Scottish Law Commission

DISCUSSION PAPER NO. 98

MULTI-PARTY ACTIONS: COURT PROCEEDINGS AND FUNDING

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PART 7: POSSIBLE FEATURES OF A SCOTTISH CLASS ACTION PROCEDURE

Introduction

7.1 In Part 5 we concluded that there is a case for considering the introduction of a class action procedure in Scotland, and in Part 6 we reviewed examples of such procedures in North America and Australia. We now consider what procedural arrangements might be suitable in Scotland. We propose, as the objectives of reform, that any new Scottish procedure should maximise the possible advantages[1] and minimise the possible disadvantages[2] of class litigation and, in particular, should be available only in those cases for which it is particularly suitable.[3] Funding arrangements are considered in the next Part.

7.2 Where an action is raised as a class action it should, we think, proceed in the same way as an action making a similar claim which is raised by a single pursuer under the conventional rules of procedure, subject to the important variations necessary to accommodate the features of the form of class action procedure which has been selected for introduction into the court system. Where, for example, an ordinary action for payment of money, such as an action for damages or for payment of a debt, is raised as a class action in the Court of

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[1] *Eg* the "judicial economy" of treating together a large number of similar claims, not necessarily for large amounts (*eg* small claims for payment of money not exceeding £750 each): see paras 4.44-4.46 above. For other possible advantages see para 6.106 above.

[2] *Eg* a representative party or his solicitor failing to have proper regard for the interests of other group or class members. For other possible disadvantages see para 6.107 above.

[3] See paras 7.4-7.9 below on the selection of cases which are particularly suitable for the procedure.

Session, it should follow as far as possible the procedural progress of an ordinary action under the conventional rules, with such familiar features as preliminary pleas, an open and closed record, commission and diligence, debate, amendment of pleadings and proof. We now discuss the ways in which the procedural features of a class action might differ from those of a conventional action.

The issues[1]

7.3 We consider first a number of issues concerned with the general features of a class action:

(1) Should there be a certification procedure?[2]

(2) If so, what criteria should be applied by the court when considering whether a case is to be certified as, or may continue to be pursued as, a class action?[3]

(3) Should class members other than the representative pursuer be entitled to opt out of, or into, the class action?[4]

(4) What notice should they be given about the raising and the progress of the action?[5]

(5) What special powers should the court have to control the conduct of the action, including its abandonment or settlement?[6]

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[1]We have drawn on "Class actions: a path to reform", a stimulating paper presented by Mr Michael G Cochrane to the Uniform Law Conference of Canada 1988.

[2]See paras 7.4-7.17 below.

[3]See paras 7.18-7.26 below.

[4]See paras 7.27-7.31 below.

[5]See paras 7.32-7.37 below.

[6]See paras 7.38-7.57 below.

(6) Should the Lord Advocate or some other government minister or public official be entitled to appear in the public interest?[1]

(7) Should the court have special power to make an aggregate monetary award to the class as a whole?[2]

(8) To what extent should a judgment in a class action be binding on the members of the class?[3]

Having examined these matters, which are concerned with the general shape of a class action, we consider a number of subsidiary but important questions of jurisdiction and procedure:

(9) In which courts should the procedure be available?[4]

(10) Would any special provisions be needed with regard to the limitation of actions?[5]

(11) Should it be competent for two or more actions to be certified as a class proceeding on the application of the defender?[6]

(12) Would any special provisions be needed with regard to appeals?[7]

(13) If a class action procedure is to be introduced, should that be done by an Act of Parliament, or court procedural rules, or both?[8]

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[1]See paras 7.58-7.63 below.

[2]See paras 7.64-7.74 below.

[3]See para 7.75 below.

[4]See paras 7.77-7.84 below.

[5]See paras 7.85-7.87 below.

[6]See para 7.88 below.

[7]See paras 7.89-7.95 below.

[8]See para 7.100 below.

(1) Certification

7.4 A certification requirement enables the court to decide at an early stage[1] whether the litigation should proceed as a class action. The certification order defines[2] the issues to be litigated and the members of the class. As an alternative to certification the court may be entitled to "decertify"[3] a class action: to decide whether an action which has been raised as a class action should continue to be conducted as such an action.[4]

7.5 We now discuss the arguments for and against a certification requirement (and express a preference for such a requirement); the appropriate procedures; and decertification.

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[1]Generally on a motion by the representative plaintiff and sometimes within a set period after defences are due (*eg* 60 days after under New York Rule 902, printed in Annexe D).

[2]See *eg* the relatively detailed requirements in the Ontario Act, s 8 (para 6.67 above). The order may also require the publication of a notice to class members, *eg* Quebec art 1005c.

[3]"Decertify" is not a strictly accurate term where the action has never been "certified": we use it as a shorthand expression meaning to order that an action is not to continue as a class action.

[4]The Australian federal procedure provides only for decertification (ss 33L, M and N: see para 6.93 above). The Ontario procedure provides for certification (s 5: see paras 6.63-6.65 above) and decertification (s 10: see para 6.66 above).

Arguments for certification

7.6 A class action may be unduly burdensome[1] for the defenders:[2] because of the aggregation of many claims, their potential liability may be very large. A class action may also be unfair to the absent class members[3] if the decision will bind them,[4] with the result that they would not be entitled to raise separate actions afterwards.

7.7 The defenders may be protected by the criteria for certification,[5] which may require a review of the allegedly common issues of fact or law and of the suitability of alternative procedures for resolving them. An absent class member may be protected by other criteria which may include a consideration of the suitability of the representative pursuer or by a rule requiring the absent class members to be given clear notice of the consequences of exercising the right to opt out of the litigation or the opportunity to opt in.[6] Most class action procedures in other jurisdictions have rules which control the raising of class actions.

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[1]The burden may be particularly heavy if the litigation is complex and the defender has to bear both his own legal and other expenses and the expenses of the representative party in the event of the latter's success.

[2]In this Part we refer to the party against whom a class action is brought as "the defenders". In Scotland a company, public authority or other body is normally referred to in court as "the defenders" when an action is brought against it.

[3]An absent class member is a member of the class other than the representative pursuer.

[4]See para 7.75 below.

[5]Discussed in paras 7.18-7.26.

[6]Discussed in paras 7.27-7.31 below.

Arguments against certification

7.8 The differences between class actions and other actions are not so great as to justify erecting for the representative pursuer of a class action a procedural barrier which the pursuers of other actions do not have to overcome. In rebuttal of the argument that a certification procedure is necessary for the protection of defenders, it may be said that the Ontario Law Reform Commission found no evidence that class actions had been used to "blackmail" defenders into settlements which they would not otherwise have made.[1] Indeed, experience in the US Federal Courts and Quebec[2] seems to indicate that a certification requirement may unduly inhibit the bringing of class actions.

7.9 It might not be possible for the parties to give the court sufficient relevant information at the stage of certification. It might be more practicable to allow the pursuer to raise the action as a class action without obtaining the leave of the court and to place on the defenders the onus of applying to the court for an order that the action should no longer continue as a class action.

Our provisional view on certification

7.10 While we agree that a class action procedure should be designed to facilitate, rather than hinder, the vindication of claims and thus to promote "access to justice",[3] it would be unrealistic to ignore the real risk that where there is a large number of parties whose claims are similar, but not identical, a class litigation may become unmanageable. Of the five class action procedures which we studied

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[1]OLRC Report, p 312.

[2]See paras 6.46, 6.98 above.

[3]See paras 4.47-4.49, 4.52-4.53 above.

in Part 6 above only one - the Australian Federal Procedure - does not provide for certification. It provides instead for "decertification" where the court considers that to be appropriate in the interests of justice.[1] We do not think that decertification is a satisfactory alternative to certification at the earliest convenient stage: the parties may have been caused unnecessary expense and inconvenience before the order for decertification is made. We would prefer that the onus should be on the representative party to demonstrate that class action procedure is suitable. We therefore suggest that:

5. **The representative party should be required to apply to the court for an order certifying the action as a class action, and to satisfy the court that specified criteria for certification are met.**

Certification: procedures

7.11 It is in the interests of all parties that the court's decision on the application for certification should be made at an early stage. On the other hand the court must have enough information to enable it to reach a properly informed decision. Accordingly, the questions which immediately arise are: when should certification be considered? what kind of information should be adduced? and what matters should be dealt with in the court's certification order? We consider these questions in the following paragraphs, and discuss in later paragraphs[2] the criteria for certification.

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[1]S 33N. See footnote to para 7.17 below for the grounds on which an order may be made.

[2]Paras 7.18-7.26 below.

7.12 *Provisions in other jurisdictions.* Under the Quebec procedure[1] a person wishing to raise a class action must obtain the court's prior authorisation. Under the Ontario procedure the class member who has commenced a "plaintiff's class proceeding" is under a duty to apply after the action has been raised and within a prescribed period of time.[2] The Ontario legislation does not provide, as the Ontario Law Reform Commission recommended,[3] that the representative plaintiff and the defendant should produce affidavits "setting forth the material facts upon which he intends to rely and in which each deposes that he knows of no fact material to the application that has not been disclosed".

Possible Scottish procedures

7.13 *Time of application - before commencement of action.* The first question is whether certification should take place before or after the action is raised. A pre-action application for certification might resemble an application before the commencement of proceedings for an order under section 1 of the Administration of Justice (Scotland) Act 1972.[4] The application would have to specify all the information

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[1]Code, art 1002. Authorisation is applied for by motion. "The motion states the facts giving rise thereto, indicates the nature of the recourses for which authorization is applied for, and describes the group on behalf of which the member intends to act; the allegations of the motion are supported by an affidavit. It is accompanied with a notice of at least ten days of the date of presentation and is served on the person against whom the applicant intends to exercise the class action."

[2]*Ie* either (a) within 90 days of the later of (1) the date on which a statement of defence or a notice of intent to defend is delivered and (2) the date on which such a statement or notice should have been delivered or (b) subsequently, with leave of the court (s 2(3)).

[3]Draft Bill, clause 8(1).

[4]*Ie* an order for the inspection, photographing, preservation, custody or detention of documents and other property or for the disclosure of the identity of witnesses. For the procedure see RC 1965, r 95A, RC 1994, r 35.2;

necessary to enable the court to reach a decision on all the criteria which must be satisfied before certification may be granted and to formulate an order in appropriate terms. Thus it would identify the proposed pursuer (the applicant), the class on whose behalf he intends to sue, and the proposed defenders. Without necessarily making averments to such a standard of relevancy and specification as would be necessary in his fully adjusted pleadings in the proposed action, the applicant should disclose the nature of the remedy which would be sought, the factual and legal basis of the action and the ways in which it satisfies the criteria for certification.[1] Whether the rules should permit the applicant to lodge in support of the application affidavits, reports or other documents[2] might depend on the nature of the criteria for certification, which we consider in the next section of this Part. The application would be served on the proposed defenders, who would be entitled to lodge answers, and the court would fix a hearing before a judge, at which the proposed defenders would be entitled to be represented. If the judge was satisfied that the conditions for certification were met, he would make an order certifying the proposed action as a class action.

7.14 *Time of application - after commencement of action.* If certification were to be a step in procedure after the commencement of the action, it would be desirable that it should take place as soon as possible. The pursuer might be required to make an application within a prescribed period after the lodging of defences. The application might be made by motion, supported by a minute, which

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OCR 1983, r 84, OCR 1993, r 28.2.

[1]It might be appropriate to require a draft summons to be annexed to the application.

[2]Cf the Ontario and Quebec rules: para 6.65 above, first footnote.

the defenders would be entitled to answer, identifying the class and the questions of fact or law common to the class and specifying how the criteria for certification are satisfied. Again, whether the parties should be entitled to lodge any documents in support of their contentions might depend on the nature of these criteria. The judge would reach his decision after hearing parties on the minute and answers.

7.15 *Time of application - discussion.* It may seem odd to allow a party to raise an action as a class action and only thereafter to require the court to decide whether the action may proceed as a class action. It may be thought that if certification had to be obtained before the raising of the action, the parties would know the nature of the action from the outset and would immediately be able to prepare their cases accordingly. On the other hand, the interval of time between the commencement of the action and a subsequent application may not be significant. There might be little difference between the amount of preparation needed for a pre-commencement hearing and for an early post-commencement hearing. We note that a post-commencement hearing has been considered suitable in other jurisdictions. Our provisional view is that a post-commencement application would be satisfactory. We invite views.

6. The application for certification should be made after the action is raised.

7.16 *The order.* We envisage that the certification order might describe the class, the nature of the claim and the questions of fact or law which are common to the class, and might require that, in the event of the action being raised, notice is to be given to the members of the class. The precise contents of the order, however, might be determined by the nature of the matters which the rules required to

be specified in the notice, a matter we discuss later.[1] We also consider in later paragraphs the conditions for certification[2] and the means by which notice might be given to class members.[3] We now propose that

> **7. The certification order should describe the class, the nature of the claim and the questions of fact or law which are common to the class.**

7.17 *Decertification.* It is possible that a case which has been certified as suitable for class action procedure may subsequently cease to satisfy one or more of the criteria for certification. It therefore seems necessary to include in the rules a procedure for decertification.[4] We therefore propose that:

> **8. At any time after certification has been granted the court should be entitled to order that the action should no longer proceed as a class action because the criteria for certification, or any of them, are no longer satisfied.**

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[1]See para 7.34 below.

[2]See paras 7.18-7.26 below.

[3]See para 7.34 below.

[4]There is such a procedure, but no certification procedure in Australian federal representative proceedings. S33N(1) of the 1991 Act provides: "The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continues under this Part where it is satisfied that it is in the interests of justice to do so because: (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding."

(2) Criteria for certification as a class action

7.18 From our discussion in Part 6 of class actions in other jurisdictions it will be apparent that there is a variety of criteria which may be prescribed as qualifications or pre-conditions for the raising, or the continuance, of class proceedings. These criteria for certification include the following:

(i) There is a particular number, or a large number, of potential class members ("numerosity").[1]

(ii) Other procedures are unavailable or impracticable.

(iii) A class procedure would be preferable or superior to any other procedure.

(iv) An identifiable class exists.

(v) There are questions of fact or law common to the class.

(vi) The facts alleged seem to justify the remedy sought.

(vii) The proposed representative party is satisfactory.

7.19 These criteria overlap to some extent. For example, *numerosity* implies that there are so many members in the potential class that *other procedures are inappropriate, impracticable or unavailable.* In other words a class action procedure might be the *preferable or superior procedure.* The criteria of an *identifiable class* and *questions of fact or law common to the class* may be said to amount to "commonality",[2] that is, the existence of a core of issues which all the members of the class wish to bring before the court. Essentially, however, the seven criteria mentioned above can be treated in four groups:

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

(b) criteria (iv) and (v): commonality;

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[1]See para 6.5 above.

[2]A useful expression employed in the OLRC Report, p 325.

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

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

7.20 *(a) Numerosity: other procedures.* It seems obvious that a court in considering whether to grant certification should assess the general suitability of the intended litigation for a class action procedure. With regard to numerosity, we do not think that any particular number should be prescribed: the precise number of litigants is not necessarily related directly to the complexity of the litigation. The test should be, we think, that there are so many potential pursuers that it would be impracticable for them all to sue together in a single action. It is also important that they should form an identifiable group or class,[1] and that other procedures, such as the conjunction of actions or the selection of a test case, would be inappropriate, impracticable or unavailable. We would also emphasise the related criterion that a class action procedure would be preferable (or superior) to any other available procedure for the resolution of the common issues or, more generally, for "the fair and efficient adjudication of the controversy".[2] We do not consider that the court should be expressly required to consider the public interest or to carry out a cost benefit analysis. It might, however, be given a discretion to refuse certification even if the specified criteria are satisfied.[3]

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[1]Each member would not necessarily be identifiable by name. They might be identified as, for example, all the purchasers of a particular model of motor car during a certain period of time (see the Canadian *Naken* case, para 2.7 above).

[2]As in New York rule 901a5.

[3]See para 7.26, proposition 11 below. The OLRC recommended (Report, pp 411) that "where a court determines that a class action is superior, and that the other prerequisites for certification have been satisfied, it nevertheless should be able to consider whether the adverse effects of the proceedings upon the class, the courts, or the public will outweigh its benefits". The draft

7.21 *(b) Commonality.* As to commonality, it seems axiomatic that the existence of questions of fact or law common to an identifiable class of persons must be a criterion for certification. It may not be necessary to add, as in Federal Rule 23(b)(3), that these questions must "predominate over any questions affecting only individual members".[1]

7.22 *(c) Preliminary view of the merits.* We also do not propose that the court should be required to undertake a preliminary assessment of the merits of the applicant's proposed case. Such an assessment is required by the Quebec rule that the facts alleged must seem to justify the conclusions sought.[2] Similarly, the Ontario Act provides that the pleadings or the notice of application should disclose a cause of action, and requires the representative plaintiff to file affidavits.[3] We do not favour any requirement that the court should consider the proposed class action's prospects of success or failure. It might seem advantageous to have a test which would empower the court to stop an unmeritorious case which would cause the defenders inordinate

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provision (clause 6(2)) makes clear that the onus of establishing that an action should not be certified for this reason is upon the person so contending (*eg* a defendant or an absent class member, *ie* a member of the class other than the representative party). The OLRC considered that the court should conduct a wide-ranging inquiry with respect to the purposes of the action, the costs of litigating it, and the benefits that are likely to result from its successful prosecution. It is not clear how the court would have obtained the necessary information. The Ontario Act has no such provision.

[1]Rule 23 is printed in Annexe C.

[2]See paras 6.44, 6.45 above. This is not the test of relevancy which in Scotland must be satisfied by a pursuer's fully adjusted pleadings: they must allege a position in fact which, if true, would justify the remedy sought. We consider that, as in conventional litigation, any question as to the relevancy of the pursuer's case should be raised by the statement of a preliminary plea in the defenders' written pleadings and should be disposed of after the record has been closed and parties have been heard in debate on the plea.

[3]See para 6.65 above.

trouble and expense. Some account could be taken of the probable difficulties of pursuers by prescribing a test which it would not be unduly onerous to satisfy, rather than a stiff test. Whatever the nature of the test, however, the applicant would no doubt be obliged, as in Quebec and Ontario, to lodge documents vouching the facts alleged in the application, such as affidavits and experts' reports; and in fairness the proposed defenders would have to be given an opportunity to inspect these documents and lodge documents of their own. The procedure would be elaborate and expensive, and the judge's task might be insuperably difficult, even with the assistance of counsel: he would have to try to digest the materials lodged and the submissions made and then form a *prima facie* view before the issues between the parties had been precisely focussed in their written pleadings.[1] There are the further objections that the applicant would be required to satisfy the court on the merits twice over, once at certification and again at the proof (the hearing of the evidence); and, if the same judge were to preside over all the important stages of the case, his final judgment might be influenced by the views he had formed, albeit provisionally, at the certification stage.

7.23 The Ontario Law Reform Commission proposed as one of the conditions for certification that "the action is brought in good faith and there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class". This proposal was not adopted,[2] and there appear to us to be a

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[1]In Scottish practice, after the parties have lodged their pleadings the court allows a period for adjustment, that is, the alteration of the pleadings so as to focus the issues between the parties. At the end of the period the adjusted pleadings are printed in a "closed record" which is, subject to amendment by leave of the court, a complete and final statement of the parties' contentions.

[2]See para 6.65 above.

number of considerations against it. The "good faith" test would be not only unusual but difficult to determine. In any event it is an elementary principle in Scotland that a party's lawyer should make applications to the court in good faith, and should state matters as facts only if he has before him evidence to support his assertions.[1]

7.24 *(d) A satisfactory representative party.* It seems important that the representative party "will fairly and adequately protect the interests of the class".[2] It may be argued that while that is no doubt important, it should not be a matter on which the court should have to be satisfied, or that it should be left to a class member or the defender to raise with the court any issue as to the conduct of the representative party. We consider, however, that this criterion is justifiable since a class action is likely to be complex, and the judgment will bind not only the representative pursuer but also the members of the class on whose behalf he sues.[3] The quality of the representative pursuer as a litigant is therefore a matter of importance both to the court and to the absent class members. The requirement that he should "fairly" promote the interests of the class implies that he should be independent of the defenders, that there should be no conflict of interest between himself and other class members and that he should not favour one class member at the expense of another. The

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[1]See Macphail (1988), para 9-12.

[2]US Federal Rule 23(a)(4); see the discussion in para 6.5 above. New York rule 901(a)(4) is in similar terms: see Annexe D. See also the Quebec and Ontario rules: Annexe E, B2(d), C2(e). S 5(1)(e)(ii) of the Ontario Act requires the representative to produce "a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class".

[3]In actions where there are both common issues and issues special to individual class members the judgment on common issues will be binding. The representative pursuer's duty of protection would extend to the litigation of these common issues, while each member would be responsible for litigating any issues special to himself or herself.

requirement that he should protect their interests "adequately" implies that he has the financial resources necessary to support the litigation and the determination to pursue it to a conclusion. His duty would be to protect their interests only in relation to those issues which were common to the class as a whole. Any issues special to individual members of the class would be litigated separately after the common issues had been decided, and each member would be responsible for the conduct of his own case.

