How do Theories of Access to Justice, Judicial Economy, and Behaviour Modification Explain Developments in the Class Actions Debate from 1970 onward in England and Canada?

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ABSTRACT

This thesis investigates the rapidly developing area of collective redress in England and Canada. It looks at three procedures: class actions, group litigation, and representative actions. I make three normative arguments:

1. Class actions represent a departure from the principle of 'accurate justice' that has traditionally underpinned civil justice systems, although this departure is not unique and is characteristic of wider civil justice reforms;

2. Class actions and group litigation are not 'one size fits all' procedures, but instead serve a variety of purposes; and

3. Representative actions are distinct from both procedures and should not be used to aggregate individual claims at all – they should instead be used for the litigation of group rights.

My thesis combines qualitative surveys, doctrinal analysis, and historical research into collective redress reforms in England and Canada. England has borrowed heavily from Canadian class actions in creating its own framework in competition law; England's group litigation regime is much more established and Canada has much to learn from it. The representative rule also originated in England, although Canada's interpretation was much broader and led to the development of class actions. There are indications that the same might be happening in England, but I argue that such an interpretation is incorrect.

Collective redress in England and Canada is at a crossroads. In England, the UK Supreme Court has just ruled on the nascent competition law class actions regime, and is considering the scope of representative actions. In Canada, significant amendments have been made to Ontario's Class Proceedings Act, and other Canadian jurisdictions are watching to see how these will be interpreted. Both countries can learn a great deal from each other. This thesis brings important empirical, historical, and normative insights into the current debates about collective redress on both sides of the Atlantic.

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Most of all, thank you to my son, Thomas, who will be born days after this thesis is submitted, and who provided the deadline and the hope I needed to finish.

Table of Contents

LIST OF ABBREVIATIONS

AB	Alberta
AGAC	Attorney General's Advisory Committee
ALRC	Australian Law Reform Commission
ALRI	Alberta Law Reform Institute
APIL	Association of Personal Injury Lawyers
ATE	After the Event Insurance
BC	British Columbia
BC Hansard	British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 4th Sess
BERR	Department for Business Enterprise and Regulatory Reform
BIS	Department for Business, Innovation and Skills
CAA	Class Actions Act
Canada Hansard	Canada, Legislative Assembly, Minutes of Proceedings and Evidence of the House of Commons Standing Committee on Finance, Trade and Economic Affairs, Bill C-42, The Competition Act
CA	Court of Appeal
CAT	Competition Appeal Tribunal
CBA	Canadian Bar Association
CCAR	Canadian Class Action Review
CCP	Code of Civil Procedure (Québec)
CFA	Conditional Fee Agreement
CJC	Civil Justice Council
CMA	Canadian Manufacturers' Association
CPA	Class Proceedings Act
CPC	Class Proceedings Committee
CPO	Collective Proceedings Order
CPR	Civil Procedure Rules
CUREC	University of Oxford Central University Research Ethics Committee
DBA	Damages-Based Agreement
DC	Divisional Court
DCMS	Department for Digital, Culture, Media & Sport
DPA	Data Protection Act (1998 or 2018)
DTI	Department of Trade and Industry
ECHR	European Convention on Human Rights
EU	European Union
FCC	Federal Court of Canada
FCR	Federal Courts Rules
FRCP	Federal Rules of Civil Procedure (US)
FSMA	Financial Services and Markets Act 2000
FTC	Federal Trade Commission (US)
GDPR	General Data Protection Regulation
GLO	Group Litigation Order
HC	House of Commons (UK)
HL	House of Lords (UK)
HMSO	Her Majesty's Stationery Office

