 1991 and, as noted in para 6.92 below the Australian Law Reform Commission Recommendations have now been implemented.

[3]*Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382.

[4]Kirby P at p 391.

representative action was appropriate on a court rule which is substantially the same as that introduced in England in the 19th century.[1] "The present case represents an attempt to make the [representative proceedings] rule the foundation of what is called in modern times a 'class action'. The question is whether the rule is capable of bearing that weight".[2] The court answered that question in the negative.:

> "If class actions of the kind now available in the Federal Court are to be permitted in New South Wales (and there are large policy issues involved in that decision), then this should only be done with the backing of appropriate legislation or rules of court, adequate to the complexity of the problem, and appropriate to the requirements of justice."[3]

Kirby P, however, dissented. He argued robustly that the case ought not to be regarded as a "class action"; that the three requirements (common interest, common grievance and relief "beneficial to all") of representative proceedings were met; and that courts should adapt procedures and need not wait for legislation.

> "There is a clear public interest in encouraging and developing representative actions. They save costs and significant court time. They dispose of legal issues efficiently. They bring many people to justice. They are potentially a vehicle which our law provides to breathe reality into the much boasted shibboleths about the rule of law. In the current climate I find it a source of amazement that anyone would suggest such rules of court should be construed narrowly in this regard. On the contrary, the rule should at least be given its proper operation to allow many to come at justice in a shared cause."[4]

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[1]Discussed in Part 5 below.

[2]Gleeson CJ at p 386. See also Bruce M Debelle, "Class actions for Australia? Do they already exist?" (1980) 54 Australian Law Journal 508.

[3]Gleeson CJ at p 390.

[4]At p 402.

A commentator has observed:

> "... the Court of Appeal decision in *Carnie* marks an unwelcome return to the outdated philosophy of *Markt*,[1] at a time when cuts in government funding to courts and litigants, and the high cost of legal services, make more urgent the utilisation of procedures promoting efficiency in litigation."[2]

Scottish court procedures[3]

2.12 In the following paragraphs we review various types of proceedings which may be brought in Scotland where a number of persons have the same or similar rights.

2.13 *(a) Action by one individual affecting a group.* A remedy obtained by an individual may indirectly benefit others as well. In *Webster v Lord Advocate*[4] the owner of a flat adjacent to the esplanade at Edinburgh Castle benefited not only herself but also many of her neighbours when she obtained an interdict against the construction of stands for the Edinburgh Military Tattoo in such a way as to cause a nuisance because of the metallic construction noise. In *McColl v Strathclyde Regional Council*[5] a Glasgow housewife obtained an interdict prohibiting a water authority from adding fluoride to the water supply. The other Edinburgh residents and the other consumers of water in Glasgow were not parties to the action which nevertheless affected them. The decision did not bind them or directly confer any

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[1]See para 5.5 below, footnote 1.

[2]D Kell, "Before the High Court (Representative actions: continued evolution or a classless society)" (1993) 15 Sydney Law Review 527 at p 536.

[3]This material is drawn from SLC Working Party Report paras 2.6-2.19. See also SCC Report (1982) chapter 2; Dundee Research Report, paras 1.5-1.13.

[4]1984 SLT 13 (Outer House), 1985 SLT 361 (Inner House).

[5]1983 SLT 616.

rights upon them. If either pursuer had lost her action, another resident or another consumer could have raised an action for the same remedy, although it would probably have had to be based on different grounds.[1]

2.14 *(b) Separate actions by members of a group against the same defender.* Individuals who are aggrieved by the same wrong (*eg* a train crash) or similar wrongs (*eg* a defective drug) may each raise a separate action.

2.15 An advantage of separate actions is that each action can be framed to specify the particular infringement of the rights of each individual and the particular remedy (*eg* the amount of damages) sought. There may be a number of disadvantages. "For the individual, however, the time and effort involved, particularly when the sum concerned is small, may be disproportionate to the benefit gained. The individual will have to take time to consult a lawyer, gather evidence and attend court. If he has to take time off work he will also incur greater financial costs. The preparation of a separate process for each claim in such a case obviously involves a considerable quantity of paperwork with considerable duplication and considerable expense".[2]

2.16 To save the expense involved where a number of separate actions have been raised, parties can formally move the court to

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[1]A second action with regard to the same subject-matter brought by a person with the same interest as the first pursuer would probably be dismissed on a plea of *res judicata*, unless brought on different grounds: 17 *Stair Memorial Encyclopaedia* para 1102.

[2]Scottish Consumer Council Report (1982) para 2.3.2 quoted in SLC Working Party Report p 8.

conjoin them.[1] Actions which are conjoined are treated as "one process" and dealt with, in practice, as a single action. The modern tendency is understood to be to avoid conjunction.[2] An alternative is for parties to agree to an informal working arrangement that the cases are taken forward together.

2.17 *(c) One action by members of a group against the same defender.*[3] A single action brought by several pursuers is competent where the ground of action by each pursuer is identical (*eg* arising out of a road accident)[4] and there is no material prejudice to the defenders.[5]

2.18 Those three types of civil proceedings are raised by the individuals affected. They conform to the traditional "individualistic model of civil procedure"[6] where the individual is free to decide whether he litigates and in what manner. The decision in his or her case will not, as a matter of strict law, directly affect any other individuals similarly affected.

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[1]See SLC Working Party Report para 3.4.

[2]For the Court of Session see Thomson and Middleton (1937), pp 387-388 and Maxwell (1980) pp 239-242. For the sheriff court see Macphail (1988), p 441.

[3]The rules as to how an unincorporated association may engage in litigation are complex. For the Court of Session see Maxwell (1980) pp 143-144, and for the sheriff court Macphail (1988) paras 4-98 to 4-100 and Ordinary Cause Rules 1993, rule 5.7.

[4]*Buchan v Thomson* 1976 SLT 42.

[5]*Armstrong v Paterson Bros* 1935 SC 464.

[6]Cappelletti and Garth (1983).

2.19 There are, however, certain other procedures whereby actions may be raised in the public interest:[1] (d) the *actio popularis*; (e) actions brought by the Lord Advocate under statute; and (f) actions by officials.

2.20 *(d) Actio popularis.* This is an action brought by a pursuer in his capacity as a member of the public to vindicate or defend a "public right". Rights which have been the subject of such actions include: rights of way; rights to certain uses of the seashore; and rights to use land for recreation. There is some doubt as to the extent to which this action is competent, and in modern practice it is regarded as limited in scope. Lord President Cooper commented on the limits of the *actio* in the "E II R" case[2] and it was described by Lord Clyde as "somewhat special and limited" in *Scottish Old People's Welfare Council, Petitioners.*[3]

2.21 *(e) Actions by Lord Advocate.* The Lord Advocate is authorised by statute to appear in certain civil proceedings.[4] Actions by or against the Crown are normally instituted by or against the Lord Advocate.[5] He may appear in an action for nullity of marriage or

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[1]See also the discussion in Part 3 below (paras 3.21-3.23) of "external pursuer actions".

[2]*MacCormick v Lord Advocate* 1953 SC 396 at p 413. In that case two members of the Scottish public unsuccessfully tried to stop publication of a proclamation which referred to the present Queen as "Elizabeth the Second of the United Kingdom of Great Britain".

[3]1987 SLT 179 at 184 J.

[4]5 *Stair Memorial Encyclopaedia* para 541; Macphail (1988), paras 4-62 to 4-67.

[5]Crown Suits (Scotland) Act 1857, s 1 (which is declaratory of the common law: *Smith v LA* 1980 SC 227 at pp 231-232).

divorce,[1] and may appear in, or initiate, an action of declarator of death[2] and proceedings with regard to a charity.[3] Under the Local Government (Scotland) Act 1973[4] he may apply on behalf of the Secretary of State for an order for specific performance of the functions in respect of which a local authority has been declared to be in default after a local inquiry. It may be that the Lord Advocate is entitled, at common law, to bring an action in the public interest, but we are not aware of any instance in which he has done so.

2.22 *(f) Actions by officials or bodies.* Under statute, some bodies or officials may raise actions which may be considered to be in the public interest. For example, under Part III of the Fair Trading Act 1973 the Director-General of Fair Trading may bring proceedings with respect to persistent conduct detrimental to the interests of consumers either before the Restrictive Practices Court or in the sheriff court.[5]

2.23 *(g) Test case.*[6] Finally, in a situation where a number of persons have the same or similar rights an action brought by one of

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[1]Court of Session Act 1988, s 19. He does so only rarely, where a matter of some public importance is involved: E M Clive, *Husband and Wife* (3rd ed, 1992), p 575.

[2]Presumption of Death (Scotland) Act 1977; Macphail (1988), paras 20-07, 20-08.

[3]Trusts (Scotland) Act 1921, s 26; Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, ss 7, 14(3).

[4]S 211.

[5]Ss 35, 38, 41(3).

[6]See in this connection paras 2.17 and 3.8-3.11 of the SLC Working Party Report. As noted there, a *test case* is one where there is agreement that the parties to other similar disputes will be bound by the outcome of the case; in a *leading action* there is no such agreement. We refer here, for convenience, simply to a "test case" and draw on the discussion in Lindbloom and Watson (1993), pp 77-82.

them may be regarded as a test case. In such a case a remedy is sought only on behalf of the pursuer who has raised the action while others, similarly affected, who might also have sought a judicial remedy hope instead to be able to rely on the decision in the test case. The defender may agree in advance to accept the decision in the case as binding in other similar cases.

2.24 In current Scottish civil court procedures there are no formal arrangements which would enable the judge to select as a test case one of a number of pending similar cases, sist the other cases and decide the selected test case for the express purpose of resolving certain issues common to all the cases. This technique might be particularly useful in mass disaster cases. In the USA there has been an instance of 8,555 consolidated asbestos cases resulting in a test case involving six of the plaintiffs whose actions have been tried for the purpose of providing the basis for the decision in the other cases.[1] Such arrangements require the judge to adopt a much more interventionist approach than is traditional. At its most extreme such an approach might involve the court in actively seeking out cases which are appropriate for the selection of a test case.[2] In the English

[1]Lindbloom and Watson (1993), footnote 84.

[2]"Case-tracking systems can be put in place requiring all litigants and lawyers on the filing of the initial documents (either claim or defence) to indicate to the court whether there are presently pending related claims or whether there are likely to be so in the future. The court should be given the power, on its own motion where necessary, to consolidate such actions, ensuring typicality of facts and adequate representation by lead counsel, with provision being made for those parties not having carriage of the claim or defence in the test case to contribute to the cost thereof. (Steps in these directions have already been taken in Canadian litigation.) The court should also be given power to direct advertising as to the existence of the litigation and inviting potential claimants to join in the litigation. Taken together, these proposals move in the direction of creating a court centred, rather than a private litigant centred, class or group action and represent a move towards making at least mass disaster litigation a public commodity rather than a private commodity. For most Commonwealth jurisdictions that lack an

Opren litigation[1] it has been said that "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".[2] In the recent English litigation arising from interest rate swap transactions, the various actions have been made subject to an order of the judge (Steyn J) which provided for the selection of lead cases to ensure determination of the major points of law and to avoid multiplicity of litigation.[3]

2.25 If a test case technique is adopted there may be difficulties with regard to payment of the legal and other expenses of the test case pursuer. It may be thought that, in principle, all the claimants who will benefit from the decision should bear a fair share[4] of these expenses. While that may appear to be only fair, it may be difficult to operate in practice particularly where the test case pursuer is legally aided and

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effective class action mechanism, this will be an improvement." Lindbloom and Watson (1993) footnote 85, quoting G Watson (1990) 69 Canadian Bar Review 623 at pp 665-666 (footnotes omitted).

[1]"This was a toxic drug case where 1,500 people were forced to accept a settlement offering them £1,800 individually since no further legal aid would be offered if the settlement was turned down. In the US the same kind of damages caused by the same drug resulted in compensation of £2m individually!" Lindbloom and Watson (1993) footnote 67.

[2]*Davies v Eli Lilly & Co* [1987] 1 WLR 1136, [1987] 3 All ER 94 *per* Sir John Donaldson MR at pp 1139, 96.

[3]The transactions having been held, by the House of Lords, to be *ultra vires* and unlawful, various banks have commenced actions in England seeking recovery of sums paid under such agreements. Cases against a Scottish local authority are reported on an issue of jurisdiction: *Barclays Bank Plc v Glasgow City Council* [1994] 2 WLR 466.

[4]But should this be on a per capita basis or related either to the amount of the original damages claim or the amount ultimately recovered?

the Legal Aid Fund is, in effect, subsidising the litigation on behalf of all the claimants, regardless of whether or not they are legally aided.[1]

Traditional features of civil litigation in Scotland: procedures

2.26 It may be considered that the problems of multi-party actions can be solved only by radical changes or innovations even if these alter the traditional features of civil litigation. It may therefore be helpful to highlight some of these features.[2]

2.27 *(a) Title and interest to sue.* The traditional principle is that when a person seeks a remedy in the courts, he must be prepared to show that he has the requisite "title" and "interest" to sue, that is, that he is the proper person to sue and has a real interest in the result of the action.[3] Such a person may be said to be the "owner" of the right vindicated in court. He may raise an action regardless of whether any other person who is similarly affected proposes to litigate, or of whether his action may be potentially useful to others as a means of deciding important issues of fact or law. Indeed he may ignore such considerations and simply decide that he cannot afford to go to court[4] or that he could not tolerate the anxiety and inconvenience which litigation would involve.

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[1]See in this connection the English Opren litigation: *Davies v Eli Lilly & Co* [1987] 1 WLR 1136, [1987] 3 All ER 94.

[2]We draw here from Cappelletti (1993) at pp 285–286.

[3]These very broad definitions are adapted from para 8.64 of the Justice - All Souls Committee Report, *Review of Administrative Law in the United Kingdom* (1988). For a discussion of the concepts of "title" and "interest" see Macphail (1988), paras 4–28 to 4–35.

[4]He may need legal aid to do so. If so, he must be financially eligible, have a "probable cause" and satisfy other conditions. See para 4.32 below and SLC Working Party Report, Annexe E.

2.28 "In the case of a class action, on the contrary, standing is granted to the 'owner' of a mere fragment of the right."[1] He sues not only on his own behalf but also on behalf of a large number of other persons who have the same interest in the subject-matter of the action as he has.[2]

2.29 *(b) The pursuer's freedom to decide how he wishes to conduct the litigation (party control).* Once the claimant has raised an action he is free, subject to the court's rules and orders, to continue the litigation to a conclusion or to settle or abandon it. He may decide to settle his claim on the basis of an apparently good offer made to him by the defender, even if a similar offer is not made to any other people similarly affected. He is also entitled to abandon the action, subject to such conditions as the court may impose.[3] As already mentioned,[4] it is rare for the Lord Advocate, another Government minister or public official to be entitled (or wish) to intervene in civil litigation. Further, a litigant is free to choose to represent him in court any lawyer who has a right of audience in that court. Those features of civil litigation have been said to be based on the principles of "party control", "party prosecution" and "party autonomy".[5]

2.30 However, in class action or other group action procedure in other jurisdictions, the person taking the litigation forward may not be free to accept what he regards as a good offer or to abandon the

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[1]Cappelletti (1993) p 285.

[2]See para 1.7 above.

[3]See Part 7 below.

[4]Para 2.21 above.

[5]Jacob (1987), pp 13-14.

litigation to the possible prejudice of the other people in the group.[1] A Government minister may be entitled to intervene in the public interest.[2] One of the pre-conditions for court authorisation of the initiation of litigation may be that the representative plaintiff would "fairly and adequately" protect the interests of the class.[3]

2.31 *(c) Damages awarded are only those due to the pursuer.* In a conventional action for damages it is axiomatic that damages are awarded only in respect of the particular loss or injury sustained by the pursuer. Even where others have suffered comparable loss or injury, there is no question, as there may be in certain types of class or group action, of fixing a maximum or "global" figure in respect of the damage suffered by all the members of the group or class affected and then dividing it up among them.

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[1]In the Australian Federal Court representative proceedings, a representative party wishing to settle his or her individual claim must obtain the leave of the court (Federal Court of Australia Act 1991, s 33W(1)).

[2]As in the draft Bill prepared by the Ontario Law Reform Commission (OLRC Report pp 864-865). Clause 14 reads:

> "At any time in an action under this Act, if it is in the public interest that the Attorney General act as representative plaintiff and either the representative plaintiff does not or will not fairly and adequately protect the interests of the class or the representative plaintiff consents,
>
> (a) the court may invite the Attorney General to be the representative plaintiff; or
> (b) the Attorney General may apply to the court for permission to be the representative plaintiff."

This provision does not appear, however, in the legislation implementing the OLRC Report recommendations. (An Act respecting class proceedings c 6 1992).

[3]OLRC Report draft Bill clause 5 reads "In determining whether the representative plaintiff would fairly and adequately represent the interest of the class, the court may consider whether provision has been made for competent legal representation that is adequate for the protection of the interests of the class."

2.32 *(d) All persons affected must be brought into the action.* In conventional litigation the pursuer must name as parties to the action all those people whose appearance or failure to appear in the action is necessary to have the question at issue effectively disposed of. In general it is not unduly difficult for the pursuer to do so. In a class or group action, however, where a large group of people are affected it may be unduly costly or impracticable for them all to be sent details of the litigation so that they can decide what they want to do.[1]

2.33 *(e) Procedure is accusatorial, rather than inquisitorial.* It is sometimes said that British[2] court procedure is accusatorial (or confrontational) rather than inquisitorial. This is a statement about what the judge does (or does not) do and about what the parties do. We have given some examples already of the freedom which a litigant has to conduct his case, broadly speaking, as he wishes.[3] The counterpart to this active role of the litigant, under the accusatorial system, is the relatively passive role of the court "to decide cases on the evidence that the parties think fit to call before it."[4] It is not for the judge to initiate new lines of inquiry or generally carry out his own

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[1]"Consider, for instance, the famous case of *Eisen v Carlisle & Jacquellin* (1974) 417 US 156) in which notification, even limited to those "absent parties" whose address was relatively easy to be found, would have cost $225,000, and this for postage alone: an impossible cost to bear for any plaintiff." Cappelletti (1993) p 285.

[2]In this respect the arrangements in England and Wales are broadly similar and English discussion of this matter can be helpful. See particularly the writings of Sir Jack I H Jacob. In his 1986 Hamlyn Lectures, *The Fabric of English Civil Justice*, he discussed a number of the matters mentioned here.

[3]See para 2.29 above.

[4]Pearce LJ in *Fallon v Calvert* [1960] 2 QB 201. See also Macphail (1988), paras 5-110 to 5-115, 16-36 to 16-38.

investigation,[1] and it is for the parties to ensure that the applicable law is brought to the judge's attention. This relatively passive role of the judge is sometimes seen as that of an umpire or referee[2] at a battle of wits between legal gladiators in the litigation arena.

> "A litigation is in essence a trial of skill between opposing parties conducted under recognised rules, and the prize is the Judge's decision. We have rejected inquisitorial methods and prefer to regard our Judges as entirely independent. Like referees at boxing contests, they see that the rules are kept and count the points."[3]

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[1] Although the judge is expected to examine critically, and may probe by his own questioning, the evidence and the legal submissions which are put to him.

[2] "It may be of interest to mention that, in cricket, the umpire gives his decisions only on an 'appeal' or application made to him by one side, whereas in football (soccer), the referee makes his decisions on his own initiative, without application made to him by either side." (Sir Jack Jacob, Hamlyn Lectures, footnote 10 on p 9.)

[3] *Thomson v Glasgow Corporation* 1962 SC (HL) 36 *per* L J-C Thomson at p 52. He also said:

> "Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. Our system of administering justice in civil affairs proceeds on the footing that each side, working at arm's length, selects its own evidence. Each side's selection of its own evidence may, for various reasons, be partial in every sense of the term. Much may depend on the diligence of the original investigators, or on the luck of finding witnesses or on the skill and judgment of those preparing the case. At the proof itself whom to call, what to ask, when to stop and so forth are matters of judgment. A witness of great value on one point may have to be left out because he is dangerous on another. Even during the progress of the proof values change, treasured material is scrapped and fresh avenues feverishly explored. It is on the basis of two carefully selected versions that the Judge is finally called upon to adjudicate. He cannot make investigations on his own behalf; he cannot call witnesses; his undoubted right to question witnesses who are put in the box has to be exercised with caution. He is at the mercy of contending sides whose whole object is not to discover truth but to get his judgment."

2.34 This characterisation of the process of civil litigation indicates that there may be questions about what is the most appropriate[1] method of adjudication in multi-party actions, particularly if the procedure adopted[2] allows one claimant to pursue claims, which are not necessarily identical, on behalf of himself and a number of other claimants. It may be against the public interest for the claims of all the claimants to be impeded or to fail because of avoidable defects in the way the main claimant ("the representative pursuer") handles the case. Court procedures may have to be designed accordingly, for example to permit the representative pursuer to be replaced in certain circumstances.

Traditional features of civil litigation in Scotland: how it is paid for[3]

2.35 How litigation is financed influences whether a case is raised, and if so, how it is conducted. The possibility of having to pay a relatively large sum by way of legal expenses, whether he succeeds or fails, will influence how a person acts, particularly if he is a person of modest means with no financial assistance available (*eg* from the legal aid fund or from other people who are willing to share the burden).

2.36 *(a) The general position.* In the first instance, each party to a case has the responsibility for paying for the legal services provided to

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[1]This vague term is used deliberately because there are important questions about the aims of multi-party litigation and how the conflicting interests of pursuers and defenders can be reconciled with reasonable fairness.

[2]As in class action procedure.

[3]The funding or financing of litigation, in particular the provision of legal advice and legal representation in court, is an aspect of the provision and financing of legal services. The subject is discussed in the Hughes Report (1980), chapter 8 (Paying for Legal Services).

him.[1] He has to pay for: court fees or dues[2]; the professional fees payable to his solicitor and (paid by the solicitor, on his behalf) to counsel; and disbursements or outlays *eg* the cost of obtaining medical and other reports from witnesses. If he is successful, however, the court may make an award of expenses in his favour[3] which will entitle him to recover part of his expenditure from the other side. (The amount of the expenses, and liability for them, cannot be determined until the case has been concluded.)

2.37 *(b) Lawyers' fees for litigation.* The amount charged in Scotland for the services of a lawyer in litigation is usually related to the amount of work done for the client.[4] For example, the fee for work done by solicitors is calculated either by particularising each item and charging separately for it or by charging a number of single, "block" or inclusive fees.[5] Other matters which influence what the client has to

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[1]Leaving out of account, for present purposes, the special arrangements where the party is in receipt of legal aid or is covered by legal expenses insurance.

[2]The appropriate Tables of these Fees provide for a payment to be made on the lodging at the court offices of each of the principal pleadings in a case: *eg* £77 is paid in the Court of Session on the lodging of the first writ in a case other than a consistorial case: Court of Session etc Fees Order 1984 (SI 1984 No 256 as amended by SI 1993 No 427).

[3]See further para 2.39 below.

[4]*Ie* for the preparation of the case by a solicitor and its presentation in court (by a solicitor, a solicitor-advocate, or an advocate instructed by a solicitor).

[5]The Rules of the Court of Session contain a Table of Fees of solicitors in that Court. An additional fee may be allowed at the discretion of the court to cover the responsibility undertaken by the solicitor in the conduct of the case. The court in deciding whether to allow such a fee and, if it is allowed, the Auditor of Court in fixing it must take into account various specified factors including the complexity of the litigation (1965 Rules, r 347(d); 1994 Rules, r 42.17(3)). In legal aid cases the fees are prescribed by regulations made by the Secretary of State for Scotland: see the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (SI 1989 No 1490, amended by SI 1992 No 372)

pay are: whether the fees charged (where fees are prescribed) are those prescribed or whether they are modified (*ie* reduced) or increased;[1] and whether there is an award of expenses[2] in favour of, or against, the client.

2.38 However, the client and his solicitor[3] may agree (a) that the lawyer will be paid only if the litigation is successful and (b) that in that event the solicitor's fee will be increased by a figure not exceeding 100 per cent.[4] Such *speculative fees* are to be contrasted with *contingency fees*. Under a speculative fee agreement, if the case is successful the lawyers receive the normal fee and an agreed percentage of that fee. Under a contingency fee agreement, the fee payable if the case is successful is calculated as a percentage of the

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printed in *The Scottish Legal Aid Handbook* (Scottish Legal Aid Board, 1992), p 70.

[1]See previous footnote.

[2]See para 2.39 below.

[3]Or the solicitor and the instructed advocate.

[4]Speculative fees were permissible at common law: *X Insurance Co v A and B* 1936 SC 225, L P Normand at pp 238-239. The position is now regulated by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 36 and the related acts of sederunt made by the Court of Session: AS (Fees of Advocates in Speculative Actions) 1992 (SI 1992 No 1897); AS (Fees of Solicitors in Speculative Actions) 1992 (SI 1992 No 1898). See W G Semple, "Fees in speculative actions" (1994) 39 JLSS 57.

amount recovered.[1] In Scotland,[2] such fees are prohibited at common law.[3]

2.39 *(c) The incidence of expenses.*[4] 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.[5] The general rule is that "expenses follow success".[6] The reason for the rule is "that the rights of parties are to be taken to have been all along such as the ultimate decree declares them to be, and that whosoever has resisted the vindication of those rights, whether by action or by defence, is *prima facie* to blame".[7]

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[1]A A Paterson, "Contingent fees and their rivals" 1989 SLT (News) 81.

[2]In the USA contingent fees are frequently resorted to, partly because of the "American" rule by which each party to a case meets their own costs with no award of costs in the event of success. (See further para 2.42 below.)

[3]In 1989 the Secretary of State for Scotland expressed the view that contingency fees should not be permitted (SHHD Paper, The Scottish Legal Profession: The Way Forward, para 9.3).