7.25 There is a question whether the court should be required to consider the adequacy of the representative pursuer's legal advisers. In the USA, Federal Rule 23 requires an evaluation of the representative party's attorneys;[1] and the Ontario Law Reform Commission's draft Bill allows, but does not require, the court "in determining whether the representative plaintiff would fairly and adequately protect the interests of the class" to consider "whether provision has been made for competent legal representation that is adequate for the protection of the interests of the class". There is no corresponding provision in the subsequent Ontario Act. The examination of the fitness of a lawyer to conduct a particular litigation would be an unfamiliar duty for a Scottish court. It may be justifiable where the class action rules provide for an "opt-out" rather than an "opt-in" procedure:[2] that is, where the representative pursuer sues on behalf of all the members of the class who do not formally exclude themselves from the litigation. In such a case the lawyers for the representative pursuer must act on behalf of persons who may be unknown to them or in any event with whom they do not have any direct professional relationship. It may be argued that it is in the

[1]See para 6.5 above.

[2]On "opt-in" and "opt-out" procedures see paras 7.27-7.31 below.

public interest that the court should be satisfied that the absent members will be afforded adequate representation.[1] The position may be different, however, under an "opt-in" procedure, where the representative pursuer appears only on his own behalf and on behalf of those members of the class who voluntarily associate themselves with the litigation by taking some formal step indicating that they consent to be bound by the judgment. It may be that conflicts could arise between the legal advisers' duty to the representative pursuer and any duty they may owe to the other class members, but it is arguable that those who have opted in may be assumed to have satisfied themselves of the fairness and competence of the representative pursuer's legal advisers. Whether the court should nevertheless consider such matters is, however, a question on which we seek views.

7.26 We therefore invite views on the following:

9. The criteria for certification should be:

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

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

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

(d) that the representative pursuer will fairly and adequately protect the interests of the class in

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[1]See the extract from Bush (1986) quoted in para 6.5 above, final footnote.

relation to those issues which are common to the class.

10. Should there be a further criterion that the legal advisers of the representative pursuer will fairly and adequately protect the interests of the class -

(a) in an "opt-out" class action procedure; or

(b) in an "opt-in" class action procedure?

11. Should the court have a discretion to decline to grant certification even if the criteria are satisfied?

(3) Action by class members: an opt-in or an opt-out scheme?

7.27 The Quebec Code of Civil Procedure defines "class action" as "the procedure which enables one member [of a group] to sue *without a mandate* on behalf of all the members".[1] This definition sharply raises the critical question whether it is acceptable that the considerations of access to justice, judicial economy, efficiency and the other advantages claimed for the class action[2] should outweigh the consideration that a person's rights may be determined in a class action without his express consent to or participation in the litigation. The practical issue which arises from this question is well expressed by the Ontario Law Reform Commission:

> "One of the most controversial issues in the design of a class action procedure is whether class members should be bound automatically by the judgment, unless they exclude themselves from the action after certification, or whether class members, other than the representative plaintiff, should be required to take affirmative action after certification in order to be bound by the judgment on the common questions and as a prerequisite to receiving any benefits of the suit."[3]

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[1]Art 999 (emphasis supplied).

[2]See paras 4.44-4.49, 6.106 above; 7.28 below, second footnote.

[3]OLRC Report, p 467.

Under the first scheme, absent class members (that is, those other than the representative party) have a right to "opt out" of the action: under the second, they have an opportunity to "opt in".

7.28 We therefore now consider the advantages and disadvantages of these two schemes.[1] Under an *opt-out scheme*, the absent class member will be automatically included in the class action and bound by the court's judgment on the common issues if he does nothing; but he will be excluded from the action if he indicates (in a prescribed manner) that that is his wish: that is, if he opts out. In that event he will not be entitled to share in any award of damages made in the action, but he will be free to bring a separate action suited to the particular circumstances of his own claim. Under an *opt-in scheme* the class member is automatically excluded from the class action and must take some prescribed step within a prescribed period before he will be bound by the result. If he does nothing, he will be free to raise a separate action. The choice between these schemes involves taking a view on the relative importance of (a) the advantages of grouping

[1]A third option would be to give the court a discretion to decide whether opting out should be allowed. The OLRC set out five matters which the court should consider in determining whether members of the class should be permitted to exclude themselves. The provision required the court to consider all relevant matters including "(a) whether as a practical matter members of the class who exclude themselves would be affected by the judgment; (b) whether the claims of the members of the class are so substantial as to justify independent litigation; (c) whether there is a likelihood that a significant number of members of the class would desire to exclude themselves; (d) the cost of notice necessary to inform members of the cost of the class action and of their right to exclude themselves; and (e) the desirability of achieving judicial economy, consistent decisions, and a broad binding effect of the judgment on the questions common to the class." (draft Bill, clause 20(2).) The OLRC considered that no other method would adequately recognise the diversity of possible class actions. It was also concerned about the possibly inordinate expense of the necessary notice to class members and its effect in discouraging class actions (unless the expense was met by a third party such as an independent, possibly Government-sponsored, fund).

claims in a class action procedure[1] and (b) the freedom of the individual class member to vindicate his claim if he wishes and in the way he wishes.[2] It is necessary to consider the effects on claimants and defenders of conducting class litigation under each scheme.

7.29 *An opt-out scheme.* It may be argued in favour of an opt-out scheme that consistency and efficiency are achieved if the issues common to many disputes are decided in a single litigation brought on behalf of all the members of the class. It is likely that those who have opted out will have decided that they do not wish to make a claim of any kind against the defenders, and therefore that the defenders will not have to deal with any claims other than those made in the class action. An opt-out scheme has been adopted in several jurisdictions.[3] On the other hand, it may be thought objectionable that anyone should be entitled to call himself a representative party and pursue an action on behalf of others without a mandate. Actions might be raised by busybodies, encouraged by "lawyer entrepreneurs",[4] without regard to the real interests and wishes of other members of the class. Those others might not have wished to bring an action. If so, they should not be put to the trouble of taking some formal step to exclude themselves from the litigation; and in any event they might not know about the

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[1]These have been summarised as: ensuring a single decision on issues in which all members of a group have the same interest; reducing costs and increasing efficiency by enabling a single determination of common issues; enhancing access to legal remedies by reducing cost barriers or lack of knowledge of legal remedies. (ALRC Report 1988, para 108). See also paras 4.44-4.49, 6.106 above.

[2]See the discussion of "party control" in para 2.29 above.

[3]US Federal Rule 23(c)(2); Quebec Code, art. 1007 (written request for exclusion); Ontario Act, s 9 (opt-out competent in the manner and within the time specified in the certification order); Australian Act, s 33(2) (written notice to the court opting out).

[4]Kirby, *cit* para 6.101 above.

litigation until it was too late to do so. An opt-out scheme may also be unfair to defenders. They may have little idea of the size of the class and thus of the number of the claims brought against them. If the class is large and the members are not identified by name, it might be difficult for the defenders to undertake negotiations for settlement.

7.30 *An opt-in scheme.* It may be argued in favour of an opt-in scheme that it preserves the liberty of the individual to choose whether to bring an action and if so, to conduct it as he sees fit: anyone who has no desire to bring an action should not find himself "roped in" to a class action. On the other hand, if he does wish to pursue his claim but does not learn of the litigation until it is too late to opt in, his loss of his opportunity to opt in might be particularly unfortunate where the amount of money available to meet claims was exhausted by the award in the class action or where his own claim was so small that it would be unduly expensive to pursue it in a separate action. The defenders must nevertheless face the prospect that those who have not opted in may bring separate actions: the number of those who would not opt in is likely to exceed the number of those who would opt out under an opt-out scheme, since opting in involves making a decision within a limited period to commit oneself to supporting the class action. The need to opt in sets up a barrier to participation in the litigation and, if it succeeds, in its benefits. If one of the objects of introducing a class action procedure is to promote access to justice, an opt-in scheme is undesirable in principle and might be unworkable in practice. It might achieve little more than multi-party litigation under existing procedures.

7.31 *Our provisional view.* Notwithstanding these arguments, our provisional view is that an opt-in scheme is preferable to an opt-out scheme. The primary consideration appears to us to be the

preservation of the liberty of the individual to participate in litigation only if he or she wishes to do so: a person should not be required to disassociate himself or herself from a litigation which he has done nothing to promote. Litigation, as a means of resolving a dispute, should be undertaken only as a last resort, after mature consideration of the advantages and disadvantages of doing so. Whether there should be rules prescribing any circumstances in which a person who has opted into a class action should be entitled thereafter to opt out of it is a matter we discuss later.[1] We invite comment.

12. Class members, other than the representative pursuer, who wish to be bound by the judgment on the common issues in the class action, should be required to opt into the action within a prescribed period and in a prescribed manner.

(4) Notices to class members

7.32 The effectiveness of an opt-in or opt-out scheme is related to the effectiveness of the publicity given to the opportunity for class members to opt in or opt out. Notices to class members may also be necessary at later stages of the litigation. It is important, however, that the giving of notice should not be so expensive as to be disproportionate to the other costs of the litigation or to the benefits of a successful result, or as to amount to a factor discouraging the raising or the continuation of the litigation. It should be possible for appropriate notice to be given without undue expense. We therefore consider the following questions:

(a) On what occasions, and of what matters, should notice be given?

[1] See paras 7.44–7.55 below.

(b) What should be the form or manner of the notice and what should it say?

(c) How should the cost of the notice be controlled and paid for?

(d) How should these matters be dealt with in the implementing legislation?

7.33 *(a) When should notice be given?* The first matter of which class members should receive notice is the application for certification,[1] to give them an opportunity to oppose certification or to make representations about the suitability of the representative pursuer. They should also receive notice at the stage when they have an opportunity to opt in (or to opt out): that stage might occur when the action is raised (after certification has been granted, or where there is no certification procedure at all) or when certification is granted (if that may be done only after the action has been raised). The selection of the other matters of which class members should receive notice would depend on the features of the subsequent procedure. A study of procedures in other jurisdictions suggests that notice might be required:

- if the representative pursuer seeks to withdraw;[2]
- if the defenders apply for decree by default;[3]

[1]If certification is to be part of the procedure and, if it is, whether it is made before or after the commencement of the action.

[2]*Eg* on settlement of his or her claim (see Australian Act, s 33W).

[3]*Eg* on the ground that the representative pursuer has failed to comply with some rule or order of court or has failed to appear or to be represented at a hearing. The Australian Act, s 33X(1)(b) provides "for dismissal of the proceedings on the ground of want of prosecution".

- if the procedure provides for approval of a settlement and it seems desirable to tell class members what is proposed;[1]
- if "the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues";[2]
- if the court decides at any time that class members should be given notice "to protect the interests of any class member or party or to ensure the fair conduct of the proceeding".[3]

7.34 *(b) The notification: form, manner and content.* In view of the importance of notices in class action procedure the general rules as to the form and manner of notification are usually prescribed in primary legislation.[4] They may require the court to have regard to the cost of giving notice in deciding when and by what means notice is to be given.[5] The legislation may detail the variety of possible ways in which

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[1]The Australian federal procedure allows the court to dispense with such a notice if satisfied that it is just to do so (Australian Act, s 33X(4): see para 6.94 above).

[2]Ontario Act, s 18(1).

[3]Ontario Act, s 19(1). The US Uniform Law Commissioners' model legislation enables notice to be given to allow members the opportunity to "signify whether they consider the representation fair and adequate, to enter an appearance and present claims or defenses, or otherwise participate in the action." (ULC model legislation clause 9(2)(iii).)

[4]*Eg* s 33X of the Australian Act provides, relative to notices to group members of the commencement of the proceedings and their right to opt out before a specified date: "The court must, by order, specify: (a) who is to give the notice; (b) the way in which notice is to be given; and the order may include provision; (c) directing a party to provide information relevant to the giving of the notice; and (d) relating to the costs of notice."

[5]There is relatively elaborate provision in the Ontario legislation for notice of certification of a class proceeding. The court may dispense with notice if, having regard to the factors set out in s 17(3), the court considers it appropriate to do so. S 17(3) provides: "(3) The court shall make an order setting out when and by what means notice shall be given under this section and in doing so shall have regard to: (a) the cost of giving notice; (b) the

notice may be given[1] and may include radio or television broadcast or any other means.[2] Similarly the contents of the notice may be prescribed in detail[3] or left to be approved by the court.[4]

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nature of the relief sought; (c) the size of the individual claims of the class members; (d) the number of class members; (e) the places of residence of class members; and (f) any other relevant matter."

The New York provision (Rule 904(c)) about the notice of commencement of a class action requires the court, in determining the method by which notice is to be given, to consider "I. The cost of giving notice by each method considered, II. The resources of the parties and III. The state of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class."

[1]As in the Ontario Act, s 17: "(4) The court may order that notice be given, (a) personally or by mail; (b) by posting, advertising, publishing or leafleting; (c) by individual notice to a sample group within the class; or (d) by any means or combination of means that the court considers appropriate."

[2]Australian Act, s 33Y(4).

[3]*Eg* the Ontario Act, s 17 provides with regard to the notice of certification to be given to the class members by the representative party: "(6) Notice under this section shall, unless the court orders otherwise, (a) describe the proceeding, including the names and addresses of the representative parties and the relief sought; (b) state the manner by which and time within which class members may opt out of the proceeding; (c) describe the possible financial consequences of the proceeding to class members; (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements; (e) describe any counterclaim being asserted by or against the class, including the relief sought in the counter-claim; (f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding; (g) describe the right of any class member to participate in the proceeding; (h) give an address to which class members may direct inquiries about the proceeding; and (i) give any other information the court considers appropriate." The Quebec Code, art 1006, provides that the notice to members is to indicate: "(a) the description of the group; (b) the principal questions to be dealt with collectively and the related conclusions sought; (c) the right of a member to intervene in the class action; (d) the district in which the class action is to be brought; (e) the right of a member to request his exclusion from the group, the formalities to be followed and the delay for requesting his exclusion; (f) the fact that a member who is not a representative or an intervener cannot be called upon to pay the costs of the class action; and (g) any other information the court deems it useful to include in the notice."

[4]New York Rule 904(c).

7.35 *(c) The cost of the notice.* As mentioned in the previous paragraph, the court is usually required to select the most economical method of notification consistent with the giving of adequate notice. As to who pays for the notice, the legislation may say nothing and leave the costs to be dealt with in the expenses order made at the conclusion of the action; or specifically permit the court to make "any order it considers appropriate as to the cost of any notice";[1] or have a relatively elaborate provision for preliminary and final determination of the expenses of notification.[2] In view of the inherent discretionary common law powers of the Scottish courts to make awards of expenses it seems doubtful whether any specific provision is necessary as to the expenses of notification.

7.36 *(d) Notice provisions in the implementing legislation.* If any new class action procedure were introduced by Act of Parliament,[3] matters of procedural detail might be dealt with in court rules made by the Court of Session, the Act only prescribing the subjects to be covered by the rules.[4] The terms of the legislative provision on the subject of notice would depend on the view taken as to what guidance the Court should be given and whether a specific judicial discretion to relax particular statutory requirements should be conferred. A discretion that may seem desirable is a power to dispense with notice where

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[1]Ontario Act, s 22(1) which expressly allows an order apportioning costs among parties.

[2]As in New York Rule 904(d).

[3]See para 7.100 below.

[4]The rules could be amended later by Act of Sederunt to take account of experience of the operation of the procedure.

there is little that an absent class member might competently do, for example where the remedy sought does not include damages.[1]

7.37 *Our provisional view.* We propose that:

13. Any legislation implementing a class action procedure should confer on the Court of Session power to prescribe by rules of court when, by what means and in what terms notice should be given to class members.

(5) Court's powers to control the conduct of the proceedings

7.38 In a Scottish civil court the judge

> "is the master of the procedure before him, with a general command over the process and the regulation of the business of the court, power to keep the litigation within bounds, control over the incidental procedure in the course of the action and a controlling and censorial power over those practising in the court. He cannot, however, take active control of the litigation once it has been brought into court, or disregard or innovate upon the rules of practice and procedure. In exceptional circumstances he may dispense with compliance with the rules of court, or depart from the accepted and traditional practice of the court when the interests of justice so require; but in general his function is rather to see to it that the rules are observed and that the progress of the proceedings is orderly and expeditious, and to discourage any delay which might be to the detriment of the interests of justice."[2]

Class action procedure, however, may have unusual features and present special difficulties. There is therefore a question whether the judge may need special powers to make orders controlling the conduct of the proceedings. What powers might he need, and should he be entitled to exercise them on his own initiative or only on the

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[1] As in Australian Act, s 33X(2).

[2] Macphail (1988), para 5-110 (footnotes omitted). See also para 2.33 above.

application of the representative pursuer, the defenders or another class member?

7.39 The original class action provision, US Federal Rule 23, lists a number of "appropriate orders" which the court may make.[1] A provision in the Uniform Law Commissioners model legislation[2] makes clear that the court's powers to make orders dealing with the conduct of the class action are exercisable either on the motion of a party or of the court's own accord, and may include, but are not restricted to, the orders mentioned in the clause. It is provided that such orders may:

- determine the course of the proceedings or prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument;
- impose conditions on the representative parties or on interveners;
- invite the Attorney-General[3] to participate with respect to the adequacy of class representation;
- make any other order to assure that the class action proceeds only with adequate class representation;
- make any order to assure that the action proceeds only with competent representation by the attorney for the class.[4]

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[1]Rule 23(d), printed in Annexe C.

[2]Clause 9.

[3]See further paragraphs 7.58-7.63 below.

[4]Clause 9(b) provides that a class member who is not a representative party may appear and be represented by separate counsel. He could presumably draw the court's attention to the adequacy of the class representative or the competency of the class representative's attorney.

7.40 The relevant provision in the Ontario legislation is less comprehensive. It allows the court to make any order it considers appropriate "respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate."[1] The court may not make such an order on its own initiative, but only on the motion of a party or class member.

7.41 It seems to us to be difficult, in advance of the introduction of a Scottish class action procedure, to envisage any particular problems which might arise in individual cases and thus to specify what special powers the judge might require. It may be helpful to confer a general power to make appropriate orders at any stage for the purpose of ensuring that the litigation is conducted fairly and with no avoidable delay.[2] We doubt, however, whether a judge would wish to make such an order without being asked to do so, at least in the early days of the new procedure.[3]

7.42 We therefore propose that

14. Without prejudice to his other powers to control the conduct of the litigation, the judge should have power to make such orders as may be appropriate to ensure that the litigation is conducted fairly and with no avoidable delay, on the motion of

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[1]Ontario Act, s 12.

[2]We prefer "no avoidable delay" to "expeditiously" and a provision which clearly allows for intervention for any purpose at any stage of the case rather than the Ontario provision, which appears to emphasise the "determination" of the case.

[3]If experience suggested that further powers were necessary, these might be conferred by amendment of the rules by Act of Sederunt.

(a) **the representative pursuer,**

(b) **another class member or**

(c) **the defenders.**

Particular circumstances

7.43 There are, however, certain circumstances where particular judicial powers may be considered to be necessary. These are: (i) where the class action is disposed of by being abandoned, or by being settled on the acceptance of an offer made by the defenders; and (ii) where a new representative pursuer is substituted.

(a) Abandonment; settlement

7.44 In conventional civil litigation in Scotland, the pursuer is entitled to abandon or settle the action at any time before the final decree or judgment is pronounced, without obtaining the approval of the court. The theory of class action procedure, however, is that the representative pursuer conducts the litigation not only on his own behalf but also on behalf of all the other members of the class who have opted in (or, under the alternative scheme, have not opted out). If he were to abandon or settle the action, the interests of these other members of the class might be adversely affected. Under an opt-in scheme a person who has opted into a class action may wish to settle his or her own claim, or to opt out and thus abandon the action as far as his or her own claim is concerned: there may be a question whether he or she should be entitled to do so only with the court's leave and on conditions as to expenses. We therefore now consider whether the court should have power to control or supervise abandonment or settlement; and if so, what powers the court might require. The issues raised are broadly similar in connection with both abandonment and settlement, and whether the procedure includes an opt-in or an opt-out scheme.

7.45 *Abandonment in conventional Scottish civil procedure.*[1] A pursuer has in general the right to abandon his action at any stage prior to final decree, and the court has no discretion to refuse to allow him to do so. The court may impose on him conditions as to expenses, but it cannot compel him to proceed with the action. By abandoning in compliance with certain rules and paying the defenders' expenses he may obtain the privilege of a decree of dismissal, which has the effect of reserving his right to bring a fresh action against the defenders raising the same question as the abandoned action, instead of a decree of absolvitor, which precludes him from doing so. The court, however, is not concerned with his reasons for abandoning the action.