ILR	US Chamber Institute for Legal Reform
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act
LCD	Lord Chancellor's Department
LCO	Law Commission of Ontario
MAG	Ministry of the Attorney General
MB	Manitoba
MDL	Multi-District Litigation
MLRC	Manitoba Law Reform Commission
MOJ	Ministry of Justice
MPA	Multi-Party Action
MPP	Member of Provincial Parliament
MPS	Multi-Party Situation
NB	New Brunswick
NCC	National Consumer Council
Newfoundland Hansard	Newfoundland, Legislative Assembly, Official Report of Debates (Hansard), 44th General Assembly
NFL/NL	Newfoundland & Labrador
NWT	Northwest Territories
NS	Nova Scotia
NS Hansard	Nova Scotia, Legislative Assembly, Official Report of Debates (Hansard), 60th Parl, 2nd Sess
Nu	Nunavut
NY	New York
NZ	New Zealand
OFT	Office of Fair Trading
OLRC	Ontario Law Reform Commission
ON	Ontario
PD	Practice Direction
PEI	Prince Edward Island
QB	Queen's Bench
QC	Québec
QOCS	Qualified One-Way Costs Shifting
Québec Hansard	Québec, Journal des débats, Troisième session – 31ième Législature: audition des memoires sur le project de loi no 39
RCC	Retail Council of Canada
SALC	South African Law Commission
SC	Superior Court
SCC	Supreme Court of Canada
SK	Saskatchewan
TCC	Technology and Construction Court
TD	Trial Division
TSO	The Stationery Office
UBC	University of British Columbia
UK	United Kingdom
UKSC	Supreme Court of the United Kingdom
ULCC	Uniform Law Commission of Canada
US/USA	United States of America
YK	Yukon

TABLE OF CASES

Alberta

Newfoundland & Labrador

Nova Scotia

Ontario

Prince Edward Island

Québec

TABLE OF LEGISLATION

PRIMARY LEGISLATION

Québec

Saskatchewan

England & Wales

European Union

United States (Federal)

New York (State)

BILLS/MODEL ACTS

Canada (Federal)

Québec

England & Wales

United States (Federal)

TABLE OF OTHER PRIMARY LEGAL SOURCES

Prince Edward Island

PEI, Legislative Assembly, Official Report of Debates (Hansard), 60th General Assembly, 1st Sess (12 March 1997)	129

Québec

Québec, Journal des débats, Troisième session – 31ième Législature: audition des memoires sur le project de loi no 39	121, 122, 123, 148, 194, 199
Québec, Journal des débats, Deuxième session – 30ième Législature: dépôt du deuxième rapport annuel de la Commission des services juridiques (le 30 octobre 1974)	122
Québec, Journal des débats, Première session – 29ième Législature: audition des memoires sur le project de loi no 45 (le 25 novembre 1970)	122

England & Wales

Financial Services HC Bill (2009) cll 18-25	178, 307
HC Deb 28 Jan 2014, vol 574, col 775	38, 48, 222
HL Deb 22 March 2018, 7th sitting, col 252	102, 306
HL Deb, 3 Nov 2014, col GC583	222
HL Deb 1 July 2014, vol 754, col 1648	38, 48
HL Deb 29 February 1988, vol 494, col 21	160
HM Treasury, *Budget 2007*, HC 342 (TSO 2007)	185

European Union

Commission, 'Commission Work Programme 2012' COM (2011) 777 final	184
Commission, 'Damages actions for breach of the EC antitrust rules' COM (2008) 165 final	184
Commission, 'Damages actions for breach of the EC antitrust rules' COM (2005) 0672 final	184, 185
Commission, 'EU Consumer Policy strategy 2007-2013, Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them' COM (2007) 99 final	184

TABLE OF TABLES AND DIAGRAMS

Chapter 1:
Introduction

This thesis investigates the rapidly developing area of collective redress in England[1] and Canada.[2] It looks at three procedures for such redress: class actions, group litigation, and representative actions. I make three normative arguments, expanded upon below:[3]

1. Class actions represent a departure from the principle of 'accurate justice' that has traditionally underpinned civil justice systems, although this departure is not unique and is characteristic of the proportionality principle that has formed the lynchpin of the civil justice reforms in England[4] and Canada[5] in recent decades. Because cost and time are elements of justice, it is impossible to obtain a perfectly accurate outcome under any kind of civil procedure;

2. Class actions and group litigation are not 'one size fits all' procedures, but instead occupy a 'continuum of aggregation'[6] and serve a variety of purposes; and

3. Representative actions are distinct from both procedures and should not be used to aggregate individual claims at all – they should be confined to their historical purpose, which is the litigation of group rights.

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[1] References to 'England' include England and Wales.