[4]The term "expenses" is used here in a technical legal sense to refer to the sums due to a party's solicitors which can be the subject of a court order for payment by the other party. The equivalent term in English law is "costs". For further information see J A Maclaren, *Expenses in the Supreme and Sheriff Courts of Scotland* (1912) and, for the sheriff court more recently, Macphail (1988), chap 19.

[5]Maclaren, p 3; Macphail (1988), para 19-03.

[6]See further paras 8.6-8.11 below.

[7]*Shepherd v Elliot* (1896) 23 R 695, L P Robertson at p 696. There are a number of exceptions and modifications to this general rule which need not be mentioned here. L P Cooper doubted whether all the conditions upon which the court's discretion as to an award of expenses should be exercised could or should be "successfully imprisoned within the framework of rigid and unalterable rules": *Howitt v Alexander & Sons* 1948 SC 154 at p 157.

2.40 The amount of any expenses awarded is usually formally determined (or "taxed" by the Auditor of Court) before the court will grant an order for payment of them. This determination is done on one of three bases:[1] (a) party and party; (b) solicitor and client, client paying; and (c) solicitor and client, third party paying. An award of expenses, without more, requires taxation as between party and party (unless the court otherwise orders) and in practice this is by far the commonest base for taxation.[2] On this basis only such expenses are allowed as are reasonable for conducting the litigation in a proper manner.[3] Taxation on basis (c) is more generous than basis (a) but less generous than basis (b). Party and party expenses often fall short of solicitor and client expenses and the successful litigant then has to pay the difference himself.[4]

2.41 It has been said that the incidence of costs ("expenses" in Scotland) is

> "the most baneful feature of English civil justice ... This is because of the operation of the broad, general rule that "costs follow the event," which put bluntly in the terms of a game means that the loser pays the costs of the winner, including his lawyer's fees, costs and charges... Inevitably, the application of

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[1]See Macphail paras 19-43 to 19-47. Broadly the same arrangements apply in the Court of Session.

[2]Macphail para 19-43.

[3]This rule now applies both in the Court of Session (RC 1965, r 347(a); RC 1994, r 42.10(1)) and in the sheriff court (AS (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (SI 1993 No 3080), Sched 1, reg 8).

[4]In Ontario it is understood that "expenses on a party and party basis normally cover approximately 30% of the true cost of litigation, while expenses on an agent and client basis cover approximately 90%" (paper on "Pursuer's offer to settle Procedure: Provisions and Practices in other Jurisdictions", by Morag Armstrong, Legal Assistant to Lord President, unpublished, 1993).

> the rule has far-reaching consequences. It greatly magnifies the factor of costs, which itself becomes a stake in the litigation, over and above the merits of the case, since if the loser has to pay in the end, there is an added incentive to the natural instinct to win. It makes winning more victorious and losing more disastrous. The parties must needs become cost-conscious, especially as, at any rate in the High Court, the costs are calculated not by the amount at stake, though this will be taken into account, but by each step taken in the proceedings, so that it is not possible to state at the beginning of an action what the costs will be at its end. Sometimes this makes parties settle or compromise cases which they would or should otherwise fight, and such settlements motivated by the desire to avoid or the fear to incur further costs might well not be fair or proper; sometimes it makes parties fight cases which they would or should otherwise settle, because the matter of costs stands in the way. In many cases, the costs exceed the amount of the claim or the value of what is at stake and thus the uncertainty as to the incidence and the amount of the costs becomes the powerful disincentive to pursuing or defending claims, however meritorious such claims or defences may be. The bane and burden of costs have existed for generations in the English system of civil justice and the problem of costs remains as intractable today as it ever has been."[1]

It may be thought that the general line of this criticism is applicable also in Scotland.

2.42 In the USA[2] the "fee shifting rule" (*ie* "expenses follow success") does not generally apply. This is relevant because American class action procedure (US Federal Rule 23[3]) is often used as the basis for discussion about procedures in multi-party actions. The American rule has been departed from, however, both in legislation

[1]Jacob (1987), pp 45-46.

[2]It seems that the only major country which follows "the American rule" is Japan: John G Fleming, *The American Tort Process* (1988), p 188, footnote 6 (hereafter "Fleming"). We have drawn on Fleming in this paragraph.

[3]See paras 6.3-6.42 below.

and by judicial decision. For example, legislative provision has been made for the recovery of fees of attorneys in civil rights actions.[1]

Terminology

2.43 As we mentioned earlier,[2] we use the term "*multi-party actions*" to refer to litigation where "a number of persons have the same or similar rights".[3] Such litigation can take a variety of forms: most commonly several cases arising out of the same[4] or similar[5] facts are raised (or defended) by a number of people. In order to contrast such actions with actions brought by individuals which do not so arise, multi-party actions are sometimes referred to as "group actions". Traditionally, *group actions* are divided into three categories. *Public actions* are those brought by a public official in which redress is sought for the public at large or for a group.[6] *Organisation actions* are brought by an organisation, such as a consumer or environmental protection association - again seeking redress not just for itself, but for its members and the public. *Class actions* are brought by a named plaintiff, who is typically the self-appointed representative of a class of persons, and who seeks redress for himself and for the other members of the class.[7] In England and other countries, such as Australia, which have adopted English court procedures there is provision for the

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[1]Fleming, p 190.

[2]Para 1.2 above.

[3]Reference from Lord Advocate to Commission quoted in para 1.1 above.

[4]*Ie* a "sudden disaster". See para 1.6 above.

[5]*Ie* a "creeping disaster". See para 1.6 above.

[6]See paras 2.21, 2.22 above.

[7]Lindbloom and Watson (1993), p 71. See further para 1.7 above.

representative action.[1] The Rules of the (English) Supreme Court[2] enable proceedings to 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.[3] Class actions may be regarded as a more sophisticated version of the representative action.

[1]This term can also, loosely, mean actions by a representative with no particular court procedure in mind. "Scottish practice admits of the representation of an unincorporated association through the medium of its officials" (SCC Report 1982, para 2.7.1).

[2]RSC Order 15, rule 12. See further Part 5 below.

[3]Similar provision is made in some Australian States – *ie* "where numerous persons have the same interest in any proceedings" – but other States specify "seven or more persons".

PART 3: OUR APPROACH TO THE REFERENCE

Introduction

3.1 In this Part we explain that certain matters are not discussed in this paper either because they are outwith the scope of our reference[1] or because an adequate treatment of them would make this paper unmanageable.

Our general approach

3.2 Our reference could be treated as raising wide issues about the aims of procedural reform, such as "access to justice" (the ready availability of formal procedures to enforce rights) and "behavour modification" (whether it is proper or necessary for an aggrieved citizen to be able to use civil litigation to, in effect, punish a company for its negligence and deter any repetition, *eg* in the manufacture and distribution of defective pharmaceutical drugs[2]). We try in this paper to pay due attention to such issues. We think, however, that it would be unfortunate if an undue emphasis on possibly contentious aims distracted attention from a discussion of practical improvements on which a measure of agreement may be possible.

An approach concentrating on the nature of the subject matter?

3.3 We gave examples earlier[3] of the types of cases where present procedures and remedies are said to be unsatisfactory. These cases could be examined with reference to their subject-matter in order to

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[1]For the terms of our reference see para 1.1 above.

[2]Some would argue that such punishment or deterrence should not be the function of civil proceedings but of a criminal prosecution by the Crown or a public law regulatory regime.

[3]Paras 1.6 and 1.7 above.

consider, for example in connection with environmental pollution, whether the existing remedies are adequate and, if not, what changes might be needed.

3.4 The main advantage of this approach would be that procedural and other solutions could be devised specifically to meet the particular problems met by "a number of persons having the same or similar rights"[1] in specific situations. For example, it might be suggested that this approach would be useful with reference to (a) dampness in rented local authority housing and (b) cases where sexual or racial discrimination is alleged. We discuss each of these.

3.5 *(a) Dampness in rented local authority housing.* Tenants of public sector (*eg* district council) housing appear to have difficulty in obtaining a satisfactory legal remedy for condensation.[2] Condensation is caused by problems with heating, insulation and ventilation. The prevention of dampness may require the heating system to be used frequently and hence expensively; this raises the question whether the landlord is under the duty of taking account of the expense of using the heating system.

[1]The phrase used in our reference.

[2]Brown & McIntosh (1987), p 129. "In practice, almost all attempts by tenants to compel landlords to perform necessary works have been unsuccessful." Michael Dailly, "The law of specific implement", 1993 SCOLAG Journal 102. For a discussion of how s 146 of the Public Health (Scotland) Act 1897 "can still be put to good use" see Derek O'Carroll and Elizabeth Aitken, "How 'ten ratepayers' can tackle statutory nuisances", 1994 SCOLAG Journal 11. See also Dundee Research Report, paras 3.68-3.74.

3.6 In the case of *Renfrew District Council v. McGourlick*[1] the landlords (Renfrew District Council) modernised the houses. In doing so the council reduced the ventilation but did not increase the insulation. The council also installed a heating system which was expensive to run. In attempting to remedy the dampness the aggrieved tenants made use of a form of group action procedure under section 146 of the Public Health (Scotland) Act 1897.[2] Under other provisions of that Act the local authority (now the district council) in the exercise of its public health functions may serve a notice on the "author of the nuisance", requiring that the nuisance be removed. If this is not done the local authority may initiate appropriate sheriff court proceedings by summary application.[3] Where, however, a district council is itself

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[1]1982 SCOLAG Journal 158 (Sh Ct); 1987 SLT 538 (Outer House of the Court of Session); 1988 SLT 127 (Inner House of the Court of Session). Discussed in Brown & McIntosh (1987) p 130.

[2]S 146(1) reads: "If any nuisance shall exist upon or in premises possessed or managed by the local authority, or in which the local authority have any interest, or if the local authority shall fail or neglect to perform any duty imposed upon them by this Act, or to take all due proceedings in this Act authorised for the removal of nuisances or preservation of health, or due regulation of lodging-houses, or for any other of the purposes of this Act, it shall be competent for any ten ratepayers residing within the district, ... or for the procurator fiscal of the sheriff court ... or for the Board, to give written notice to such local authority of the matters in which such neglect exists; and if the local authority do not within fourteen days after such notice, or, in the case of neglect to enforce any regulation or direction of the Board under Part IV of this Act, within two days after such notice, remove or remedy the nuisance referred to, or in any other case neglect to take the steps authorised or required by or under this Act, it shall be competent for the parties aforesaid, or any one of them, to apply to the sheriff by summary petition, and the sheriff shall thereupon inquire into the same, and may make such decree as shall in his judgment be required to enforce the removal or remedy of the nuisance, or otherwise to compel execution of or carry out the provisions and purposes of this Act, and may appoint the same to be carried into effect by and at the sight of such persons as he may think fit, and at the expense of the local authority, or of other parties on whom the expense ought in his opinion to be laid, and for payment of the expenses of such application by the petitioners or by the local authority or other party, as justice may require: ..."

[3]See Macphail (1988), paras 27-269 to 27-271.

the author of a nuisance in its own housing, it is hardly possible to conceive that the environmental health department of the council would or could take proceedings against the housing department of the same council.[1] In *McGourlick* the tenants gave written notice to the district council and later made an application to the sheriff under section 146 to find: that a nuisance existed, that that nuisance was the responsibility of the local authority and that the local authority should be ordered to remove the conditions which caused the nuisance. The sheriff ordered the district council to carry out certain specified works. The local authority sought reduction of the sheriff's interlocutor. The Lord Ordinary granted reduction on the ground that the sheriff had not had evidence before him to justify him in specifying the particular works which he had ordered to be carried out to remedy the condensation problems. The tenants reclaimed to the Inner House, which, of consent, reinstated the sheriff's interlocutor but with the deletion of certain words requiring the district council to carry out specific remedies in order to cure the nuisance.[2]

3.7 The *McGourlick* case illustrates the difficulties and questions which are raised by this procedure under the 1897 Act. These include the following: the meaning of "nuisance" in the 1897 Act; the suitability of a group of 10 ratepayers to raise the court proceedings;

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[1]Brown & McIntosh (1987) p 29. They also comment (p 30): "Tenants can also ask their local procurator fiscal to take action against the district council under s 146. However it is unlikely that the fiscal will be willing to undertake such action".

[2]Interlocutor of 29 September 1987, the effect of which was that the material part of the sheriff's interlocutor now read: "The sheriff ... finds that there exists a nuisance in each of the dwelling houses occupied by the petitioners, finds that the respondents are the authors of the nuisances, ordains the respondents to remove said nuisances ...". It appears that the Inner House considered that it was sufficient for the sheriff to require the local authority to remove a proven nuisance, without specifying how they were to do so.

whether the ratepayers, rather than specifying in detail what works are needed, should simply state the result to be achieved;[1] whether sheriff court summary application procedure is suitable where there are relatively complicated issues in dispute; and whether recourse to a court (rather than, say, an administrative tribunal with expert knowledge) is appropriate where difficult technical issues are raised. Wider issues which might require discussion include: the respective roles of central and local government with regard to the provision of rented housing; and whether the local authority's obligations as housing authority might be made more specific. A consideration of such matters would take us beyond the terms of our reference.

3.8 *(b) Cases where sexual or racial discrimination is alleged.* There are statutory provisions governing discrimination on the grounds of sex[2] (including marital status), race,[3] trade union membership and activities[4] and in relation to the dismissal of participants in industrial action.[5] "Except insofar as it is rendered so by statute, discrimination is not unlawful in the United Kingdom. There is no protection against discrimination, for example, on the ground of age or disability or religion."[6] The duties of the Equal Opportunities Commission and the Commission for Racial Equality include working towards the elimination of discrimination and the promotion of equality of

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[1]The outcome of the proceedings in *McGourlick* 1988 SLT 127 appears to indicate that this may be so (see previous footnote). See, however, letter from Derek O'Carroll in 1993 SCOLAG Journal 115.

[2]Sex Discrimination Act 1975.

[3]Race Relations Act 1976.

[4]Employment Protection (Consolidation) Act 1978 s 23.

[5]*Ibid*, s 62.

[6]9 *Stair Memorial Encyclopaedia* para 332.

opportunity.[1] Both Commissions have the power to conduct formal investigations[2] and may issue non-discrimination notices.[3] Complaints of discrimination may be made by the aggrieved individual to an industrial tribunal.[4] The individual has no right to go to the ordinary courts,[5] except on appeal from an industrial tribunal.[6] A formal investigation may be carried out where an individual is a member of a defined group and the Commission considers that it is essential to investigate further in the interests of the remaining members of the group.

3.9 The existence of such specific remedies, forming part of a general statutory scheme specifically devised to provide appropriate remedies for particular problems, leads us to conclude that we should not consider these matters. To do so would lead us into a consideration of the aims, working and effectiveness of the legislation.[7] That would be a major task and, in any event, we regard these matters as beyond the scope of our reference.

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[1]In the fulfilment of these duties the Equal Opportunities Commission was held to be entitled to bring proceedings in the Divisional Court for a declaration that certain provisions of the Employment Protection (Consolidation) Act 1978 were incompatible with EC law: *R v Secretary of State for Employment ex p Equal Opportunities Commission* [1994] 2 WLR 409.

[2]1975 Act, s 57(1); 1976 Act, s 48(1).

[3]1975 Act, s 67; 1976 Act, s 58.

[4]1975 Act, s 63(1); 1976 Act, s 54(1).

[5]The Commission may apply to the sheriff court for an order restraining "persistent discrimination": 1975 Act, s 71; 1976 Act, s 62.

[6]Our reference (para 1.1 above) directs us to consider "Scottish civil court proceedings" and thus excludes industrial tribunal proceedings.

[7]Since the legislation applies throughout Great Britain any review would have to cover the whole country.

Approach concentrates on civil court proceedings

3.10 Our reference is expressly concerned with "civil court proceedings".[1] This narrows our approach in two ways. *First*, we are not concerned with criminal proceedings, the prospect of which might influence the conduct of a potential defender such as a drug company or a North Sea oil rig operator.[2] *Secondly*, we are not primarily concerned with tribunals[3] or other adjudicatory bodies notwithstanding that they may deal with matters as important as those dealt with in the ordinary civil courts.

3.11 *A "disaster court"?* A sudden disaster may lead to three separate court proceedings: civil proceedings for damages; criminal proceedings for breach of statutory health and safety requirements;[4] and proceedings to determine why the disaster occurred (*eg* a fatal accident inquiry[5] or other statutory inquiry).[6] It has been suggested[7]

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[1]See para 1.1 above.

[2]The responsibility of corporations for criminal offences is, however, a difficult subject: see G H Gordon, *The Criminal Law of Scotland* (2nd ed, 1978) paras 8-84 to 8-90 and Second Cumulative Supplement (1992).

[3]See further paras 4.35 and 4.36 below.

[4]See the provisions about offences in s 33 of the Health and Safety at Work etc Act 1974.

[5]Under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. See further chapter 7 of the Dundee Research Report.

[6]The Piper Alpha Inquiry was set up in July 1988 by the Secretary of State for Energy in the exercise of powers conferred by the Offshore Installations (Public Inquiries) Regulations 1974 (SI 1974 No 338): see Inquiry Report (Cm 1310) para 2.4.

[7]*Eg* by Mr David Tench, legal director of the Consumers Association, in 1991. "Earlier this week, David Tench called for the setting up of a joint national disaster court and standing commission which would jointly respond to disasters as well as oversee compensation to victims. According to Mr Tench's proposals, a disaster court would handle investigation of the circumstances, punishment of those responsible and compensation of victims

that one set of proceedings (a "disaster court") should suffice because more than one set of proceedings is unnecessarily expensive, time-consuming and distressing for those affected, such as the relatives of the deceased. This suggestion is superficially attractive but it raises a number of difficulties. Some of the issues raised by a disaster may be common to a fatal accident inquiry, a criminal trial, and civil actions of damages by the bereaved or injured. Others, however, will be different, since each procedure has a distinctive purpose which is fulfilled in a particular way. A *fatal accident inquiry* is concerned with establishing, in the public interest, the circumstances of the death or deaths, and not with questions of civil or criminal liability. Those who may be civilly or criminally liable are not obliged to be represented. They may have no notice of any allegations which may be made against them at the inquiry. A *criminal trial* is concerned with whether the accused has committed a criminal offence, which must be proved beyond reasonable doubt on corroborated evidence and generally without the use of hearsay as evidence of the facts. A *civil action* is concerned with the pursuer's entitlement to damages and the pursuer's claim should be thoroughly investigated and carefully formulated. This process takes more time than is normally available before a fatal accident inquiry or criminal trial. Fair notice of the basis of the claim must be given to the defenders, and the pursuer's case may be proved on a balance of probabilities without corroboration and with the use of hearsay evidence. We find it difficult to envisage how a single set of proceedings might be devised which would serve all these purposes

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and families. Headed by a top-ranking judge, the court would have the powers of the High Court, combining the roles of a court of inquiry and court of law. The standing commission, on the other hand, would primarily be responsible for immediate co-ordination of rescue efforts following a disaster. It would be staffed by doctors, engineers and lawyers. The lawyers, said Mr Tench, would be required to collect the evidence as soon as a disaster happens and accumulate and deploy it in order that later on the full facts can be brought forward and dealt with by the necessary legal procedures." (*Law Society's Gazette*, 25 September 1991, p 8.)

with efficiency and without infringing the principles of fairness which are central to the administration of justice. We therefore do not pursue in this paper the suggestion of a disaster court.[1]

Approach essentially procedural

3.12 Our reference asks us to consider ways in which, when a number of people have the same or similar rights, they might be given a more effective remedy. The purpose of a remedy is to rectify a wrong. Our reference assumes that there is a legal obligation on someone to rectify that wrong, and directs us to propose means by which that obligation may be effectively enforced. The approach which we have adopted therefore concentrates on procedural matters:[2] on the ways in which the right might be more effectively vindicated rather than on the nature of the right itself. We are accordingly concerned with procedural law rather than substantive law.

3.13 We recognise, however, that certain issues raised by multi-party actions might also be dealt with by radical changes in the substantive law. There may, for example, be concern about drug manufacturers marketing defective drugs. One possibility would be to impose strict liability - that is, no need for proof of culpability - in certain circumstances: for example, where the company has failed to meet prescribed standards in the production of drugs. Again, if it were

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[1]We understand that, following the succession of major disasters which occurred between 1978 and 1990, the Crown Agent arranged for a working group of procurators fiscal to prepare a Manual for Procurators Fiscal on Major Disasters.

[2]But we do not discuss here matters relating to the detailed drafting of the court rules which would be needed if it was decided to introduce a new procedure for certain multi-party actions in the Court of Session or the sheriff court. (There are three main sets of civil court rules in the sheriff court regulating procedure in ordinary causes, summary causes (other than small claims) and small claims.)

considered that litigation was unduly protracted and expensive for the victims of defective drugs,[1] a no-fault compensation scheme could be introduced by statute. Such a scheme might be combined with a compulsory levy on the profits of drug companies to establish the compensation fund. The determination of whether claims should be met from the fund could be the function of a statutory tribunal. We are in no doubt, however, that any consideration of such changes in the law is beyond the terms of our reference.[2]

No consideration of means, other than litigation, of resolving disputes

3.14 It may be argued that rather than attempting to reform the litigation process in order to remove or mitigate its perceived defects it would be preferable to consider whether some other process might be more satisfactory for the resolution of disputes where a large number of people are involved.

3.15 One possibility would be to consider whether there should be statutory and financial encouragement of alternative dispute resolution (ADR). ADR includes services such as mediation and conciliation and is often seen as a helpful alternative or supplement to conventional civil litigation. A Practice Statement issued by the Commercial Court of the Queen's Bench Division of the (English) High Court in December 1993 states that the judges will in appropriate cases invite parties to consider whether their case, or certain issues in their case,

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[1] See for example one comment on the Opren case:

> "The Opren case ... caused a substantial debate in England. *The Daily Telegraph* put it this way in an article of February 16, 1988: 'The combination of the company's determinedly legalistic and mean-minded practice and the inadequacies of English laws and procedures has resulted in a level of compensation that disgraces English justice.'" Lindbloom and Watson (1993) footnote 67.

[2] See also para 4.29 below, final footnote.

could be resolved by means of ADR.[1] In 1994 both the Faculty of Advocates and the Law Society of Scotland introduced ADR services provided respectively by accredited advocates and solicitors.[2]

3.16 It appears that ADR can work well in appropriate circumstances. These circumstances, however, must include the agreement of parties to resort to ADR. If they do not so agree, and are not prepared to settle their differences by negotiation, there is no alternative to litigation. Accordingly, in the last resort, it will always be necessary to resort to litigation and the efficiency and effectiveness of the litigation process will remain significant. For this reason also we concentrate on the process of litigation in the ordinary civil courts, with which our reference is concerned.

No consideration of means, other than litigation, of influencing the conduct of defenders

3.17 One of the reasons for raising a civil case may be to discourage the defender from repeating culpable conduct. However, civil litigation cannot be relied upon to have that effect. Whether a civil case is raised depends on many matters, including whether the potential pursuer has the necessary stamina and financial resources to sustain the litigation. Even if the pursuer is successful, the defender may persist in the culpable conduct and further people may be similarly affected. The effective protection of the public interest may require a public law regulatory system under which appropriate standards are

[1] *Practice Statement (Commercial Cases: Alternative Dispute Resolution)* [1994] 1 WLR 14; [1994] 1 All ER 34.

[2] (1994) 39 JLSS 153, 155.

set, inspections carried out and breaches of the standards enforced (for example, by criminal prosecution).[1]

3.18 Sudden mass disasters, in particular, give rise to multi-party litigation and raise questions about how to prevent a similar disaster in the future.[2] Events following the Piper Alpha oil platform disaster illustrate the importance of public law measures in establishing a suitable regime. The purposes of the public inquiry,[3] held by Lord Cullen, were: to establish the causes and circumstances of the disaster; and to make recommendations for the preservation of life and the avoidance of similar accidents in the future. Lord Cullen made 106 recommendations.[4] All these recommendations were accepted by the Government and they were implemented in part by the Offshore Safety Act 1992.[5] The civil claims made by the families of the deceased and by the survivors appear to have been settled out of court[6].

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[1]In commenting on the institutions regulating consumer protection it has been observed: "Until fairly recently consumer protection was for the most part a matter of private law ... it is only in the last two decades that the state has become deeply involved in the welfare of its citizens as consumers." W C H Ervine on "Consumer Protection", 6 *Stair Memorial Encyclopaedia* para 10. The importance for consumer protection of the creation of new criminal offences is discussed in Sir Gordon Borrie's Hamlyn Lectures (1984), chap 3.

[2]See the study of the Chinook, Piper Alpha, Ocean Odyssey, Guthrie Street and Lockerbie disasters in the Dundee Research Report, chap 3.

[3]Under the Offshore Installations (Public Inquiries) Regulations 1974 (SI 1974 No 338).

[4]Cullen Report, Chapter 23.

[5]For a discussion of the relation between the Cullen Report and the Act see the annotations to the Act by Nicholas Gaskell in Current Law Statutes Annotated 1992.

[6]Dundee Research Report paras 3.25-3.27. The Lord Advocate announced in July 1991 that the company (Occidental) would not be the subject of a criminal prosecution in respect of the disaster.

3.19 We regard the consideration of public law regimes to prevent disasters and accidents generally as beyond the scope of our reference.

Approach concentrates on internal pursuer actions

3.20 Multi-party actions are sometimes referred to as "group actions".[1] A useful distinction may be drawn between an action raised by an aggrieved individual who is directly affected as a member of the group (an "internal pursuer") and one raised by a third party who is not directly affected, but acts in the interests of the group as a whole (an "external pursuer"). These actions may be called internal pursuer actions and external pursuer actions.[2] Internal pursuer actions include:

Separate actions

- independent actions by aggrieved individuals, pursued separately and not co-ordinated; or
- independent actions, initially pursued separately but later informally co-ordinated with one case proceeding as a test case.