7.46 *Settlement in conventional Scottish civil procedure.*[2] In practice, a very high proportion of actions are settled before they reach the stage of final judgment. The court, however, has no formal power or duty to initiate, promote or approve the settlement of actions. Parties may settle their differences "just as and when they please without the leave or approval of the court. The leave of the court to settle any ordinary litigation is never asked - it is a matter with which the court is not concerned."[3] The settlement of an action may be brought about judicially or extrajudicially.[4] A judicial settlement is operated by a judicial offer, known as a tender, and a judicial acceptance, each made by lodging a minute in the process. If the pursuer accepts the tender, the court grants decree in terms of the tender and the acceptance.

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[1]See Maxwell (1980), pp 251-254; Macphail (1988) paras 14-13 to 14-27.

[2]See Maxwell (1980), pp 245-248; Macphail (1988) paras 14-28 to 14-68.

[3]*Gow v Henry* (1899) 2 F 48 *per* Lord Trayner at p 55.

[4]Macphail (1988) para 14-29.

Where there has been an extrajudicial settlement, that is, a settlement reached by private negotiation, the parties request the court to grant decree in the terms which they have agreed.

7.47 *Abandonment and settlement of class actions.* A number of practical problems might arise if the present law with regard to abandonment and settlement were applied without modification in class action procedure.[1] Since the object of a class action is to determine the rights of all those members of the group who have opted in (or, under the alternative scheme, have not opted out), it would be quite wrong for the representative pursuer to be entirely free to abandon or settle the litigation as he wished. He might wish to abandon the action for reasons with which the other members of the group did not agree. As to settlement, the defenders might seek to persuade him to settle the action by making an offer designed to have particular attractions for him. In the absence of some constraint there would be no need for him to consult, or obtain the consent of, the other class members before abandoning or settling the action: he could ignore their interests altogether. It seems clear that he should not be entitled to do so. It may be thought that there should also be some control over the abandonment or settlement by other class members of their individual claims.

7.48 *The provisions in other jurisdictions.* It is useful to consider how this problem has been addressed in other jurisdictions. In the United States, Federal Rule 23 provides:

> "(e) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed

[1] We ignore here a situation in which the common issues have been decided and a class member and the defenders are continuing to litigate particular issues special to that member's claim.

dismissal or compromise shall be given to all members of the class in such manner as the court directs."

The Uniform Law Commissioners' model legislation takes account of the fact that discontinuance may take place before or after certification, and prescribes in detail what a notice to class members is to include.[1] In Quebec, the representative party cannot discontinue without the permission of the court.[2] The Ontario legislation provides that a class proceeding may be discontinued, abandoned or settled only with the approval of the court, and requires the court to consider whether various specified matters should be mentioned in the notice to class members.[3] The draft Bill prepared by the Australian Law Reform Commission requires the court's consent to discontinuance and lists matters which the court should take into account in determining whether to grant consent.[4] The Australian Federal Act requires the court's approval of discontinuance or settlement and

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[1]Rule 12 provides: "(c) Notice given under subsection (b) shall include a full disclosure of the reasons for the dismissal or compromise including, but not limited to, (1) any payments made or to be made in connection with the dismissal or compromise, (2) the anticipated effect of the dismissal or compromise on the class members, (3) any agreement made in connection with the dismissal or compromise, (4) a description and evaluation of alternatives considered by the representative party and (5) an explanation of any other circumstances giving rise to the proposal. The notice also shall include a description of the procedure available for modification of the dismissal or compromise."

[2]Art 1016.

[3]These are: an account of the conduct of the proceedings; a statement of the result of the proceedings; and a description of any plan for distributing settlement of funds. (Class Proceedings Act 1992, s 29.)

[4]These are: (a) the nature and the likely cost and duration of the proceedings if approval or leave were not given; (b) the amount offered and the likelihood of success in the proceeding; (c) whether the discontinuance, compromise, settlement or acceptance of money is in the interests of the group member having regard to the views, if they are made known to the court, of the group member; and (d) whether satisfactory arrangements have been made for the distribution of money to be paid to the group members: draft Federal Court (Group Proceedings) Bill, clause 28(3).

empowers the court, if it approves, to "make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the court.[1]

7.49 *Our provisional view.* The rules in these jurisdictions generally provide that before the action is disposed of, the class members must be given notice of the terms of the proposed arrangement and other relevant information; and the approval of the court must be obtained. It would not be difficult to devise for Scotland a provision in the implementing legislation requiring the prior notification of class members, the information to be included in the notice being prescribed by rules of court. It is much more difficult, however, to devise rules as to what is to be done if any of them objects to the proposed arrangement, how the court is to satisfy itself that it should approve the arrangement and what is to happen if the court withholds its approval. For convenience, the following discussion considers only settlements, but analogous problems arise in relation to abandonment. We further restrict the discussion to a class action procedure with an opt-in scheme: with an opt-out scheme and a large class of members who are not identified by name, the problems are magnified.

7.50 There is an initial question as to the kind of offer the defenders should be entitled to make in a procedure with an opt-in scheme. Should they be required to make a separate offer to each member of the class who has opted in, in settlement of his claim? Or should they be entitled, as they would not be in ordinary procedure, to add a condition that each class member must accept the specific sum tendered to him, or to tender a lump sum to the representative pursuer only, leaving it to him, or to the class members, to allocate it

[1]Federal Court of Australia Amendment Act 1991, s 33V(2).

among the members? Although tenders of the two latter kinds are incompetent under the present law, they would have obvious attractions, in any event for defenders, in a class action procedure. Defenders who have decided to try to settle an action will wish to do so by paying a global sum, and will not be concerned as to how much each class member receives so long as they all accept and the action is finally disposed of.

7.51 Whatever the nature of the offer, it seems reasonable to suppose that the larger the class, the more likely it is that they will not be unanimous in their response to the offer. Let it be assumed that they are all duly notified of the terms of the offer and any other prescribed relevant information, and that some of them intimate that they are unwilling to accept the offer. Should they be required to acquiesce in the views of the majority, or should they be protected against unfair pressure from the majority to accept the offer? Should they be entitled to opt out of the action and pursue separate actions of their own?[1] On one view, acquiescence in the views of the majority should be the price to be paid for the convenience of participation in a class action. But should the majority be a majority in number, or in value? Suppose that large offers are made to 20 members of a class of 100 which in aggregate exceed the total of all the much smaller offers made to the other 80 members: the 20 are content with their offers, but the 80 are not: whose views should prevail? Again, lack of unanimity in response to an offer might raise questions as to the duties of the legal advisers of the representative pursuer towards the

[1]If they required legal aid to do so, would the Scottish Legal Aid Board consider it reasonable to grant them legal aid? See para 8.38 below.

other members of the class, particularly if the representative pursuer is obliged to protect or promote fairly the interests of the class.[1]

7.52 There are also questions as to the role of the court (that is, the judge who has been presiding over the earlier stages of the action) in approving a proposed settlement. First, in order to decide whether to grant approval, he would have to be given all the relevant information which the parties' advisers had already considered. He would have to assess the action's prospects of success, and the sum each class member would be likely to be awarded in the event of the defenders' liability in damages being established. Where a class member has expressed dissatisfaction with the proposed settlement, it seems that the judge would be entitled to examine his complaint and reject it if he considered it to be ill-founded. Where no class member has expressed dissatisfaction, the purpose of the judge's scrutiny of the proposed settlement would seem to be to protect the interests of those class members who have not been separately advised by lawyers other than those acting for the representative pursuer. It is not clear what the consequences would be if the judge refused to approve the proposed settlement. It is difficult to envisage that he should be entitled to require parties to litigate against their will: it may be that he should be entitled to sist (that is, stay or suspend) the action until the parties either produce terms of settlement which he is prepared to approve, or move him to recall the sist so that they may resume the litigation.

7.53 The foregoing discussion appears to us to raise large and difficult questions. We are impressed, however, by the consideration that other jurisdictions with experience of class action procedures do

[1]See para 7.24 above.

not seem to have found it necessary to resolve such questions by the enactment of rules other than those we have noted above.[1] We are therefore inclined to think that special rules should not be enacted for Scottish class actions unless experience shows them to be necessary. Several of the problems discussed seem to be no different in kind, and in at least some cases may only be different in a small degree, from the problems encountered in conventional litigation where several pursuers sue in one action, each claiming a separate award of damages: for example, where the members of a family claim damages for the death of a relative, or where actions have been conjoined. In such cases defenders may have difficulty in framing offers, and one pursuer may be pressed by others to accept an offer which he does not consider to be satisfactory. Again, in many actions for damages the pursuer is not funded from his own resources and may experience pressure to accept a settlement from the body providing his funding, which may be his trade union or the Scottish Legal Aid Board, if that body considers that it would be unreasonable for him to reject the defenders' offer. It also seems difficult in principle to impose a requirement that the court should approve settlements in class actions with an opt-in scheme, but not in actions brought under ordinary procedure.

7.54 Instead of introducing rules of court regulating the abandonment and settlement of class actions, it may be preferable to leave it to class members to agree among themselves as to how negotiations with the defenders, and the disposal of the action or individual claims by abandonment or settlement, might be managed. Such agreements could be tailored to suit the particular circumstances

[1]See para 7.48 above.

of each case. Defenders might find it sensible to negotiate with a group which was organised in such a way.

7.55 These, however, are issues on which we would welcome views. We therefore invite responses to the following questions.

15. (1) Should the court be entitled to order that notice of the proposed abandonment or settlement of a class action is to be given to all the members of the class?

(2) If so, should the matters which such a notice might contain be prescribed by rules of court rather than primary legislation?

16. (1) Should any special rules be introduced regulating -

(a) the abandonment

(b) the settlement

of class actions?

(2) If so, -

(a) should the rules require the approval of the court to be obtained before a class action is abandoned or settled;

(b) what other rules should be prescribed?

17. If the approval of the court is required, -

(a) what matters should the court take into account;

(b) what should be the consequences of the court's refusal to approve the proposed abandonment or settlement?

(b) The substitution of a new representative pursuer

7.56 It seems necessary to provide that the approval of the court should be required before a person is entitled to sue in substitution for

the original representative pursuer. The original representative pursuer may have to be replaced where he has died; or where he has settled his own claim and thus has no further interest in the subject-matter of the action;[1] or where his ability to protect the interests of the class is one of the criteria for certification[2] and the court is satisfied, on the application of the defenders or one or more of the class members, that he is no longer able to do so. In the latter situation the substitution of a person who meets the criterion might be the only way to avoid decertification of the action.[3]

7.57 In ordinary civil litigation the introduction of a new party to an action cannot be effected automatically. The introduction, by amendment, of a person as pursuer in substitution for the original pursuer requires the leave of the court;[4] and a person who wishes to be sisted, or allowed to appear, as a party must satisfy the court that he has a title and an interest to be made a party to the action.[5] Where the substitution is made by amendment the court is directed to attach such conditions as may be just and to hold the party making the amendment liable in the expenses thereby occasioned unless it is shown that it is just and equitable that these expenses should be otherwise dealt with.[6] We would suggest that analogous rules should

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

[2]See para 7.24 above.

[3]See para 7.17 above.

[4]RC 1965, r 92(1)(b); RC 1994, r 24.1(2)(b)(v); OCR, r 64(1)(b); OCR 1993, r 18.2(2)(b)(v).

[5]Maxwell, p 230; Macphail (1988), para 12-15.

[6]RC 1965, r 92(2); RC 1994, r 24.4; OCR, r 64(2); OCR 1993, r 18.6.

be introduced for the substitution of a new representative pursuer, whether or not the qualities of the representative pursuer are a condition for certification. We therefore propose:

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

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

(6) Ministerial or official participation

7.58 We have already noted that the Lord Advocate is authorised by statute to appear in certain civil proceedings,[1] and that public bodies or officials such as the Equal Opportunities Commission[2] and the Director-General of Fair Trading[3] are entitled by statute to bring certain proceedings in the civil courts. We have also discussed the concept of the "external pursuer" action which is a multi-party action raised not by an aggrieved party but by a third party who acts in the interests of the group as a whole. We have noted that such actions might be brought by a government minister or a public official, but we have decided not to explore "external pursuer" actions further in this paper.[4] We now consider whether there might be any other role for a government minister or some public official in class action procedure.

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[1]See para 2.21 above.

[2]See para 3.8 above.

[3]See para 2.22 above.

[4]See paras 3.20-3.23 above.

7.59 There are various situations in which intervention in a class action by a minister or official might be thought desirable in the public interest. One possible situation is that the representative party is no longer qualified to act as such, no suitable substitute can be found from among the class members, and the issues in the class action are of some public importance, perhaps because they are pressing legal questions which ought to be resolved by a decision of the court, or because of the sheer numbers of those who would be affected by the decision. In such a case it might be helpful if a minister or official were entitled to substitute himself for the representative pursuer. Again, he might be entitled to apply to appear as a party where he considered that to be necessary in the public interest: for example, where the representative party does not fulfil his duty to protect the interests of the other members of the class but they cannot take the necessary steps to have him replaced. A further possibility is that a minister or official might be authorised to appear in prescribed circumstances: for example, where there has been an aggregate assessment of damages and questions arise as to the distribution of the damages fund or the disposal of any unallocated residue.[1]

7.60 Various reasons why law officer (or other ministerial) intervention should be encouraged, or permitted, are discussed in the report of the Ontario Law Reform Commission.[2] At various stages in the class action procedure recommended by the Commission, the court would be required to make decisions affecting the public interest, for example when considering the criteria for certification.[3] Questions

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[1]See para 7.73 below.

[2]Report, pp 302-304.

[3]"For example, at certification a judge will be required to determine, as a precondition to the maintenance of a class action, whether the

involving the public interest could arise at other stages of the action.[1] The Commission therefore recommended that the Attorney-General should be permitted to apply to the court to intervene in the class action, in respect of any aspect of the action that raised a matter of public interest, at any stage of the proceedings.[2] This general right of intervention was to be supplemented by a discretion in the court to invite the Attorney-General to act as a representative plaintiff. In making these recommendations the Commission no doubt wished to recognise the unusual nature of a class action - a civil litigation between private parties which might raise issues of public interest - and to enable the court fully to take account of such issues with the advantage of any submissions made by the Attorney-General. It appears that no enacted class action legislation[3] makes such detailed

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representative plaintiff will fairly and adequately protect the interests of the class, whether a class action is superior to other available methods of dealing with the dispute in question, and whether the costs to the parties, the courts, and the public outweigh the benefits of the class action. The 'superiority' test would require the court to compare the class action with other available means of dealing with the dispute. Under the 'cost-benefit' test, such matters as the effect of a particular class action upon the workload of the courts or upon the substantive law of the community, or the desirability of a particular class action going forward where compensation of class members does not appear possible, also may be in issue." (OLRC Report, p 302.) The "cost-benefit" test was not adopted in the Ontario legislation: see para 7.20 above, final footnote.

[1]"For example, the disposition of any residue of damages assessed against the defendant, and the propriety of a 'cy-près' distribution or an order that the residue be returned to the defendant or forfeited to the Crown." (OLRC Report, p 302.)

[2]He would receive notice of every class action commenced and the court would be able, on its own initiative, to invite him to make submissions on issues of public interest.

[3]In their May 1977 Report the South Australian Law Reform Committee considered that the Attorney-General should be able to intervene in connection with the distribution of an award of damages to the class (draft Bill, cl 10(6)). The US Uniform Law Commission's model legislation allows the court to invite the Attorney-General "to participate with respect to the adequacy of class representation" (cl 9(a)(4)) but comments that this provision does not limit the power of the Attorney-General to participate in litigation

provisions as the Ontario Law Reform Commission proposed. The Ontario Attorney-General's Advisory Committee recommended that there should be no special role for the Attorney-General in the enacted Ontario legislation, and that recommendation was accepted.

7.61 The arguments against ministerial or official intervention include the following. A representative pursuer, like any other pursuer, should be entitled to conduct the litigation in whatever way he thinks fit without interference by a minister or official. Such intervention might protract or unduly complicate the litigation. The Crown, any government department or agency, or any public official who was entitled to appear might have an interest in the subject-matter or conduct of the proceedings which conflicted with that of the class members.

7.62 On one view, it might be helpful to include in a class action scheme a provision entitling a law officer, government minister or public official to appear with the leave of the court. We doubt, however, whether it would be appropriate for a minister or official to be specifically entitled to take over a class action from the representative pursuer, or to appear at particular stages in the action, such as certification or the distribution of aggregate damages. We are inclined to regard class actions as essentially private litigation. We believe that if in highly exceptional circumstances it appeared to the court that the Crown might consider it appropriate to appear in the public interest, the court would consider itself entitled to intimate the proceedings to the Lord Advocate and invite him to appear.

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under other applicable statutory provisions.

7.63 We therefore invite comment on our provisional view that

19. There should be no provision for the appearance in a class action of the Lord Advocate, any government minister or any public official.

(7) Aggregate monetary awards

7.64 We now discuss an issue of importance in relation to class actions for the payment of money by the defenders. Such actions include not only actions for damages, such as damages for breach of contract or for delict, but many other actions where the remedy sought is the payment of money, such as actions for payment of sums due under a contract, or actions founded on unjustified enrichment. The Ontario Law Reform Commission uses the convenient expression "class actions seeking monetary relief".[1] In such actions the question of liability - that is, the question whether the defenders are in breach of the legal obligation founded on by the class members - will normally be a question common to all the members and thus will be decided as a common question. The next question for the court will be how much is due to the class members in respect of the defenders' breach of their obligation to the class.

7.65 The important issue for discussion is whether there are any circumstances in which this question should also be decided as a common question, without any assessment by the court of the amount due to each member of the class. Thus, decree would be pronounced for the total amount to which the class members are entitled, and that sum would then be distributed by means of procedures which could be informally conducted and to which the defenders need not be parties. This technique, which is known as "aggregate assessment", is more

[1]OLRC Report, p 520.

likely to be useful in a class action procedure with an opt-out scheme than in one with an opt-in scheme. With an opt-in scheme the class members are identified and it should generally be possible for each to quantify his or her own claim and to be given a separate award. An aggregate assessment may be appropriate in, for example, a consumer claim[1] where the defenders have overcharged their customers for services over a specified period and are sued under an opt-out scheme: the court may be able to calculate the total amount which the defenders should repay to their customers, but it will not be able to quantify how much should be paid to each, since the size of the class and the identity of its members (other than the representative pursuer) are unknown.[2]

7.66 The technique of aggregate assessment raises two questions. The first is a question of principle: would it be fair to the defenders to proceed in this way? The second is a question of practicability: how should the award be assessed by the court and distributed to the members of the class? These are serious issues, since some might argue that it would not be worthwhile to introduce a class action procedure that did not make some provision for aggregate assessment. Again, the availability of aggregate assessment would be relevant to a decision whether class action procedure would be the preferable way of resolving a particular dispute.

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[1]See para 2.5 above.

[2]There have been, however, remarkable cases in the USA where individual awards have been made to a large number of class members on the basis of the defendants' computerised records, *eg Roper v Consurve Inc* 578 F 2d 1106 (5th Cir 1978), *cit* OLRC Report, p 541, an action by credit card holders against a bank where the identity of the 90,000 class members and the amount of any overcharges against their accounts were thus determined.

7.67 In the following paragraphs we therefore consider, first, whether aggregate assessment is acceptable in principle. If it is, should the legislation impose a requirement, or merely confer a discretion, on the court to employ the technique in cases with prescribed features? In any event, if there is provision for aggregate assessment, the court may have to decide whether a particular class action is suitable for that technique. If the court so decides, and liability is established, the court will have to determine its aggregate award. We shall discuss how the court might undertake these tasks, and how the aggregate award might be distributed.[1]

(a) The principle of aggregate assessment

7.68 Differing views on the principle of aggregate assessment are discernible in the United States, where Federal Rule 23 says nothing about it and the attitude of the courts has moved from initial rejection of aggregate assessment to a more receptive approach. In some cases[2] the courts have been unhappy about the degree of approximation which this method of assessment would involve. In other cases the courts have been more receptive to the use of "common proof", that is, evidence applicable to all the class members instead of evidence about each claim, where proof of each claim would involve unmanageable difficulties for the class members and the courts. In an English representative action, *EMI Records Ltd v Riley*,[3] the court was prepared to make an aggregate assessment of damages.

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[1]In the following paragraphs we draw, in particular, on the OLRC Report, chap 14.

[2]Discussed in OLRC Report, pp 528-537.

[3][1981] 1 WLR 923, [1981] 2 All ER 838. For the facts see para 5.11(ii) above.