[2] References to 'Canada' include the provinces, territories, and the federal level. The only Canadian jurisdictions without class proceedings legislation are Prince Edward Island and the territories (Nunavut, Northwest Territories, and Yukon). Class proceedings have been available in jurisdictions without legislation since 2001: *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46.

[3] The law in this thesis is stated as at 29 April 2021.

[4] The overriding objective enshrined in CPR 1.1 is also explicitly incorporated into the Competition Appeal Tribunal Rules 2015, SI 2015 No 1648, Rule 4, 'Governing Principles' (CAT Rules).

[5] Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194; *Mastercard Incorporated & Others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51 [25] (Lord Briggs).

[6] Alexandra D Lahav, 'The Continuum of Aggregation' (2019) 53 Ga L Rev 1393. Lahav's continuum also includes bankruptcy proceedings.

‘Class actions’ are defined as a procedure in which a representative claimant or plaintiff[7] commences litigation on behalf of a defined class, in which all individuals who meet the definition are included unless they opt out.[8] The procedure can encompass one sector (such as competition law) or be generic in that it can handle a variety of substantive law disputes. ‘Group litigation’ includes not only opt-in proceedings subject in England to a formal Group Litigation Order (GLO), but also more informal case management in England or Canada of multiple individual cases that arise from similar issues of fact or law, by way of joinder, consolidation, or other means (but all of them on an opt-in basis). This includes the device of test cases, which is available as part of a GLO.[9] While this procedure is not analysed in depth as part of this thesis, it has made a significant contribution to resolving multiple cases that share common issues. It is therefore considered in chapter 7 as a potential element of reform in Ontario’s collective redress regime. ‘Representative actions’ are brought under CPR 19.6 in England, and under the rules of civil procedure in the Canadian jurisdictions; these rules generally stipulate that a claim may be commenced by a person or persons who have the ‘same interest’ in a claim on behalf of any other persons who share that interest. All persons who share that interest are automatically included in the represented group, although most representative rules do not have provisions for opting out.

My thesis combines qualitative surveys, doctrinal analysis, and historical research into the drivers of, and reception of, collective redress reforms in England and Canada; these methodologies are expanded on in Chapter 2. England and Canada have been chosen

[7] The Civil Procedure Rules (CPR) in England refer to claimants, while the Rules of Civil Procedure in Ontario (and the rules of court of several other Canadian jurisdictions) refer to plaintiffs. I use both interchangeably to refer to litigants that commence proceedings against one or more defendants.

[8] Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Civil Justice Council 2007) 7. Class actions are also known as class proceedings in Ontario and certain other Canadian provinces, where the procedure encompasses both actions and applications.

[9] CPR 19.13(b), and under the court’s case management power generally.

because Canada was one of the world's earliest adopters of class actions, and its jurisdictions now have established regimes that are ripe for study. By contrast, England is one of the most recent adopters of class actions, with the Consumer Rights Act 2015 coming into effect on 1 October 2015, and creating a class action regime in the area of competition law.[10] The two countries therefore represent opposite ends of a time continuum. In addition, recent UK Supreme Court and Court of Appeal jurisprudence, as well as the consultations and legislative history of the Consumer Rights Act 2015, reveals that England has borrowed heavily from the Canadian class actions experience in creating its own framework.

With regard to group litigation, England's framework is much more established, while Canada occupies the much later end of the time continuum. Group litigation began emerging in England with the Thalidomide and asbestos cases in the late 1960s and early 1970s, and came to be known as 'multi-party actions'. By contrast, in most of Canada's jurisdictions with the exception of Alberta, group litigation was in its infancy when class proceedings legislation was introduced. Its use since has not been widespread, although recently it has been experiencing a surge in popularity in Ontario.

With regard to representative actions, the procedure that began its life in England as early as the 13th century was later transplanted to Canada when the latter adopted the English legal system prior to Confederation.[11] The representative rule has remained largely the same in England and in Canada although, as detailed in Chapter 4 and elsewhere, the English and Canadian courts have interpreted it in different ways and at different times.

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[10] Competition Act 1998, s 47, as amended by Schedule 8 of the Consumer Rights Act 2015, 2015 c 15.

[11] Québec has never adopted the English legal system and has never had a representative action procedure.