Aggregated actions

- independent actions, initially pursued separately, but later aggregated by formal conjunction.

Actions by groups of pursuers

- pursuers join together initially to raise a single action; or

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[1] See para 2.43 above.

[2] A third possibility is for a third party to be empowered to provide financial assistance to the internal pursuer. For example, the Commissioner for the Rights of Trade Union Members (appointed under s 19 of the Employment Act 1988) is empowered (by s 20 of that Act) to provide financial assistance for the bringing of certain specified proceedings if he considers that a case raises a question of principle, involves a matter of substantial public interest or "it is unreasonable, having regard to the complexity of the case, to expect the applicant [for financial assistance] to deal with the case unaided" 20(4).

- representative actions (under English procedure); or
- class actions.

3.21 External pursuer actions are raised not by an aggrieved individual but by a third party. Possible examples of such a third party include: a Government Minister: *eg*, in England and Wales, the Attorney-General;[1] a public official: *eg* the procurator fiscal;[2] the Director General of Fair Trading;[3] and an organisation, either statutory, *eg* the Equal Opportunities Commission,[4] or non-statutory, *eg* the Consumers Association.[5]

3.22 We noted earlier[6] the provision in draft Ontario class action legislation enabling the Attorney General to be appointed as a representative plaintiff. (The enacted Ontario legislation omits this

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[1]"It is unfair to expect the individual to have to shoulder the whole responsibility of upholding the rule of law whether as applicant or respondent. Traditionally it is the Attorney-General who has the primary responsibility for bringing proceedings for protecting the public interest" Sir Harry Woolf (now Lord Woolf), Hamlyn Lectures (1989), pp 103-104.

[2]Fatal accident inquiries (see para 3.11 above) are held on the application of the procurator fiscal under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 and may, in practice, be a prelude to civil proceedings raised, for example, by the relatives of the deceased.

[3]See para 2.22 above.

[4]*Eg* where there has been "persistent discrimination" the Commission may obtain an order from the sheriff restraining such discrimination (Sex Discrimination Act 1975 s 71). See para 3.8 above.

[5]Under the provisions of the Quebec Code of Civil Procedure (Article 1048) relating to the Class Action, certain corporate bodies may apply for the status of representative (in order to bring a class action) if: (a) one of its members designated by it is a member of the group on behalf of which it intends to bring a class action; and (b) the interest of that member is linked to the objects for which the corporate body has been incorporated or formed.

[6]Para 2.30, footnote 3 above; clause 14 of the draft Act respecting Class Actions, prepared by the Ontario Law Reform Commission (Report, p 864).

provision, perhaps on the view that it is inappropriate for a Government law officer to intervene at public expense in private litigation, and that the interests of the Government would not necessarily coincide with those of the parties who were assisted.) The role of such a public third party would be broadly the same, whether the duties were discharged by a law officer or by a public official appointed specifically for that purpose.[1] The general role might be to ensure that selected multi-party litigations were efficiently[2] pursued, for the benefit of the parties and in the general public interest. Under the Ontario draft legislation the Attorney General would have taken over as a representative plaintiff. Another possibility might be the appointment by the court of an *amicus curiae* (*ie* an impartial person

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[1]Compare the Commissioner for the Rights of Trade Union Members, appointed under the Employment Act 1988. (See para 3.20 footnote 2 above.) In his Hamlyn Lectures (1989), pp 109-113, Sir Harry Woolf suggested a Director of Civil Proceedings, who might act wholly independently of the Government and the law officers, and whose responsibilities might include the following.

> 1. "He would initiate proceedings whenever in his judgment this was required in the public interest. He would do so either on his own initiative or on the instigation of members of the public.... The ability of the Director to bring proceedings in many cases would solve the problem of the burden having to be shouldered by the member of the public. He could provide an alternative to class actions and avoid multiplicity of proceedings.
>
> 2. He would be responsible for providing arguments to assist the court not only in cases where at present the Attorney-General would provide an *amicus* at the request of the court but also in those cases where in his view the issues were such that *inter partes* argument might not adequately draw attention to the broader issues. He could provide a channel for placing before the court arguments on behalf of interested bodies.
>
> 3. If he were not prepared to bring proceedings himself, he could authorise a member of the public to do so. This would clothe the member of the public with all necessary standing to bring proceedings."

[2]Having regard to the need to avoid undue delay, complexity and expense.

entitled to draw to the court's attention such matters as appear to him to be appropriate).

3.23 The justification for such a proposal would be that some multi-party actions are so different from other multi-party actions that they deserve special arrangements to deal with their peculiar difficulties. We are dubious about this argument. The nature of the litigation might be essentially the same whether the number of litigants was large or small. It seems arbitrary that whether or not further public resources[1] were devoted to private litigation should turn solely on the number of the parties. The participation of the public external pursuer would no doubt take place at his discretion or with the leave of the court: in any event it would not be a right on which the pursuer or potential pursuer would be entitled to insist.[2] It appears that most multi-party actions in recent years[3] have been actions for damages in which much of the work of the claimants' lawyers consists in the formulation of the claim and negotiations with the defenders (including in some cases arbitrations), rather than in conducting hearings of evidence in court which lead to a final judgment. The duties of an external pursuer would logically have to extend to negotiations about a settlement between the claimants and the defenders as well as the carrying forward of a formal litigation. This would further, and unfairly, increase the advantages of pursuers in multi-party actions over pursuers in other forms of litigation, who would not be entitled to such assistance. Finally, any external pursuer

[1] *Ie* in addition to the costs of running the courts and any legal aid granted.

[2] Compare the Employment Act 1988, s 20(4) (para 3.20 above, final footnote) and the requirements (of probable cause and reasonableness) for the availability of civil legal aid (Legal Aid (Scotland) Act 1986, s 14(1)).

[3] See Dundee Research Report chapter 3.

would have to be funded from scarce public resources: we are not convinced that it would be justifiable to divert funding from, say, legal aid for this purpose.

Other matters not discussed in detail

3.24 Any discussion of group actions or class action procedure overlaps with discussion of public interest litigation,[1] the problems of complex litigation[2] and matters relating to consumer protection.[3] We touch on these matters only incidentally.

Conclusion to Part 3

3.25 We conclude therefore that we should concentrate on procedural matters[4] in civil court proceedings[5] raised by the aggrieved individuals themselves rather than by a third party on their behalf.[6] We do not consider in this paper: possible changes in the substantive law;[7] possible changes devised to meet particular problems[8] *eg* dampness in rented local authority housing[9] or sexual

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[1]See Cooper (1991).

[2]See Lindbloom and Watson (1993).

[3]See Bourgoignie (1992).

[4]Para 3.12 above.

[5]Para 3.10 above.

[6]Paras 3.21-3.23 above.

[7]Paras 3.12 and 3.13 above.

[8]Paras 3.3 and 3.4 above.

[9]Paras 3.5-3.7 above.

or racial discrimination;[1] and any means, other than civil litigation, of resolving disputes;[2] or influencing the conduct of defenders.[3]

[1]Paras 3.8 and 3.9 above.

[2]Paras 3.14–3.16 above.

[3]Paras 3.17–3.19 above.

PART 4: ARE REFORMS NEEDED?

Introduction

4.1 In this Part we assess the effectiveness of existing Scottish court procedures in dealing with multi-party actions, and we discuss the aims of reform. First, however, we offer three general observations.[1]

A Preliminary observations

4.2 *(a) The proper functions of civil litigation.* It is generally accepted that the main function of civil litigation is the determination of disputes: the courts are a forum where aggrieved persons can obtain a finding about their rights and a suitable remedy - such as an award of damages by way of reparation for loss suffered - for any breach of their rights. This has been described as the "*conflict resolution model*" of civil litigation. The emphasis is on the process of adjudication. It is assumed that the court system will deal with the parties in an even-handed manner and that there is no need to regard either party as being less able than the other - for financial or other reasons - to pursue or defend a case in the court. What the effects of the court's judgment will be on the defender, if the pursuer succeeds, is not a concern of the court.

4.3 It may be argued that this model is incomplete. In devising and operating court procedures, the court should try to ensure that there are no features of its procedures which will unduly or unfairly affect any party. Procedures which are slow and complex may prejudice a party with modest means. Further, it may be suggested that civil litigation "can play an important role in encouraging adherence to social norms by imposing appropriate costs upon wrongdoers and

[1]Paras 4.2-4.10; drawn partly from the OLRC Report pp 114-117.

depriving them of the fruits of their misconduct."[1] This view is the basis of the *"behaviour modification model"* of civil litigation.

4.4 This contrast between the civil litigation models of conflict resolution and behaviour modification indicates that discussion about multi-party actions may involve taking a view about policy matters such as whether it should be easier for multi-party claimants to litigate and whether a defender should always be obliged to make reparation to such claimants and meet their expenses whenever they have a good claim, however small each claim may be.[2] The first matter raises questions about "access to justice" and the latter may be regarded as one way of ensuring that wrongful conduct is appropriately punished or deterred.

4.5 It has been suggested[3] that critics of class actions favour the conflict resolution model while supporters of class actions favour the behaviour modification model. Some assert that class actions may serve a legitimate function by deterring wrongful conduct; others condemn class actions as a means of stirring up unnecessary litigation and placing unreasonable burdens on business or other commercial activities.[4]

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[1]OLRC Report p 115. This function of civil litigation is, of course, different from any public law regulatory regime.

[2]Notwithstanding, for example, that the cost of litigation may be disproportionate to the amount of damages recovered.

[3]OLRC Report p 115.

[4]Such general discussion may not pay adequate attention to the fact that the expression "class actions" signifies not a single clearly defined procedure but a variety of procedures whose features vary considerably in detail: see Part 6 below.

4.6 We doubt whether a polarisation of view in favour of either model of civil litigation is helpful. We think it is important, however, to recognise that the framing of reforms in civil procedures must be preceded by an identification of the policy assumptions implicit in any possible reforms. That is particularly necessary where the implementation of reforms would require scarce public resources. What are the deemed benefits of any reforms, and would those benefits be worth the cost of implementation?

4.7 *(b) The different remedies available.* An examination of the US federal class action procedure shows the need to distinguish between actions in which reparation (typically damages) is sought and actions in which other remedies (and in particular an interdict forbidding the conduct complained of) are sought. In damages actions it may be more difficult to establish common issues among the class of pursuers and it may be necessary to carry out individual assessments of damages. It may be argued that this reduces the usefulness of the class action in these cases. (It appears that in the United States the largest proportion of class actions is in the area of civil rights and a substantial number of these actions seek only equitable relief, *ie* an interdict or declarator on the ground that the defender has wrongfully acted or refused to act and has thereby infringed the rights of the class as a whole.)[1]

4.8 *(c) The significance of the size of the individual claims.* The size of the claim relative to the likely cost of successfully enforcing it is an important, but sometimes ignored, element in assessing the need for, and the effectiveness of, class action procedure.

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[1]OLRC Report p 116.

4.9 A distinction has been made[1] 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."

4.10 This distinction may be relevant in considering the arguments for, and against, the possible introduction of a class action and in framing the specific provisions of a possible Scottish class action procedure.

B The effectiveness of court procedures dealing with multiple claims

4.11 We now discuss existing Scottish court procedures[2] and how effective they are in multi-party actions, particularly those where there are separate individual claims.[3]

4.12 *Individual action affecting a group.*[4] An action raised by one person in a group may benefit the others, particularly where the remedy is an interdict: *eg* the prevention of the discharge of sewage at

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[1]1976 Harvard Law Review 1318, cited in the OLRC Report p 103, note 9 and pp 116–117.

[2]Which we described in paras 2.13–2.25 above.

[3]*Eg* for reparation. We draw here on the SCC Report (1982), chapter 2.

[4]See SLC Working Party Report para 2.7, and para 2.13 above.

one point will benefit the pursuer and other users of the water[1]. But if the remedy is damages and the defender recognises no obligation to the others in the group, the fact that one claimant has established his right to damages will not necessarily help the others.

4.13 Further, the person who raises the action has no right to call on the others to share the costs of the litigation.

4.14 *Separate actions.*[2] Each of the individuals similarly affected can raise a separate action. If successful, each will obtain a remedy suited to his or her particular grievance. However the separate actions will be wasteful of the time, effort and financial resources of the various pursuers,[3] even if the proof in all the actions is heard together.

4.15 If the claim is for a small amount - for example a "small claim" in the sheriff court[4] - it is possible that the amount of the expense of bringing a small claim may exceed the amount of the claim itself and the claimant may not pursue his or her claim or may abandon it.[5]

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[1] *Moncrieff v Perth Police Commissioners* (1886) 13 R 921.

[2] See SLC Working Party Report paras 2.8 to 2.10.

[3] See para 2.15 above.

[4] The small claims procedure in the sheriff court applies principally to claims for payment of money not exceeding £750 (Small Claims (Scotland) Order 1988 (SI 1988 No 1999) Art 2) and there is a limit of £75 on the expenses which are normally awardable in a small claim in which the claim is, or exceeds, £200 (Order of 1988, Art 4). See further W C H Ervine, *Small Claims Handbook* (1991), pp 51-56. However, there is no prescribed limit on the amount which the claimant may have to pay his or her solicitor.

[5] *Ie* the claim is "individually non-recoverable" (para 4.9 above).

4.16 *Test case.*[1] In principle a test case is a useful technique for enabling the decision in one case to be applied to a number of identical or similar claims. Ideally, it may be necessary to take to a conclusion only one of several cases raised or it may be necessary to raise only one case.

4.17 One study[2] has listed various advantages and disadvantages in the use of the test case. The *advantages* include:

(1) the prerequisites of a class action (such as the establishment of the existence of common issues) need not be met;

(2) the plaintiff (pursuer) can enforce a court award in his favour more quickly than a group;

(3) legal costs may be lower than in a class action;

(4) the threat of numerous similar actions may encourage the defender to negotiate an advantageous settlement for the whole group; and

(5) it is easier to initiate and pursue a test case than to arrange a combination of pursuers[3] or a class action.

4.18 However, the *disadvantages*[4] include the following:

(1) the defendant (defender) must agree to abide by the results of the test case;

[1]See paras 2.23-2.25 above.

[2]Lindbloom and Watson (1993) p 79.

[3]Para 4.21 below.

[4]Particularly in those countries (such as the USA) where a group action procedure exists.

(2) an individual is needed to initiate the case (contrast external pursuer actions[1]);

(3) the plaintiff (pursuer) is solely responsible for the court costs: other affected individuals may be unwilling to contribute, despite the existence of an agreement;

(4) the defendant may "pay off" the plaintiff by making him an offer which he accepts before the issue of liability is decided;

(5) the group is denied the opportunity to influence the conduct of the case;

(6) there are risks of conflict between the plaintiff and the group, and among the group members, for example with regard to choice of test case plaintiff and of counsel;

(7) the interests of the test case plaintiff may conflict with those of the group;

(8) if the test case is not typical there is a risk that it may be disposed of on grounds peculiar to it or that the judgment will be formulated in such a way that important legal issues common to the other cases in the group are not resolved;

(9) test cases are not suitable for pursuing individually non-recoverable claims.[2]

4.19 We conclude that there are a number of significant potential disadvantages in the test case method which outweigh its potential advantages.[3] The main disadvantage is that the decision in the test

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[1]Para 3.21 above.

[2]See para 4.9 above.

[3]We have ignored in the above discussion the procedure in some jurisdictions (but not Scotland) where the court selects one of a number of pending cases, while staying (sisting) the other cases, and decides the selected

case will not be applied to the other cases unless (a) all parties remain agreed that the test case decision will be so applied or (b) there is pressure (for example of public opinion) on the defenders obliging them to generalise the application of the test case decision.[1]

4.20 *Claims grouped in one litigation.* Common questions can be decided in a single proceeding. The several individual claimants can join together as pursuers to raise an action together (combination of pursuers); or the various cases started separately can be conjoined (conjunction).

4.21 *Combination of pursuers.*[2] A single action with several pursuers is competent where the ground of the action by each pursuer is identical and there is no material prejudice to the defender, *eg* when the pursuers are aggrieved by the same act of the defender or the pursuers have a joint interest in the subject matter of the action. But if the pursuers have individual claims for damages the action must contain a separate conclusion for damages for each pursuer and in complex cases a separate hearing on each claim may be necessary.

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case for the purpose of resolving certain issues with that decision being treated as binding on the parties to the cases which were stayed. See Lindbloom and Watson (1993), p 81 and para 2.24 above.

[1] "In *Electrolux Ltd v Hutchinson & Others* 1977 ICR 252 the claims by six women for equal pay were upheld by the Employment Appeal Tribunal. A further 122 women in the same grade had lodged claims and more were likely. But the company did not immediately apply the decision to any of these other cases and but for the intervention of the Equal Opportunities Commission further legal action might have been necessary." SCC Report para 3.3.

[2] See para 2.17 above; SLC Working Party Report para 2.19; and, for the sheriff court, Macphail (1988) paras 4-37, 4-38.

4.22 *Conjunction.*[1] Conjunction of actions may be appropriate where they relate to the same subject-matter. Examples of cases where conjunction was allowed are: where three proprietors of lands on the River North Esk raised proceedings to stop the pollution of the river by the defenders' paper mills[2]; and where five actions were raised for damages arising out of the loss of a fishing boat in a collision at sea.[3]

4.23 The grouping of claims in a single proceeding can be useful, particularly in reducing the expense of litigating. Each pursuer, however, is a full party to the proceedings with corresponding liability to meet both his own legal expenses and any order for expenses made against him. The more numerous the claims which are grouped the more unwieldy (and expensive and time-consuming) the case may be, particularly if each party is separately advised and there are separate claims for damages.

Conclusion to Section B

4.24 We have discussed above how (a) an action raised by one person in a group may benefit others[4] and (b) claims may be gathered into a single litigation so that common questions affecting all of a group of claimants can be considered[5]. Neither method of enforcing a claim is satisfactory. In particular there may be difficulty in applying a decision in an action raised by an individual to other similar cases.

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[1]See SLC Working Party Report paras 2.8-2.18 and, for the sheriff court, Macphail (1988) paras 13.44-13.46.

[2]*Duke of Buccleuch v Cowan* (1868) 4 M 475, (1876) 4 R (HL) 14.

[3]*Gatt v Angus Shipping Co* (1907) 14 SLT 749.

[4]Paras 4.12-4.19 above.

[5]Paras 4.20-4.23 above.

"There is no guarantee or certainty that the single decision will be applied universally and where the matter is not notorious or if there is no other pressure on the defender to generalise its application those who have not taken proceedings may become involved in unnecessary trouble or expense or even lose out altogether".[1]

4.25 We therefore provisionally conclude that:

1. **There is no completely satisfactory procedure in the Scottish civil courts by which 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.**

4.26 However, the absence of a suitable procedure is exacerbated by other difficulties in the successful vindication of multiple claims, which we now discuss.

C Expense as a deterrent to the vindication of rights in multiple claims

4.27 We mentioned earlier[2] that the way in which litigation is financed influences whether a case is raised and how it is conducted. A claimant may not raise an action if he thinks that he may be unable to meet his legal expenses and the amount of any award of expenses made against him. The potential defender will be aware that the claimant may not be able to afford to go to court and the claimant's position in any negotiations with the potential defender will be correspondingly weakened.

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[1]SCC Report (1982), para 3.3. That Report recognises that defenders may have difficulties in applying the single decision where possible points of distinction can be found in the cases of the other claimants (Report, para 3.4).

[2]Para 2.35 onwards.

4.28 Where there are a number of claimants it is open to an individual claimant to negotiate (with the other potential claimants and the potential defender) for the adoption of test case procedure[1] but these negotiations are likely to be complicated (and hence expensive) where, as in drugs cases, there is a large number of potential claimants and there are difficult questions both as to liability and as to the quantification of individual claims. In recent years courts in other jurisdictions (particularly in England and Wales) have developed novel techniques for the sharing of costs by court order.[2] It is not clear that such arrangements are sufficiently developed (particularly in Scotland) for a lead claimant to be sure that he will be able to rely on other claimants to meet a share of his expenses.[3] There is further complication where only some of the litigants are legally aided. These difficulties and the doubts as to whether they can be satisfactorily resolved are likely to inhibit potential multi-party litigants.

4.29 The expense of litigating will weigh particularly in the minds of potential pursuers where the amount of each separate claim is relatively small.[4] It will seem to a claimant unfair and unjust that even if successful he may be out of pocket at the end of the day. The Scottish Consumer Council report gives two examples.[5] *First*, where

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[1]Paras 4.16–4.19 above.

[2]As in cases about the drug Opren. See *Davies v Eli Lilly & Co* [1987] 1 WLR 1136; [1987] 3 All ER 94; *Nash v Eli Lilly & Co* [1993] 1 WLR 782, [1992] 4 All ER 383.

[3]See para 2.25 above.

[4]See our earlier comments about individually non-recoverable claims; paras 4.9 and 4.15 above.

[5]SCC Report (1982) para 3.6.

the damage suffered in individual cases is relatively small, *eg* where contaminated food purchased at a shop and eaten at home causes only a mild stomach upset. *Second*, where proof of liability will not be possible without a costly technical investigation. The result may be that a remedy is available where there is substantive damage to one person but not where there is minor damage to each of a large number of people.[1]

4.30 It may be argued that in any event the expense to the litigant of civil litigation is unduly high and should be reduced. Ideally, therefore, the aims of reform should be both to eliminate the expense of the duplicated litigation and to reduce the expense of each individual action.

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[1] "Unless the cost to the individual of recovering compensation can be reduced, the result is that a person may be held accountable for causing damage of $500 000 to one person, but escape liability if damage of $1000 is caused to each of 500 people. This situation brings the law into disrepute. A measure of the effectiveness of the legal system is that people should be able to obtain redress for wrongful injury and that they should have equal access to remedies." (ALRC Report 1988 para 18). However we do think it should not be assumed that all claims of whatever amount should be recoverable by recourse to the civil courts. For example it may be that public resources would be better applied to reducing the possibility of damage (eg safety measures and publicity) in order to prevent damage occurring in the first place. A further way of avoiding the expense (and delay) associated with litigation would be the introduction of a no-fault compensation scheme (as an alternative to liability in tort or delictual liability). This was suggested by the Lord Chancellor's Civil Justice Review Body (Review Report, paras 455 and 476) for less serious road accidents and a consultation paper was issued by the Lord Chancellor in 1991. The proposed scheme provides for compensation, without proof of fault, for personal injuries claims for up to £2,500, arising out of road accidents involving one or more vehicles. Claims below £250 would not be allowed. The scheme would cover the United Kingdom as a whole and would be funded and operated by the insurance industry through motor vehicle premiums. (Lord Chancellor's Department, "Compensation for Road Accidents: A Consultation Paper", May 1991.) See also Fleming (1988), pp 265-266.

Means of reducing the expense of litigation

4.31 There are a number of means of attempting to reduce the burden of the expense of litigating. These include: (a) providing financial assistance (legal aid); (b) improving court procedures; and (c) providing places other than courts in which disputes could be resolved. We now consider whether these have helped to reduce the expense of multi-party litigation and should be fostered. Our conclusion, however, is that while they have reduced the expense of litigation in general they have not significantly reduced the expense of multi-party litigation.

4.32 *(a) Legal aid.*[1] Six points may be noted in connection with legal aid. *First*, it is not available in all court proceedings (*eg* the excepted proceedings include small claims).[2] *Second*, legal aid is only available to those individuals in a group of claimants who are financially eligible: *ie* the most impecunious. *Third*, the legal aid scheme only makes loans to those who win cases.[3] *Fourth*, legal aid is available only to individuals, not to a group, as such. *Fifth*, there are at present no specific provisions in Scottish legal aid legislation with regard to the availability of legal aid in multi-party actions.[4] *Sixth*, it seems unlikely, in present economic circumstances, that increased public resources will be made available for legal aid.

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[1]See the factual narrative in Annexe E to the SLC Working Party Report ("Annexe E").

[2]Annexe E, para 9.

[3]Annexe E, para 22.

[4]Compare the position in England and Wales where the Legal Aid Board can invoke, in personal injuries multi-party actions, the Legal Aid Multi-Party Action Arrangements 1992. See the factual narrative in Annexe F to the SLC Working Party Report and the discussion in Part 4 of that Report.

4.33 *(b) Improving court procedures.*[1] Unnecessary delay will lead to unnecessary expenditure of the private resources of parties and of the public resources of the court authorities eg the time of judges. In principle, there is general acceptance of the need to continue to improve procedures, both by reforming existing procedures and by devising new procedures. A number of improvements have been made in recent years in Court of Session[2] and sheriff court[3] procedures. Some of these improvements have required primary legislation (*eg* small claims procedure); others have been possible in exercise of the Court of Session's rule-making power[4] *ie* subordinate legislation. (The significant change made by the introduction of judicial review procedure was made entirely in the exercise of the court's rule-making power without the need for primary legislation.)

4.34 It seemed to us that it might be possible by subordinate legislation to make further improvements in court procedures which would be particularly useful in multi-party and other complex litigation. With that in mind we set up the Working Party to which we

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[1]We use the term "court procedures" in the widest sense to include any measures which will reduce delay and complexity and hence cost, *eg* solicitors' groups (see SLC Working Party Report paras 2.23 and 2.24).

[2]*Eg* simplified divorce procedure (now also adopted in the sheriff court) (RC 1965, rr 170E-170L; RC 1994, rr 49.72-49.80), optional procedure in certain actions of reparation (RC 1965, rr 188E-188P; RC 1994, rr 43.18-43.28) and applications for judicial review (RC 1965, r 260B; RC 1994, rr 58.1-58.10), based on the recommendations of Committees chaired by Lord Cowie, Lord Kincraig and Lord Dunpark, respectively.