7.69 Some of the opposition to aggregate assessment may stem from a reluctance to depart from the traditional view that it is for the claimant to establish the amount of his loss. The counter-argument is that "mass wrongs" may be difficult for courts and claimants to handle by traditional methods and that other methods must be evolved in order to provide an appropriate remedy. Such methods, while apparently unconventional, may be most suitable for coping with the unusual features of mass wrongs and class actions. The Ontario Law Reform Commission argues that the question should be whether the evidence submitted in support of an aggregate assessment is reliable:

> "The fundamental question that must be answered concerns the reliability of aggregate assessment as a means of determining the defendant's monetary liability. Is reliable common evidence ever available that might permit a fair determination of the amounts owed by the defendant without individual evidence from the class members? If not, then, aggregate assessment would obviously be improper in all cases. If such common evidence is available in at least some cases, it would appear useful, as a means of reducing the burdens that mass litigation places upon courts and parties, to permit aggregate assessment of monetary relief. The key issue is the type of evidence that should be required before a court makes an aggregate assessment."[1]

We agree with this view. We consider that there can be no objection to aggregate assessment in principle if the evidence tendered in a particular case is reliable. Since the reliability of the evidence adduced in each case will have to be weighed by the court, we consider that the court should be entitled, but not bound, to make an aggregate award. We now consider the degree of reliability which should be required of the evidence.

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[1]OLRC Report, p 549.

(b) The assessment of the aggregate award

7.70 When discussing the quality of the evidence which should be required as the basis of an aggregate assessment it seems important to notice that there is no general rule that a court when making a monetary award must attain scientific or mathematical certainty. It is a commonplace that an award of damages, which is intended to compensate the pursuer for his loss, cannot be assessed by mathematical calculation. It is also true that it is no reason for refusing an award of damages that it is difficult to estimate the injury or loss suffered, or to assess the damages properly payable with any certainty or accuracy.[1] The matter is expressed in this way by the United States Supreme Court:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such a case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."[2]

7.71 We would suggest that these are the standards which should be applied in the assessment of aggregate awards. The Ontario Law Reform Commission recommended that aggregate assessment should be permissible where "the total amount of the defendant's liability ... can be assessed without proof by the individual members of the class *with the same degree of accuracy as in an ordinary action*".[3] The Ontario Act, however, imposes a less stringent test of "reasonableness",

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[1]Cases cited in D M Walker, *Civil Remedies* (1974), pp 394-395, 398-399.

[2]*Story Parchment Co v Patterson Parchment Paper Co* 282 US 555 (1931) at p 563, *cit* OLRC Report, p 554.

[3]OLRC Report, draft Bill, clause 22(c) (emphasis supplied).

allowing aggregate assessment where, among other things, the aggregate amount of the defendant's liability "*can reasonably be determined* without proof by individual class members".[1] The Quebec Code of Civil Procedure allows "collective recovery if the evidence produced enables the establishment *with sufficient accuracy* of the total amount of the claim of the members" of the class.[2] The Australian Federal Court may not make an aggregate award "unless *a reasonably accurate assessment* can be made of the total amount to which group members will be entitled".[3] We think that a test of reasonableness might be appropriate in any Scottish class action procedure. In any event the test selected should not, we think, emphasise accuracy but should encourage the court to have regard both to the standard applied in the assessment of comparable awards in ordinary litigation and to any modification of these standards which may be necessarily imposed by the realities of the particular class litigation. Justice may require an award, even one which may be reached "by the exercise of a sound imagination and the practice of the broad axe"[4] and may err on the side of parsimony, rather than acquiescence in the purist's insistence that since accuracy cannot be achieved, no award should be made at all.

7.72 The remaining question is whether the court should be obliged, or should have a discretion, to make an aggregate award. The Ontario

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[1]Ontario Act, s 24(1)(c) (emphasis supplied). The Ontario Attorney-General's Advisory Committee does not explain why the draft Bill was not followed.

[2]Quebec Code of Civil Procedure, art 1031 (emphasis supplied): "sufficient accuracy" invites the question, sufficient for what?

[3]Australian Act, s 33Z(1)(f), (3) (emphasis supplied).

[4]*Watson, Laidlaw & Co v Pott, Cassels & Williamson* 1914 SC (HL) 18 *per* Lord Shaw of Dunfermline at p 29.

Law Reform Commission's draft Bill requires the court to make an award in specified circumstances,[1] but the Ontario Act only confers on the court a discretion to do so. The circumstances specified in the draft Bill are that

> "*(a)* monetary relief is claimed on behalf of the members of the class;
>
> *(b)* no questions of fact or law other than the assessment of monetary relief remain to be determined in order to establish the liability of the defendant to some or all members of the class; and
>
> *(c)* the total amount of the defendant's liability, or part thereof, to some or all of the members of the class can be assessed without proof by the individual members of the class with the same degree of accuracy as in an ordinary action."[2]

Our provisional view is that some flexibility is desirable when an entirely new procedural scheme is introduced, and that it would therefore be preferable to confer on the court a discretion to make an aggregate award.

(c) The distribution of aggregate awards

7.73 Where an aggregate award is made, there are various means by which it may be distributed among the class members. The court could be empowered to order either that the award should be shared on a specified basis[3] or that individual claims should be made.[4] It may not

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[1]OLRC draft Bill, clause 22.

[2]We have already noticed para *(c)*: see para 7.21 above.

[3]As in Ontario Act, s 24(2). Subsection (3) requires the courts to consider "whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members".

[4]The Ontario Act's provisions are helpfully detailed with regard to the procedures for determining claims and the time limits for making claims (s

be suitable or practicable for payments to be made to individual class members directly by the defenders. The court might be given power to set up a fund consisting of the money to be distributed, with statutory provisions setting out the matters the court orders should cover.[1] In particular there would have to be provision for what was to be done with any uncollected residue left in the fund. One possibility would be for any residue to be paid to a fund which might be set up for the financial assistance of class action litigants. We think that the fairest arrangement would be that any residue should simply be repaid to the defenders.[2]

7.74 We accordingly invite responses to the following questions.

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

(a) an opt-in scheme; or

(b) an opt-out scheme?

(2) If so, should the court

(a) be obliged to do so; or

(b) have a discretion to do so,

if certain conditions are satisfied?

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

(a) reasonably; or

(b) with reasonable accuracy; or

24(4) to (9)).

[1]See Australian Federal Act, s 33ZA (constitution etc of fund).

[2]See Australian Federal Act, s 33ZA(5): "On application by the respondent in the representative proceeding ... the court may make such orders as are just for the payment from the fund to the respondent of the money remaining in the fund."

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

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

(8) The binding effect of the judgment

7.75 One of the distinctive features of a class action is that it is taken forward on behalf of all the members of the class who have opted in (or who have not opted out) irrespective of whether they actively participate in the litigation. The court's judgment on the common questions binds all the members of the class.[1] If any of them brings a further action against the defenders in regard to the same subject-matter and raising the same questions, the court will dismiss the action on a plea by the defenders of *res judicata*, that is, that the action is excluded by the judgment in the class action. When a plea of *res judicata* is taken in ordinary civil litigation, there is sometimes room for argument as to what was the interest of the parties in the prior action and as to what was then litigated and decided. While the court resolves such questions by having regard to the reality of the matter, it seems desirable that measures should be taken to prevent them from arising in the aftermath of a class action. We therefore consider that a court interlocutor, or order, which gives effect to a judgment on the common questions in a class action should be expressed in a form which identifies the parties and the questions which were decided. There should be no difficulty in identifying the class members under an opt-in procedure. Under an opt-out

[1] "The judgment enures for the benefit of the members of the class and binds them": Law Reform Committee of South Australia, *Report Relating to Class Actions* (1977), p 7. See also Quebec Code, art 1027; Ontario Act, s 27; Australian Act, s 33ZB.

procedure, the order should identify the class it is intended to affect. Under either procedure, the common questions may have been already defined in the order certifying the action as a class action.[1] If these matters are specified in the interlocutor, there should be no doubt as to the questions decided or the persons bound by the decision. We therefore propose that

> **22. An order giving effect to the court's judgment on any question common to the class should**
>
> **(a) name (under an opt-in scheme) or describe (under an opt-out scheme) the members of the class who are bound by the judgment; and**
>
> **(b) define the question decided.**

7.76 We have now discussed the principal features of a possible Scottish class action scheme. We now consider a number of questions of jurisdiction and procedure.

(9) Jurisdiction: in which courts should a class action procedure be available?

7.77 Many kinds of civil action may be brought either in the Court of Session or in the sheriff court, but some matters are reserved exclusively to one court or the other. Two questions should now be discussed. First, should class actions be reserved exclusively to the Court of Session? Secondly, would any difficulty be presented in either court by "the value rule", that is, the statutory rule which reserves to the sheriff court "causes not exceeding £1,500 in value exclusive of interest and expenses [which are] competent in the sheriff court"?[2]

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[1] See para 7.16 above; Proposition 7.

[2] Sheriff Courts (Scotland) Act 1907, s 7, as amended.

7.78 A discussion of the first question requires a consideration of the qualities of the Court of Session. It appears to be generally true that when actions which could competently be brought either in the Court of Session or in the sheriff court are expected to be lengthy, complex or difficult, parties generally prefer to litigate in the Court of Session.

> "Since the Court of Session has exclusive jurisdiction in only a very limited range of cases, the fact that people bring ordinary actions there suggests that they perceive that the Court of Session has particular qualities which they value and which do not show up simply in the cost of the service. That in turn provokes one to consider precisely what these qualities are. For instance, the optional procedure in the Court of Session has made for the speedy disposal of reparation actions in that court and this has undoubtedly led to the raising of many actions there. But one suspects that some at least of those who raise actions there do so because they consider that they will be handled better and that the ultimate decision will be better. This will be particularly important in cases where large sums of money are at stake. Understandably enough perhaps, lawyers do not always feel comfortable discussing and comparing in public the respective roles of the Court of Session and the sheriff courts. Yet the topic is important, because the system of Scots law cannot survive unless it has a strong supreme court in which new issues can be discussed and guidance given to the profession. A clear and authoritative precedent from the Court of Session may avoid many litigations in the sheriff courts."[1]

7.79 It may be expected, accordingly, that if a class action procedure were introduced in the Court of Session only, or first of all in the Court of Session and only later in the sheriff court, the novel issues of practice and procedure which this new type of litigation presented would be discussed, and guidance given, in the earliest cases brought under the new procedure. They would be handled by a comparatively

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[1]Lord Rodger of Earlsferry, QC, "A civil justice system in motion" in *The Costs of Justice* ed H L MacQueen (David Hume Institute, 1994) 9 at p 12.

small body of judges and advocates[1] who would acquire expertise in dealing with class actions more readily than their counterparts in the sheriff courts, in many of which such actions might seldom be brought.

7.80 Another matter which might have a bearing on the first question would be an estimate of the number of class actions which would be likely to be brought. That, however, cannot be predicted. Much would depend on the nature of the procedure, the arrangements for funding and the levels of the professional fees of legal advisers and of the various fees payable to the court during the progress of the action. It is thus impossible to say whether the number of class actions brought would be sufficient to justify the nomination of judges to hear them, as in applications for judicial review.[2]

7.81 We would suggest that any primary legislation introducing class action procedure might provide that a class action may be raised in the Court of Session or the sheriff court, if the claim is of a kind which may be competently brought in that particular court.[3] It might further provide, however, that class actions may be brought in the sheriff court only when an order to that effect is made by statutory instrument.[4] An order might be made if experience of the procedure

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[1]The term "advocates" includes here solicitors who have been granted extended rights of audience before the Court of Session.

[2]RC 1965, r 260B(6), RC 1994, r 58.5. On the other hand the nomination of judges might be justified by the distinctive nature of the procedure.

[3]Thus a class application for judicial review could only be brought in the Court of Session.

[4]The order might be made by the Lord Advocate, in view of his ministerial responsibility for the general oversight of civil jurisdiction and procedure: HC Deb vol 848, Written Answers, cols *455-457* (Prime Minister's Statement on Scots Law (Ministerial Functions), 21 December 1972, printed in 1973 SLT (News) 11-12).

in the Court of Session suggested that it might be extended to the sheriff court. There might also be a provision for the remit of class actions from one court to the other, comparable to the provisions for the remit of sheriff court ordinary causes to the Court of Session[1] and, perhaps, for the remit from the Court of Session to the sheriff court of actions which could competently have been brought in that court.[2] It might also be desirable to have a further provision empowering the Court of Session to order a class action to be remitted from the sheriff court to that Court.[3]

7.82 We now consider "the value rule" which reserves to the sheriff court "causes not exceeding £1,500 in value exclusive of interest and expenses [which are] competent in the sheriff court".[4] Such actions are generally brought in the sheriff court as summary causes, to which special procedural rules apply. Summary causes which are actions for the payment of money not exceeding £750 in amount (exclusive of interest and expenses) are brought as small claims, to which further special rules apply.[5]

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[1]Sheriff Courts (Scotland) Act 1971, s 37(1)(b), as amended: the sheriff, on the motion of any party to the action, may remit an ordinary action to the Court of Session if he is of the opinion that its importance or difficulty make a remit appropriate.

[2]Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 14.

[3]Cf Presumption of Death (Scotland) Act 1977, s 1(6).

[4]Sheriff Courts (Scotland) Act 1907, s 7, as amended.

[5]Actions in which a sum not exceeding £750 (exclusive of interest and expenses) is sued for as an alternative to an order *ad factum praestandum* (to enforce the performance of an act other than the payment of money) or for the recovery of possession of moveable property are also brought as small claims. See Sheriff Courts (Scotland) Act 1971, ss 35-36B; Summary Cause Rules 1976 (SI 1976, No 476) as amended; Small Claim Rules 1988 (SI 1988, No 1976) as amended; Small Claims (Scotland) Order 1988 (SI 1988, No 1999).

7.83 We consider that the value rule would not cause any special difficulty. There is authority for the view that the "value" of a cause is not necessarily the sum sued for, where something of greater value is at stake.[1] Thus we would not expect the court to determine the "value" of a class action by the apparent value of the remedy claimed by the representative pursuer for himself or herself alone. The court would, we think, determine the true subject of the cause and would generally conclude that its "value" exceeded £1,500. If, for example, the representative pursuer brought an action for payment of £15, the £15 being a charge levied by the defenders on members of the public, and the action raised the general question whether the defenders were entitled to exact that charge, that would probably be regarded as a larger question than their liability to the representative pursuer alone.[2] On the other hand, it may be thought that in order to avoid any potential difficulty the value rule should not be applicable in class actions.

7.84 We invite views on the following questions.

23. Should class action procedure be introduced

(a) in the Court of Session only;

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

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

24. Should there be provisions for the remit of class actions

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

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[1]Cases cited in Macphail (1988), paras 2-29 to 2-32.

[2]*Aitchison v McDonald* 1911 SC 174 *per* L P Dunedin at p 176.

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

(ii) **by order of the Court of Session;**

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

25. Should the value rule apply to class actions?

(10) Statutory limitation periods

7.85 In Scotland, as in many other jurisdictions, there are statutory rules as to the limitation of actions, whereby after a stated period of time certain rights are unenforceable. The object of such rules is to prevent actions being raised after the lapse of what Parliament regards as a reasonable time. There is, for example, a general rule which requires a person who has been injured in an accident to raise an action of damages for his injuries within three years after the date of the accident.[2] As we have already noted,[3] most class action legislation and proposals do not contain provisions that deal expressly with limitation periods. We agree, however, with the views of the Law Reform Committee of South Australia:

> "Class actions require some modification of the rules regarding limitation of actions. The ordinary 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."[4]

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[1]See para 7.81 above, third footnote.

[2]Prescription and Limitation (Scotland) Act 1973, s 17(2). The rule is subject to a number of important qualifications.

[3]Para 6.75 above.

[4]*Report Relating to Class Actions* (36th Report, Adelaide, 1977), p 10.

7.86 We therefore consider that any class action legislation enacted for Scotland should contain rules as to the limitation of actions. We propose that any limitation period applicable to a class action should be interrupted upon the commencement of the action, as far as the representative pursuer is concerned. It would be interrupted as against any other class member from the same date, under an opt-out scheme,[1] or from the date when he or she opted in, under an opt-in scheme. The limitation period would remain interrupted against the representative pursuer and against any other class member so long as he or she remained a member of the class and the action remained in dependence. Thus, the period would resume running when the class member opted out (under an opt-out scheme, or under an opt-in scheme which allowed opting out after opting in); [or when the action was abandoned or settled, either generally or as far as his or her claim was concerned] or when the action was dismissed[2].

7.87 We therefore invite views on the following proposal.

26. Any limitation period applicable to a class action should be interrupted for the members of the class

(a) under an opt-out scheme -

(i) from the commencement of the action; or

(ii) from the date of certification, if that takes place after the commencement of the action;

(b) under an opt-in scheme -

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[1]Or from the date of certification, if the issue of certification is determined after the commencement of the action.

[2]*Ie* brought to an end without a final judgment on the merits of the claim. This proposal is derived from OLRC Report, pp 779-784, and Ontario Act, s 28.

(i) **from the commencement of the action as regards the representative pursuer;**

(ii) **from the date of opting in, as regards any other class member.**

27. The limitation period should resume running against any class member

(a) when he or she opts out; or

(b) when the action, or his or her claim, is abandoned or settled; or

(c) when the action, or his or her claim, is dismissed or proceeds to final judgment and either

(i) the time for appealing has expired or

(ii) any appeal has been finally determined.

(11) Certification on the application of the defenders

7.88 The Ontario legislation provides for "defendant's class proceedings":[1] a defendant to two or more proceedings may at any stage of the proceedings ask the court to certify the proceedings as a class proceeding and to appoint a representative plaintiff. We do not favour such a provision since we do not think that pursuers who have chosen to bring a competent form of action should be required by the court, on the application of the defenders, to adopt a different form of action. Where two or more actions have been raised against defenders in relation to the same subject-matter they are entitled to move the court to conjoin the actions. We doubt whether any further provision is necessary. Our provisional view is that

28. The court should not be entitled to certify as a class action, on the application of the defenders, two or more

[1]Ontario Act, s 3.

actions which have already been raised against them under the conventional rules of procedure.

(12) Appeals

7.89 We have already stated our view that a class action should proceed in the same way as a conventional action for the same remedy raised by a single pursuer, subject to such modifications as may be considered appropriate in class action procedure. Thus a class action for payment of money should take, as far as possible, the course of an ordinary action for payment, with an open and closed record and the same scope for commission and diligence, debate on preliminary pleas, amendment of pleadings and proof. It should be competent to reclaim (that is, appeal) against interlocutors, or orders, pronounced by the court in relation to such matters to the same extent as against similar interlocutors pronounced in an ordinary action brought under the existing rules.

7.90 It is necessary, however, to consider two questions. First, what interlocutors of a kind pronounced only in a class action should be appealable, and should they be appealable with or without leave? Secondly, if the representative pursuer fails to appeal, should it be competent for another class member to do so?

(a) Specific appeal provisions

7.91 On the first topic, we think it would be premature to identify in detail all the stages peculiar to class actions at which appeals might be taken: that would best be done once a provisional decision had been taken as to the particular features of the class action scheme selected for implementation. There are, however, four stages which it may be useful to discuss now: certification, decertification, the identification of the common questions, and monetary awards.

7.92 The stage of certification may be designed to occur before the commencement of the action or afterwards (as we have proposed)[1]. The disposal of an application for certification is obviously a matter of importance, whether it is granted or refused. The same may be said of an application for decertification. The Ontario legislation requires a defendant who wishes to appeal against a grant of certification to obtain the leave of the court to bring the appeal.[2] Such a requirement may be thought to be justifiable on the ground that the financial and other resources of the defenders in a class action are likely to be superior to those of the representative pursuer, or of the class as a whole, and that the defenders should be discouraged from delaying the progress of the action by appealing the grant of certification. We consider, however, that all decisions disposing of applications for certification or decertification are of sufficient importance to justify appeal without leave.

7.93 The common questions may have been identified in the interlocutor granting certification. It is possible, however, that in the course of the adjustment of the pleadings it may become apparent that the common questions could with advantage be restated, to reflect any refinement of the issues which has been achieved by adjustment. If so, it should be possible for the parties to apply to the court to restate the common questions after the closing of the record, in the interlocutor allowing proof or, where the questions may be resolved without proof, in the interlocutor allowing debate. Any interlocutor identifying the common issues seems to us to be clearly one of material importance against which an appeal should be competent without leave.

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[1]See para 7.15 and Proposition 6 above.

[2]Ontario Act, s 30(2). There is no leave requirement in the corresponding cl 37(1) of the OLRC draft Bill.

7.94 Further special appeal provisions would be necessary if the class action procedure selected for implementation made it competent for the court to make an aggregate monetary award to the class as a whole and to make rules for the distribution for the award among the class members. Such awards and orders, we think, should be appealable without leave, as should awards made by the court to individual class members.[1] They are comparable to judgments disposing of the subject-matter of the cause in ordinary actions, which are appealable without leave under the existing rules.

7.95 We therefore propose:

29. It should be competent to appeal without leave against an interlocutor

(a) disposing of an application for

(i) certification,

(ii) decertification;

(b) identifying the common questions;

(c) making an aggregate monetary award and ancillary orders for its distribution among the class members;

(d) making monetary awards to individual class members.

(b) Appeal by another class member

7.96 Any interlocutor pronounced binds each member of the class who has opted in (or who has not opted out).[2] If the representative pursuer fails to appeal, or intimates an appeal but afterwards

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[1]The Ontario Act, s 30, requires leave to appeal where the amount of the award is less than $3,000.