These commonalities and differences between the two countries make their procedures for collective redress a fascinating subject of study. In addition, the way in which these three procedures interact with each other explains a great deal about the historical roots and current-day practice of collective redress in England and Canada. As I expand upon in Chapter 5, from the 1980s onwards in Canada, numerous high-profile court decisions frustrated efforts to litigate group rights through the representative action. This led to a combination of legislative and court intervention to remove the barriers to the use of that device; the result was the modern-day class action. In England, procedural difficulties were instead presented by multi-party actions. These difficulties were considered by Lord Woolf in his review of the civil justice system in the late 1990s, and resulted in the GLO framework, which focused on a proportionate method for litigating multiple individual claims. The two countries' different approaches provide evidence of differing outlooks with regards to collective redress, and, as detailed in Chapter 6, these differing outlooks are still evident in the conduct of collective litigation today.

It is only in the past 25 years that England has considered the introduction of opt-out class actions. While there has been some resistance to the introduction of class actions on a generic (cross-sectoral) basis, class actions have been introduced in the area of competition law. This development has not arisen from the representative action rule, but instead is a response to a government approach that seeks greater enforcement of competition law and more effective redress for consumers. The design of the opt-out (or opt-in) scheme ushered in by the Consumer Rights Act 2015 was directly inspired by the class actions regime in Canada, and this can also be seen in recent jurisprudence interpreting that framework.

The two countries still have much to learn from each other, and Chapter 7 evaluates each country's collective redress mechanisms and makes recommendations for reform.

Canada would benefit from importing some of the approaches of the English group litigation regime, in order to ensure greater compensation for larger individual claims while continuing to litigate common questions efficiently. England would benefit from opt-out class proceedings in certain sectors, along the lines of the class actions regimes in Canada, for smaller claims below a certain threshold. This would provide access to justice for individually non-viable claims that are difficult to pursue as group litigation. Representative actions in both countries should be used for the purposes for which they have historically been suited: the litigation of group rights.

My thesis makes three normative arguments. First, class actions represent a departure from the principle of what I call 'accurate justice' that has traditionally underpinned civil justice systems, although this departure is not unique and is characteristic of the proportionality principle that has formed the lynchpin of the civil justice reforms in England and Canada in recent decades. Class action mechanisms necessarily involve a 'rough justice'[12] approach that dispenses with the pursuit of accuracy. The three justifications for this departure are access to justice (including proportionality), judicial economy, and behaviour modification. Behaviour modification is more controversial because, although it is a core function of the courts, it is not an independent function of civil justice and is not a primary aim of the traditional model of civil litigation. As I argue in Chapter 3 and support with historical research and empirical evidence in Chapters 5 and 6, access to justice and providing compensatory redress to victims have been the primary focus of class action reform on both sides of the Atlantic, with behaviour modification playing a supplementary role.

[12] Also described as a 'broad axe' or 'broad brush' approach: *Mastercard UKSC* (n 5) [51] (Lord Briggs).

Second, class actions and group litigation are not procedural substitutes for each other, but instead occupy a 'continuum of aggregation'[13] and serve a variety of purposes. Class actions tend to be better-suited to smaller and individually non-viable claims, because such claims would otherwise be without any redress at all and access to justice and behaviour modification would thereby be denied; group litigation, on the other hand, is more suitable for larger, individually viable claims, because those claims do not require aggregation for the purposes of redress, but answering certain questions in common promotes the purposes of proportionality (an element of access to justice) as well as judicial economy. A normative implication of this position is that courts would be better placed to decide whether a procedure should be opt-out (a class action) or opt-in (more akin to group litigation). Within a group litigation structure, formal and informal procedures can be used, as I discuss in Chapter 7. Informal group litigation provides more access to justice and judicial economy in simpler cases (where the parties can agree on case management issues, there is less of a need to define numerous common questions, the constituency of claimants is well-defined, and where claimants are represented by only a few law firms). Formal group litigation is better-suited to more complex litigation (where agreement cannot be reached on case management issues, numerous common questions need to be identified, the claimant group is less well-defined, and there is more competition between law firms for control of the litigation).