[3]*Eg* the introduction of summary cause procedure in 1976, of small claims procedure in 1988 (see Sheriff Court (Scotland) Act 1971 s 35, as amended, and the related procedural rules) and of new Ordinary Cause Rules in 1994 (see Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993).

[4]*Eg* Court of Session Act 1988, s 5 (power to regulate procedure etc by Act of Sederunt).

have already referred.[1] The Working Party's Report, published simultaneously with this Discussion Paper, makes a number of suggestions for apparently useful changes both in multi-party actions[2] (*eg* the suggestion of the introduction of master pleadings to do away with the need for identical pleadings in a number of similar cases) and in actions generally before proof.[3] Implementation of these suggestions would be helpful but would leave unanswered the main question raised by this Paper: whether it would be worthwhile to introduce novel procedures for multi-party actions in the Scottish courts. Novel court procedures might be particularly welcome if they were accompanied by new (and satisfactory) means of financing multi-party litigation.

4.35 *(c) Resolution of disputes in places other than courts.* We have already mentioned the possibility of resorting to alternative dispute resolution.[4] Another possibility is to confer jurisdiction on a statutory tribunal.[5] Among the advantages claimed for tribunals over courts are: that their procedures are relatively informal, *eg* with less reliance on written pleadings; there may be no need for a party to be represented by a lawyer (and hence less expense); there would not normally be an award of expenses in favour of the successful party - each side would bear its own expenses; and fees payable to the

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[1]Para 1.15 above.

[2]Report, paras 3.4-3.29.

[3]*Ibid*, paras 3.30-3.55. In addition there are recommendations about procedures at proof (paras 3.56-3.58) and a possible Guide to Multi-Party Actions (para 3.59).

[4]Paras 3.15, 3.16 above.

[5]We mention this possibility for the sake of completeness although our reference excludes tribunal proceedings. (For the terms of our reference see para 1.1.)

tribunal would generally be lower than those payable to a court of equivalent jurisdiction. Like the decision of a court, the decision of a tribunal may act as a precedent in deciding part or all of similar disputes. In general tribunals are claimed to combine the advantages of relative cheapness, informality and absence of delay with the need to have a system which will produce an enforceable order.[1]

4.36 We think that the benefits of giving jurisdiction to statutory tribunals should not be over-emphasised. *First*, the jurisdiction of a tribunal is likely to be limited to matters for which a tribunal is particularly suitable, *eg* the resolution of disputes arising out of a statutory scheme. (For example, although industrial tribunals now have a relatively wide jurisdiction[2] embracing unfair dismissal, redundancy payments and discrimination on grounds of sex and race, they were originally set up to determine appeals by persons assessed to levy under the Industrial Training Act 1964.) *Second*, tribunals are likely to be less fitted - by their tribunal membership (which may consist partly of lay members) and their procedures - to cope with the complicated issues of fact and law which are likely to arise in multi-party actions. It may be thought that the only satisfactory place for the determination of disputes is the courts, either the Court of Session or the sheriff court.[3]

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[1] *Ie* one which can be used, without further procedure, to seek to recover a sum due. However it is, in Scotland, the responsibility of the person holding the court or tribunal order to enforce it, instructing, if necessary, a messenger-at-arms or a sheriff officer. The court or tribunal will not enforce its order on behalf of the party.

[2] W Leslie, *Industrial Tribunal Practice in Scotland*, (1981) lists 12 grounds of jurisdiction (pp 2-13).

[3] In paras 7.77 to 7.84 below we discuss the courts in which a class action procedure should be available.

Conclusion to Section C

4.37 In this section we have discussed the expense of litigating as a deterrent to the vindication of rights in multiple claims and have considered some ways in which that expense might be reduced. These were: increased provision of legal aid; improvements in court procedures; and conferring jurisdiction on tribunals. Each of these might in appropriate circumstances reduce to some degree the deterrent of expense. Our provisional view is, however, that:

> 2. **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.**

D Other constraints on the vindication of rights

4.38 The individualistic model of litigation[1] assumes that a person aggrieved will know that his rights have been infringed and that he is entitled to bring a court action in respect of that infringement, *eg* for interdict of the further emission of noxious fumes or for reparation for actual damage suffered. This assumption may be wrong: a person may not be aware that he has suffered loss; or if he is, he may not know that he is entitled to litigate.

4.39 In principle we accept that it is desirable that aggrieved individuals should be made aware of the procedures which would enable them to vindicate their rights. It may therefore be necessary to consider including in a procedural scheme for multi-party actions some provision for advertisement or other public notice of the fact that proceedings are pending and can be joined by persons similarly affected. However, where there are thousands of potential claimants

[1] Paras 2.27-2.29 above.

a notice procedure may be very expensive:[1] would it be fair to burden the defenders with that expense if they lost the case?

4.40 Potential claimants' unawareness of rights and procedures is a problem which is not confined to multi-party actions. It would be wrong to put the multiple claimant in a substantially better position than the individual claimant. We consider, however, that this is one of the matters which should be borne in mind in devising procedures for multi-party actions.

Conclusions to Section D

4.41 While we accept the desirability of reducing non-financial constraints on the vindication of rights, we do not think that this should be seen as a primary objective if any new procedures for multi-party actions are to be devised. If such constraints are thought to be serious, they might be tackled in other ways, for example by additional funding for legal advice centres. We propose, however, that:

> **3. Consideration of reforms in multi-party action procedure should take account of the desirability of reducing non-financial constraints on the vindication of rights.**

E The broad aims of reform of multi-party actions

4.42 We have now provisionally concluded that: there is not an entirely adequate Scottish court procedure for multi-party litigation; a special court procedure appears to be needed; and that procedure

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[1]Particularly if the court requires that individual notice be given to all the identifiable class or group members. This was the decision of the US Supreme Court in the case of *Eisen v Carlisle & Jacquelin* (1974) 417 US 156 - the "Eisen IV" case - interpreting US Federal Rule 23(c)(2) (see Annexe C) for the protection of the interests of all the members of the class. See para 2.32, footnote 2 above.

should be accompanied by the minimisation of the expense of litigating and the reduction of non-financial constraints on the vindication of rights.

4.43 In this connection we should mention three broad aims of reform which have been suggested.[1] These are: (a) judicial economy; (b) greater access to justice; and (c) behaviour modification. The relative importance which consultees place on each of these aims will no doubt reflect, among other things, their view of the proper functions of civil litigation, which we discussed earlier.[2]

4.44 *(a) Judicial economy.* We mean by "judicial economy" the efficient use of the time and resources of the courts. British reviews of civil litigation commonly adopt the general aim of reducing delay, cost and complexity.[3] In Scotland, the Review Body on the Use of Judicial Time in the Superior Courts investigated "means by which judicial time in the Superior Courts may be organised more effectively in order to secure earlier disposal of cases" (both civil and criminal).[4] Similar aims were adopted by the Sheriff Court Rules Council in its review of sheriff court procedures and practices.[5]

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[1]By the Ontario Law Reform Commission. See OLRC Report pp 117-146. We have already discussed behaviour modification in para 4.3 above.

[2]Paras 4.2-4.6 above.

[3]See the terms of reference of the Lord Chancellor's Civil Justice Review (Report, para 1.4).

[4]Maxwell Report, para 1.4.

[5]That Council's consultation paper, issued in January 1990, said: "Civil procedures in the sheriff court should avoid unnecessary complexity and contribute to the effective and economical despatch of cases both in court and out of it (for example, in the offices of solicitors and sheriff clerks) together with an avoidance of unnecessary delay. In particular, a hearing in court should only be held when necessary and the number of hearings (*eg* where a party's case is being adjusted) should be kept to a minimum. Time in court

4.45 It may be argued that to concentrate on judicial economy may prejudice judicial fairness. To hasten or abbreviate civil proceedings unduly may cause unfairness or injustice. However, multi-party actions have unusual features. It may be that established procedures evolved principally to deal with actions in which there are only a few parties need to be adjusted to cope with these features of multi-party actions. Such adjustments could be applied only to those multi-party actions in which they were most likely to be helpful.[1]

4.46 In discussions of multi-party actions the term "judicial economy" also has a narrower and more specific meaning. One benefit commonly attributed to class actions is that they diminish the total amount of litigation. "There is no real disagreement that class actions can achieve judicial economy where all class members have individually recoverable claims. If a class action procedure were not available, most of these claims would be litigated individually, leading to duplicative and costly hearings, at least in situations where there are too many potential plaintiffs for joinder to be feasible. Class actions aggregating individually recoverable claims are beneficial not only to plaintiffs, but also to defendants, since such actions reduce defence costs by eliminating the need to assert common defences in each individual suit."[2]

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represents expenditure both on the part of the court, sheriff and clerk and of parties and their legal representatives, if any. That expenditure should be made as cost-effective as possible". SCRC consultation paper (1990), para 1.17.

[1]It will be noted below in our discussion of class actions that a class action procedure can prescribe the criteria for the selection of the actions which are suitable for the procedure.

[2]OLRC Report p 118.

4.47 *(b) Greater access to justice.* If claimants are able to litigate (and thus obtain a remedy) more readily, greater "access to justice" will have been obtained. This expression is often used in a broad sense to refer to access to legal services in general and, more narrowly, to refer to issues arising in connection with legal aid, *eg* eligibility for legal aid and the level of remuneration of solicitors acting for legally-aided clients. In the context of multi-party actions the aim of greater access to justice is commonly discussed in connection with the alleged benefits of class action procedure, *ie* "the potential of class actions to provide access to justice for aggrieved persons who would otherwise be denied the benefit of existing remedies".[1]

4.48 A particular aim of reform might be that of enabling the recovery by individuals of small sums which would otherwise be irrecoverable because of the disproportionate expense of litigating. In cases of alleged maladministration by public authorities, a large number of people may have been affected, *eg* by changes in TV licence fees without statutory or other authority.[2]

4.49 Further it may be argued that there may be considerable disparity between the resources of the parties: for example, the claimant may be a private individual with few resources (a "one-shotter") and the defender may be a public corporation with large resources which is familiar with litigation. It may be argued that such a disparity should be rectified.

4.50 *(c) Behaviour modification.* It is sometimes argued that civil litigation - and in particular class action procedure - has a potential to

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[1]OLRC Report, p 121.

[2]*Congreve v Home Office* [1976] QB 629.

modify future inappropriate behaviour on the part of the defenders in that litigation and of potential defenders in future similar litigation.[1] Court judgments ordering the payment of damages will be influential in the settlement of other similar claims by negotiation among claimants and defenders and their advisers and insurers. Where the court order is an interdict, the defenders will not be able to do what they did before. Where the court order is for payment, a wrongdoer may be compelled to hand back profits improperly obtained or may, in some jurisdictions, be penalised by punitive or exemplary damages. (The Law Commission for England and Wales is now considering changes in civil litigation, including punitive damages[2].) In any form of litigation the defenders may be obliged to take into account the trouble and expense of litigating and may take more care in future.

4.51 A counter-argument is that the proper and primary function of civil litigation is to resolve particular disputes, and not to influence future conduct; and that "behaviour modification" should be achieved by reform of the substantive law relative to particular matters[3] or by the introduction of regulatory regimes with criminal penalties,[4] rather than by reform of the adjective law relating to court procedures.

Conclusions to Section E

4.52 There is some undue simplification in discussing the aims of reform in the field of multi-party actions under those headings of judicial economy, greater access to justice and behaviour modification. Further, these aims are not mutually exclusive. For example, a

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[1]See para 4.3 above.

[2]See para 1.13 above.

[3]See para 3.13 above.

[4]See paras 3.17-3.19 above.

simplification of court procedures (judicial economy) should enable more people to invoke them (access to justice); and that in turn may to some extent influence the conduct of defenders and potential defenders (behaviour modification).

4.53 It seems to us that the principal aim of reform must be to devise procedures for multi-party actions which will minimise complexity, delay and expense. As between pursuers and defenders, the procedures should be as even-handed as possible: we do not think they should be designed to promote the aim of behaviour modification.[1]

Conclusion to Part 4

4.54 Our main conclusion in this Part is that existing Scottish civil court procedures for handling multi-party actions are unsatisfactory. A new procedure would appear to be needed.[2] In considering the objectives of a new procedure we doubt whether it is helpful to assert that the correct model of civil litigation is either that of conflict resolution or behaviour modification.[3] It is clear, however, that the expense of litigating is an important deterrent to the vindication of

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[1]We note in this connection that the Ontario Law Reform Commission thought that behaviour modification should not be regarded as one of the main aims of the introduction of a class action procedure. "It bears emphasising that in the view of the Commission the justification for endorsing class actions aggregating individually recoverable and individually non-recoverable claims lies mainly in the ability of these types of class action to achieve either judicial economy or increased access to justice. Behaviour modification is essentially an inevitable, albeit important, by-product of class actions." (OLRC Report, p 145.)

[2]Para 4.25 above, proposition 1.

[3]Para 4.6 above.

rights in multiple claims.[1] There are means, such as the appropriate use of legal aid, of reducing the amount of expense borne by the individual litigant, but that is a separate matter from the whole cost of a litigation, which must be borne by someone - by the parties or their insurers or other financial supporters, or by the legal aid fund. In addressing the problems of multi-party litigation it is necessary to consider the reduction of the expense of litigating as well as the devising of special court procedures.[2] There are also other, non-financial constraints on the vindication of rights: ideally, the reduction of such constraints should also be among the objectives of reform.[3]

[1]Paras 4.27-4.30 above: the litigation is likely to be complex and therefore costly.

[2]Para 4.37 above, proposition 2.

[3]Para 4.41 above, proposition 3.

PART 5: POSSIBLE NEW PROCEDURES: THE REPRESENTATIVE ACTION

Introduction

5.1 In the previous Part we concluded that it appeared that a new Scottish procedure was needed. We now consider experience in other jurisdictions[1] and in particular the advantages and disadvantages of the representative action[2] and the class action.[3]

The representative action[4]: features of the English procedure

5.2 Many of the Scottish procedures described earlier in this Paper have their equivalents in English court practice. There is no class action procedure in England and Wales but there is one procedure in that jurisdiction, the representative action,[5] which has no counterpart in Scotland and should be considered in any discussion of multi-party litigation. The representative action is of some antiquity[6] and seems to have been unique to England,[7] apparently owing its origin to the practice of the Court of Chancery.

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[1]A summary of the developments introduced or discussed in certain other jurisdictions is provided in Chapter 4 of the SCC Report (1982).

[2]See this Part.

[3]See Part 6.

[4]See the discussion of the Ontario version of this procedure in *Naken v General Motors of Canada Ltd*, cited in paras 2.7 and 2.8 above.

[5]Available under Order 15, rule 12 of the Rules of the Supreme Court and described there as "representative proceedings".

[6]See Yeazell (1987).

[7]Although it has been imported into other countries such as Australia whose civil procedure is derived from English procedure.

5.3 The leading provisions of Order 15, rule 12 of the Rules of the Supreme Court are as follows:

> "(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 13,[1] the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
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> (2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under Rule 6 adding that person as a defendant.
>
> (3) A judgment or order given in proceedings under this Rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court."

5.4 The earliest form of this rule was derived from the practice of the Court of Chancery and was intended to apply that practice to all the Divisions of the High Court. Originally the Court of Chancery required all those with an interest in a particular suit to attend as parties but gradually that requirement was relaxed and representative suits were allowed.[2] The way the procedure operates has developed over the years, and some salient features of modern practice are noted in the following paragraphs.

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[1]The proceedings mentioned in Rule 13 are proceedings concerning (a) the estate of a deceased person, (b) property subject to a trust, and (c) the construction of a written instrument, including a statute.

[2]*Commissioners of Sewers of the City of London v Gellatly* (1876) 3 Ch D 610, *per* Jessel M R at 615.

5.5 It is an essential condition of a representative action that the persons who are to be represented and the person or persons representing them should have the same interest in the same proceedings.[1] "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."[2] It was formerly held that a representative action would not lie to establish the right of numerous persons to recover individual damages, where that was the only relief claimed, since none of the persons represented had any interest in the damages sought by the plaintiff claiming to represent them.[3] That is now doubted.[4]

5.6 To enable a representative action to be brought under rule 12 the persons having the same interest must be "numerous". The class of

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[1]See *Markt and Co Ltd v Knight S S Co Ltd* [1910] 2 KB 1021. A ship carrying various goods from New York to Japan was sunk by a Russian cruiser during the Russo-Japanese war on the ground that she was carrying contraband. The plaintiffs brought an action against the ship-owners for damages for breach of contract "on behalf of themselves and others owners of cargo lately laden on board the steamship *Knight Commander*". The court held that they were not entitled to bring a representative action because there was no common interest: they and each of the other owners of cargo had separate contracts with the ship-owners, and defences might exist against some but not others.

[2]*Duke of Bedford v Ellis* [1901] AC 1, *per* Lord Macnaghten at 8. See also *Smith v Cardiff Corporation* [1954] 1 QB 210 where four tenants of Cardiff Corporation sought a declaration that a rents increase scheme was *ultra vires*.

[3]*Markt and Co Ltd, supra.* (This may be why the Opren case (see para 2.24 above) was not brought under this procedure.) Fletcher Moulton LJ observed, referring to the statement of Lord Macnaghten in *Duke of Bedford v Ellis, supra*, that "where the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable" (p 1035).

[4]See *Irish Shipping Ltd v Commercial Union Assurance Co plc* [1991] 2 QB 206. "It would appear that the *Irish Shipping* case has finally removed the obstacle in the way of the flexible development of the representative action created by the restrictive application of the rule in the *Markt* case." (*Supreme Court Practice 1991*, vol 1, p 218).

persons sought to be represented must be defined in the writ with sufficient clearness and precision,[1] but it does not appear to be necessary to name each individual within the class.

5.7 The representative plaintiff is in effect in charge of the action and is responsible for the legal expenses. He may begin the action without notifying other members of the group or class of "numerous persons".[2] They may know nothing about the action. The representative plaintiff is the sole plaintiff and can discontinue, settle or otherwise deal with the action as he or she pleases without reference to any other members of the group. (However, a member of the group not wanting to be represented by the plaintiff, or opposing the group, may apply to the court to be added as a defendant.[3]) A judgment pronounced, or an order made, is binding on all the members of the group, whether or not they have had notice of the action.[4] No leave is required to enforce the judgment as against the parties actually before the court; but as against a person not a party to the proceedings the judgment can only be enforced with the leave of the court.[5] The represented parties are not liable for costs: only the plaintiff is liable. If the plaintiff succeeds, he can recover costs from

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[1] *Markt and Co Ltd, supra*; *Campbell v Thompson* [1953] 1 QB 445.

[2] "The artificial nature of the process is shown by the fact that, as Fletcher Moulton LJ pointed out in *Markt & Co Ltd supra* at p 1039, a plaintiff suing in a representative capacity does not have to obtain the consent of those whom he purports to represent, and they are not liable for costs, though by estoppel or *res judicata* they will be bound by the result of the case." (*John v Rees* [1970] Ch 345 *per* Megarry J at pp 371-372.)

[3] *John v Rees, supra.*

[4] Rule 12(3), quoted in para 5.3 above.

[5] Rule 12(3).

the defendant: if he loses, the defendant can recover costs only from him.

5.8 Rule 12 also applies to representative defendants. One of the objects of the rule is "to facilitate the bringing of actions against unincorporated aggregates of persons".[1] In more modern times, however, the rule has been used to bring proceedings for an injunction (interdict) against a known individual as representing the other members of a secret or unidentifiable organisation such as animal rights campaigners[2] or audio or videotape pirates.[3]

Conjunction and the representative action compared

5.9 The distinctive features of the English representative action may be seen from the following tabular comparison of the position of group members where actions are conjoined in Scotland and where a representative action is raised in England.

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[1]*London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 *per* Lord Atkinson at 30.

[2]Where there is an arguable case that a person is a member of a group threatening to commit illegal action, an interlocutory injunction may be granted on a representative basis. *M Michaels (Furriers) Ltd v Askew*, *The Times*, 25 June 1983 (CA).

[3]*EMI Records Ltd v Kudhail*, *The Times*, 28 June 1983 (CA).

Comparison of position of group members where actions conjoined and where representative action procedure adopted

CONJOINED ACTIONS (Scotland)	REPRESENTATIVE ACTION (England and Wales RSC Order 15, rule 12)
A. Organisation	
Pursuers are likely to know each other and can communicate readily with each other (and/or with each pursuer's solicitors).	Representative may be unknown to those represented and communication within group may be difficult or costly due to numbers involved.
B. Commencement	
Each pursuer will instruct separately, although some or all pursuers may use same solicitor.	Representative alone commences action and others do nothing until litigation concluded (by settlement or judgment in their favour on at least one common issue).
C. Absentee claimants?	
None - all members of the group are pursuers.	All, except the representative of claimants; only the representative is named as plaintiff and is before court on behalf of absentees.
D. Legal fees and legal costs generally	
All members responsible (subject to any court order on expenses).	Only representative responsible (subject to any court order on costs (expenses)).

E. Instructions to solicitor	
Each member may instruct his or her own solicitor on all matters including settlement.	Only the representative can instruct.
F. Binding effect of final judgment	
All members bound.	All members bound.
G. Damages recoverable	
Each pursuer can seek individual award of damages.	Individual damages recoverable for each member (although this doubted at one time: see *Markt* and *Irish Shipping Ltd*, para 5.5 above).

Discussion

5.10 Like its counterparts in Ontario[1] and Australia,[2] the English Supreme Court rule is brief and unhelpful. As already mentioned,[3] its main purpose historically was to relax the rule which required the attendance as parties of all those with an interest in a particular suit. A number of matters are left unprovided for and open to judicial interpretation.

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[1]Supreme Court of Ontario Rules of Practice, Rule 75: see paras 2.7, 2.8 above.

[2]Eg Federal Court Rules, Order 6, rule 13.

[3]Para 5.4 above.

5.11 These include the following:

(i) The requirement of "numerous persons". This term is not defined in the rule. In a Canadian case[1] a court in Alberta doubted whether a class of four persons was adequate. In an English case[2] it was doubted whether a class of five persons was adequate, unless the amount involved was very small. In another Canadian case,[3] however, the court was apparently not concerned that the action was brought on behalf of some 180,000 subscribers to *Time* magazine (when the Canadian edition of *Time* had been stopped and subscribers had received the US edition).

(ii) The requirement of "same interest". This requirement has been the basis of judicial views that representative proceedings are not competent where the relief sought is damages or where the action is founded upon separate contracts between each of the members of the class and the defendant. More recently, where plaintiffs raised a representative action on their own behalf and on behalf of all members of the British Phonographic Industry Ltd ("BPI") for an injunction and damages for breach of copyright, it was held that damages could be recovered without establishing what damage had been suffered individually by members of BPI.[4] Notwithstanding such judicial relaxations of the earlier restrictive application of the rule, there apparently remains uncertainty about the applicability of the rule and the remedies available under the procedure.[5]

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[1] *Goodfellow v Knight* (1977) *cit* OLRC Report, p 18 footnote 69.

[2] *Re Braybrook* [1916] WN 74 *cit* OLRC Report, p 18 footnote 68.

[3] *Cobbold v Time Canada Ltd* (1976) *cit* OLRC Report, p 19 footnote 72.

[4] *EMI Records Ltd v Riley* [1981] 1 WLR 923, [1981] 2 All ER 838.

[5] See para 5.5 above, footnote 4.

(iii) The dominant role of the representative plaintiff. The representative plaintiff may be a self-appointed advocate for the class. He need not consult the other members of the class or give notice to them. He does not need to obtain the court's approval to acting as the representative party and the conduct of the action is entirely left to him. He can settle the action without regard to the interests of the others. The others will be bound by the results of the case.

(iv) Other members of the group or class may not know about the proceedings. There is no requirement in the English rule that notification of the intended litigation be given to the other members of the group or class. They may not know anything about the proceedings.

(v) The cost of raising representative proceedings. Only the representative plaintiff is responsible for the costs of the proceedings. Although others may benefit they are not bound to share these costs.[1] Further, if the proceedings fail the defendant may not be able to recover his costs - assuming the costs follow success" rule is applied - from the representative plaintiff, if the latter has little money.

5.12 It has been argued in Australia[2] that the representative action is a kind of class action and that rather than introducing the class action it might be preferable to make the existing representative action procedure more effective.[3] This suggestion has now been

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[1]"It would be little less than economic suicide for a person with a small claim to volunteer to act as a representative plaintiff" OLRC Report, p 37.

[2]B M Debelle, "Class Actions for Australia? Do they already exist?" (1980) 54 Australian Law Journal 508.

[3]Mr Debelle admitted, however, that modification of the procedure might not be worthwhile if the costs (expenses) rule was retained.

overtaken by the enactment of the procedure recommended by the Australian Law Reform Commission.[1]

Conclusion

5.13 We do not think it worthwhile to consider the introduction in Scotland of an amended version of the representative action procedure. Our provisional view is that:

4. 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.

[1] See paras 6.92-6.102 below.

PART 6: POSSIBLE NEW PROCEDURES: THE CLASS ACTION - EXPERIENCE IN OTHER JURISDICTIONS

Introduction

6.1 In the previous Part we concluded that the English representative action could not satisfactorily be adapted to deal with the problems presented by multi-party litigation. Class action procedure[1] has been developed from the representative action and may be regarded as a sophisticated and improved version of it. The four basic elements are the same: numerous parties (so that conjunction of the actions would not be helpful); the same or a similar interest in the subject matter of the litigation; the "representative party" takes the proceedings forward on behalf of all the members of the group without an express mandate from each of them;[2] and all those members are bound by the result. One significant difference is that in the class action the members of the group of litigants need not be identified by name.