[2]See para 7.75 above.

abandons it, should another member of the class be entitled to appeal? Issues of principle and practice are involved. In principle, should another class member be entitled to appeal? In practice, by the time it was clear that the representative pursuer had failed to appeal, or had abandoned his appeal, the time for appealing would generally have expired, and there would have to be some provision for an extension of time.

7.97 It may be argued against allowing an appeal by another class member that it would permit further complexity in an action which is already likely to be complicated in any event. The representative pursuer may be expected to have taken legal advice before deciding not to appeal, or to abandon an appeal. It seems inappropriate to allow another class member to intervene and seek to reverse the considered decision of the representative: the other class member may not be aware of all the circumstances which lay behind the representative pursuer's decision. The proper course for the discontented class member is to persuade the representative pursuer to change his or her mind or, in the last resort, to seek to have him or her replaced.

7.98 The contrary view is that although the other class members have not participated actively in the litigation they are nevertheless parties to the action and each should have an independent right to appeal: the representative pursuer sues on their behalf, and thus should not have "exclusive ownership" of the right to conduct the litigation. This argument is perhaps stronger where the class action is brought under an opt-in scheme. The question should not be whether another class member should be entitled to appeal, but which would be the most suitable arrangements for enabling him or her to appeal after the appeal period has expired. In devising such arrangements the

overall considerations must be fairness to the interests of the class as a whole[1] and avoiding unfairness to the defenders in the form of unnecessary proceedings.

7.99 Our provisional view is that the arguments in favour of allowing another class member to appeal are stronger than the counter-arguments. If the appeal is one for which the representative pursuer would not require leave to appeal, we do not think that another member should require leave. In any event an application for leave might involve an undesirable investigation by the court into the reasons why the representative pursuer has not appealed and why the other class member wishes to do so, since the judge in exercising his discretion whether to grant leave would be required to assess the circumstances of the particular case.[2] We therefore propose that

> **30. If the representative pursuer does not appeal or abandons an appeal which he or she has intimated, it should be competent for another class member to exercise the same right of appeal within a prescribed period after the expiry of the time for appealing under the relevant rule.**

(13) The form of the implementing legislation

7.100 The options for a class action scheme which we have considered in this Part may be thought to be matters of procedural, rather than substantive, law. Procedure in the Court of Session and the sheriff court is generally regulated by Acts of Sederunt made by the Court of Session. The Acts of Sederunt may embody, with or without

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[1]The Quebec provision allows an appeal by another class member against the final judgment, with leave, "if the court is of the opinion that the interests of the members so requires" (Quebec Code, art 1042).

[2]See Macphail (1988), para 18-48.

amendment, rules submitted to the Court by the Court of Session Rules Council or the Sheriff Court Rules Council.[1] It would be advantageous if the rules for a Scottish class action procedure[2] were prescribed by Act of Sederunt since rules so made may be readily amended to take account of experience of their operation. A further advantage of this course is that all the rules would be found in a single piece of legislation. On the other hand an Act of Parliament would be required to introduce any new rules as to the limitation of actions and to confer on the courts any novel powers, such as power under an opt-out scheme to determine the rights of persons who are not parties before the court, or a power to make aggregate monetary awards. Our provisional view is that, as far as possible, any class action procedure should be regulated by Act of Sederunt.

31. As far as possible, any class action procedure should be regulated by Act of Sederunt rather than by Act of Parliament.

[1]Court of Session Act 1988, ss 5, 8; Sheriff Courts (Scotland) Act 1971, ss 32, 33.

[2]Or procedures, since separate sets of rules would probably be made for the Court of Session and the sheriff court.

PART 8: FUNDING ARRANGEMENTS FOR A SCOTTISH CLASS ACTION PROCEDURE

Introduction

8.1 Having discussed in Part 7 the possible features of a Scottish class action procedure, we now consider what arrangements might be made for the funding of class actions. We acknowledge that it may seem unsatisfactory to discuss this topic without examining the funding of litigation and legal services in general. That, however, would be clearly outside the terms of our reference.[1] Funding arrangements are of critical importance because very many people in Scotland cannot afford to bring an ordinary civil action, far less a class action which might be so lengthy and complex as to be particularly expensive. In our review of how civil litigation in Scotland is paid for we have already noted that the way an action would be financed has a bearing on the decision whether to bring it, and if it is brought, on decisions as to how to conduct it.[2] It is therefore important that people who would be entitled to obtain an effective remedy through a class action should not be constrained from bringing one by considerations of expense.

8.2 The nature of any funding arrangements would have to be related to the particular features of the type of class action procedure selected for introduction into the legal system. For example, a procedure with stringent criteria for certification and an opt-in scheme would be very different from one where there was no certification requirement and an opt-out scheme. Under the former, comparatively few litigations might be certified as class actions, and if so, the expense

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[1]See para (b) of our reference, quoted in para 1.1 above.

[2]See para 2.35 above.

of some form of public funding might be small: under the latter, many class actions might be raised, each with many class members, and the expense of such funding might be great.

8.3 There are also wider policy issues which may influence views on funding arrangements. Those who consider that the promotion of class actions is of some social importance - because, for example, it would afford "access to justice"[1] to the aggrieved or deter negligence on the part of potential defenders - might think it justifiable to select funding arrangements which would involve an increase in the amount of public funds allocated to civil legal aid. Others, while attaching some social importance to class litigation, might prefer that any arrangements for public funding should be financed within the existing civil legal aid budget, thus diverting public funds from the support of other forms of civil litigation. Others, again, might consider that public funds should not be involved at all, and might advocate the setting up of a fund which would assist litigants with their legal expenses at no cost to the taxpayer. The reader's responses to the questions and propositions we set out for consideration in this Part are therefore likely to be influenced by his or her views on the type of class action procedure which should be chosen for Scotland and on the degree of social importance he or she attaches to class litigation.

8.4 We begin by considering whether the general rule as to the incidence of expenses, that "expenses follow success", should be applicable in class actions. We provisionally conclude that it should.[2] On that basis we discuss three different ways of funding a class action. The first is by a private arrangement between the litigant and his

[1]See paras 4.47-4.49 above.

[2]See paras 8.6-8.17 below; Proposition 32.

lawyer for the payment of contingency fees. We reject this option.[1] The second is by what we shall call "third party funding", that is, funding by public resources in the form of legal aid; or by a special fund derived initially, or in part, from public resources (a contingency legal aid fund or a class action fund).[2] The third option is that class members should contribute towards the expenses of the representative pursuer.[3] We shall invite views on the second and third options.

8.5 For convenience we consider only a class action which determines questions common to the class members as a whole: we do not concern ourselves with expenses rules or funding arrangements relative to the resolution of issues special to individual class members after these common questions have been decided. In our discussion of a special fund we concentrate on actions for the payment of money since some part of the proceeds of successful class actions of that kind might be allocated to a fund.

A The general rule that expenses follow success

(1) The effect of the rule

8.6 As we have already explained in Part 2,[4] a party to an action is required to meet the various court and professional fees and disbursements incurred in the preparation and presentation of his case. If he is successful, the court may make an award of expenses in his favour which will entitle him to recover part of his expenses from the other side, but he will still have to pay his solicitor the difference

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[1] See paras 8.18-8.22 below.

[2] See paras 8.23-8.52 below.

[3] See paras 8.53-8.57 below.

[4] See paras 2.36-2.40 above.

between the amount of his solicitor's bill and the amount of the award. That is because the fees he pays to his own solicitor are determined on a "solicitor and client" basis which is more generous than the "party and party" basis on which the expenses awarded by the court are generally based.[1] We have also explained that the court, when exercising its discretion to award expenses, generally applies the rule that "expenses follow success", that is, that the cost of the litigation should fall on the loser, who is regarded as the party who has caused the litigation by pursuing a claim, or maintaining a defence, which the court has declined to sustain.

8.7 The following table shows what would would be the result of the application of the "expenses follow success" rule in a class action. The table assumes that there are no circumstances justifying a departure from the general rule and no special arrangements, such as legal aid or some agreement among the class members, for funding the representative pursuer. The table also ignores any special rules that might be introduced in relation to an opt-in or an opt-out scheme. Broadly, then, the effect of the "expenses follow success" rule on the incidence of expenses would be this:

[1]W G Semple, "Fees in speculative actions" (1994) 39 JLSS 57, points out that remuneration "on a party-and-party basis rather than on an agent-and-client basis can produce dramatically different results. For example, excluded from a party-and-party account are fees for any work carried out before the litigation commenced. This could be considerable. Also excluded are fees disallowed at taxation for work which an auditor might regard as not strictly recoverable from the other party, such as excessive consultations with the client or with counsel, or late amendment of pleadings, whether or not this was avoidable."

The Incidence of Expenses where Expenses follow Success

	Representative Pursuer	Other members of class	Defenders
W *Action succeeds* (Class wins)	1 *Entitlement*: to "party and party" expenses from defenders. *Liability*: for own solicitor's fees ("solicitor and client").	2 *Entitlement*: None. *Liability*: None.	3 *Entitlement*: None. *Liability*: for (a) own solicitor's fees ("solicitor and client") and (b) represent-ative pursuer's expenses ("party and party").
L *Action fails* (Class loses)	1 *Entitlement*: None. *Liability*: for (a) own solicitor's fees ("solicitor and client") and (b) defenders' expenses ("party and party").	2 *Entitlement*: None. *Liability*: None.	3 *Entitlement*: to "party and party" expenses from representative pursuer. *Liability*: for own solicitor's fees ("solicitor and client").

8.8 The three columns of the table are concerned with those whose interests must be considered in this Part: the representative pursuer; the other class members; and the defenders. As to *the representative pursuer*, the table illustrates the financial risks involved in raising an action. Box W1 of the table shows what would happen if he won the action on behalf of the class. He would be left with a part of his solicitor's bill to pay, with no prospect of recovery from the other members of the class on whose behalf he had exerted himself. Box L1 shows how, if he lost the action, his position would be even worse: he

would be liable not only for the total amount of his solicitor's bill but also for the defenders' expenses. Some may think that an element of financial risk is an appropriate means of deterring the raising of unmeritorious actions and of encouraging settlements.[1] Others may think that raising a class action should involve no financial risk at all, especially, perhaps, where the remedy sought would be otherwise unobtainable so that the defenders could not be called to account.

8.9 We consider that the degree of risk a representative pursuer would be required to undertake is unreasonably high. Indeed it is possible to envisage cases where any award of, for example, damages in his favour would be exceeded by the amount of his personal liability in expenses.[2] The risk might be reduced, however, by some means other than a modification of the "expenses follow success" rule: for example, by resorting to third-party funding, or by requiring the other class members to contribute to the representative pursuer's expenses, the two options we consider in later paragraphs. In any event it seems clear that the interests of *the other class members* are over-protected by the arrangements shown in the table: they are entitled to benefit from the action without assuming any financial responsibilities whatever. It would not be an unreasonable infringement of their interests to require them to make a contribution to the representative pursuer's expenses, at least in a procedure with an opt-in scheme.

[1]ALRC Report, para 256.

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

8.10 As to *the defenders*, their position corresponds to that of the representative pursuer: box L3 is mirrored by box W1, and box W3 by box L1. The particular risk borne by the defenders is that even if they win the action they may be unable to recover the expenses awarded in their favour because the representative pursuer has no funds. Their position might be safeguarded, however, by including in the criteria for certification a requirement that the representative pursuer should be able to meet any expenses awarded against him.[1] It might also be possible for the defenders' expenses to be met from some special fund. In any event it does not seem necessary to consider altering the general rule that expenses follow success in order to protect the interests of defenders.

8.11 We therefore doubt whether class actions are so very different from other actions that the "expenses follow success" rule should not be applied to them. We note that those jurisdictions with a rule corresponding to the "expenses follow success" rule have not abolished it when introducing a class action procedure.[2] We shall nevertheless consider a number of alternatives to the rule which have been examined in other jurisdictions: a "no expenses rule"; a "no expenses election"; a "discretionary no expenses rule"; and a "one-way expenses rule".

(2) Alternatives to the rule

8.12 *A "no expenses rule".* Under this rule each party, the representative pursuer and the defenders, would bear their own

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[1]Under the present law the court will not order a pursuer to find caution (security) for expenses unless he is an undischarged bankrupt or is a nominal pursuer, or special circumstances exist: Macphail (1988), paras 11-52 to 11-56.

[2]See above, paras 6.57 (Quebec), 6.79 (Ontario), 6.92 (Australian Federal Court).

expenses, regardless of the outcome of the action.[1] The advantages and disadvantages of such a rule are clear. Neither party would bear the risk of having to meet the other's expenses in the event of losing the action. It has been said that the rule would accordingly "provide greater access to the court for those potential claimants who would be discouraged from seeking redress because of the risk, however small, of losing the case".[2] On the other hand neither party would be able to recover expenses from the other in the event of success. A monetary award in favour of the representative pursuer might be exhausted by paying his expenses. Defenders would have to meet their own expenses. Unmeritorious cases might be brought against them because there was no prospect of the representative pursuer's having to pay their expenses. We consider that the advantages of a "no expenses rule" are outweighed by the disadvantages.[3]

8.13 *A "no expenses election".* A refinement of the "no expenses rule" is that it should operate at the option of the representative pursuer when the action is commenced. We adopt the Australian Law Reform Commission's explanation and assessment of such an arrangement:

> "The court could have a discretion to award costs
>
> - if the proceedings were struck out as frivolous, vexatious or an abuse of process
> - where money paid into court was unreasonably rejected
> - where the conduct of a party justified such an order.

[1]See the USA rule discussed in para 6.26 above.

[2]ALRC Report, para 266.

[3]The ALRC decided against the adoption of such a rule: Report, para 267.

> This regime would offer maximum flexibility to a principal applicant by allowing him or her to elect for a no costs rule for individually non-recoverable claims [that is, claims so small that the cost of recovery would be more than the amount recovered, if successful] but retain the existing rule for individually recoverable claims. However, the right to elect for a no costs rule could be seen as removing any disincentive to commencing unmeritorious or weak claims. Although the respondent would have no say on what costs rules should apply, once an election was made both parties would be treated equally. The majority of submissions dealing with this issue opposed it on the basis that it would allow a principal applicant to elect the most advantageous costs rule depending on the case and would be unfair to respondents."[1]

For these reasons we do not propose the adoption of such an arrangement.

8.14 *A "discretionary no expenses rule".* A further option, which has been called a "discretionary no costs rule",[2] involves the abolition of the present law and practice with regard to awards of expenses and its replacement by a regime under which the court would be required to award expenses after considering a number of specified factors. Thus, the general rule that expenses follow success would no longer exist. Rules might be made as to awards of expenses at particular stages of the litigation, such as certification, and as to the matters to be taken into account, such as whether the action was meritorious and the reasonableness of the conduct of the parties. We consider, however, that such a regime would make awards of expenses difficult to predict and thus would increase the difficulties not only of deciding whether to raise an action but also of conducting negotiations for settlement. In any event it would be extremely difficult to devise an acceptable set

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[1]ALRC Report, para 268.

[2]ALRC Report, para 269.

of rules. We share the views of Lord President Cooper as to the regulation of the exercise of judicial discretion in awarding expenses:

> "I gravely doubt whether all the conditions upon which that discretion should be exercised have ever been, or ever will be, successfully imprisoned within the framework of rigid and unalterable rules, and I do not think that it would be desirable that they should be."[1]

8.15 *A "one-way expenses rule".* The Law Reform Committee of South Australia proposed a rule that costs (expenses) might be awarded against the defendants (defenders) in a class action but not against the plaintiff (pursuer). The proposal was said to be justified by the considerations that the plaintiff must first succeed in his or her application for the case to proceed as a class action and that the defendants would in most cases be public authorities or large corporations which would not find the costs of litigation ruinous. The potential for injustice to defenders was balanced against the serious injustice now done to great numbers of people who suffered loss and had no effective remedy.[2]

8.16 We consider, however, that it would not be equitable to weight the rules against defenders in this way. The circumstances of the pursuers of class actions do not seem to us to be so special as to justify according to them the privilege of conducting litigation in the knowledge that they may be awarded expenses if they win but will not have expenses awarded against them if they lose. We agree with the Australian Law Reform Commission that the principle of a "heads I win, tails you lose" approach to expenses is unacceptable.[3] The

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[1] *Howitt v Alexander & Sons* 1948 SC 154 at p 157.

[2] SALRC Report, p 7-8.

[3] ALRC Report, para 264.

establishment of a fund from which the expenses of defenders might be paid, which was also suggested by the South Australian Law Reform Committee, might mitigate the element of unfairness to them, but would leave the pursuers in an extraordinarily privileged position. We accordingly do not adopt this proposal.

8.17 Our provisional conclusion is that

32. When awarding expenses in a class action the court should retain its discretion to apply the general rule that expenses follow success.

B Contingency fees

8.18 We now consider whether a class action might be funded by means of an agreement between the proposed representative pursuer and his legal advisers as to the payment of the latters' fees. In our survey of how civil litigation is paid for in Scotland we mentioned two kinds of agreement, a speculative fee agreement and a contingency fee agreement. Under a *speculative fee agreement* the client and his legal advisers agree that the latter will be paid only if the client is successful in the litigation. They may agree that in that event his legal advisers' fees will be increased by a figure not exceeding 100 per cent. In Scotland, such agreements are lawful.[1] A *contingency fee agreement* is "a contract for the provision of legal services in which the amount of the lawyer's fee is contingent in whole or in part upon the successful outcome of the case either through settlement or litigation. Usually such agreements involve rewarding lawyers with higher fees than they would normally receive if they win, in return for running the risk of

[1] See para 2.38 above. Instead of making such an agreement a solicitor undertaking a speculative action may charge his client on a solicitor-and-client basis, or may enter into a written fee-charging agreement with him: see W G Semple, "Fees in Speculative Actions" (1994) 39 JLSS 57, and "Written Fee-charging Agreements" (1993) 38 JLSS 395.

going without a fee if the case is lost".[1] The commonest form of agreement is that the lawyer stipulates for a share of the proceeds of the action: in an action for damages, his fee is generally a percentage of the amount recovered. In tort litigation in the United States the fees of the plaintiff's attorney are almost invariably fixed on a contingent basis.[2] In Scotland, however, contingency fee agreements are unlawful. Both speculative fee agreements and contingency fee agreements, if lawful, might mitigate the deterrent effect of the pursuer's liability to pay his legal advisers,[3] but they would not mitigate the risk of his being found liable in the defenders' expenses if he lost the case.

8.19 We now consider whether contingency fee agreements should be lawful between pursuers in class actions and their legal advisers. We begin by summarising the differing views on the question whether contingency fee agreements should be permitted, which has been much debated in recent years.[4]

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

[2]"If the plaintiff wins, his attorney will be paid, typically in proportion to the amount recovered, say one-third; if the plaintiff loses, his attorney will be paid nothing." (Fleming (1988), p 195.) The US Federal Rules, however, do not allow a contingent fee in class actions to be calculated by way of a percentage of recovery (ALRC Report, para 296).

[3]It is too early to assess the effect of the Scottish provisions for speculative fee agreements which came into force in August 1992.

[4]A A Paterson, "Paying for legal services" (1977) 22 JLSS 236; R C A White, "Contingent fees: a supplement to legal aid?" 1978 MLR 286; Hughes Report (1980), paras 8.83-8.86; D L Carey Miller, "A case for considering the contingent fee" (1987) 32 JLSS 461; Jacob (1987) pp 278-280; Lord Chancellor's Civil Justice Review Report (1988), paras 384-389; A A Paterson, "Contingent fees and their rivals" 1989 SLT (News) 81; SHHD Consultation Paper on the Legal Profession in Scotland, March 1989, paras 7.13-7.15; SHHD paper "The Scottish Legal Profession: The Way Forward" October 1989.

8.20 The perceived advantages of contingency fees include the following.

(a) Poor clients who are unable to pay lawyers' fees can bring their cases to court.[1]

(b) Lawyers accepting cases on this basis will have a stake in winning the case[2] and, therefore, will be more committed and more diligent in their preparation and presentation.[3]

(c) Lawyers may benefit by a simplification of the administrative procedures by which they are paid and by an increase in their earnings.[4]

8.21 On the other hand, the following are the perceived disadvantages of contingency fees.

(a) It is said, on the basis of experience in America, that a contingency fee system leads to excessive awards and an explosion in litigation.[5]

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[1]Paterson, 1989 SLT (News) 81. He comments that "one shot" litigants, who engage in litigation very rarely, are often in a poor position to bear the financial risks of going to court. The American contingent fee system allows these risks to be shifted to the lawyers, who can spread the risk over many cases.

[2]Thus contingent fees can be viewed as "productivity bonuses" or as an unusual form of venture capitalism (Paterson, above, at p 82).

[3]Hughes Report, p 112.

[4]Hughes Report, p 113.