6.2 Class action procedure has existed in the United States since 1938. The procedure is well established there and has been the subject of numerous decisions and considerable discussion.[3] Our discussion of the class action starts therefore by considering the American

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[1]For a definition of a "class action procedure" see para 1.7 above.

[2]Class action procedures typically allow a group member (or potential group member) either to opt out of, or to opt into, the proceedings. See paras 7.27-7.31 below.

[3]And corresponding divergence of views. "Within the legal profession debate reaches unaccustomed shrillness, with some describing class actions as 'legalised blackmail' and others defending them as 'the most useful remedy in history'". Yeazell (1987), pp 8-9 (footnotes omitted). Class actions in the USA are discussed in paras 2.17-2.47 of the Dundee Research Report.

experience of class actions.[1] We then consider how the US experience has been built on in Canada (in Quebec and Ontario) and in Australia.

A The class action in the USA: Federal Rule 23

6.3 The Federal Equity Rule of 1912 was short and cryptic,[2] but not dissimilar to the English rule.[3] It was superseded in 1938 by Federal Rule of Procedure 23,[4] which was substantially revised in

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[1]Particularly Rule 23 of the US Federal Procedure which has been adopted or adapted in various of the 50 States. There are five basic class action models mentioned in the OLRC Report 1982 (p 64): (1) common law class actions; (2) the New York Field Code of 1848, as amended in 1849; (3) the original Rule 23 of 1938; (4) the present Rule 23, as amended in 1966 and (5) the proposed Uniform Class Actions Act recommended by the National Conference of Commissioners on Uniform State laws. In this paper we concentrate on (4) and (5). In addition "there are other statutes, both State and Federal, which expressly grant consumers the right to bring class actions where there are private rights of action in existence". (NCC Opren Report (1989) pp 12-13).

[2]Miller (1979), p 669. Federal Equity Rule 38 (1912) provided: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." In effect, this does little more than provide an exception to the rule that all parties interested must sue. The rule is concerned solely with whether the court can conveniently manage the litigation; it appears to be assumed that it will be satisfactory for one claimant to act for all.

[3]Quoted in para 5.3 above.

[4]The rule provided for three types of class actions, based on differences in the "jural relationships" among the members of the class. It was argued that the binding effect of the judgment depended on the category to which the particular class suit belonged. This caused courts great difficulty and, to some extent, inhibited the use of the class suit. (James and Hazard (1977) pp 502-505.)

1966.[1] We discuss here the rule as revised. The text of the revised rule is given in Annexe C.

The Provisions of Federal Rule 23

6.4 The court has to decide whether a class action is to be maintained as such. This duty of considering the nature of the action - and deciding whether it may proceed - is generally referred to as "*certification*". This is a two-stage process: the court considers first the "prerequisites" of general application set out in subdivision (a) of the Rule. If these general requirements are all met,[2] the court has to consider whether the proposed class action falls into one or more of the three categories of class action,[3] which describe different factual situations in which a class action is appropriate.

Four prerequisites

6.5 The prerequisites in subdivision (a) apply to all proposed class actions.[4] They may be described as: numerosity; commonality;

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[1]According to the note accompanying the rule, the 1966 amendment was intended (1) to redefine the cases that could proceed under rule 23, by adopting more functional definitions of class actions, (2) to clarify the effect of a class action judgment on members of the class, (3) to codify some of the better class action practices that federal judges had developed, (4) to provide district court judges more guidance regarding their procedural powers and responsibilities, and (5) to deal explicitly with the notice that should be provided to absent class members. (Miller (1979) p 669.)

[2]In addition, there are two implied prerequisites. First, there must be an identifiable class whose membership can be defined for purposes of discovery, notice, settlement and *res judicata*. For example, it might be considered that "all people active in the peace movement" could not constitute a class. Second, the representative must himself be a member of the class. Bush (1986), p 15, footnote 39, referring to an article by Professor Arthur R Miller.

[3]Subdivision (b) of the Rule.

[4]Contrast the notice requirement which applies only to the damages category of action (Rule 23(b)(3) read with Rule 23(c)(2)).

typicality; and adequacy. The first, *numerosity*, reflects the origin of the representative procedure as an exception to the rule requiring joinder of all "necessary parties". Without the existence of the second pre-requisite of *commonality* - that is, questions of law or fact common to the class - the individual claims could not be progressed in one litigation.[1] The third and fourth prerequisites recognise that the class action departs from the traditional notion that only the holder of a right can litigate about it.[2] The third prerequisite, *typicality*, ensures that the representative has a claim (or defence) which is typical of the claims of the class as a whole.[3] The last prerequisite, *adequacy of representation*, is the most difficult to satisfy. Two points may be noted about the court's inquiry into adequacy.[4] First, the adequacy of both the party-representatives and their attorneys must be evaluated. Second, an initial finding of adequacy is subject to review at a later stage of the case. There could be many reasons for denying a named party litigant the right to speak for the absentee class members.[5]

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[1]But note that only some questions need be common. The court can restrict the proceedings to particular issues (Rule 23(c)(4)(A)): *eg* in a damages class action the action may deal only with the question whether the defender is liable in damages to the claimants, leaving the amount of damages due to each of the claimants to be separately determined.

[2]In a sense, he owns it. See the discussion of "party control" in para 2.29 above.

[3]"Although some commentators view typicality as simply an amplification of the other factors, judges have tended to treat it as a requirement having independent significance sufficient to deny certification if there are obvious differences between the legal or factual position of the would-be representative and that of the class members generally." (Bush (1986) pp 115-116). Bush cites a case (*Warren v Reserve Fund Inc* 1984) where certification was denied on the ground that the business acumen of a class representative might not be typical of the class as a whole and might jeopardise his claim of reliance on the defender's misrepresentations.

[4]Bush (1986) p 116.

[5]"Perhaps a representative plaintiff is so aligned personally or economically with the defendant that he might not pursue the class claims

Three categories of class actions

6.6 If the court is satisfied that all these prerequisites are met it has to consider, in the second stage, whether the case fits into at least one[1] of the three categories of case set out in subdivision (b). The provision may be paraphrased as follows:

(1) Separate actions by individual members of the class (A) might establish incompatible standards for the opponent of the class or (B) might effectively dispose of the interests of potential class members. (The "prejudice" category.)

(2) The opponent has acted on grounds generally applicable to the class, thereby making appropriate injunctive or declaratory relief.[2] (The "injunctive" category.)

(3) There are common questions raised by the case which "predominate" over possible individual questions and a class action is "superior to other available methods for

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with sufficient vigour, or perhaps he has a conflict of interest with other class members, or most of his claims have become moot. He may lack the financial resources or the interest to support the litigation. If anything about the representative's circumstances indicates an unwillingness or inability to litigate effectively on behalf of the class, certification may be denied.

Examination of the 'adequacy' of the attorneys representing the class can be equally searching. In other litigation the lawyer represents clients with whom he has entered into a contract of employment. No such relationship exists with absent class members. Therefore, the court has a fiduciary obligation to the entire class to ensure that the lawyer who will represent its interests is sufficiently competent and experienced to pursue its claims or defences. Such an unfamiliar and perhaps distasteful judicial task is nonetheless deemed essential if the rights of persons not before the court are to be protected and if the results of the litigation are to be shielded from later collateral attack by class members on due process grounds." Bush (1986) pp 116-117. (References omitted.)

[1] *Eg* certification might be appropriate under both the injunctive category and the prejudice category.

[2] In Scottish terms, an interdict or a declaratory order with respect to the class as a whole.

the fair and efficient adjudication of the controversy". (The so-called "damages" category).

6.7 *(a) The prejudice category.* Sub-paragraphs (A) and (B) of paragraph (b)(1) describe situations where there is a likelihood that either the class or the parties opposed to it will suffer if litigation is allowed to proceed by way of separate actions rather than a single case covering the whole class. Prejudice to the defender might arise if differing standards were applied to similarly situated persons. For example, if a state agency needed to apply abortion guidelines equally to all unmarried women under 18 years of age, its ability to do so would be threatened if separate suits seeking to impose different standards were filed.[1] Prejudice does not apparently arise (by the establishment of "incompatible standards" for the defender) where there are numerous claims for damages arising out of a single incident and there is a possibility that if the claims were heard separately the defender might have to pay some claims but not others.[2] So far as prejudice to the class members themselves is concerned, the most obvious instance is where a fund (such as an insurance policy) would be insufficient to meet all the claims, if successful; the first successful claimant might exhaust the fund.[3]

6.8 *(b) The injunctive category.* This provision reflects pre-1966 experience of, particularly, civil rights cases. Actions have been sustained on this ground in a variety of circumstances, *eg* to enforce

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[1]Case cited by Bush (1986), p 117, footnote 48.

[2]ALRC Report p 193 Appendix C, derived from Basten (1988).

[3]It has been held, however, that this category was not intended to permit class actions where the decision in one case might have a binding effect on another.

constitutional rights or rights under employment discrimination legislation, or to protect the environment.[1]

6.9 *(c) The damages category.* Cases under this category are the least likely of the three categories to deserve to be certified as a class action. For example, persons injured by a manufacturer's negligence (product liability cases) would probably not know one another; and unlike mass accident cases, product liability cases may be based not on a single event but on a number of separate events. The particular circumstances of the plaintiffs' use of the product and their personal knowledge of the prospect of damage will almost certainly differ.[2] For this reason four special requirements are provided in Rule 23(b)(3). These are the "predominance" factor; the "superiority" factor; the requirement of notice to the class; and the opportunity for the class member to opt out.

6.10 *The damages category: the predominance factor.* The court must find "that the questions of law or fact common to members of the class predominate over any questions affecting only individual members". This is a matter for the court's informed discretion.[3] Whether this factor applies in any given case has been described as a very complex question.[4] Issues could be said to predominate if a decision on them would resolve the most significant, although not necessarily conclusive, aspects of the claims. "For instance, if, in a securities fraud case, the same alleged fraudulent acts of the defendant would, if proven, give

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[1]Bush (1986), p 118.

[2]Fleming (1988), p 241.

[3]Bush (1986), p 119.

[4]OLRC Report, p 55.

rise to liability to all class members, these common legal and factual issues would probably predominate, despite the fact that the damages suffered by each claimant would vary. In such a case, the provisions of Rule 23(c)(4) would permit the certification of a 'partial class' limited to the class-wide issues, leaving the damages claims, and any defences thereto, for later individual hearings. On the other hand, if the alleged fraudulent acts primarily consisted of individual transactions with each claimant, then it is likely that there would be no predominance of common issues and class action status would be denied."[1]

6.11 *The damages category: the superiority factor.* The court must find "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy". This requirement is intended to ensure that the courts are not burdened with complex class proceedings where "another method of handling the litigious situation may be available which has greater advantages".[2] Other methods might include: consolidation of existing non-class actions or obtaining the agreement of parties to a test case. The provision lists four matters which the judge is to consider in arriving at a decision on "superiority".[3] These are: (A) the interests of potential class members in controlling their actions as individuals, (B) whether, and to what extent, litigation concerning the matters in dispute has been commenced, (C) the desirability or undesirability of concentrating the

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[1]Bush (1986) p 119.

[2]OLRC Report p 55.

[3]The provision does not say so expressly but these matters would presumably not be relevant in assessing "predominance". The result is that there are four sets of criteria which the judge has to consider in damages cases: the prerequisites; the category of action; the predominancy and superiority factors; and the four listed matters. This structure has been criticised as unnecessarily complex: Homburger (1971). See particularly his redrafted provision at pp 655-657.

litigation of the claims in the particular forum, *ie* court[1] and (D) the difficulties likely to be encountered in the management of a class action. It appears that this issue of manageability[2] has been by far the most controversial.[3] "Several years ago, when it seemed that the federal courts were drowning in 'damages' class cases, many judges relied heavily on difficulties in 'management' as a sufficient reason to justify refusing certification. However, this practice has generally been condemned by the commentators as an abdication of the expanded responsibilities imposed on the courts by the 1966 amendments and now appears to be on the wane."[4]

6.12 *The damages category: the requirement of notice.* The members of the class need not be initially identified but the results of the litigation will bind all the members of the class. It is therefore fair and necessary that individual class members should be able to leave the class. They need to know that the putative class action has been raised. Hence the requirement of notice (in the "damages category" of case only[5]). The provision[6] requires the court to give "the best notice practicable under the circumstances, including individual notice to all members [of the class] who can be identified through reasonable effort". If individual members cannot be given personal notice, there

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[1]"Such as lack of personal jurisdiction over some parties or a crowded docket [list of cases for trial]" (Bush (1986), p 120).

[2]Raised in Rule 23(b)(3)(D).

[3]OLRC Report, p 55.

[4]Bush (1986), p 120.

[5]The framers of the rule were apparently content to leave it to the court's discretion whether to inform members of the other categories of class action. (Bush (1986), p 120).

[6]Federal Rule 23(c)(2). See Annexe C.

must be advertisement in the newspapers, magazines or electronic media likely to be seen by the absent class members.[1] The party seeking class certification must bear the cost of the notice, even if the number of potential class members runs into millions and the cost of such notice is so large that the representative cannot afford to continue the case on a class basis.[2]

6.13 *The damages category: opportunity to "opt out".* The notice tells each member of the class that they can request exclusion. If a class member does so, he preserves his ability to sue as an individual. If he

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[1]As in the *Agent Orange* Product Liability Litigation. (Bush (1986), p 120, footnote 59.)

[2]Bush (1986), p 120, footnote 60 referring to the notorious case of *Eisen v Carlisle & Jacquelin.* The circumstances of the case are as follows:

> "The representative plaintiff, Mr Morton Eisen, brought a class action on behalf of all persons who had bought and sold securities in 'odd-lots' on the New York Stock Exchange during a specified four-year period. An 'odd-lot' is a group of less than one hundred shares. Throughout the relevant period, odd-lot trading was processed by the two defendant brokerage firms, Carlisle & Jacquelin and DeCoppet & Doremus, instead of through the regular auction market of the New York Stock Exchange. Together these firms handled ninety-nine percent of the trading. In each odd-lot transaction, the investor was obliged to pay a service surcharge known as the 'odd-lot differential', as well as the standard brokerage commission levied on so-called 'round-lot' transactions.
>
> "Although Mr Eisen possessed a claim worth only seventy dollars, he launched a class action in which he alleged that the defendant brokerage firms, in violation of the Sherman Act, had conspired to monopolize odd-lot trading and had charged an unfair odd-lot differential. The class on whose behalf the suit was brought included six million members. The names of approximately two million investors could be determined 'with reasonable effort' using existing computer records. It was estimated that, at the first class postage rate, the cost of sending individual notice by mail to all identifiable class members would be $315,000. For the four million class members who were not identifiable, notice by means of publication would have to be arranged, which would incur further expense. Mr Eisen argued that, under the circumstances, individual notice should not be required for the identifiable class members, and that a form of publication notice should suffice." OLRC Report, pp 497-8.

does not do so, the notice makes clear that the judgment will include and describe all members of the class who have not requested exclusion.[1] Under the pre-1966 provision there was an "opt in" approach: only persons who had actually intervened were bound by an adverse decision or entitled to enforce a favourable one.[2]

Federal Court's power to make ancillary orders

6.14 Rule 23 contains provisions[3] enabling the court to make orders which may make the action more manageable by allowing the court to concentrate on particular issues (*eg* leaving aside the quantification of individual claims) or to subdivide the class and treat each sub-class as a complete class. In addition, there is a list[4] of some types of order which the court may consider appropriate for the fair and efficient conduct of the action. There is also set out (in subdivision (d)(2)) a non-exhaustive list of possible occasions for orders requiring notice to

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[1]See Rule 23(c)(3). The provision does not expressly say that the judgment will bind all class members and it "does not disturb the recognised principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action". If, however, the court's judgment is carefully considered with regard to its extent or coverage, questions of *res judicata* are less likely to be raised. (Notes on Rule 23(c)(3) by Advisory Committee on Civil Rules.)

[2]Some critics argue that anything other than individual notice is not good enough. "In many class actions the majority of class members have never made any conscious choice and, indeed, they never have received any actual notice that they have a choice to make." In this way, it is said, Rule 23 has become a device to conscript clients, without their consent: E E Pollock, "Class actions reconsidered", 1972 Business Lawyer 741 at 742. Pollock stigmatises this as "the Book-of-the-Month Club principle": no answer means yes; silence means approval; and a member is automatically in unless he takes affirmative action to opt out.

[3]Rule 23(c)(4).

[4]Rule 23(d).

the class.[1] Unlike the mandatory notice to members of a class action maintained under subdivision (b)(3) (*ie* the so-called damages category),[2] notices under subdivision (d)(2) are discretionary, although such discretionary notices may be particularly useful in damages category class actions. These notice provisions reflect the requirements of due process[3] and the need to try to ensure that the representative party pays due regard to the interests of absentees.

Settlement needs court's approval

6.15 A further protection for the absent parties[4] is the provision[5] that the dismissal or compromise of any class action requires the approval of the court, after notice of the proposed dismissal or compromise has been given to all members of the class in such manner as the court directs.

Federal Rule 23 illustrates the general features of class actions

6.16 Although the structure of Rule 23 may be unduly complex,[6] the rule illustrates some general features of class actions:

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[1]But such notice "should not be used merely as a device for the undesirable solicitation of claims" (Notes of (Rules) Advisory Committee).

[2]See para 6.12 above.

[3]James and Hazard (1977), 505 refer in particular to *Hansbury v Lee* (1940).

[4]In this paper we use the term "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 not opted out or have opted in (depending on which arrangement is adopted in a class action procedure).

[5]Rule 23(e).

[6]See paras 6.22-6.23 below.

- the procedure seeks to achieve judicial economy[1] or adjudicatory efficiency[2] without sacrificing procedural fairness;[3]
- the procedure includes an unusual degree of judicial discretion;[4] and
- although superficially similar to conventional litigation the procedure is in fact a hybrid of private initiative and public control: private initiative is allowed to work on behalf of a group which may be much larger than the actual raisers of the action, but is subject to judicial control to ensure efficiency and fairness.[5]

Aims of adjudicatory efficiency and procedural fairness

6.17 It may be regarded as wrong that a person should not be able to vindicate a right in court simply because there is a large number of similar claims and the difficulty and cost of litigating are dauntingly disproportionate to the value of his claim. It may be argued that courts should be able to devise a way of dealing with actions where a number of people have the same or similar claims, notwithstanding that there are many claims. In particular there should be a procedure which maximises the advantages[6] of the aggregation of claims in one

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[1]The OLRC term. See paras 4.44-4.46 above.

[2]"Adjudicatory efficiency is the central claim for class actions, procedural fairness against it. Separate litigation of numerous similar claims entails enormous waste of resources, whereas findings on common questions of law or fact bind all members of a class, thereby precluding endless relitigation." Fleming (1988), pp 244-245.

[3]Para 6.17 below.

[4]Paras 6.18-6.20 below.

[5]Para 6.21 below.

[6]Such as the avoidance of undue cost, delay and complexity.

litigation - *ie* achieves adjudicatory efficiency - and minimises the disadvantages of doing so by being as fair as possible to the interests of all the claimants and the defenders. These issues of judicial efficiency, effectiveness and fairness are central to the debate about US class action procedure. One respected commentator considers that the class action can be very valuable, provided that it is accompanied by adequate controls.[1]

Judicial discretion

6.18 Rule 23 concentrates on two matters: the criteria guiding the court in deciding whether certain claims are to be aggregated in a single litigation; and procedural devices to enable the court to minimise some of the disadvantages of the representative party acting both on his own behalf and on behalf of the absent parties. "Even in its current elaborated form, rule 23 really must be thought of as a procedural skeleton requiring fleshing out by judges and lawyers experimenting with it in an ever-increasing range of circumstances and in a variety of innovative ways ... Although the rule provides guidance on a number of matters and expressly authorizes various kinds of judicial activity, its basic operation ultimately depends on the ingenuity of district judges working co-operatively with counsel to engineer the management of complicated lawsuits."[2]

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[1]Cappelletti (1989), p 291. He does not know of "any serious examination by non-American experts which has not been favourable, even although doubts sometimes may have been cast on the feasibility of importing the American solution into other parts of the world". He does not consider that the absence of the contingency fee system outside the United States particularly hinders the development of class actions since there can be other financial inducements for a class suitor and his lawyers.

[2]Miller (1979), p 677.

6.19 Some commentators question whether this degree of judicial discretion is appropriate because it may allow the judge to favour unduly "social activism".[1] This view has been put as follows. "Under the present rules, a class action lawsuit is much like a game of Russian roulette - it depends almost entirely on the philosophy of the judge trying the lawsuit. If he thinks class action suits serve a useful social purpose, then he will find grounds for continuing the action. If, on the other hand, he thinks the particular case deals with a nit-picking problem, of no social consequence; and, if he joins with that a view that class action lawsuits unnecessarily clog court calendars, then he will probably dismiss the action."[2]

6.20 Writing in 1979, Professor Arthur Miller discerned three distinct periods in the development of judicial attitudes to Rule 23.[3] The *first period*, immediately following the adoption of Rule 23 in 1966, was characterised by an optimistic view of the potential usefulness of the rule as a means of "dispensing justice to socially or economically disadvantaged groups as well as to small claimants generally". However, in their enthusiasm for the use of the class action device, lawyers and judges were somewhat lax in ensuring that putative class actions satisfied the requirements stipulated by Rule 23. As a result, a *second period* - of reaction - developed, in which judicial aversion to class actions was evident. At present, class actions are in a *third period* of development, marked by "increasing sophistication, restraint, and stabilization in class action practice on the part of both

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[1]Fleming (1986), pp 248-250.

[2]G Edward Fitzgerald, "When is a class a class?", (1972-73) 28 Business Lawyer 95 at 108.

[3]Miller (1979), p 678. Professor Miller's views may be coloured by his support of class actions as a means of redressing mass injuries. (See OLRC Report, p 63 on which this para is based.)

the courts and class action lawyers. Lawyers, in the face of negative judicial reaction to class litigation, have responded by attempting to define classes and to describe allegations with greater precision and clarity, resulting in smaller classes with a concomitant reduction in problems of manageability. For their part, the courts have begun to rely more on their various powers to supervise and administer class actions rather than on denial of certification, to deal with difficult class actions that otherwise satisfy the prerequisites of Rule 23." Professor Miller is therefore optimistic about the future of class actions.[1]

A hybrid of private initiative and public (judicial) control

6.21 The class action procedure departs from the traditional concepts of civil litigation:[2] that only the "owner" of a right may litigate about it; he is free to decide how to conduct the litigation; and the result of the case binds only the parties to it.[3] In the class action there is scope for the initiative and zeal of private persons who are allowed to act in court for a general or group interest.[4] The assumption is that the representative party can reasonably be expected to act in the best interests of the class since those will, broadly speaking, coincide with his own interests. This is the so-called "private Attorney-General" solution.

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[1]One important reason for his optimism has apparently been that there has been extensive consultation among federal judges at meetings conducted by the Federal Judicial Center, which has contributed significantly to a growing expertise (OLRC Report, p 64).

[2]See paras 2.26-2.34 above.

[3]Leaving aside questions as to *res judicata* or, in English law, issue estoppel.

[4]Cappelletti (1989), p 283.

Federal Rule 23 complex and incomplete

6.22 The drafters of more recent class action proposals have had the opportunity to learn from American experience of the operation of Rule 23.[1] For example, a comparison of the New York Rules[2] and the recommended legislation of the Uniform Law Commissioners[3] with the Federal Rule 23 show that the Federal Rule is both unduly complex and incomplete.

Complexity of Rule 23

6.23 Rule 23 has been criticised as unduly complex, particularly in the prescription of three categories of class actions[4] and of a (mandatory) notice provision which applied to only one of these categories.[5] The New York State rules[6] omit the triple characterisation and apply to all actions the requirements of "predominancy" and "superiority" which formerly appeared in Rule 23(b)(3) relating to the damages category only.[7] Notice is mandatory in all actions (except certain actions for injunctive or declaratory

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[1]As the Ontario Law Reform Commission noted: OLRC Report, p 57.

[2]Effective since 1 September 1975. The text is given in Annexe D.

[3]The Uniform Law Commissioners' Model Class Actions [Act][Rule], referred to here as the "ULC Model", was issued in 1975. The National Conference of Commissioners on Uniform State Laws consists of three representatives (judge, practitioner and academic) from each state who produce uniform acts, where the need is regarded as most clear eg commercial law, in the form of recommendations to the legislatures of the states.

[4]Rule 23(b). See paras 6.6-6.13 above.

[5]See para 6.12 above.

[6]Following the draft proposal in Homburger (1971), pp 655-657. The New York State rules are printed in Annexe D.

[7]The requirements of "predominancy" and "superiority" now appear as prerequisites to a class action in Rule 901.a.2 and 5.

relief)[1] and express provision is made about the methods, and liability for the expenses, of notification.

Incompleteness of Rule 23

6.24 Experience of Rule 23 indicates that it might with advantage contain other provisions, or more detailed provisions, on a number of matters, including the following.

6.25 *(a) Notice.* The Supreme Court decision in the *Eisen* case[2] demonstrated that a requirement of individual notice without regard to the resources of the representative party might be unduly burdensome and might even bring the litigation to an end.

6.26 *(b) Lawyers' fees.* The complexity and cost of class actions sharply raised the question of the appropriateness of the American rule[3] that each litigant bears his own attorney's fee and does not look to the loser for reimbursement. Since the 1880's there have been judicial developments of "fee shifting" in the public interest. For example, under the "common fund" exception, lawyers who have been instrumental in the creation or preservation of a fund for a group of beneficiaries could reward themselves out of the fund. The Supreme

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[1]Rule 904(a).

[2]*Eisen v Carlisle & Jacquelin* 417 US 156 (1974) (see para 6.12 above) which held that Rule 23(c)(2) of the Federal Rules requires that individual notice be sent, at the expense of the plaintiff, to all class members who can be identified through reasonable effort. Compare the more detailed requirements of New York Rule 904 and of the ULC Model. The latter suggests in s 7(e) various techniques - including "distribution through trade union, public interest or other appropriate groups" - which may be used for notification to members of the class not given a personal or mailed notice.

[3]Discussed in Fleming (1988), pp 188-192.

Court decision in the *Alyeska Pipeline* case[1] stopped this line of judicial development of public interest litigation. Recovery from the unsuccessful opponent is allowed under the New York Rules[2] although the court's discretion is emphasised ("if justice requires").

6.27 *(c) Assessment and distribution of monetary awards.* Federal Rule 23 gives no guidance about whether, for example, damages awarded to the class may be paid in instalments, rather than in a single lump sum. Typically the class will be large and all the members will not be identifiable. What happens to any unclaimed sum of damages? Should it be regarded as unclaimed property or paid back to the defendant? The New York Rules deal with this matter briefly[3] and the ULC Model at more length.[4]

6.28 *(d) Preliminary hearing on the merits.* A preliminary hearing on the substantive merits of a class action may be desirable,[5] partly in order to avoid the possibility of unfair pressure on the defendant to settle the claims, sometimes called "legalised blackmail". In *Eisen*,

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[1] *Alyeska Pipeline Service Co v Wilderness Society* 421 US 240 (1975). The Supreme Court rejected the notion that a successful public interest plaintiff (here an environmental organisation) should, as a "private Attorney-General" be awarded attorneys' fees against the defendant pipeline corporation. The Supreme Court decision was based on the absence of statutory authority for this "reallocation of the burden of litigation".

[2] Rule 909. The ULC Model has even more detailed provisions in ss 14 (costs), 16 (attorney's fees) and 17 (arrangements for attorney's fees and expenses).

[3] Rule 907.5.

[4] S 15 (relief afforded). The court in determining the amount to be distributed as unclaimed property repayable to the defendant is required to take account, among other things, of any criminal sanction imposed on the defendant (s 15(c)(6)(v)).

[5] See, however, para 7.22 below.

however, the Supreme Court ruled that there was no authority under Rule 23 for the holding of such a hearing.[1]

US experience of the Revised Federal Rule 23

6.29 Judging by the number of class actions raised, there was initially a favourable reaction to the revised Federal Rule 23 (1966). By 1976, more than 3,000 federal class actions were being filed annually, but in later years the numbers declined: there were 987 in 1984 and 610 in 1987.[2]

6.30 It appears that civil rights suits make up the greatest number of class actions in the United States federal courts: more than half of the total of actions brought are based on civil rights statutes.[3] Only a relatively small proportion of federal class actions are based on violations of federal securities laws or seek to enforce antitrust legislation; they are, however, regarded as useful and important cases.

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[1]The court observed that such a procedure involved the possibility of prejudice to the defendant, due to the absence of the normal procedural safeguards available to litigants in civil trials.

[2]Glenn (1986), p 266; ALRC Report, p 195. The reason for the decline is unclear. Glenn says that some blame US Supreme Court decisions (*eg* that individual claims may not be aggregated to meet the jurisdictional or monetary requirements: *Snyder* (1969); *Zahn* (1973)) while others see the decline as symptomatic of the defects in Rule 23.

[3]OLRC Report, p 219. *Eg* actions under the provision in the Civil Rights Act 1964 which prohibits discrimination on the basis of race, colour, religion, sex or national origin. Under UK legislation complaints of discrimination on grounds of race or sex are made to industrial tribunals, not to the civil courts: thus the introduction of class actions in the Scottish courts would not affect such discrimination complaints. See para 3.8 above.

Consumer class actions[1] are also comparatively scarce, other than actions relating to consumer credit.

Mass tort cases

6.31 It might be thought that mass disaster cases - particularly of the sudden rather than the creeping variety[2] - would be particularly suitable for class action procedure with its alleged advantage of adjudicatory efficiency.[3] The main problem is that class action procedure presupposes a core of common issues and in mass tort actions[4] claims may be based not on a single event but on a series of events. This was recognised by the framers of the revisals to Rule 23.[5] One commentator,[6] Professor Arthur Bush, has discussed the cases in which the use of class action procedure has been considered in three categories of (a) mass accidents, involving such single incident occurrences as fires, aircraft and motor coach crashes, building collapses, cruise ship food poisonings, and nuclear power plant accidents; (b) air and water pollution, involving single-source industrial polluters acting over a period of time; and (c) defective consumer

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[1] *Ie* actions raised by aggrieved consumers as purchasers of goods and services: in particular actions in the context of consumer credit legislation; trade practices not addressed by competition law; product liability; landlord and tenant; and condominium (tenement) law.

[2] To use the terms mentioned in para 1.6 above.

[3] Discussed in para 6.17 above.

[4] Using the US and English term for actions based on delictual liability.

[5] "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action, would degenerate in practice into multiple lawsuits separately tried." (Notes by Advisory Committee on Civil Rules).

[6] Bush (1986), pp 202 ff.

products. His detailed discussion is summarised here.[1] Bush notes that there has been a sizeable body of federal trial court opinions over the two decades since 1966. "To date, however, no pollution or defective product classes, and only one 'mass accident' class, have met with direct clear-cut appellate court approval, while several circuit courts of appeal have reversed certifications in such cases. The Supreme Court has yet to pass on the appropriateness of using Rule 23 in any of these cases."

6.32 *(a) Mass accidents.* If the defender's liability for the accident can be established this will normally leave the class members with only the damages question for individual resolution. If liability cannot be established the defender is free from the possibility of further litigation.

6.33 *American Trading & Production Corporation v Fischbach & Moore Inc*[2] involved a fire at an exhibition which destroyed the property of some 12,000 exhibitors. Twelve of them obtained certification under Rule 23(b)(3). So far as the prerequisites of Rule 23(a) were concerned it was clear that the joinder of some 12,000 plaintiffs was impractical. Further, the fact that all the claims arose from the same fire meant that there were common questions of law and fact; the named plaintiffs had suffered essentially the same kind of property loss as the other members of the class; and their losses were substantial enough to satisfy the court that they would vigorously and adequately represent the class as a whole. On the superiority

[1]Paras 6.31-6.42 below. See also discussion in Dundee Research Report, chapter 2.

[2]47 FRD 155 (D111) (1969).

factor[1] the court took account of the absence of other litigation, coupled with the presence of most of the witnesses and evidence in the district and the ease with which the class members could be identified and notified of their rights to opt out. The court found a "predominance" of common fact and law issues as well. The court said:

> "Each exhibitor brought merchandise to [the exhibition], erected display booths and sustained a loss. For each, identical evidence will be required to establish the fire's origin, the parties' responsibility, and the proximate causation ... The only issue distinguishing the class members is the amount of damages sustained ... since common questions predominate, a class action may be maintained. Individual members of the class will, however, be required to present evidence of their particular damages."

There was only a partial class certification[2] limited to liability issues. There has also been only partial certification in the subsequent mass tort cases in which class actions have been approved.

6.34 Certification was refused in *Hobbs v North East Airlines Inc.*[3] The district court for the Eastern District of Pennsylvania refused to permit Pennsylvania residents to represent a class of all claimants seeking damages for personal injury and wrongful death as the result of an airliner's crash in New Hampshire. The court conceded that common questions of law and fact probably predominated in the action against the primary defendants, but it was concerned about not infringing the individual autonomy of litigants in such cases.[4] The

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[1]Rule 23(b)(3).

[2]Under Rule 23(c)(4)(A).

[3]50 FRD 76 (ED Pa 1970).

[4]The court said: "It is clear that each claimant in this situation may properly be regarded as having a legitimate interest in litigating independently. Not only do the claims vitally affect a significant aspect of the lives of the claimants (unlike the usual class action, where individual claims are usually somewhat peripheral to the lives of the claimants), but there is a

court was also concerned with complications caused by the presence of claims against third party defenders which included the United States and two manufacturers of components of the aircraft.[1]

6.35 *(b) Pollution cases.* Actions brought by alleged victims of pollution are less likely to be certified as class actions than mass accident cases where the people injured are geographically dispersed and it may be desirable for proof of causation to be separately considered in individual cases.

6.36 In the leading case, *Pruitt v Allied Chemical Corporation*,[2] people whose livelihoods depended on Chesapeake Bay sea food alleged that they had been injured by the defendants' disposal of toxic chemicals into the bay. They sought to form a single class which would have included not only crabbers and other sea food harvesters but also marina owners, restaurateurs and other businesses whose economic interests were affected by the alleged pollution in very different ways from the sea food harvesters'. The court exercised its discretion under Rule 23(c)(4)(B) and divided the proposed class into six sub-classes engaged in similar economic activities. In this way the judge was able

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wide range of choice of the strategy and tactics of the litigation .... Plaintiffs are clearly correct in suggesting that claimants wishing to control their own litigation need only elect to be excluded from the case. Nevertheless, the fact that 16 suits have already been filed ... together with the variety of potential theories of liability makes it clear that very little would be accomplished by permitting a class action in this case, and that the few class members who would be likely to remain could presumably intervene in this action if they saw fit."

[1]Compare the conflict of law questions which have apparently arisen in the Lockerbie air crash and Piper Alpha Oil Rig disasters. For Lockerbie see for example *Pan American World Airways Inc v Andrews* 1992 SLT 268; and for Piper Alpha, T M Kolman "The Piper Alpha Oil Rig Disaster; is there a forum for pursuers in the United States?" 1988 SLT (News) p 293.

[2]85 FRD 100 (ED Va 1980).

to satisfy himself that common liability issues would predominate within each sub-class. The "superiority" issue was more difficult however because "the multiplicity of legal theories and individual fact patterns" created serious manageability problems, particularly given the possible need for tens of thousands of subsequent individual damages hearings. Despite the burden such proceedings would impose on the court the judge concluded that certification[1] could not be denied "unless the problems of manageability in a class action are found to be greater than, or the same as, those found in other available methods of adjudicating the proposed classes claim".[2] The court examined the alternatives to certification and found serious problems in each.[3]

6.37 *(c) Defective products.* In the mid-1970s the number of product liability cases[4] raised in the US courts increased considerably.

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[1]Under Rule 23(b)(3).

[2]The judge's apparent lack of concern about the manageability of the litigation apparently reflected a belief that even if class-wide issues were won by the plaintiffs, most of the individual hearings would never take place, either because of settlement or lack of prosecution by class members. In the end, not even the class-wide issues were tried. The class representatives never attempted to prove that the prerequisites of rule 23(a) were met for each sub-class, or that they had ability to finance the notice to class members, as required by the court. As a result, the conditional class certifications were dismissed (in an unpublished opinion).

[3]If individual cases were pursued the likely result would be that many of them would not proceed and it was thought that this would be unjust. The joinder of individual cases into a single proceeding would in the judge's view be little more than a half-hearted way of achieving some of the benefits of certification. Further, the use of a "test case" was not feasible given the need for agreement among all parties to be bound by the result and the tremendous burden on the "test litigant".

[4]Arising from toxic products such as asbestos, thalidomide, DES (Dyethylistibestrol), Dalkon Shield intra-uterine devices, Agent Orange (a chemical containing dioxin used by the US Army in Vietnam to defoliate the countryside and accused of exposing millions of people to toxic injury) and other dioxins causing cancer and other health-threatening conditions.

Thousands of new cases of "repetitive litigation" threatened to congest the courts. In theory class certification under Rule 23 would have avoided some of these difficulties; in practice it seems that most courts rejected[1] attempts to certify product liability classes, mostly because proof of proximate cause as well as defences (*eg* voluntary assumption of the risk or time-bar of claims) would turn largely on the facts of each individual claimant's case.

6.38 This was illustrated in *Ryan v Eli Lilly & Co*[2] where an attempt was made to sue seven major drug manufacturing companies on behalf of a class composed of "all those females who are residents of the State of South California who were exposed to the risk of development of vaginal cancer and other conditions due to the use, by their mother during pregnancy, of [Dyethylistibestrol] manufactured by the defendants". The plaintiffs, following the usual pattern in such cases, sought both injunctive relief (interdict) and compensatory and punitive damages and alleged every available cause of action.[3] The court refused to certify a Rule 23(b)(3) class. It distinguished the earlier cases approving mass accident classes by noting that those classes had involved what the court called "standardised" class members, that is to say persons "whose claims against a common defendant arise out of essentially identical fact patterns". There were no such identical fact patterns in *Ryan*.

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[1]Bush is writing in 1986.

[2]84 FRD 230 (DSC 1979).

[3]Including negligence, strict products liability, breach of warranty, civil conspiracy, fraud and deceit, and violation of the Federal Food Drug and Cosmetic Act of 1938.

6.39 Attempts by some American judges to innovate are illustrated by the *Agent Orange* litigation in 1983 and 1984.

6.40 The *Agent Orange* litigation is apparently the largest tort case in history. The case represents, in Bush's view, "the most innovative use of the class action device as an engine of judicial efficiency" yet attempted. The case was very complex: there were uncounted thousands of plaintiffs, numerous defendants and third party defendants throughout the world. The case raised complicated tort and contract issues, as well as choice of law problems. The burdens of class management seemed overwhelming. The judge (Judge Weinstein[1]) attempted to structure the proceedings in a way which would resolve the entire *Agent Orange* liability controversy. The judge said:

> "Three factors in the instant litigation make the desirability of class certification even greater than it would be in most mass tort litigation. The first is size. The potential size of plaintiffs' class in this litigation numbers in the tens of thousands. If the claims are dealt with individually, the result might 'result in a tedium of repetition lasting well into the next century' [citing *Re 'Dalkon Shield'*] ... By way of contrast, there were only several plaintiffs in the class certified by the district court in *Re Federal Skywalk* Cases ... and less than 4,000 in the 'Dalkon Shield' litigation.
>
> "Second is the need to assure that the financial burden will ultimately fall on the party which, it may be found, should as a matter of fairness bear it [that is, the US government, which purchased the 'Agent Orange' and used it as a defoliant in the Vietnam War] ... A class action is the best vehicle for achieving that end. A single class-wide determination on the issue of causation will focus the attention of Congress, the Executive branch and the Veterans Administration on their responsibility, if any, in this case. By contrast, possibly conflicting determinations made over many years by different juries make it less likely that appropriate authorities and the parties will arrive at a fair allocation of the financial burden, if any.

[1] In the US District Court for the Eastern District of New York.

> "Third, certification may encourage settlement of the litigation. In a situation where there are potentially tens of thousands of plaintiffs, the defendants may naturally be reluctant to settle with individual claimants on a piecemeal basis."

The judge defined an all-encompassing class which he certified under the "voluntary" Rule 23(b)(3) for liability issues and under the "mandatory" Rule 23(b)(1)(B) for punitive damages. The class-wide issues to be decided included the major affirmative defence of "government contract defence"[1] and what the court styled as the "general causation" question, that is to say, whether "Agent Orange" could be responsible for the various kinds of personal injuries alleged at all, as opposed to the specific causation necessary for liability towards any individual. To try the "general causation" issues, the court directed the class to designate representative claimants for each type of injury alleged, primarily cancer and birth defects. If the class successfully proved "general causation" by prevailing with these representative claims, it would then clear the way for subsequent individual "specific causation" hearings for each class member allegedly manifesting that kind of injury.

6.41 The defendant chemical companies appealed against this ruling by attempting to decertify the classes in a petition to the second circuit Court of Appeals. However the case was settled and did not go to what might have been the largest jury trial ever.[2]

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[1] *Ie* that the companies were merely performing the work specified in the contracts with the US Government.

[2] Early on the morning of the first day of the trial, after discussions involving considerable first-hand pressure by the judge, the parties reached a tentative settlement, creating a damages fund of $180m to be divided among claimants in a manner to be designated by the court. Subsequently, after "fairness" hearings conducted at several locations around the United States, the settlement was approved. Bush concludes that the *Agent Orange* litigation stands as the first fully successful use of Rule 23 to resolve in a single law suit most of the claims for injuries from an allegedly defective product.

6.42 *Conclusion on mass tort cases.* Bush concludes that the use of Rule 23 "in mass tort cases can achieve a reasonably fair balance of the interest of the affected class as a whole, of the individual claimants and the judicial system, provided that proper attention is paid to tailoring its mechanisms to the legitimate needs of each group."[1] However he considers that class action proceedings have serious limitations. At best the resolution of a few class-wide issues is the most that can be accomplished in most cases.[2] Such a result in a mass tort class action may be similar to a declaration of entitlement to damages from a defendant, as for example in the English case of *Prudential Assurance Co Ltd v Newman Industries Ltd.*[3] Bush considers that concern for the protection of the rights of individual litigants makes it unlikely that class actions will ever become the norm in the United States. However, where the same discrete acts of a defendant give rise to great numbers of substantially similar claims, class certification under Rule 23 "may be seen as providing the fairest and most effective means for the resolution of the several claims particularly in those jurisdictions where congested dockets[4] make it unlikely that they could be dealt with expeditiously as separate actions".

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[1]It is unclear whether he considers that "the legitimate needs" of defendants were met.

[2]He notes that such a result provides little more than a declaratory judgment on the question of whether the class members have the right to proceed further for the purpose of proving individual causation and actual damages.

[3][1981] Ch 229 (a minority shareholder's representative action for declaration of entitlement to damages).

[4]Lists of causes for trial.

B The class action in Canada: Quebec[1]

6.43 Quebec was the first Canadian jurisdiction to adopt, in 1978, a revised class action procedure,[2] which forms a new book of the Code of Civil Procedure. The code provisions are clearly influenced by US Federal Rule 23: thus a class action must be authorised by the court and notice of the action is given to the members of the group who can then request exclusion. These provisions may be invoked in all proceedings and are not restricted to particular types of action.[3] The Quebec arrangements are noteworthy for the setting up of an agency (Fonds d'aide aux recours collectifs[4]) to provide financial assistance to representative parties in class actions. A number of amendments were made in 1982.[5] We narrate separately the new provisions in the

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[1]We have drawn on the OLRC Report, pp 70-76 and 694-697. Ducharme and Lauzon (1988) provide the text of the code and a comprehensive commentary.

[2]The relevant legislation is "An Act respecting the Class Action" (S.Q. 1978 c 8) which comprises 3 titles. The first title, "Class Action", inserted new provisions about procedure in Class Actions into the Code of Civil Procedure (new Book IX: Class Action). The second title, "Assistance to Class Actions", established an agency ("Fonds d'aide aux recours collectifs") to provide financial assistance to representatives in class actions. The third title, "Miscellaneous Provisions", made certain consequential provisions (including with regard to the running of prescription against the members of the group). The Act came fully into force on 19 January 1979.

[3]However the Superior Court of Quebec has exclusive jurisdiction (Art 1,000). The Chief Justice of the Superior Court may designate a particular judge of that court to hear the entire proceedings relating to the same class action (Art 1001).

[4]Referred to here as "the Fonds".

[5]Glenn (1984) says that the Quebec government enacted the reforms, acting upon the advice of consumer groups and of the Fonds, because it was disappointed with the results of the original legislation.

Code of Civil procedure[1] and the provisions dealing with financial assistance.[2]

Provisions in Quebec Civil Code

Authorisation to institute a class action[3]

6.44 There are four factors[4] which the court has to consider in deciding whether to authorise the bringing of the class action (and to ascribe the status of representative to a designated member of the class). These are:

(a) the recourses[5] of the members raise identical, similar or related questions of law or fact;

(b) the facts alleged seem to justify the conclusions sought;

(c) the composition of the group makes the application of Article 59 or 67[6] difficult or impracticable; and

(d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

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[1]Paras 6.44-6.55 below.

[2]Paras 6.56-6.58 below.

[3]Code Book IX Title II.

[4]Art 1003.

[5]The word "recourses" in the English version of the Code is the counterpart of "recours" (*ie* claims) in the French version.

[6]Art 59 contains a limited form of group action procedure where any one of several persons having a common interest in a dispute may appear in judicial proceedings if he holds a mandate from the others. (Compare the definition of "class action" in art 999: "the procedure which enables one member to sue without a mandate on behalf of all the others". The same article defines "member" as "a natural person who is part of a group on behalf of which a natural person brings or intends to bring a class action".) Article 67 provides for joinder (conjunction of parties).

6.45 In short, the conditions to be satisfied before a class action may be authorised are:

(a) commonality of questions raised;

(b) a favourable preliminary view of the merits;[1]

(c) unsuitability of other procedures; and

(d) an apparently satisfactory representative party.

Conditions (a),(c) and (d) have counterpart prerequisites in Federal Rule 23.[2] The Quebec rules have no requirement of "typicality"[3] of the representative party's claims (or defences), but have added the requirement[4] that the court should take a preliminary view on the merits of the case. The latter requirement has been held to require the court to be of the opinion that the facts alleged raise a substantial issue ("une apparence serieuse de droit").[5]

6.46 It appears that "despite its progressiveness, the legislation had little effect on the number of class actions generated, largely because of the restrictive interpretation given by our courts to this section, until recently when the Quebec Court of Appeal changed substantially the direction taken by the lower courts."[6] In the 1990 *Alcan* case[7] a committee of citizens[8] acting on behalf of a group of some 2,400

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[1]See para 7.22 below.

[2]*Ie* (2),(1) and (4) of Federal Rule 23(a).

[3]Federal Rule 23(a)(3).

[4]Art 1003(b).

[5]Unreported case in 1981 cited in OLRC Report p 72, footnote 384.

[6]Robert (1991).

[7]Cited in Robert (1991).

[8]Acting under art 1048, as amended in 1982. See para 6.48 below.

residents of the Municipality of La Baie wanted to sue Alcan for damages resulting from air pollution caused by bauxite and other substances. On the commonality requirement of article 1003(a) the Court of Appeal (Mr Justice Rothman) held that it is "sufficient if the claims of the members raise *some* questions of law or of fact that are sufficiently similar or sufficiently related to justify a class action".[1] He added that the source of the pollution was the same and that the facts giving rise to responsibility (particularly the technical questions) were likely to be the same. There were three questions of law common to all the claims: the standard of care required to prevent air pollution; the applicability of the *volenti non fit injuria* principle; and the rule of prescription applicable. The fact that the claims of individuals might vary greatly and not be susceptible of collective recovery was not regarded as a basis on which to refuse the authorisation since article 1037 provides for individual recovery if it is more expedient. With regard to the second condition of article 1003 (that the facts alleged seem to justify the conclusions sought) Mr Justice Rothman said that the judge must dismiss the motion for authorisation if the recourse is obviously frivolous or manifestly ill-founded but must grant it if the alleged facts reveal a "serious colour of right".

6.47 The application for authorisation is made by way of a motion.[2] (The detailed procedural requirements are in the Supreme Court Rules of Practice.) The motion must include a detailed description of the identical, similar or related questions of law or fact and of the questions of law or fact which are particular to each member.[3] The

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[1]A "predominance" test (as in US Federal Rule 23(b)(3)) might have been helpful in this connection.

[2]Art 1002.

[3]Rule 54.

motion must be accompanied by relevant documents (*eg* copies of contracts), a draft notice to members and a draft judgment granting the motion.[1] Unless the judge grants special leave to the contrary, the motion is decided on the basis of the documents and affidavits submitted by the parties, without hearing witnesses[2].

6.48 A member is defined as a "natural person"[3] but a 1982 amendment makes it possible for a non-profit corporation (such as a consumer protection association) or a co-operative to sue on behalf of an entire class the members of which have joined the corporation or co-operative after the litigious event in order to be represented in the action.[4] Glenn[5] comments that it is highly unlikely that class actions instituted by corporate persons will be more successful than those instituted by natural persons who are members of the class; "courts are presently unwilling to extrapolate from the experience of one class member conclusions valid for an entire class."

6.49 If the court grants authorisation for the class action the judgment granting the motion (a) describes the group whose members will be bound by any judgment; (b) identifies the principal questions to be dealt with collectively and the related conclusions sought; and

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[1]Rule 55.

[2]Rule 58.

[3]Art 999.

[4]Art 1048, as amended: an application for the status of representative may be made if: (a) one of its members designated by it is a member of the group on behalf of which it intends to bring a class action; and (b) the interest of that member is linked to the objects for which the corporation, the association or the group has been incorporated or formed.

[5]Glenn (1984), p 257, footnote 72.

(c) orders the publication of a notice[1] to the members[2]. A judgment granting the authorisation motion is not appealable but a judgment dismissing the motion may be appealed by the applicant or, with leave, by a member of the group.[3]

Conduct of the action[4]

6.50 The Code contains provisions designed to promote the conduct of the action and to protect the interests of the class members and the parties. A class action must be begun within 3 months of authorisation.[5] A defendant cannot raise a preliminary plea against the representative unless it is "common to a substantial part of the members and bears on a question dealt with collectively".[6] The ordinary rules of civil procedure are amended with regard to a number of matters, *eg* admissions by the representative bind all the members;[7] the representative cannot amend or discontinue without the permission of the court;[8] an absent class member cannot generally intervene (except to assist the representative or if the court thinks that the

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[1]The contents of the notice are prescribed by art 1006.

[2]Art 1005.

[3]Art 1010, as amended in 1982. The original provision simply allowed appeal by the applicant, the respondent or, with leave, a member of the group. The intention of the amendment is presumably to avoid the hearing of the motion being turned into a full hearing on the merits with consequential delay and expense. For appeal against the final judgment see para 6.54 below.

[4]Code, Book IX, Title III.

[5]Art 1011.

[6]Art 1012.

[7]Art 1014.