[5]Paterson, above, at p 82. He comments (writing in 1989) that it is not established that there has been a substantial increase in litigation; even if there has been it may not be undesirable and contingent fees may not be responsible for it. "The issue would appear to be whether the additional cost factor is a worthwhile price to pay for improved access to the courts by damages claimants." (Carey Miller (1987) at p 462.)

aid fund"; and (3) a class action fund. We do not discuss loans for prospective litigants,[1] legal expenses insurance,[2] group legal services[3] or public interest litigation.[4]

(1) Legal aid

8.24 Legal aid is made available from public funds under the Legal Aid (Scotland) Act 1986. The term "legal aid" covers both "legal advice and assistance" before an action is brought and "civil legal aid" which is available to meet the expenses of the action. We concentrate here on civil legal aid and consider changes which would require primary legislation. Reforms which could be introduced in other ways have been examined by our Working Party.[5]

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[1]Discussed in chap 3 of The Scottish Office Home and Health Department Consultation Paper on Eligibility for Civil Legal Aid in Scotland, issued in July 1991 ("SOHHD Legal Aid Paper (1991)"). This paper sets out the Government's provisional thinking about non-matrimonial civil legal aid in Scotland (Introduction, para 5). The Government's concluded views on the matters discussed in this paper are awaited.

[2]See Paterson (1979), p 239 (discussion of prepaid legal services); Hughes Report (1980) paras 8.88, 8.89; SOHHD Legal Aid Paper (1991), chap 4. Such insurance might be financed by the State as an alternative to civil legal aid.

[3]*Eg* legal services provided by a motoring organisation or a trade union. A motoring organisation might finance an action raised by a member or members in connection with a defective model of a car or a motorway crash in which many members were injured: see Paterson (1979) p 238; Hughes Report (1980), para 8.90; SOHHD Legal Aid Paper (1991), chap 3, paras 16-19. "It is clear that a considerable proportion of personal injury cases in the United Kingdom are funded by trade unions and the structure of the legal aid schemes contributes to this, for applicants can be refused legal aid if they have access to other facilities or sources of financial assistance." (Paterson (1979), p 239.) See also A A Paterson and others, *Funding Issues in Personal Injury Litigation* (forthcoming).

[4]See Hughes Report (1980), para 8.91. An action might be brought by the persons aggrieved or by some person or body on their behalf.

[5]See SLC Working Party Report, para 1.3. Their comments on legal aid are summarised in Part 5, section II, pp 106-108.

8.25 The arrangements for the provision of civil legal aid are summarised in Annexe E to our Working Party's report. For present purposes the following are the relevant features of the statutory arrangements.

- Legal aid will not be available if the applicant fails to meet the financial conditions,[1] the tests of the merits of his proposed action[2] and the requirement of the absence of other sources of funding.[3] The financial conditions are such that in multi-party litigation it is unlikely that all the pursuers would be legally aided.
- Legal aid is not available for certain types of proceedings, in particular "small claims" where the sum sued for does not exceed £750.[4]
- Legal aid is available only to a private individual and not, for example, to a small business operating as a private company or partnership.[5]
- For a successful assisted party (a person receiving legal aid) legal aid is in many situations a loan, not a grant: should he be unable to recover the amount of his legal fees from the other

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[1]See SLC Working Party Report, Annexe E. The percentage of the population presently covered by legal aid is not known. Paterson says (unpublished paper on "Financing Legal Services", commissioned by the Scottish Home and Health Department in 1987) that in England in 1988 the figure was near 50%.

[2]See SLC Working Party Report, Annexe E, paras 10, 11, 19-21: the probable cause ("*probabilis causa litigandi*") and reasonableness tests.

[3]See SLC Working Party Report, Annexe E, paras 17, 18: *eg* funding supplied by a trade union to its members.

[4]Small Claims (Scotland) Order 1988 (SI 1988 No 1999), art 2. The cases not covered by legal aid ("excepted proceedings") are listed in the Legal Aid (Scotland) Act 1986, Sched 2, Part II.

[5]See the definition of "person" in the Legal Aid (Scotland) Act 1986, s 41.

side it will be deducted from the proceeds of the litigation, through the mechanism of the statutory charge.[1]

8.26 Could the present statutory legal aid system be reformed to deal with the financing of Scottish class actions?[2] A number of matters would require consideration. *First*, a class action is brought on a different basis from any of the conventional forms of multi-party litigation. In a class action, the other class members leave the representative pursuer to take the action forward and finance it himself.[3] In conventional multi-party litigation a typical arrangement is that a large number of the parties affected all raise separately financed actions one of which is selected as a lead case to be taken forward in order to determine the issues common to all the cases.[4] *Secondly*, different considerations may arise depending on whether the class action procedure adopted incorporates an opt-out or an opt-in scheme. Under the latter, each of the members opting in has actively expressed a desire to be a member of the class; all the members of the class are identifiable and the total number in the class is likely to be

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[1]A A Paterson, "Legal aid at the crossroads" 1991 Civil Justice Quarterly 124 at 126 ("Paterson (1991)"). "[E]very legally aided plaintiff should realise that if he succeeds in recovering more by way of damages, costs and interest than it has cost to recover them - if the money actually paid by the defendant in respect of damages, cost and interest exceeds his own costs, which after all is what he expected - he will be in no better position than an unassisted litigant." (Sir John Donaldson MR in *Davies v Eli Lilly & Co* [1987] 1 WLR 1136, [1987] 3 All ER 94, at pp 1140-1141, 98. See also J Levin, "Opren: litigation lessons" 1988 Legal Action 5; SLC Working Party Report, Annexe E, para 23.)

[2]We assume here that any necessary public funding could be provided.

[3]See paras 8.7-8.9 above. We assume the absence of any special agreement among the class members, *eg* that they should contribute to the representative pursuer's expenses, or that these should be met from the proceeds of the action in the event of success.

[4]See paras 4.16-4.19 above; SLC Working Party Report, para 4.11.

smaller, and more manageable, than under an opt-out scheme. *Thirdly*, the number of people in a class is potentially very much larger than the number of people who would be prepared to take the trouble to bring conventional actions for the same remedy with legal aid.[1] Partly for this reason the legal expenses in a class action may be very great, particularly if the class action is lost and the successful defenders seek to recover their expenses from the representative pursuer. If, however, many separate actions were raised and pursued, the total amount of the legal expenses might be even greater.[2] *Fourthly*, it might be thought necessary to abolish the rule that legal aid is not available for claims under £750. The rule could produce unacceptable and capricious anomalies where a single individual could not obtain legal aid to pursue a small claim but a large number of people could obtain legal aid to pursue virtually identical claims in a class action.[3] *Fifthly*,

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[1]See in this connection the sudden disaster (*eg* Lockerbie and Piper Alpha disasters) and creeping disaster (*eg* tranquillisers and other drugs) cases discussed in the Dundee University Research Report, chap 3. The OLRC Report, pp 90-100, cites four cases to illustrate the deficiencies in the then existing procedures available in Ontario: the Missisauga train derailment (escape of toxic gases; about 250,000 people evacuated from Missisauga for six days); the installation of urea formaldehyde foam insulation (health hazards in approximately 100,000 homes); the collapse of the Re-mor Investment Management Corporation (about 300 investors with losses of an estimated $6m); and the faulty Firenza cars manufactured and sold by General Motors of Canada. (See para 2.7 above.)

[2]In the litigation in respect of Benzodiazepine and other sedative drugs some 98% of the prospective litigants were legally aided. Legal aid was later withdrawn, apparently because medical reports did not sufficiently establish their case (J Winter, "Acting for classes: strategies for representing group interests" 1993 Northern Ireland Law Quarterly 276). Some 13,000 legal aid certificates were granted. An interim estimate of the cost to the Legal Aid Fund was as follows. The average cost per certificate was £1,750 where no proceedings were issued, and £3,500 where proceedings were served. There were also "generic costs in the region of £3 million to £4 million". (Lord Mackay of Clashfern, LC, HL Deb vol 555, col 603, 24 May 1994.) The Legal Aid Board has recommended reforms ("Issues Arising for the Legal Aid Board and the Lord Chancellor's Department from Multi-Party Actions", Legal Aid Board, June 1994).

[3]See paras 7.82-7.83 above.

it may be considered that it is in the public interest that certain claims should be pursued by class litigation. If so, it may be thought inappropriate that legal aid should be provided for such litigation on a "grant or loan" basis.[1]

8.27 At present legal aid is available to pursuers in conventional multi-party actions. In England and Wales the Legal Aid Board has a discretion to secure representation by means of contracts with solicitors in any multi-party action which includes a claim in respect of personal injuries.[2] On both sides of the Border, however, legal aid is made available separately to each of the litigants since each assisted person litigates separately. Further, the financial conditions which must be met before legal aid is granted mean that one or more members of a group may be refused legal aid. If civil legal aid were to be available to the representative pursuer in a class action it is likely that the financial conditions would have to be disapplied. Also, the fact that for the successful pursuer the legal aid fund may provide a loan, not a grant,[3] might deter certain claimants from raising class actions. It would no doubt be possible to amend the legal aid legislation in such a way as to make civil legal aid available on appropriate terms to representative pursuers of class actions. We consider, however, for the reasons which we give in the following paragraphs, that it would be preferable for class actions to be financed

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[1]See para 8.25 above. We have already considered whether actions might be brought by a Minister or official in the public interest (paras 7.58-7.63 above).

[2]Legal Aid Act 1988, s 4(5); Civil Legal Aid (General) Regulations 1989, Part XVI. See para 1.12 above for the Board's proposals for the reform of multi-party litigation in their report *Issues arising for the Legal Aid Board and the Lord Chancellor's Department from multi-party actions* (June 1994).

[3]See para 8.25 above.

by some other kind of third party funding. Our provisional view, accordingly, is that

34. The amendment of the legal aid legislation would not be a suitable way of providing for the third party funding of class litigation.

8.28 We now discuss funding by means of a 'contingency legal aid fund' or a class action fund. In some jurisdictions such funds receive financial support from the Government. We refer to such support as 'direct public funding' to distinguish it from legal aid. If such funds could only be constituted and operated in Scotland by means of direct public funding, a number of policy questions might arise. *First*, is it right that class actions should receive direct public funding? We have already referred to the differing views which may underlie the responses to such a question.[1] It might be argued that such actions should be the sole financial responsibility of the private individuals who choose to bring them: that they cannot afford to do so is not of itself a reason why public funding should be made available. On the other hand, it may be argued that class actions, or at least some of them, have a "public character" which justifies, or requires, public funding.[2] A modified version of this "philosophical opposition"[3] is, *secondly*, to question whether it is right to single out class actions for preferential access to Government funding when, on one view, it is a

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[1]See para 8.3 above.

[2]"Conceivably, public funding could be justified on the basis that a class action procedure constitutes a means of providing access to justice for persons with injuries that otherwise would remain uncompensated. By providing direct benefits to potentially large numbers of persons other than the active litigants, class actions could be considered to have a 'public' character which, arguably, could support demands for government financial assistance. This appears to be the philosophical foundation supporting the establishment of the Fonds in Quebec." OLRC Report, p 712.

[3]OLRC Report, p 713.

mere coincidence that a number of people are making the same claim. It may be argued that if the Government, when making necessary choices in the allocation of public resources, has to limit the amount of public money available for assisting litigation, it is wrong for some of that money to be syphoned off to support expensive class actions funded on a more generous basis than conventional litigation supported by legal aid. *Thirdly*, there is the question whether the public institution needed to run the fund might not be unduly costly for the benefits it might confer: in other words, would it give value for money? The reader's responses to such questions may reflect the degree of social importance he or she attaches to class litigation.[1]

(2) A contingency legal aid fund (CLAF)

8.29 We now consider third party funding by means of a "contingency legal aid fund" (or "CLAF").[2] The term "contingency legal aid fund" is well established but is misleading because such a fund has nothing to do with contingency fees or with legal aid provided under the Legal Aid (Scotland) Act 1986. The general nature of a CLAF was succinctly described by the Royal Commission on Legal Services in Scotland:

> "The scheme would involve setting up a fund, initially provided by the government, which would provide financial guarantees to pursuers who would otherwise be unable to afford to bring their cases to court. The proposal is that in the event of success the pursuer would contribute to the fund a proportion of the money he recovered with his legal costs being paid, in accordance with the usual practice, by the losing side. If the case were lost the fund would guarantee to meet the expenses

[1]See para 8.3 above.

[2]Here we draw on the Lord Chancellor's Department Legal Aid Consultation Paper issued in June 1991 ("LCD Consultation Paper (1991)"), the corresponding Scottish Office Home and Health Department Paper issued in July 1991 ("SOHHD Consultation Paper (1991)") and the Justice Reports of 1978 and 1992.

> of both parties. The administration costs of the scheme would be met by charging a registration fee to all applicants; and the money to pay expenses in unsuccessful cases would be built up from the contingency fee paid in successful cases out of the sum recovered. An applicant for aid from the fund would have to pass a test of '*probabilis causa*'."[1]

8.30 A contingency legal aid fund was originally proposed by Justice[2] in 1966 and, most recently in Scotland, in The Scottish Office Review of the Financial Conditions for Legal Aid.[3] After considering various possible ways of financing class actions the Working Party of the Scottish Consumer Council concluded[4] that "the creation of a Class Action Fund [ie a CLAF] contained the best hope of seeing the practical realisation of class actions in Scotland and their viability". The possibility of a CLAF was considered, but rejected, by both Royal Commissions on Legal Services.[5] The Scottish Office Review, on the other hand, described a CLAF as a fund which "would assist litigants

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[1]Hughes Report (1980), para 8.84.

[2]The British Section of the International Commission of Jurists; and again in 1978 and 1992 ("Justice and the Individual").

[3]SOHHD Consultation Paper (1991), chap 5. The LCD Consultation Paper (1991), Annexe H, estimates that a deduction of 25% to 30% from damages awarded would be likely to be needed to sustain a self-financing CLAF.

[4]SCC Report (1982) para 8.7.3.

[5]Hughes Report (1980), paras 8.84, 8.85; Benson Report (1979) paras 16.7-16.12. The Hughes Royal Commission recommended that a CLAF should not be established because they thought it would be unnecessary if their proposals for the further development of the civil legal aid scheme were accepted. The Benson Royal Commission were similarly concerned that a CLAF might be merely a palliative which would delay improvements in legal aid; also they were doubtful about (1) the principle of successful litigants subsidising the unsuccessful and (2) the financial viability of the scheme. In their comments on SOHHD Consultation Paper (1991) the Scottish Legal Aid Board similarly contrasted the possible complexity of a CLAF with legal aid improvements *ie* universal eligibility and/or a flexible upper limit. (SLAB Response to SOHHD Consultation Paper (1991), para 16.1.)

with their legal expenses, regardless of their means,[1] at no costs to the taxpayer," and concluded that such a "scheme would be an effective means of helping people face the cost of litigation, without penalising their opponents", although "rigorous controls would still be needed to prevent litigation of little intrinsic value, conducted with no regard to cost, which could inflate litigation costs generally".[2] In the following paragraphs we discuss the concept of a CLAF in general terms and then consider how a CLAF might be operated to finance class litigation in Scotland.

8.31 The perceived advantages of a CLAF include the following.

- It could offer financial support to any litigant who had an arguable claim and who might otherwise be deterred by fear of the cost.
- Although initial Government funding might be needed, a viable CLAF should operate at no net cost to the taxpayer.[3]
- It does not have the disadvantage of the expenses "clawback" which is attached to a grant of legal aid.[4]
- It avoids the conflict between the interests of the client and his lawyer inherent in a contingency fees agreement where the fees are a percentage of the proceeds.[5]

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[1]Hence, unlike legal aid, there would not be a means test.

[2]SOHHD Consultation Paper (1991), chap 5, paras 1, 36.

[3]This assumes enough successful cases to make the CLAF financially viable. See para 8.42 below.

[4]*Ie* the obligation on a legally assisted person, where he has a liability to the Scottish Legal Aid Fund, to reimburse the Fund the amount of that liability, in priority to any other debts, out of any property which is recovered or preserved for him in the legally aided proceedings or under any settlement of those proceedings: Legal Aid (Scotland) Act 1986, s 17(2B).

[5]See para 8.18 above.

- It avoids the deterrent effect of the unsuccessful litigant having to meet his opponent's expenses, under the general rule that expenses follow success. ("This risk is arguably the major deterrent against taking legal action."[1])
- It might be able to dispense with the means test which is applied to applicants for legal aid. (A CLAF case would be relatively cheaper to administer than a legally aided case.)

8.32 On the other hand the perceived disadvantages of a CLAF include the following.

- In principle, it appears wrong for successful litigants to be obliged to contribute part of the proceeds of the litigation to subsidise unsuccessful litigants.[2] (But in its 1992 Report, Justice argues that the litigant volunteers to part with a proportion of his damages and then only if he succeeds.[3])

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[1]LCD Consultation Paper (1991) chap 6, para 8.

[2]In their response to SOHHD Consultation Paper (1991) the Scottish Consumer Council say that the cross-subsidisation criticism "becomes even stronger when the CLAF is extended to non-monetary claims and to defenders in the manner which is envisaged by the [SOHHD] Review. Successful personal injuries pursuers would then, for instance, be subsidising pursuers and defenders in contested actions. Paraplegics with no assets other than their compensation could be required to pay a percentage of it to subsidise other types of litigation ... We consider that this makes the proposal for a CLAF as put forward in the Review unacceptable in principle." The Scottish Legal Aid Board said: "If the CLAF were to operate, however, so that successful pursuers who recovered money were to be put in the position not only of subsidising unsuccessful pursuers but also defenders and other litigants who never had any prospect of recovering money, then that would be objectionable." (SLAB Response to SOHHD Consultation Paper (1991), para 13.2.)

[3]Justice Report (1992), para 3.8.

- A court award of damages takes no account of the CLAF fee (which might be a quarter of the court award[1]), so that the litigant is deprived of full compensation. (But monetary awards vary considerably and on settlement each side may in any event compromise his full claim for the sake of certainty.[2])
- Those litigants who are likely to succeed will choose not to take advantage of the CLAF and this will put its financial viability in jeopardy. This is the problem of "adverse selection". (But Justice comments that "personal injury cases account for the largest proportion of civil claims and there are few certain winners. Even passengers in cars have their problems on liability: seat belts, drunken driver, under age driver".[3] A CLAF would need to incorporate restrictions to prevent abuses, such as an unreasonable refusal of an offer to settle.)
- It may not be possible for a CLAF to cover all classes of case. This depends partly on the nature of the "subscription" required of a CLAF litigant, which might be an initial payment, or a surcharge or a percentage of the proceeds, or a combination of these. (But "[t]he fact that a CLAF is not suited to all areas of litigation cannot be a reason for refusing it to those who would benefit from it."[4])

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[1]See LCD Consultation Paper (1991), Annexe H, cited in para 8.31 above.

[2]Justice Report (1992), para 3.8.

[3]Justice Report (1992), para 3.8 (discussing the position in England and Wales).

[4]Justice Report (1992), para 3.8. Justice comments: "CLAF is not suited to some multi-plaintiff litigation, such as drug claims and 'disasters'. If one such case was lost the defendants' costs could exhaust CLAF."

- A CLAF allows virtually risk-free litigation. "A pursuer who fails to recover damages need pay nothing while a fixed fee, paid at the outset of a case, may have little or no effect on the litigant's subsequent behaviour."[1]
- A CLAF, unlike legal aid, takes no account of the means of the recipient of financial assistance.

The Hong Kong CLAF

8.33 The only working example of a CLAF is in Hong Kong. It appears to have had a remarkable success rate; in 95 of 97 concluded cases damages have been obtained. Further details of the scheme are provided in the LCD Consultation Paper (1991):

> "It was set up in 1984 as an adjunct to legal aid [ie for those whose means were just outwith the legal aid limits], backed by a one million dollar loan facility from the State Lotteries Fund; in the event, HK$400,000 [there are about HK$15 to the pound] was needed. Income began to exceed expenditure in March 1987 and the loan was paid off during 1988. Up to November 1990, there had been 297 successful applications to the scheme, representing 67% of all decided applications; this compares with 22% refusals on merits by the Legal Aid Board in 1989/90. The rigour of the Hong Kong merits test is also illustrated by the remarkable success rate (achieved in the absence of legal aid costs protection rules); damages had been obtained in 95 of 97 concluded cases. A total of HK$1,586,831 had been retained by the fund, which stood at HK$1,016,497.
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> "The scope of the scheme is limited to plaintiffs in personal injury cases (excluding medical negligence) claiming in excess of the High Court lower limit of HK$60,000 (about £4,000). Successful plaintiffs are required to pay 10% of the first $50,000 they recover, 12.5% of the next $200,000 and 10% of

[1] "The viability of the fund could, however, be threatened if weak cases are admitted and there is insufficient monitoring and control of costs. The Scottish Legal Aid Board's machinery for assessing merits and scrutinising the subsequent progress of cases would be required for a CLAF as much as ordinary legal aid cases." SOHHD Consultation Paper, chap 5, para 13.

any excess. These percentages are reduced if the case settles, depending on the stage reached."[1]

Features of a Scottish CLAF

8.34 We now discuss the possible features of a CLAF for class actions in Scotland. We do so on the important assumption that such a CLAF would be restricted to class litigation but would nevertheless be financially viable. We assume that the CLAF would be restricted to class actions because a discussion of a CLAF that was not so restricted would be beyond the terms of our reference. By "financially viable" we mean that although the initial funding of the CLAF would be provided by the Government, enough successful class actions would be brought to make the CLAF self-financing within a reasonable time. As we have already observed, however, it is not possible to predict how many actions might be brought under any new Scottish class actions procedure.[2] The assumption that a CLAF limited to class litigation would be financially viable is made only for the purposes of the following discussion and not because we consider that the financial viability of such a CLAF would be at all likely.