[8]Art 1016.

intervention is useful to the group).[1] The court can revise the judgment authorising the action and may "at any time and even *ex officio*"[2] change or divide the group.[3] Settlement of the action is only valid if approved by the court, after notice has been given to the class members.[4]

Judgment in the action[5]

6.51 Every final judgment[6] describes the group and binds all members of the group who have not requested exclusion.[7] If the final judgment is for damages the judgment may provide either for an aggregate assessment of damages[8] ("collective recovery") or for the making of individual claims.[9] The Code takes account of the binding effect of a final judgment on the members of the group by requiring publication of a notice describing the group and indicating the tenor of the judgment.[10]

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[1]Art 1017.

[2]*Ie*, presumably, on its own initiative.

[3]Art 1022.

[4]Art 1025.

[5]Code, Book IX, Title IV.

[6]*Ie* the judgment of the court which decides the questions of law or fact dealt with collectively (definition in art 999(b)).

[7]Art 1027.

[8]This involves a determination of the total amount of monetary relief to which the class members are entitled, where the underlying facts permit this to be done with an acceptable degree of accuracy. Judgment is given for the aggregate amount, and the resulting award is then distributed in proceedings to which the defendant need not be a party. (OLRC Report, p 532.)

[9]Art 1028.

[10]Art 1030.

6.52 *Collective recovery.* Collective recovery - the calculation of damages on the basis of harm to the whole group - can be ordered "if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members" of the group.[1] (It is not necessary for the identity of each of the members of the class or the exact amount of their claims to be established.) The court in ordering aggregate assessment may require the defendant either to pay the money found due into court or to carry out a "reparatory measure".[2] If there is an undistributed residue of the aggregate award (*eg* where the amounts are not claimed) the court can say what should be done with the residue.[3]

6.53 *Individual claims.* Where there is not collective recovery, individual claims must be made to the court within 1 year.[4] The court has the power to determine "special modes of proof and procedure".[5] The defendant can raise issues that relate to an individual claim.[6]

Appeal

6.54 There is provision for appeal against a final judgment.[7] If the representative does not appeal, or if his appeal is dismissed, a member of the group may within 60 days apply for leave to appeal and to be

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[1]Art 1031.

[2]Art 1032.

[3]After deduction of the costs of the action (*eg* of notification), the legal fees of the representative's attorney and any claims of members (art 1035).

[4]Art 1038.

[5]Art 1039.

[6]Art 1040.

[7]Arts 1041-1044.

substituted for the representative. "The court grants the motion if it is of opinion that the interest of the members so requires."[1]

Miscellaneous provisions[2]

6.55 Recognising the unusual nature of a class action the court is empowered[3] to order:

- measures to hasten the proceedings and to simplify the proof (provided the measures do not prejudice a party or the members); and
- publication of a notice[4] to the members when considered necessary "for the preservation of their rights".

Financial assistance in Quebec class actions: the Fonds

6.56 The Quebec legislation[5] also made detailed provision for financial assistance to class representatives from a new agency, the Fonds d'aide aux recours collectifs: "The decision to institute a scheme of government financial aid was based on a view that a prospective class plaintiff, faced with the responsibility of paying lawyers' fees, the cost of notice, and other expenses, would be unlikely to invoke the procedure. Because class actions could benefit many injured persons, it was believed to be appropriate for the state to assume the financial burden that otherwise would be cast on a representative plaintiff."[6] In

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[1]Art 1042.

[2]Code, Book IX, Title V.

[3]Art 1045.

[4]The court can determine the date, form and mode of such publication (art 1046).

[5]1978 Act, Title II (Assistance to Class Actions).

[6]OLRC Report, p 694 which refers to Fonds d'aide aux recours collectifs, *Rapport Annuel 1979-80* (1980).

addition to financing class actions the Fonds is required to publicise the procedure.[1]

6.57 The Fonds meets the costs incurred by the representative party.[2] The normal "expenses follow success" rule of civil litigation applies to class actions in Quebec.[3] The representative party (or his attorney) has to pay over to the Fonds by way of reimbursement the amounts received from a third party by way of fees, costs or expenses[4] (up to the amount of the assistance by the Fonds).[5] The difference between any reimbursement and the amount paid out by the Fonds is met by the Fonds. If, however, costs are awarded against the representative party, the Fonds will not meet these costs. The Ontario Law Reform Commission, writing in 1982, suggested that the deterrent effect of the application of the normal costs rule was one of the reasons why fewer motions for authorisation to institute a class action had been presented in Quebec than had been expected.[6] Problems of

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[1]1978 Act, s 7. For example, a leaflet entitled "It evens things up - The Class Action", is available.

[2]*Ie* (a) the fees of the recipient's attorney, (b) the fees and expenses of experts and counsel acting for the recipient, (c) the costs of other court expenditures, including the cost of public notices and (d) the other expenses in the preparation and bringing of the class action. The amount paid by the Fonds will not, however, exceed the amount of the assistance agreed with the representative party. (1978 Act, s 29.)

[3]The Code of Civil Procedure provides by art 477: "The losing party must pay all costs, including the costs of the stenographer, unless by decision giving reasons the court reduces or compensates them, or others otherwise ...."

[4]But not the amount of damages individually recovered by the representative plaintiff and the class members.

[5]The Fonds and the recipient enter into an agreement and their respective obligations are set out in the Act and in this agreement (Act, s 25). The agreement subrogates the Fonds in the rights of the recipient and his attorney up to the amounts paid to them (Act, s 25(g)).

[6]OLRC Report, p 696.

costs were apparently one of the reasons for the legislative changes made in 1982.[1]

6.58 Assistance from the Fonds in Quebec may be contrasted with legal aid from the Scottish Legal Aid Board. Both the Fonds and the Board enquire into the financial circumstances of the applicant and the nature of the case which the applicant wishes to raise.[2] The Quebec scheme, unlike the Scottish one, imposes no financial eligibility limits on applicants and requires no financial contribution if assistance is made available. Both schemes require reimbursement of costs (expenses) awarded to the successful financially assisted litigant but the Fonds, unlike SLAB, makes no claim on amounts recovered as part of the principal sum sued for. The Quebec scheme may be regarded as more generous than the Scottish scheme. This may reflect a view that, in the wider public interest, a representative pursuer should be encouraged to bring a class action.

The class action in Quebec: conclusions

6.59 The number of class actions raised appears to have been fewer than expected originally. When the legislation was introduced it was

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[1]Glenn (1984), pp 258-259. The effect of the changes is "to lower the amount of recoverable costs and to provide greater protection to class representatives from costs risks." Glenn notes that it is possible to combine a contingent fee agreement (up to a maximum of 30% of the amount obtained and collected) with funding from the Fonds, "thus providing counsel, as well as party, incentive".

[2]An applicant to the Fonds "shall set forth in his application the basis of his claim and the essential facts determining its exercise, and shall describe the group on behalf of which he intends to bring or is bringing the class action. He shall also state his financial conditions and that of the members of the group who have made themselves known; he shall indicate the purposes for which the assistance is required to be used, the amount required, and any other revenue or service available to him." (Act, s 21.)

estimated that there would be approximately 580 cases a year.[1] In the first five years the average annual number of class action petitions was slightly more than 20[2] and the number does not appear to have increased significantly since then.[3] "Nor has the low volume of class litigation in Quebec been compensated for by a high rate of plaintiff success."[4] Few cases have involved a class of significant size. There have been high levels of abandonment, delay (in part because of appeals) and dismissal.[5]

6.60 Various reasons have been suggested for these statistics.[6] These include the following: chronic court delays (although not exceptional by Canadian standards); the deterrent of what are seen as excessive costs; an excessive number of procedural obstacles;[7] and reluctance on the part of the judiciary (more familiar with

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[1]OLRC Report, p 696.

[2]Glenn (1984), p 255.

[3]The 1990-91 Rapport Annuel of the Fonds indicates a total of 246 cases at the authorisation stage in the period 1988-1991.

[4]Glenn (1984), p 256.

[5]Glenn (1984), p 256.

[6]Glenn (1984). He concludes (p 277): "[Class action procedures] where they now exist, now appear to be failing, both as significant measures of social reform and as procedures viable even on a limited scale in the court system. There are profound and systemic reasons for this, which no amount of legislative design or fine tuning can overcome. Parties and counsel are rejecting class actions because they are too onerous and problematical (aside from questions of cost) in a judicial system which responds to radically different priorities. Judges reject class actions because they see them as incompatible with both their procedural and adjudicative functions, and in this they are probably correct. Class action implementation therefore accomplishes little, and anything which is accomplished is at the critical expense of judicial authority and the principles of fundamental justice." (Footnotes omitted.)

[7]Glenn suggests there are 25 stages starting with the petition to the Fonds and concluding with execution (diligence).

conventional adversarial litigation) to respond positively to the needs of class action litigation which may require more judicial intervention and initiative. There are fundamental problems "which even the most sophisticated legislation and generous financing cannot overcome".[1] More optimistic commentators are heartened by recent judgments by the Court of Appeal.[2]

C The class action in Canada: Ontario

6.61 Ontario introduced class proceedings by legislation passed in 1992.[3] This legislation was the result of unusually long and thorough consideration.[4] The Ontario Law Reform Commission reported in 1982. In 1989 the Ontario Attorney-General announced the decision to bring forward legislation,[5] following consultation with the Attorney-

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[1]Robert (1991), p 6.

[2]*Eg* Mr Justice Rothman in the *Alcan* case (para 6.46 above): "The class action recourse seems to me a particularly useful remedy in appropriate cases of environmental damage. Air or water pollution rarely affect just one individual or one piece of property. They often cause harm to many individuals over a large geographical area. The issues involved may be expensive to litigate, while the amount involved in each case may be relatively modest. The class action in these cases seems an obvious means for dealing with claims for compensation for the harm done when compared to numerous individual law suits, each raising many of the same issues of fact and law."

[3]An Act respecting Class Proceedings (Chapter 6, Statutes of Ontario 1992) and An Act to amend the Law Society Act to provide for Funding to Parties to Class Proceedings (Chapter 7, Statutes of Ontario 1992).

[4]The Attorney General made the reference to the Ontario Law Reform Commission "(OLRC)" in November 1976. That Commission published its Report (in three volumes and 880 pages), with draft Bill annexed, in 1982.

[5]The News Release (printed in Part II of the Report of Attorney-General's Advisory Committee on Class Action Reform) said that the Ontario Government intended the new remedy to apply in all types of claims and particularly in environmental and consumer litigation.

General's Advisory Committee on Class Action Reform.[1] That Committee reported in February 1990. The main part of the Committee's Report was an annotated draft Act, based on the draft Act prepared by the Ontario Law Reform Commission. The Bill, introduced in December 1990, substantially followed the draft prepared by the Attorney-General's Committee. The Committee made recommendations on related matters, such as legal education[2] and monitoring the legislation.

6.62 We explain below the features of the enacted procedure and note how it differs from the procedure recommended by the Law Reform Commission. The members of the Attorney-General's Committee agreed that "the reform should be designed within the following parameters:

- any procedure developed should treat plaintiffs and defendants in a fair and equitable manner and should not impose any unnecessary burdens on the courts,
- the procedure should have a certification component by which the court would screen potential class actions according to specific tests,
- the procedure would feature a rule that all class members who do not specifically opt out of the class action procedure would be included in it,

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[1]Report by the Attorney-General's Advisory Committee on Class Action Reform (hereafter "the AGA Committee") published in February 1990. The Committee consisted of representatives of government, lawyers, business and consumers.

[2]"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." Report, p 74.

- there would be a presumption that notice would be given to class members following certification, unless otherwise ordered by the court,
- there would be a controlled contingency fee,
- there would be no special role for the Attorney-General in class actions,[1] and finally,
- any undistributed monetary award made in a class action would be returned to the defendant following the expiry of relevant limitation periods, except in the case of environmental cases, which would be given further consideration by the Committee."[2]

The Committee assumed that any new procedure would be introduced "through statutory reform as opposed to changes to the Rules of Civil Procedure of the Supreme and District Court".[3]

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[1]The OLRC draft Bill involved the Attorney-General as follows: he was entitled to intervene, in the public interest, in a class action (clause 12(2)); he was entitled to be a representative plaintiff (clause 14); and he was given the opportunity of making submissions "respecting the propriety" of certain orders *eg* a settlement containing provision for a cy pres distribution or forfeiture to the Crown of undistributed amounts awarded as damages (clause 29).

[2]AGA Committee Report, pp 6-7.

[3]Report, p 7. The reasons for this assumption were: the new procedure was regarded as a significant development; it was the subject of controversy; and it required the removal of substantive obstacles to class proceedings. Hence the reforms proposed warranted consideration by the legislature rather than by the Rules Committee (containing representatives of the judiciary and the bar).

Commencement of class proceedings[1]

6.63 The Act[2] provides for the creation of a class of plaintiffs or a class of defendants on certification by the court.[3] A motion for certification as class proceedings (and the appointment of a representative party) may be made by the plaintiff,[4] by a defendant[5] or by any party at any stage.[6]

6.64 The Act sets out[7] five factors or conditions on which the court must be satisfied before granting the motion for certification. In addition there is a list of matters which are not to be the sole ground on which the court refuses to certify.[8]

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[1]The AGA Committee had recommended that the procedure should be known as a "class proceeding", rather than a "class action" because of terminology changes in the Courts of Justice Act 1984 (Report, p 8).

[2]*Ie* the Act respecting Class Proceedings. We refer to the other Act of 1992 as "the Funding Act".

[3]The Act also provides (s 5(2)) for a sub-class with its own representative party.

[4]Act, s 2; motion to be made within 90 days of delivery of defence.

[5]Act, s 3.

[6]Act, s 4.

[7]Act, s 5 (certification).

[8]Act, s 6 (certain matters not to bar certification). This is in effect an "avoidance of doubt" provision. S 6 reads: "The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

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

6.65 The five factors are:

(a) "the pleadings or the notice of application disclose a cause of action;"[1]

(b) "there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;"[2]

(c) "the claims or defences of the class members raise common issues", which the Act defines earlier[3] as meaning "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.";[4]

(d) "a class proceeding would be the preferable procedure for the resolution of the common issues;"[5] and

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[1]The AGA Committee's draft referred simply to "a cause of action" (clause 4(4)(a)). The Act's expanded provision may be designed to discourage an unduly protracted consideration of this factor by reference to matters outside the papers before the court. The Committee's annotation says that like other motions before the court the motion for certification will rely primarily on affidavit evidence from *both* parties; contrast the Quebec restriction to affidavit material only from the plaintiff (see para 7.11 below, first footnote). The Committee note that there would be an entitlement to cross-examine on the affidavits filed. Compare factor (b) in the Quebec provision (para 6.44 above).

[2]The AGA Committee's draft was "an identifiable class of more than one person".

[3]Act, s 1 (definitions).

[4]Contrast factor (a) in the Quebec provision (para 6.44 above).

[5]The AGA Committee annotate this provision as follows: "The Committee ... selected the word 'preferable' over other words such as 'reasonable' or 'superior', and it was thought that the word 'preferable' would best draw the court into a consideration of whether or not the class proceeding was a fair, efficient and manageable method of advancing the claim. The class proceeding should also be preferable in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on." (AGA Committee Report p 32.) The OLRC draft Bill had the more stringent test that a class action would be "superior" to other available methods for the fair

(e) "there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members."[1]

6.66 The Attorney-General's Advisory Committee thought that the certification motion "should not be a forced choice between certification or no certification. The court should have the specific power to send the parties away to come back before the court at a later date with further and better information, a revised plan, or amended pleadings."[2] If the court refuses certification there is no need for a new action to be raised: the court may permit the proceeding to continue as one or more proceedings between different parties.[3] After certification it is possible that the proceedings will no

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and efficient resolution of the controversy (draft Bill clause 3(d) and clause 4 (Superiority of Class Action)).

[1]The AGA Committee annotate with reference to the third requirement (no conflict of interest): "The Committee recommends that the Law Society of Upper Canada consider changes to the Rules of Professional Conduct to resolve potential conflicts between the lawyers' respective obligations to the representative plaintiff and members of the class. Consideration of a special written retainer may be necessary." Compare the less developed Quebec provision (factor (d); para 6.44 above).

[2]Act, s 5(4): "The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence."

[3]Act, s 7.

longer meet the statutory conditions:[1] if that happens the court has power to decertify the proceedings or make any other appropriate order.[2]

6.67 Any member of the class may opt out of the proceedings in the manner, and within the time, specified in the certification order.[3] (The order also: describes the class; names the representative parties; states the nature of the claims or defences made on behalf of the class; states the relief (remedy) sought; and sets out the common issues.[4]) For the right to opt out to be effective, the class member needs of course to know that the proceeding has been certified as a class proceeding. The Act contains detailed provisions about notice to class members.[5] The court may dispense with notice and in deciding "when and by what means" notice is to be given the court must have regard to such matters as cost, the number of the class members and where they reside. With leave of the court, a notice "may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements."[6]

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[1]*Eg* the representative plaintiff might discover that another procedure would be preferable.

[2]Act, s 10.

[3]The AGA Committee believed that those who wanted to launch individual proceedings (or not to litigate at all) should be given a reasonable opportunity to opt out. "However, once a certain point in litigation has passed, those who are class members must stay involved with the claim. 'Fence sitting' undermines the action, is unfair to the defendant and can be prevented by a fixed cut-off date." Report, p 35.

[4]Act, s 8.

[5]Act, s 17.

[6]Act, s 17(7).

6.68 The court may make any appropriate order about the conduct of a class proceeding to ensure its fair and expeditious determination.[1] The court may permit otherwise absent class members to participate in the class proceeding[2] and may grant leave for discovery (disclosure of evidence) against other class members.[3] To facilitate the gathering of evidence[4] the Act empowers the Court to admit, for certain purposes, statistical information which would not otherwise be admissible.[5]

Course of the proceedings

6.69 There are two provisions allowing notices to be given during the course of the proceedings. The *first* requires the representative party to give notice to individual class members when the court determines common issues in favour of a class and "considers that the participation of individual class members is required to determine

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[1]The order may be made on the motion of a party or a class member (Act, s 12).

[2]"to ensure the fair and adequate representation of the interests of the class or any sub-class or for any other appropriate reason" (Act, s 14).

[3]S 15. The provision requires the court to consider, among other things, "whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered" (subsection (3)(e)).

[4]AGA Committee's Report, p 53.

[5]S 23(1): "For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics." It appears that at common law such evidence might be inadmissible hearsay. It is thought that in Scotland such evidence would not be excluded solely on the ground that it was hearsay: Civil Evidence (Scotland) Act 1988, s 2.

individual issues".[1] The *second* is a general provision enabling the court to order any party to give notice.[2]

Conclusion of the proceedings

6.70 *Aggregate assessment of monetary award.*[3] In certain circumstances the court may give judgment for the whole or part of the defendant's liability to class members. An award of damages may be shared "on an average or proportional basis".

6.71 *Individual issues.* Once the common issues have been resolved the court may have to decide individual issues. The Act[4] leaves the court free to decide how to do this but expressly mentions the possibility of further proceedings or the appointment of persons to conduct a reference or inquiry and report back to the court.

6.72 *Discontinuance, abandonment or settlement.* In order to protect absent court members a class proceeding may be discontinued,

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[1]Act, s 18. In practice such individual issues are likely to be individual claims. When the court determines (under subsection (4)) that individual claims must be made the court must specify (subsection (5)) procedures for determining the claims. In specifying such procedures the court is required to minimise the burden on class members and may, for example, authorise the use of standardised proof of claim forms.

[2]*Ie* "such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding" (Act, s 19(1).) A notice under any of ss 17, 18 or 19 must be approved by the court before it is given (s 20).

[3]Act, s 24.

[4]S 25.

abandoned or settled only with the approval of the court.[1] An approved settlement binds all class members.[2]

Provisions on other matters

6.73 *Appeals.*[3] A certification order may be appealed against only with the leave of the superior court: no leave is required to appeal against an order refusing to certify or decertifying a class proceeding. Appeals are competent from a judgment on common issues or making an aggregate award. If the representative party does not seek to appeal, any class member may seek leave to act as the representative party for the purposes of the appeal.

6.74 *Binding effect of judgment on common issues.* A judgment on common issues binds every class member who has not opted out of the class proceedings, but only to the extent that the judgment determines common issues.[4]

6.75 *Limitation periods.* It appears that most class action legislation and proposals do not contain rules as to the limitation of actions,[5] whereby after a stated period of time certain rights are unenforceable. It has been noted, however, that "class actions require some modification of the rules regarding limitation of actions. The ordinary

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[1]Act, s 29. (The distinction in Ontario civil procedure between discontinuance and abandonment is unclear.)

[2]Act, s 29(3).

[3]S 30.

[4]These are set out in the certification order and may relate to claims or defences described in the certification order or to relief sought by or from the class or sub-class as stated in the certification order (s 27(3)).

[5]OLRC Report, p 777.

limitation provisions must be made subject to the right of individual members of a class to establish their claims after the common questions have been determined, notwithstanding that the time for instituting proceedings has expired. Some provision must also be made for members of the class who may have delayed their remedy as the result of the class action but who are disappointed in that expectation, as where an order to proceed as a class action is refused or having been granted is subsequently rescinded."[1]

6.76 The main provision of the Ontario Act on this matter[2] provides that "any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member" when the member opts out of or is excluded from the class proceeding or when the class proceeding ceases.[3] Where there is a right of appeal the limitation period resumes running when either the time for an appeal has expired or any appeal has been finally disposed of.[4]

Provisions on costs and other financial matters

6.77 The Ontario Law Reform Commission regarded costs as the single most important issue they had to consider. "The matter of costs

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[1]Law Reform Committee of South Australia, *Report relating to Class Actions* (36th Report, Adelaide, 1977), p 10.

[2]S 28(1).

[3]The class proceeding ceases when a decertification order is made or when the class proceeding is dismissed without an adjudication on the merits; or is abandoned or discontinued with the approval of the court; or when it is settled with the approval of the court, unless the settlement provides otherwise.

[4]S 28(2).

will not merely affect the efficacy of class actions, but in fact will determine whether this procedure will be utilised at all."[1]

6.78 The Commission thought[2] that a departure from the ordinary costs rule[3] was necessary.[4] The Commission's recommended special costs regime had two main features:[5] *first*, a no-way costs rule whereby, in general, a court is precluded from awarding costs to either party at any stage of the proceedings, including any appeal; and *second*, a rule which would permit a lawyer to make an agreement with the representative plaintiff stipulating for payment of fees and disbursements, as determined by the court, only in the event of success in the action. The Chairman dissented from the Commission's recommendations. He considered that it was unfair that whether a class action succeeded or failed, a representative plaintiff who had entered into such an agreement with his lawyer[6] should incur no liability for costs or disbursements, either to the class lawyer or to the

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[1]OLRC Report, p 647.

[2]But only by a majority. The Commission's Chairman dissented: see his Reservations at p 852 of the OLRC Report.

[3]*Ie* the rule that costs are awarded to the successful party.

[4]The OLRC made 18 Recommendations on costs; see pp 749-752 of the Report.

[5]Summary taken from Chairman's Reservations, OLRC Report, p 852. There was no recommendation for a Costs Assistance Fund, like the Quebec Fonds.

[6]And such an agreement would be novel. "No legislation in Ontario, proposed or adopted, has embraced the concept of the contingent fee."

defendant:[1] the defendant, on the other hand, would always have to pay the costs of his own lawyer.[2]

6.79 The Report of the Ontario Attorney-General's Advisory Committee on Class Action Reform differed from that of the Law Reform Commission in two main respects: they did not recommend a departure from the normal costs rule (costs follows success); and they favoured the establishment of a Fund which would assist plaintiffs with the payments of outlays (but not legal fees[3]). Their detailed recommendations[4] were as follows:

(a) Costs

- the normal rules with respect to costs should apply and costs should continue to be in the court's discretion; in exercising its discretion the court should have regard to the fact that the issue in dispute was in the nature of a test case or raised a novel point of law or concerned a matter of public interest.[5]

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[1]The OLRC argued that it was likely that, even if the action succeeded (and costs were recovered from the defendant on the ordinary costs rule) there would be some payment due by the representative party to his lawyer. If so, "there is little hope that a rational person will choose to be a representative plaintiff. In our view, to make the use of class action procedure depend on the presence of such selfless zeal would cause it to be neglected." (Report, p 663).

[2]Hence, a basis for the "legalised blackmail" argument against the institution of a class action procedure.

[3]These would be met under the fee agreement between solicitor and client.

[4]AGA Report, pp 11-13.

[5]Implemented by the Act, s 31(1). Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims (s 31(2)).

(b) *Fees and disbursements*

- contingency fee arrangements between a lawyer and representative plaintiff should be permitted;[1]
- fees and disbursements agreements between lawyer and client should be in writing and should stipulate the arrangement;[2]
- a lawyer and representative plaintiff should be entitled to agree on a method of billing for legal fees that would entail a multiplier being applied to the normal legal fees in order to compensate a lawyer for undertaking the risk should be permitted;[3]
- any agreement with respect to fees and disbursements should be subject to approval by the court and once approved should become a first charge on the settlement funds or monetary award.[4]

(c) *Financial assistance*

- assistance through a "Costs Assistance Fund" should be provided to assist plaintiffs with disbursements, the costs of

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[1]Implemented by the Act, s 33(1).

[2]Implemented by the Act, s 32(1). The written agreement is to: (a) state the terms under which fees and disbursements shall be paid; (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

[3]Implemented by the Act, s 33. See particularly subsections (1) and (4). A written agreement providing for the payment of fees and disbursements only in the event of success in a class proceeding may permit the solicitor to move the court to have his fees increased by a "multiplier", *ie* a multiple applied to the "base fee" (which is arrived at by multiplying the total number of hours worked by an hourly rate). In determining the "base fee", the court is directed to allow only a reasonable fee (subsection (8)) and in determining the "multiplier" the court may consider the manner in which the solicitor conducted the proceedings (subsection (9)). The motion to increase the fee by a multiplier is heard by a judge who has (a) given judgment on common issues in favour of class members or (b) approved a settlement that benefits a class member.

[4]Implemented by the Act, s 32(2), (3).

experts and such expenses as notice to the class: in addition, the Fund should stand ready to indemnify a plaintiff for the defendant's costs if the action is unsuccessful;

- the precise structure of the Costs Assistance Fund and amount of an initial endowment necessary to meet its potential obligations should be determined with the assistance of persons knowledgable in the area of financial funding.[1]

6.80 The AGA Committee regarded a Costs Assistance Fund as integral to their recommendations.[2] Their draft Bill accordingly provided for a Commission to be established with the duty to "provide plaintiffs in class proceedings with assistance in the payment of disbursements, the costs of notice, the costs of experts and indemnification for adverse costs awards."[3] The Committee viewed the fund as administratively similar to the Quebec funding scheme but thought that the Ontario fund need not assist in the payment of legal fees because the Committee's recommendation about lawyers' fees would "enable the lawyer for the class to underwrite the cost of the litigation".[4]

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[1]The Committee acknowledged that it did not have the resources to investigate all the questions and issues that arise around the creation and endowment of such a fund. "However the existence of the Quebec Fonds and the very creative methods undertaken in Ontario to date indicate that such a Fund is not only possible but necessary". The Committee recommended that the Ministry of the Attorney-General undertake immediate research into the best method of establishing and endowing such a fund: AGA Report, p 71.

[2]"The Committee's model stands as the sum of its parts. It should not be implemented in part (for example without the 'Cost Assistance Fund') since the certification test, costs regime and 'Costs Assistance Fund' are interdependent". AGA Report, p 72.

[3]Draft Bill, s 44(2).

[4]AGA Report, pp 54-55.

6.81 The enacted provisions as to the Fund are in a separate Act[1] which amends the Law Society Act[2] by requiring the Law Foundation of Canada[3] to set up the "Class Proceedings Fund"[4] and to endow it with $500,000 from the funds of the Foundation.[5] Plaintiffs to class proceedings may apply to the Fund (in practice to the Class Proceedings Committee) for financial support in respect of disbursements.[6] An application is not to include a claim in respect of solicitor's fees. Where a costs award has been made in favour of the defendant against a plaintiff who has received financial support from the Fund, the defendant may apply to the Fund for payment.[7] A

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[1]An Act to amend the Law Society Act to provide for Funding to Parties to Class Proceedings (Statutes of Ontario, 1992, chapter 7) ("The Funding Act").

[2]As amended by the Funding Act the Foundation has the duty to establish and maintain a fund for these purposes: legal education and research; legal aid; the establishment, maintenance and operation of law libraries; and the provision of costs assistance to parties to class proceedings: Law Society Act, s 55.

[3]*Ie* the Board of Trustees. See the new s 59.1 inserted by s 3 of the Funding Act.

[4]The Class Proceedings Fund is to be used for two purposes: financial support for plaintiffs to class proceedings in respect of the disbursements related to the proceedings; and payments to defendants in respect of costs awards made in their favour against plaintiffs who have received financial support from the Fund (Funding Act, s 3).

[5]The funds of the Foundation are derived principally from interest moneys received from members from "money in trust for or on account of more than one client in one fund" (members are obliged to hold such money in an interest-bearing account and to pay the interest to the Foundation).

[6]New s 59.3 inserted into the Law Society Act. In making a decision the Committee may have regard to: the merits of the plaintiff's case; whether the plaintiff has made reasonable efforts to raise funds from other sources; whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded; whether the plaintiff has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award; and any other relevant matter.

[7]S 59.4. Under the Quebec arrangement as noted above (para 6.57), the Fonds will not meet any costs award against the representative plaintiff.

defendant who has the right to apply for this payment may not recover any part of the award from the plaintiff.

D The class action in South Australia

6.82 In South Australia a report, with a draft Bill for a Class Actions Act, was produced in 1977[1] by the Law Reform Committee. This has not been implemented in the form recommended.

The Law Reform Committee's recommendations

6.83 The main provisions in the draft Bill are as follows. One or more members of a class may sue as representative parties on behalf of all provided three conditions are met: (1) the class is numerous; (2) there are questions of law or fact common to the class; and (3) the representative parties will fairly and adequately protect the interests of the class.[2] The plaintiff must apply for certification, which in this procedure is an order that the action is to be maintained as a class action.[3] The court will grant such an order if the three conditions are satisfied and if, in the court's opinion, (a) the action is brought in good faith and appears to have merit and (b) a class action is "superior to other available methods for the fair and efficient adjudication of the controversy". In determining whether a class action would be superior the court must consider, among other matters, (1) "whether common questions of law or fact predominate over any questions affecting individual members" and (2) "the difficulties likely to be encountered

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[1]Law Reform Committee of South Australia, *Report relating to Class Actions* (36th Report, Adelaide, 1977).

[2]Bill, clause 2.

[3]Bill, clause 3. In determining (3), the court may consider whether provision has been made for legal representation that is adequate for the protection of the interests of the class (clause 4(1)).

in administering relief to members of the class by reason of the size of their individual claims and the number of the class members".

6.84 If the court orders that a class action be maintained, the court may order that notice be given to the members of the class telling them that they may request exclusion from the class.[1] In deciding whether to order such notice the court is to take into account (a) the cost of the notice relative to the amount of the individual claims, (b) the possible prejudice to class members if notice is not given and (c) "the policy of this Act to facilitate class actions". Detailed provisions are made as to the notice to be given to class members after a judgment on common issues.[2]

6.85 So far as financial matters are concerned, the Bill provides for three matters: (a) a "scheme for the payment of the fees and out of pocket expenses of the plaintiff's solicitors";[3] (b) "The Class Action Indemnity Fund";[4] and (c) the costs of the action.[5]

6.86 *Scheme for payment of fees and outlays.* The Bill requires that an order allowing a class action to be maintained must contain such a scheme. An approved scheme may contain, in addition to such other provisions as the judge may consider to be just and expedient, any of the following provisions -

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[1]Bill, clause 5(1).

[2]Bill, clause 9.

[3]Bill, clause 3(7)(e) and clause 3(8).

[4]Bill, clause 10(7).

[5]Bill, clause 11.

"(a) that the plaintiff or his solicitor be paid out of the fruits of the action, in accordance with a scheme approved by the Judge, the excess of the solicitor and client costs over any costs recovered from the defendant;

(b) that the solicitor for the plaintiff, in consideration of foregoing his right to be paid his costs by the plaintiff, be paid out of the fruits of the litigation or by the defendant, in accordance with a scheme approved by the Judge, a sum, in excess of solicitor and client costs, determined by the Court as fair and reasonable compensation to the solicitor for the risk of loss incurred by him in undertaking the conduct of the action;

(c) that the question of payment or recoupment of the plaintiff's costs be reserved to the trial Judge with power to that Judge to make an order including any of the above provisions and such other provisions as he deems just and expedient;

(d) that the solicitor for the plaintiff have a first charge for his costs on the fruits of the litigation."[1]

6.87 *The Class Action Indemnity Fund.* The Bill prescribes three purposes for this Fund: (a) the provision of a "legal aid scheme" for proposed representative plaintiffs who are unable to obtain legal representation without incurring personal liability for costs; (b) the payment in "proper cases" (undefined) of the costs of defendants where such costs are not otherwise recoverable; and (c) "the alleviation of any hardship caused to class members by defaults or defalcations of a representative or his agents".

6.88 *The costs of the class action.* The general "costs follow success" rule is not followed. The court has a discretion to determine by whom and to what extent the costs are to be paid. No costs are to be

[1]Bill, clause 3(8).

awarded to the defendant except as prescribed in the Bill,[1] for example, if the representative plaintiff is a public official acting in his official capacity.

6.89 In their Report the Committee acknowledged that the Bill's costs provisions were radical but said that they had been carefully considered.

> "We are convinced that they are necessary if class actions are to be an effective means of redress. A representative plaintiff suing on behalf of a class of persons who seek damages for breach of warranty by the vendor of a mass distributed article or on behalf of nearby residents who sue for damages for nuisance arising out of air pollution emanating from a factory, cannot be expected to expose himself to the risk of costs being awarded against him if the action fails. Unless he is relieved of that risk, class actions in the areas which are of interest to the general public will be rare. Our proposal is that there be no power to award costs to a defendant to a class action where the order permitting the action to proceed as a class action has been obtained without perjury or fraud on the part of the representative plaintiff. The ordinary rule as to costs would apply where the plaintiff failed in his application for the order to proceed as a class action, and in relation to the determination of the claims of the individual class members after the common questions have been decided.
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> "We appreciate the potential in this recommendation for injustice to a defendant who defeats the class claim but nevertheless cannot recover his costs. It is palliated to some extent by the fact that the plaintiff must show *bona fides* and an appearance of merit to obtain the order to proceed and by the fact that the defendants to class actions will, almost without exception, be public authorities or large corporations which will not find the costs of litigation ruinous. Nevertheless, the potential for injustice is there and must be acknowledged. It must be balanced against the serious injustice now done to great numbers of people who suffer loss and have no effective remedy. If, as we believe, this latter injustice can only be prevented by relieving the representative plaintiff of the

[1]Bill, clause 11(2).

ordinary party and party costs liability, we think that the balance is in favour of taking that course.

"While this recommendation relieves the representative plaintiff of the risk of having to pay the defendant's costs if unsuccessful, it does not provide the means by which he can launch and prosecute the action on behalf of the class. The representative plaintiff cannot be expected to provide out of his own resources the funds to enable the action to proceed for the benefit of the members of the class. The solicitor retained by the representative plaintiff cannot look to members of the class who have not instructed him. A solicitor cannot be expected to finance the litigation on the basis that he will obtain his fees and out of pocket expenses if the action succeeds but will bear them himself if the action fails. As explained above, this problem does not exist, or does not exist to the same degree in the United States of America where the contingency fee basis of remuneration of lawyers is generally practised and approved. It seems to us that some special scheme for the remuneration of the plaintiff's solicitor (and counsel if retained) is required if class actions are to be a useful remedy for ordinary people.

"The circumstances in which class actions will be brought will be so variable that we think a considerable degree of flexibility is necessary and that the approval of an appropriate scheme must be left to the Judge who makes the order for the action to proceed as a class action. Our proposal in the draft bill envisages an unsuccessful defendant paying, in certain circumstances, sums by way of costs which exceed the normal party and party costs. We think that this is justified on the general considerations of public interest referred to above and also by the consideration that the class action enables a host of claims arising out of the defendant's wrongdoing to be determined in the one action.

"Our proposals also envisage that, subject to the approval of the Judge, the plaintiff's solicitor be paid, if the action is successful, on a basis in excess of the ordinary scale of costs, the excess being that 'determined by the Court as fair and reasonable compensation to the solicitor for the risk of loss incurred by him in undertaking the conduct of the action'. We recognise that this imports a contingency element into the solicitor's remuneration and that this is in conflict with the traditional approach to legal fees in this country. We acknowledge the force of the considerations which have led to the rejection of the contingency fee system of remuneration in

this country and have given anxious consideration to this proposal. We are satisfied, however, that it is necessary if solicitors are to be encouraged to undertake class action work without looking to the representative plaintiff for their fees. We are, moreover, satisfied that the limited scope of the contingency element and the supervision of the Court provide adequate safeguards against the evils seen to exist in a fully fledged contingency fee system."[1]

The provisions in the revised court rules

6.90 In the revision of the Court Rules made in 1986 new provisions[2] were introduced relating to class actions by plaintiffs. These actions are referred to in the Rules as "representative actions". "Where numerous persons have common questions of fact or law requiring adjudication, one or more members of that group of persons may commence an action as representative parties on behalf of all or some of the group."[3] Within 28 days of the day when the defendant is due to enter appearance in the action, the representative parties must apply to the court for (a) an order authorising the action to be maintained as a representative action and (b) directions as to the conduct of the action.[4] If the court allows the action to be maintained as a representative action its order (a) defines the group, (b) defines the claims made and the relief (remedies) sought and (c) defines the common questions of law or fact.[5] The other new rules allow individual assessment of damages;[6] enable the court to vary an order

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[1]Report pp 7-9 (paragraph divisions supplied).

[2]Rules 34.01-34.07.

[3]Rule 34.01.

[4]Rule 34.02.

[5]Rule 34.04.

[6]Rule 34.03.

allowing a representative action;[1] and enable common questions to be determined in common proceedings and individual questions, as directed, in separate hearings.[2]

Comment on the procedure, as introduced

6.91 There are no other procedural rules (for example as to notices to class members or as to opting in or opting out) and, in particular, no provisions about costs or financial assistance to representative parties. In effect, the revision of the Rules, in allowing "representative actions", appears to have provided the skeleton of a class action procedure without the detailed provisions which are usually included. We understand that, as at the end of 1992, there were no reported cases on the operation of these Rules.

E The class action in the Australian Federal Court

6.92 The Australian Law Reform Commission produced detailed recommendations in 1988[3] and legislation was enacted in 1991.[4] The

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[1]Rule 34.05.

[2]Rule 34.06.

[3]Law Reform Commission, Australia, *Grouped Proceedings in the Federal Court* (Report No 46, Canberra, 1988). (That Commission and their Report are referred to here, respectively, as "ALRC", and "the ALRC Report".)

[4]Federal Court of Australia Amendment Act 1991 (No 118 of 1991) which commenced on 4 March 1992. The Act inserts a new "Part IVA - Representative Proceedings" into the Federal Court of Australia Act 1976. At the second reading of the Bill in the House of Representatives the Attorney General said that a procedure to deal with multiple claims was needed for two purposes: to provide a real remedy where each person's loss is small and not economically viable to recover in individual actions; and 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. He noted that the Government was not able to accept all the ALRC recommendations, in particular the Commission's proposals for contingency fees and a grouped proceedings assistance fund. No reason was given for this decision.

Federal Court procedure is noteworthy in two respects. *First*, there is no requirement for certification or similar court approval of the commencement of proceedings.[1] *Secondly*, the only provision dealing with the expenses incurred by the representative party is one which enables the court to order payment out of the damages awarded of all or part of the costs incurred by the representative which are not recoverable from the respondent as the result of a court order.[2]

Provisions in Federal Court of Australia Act

Commencement of representative proceeding[3]

6.93 There are three prerequisites for the commencement of a "representative proceeding":[4] (1) 7 or more persons who have claims against the same person which (2) arise out of the same, similar or related circumstances and (3) give rise to a substantial common issue of law or fact. The application commencing the proceedings must: identify the group members; specify the claims made and the relief

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[1]However, as explained in para 6.93 below, the court has power to order that the proceedings should not continue as a representative proceeding where *eg* costs are excessive (new Section 33N). This follows the procedure in other Australian representative proceedings (except South Australia). The ALRC argued that the policy objectives of certification (ensuring compliance with statutory pre-conditions and protection of interests of group members and of respondent) could be met in other ways. (See ALRC Report paras 144 ff.)

[2]New section 33ZJ(1) (reimbursement of representative party's costs). The ALRC considered that some modification to the costs regime was essential if grouped proceedings were to be encouraged. It accordingly favoured (1) the legalising of a fee agreement which would enable class members as a whole (and not the representative party only) to contribute to costs in successful cases (draft Bill, clause 33). However, fees based on a percentage of the amount recovered were not recommended. It also favoured (2) the establishment of a special fund providing financial assistance in grouped proceedings, including payment of the costs of a successful respondent.

[3]Act, Part IVA, Division 2.

[4]S 33C(1). S 36C(2) makes clear, among other things, that a representative proceeding may be commenced whether or not the relief sought includes damages that would require individual assessment.

sought; and specify the common question of law or fact.[1] A group member may opt out by written notice given before a date fixed by the court.[2] As already mentioned, there is no certification procedure but in three situations the court is empowered to order that a proceeding no longer continue as a representative proceeding.[3] These are: where there are fewer than 7 group members;[4] where the cost to the respondent of identifying the group members and distributing money (damages) to them would be excessive;[5] and where the costs are excessive or it is otherwise inappropriate that the claims be pursued by a representative proceeding.[6] The possibility that the representative party may not be able adequately to represent the interests of the group members is dealt with by enabling the court to substitute another group member as a representative party.[7] A representative proceeding may not be settled or discontinued without the approval of the court.[8]

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[1]S 33H(1).

[2]S 33J.

[3]The representative party may continue the proceedings on his or her own behalf; or a group member may be joined as an applicant (s 33P).

[4]S 33L.

[5]S 33M.

[6]S 33N. The specific grounds there mentioned on which discontinuance may be ordered are similar to those factors or prerequisites which, in other jurisdictions, determine whether a class or similar action can be initiated. These are that (a) the costs are likely to be higher than those of separate proceedings, (b) the relief sought may be obtained by other proceedings, (c) a representative proceeding will not provide "an efficient and effective means" of dealing with the claims.

[7]S 33T(1).

[8]S 33V. Also, a representative party may, with leave of the court, settle his or her individual claim; and the court may substitute another group member as a representative party.

Notices[1]

6.94 On the commencement of the proceeding, notice must be given to group members telling them of their right to opt out. They also have to be notified of an application by the respondent to discontinue the proceeding and of an application by the representative party seeking leave to withdraw as a representative party.[2] Before approving a settlement the court has to consider whether notice is to be given.[3] There are detailed ancillary provisions[4] requiring the court's approval of the form and content of a notice.[5]

Judgment[6]

6.95 The Act lists the various orders the court may make in determining a matter in a representative proceeding.[7] Any damages awarded may consist of (1) specific amounts worked out in such manner as the court may specify, or (2) damages in an aggregate amount, without any specification of the sums to be awarded to individual group members. An aggregate amount may not be awarded, however, unless a reasonably accurate assessment can be made of the

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[1]Act, Part IVA, Division 3. The allocation of the notice provisions to a separate Division indicates the importance of ensuring, in the absence of a certification procedure, that class members are fully aware of what is being done on their behalf.

[2]S 33X(1).

[3]S 33X(4).

[4]S 33Y.

[5]S 33Y(2). In addition the court "may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so" (s 33Y(5)).

[6]Act, Part IVA, Division 4.

[7]S 33Z(1). They include: a declaration of liability; a grant of equitable relief.

total amount to which group members will be entitled under the judgment.[1] If there is an award of damages, the court may provide for the constitution and administration of a fund consisting of the money to be distributed.[2]

Appeals[3]

6.96 Certain appeals may be brought as representative proceedings. The court may order that notice of an appeal is to be given.

Miscellaneous provisions[4]

6.97 Other provisions deal with the suspension of limitation periods.[5] The Act also provides that where damages are awarded the costs of the representative party may be reimbursed out of the damages if the court is satisfied that the costs reasonably incurred in relation to the representative proceeding are likely to exceed the costs recoverable by that person from the respondent.[6]

Australian federal representative proceedings: some comments

6.98 We have already noted the absence of a requirement for

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[1]S 33Z(3).

[2]S 33ZA. The court has power to order the payment by the respondent into the fund of either a fixed sum of money or such instalments, on such terms, as the court directs to meet the claims.

[3]Act, Part IVA, Division 5.

[4]Act, Part IVA, Division 6.

[5]S 33ZE.

[6]S 33ZJ, particularly subsection (2).

certification.[1] This was welcomed by one commentator[2] who considers that the requirement for certification in the United States and Quebec has quite often turned out to be more complex than the trial of the substantive issues and has been a "chilling deterrent" to the use of class actions.[3] He regards the ALRC draft Bill as a major liberalisation[4] of class actions in a Commonwealth jurisdiction while maintaining various commonsense protections for absent class members.

6.99 It seems questionable whether the single provision as to costs in the Australian Act[5] does enough to deal with the financing problems to which the Australian Law Reform Commission drew attention in its Report.

6.100 The terms of the enacted legislation may reflect opposition to the ALRC Report from business and other interests who were worried about meeting the costs of successful class actions. For example, the

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[1]See para 6.92 above.

[2]Andrew J Roman, "Class actions in Canada: the path to reform", The Advocates Society Journal [Canada] 1988, p 28. Mr Roman was a consultant to the ALRC. He was writing before the Federal Government brought forward its Bill.

[3]"There has been a steady decline in the number of class actions at the same time that litigation in general would appear to be increasing modestly."

[4]He mentions the express provisions overruling the earlier cases that require such a high degree of homogeneity among the plaintiffs as to render an "appropriate" class exceedingly rare. He notes that the draft Bill would permit group proceedings if at least one question that would arise in the action was the same in all the plaintiffs' cases and the causes of action were similar or related.

[5]See para 6.97 above.

Business Council of Australia had commented:

> "The latest set of proposals before the Law Reform Commission failed to acknowledge overseas experience, particularly in the United States where class actions came into vogue in the early 1970s, that class litigation has not lived up to the claims of its advocates and has benefited lawyers rather than consumers and other assumed beneficiaries. With more cost effective mechanisms, such as Small Claims Tribunals available to consumers and greater media involvement and identification of redress, the costs of class action procedure to business and the community generally far outweigh the benefits. Of even greater concern, however, is the further drift towards a highly litigious society that these proposals would encourage."[1]

6.101 Mr Justice M D Kirby had drawn attention to similar views:[2]

> "Other arguments against class actions point to their effect upon litigation, the role of courts, the judiciary and the legal profession. It has generally been thought, in our system, that litigation is or should be a 'last resort'. Class actions may have the effect of positively organizing and encouraging litigation. Furthermore, they amount in the view of their critics to the artificial organization of discontent. People who would never have brought a claim to court may find themselves 'roped in' to class action litigation as members of a class who are litigating a claim in a court of law. Many of them would not themselves be bothered to bring such a claim. Many might just accept the wrong done to them as part of the inevitable price of living in a busy consumer society. Many may even oppose the motion of a class action but may not hear about it at all or until it was too late. Critics of class actions say that it allows the 'lawyer entrepreneur' and the noisy minority to take charge of mass litigation, often for their personal interests rather than for the *real* interests of the disaffected or disadvantaged. It is also argued that the common law procedure of advocacy trial depends for its effectiveness upon motivated litigants. The fear is expressed about the class action that symbolic litigation may

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[1]Business Law of Australia Annual Report 1986-87 quoted in 1988 Reform (periodical of the Law Reform Commission, Australia) p 25.

[2]In a speech in July 1979, reprinted in Kirby (1983), pp 161-162. The author was then Chairman of the ALRC. He later became President of the Court of Appeal of New South Wales.

not lead to the personal motivation that arises from actual direct involvement in 'last resort' litigation. The very size of the claim will make the potential of costs an important factor in determining whether the claim proceeds."

6.102 Mr Justice Kirby concluded that if class actions procedure or some other form of representative action were to be introduced in Australia "adequate protections will be necessary to ensure that we do not fall victims to the same abuses as have been identified in the United States." He continued:[1]

> "The rules governing the legal profession in this country already provide some protections against such abuses. However, additional protections may be needed against such risks as liability for technical breaches of the law, litigation by incompetent or ill-motivated lawyers, premature settlement adversely affecting the rights of persons who may not have heard of the litigation, and adequate means to disperse fairly residual funds which are recouped from class defendants."

Conclusion to Part 6

6.103 In this Part we have provided information about five class action procedures in order to show the provisions which have been considered necessary in other jurisdictions to achieve a relatively satisfactory scheme. To enable comparisons to be made more readily, the main features of the US Federal procedure, the Quebec and Ontario procedures and the Australian Federal procedure are summarised in Annexe E.

6.104 The following table provides a simplified tabular comparison of these four procedures:

[1]Kirby (1983), pp 168-169.

FEATURE	US FEDERAL PROCEDURE	QUEBEC	ONTARIO	AUSTRALIAN FEDERAL PROCEDURE
(1) Name Relevant legislation	*Class action* Federal Rule of Civil Procedure 23 (amended 1966)	*Class action* Act respecting the Class Action 1978	*Class proceeding* Act respecting Class Proceedings 1992; Law Society Amendment Act 1992	*Representative proceeding* Federal Court of Australia Amendment Act 1991
(2) Pre-conditions	Two prerequisites (rule 23(a)) and further conditions (rule 23(b))	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 three matters (section 33C(1))
Certification	Certification (rule 23(c)(1))	Court's authorisation needed (article 1002)	Certification (section 5)	No certification required but "decertification" competent
(3) Opt in or opt out?	Notice given: class members may opt out (rule 23(c)(2))	Notice given (article 1006): member may request exclusion (article 1007)	Notice given: members may opt out (section 9)	Notice given: member may opt out (section 33J)
(4) Award	No provisions	Provisions for collective recovery and individual claims	Provisions for aggregate assessment of monetary relief	Provision for court to award damages in an aggregate amount

FEATURE	US FEDERAL PROCEDURE	QUEBEC	ONTARIO	AUSTRALIAN FEDERAL PROCEDURE
(5) Appeals	No specific provisions in Rule 23	Member, other than representative party, may appeal	Leave of court needed for appeal against certification order	Appeal competent by group member if representative party does not appeal
(6) 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
(7) Financial assistance	None (other than by contingency fees)	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; that party may apply to Class Proceedings Fund for payment of disbursements; Fund may also meet costs awarded against that party.	Court may order reimbursement of costs of representative party from damages awarded.

6.105 In the discussion of these four procedures we have referred to some of the perceived advantages and disadvantages of class action procedure. It may be helpful to summarise these.

6.106 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":[1] 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 be ignorant of their rights. The existence of the procedure might encourage "the use of safer working practices, better quality control and increased research before marketing of new products".[2]

6.107 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.[3] They may also involve a misuse of civil procedure by, in effect, punishing the defender. They may encourage litigation which, some argue, 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

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

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

[3]SCC Report (1982), para 5.5

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.[1]

[1]See Kirby (1983), *cit* para 6.101 above.