8.35 *Cases to be covered by a Scottish CLAF?* A CLAF is most readily operated where the successful pursuer (or class of claimant) has obtained a monetary award from which a percentage deduction can be made. Among such cases are those which under present procedures are likely to involve multi-party litigation, such as sudden

[1]LCD Consultation Paper (1991), p 36.

[2]See para 7.80 above. See also the Dundee Research Report, chap 3, on the relatively few multi-party actions studied by the Dundee researchers which have gone to a hearing on the merits rather than being settled or otherwise disposed of (Dundee Research Report, chap 3).

and "creeping" disasters. The scope of a CLAF for class actions might be initially restricted to damages cases only.

8.36 *Calculation of surcharge?*[1] One possibility would be a mixed scheme: where money is awarded, the surcharge would be based on a percentage deduction; in other cases, the surcharge would be a fixed fee. If the principle of a CLAF is accepted, the precise arrangements for an appropriate surcharge will depend on such matters as the nature of the cases where the CLAF is likely to be used and the expenses likely to be incurred by the CLAF administration. It was suggested in 1991 that a self-financing CLAF scheme would probably have to retain 25% to 30% of any damages awarded or charge a fixed fee of £300.[2]

8.37 *Relationship to legal aid?* "If legal aid remained in its present form, there would be nothing to stop those who are eligible from using the non-means tested CLAF instead."[3] We assume that they would not be entitled to use both. They could not use the CLAF to supplement any form of legal aid which might be available for class litigation, but would have to choose between these sources of funding.

8.38 *A merits test?* The administrators of the CLAF would be committed to support the litigation until it was concluded.[4] The fund administrators must therefore be entitled to refuse to fund those cases

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[1]See SOHHD Consultation Paper (1991), chap 5, paras 14-17.

[2]*Ibid*, para 15, citing figures from work by the Lord Chancellor's Department.

[3]*Ibid*, chap 5, para 22.

[4]But, as mentioned in the next paragraph, that commitment would be conditional on the assisted party conducting the case reasonably.

which have little chance of success. Our provisional view is that a suitable test would be very similar to that applied where civil legal aid is sought.[1]

8.39 *Supervision of the conduct of the case?* For the same reasons, the administrators of the CLAF would have to be entitled to call for reports on the progress of the case and generally to supervise how the case was conducted.[2] As has already been suggested,[3] the assessment of the merits and the supervision of the progress of the case might be suitable tasks for the Scottish Legal Aid Board, rather than for a new body set up for that purpose: in effect, the Board might act as administrators of the CLAF.

A CLAF and class action procedure

8.40 In a class action the representative pursuer initiates and conducts the litigation on behalf of the whole class.[4] He does not need the consent of the other class members to the initiation of the

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[1] *Ie* that the applicant has a *probabilis causa litigandi* and that it is reasonable that he should receive the support of the CLAF. Cf Legal Aid (Scotland) Act 1986, s 14(1); SLC Working Party Report, Annexe E, paras 11, 19-21.

[2] Favourable reports might be a condition of the making of payments to account to the assisted party's solicitors. Compare SLAB's powers to require a person receiving legal aid "to comply with such conditions as it considers expedient to enable it to satisfy itself from time to time that it is reasonable for him to continue to receive civil legal aid": Legal Aid (Scotland) Act 1986, s 14(2).

[3] Para 8.32 above, final footnote.

[4] The class would be described in general terms only on the initiation of the action. The composition of the class would be defined further after potential class members had decided either to opt in (under an opt-in scheme) or not to opt out (under an opt-out scheme). See paras 7.27-7.31 above.

action although the outcome will determine their rights also.[1] The other class members are unlikely to participate in the preparation and conduct of the case. If the representative pursuer is to be entitled, for the purpose of resolving the issues common to the class, to support from a CLAF which has been established with public funds, it seems only reasonable that the other class members should not be entitled to assistance from public funds[2] in order to bring separate actions raising these issues. A person who chose not to participate in the class action, and thus was not a class member and was not bound by the judgment, would be entitled to raise a separate action and to seek legal aid in order to do so; but legal aid might be refused if it appeared to the Board that it was not reasonable that he should receive it in the particular circumstances of the case.[3] The Board might be entitled, in some circumstances, to take the view that there was insufficient justification for his decision to opt out of (or not to opt into) the class action.

8.41 In view of the importance to the whole class of the class action receiving support from the CLAF it would be for consideration whether the arrangements for dealing with the application to the CLAF should involve the other class members as well as the prospective representative pursuer. It might be, for example, that they should be entitled to supplement the information supplied with the

[1]If they opt in (or do not opt out). For the binding effect of a judgment in a class action see para 7.75 above.

[2]Whether from CLAF, the Legal Aid Fund or otherwise.

[3]Legal Aid (Scotland) Act 1986, s 14(1)(b).

application for CLAF support, or to appeal against a refusal of an application.[1]

Provisional views on a CLAF for class actions

8.42 If it is assumed that a CLAF for class actions would be financially viable, the establishment of such a CLAF may be justified on a number of grounds. A class action is likely to be too lengthy and complicated, and thus too expensive, for any prospective litigant who is not entitled to full legal aid. Again, a CLAF could support a class action where it was in the public interest that it should be brought.[2] A CLAF might enable people to obtain, through a class action, an effective remedy to which they were entitled. Suitable arrangements could readily be made for the assessment of the merits of a proposed class action and for the supervision of its progress if it was brought. The various arguments in favour of a CLAF seem to us to be stronger than the counter-arguments.[3] It appears to us, however, that it would not be prudent to assume that a CLAF whose scope was restricted to class actions would be financially viable. We invite views.

35. In principle, a financially viable contingency legal aid fund for class actions would be a suitable source of third party funding for class litigation.

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[1]Some appeal arrangements would be necessary but it would be premature to discuss here what they might be. A person refused legal aid may apply to SLAB for a review of his application, unless his proposed action is against SLAB when the application for review is referred to the sheriff for Lothian and Borders at Edinburgh (Legal Aid (Scotland) Act 1986, s 14(3), (4)).

[2]This might be a factor in the test of "reasonableness": see para 8.38 above.

[3]See paras 8.31 and 8.32 above.

(3) A class action fund

8.43 A further means of providing third party funding for class litigation is by the establishment of a class action fund. Such a fund would be entitled to make discretionary grants. That discretion might extend to the financial resources of applicants[1] and there might be a means test on applicants or the exaction of a financial contribution such as a proportion of the proceeds of a successful action. The principal advantage of such a fund is that it would be entitled (although not bound) to assist all class litigants (not only impecunious pursuers, as with civil legal aid) to bring actions for any kind of remedy (not only actions of damages, which might be the only actions supported by a CLAF).

8.44 A class action fund need not be financed by the Government. The Class Proceedings Fund in Ontario is financed in another way, which we describe in a later paragraph.[2] In Canada and the United States several funds have been set up to support particular types of litigation, not always from public resources.[3]

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[1]Compare the matters which the Ontario Class Proceedings Committee may have regard to (para 8.50 last footnote).

[2]See para 8.46 below.

[3]The Ontario Attorney-General's committee note that: "There are precedents in a number of jurisdictions for creative and co-operative methods of creating funds or methods to assist with socially worthwhile litigation." (Report, pp 60, 61.) They give the following examples: the Quebec class action Fonds; in Ontario, the Women's Legal Education and Action Fund (the funding from the Ontario Government is to be used to challenge Ontario provincial legislation or to represent the interests of Ontario plaintiffs); the Ontario Intervenor Funding Project Act (this sets up a pilot project to allow the Environmental Assessment Board, the Ontario Energy Board and certain joint boards to provide funding for public interest intervenors); Manitoba Legal Aid group funding (funding for public interest groups); the "New York milk" fund (derived from interest accrued on the remaining balance after judgment in an anti-trust case: the fund is for use by State Attorneys-General in bringing anti-trust suits and can be used to pay experts' fees and other expenses); and the US Class Action Reports Fund (a private non-profit

The Quebec and Ontario Funds

8.45 The Quebec Fonds[1] and the Ontario Class Proceedings Fund[2] illustrate how provision might be made for a class actions fund. We outline below the main features of each of these funds as a basis for a discussion of whether such a fund might be useful in Scotland.

8.46 *The Fund*

Quebec: The "Fonds d'Aide aux Recours Collectifs" is a corporation administered by three persons appointed by the Quebec Government and responsible to the Minister of Justice, to whom an Annual Report is made. The Fonds is supported by Government funding.[3]

Ontario: The Class Proceedings Fund is an "account" of the Law Foundation of Ontario which is managed by a Board of Trustees (two appointed by the Attorney-General and three by the Law Society). The objects of the Foundation are to establish and maintain a fund to be used for: legal education and research; legal aid; and the maintenance of law libraries. The Fund is administered by a Class Proceedings Committee. The funds of the Foundation are derived, in part, from the interest on trust funds held by members of the Law Society on behalf of clients. The Funding Act provides (1) that every member of the Society who holds money in trust for or on account of more than one client in one fund is to hold the money in an account

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foundation which financially assists private litigants in class actions).

[1]See paras 6.56-6.58 above. The Fonds was established under the Act Respecting Class Action (Loi sur le Recours Collectif) 1978, Title II, Assistance to Class Actions ("the 1978 Act"). The legislation is reproduced in Ducharme and Lauzon, *Le Recours Collectif Québecois*, Les Editions Yvon Blais, 1988 ("Ducharme and Lauzon").

[2]See para 6.81 above. The Fund was established under the Law Society Amendment Act (Class Proceedings Funding), 1992 ("the Funding Act").

[3]Loi sur le recours collectif 1978, art 45.

at a chartered bank etc bearing interest at a rate approved by the trustees of the board of the Law Foundation; and (2) that the interest accruing on money held in such an account is deemed to be held in trust for the Foundation.[1]

8.47 *Who may apply for assistance?*

Quebec: Every person who wishes the status of a representative for the institution of a class action.

Ontario: A plaintiff or a defendant to a class proceeding.

8.48 *What does the assistance cover?*

Quebec:[2] The assistance covers mainly the expenses of the preparation or bringing of the class action (including the fees of the recipient's lawyers, the fees payable to experts and court expenses, such as the costs of notification). In addition, if the representative plaintiff loses the action and the defendant is awarded costs, the Fonds, if satisfied that the plaintiff lacks adequate financial resources to pay the costs award, may pay costs to the defendant on the plaintiff's behalf.[3]

Ontario:[4] Assistance can be given to *plaintiffs* in respect of disbursements only; and to *defendants* in respect of costs awards made in their favour against plaintiffs who have received financial support

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[1]S 57(1), (2).

[2]See para 6.57 above.

[3]1978 Loi, art 31.

[4]See para 6.81 above.

from the Fund. However, the Fund is not responsible for plaintiffs' counsel's legal fees and the disbursements.[1]

8.49 *Is the Fund entitled to reimbursement from assisted parties?* *Quebec*:[2] The Fonds is entitled to receive payment in three situations. *First*, if the assisted class representative (or his lawyer) receives amounts from a third party in respect of fees, costs or expenses (under the "expenses follow success" rule), these amounts must be reimbursed to the Fonds to the extent of the financial assistance granted.[3] However, if the financial assistance from the Fonds exceeds the amounts received from the third party, the difference is borne by the Fonds. *Secondly*, if the assisted representative plaintiff loses the action and costs are awarded against him or her, the Fonds (if satisfied that the assisted person cannot pay the costs award) may pay the amount due to the defendant on the plaintiff's behalf. The Fonds is entitled to reclaim such an amount from the representative plaintiff but it appears that in practice it does so only on a change of circumstances, such as a material improvement in his or her financial position.[4] *Thirdly*, the Fonds is required to withhold a percentage fixed by regulation from any undistributed balance of a collective recovery of claims or from a claim that is individually assessed.[5] This arrangement

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[1]These would be covered by a written fee agreement under s 32 or s 33 of the Funding Act.

[2]See para 6.57 above.

[3]1978 Loi, art 30.

[4]Ducharme and Lauzon (1988), p 236; Ontario AGA Committee Report, p 62.

[5]1978 Loi, art 42. The court has power to order the amount due under a collective award to be paid into court (Quebec Code, art 1032).

is intended to ensure that the Fonds is self-financing "in the medium or long term".[1]

Ontario: Regulations may provide "for levies in favour of the Class Proceedings Fund against awards and settlement funds in proceedings in respect of which a party receives financial support from the Class Proceedings Fund".[2] The Regulations may provide for levies that (a) exceed the amount of financial support given,[3] and (b) are based on a formula that takes the amount of an award or settlement fund into account.[4]

8.50 *What factors does the Fund take into account when deciding whether to provide financial assistance?*

Quebec: The Fonds has to assess "whether the class action may be brought or continued" without the assistance of the Fonds. If the status of representative has not yet been ascribed to the applicant the Fonds has to consider "the probable existence of the right he intends to assert and the probability that the class action will be brought".[5] If an application for assistance is accepted, the Fonds enters into an agreement with the applicant which sets out the detailed arrangements for the provision of assistance.[6] In particular the agreement is to state

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[1]Ducharme and Lauzon (1988), p 251.

[2]Funding Act, s 59.5(1)(g).

[3]*Ibid*, s 59.5(3).

[4]*Ibid*, s 59.5(4): *ie* the Regulations may enable the Fund to operate as a CLAF.

[5]1978 Loi, art 23. For the contents of an application see para 6.58 above, footnote.

[6]The matters dealt with in such an agreement include: the amount and use of the assistance; the advances that may be paid to the recipient; the terms and conditions of producing accounts and expenditure; the reports the

the amount of the assistance: the Fonds does not enter into an open-ended commitment to meet the recipient's legal expenses.

Ontario: In making a decision on an application, the Act provides that the Class Proceedings Committee may have regard, in particular, to the merits of the plaintiff's case and how he proposes to use any funds awarded.[1]

Should there be a Scottish class action fund?

8.51 Some helpful conclusions can be drawn from the features of the funds in Quebec and Ontario:

(a) The criteria for the granting of financial assistance can be made discretionary[2] in order to ensure that assistance is given only in apparently appropriate cases, and to exclude unmeritorious cases or applicants who have access to sufficient funds from other sources.

(b) The Fund need not meet all the possible financial liabilities of the assisted party: his own legal fees and

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recipient or his attorney must supply to the Fonds; the cases where assistance may be suspended or diminished; the terms and conditions of reimbursing the advances received or of assistance, if such is the case; and the subrogation of the Fonds and the rights of the recipient or his attorney up to the amounts paid to them (1978 Loi, art 25).

[1]"In making a decision under subsection (3), the Committee may have regard to, (a) the merits of the plaintiff's case; (b) whether the plaintiff has made reasonable efforts to raise funds from other sources; (c) whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded; (d) whether the plaintiff has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award; and (e) any other matter that the Committee considers relevant." Law Society Act, s 59.3(4), inserted by the Funding Act.)

[2]The framing of suitable criteria might not be easy: they should not lay the fund administrators open to charges of capriciousness in the exercise of discretion. The Quebec Loi (art 35) provides for appeals to the Provincial Court against a refusal of assistance: a similar arrangement would be needed in Scotland. (Compare the provisions for appeals against a refusal of legal aid: Legal Aid (Scotland) Act 1986, s 14(3)-(6), as amended.)

outlays, and the defenders' expenses. An assisted party might be permitted, or encouraged, to supplement the assistance from the Fund by other means of funding. For example, his own fees and outlays might be met under a speculative fee-charging agreement. Again, it might be decided that defenders who have been awarded expenses should not be entitled to apply to the Fund for payment if the assisted party cannot meet these expenses.[1]

(c) There is no need for the Fund's initial financial commitment to an assisted person to be unlimited; it could be for specific maximum sums which could be varied, if thought fit, later.

(d) It need not be assumed that all the resources needed to set up a Fund would come from public funds. As in Ontario, the interest on money held by solicitors for clients might be made a source of finance.[2] Appeal funds set up in the aftermath of sudden disasters might

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[1]We would not necessarily favour that course. It may be preferable that successful defenders' expenses should be met from the Fund if the representative pursuer cannot pay them. It seems to us unfair to assume that it is reasonable that successful defenders should bear their own expenses.

[2]The Royal Commission on Legal Services in Scotland recommended (Recommendation 19.16) that interest on money held for clients should wherever possible be paid to clients but that where this was not possible the interest should be used for public purposes in the field of legal services by establishing a Scottish law foundation. The suggested functions of that Foundation are somewhat similar to those of the Law Foundation of Ontario. The Commission suggested: financial involvement in the preparation of text books, the establishment of a computerised law retrieval system, the provision of scholarships and the support of socio-legal research. This matter was discussed further by the National Consumer Council in its 1984 Report, "Whose Interest? Solicitors and their Client Accounts: a Discussion Paper." That Report acknowledged that the issues are complex and controversial and discussed the arguments for and against funding law foundations from interest on money held for clients.

be so constituted as to allow for the funding of a class action against those apparently responsible.

(e) Since it is not possible to estimate how many prospective class action litigants would seek financial assistance from a Scottish Fund, it may be that any new body which might be set up to administer the Fund would be initially over- or under-resourced. It might be appropriate, however, for the administration of the Fund to be allocated to the Scottish Legal Aid Board.[1]

8.52 Whether a class action fund is needed, and what its features might be, depends on what other arrangements are made for the provision of financial assistance to class litigants. The three means of third party funding which we have discussed - legal aid, a CLAF and a class action fund - potentially overlap. If, for example, a CLAF was designed to cover all the possible financial liabilities of the representative pursuer[2] there might be no need for a separate class action fund. A further important consideration is that at least some Government financing would probably be necessary in order to set up a class action fund. In order to justify the allocation of public resources to a class action fund it would be essential to establish not only that it is necessary to introduce a class action procedure but also that it could not otherwise be satisfactorily funded. We invite views on the following questions.

36. Should a class action fund be set up?

37. If so, -

(1) Should it be financed by

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[1]We have already suggested that SLAB might administer a Scottish CLAF (para 8.39 above).

[2]*Ie* his own legal fees and outlays and his liability to meet an award of expenses in favour of the defenders. See paras 2.36-2.40, 8.6-8.9 above.

(a) **public funding;**

(b) **some other means of funding;**

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

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

38. If a class action fund were established, -

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

(2) **What liabilities should the fund cover?**

(3) **On what grounds should assistance be provided?**

D Contribution by class members towards the expenses of the representative pursuer

8.53 The representative pursuer incurs financial liabilities as a litigant[1] when acting on behalf of the class as a whole. Under the class action procedures in other jurisdictions discussed in Part 6 (which have opt-out, rather than opt-in, schemes), the other class members are not obliged by the rules[2] to make any contribution to his expenses.[3] It has been recognised in England[4] and in the United

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[1]See previous footnote.

[2]They could, of course, agree to pay a share of his expenses.

[3]There may be an express provision, *eg* the Ontario Funding Act, s 31(2): "Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims."

[4]In *Davies v Eli Lilly & Co* [1987] 1 WLR 1136; [1987] 3 All ER 94 (the Opren litigation) where certain actions were selected as "lead actions" to decide various preliminary issues, the Court of Appeal upheld an order by Hirst J that as from a specified date all the plaintiffs should contribute rateably on a *per capita* basis to pay the costs incurred by those plaintiffs, either personally or through the legal aid fund, who were selected to pursue the lead actions and to meet any liability to meet the defendants' costs. "Those who have practised in the Commercial Court, of which Hirst J is one of the judges, will recognise the age-old respectability of such an order, based as it clearly is upon the Rhodian Law, The Rolls of Oleron and the maritime law of general average." (Sir John Donaldson MR at pp 1141, 98.)

States of America[1] that in appropriate circumstances members of a group of litigants (not necessarily forming a class for the purposes of class action procedure) should contribute to the costs of litigation from which they may be expected to benefit.

8.54 Similarly, we think it is only reasonable that the members of a class should contribute to the expenses of a class action brought on their behalf. It would be difficult, however, to give effect to this policy in a class action procedure with an opt-out scheme. It is significant that in those jurisdictions with opt-out schemes the other class members are not obliged by the rules to contribute to the representative party's expenses. It would obviously be impossible to enforce an order for contribution against class members who could not be identified, and inequitable to enforce it only against those who could be identified. We therefore confine ourselves to considering what arrangements for contributions might be made in a procedure with an opt-in scheme.

8.55 In a procedure with an opt-in scheme a person who has determined to opt in and thus to become a member of the class may be assumed to have made a considered decision to join in the litigation in the hope that he or she will benefit from the result. He or she should therefore bear some share of the financial liabilities incurred by the representative pursuer who is conducting the action on

[1]In a minority shareholder action where expenses incurred by a shareholder in vindicating a corporate right of action were spread among all the shareholders through an award against the defendant corporation. *Mills v Electric Auto-lite Co* 396 US 375 (1970) (cited in the ALRC Report, para 288). This was a successful case where no monetary relief was claimed. The ALRC comments that such orders (sharing the legal costs) can only be made in a narrow range of cases where the class members are identified. Such cases might include those where there is an opt-in arrangement.

his or her behalf.[1] The extent of his or her share should, we think, be determined by the court, since there may be circumstances in which an equal division of liability among all the class members might not be appropriate: one member might have opted in at a later date than another, or might have been awarded a larger sum of money than another; or the representative pursuer's personal exertions on behalf of the class might have been so exceptional as to entitle him to favourable treatment. We also propose that the court should be entitled, as in the Opren litigation, to make an order for the apportionment of expenses in advance of the final judgment.[2]

8.56 Where the representative pursuer has succeeded in obtaining a decree (judgment) for the payment of money, such as an award of damages, it might be useful to provide that a class member's share of the expenses should be deducted from his share of the proceeds of the action. Under an opt-in scheme it should be possible for the court to allocate a sum to be awarded to each of those who have opted in, perhaps after some further inquiry. In any event, the court could be entitled to order the defenders to pay the total sum awarded into court, and to direct the clerk of court to pay to each class member the sum awarded to him or her as an individual under deduction of his or her share of the liability for the representative pursuer's taxed expenses.[3]

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[1]He or she may incur some expense simply by opting in, such as the expense of lodging a minute applying for leave to opt in and any hearing on the minute. He or she should be entitled to apply for an award of those expenses against the defenders in the event of the success of the action.

[2]See para 8.53 above, fourth footnote.

[3]On taxation of expenses see para 2.40 above.

8.57 We therefore propose:

39. (1) **In a class action procedure with an opt-in scheme the court should be entitled to determine the liability of each person who has opted in for payment of any taxed expenses incurred by the representative pursuer.**

(2) **The court should be entitled to do so either before or after the conclusion of the action.**

40. **Where the representative pursuer in a class action procedure with an opt-in scheme has obtained a decree for the payment of money,**

(a) **the court should be entitled to require the defenders to pay the total sum awarded into court;**

(b) **the clerk of court should administer the sum paid into court and pay to each member of the class such sum as the court may direct;**

(c) **the court should be entitled to direct the clerk of court**

(i) **to deduct from the amount otherwise payable to any member of the class such sum as the court considers to represent his share of the liability for payment of any taxed expenses incurred by the representative pursuer which are not covered by an award of expenses in his favour, and**

(ii) **to pay these expenses to the representative pursuer's solicitor.**

PART 9: SUMMARY OF PROPOSITIONS AND QUESTIONS FOR CONSIDERATION

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.

(Paragraph 4.25)

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.

(Paragraph 4.37)

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.

(Paragraph 4.41)

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.

(Paragraph 5.13)

5. The representative party should be required to apply to the court for an order certifying the action as a class action, and to satisfy the court that specified criteria for certification are met.

(Paragraph 7.10)

6. The application for certification should be made after the action is raised.

(Paragraph 7.15)

7. The certification order should describe the class, the nature of the claim and the questions of fact or law which are common to the class. (Paragraph 7.16)

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

(Paragraph 7.17)

9. The criteria for certification should be:

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

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

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

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

(Paragraph 7.26)

10. Should there be a further criterion that the legal advisers of the representative pursuer will fairly and adequately protect the interests of the class -

(a) in an "opt-out" class action procedure; or

(b) in an "opt-in" class action procedure?

(Paragraph 7.26)

11. Should the court have a discretion to decline to grant certification even if the criteria are satisfied?

(Paragraph 7.26)

12. Class members, other than the representative pursuer, who wish to be bound by the judgment on the common issues in the class action, should be required to opt into the action within a prescribed period and in a prescribed manner.

(Paragraph 7.31)

13. Any legislation implementing a class action procedure should confer on the Court of Session power to prescribe by rules of court when, by what means and in what terms notice should be given to class members.

(Paragraph 7.37)

14. Without prejudice to his other powers to control the conduct of the litigation, the judge should have power to make such orders as may be appropriate to ensure that the litigation is conducted fairly and with no avoidable delay, on the motion of

(a) the representative pursuer,

(b) another class member or

(c) the defenders.

(Paragraph 7.42)

15. (1) Should the court be entitled to order that notice of the proposed abandonment or settlement of a class action is to be given to all the members of the class?

(2) If so, should the matters which such a notice might contain be prescribed by rules of court rather than primary legislation?

(Paragraph 7.55)

16. (1) Should any special rules be introduced regulating -

(a) the abandonment

(b) the settlementof class actions?

(2) If so, -

(a) should the rules require the approval of the court to be obtained before a class action is abandoned or settled;

(b) what other rules should be prescribed?

(Paragraph 7.55)

17. If the approval of the court is required, -

(a) what matters should the court take into account;

(b) what should be the consequences of the court's refusal to approve the proposed abandonment or settlement?

(Paragraph 7.55)

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

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

(Paragraph 7.57)

19. There should be no provision for the appearance in a class action of the Lord Advocate, any government minister or any public official. (Paragraph 7.63)

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

(a) an opt-in scheme; or

(b) an opt-out scheme?

(2) If so, should the court

(a) be obliged to do so; or

(b) have a discretion to do so,

if certain conditions are satisfied?

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

(a) reasonably; or

(b) with reasonable accuracy; or

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

(Paragraph 7.74)

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

(Paragraph 7.74)

22. An order giving effect to the court's judgment on any question common to the class should

(a) name (under an opt-in scheme) or describe (under an opt-out scheme) the members of the class who are bound by the judgment; and

(b) define the question decided.

(Paragraph 7.75)

23. Should class action procedure be introduced

(a) in the Court of Session only;

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

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

24. Should there be provisions for the remit of class actions

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

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

(ii) by order of the Court of Session;

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

(Paragraph 7.84)

25. Should the value rule apply to class actions?

(Paragraph 7.84)

26. Any limitation period applicable to a class action should be interrupted for the members of the class

(a) under an opt-out scheme -

(i) from the commencement of the action; or

(ii) from the date of certification, if that takes place after the commencement of the action;

[1]See para 7.81 above, third footnote.

(b) under an opt-in scheme -

(i) from the commencement of the action as regards the representative pursuer;

(ii) from the date of opting in, as regards any other class member.

(Paragraph 7.87)

27. The limitation period should resume running against any class member

(a) when he or she opts out; or

(b) when the action, or his or her claim, is abandoned or settled; or

(c) when the action, or his or her claim, is dismissed or proceeds to final judgment and either

(i) the time for appealing has expired or

(ii) any appeal has been finally determined.

(Paragraph 7.87)

28. The court should not be entitled to certify as a class action, on the application of the defenders, two or more actions which have already been raised against them under the conventional rules of procedure.

(Paragraph 7.88)

29. It should be competent to appeal without leave against an interlocutor

(a) disposing of an application for

(i) certification,

(ii) decertification;

(b) identifying the common questions;

(c) making an aggregate monetary award and ancillary orders for its distribution among the class members;

(d) making monetary awards to individual class members.

(Paragraph 7.95)

30. If the representative pursuer does not appeal or abandons an appeal which he or she has intimated, it should be competent for another class member to exercise the same right of appeal within a prescribed period after the expiry of the time for appealing under the relevant rule.

(Paragraph 7.99)

31. As far as possible, any class action procedure should be regulated by Act of Sederunt rather than by Act of Parliament.

(Paragraph 7.100)

32. When awarding expenses in a class action the court should retain its discretion to apply the general rule that expenses follow success.

(Paragraph 8.17)

33. It should not be lawful for the representative pursuer of a class action to make a contingency fee agreement with his legal advisers by which they would receive a share of the proceeds.

(Paragraph 8.22)

34. The amendment of the legal aid legislation would not be a suitable way of providing for the third party funding of class litigation.

(Paragraph 8.27)

35. In principle, a financially viable contingency legal aid fund for class actions would be a suitable source of third party funding for class litigation.

(Paragraph 8.42)

36. Should a class action fund be set up?

(Paragraph 8.52)

37. If so, -

(1) Should it be financed by

(a) public funding;

(b) some other means of funding;

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

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

(Paragraph 8.52)

38. If a class action fund were established, -

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

(2) What liabilities should the fund cover?

(3) On what grounds should assistance be provided?

(Paragraph 8.52)

39. (1) In a class action procedure with an opt-in scheme the court should be entitled to determine the liability of each person who has opted in for payment of any taxed expenses incurred by the representative pursuer.

(2) The court should be entitled to do so either before or after the conclusion of the action.

(Paragraph 8.57)

40. Where the representative pursuer in a class action procedure with an opt-in scheme has obtained a decree for the payment of money,

(a) the court should be entitled to require the defenders to pay the total sum awarded into court;

(b) the clerk of court should administer the sum paid into court and pay to each member of the class such sum as the court may direct;

(c) the court should be entitled to direct the clerk of court

(i) to deduct from the amount otherwise payable to any member of the class such sum as the court considers to represent his share of the liability for payment of any taxed expenses incurred by the representative pursuer which are not covered by an award of expenses in his favour, and

(ii) to pay these expenses to the representative pursuer's solicitor.

(Paragraph 8.57)

ANNEXES

A. References

B. Abbreviations

C. Text of US Federal Rule of Civil Procedure 23 (as revised in 1966)

D. New York Class Action Procedure

E. Summary of features of certain class action procedures

ANNEXE A

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ANNEXE B

Abbreviations used in this Discussion Paper

ALRC	-	The Law Reform Commission, Australia
NCC	-	National Consumer Council
OLRC	-	Ontario Law Reform Commission
SALRC	-	The Law Reform Committee of South Australia
SCC	-	Scottish Consumer Council
SLC	-	Scottish Law Commission
SLAB	-	Scottish Legal Aid Board
US Federal Rule 23	-	United States Federal Rule of Civil Procedure 23

ANNEXE C

US FEDERAL RULE OF CIVIL PROCEDURE 23

Class Actions

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

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

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

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

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

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

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually

controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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

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

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each members that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

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

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

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

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

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

[As amended Feb 28, 1966, eff. July 1, 1966].

ANNEXE D

CLASS ACTION PROCEDURE IN NEW YORK

(Taken from: Recours Collectif by Louise Ducharme and Yves Lauzon, 1988)

NEW YORK CIVIL PRACTICE: LAW AND RULES

SS 901-906, rules 907-909

New York Sess. Laws, 1975

901. Prerequisites to a class action

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable:

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recovery a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

902. Order allowing class action

Within sixty days after the time to serve a responsive pleading has expired

for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class section are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The impracticability or inefficiency of prosecuting or defending separate actions;

3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. The difficulties likely to be encountered in the management of a class action.

903. Description of class

The order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice.

904. Notice of class action

(a) In class action brought primarily for injunctive or declaratory relief, notice of the pendency of action need not be given to the class unless the court finds that notice is necessary to protect the interests of the represented parties and that the cost of notice will prevent the action from going forward.

(b) In all other class actions, reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs.

(c) The content of the notice shall be subject to court approval. In determining the method by which notice is to be given, the court shall consider

I. the cost of giving notice by each method considered

II. the resources of the parties and

III. The state of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

(d) I. Preliminary determination of expenses of notification. Unless the court orders otherwise, the plaintiff shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification, or may require each of them to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

II. Final determination. Upon termination of the action by order or judgment, the court may, but shall not be required to, allow to the prevailing party the expenses of notification as taxable disbursements under article eighty-three of the civil practice law and rules.

905. Judgment

The judgment in an action maintained as a class action, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.

906. Actions conducted partially as class actions

When appropriate,

1. an action may be brought or maintained as a class action with respect to particular issues, or

2. a class may be divided into subclasses and each subclass treated as a class.

The provisions of this article shall then be construed and applied accordingly.

907. Orders in conduct of class actions

In the conduct of class actions the court may make appropriate orders:

1. determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members or of the opportunity of members to signify whether they consider the representation fair and adequate, or to appear and present claims or defenses, or otherwise to come into the action:

3. imposing conditions on the representative parties or on intervenors;

4. requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

5. directing that a money judgment favorable to the class be paid either in one sum, whether forthwith or within such period as the court may fix, or in such installments as the court may specify;

6. dealing with similar procedural matters.

The orders may be altered or amended as may be desirable from time to time.

908. Dismissal, discontinuance or compromise

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

909. Attorneys' fees

If a judgment in an action maintained as a class action is rendered in favor of the class, the court in his discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class. Added L. 1975, c 107 1.

ANNEXE E:

SUMMARY OF FEATURES OF CERTAIN CLASS ACTION PROCEDURES

The features summarised include:-

- Name of procedure; and relevant statutory provisions;
- what cases are eligible? does the court have to approve the use of the procedure by certification or otherwise?
- what parties are covered?; in particular, is there an opt out or an opt in arrangement?
- conclusion of proceedings: what remedies are available or specifically provided for?
- what are the arrangements about appeals?
- what are the financial arrangements? (Is there a costs rule and is any financial assistance available?)

A. US Federal Procedure

A1 The US Federal Procedure is referred to as a "class action". Federal Rule of Civil Procedure 23 was promulgated in 1938 and amended in 1966. For the text of the rule see Annexe C. See also the text of the New York Rules, which provide a clarified version of Rule 23, in Annexe D.

A2 Rule 23 states both prerequisites (in (a)) and further conditions (in (b)).

The prerequisites are:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defences of the representative parties are typical of those of the class; and

(4) the representative parties will fairly and adequately protect class interests.

The further conditions are:

(1) the maintenance of separate actions would create a risk to individual members of the class for example in inconsistent or varying adjudications;

or

(2) the defenders have acted (or refused to act) on grounds generally applicable to the class or

(3) the questions of law or fact common to the members of the class predominate over any other questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

A3 The court has to determine by order whether a class action is to be maintained (Rule 23(c(1)) ie "certification"

A4 Notice is given to the class members and a class member can request exclusion ie "opt out" (Rule 23(c)(2)).

A5 The rule makes provision (Rule 23(d)) about the orders which the court may make in the conduct of actions and "dismissal or compromise" requires express court approval (Rule 23(e)).

A6 The rule makes no provision about remedies (eg aggregate or "global" damages) or about costs/expenses. Hence the usual "American rule" applies and there is no costs order made in favour of a successful party. Again in accordance with the usual US arrangements contingency fees are competent (and normal).

B. Quebec

B1 The action is referred to as a "class action". The Act Respecting Class Action (Loi sur le recours collectif) of 1978 had two main Titles: providing for the class action by provisions integrated now into the Code of Civil Procedure; and providing for Assistance to Class Actions (principally by the setting up of the "Fonds d'aide aux recours collectifs").

B2 There are four matters on which the court has to be satisfied (Article 1003) ie that

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

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

(c) the composition of the group makes the use of other alternative procedures (eg joinder) difficult or impracticable; and

(d) the representative party is in a position to represent the members of the class adequately.

B3 The prior authorisation of the court has to be obtained by a motion which, *inter alia*, indicates the nature of the recourses for which authorisation is applied and describes the group on behalf of which the member intends to act. (Article 1002).

B4 Notice is given to the members of the class (Article 1006) and a member may request his exclusion from the group (Article 1007).

B5 The Code makes express provision for collective recovery (Articles 1031-1035) and individual claims (Articles 1037-1040). "The court orders collective recovery if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; it then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is not established." (Article 1031).

B6 The appeal provision allows a member, other than the class representative, to appeal in certain circumstances. ("If the representative does not appeal or if his appeal is dismissed ...a member may... apply to the Court of Appeal for leave to appeal and to be substituted for the representative. The Court grants the motion if it is of opinion that the interest of the members so requires." (Article 1042)).

B7 Legal representation of the representative, or of a member who applies to act as a representative, is compulsory (Article 1049).

B8 The normal costs/expenses rule (ie expenses follow success) applies. However the Fonds will meet the costs which fall directly on the representative party.

C. Ontario

C1 The proceedings are referred to as a "class proceeding", either plaintiff's class proceeding or defendant's class proceeding. The provisions are contained in the Act concerning Class Proceedings, 1992. The Law Society Amendment Act (Class Proceedings Funding) Act 1992 establishes an account of the Law

Foundation of Ontario, known as the Class Proceedings Fund. The purpose of the Class Proceedings Fund is to provide financial support for plaintiffs to class proceedings in respect of disbursements (only) related to the proceeding. The 1992 Act provides that regulations may be made providing for levies in favour of the Class Proceedings Fund against awards and settlement funds in proceedings in respect of which a party receives financial support from the Class Proceedings Fund.

C2 The court is required to certify a class proceeding if,

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

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

(c) the claims or defences of the class members raise common issues;

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

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

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

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

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

(Section 5(1)).

C3 The Act expressly provides certain grounds on which the court is not to refuse to certify a proceeding as a class proceeding solely on any of these grounds. These grounds are:

1. The relief 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 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.

C4 The certification order, *inter alia* specifies the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out (section 8(1)(f)). There are relatively elaborate provisions about: notice of certification (section 17); notice where individual participation is required (section 18); and notice to protect the interests of persons affected, where the court considers this necessary at any time (section 19).

C5 Aggregate assessment of monetary relief (damages) is provided for. The court may make an aggregate assessment where no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined and the aggregate of the defendant's liability to summon all class members can reasonably be determined without proof by individual class members. (Section 24(1)). Under section 26 (judgment distribution) the court may direct any means of distribution of amounts awarded as aggregate or individual damages that it considers appropriate.

C6 An appeal from an order certifying a proceeding requires leave of the court but an appeal from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding does not require leave. If a representative party does not appeal or seek leave to appeal, or abandons an appeal, any class member may make a motion to the court for leave to act as the representative party. Appeals are competent against individual awards of monetary relief (damages).

C7 The normal costs/expenses rule applies but the court, in exercising its discretion with regard to costs, may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest (section 31(1)). A written agreement about fees and disbursements (outlays) is competent between a solicitor and a representative party, provided it is approved by the court. (Section 32). Such an agreement may provide for payment of fees and disbursements only in the event of success in a class proceeding. Ie speculative fees (section 33). A representative plaintiff can apply to the Class Proceedings Fund for the payment of disbursements.

D. Australian Federal Procedure

D1 The Federal Court of Australia Amendment Act 1991 inserted provisions

about "Representative Proceedings" into the Federal Court of Australia Act 1976 (new Part IVA).

D2 A representative proceeding may be commenced where:

"(a) 7 or more persons have claims against the same person; and

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(c) the claims of all of those persons give rise to a substantial common issue of law or fact."

(Section 33C(1))

It is also provided that a representative proceeding may be commenced (a) whether or not the relief sought includes claims for damages that would require individual assessment or is the same for each person represented and (b) whether or not the proceeding is concerned with separate contracts or transactions or involves separate acts or omissions of the respondent. (Section 33C(2)).

D3 There is no requirement for the court to certify or otherwise approve that claims are dealt with as a representative proceeding but the court may direct that the proceeding no longer continue as a representative proceeding where

(1) there are fewer than 7 group members (section 33L);

(2) where the court considers that the cost of distributing an award of damages to individual members of the group would be relatively excessive (section 33M(b)); and

(3) where the court is satisfied that it is in the interests of justice that the proceeding should not continue as a representative proceeding because (a) the costs incurred would exceed those of separate proceedings, (b) the relief sought can be obtained by other proceedings; (c) the representative proceeding would not be an efficient and effective means of dealing with the claims of group members or (d) it is otherwise inappropriate. (Section 33N).

D4 A group member has the right to opt out of a representative proceeding (section 33J).

D5 There are detailed provisions about notices. For example notice must be given to group members of the commencement of the proceeding and of the right of the group members to opt out before a specified date. (Sections 33X and 33Y.)

D6 The court has a full range of powers in giving judgment (section 33Z). The court can award damages in an aggregate amount without specifying the amounts awarded to individual group members if it considers that a reasonably accurate assessment can be made of the total amount to which group members will be entitled. The court must make provision for the payment or distribution of the money to the group members entitled and may provide for the constitution and administration of a fund consisting of the money to be distributed (section 33ZA).

D7 So far as appeals are concerned there is provision that if the representative party does not appeal within the time provided for doing so another member of the group or sub-group may bring an appeal as representing the group members. (Section 33ZC(6).)

D8 The normal cost/expenses rule applies but there is provision for the reimbursement of the costs of the representative party. The representative party must apply to the court which if satisfied that the costs reasonably incurred are likely to exceed the costs recoverable by the representative from the respondent, may order that an amount equal to the whole or part of the excess be paid out of the damages awarded (section 33ZJ). There are no provisions about fee agreements (which the Australian Law Reform Commission had recommended) or establishing a special fund to provide financial assistance.