The purpose of class actions and group litigation is the litigation of individual rights, even though they involve the aggregation of claims based on the defendant's breach of those rights. By contrast, representative actions are historically suited to the litigation

[13] Lahav (n 6).

of indivisible group rights – that is, a group that has its identity outside of and prior to the litigation, and which is litigating rights belonging to that group *as a group*.[14]

The third and related argument is that representative actions should be confined to their historical purpose and should not be used to craft a common-law class action procedure; where a need for class actions is apparent, the response should be legislative rather than judicial. This historical purpose is the litigation of group rights. The group derives its commonality from an identity that pre-exists the litigation (for example, an Indigenous people group), the rights pursued arise from that communal identity and are indivisible (such as rights to the use of land or other communal rights), and the relief in which the group members have an interest also arises from that identity and applies to the group as a whole. Put simply, a representative action has traditionally involved one communal claim, rather than (as in a class action or group litigation) an aggregation of many individual claims. The historical function of the representative action is also doctrinally coherent, and the procedure should remain within the parameters of that function.

This thesis is divided into three parts. Part I consists of this introduction, Chapter 2 (my methodology and literature review), and Chapter 3 (which provides the theoretical framework for the later substantive chapters, and makes the normative arguments referred to above).

Part II begins with a discussion of the history of the representative action, which also touches on the third normative argument discussed above. Chapter 5 continues the history of the representative action in Canada from 1970 onwards, and discusses the background of class actions and group litigation in England and Canada. Chapter 6 looks

[14] The analogy I use is that of a priceless diamond, which one cannot divide up without destroying its value and character. Such are the indivisible rights to which a representative action is classically suited.

at the current-day practice of collective redress in England and Canada, using original empirical research and drawing comparisons between the two countries. Empirical research on collective redress is remarkably sparse in both countries, and my work therefore makes a valuable contribution.

Part III consists of Chapter 7 (in which I evaluate the collective redress mechanisms in Canada and England, make some comparative conclusions, and recommend reforms for both countries) and Chapter 8, in which I conclude with an overview of my arguments and findings.

Collective redress in England and Canada is at a crossroads. In England, the UK Supreme Court has just ruled on the nascent class actions regime in competition law, and is considering the scope of representative actions in the *Lloyd v Google* case. In Canada, the purpose of class actions has just been revisited in the form of significant amendments to the Ontario Class Proceedings Act, and other Canadian jurisdictions are watching closely to see how the courts will interpret those amendments. Both countries can learn a great deal from each other. This thesis brings important empirical, historical, and normative insights into the current debates about the development of collective redress on both sides of the Atlantic.

Chapter 2:
Preliminaries – Methodology and Literature Review

This chapter discusses my methodologies and demonstrates how my thesis fills a gap in the literature. My combination of theoretical, historical, and empirical approaches give rise to conclusions which provide a novel contribution to the field. While much has been written on class action theory in economic and political terms, 'it is both puzzling and disappointing how little of it has sought to grasp the deep structural precepts underlying the device.'[15] My research seeks to do just that.

The collective redress debate in England and Canada has paid insufficient attention to the fundamental purposes of class actions. The result has been confusion about controversial matters such as aggregate damages, *cy-près* distributions, and opt-out mechanisms.[16] Without making explicit the purposes of class actions, it is difficult to make choices about future reforms.[17] By revealing the theoretical underpinnings of the collective redress debate, my research makes a valuable contribution.

1. Methodological Approaches

My thesis uses theoretical, historical, and empirical methodologies, each of which I will address in turn.

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[15] Martin H Redish, 'Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process' (2014) 64 Emory LJ 451, 453.

[16] Suzanne Chiodo, *The Class Actions Controversy: The Origins and Development of the Ontario* Class Proceedings Act (Irwin Law 2018).

[17] David Marcus, 'The History of the Modern Class Action, Part I: *Sturm Und Drang*, 1953-1980' (2013) 90 Wash U L Rev 587, 591.

(a) Theoretical Analysis

The theoretical framework in Chapter 3 contrasts accurate justice with access to justice, judicial economy, and behaviour modification, as well as proportionality, and lays the foundation for the following chapters. That chapter is based on existing theoretical scholarship. However, it also includes my normative arguments for prioritising access to justice and judicial economy (as well as proportionality) over behaviour modification in any design of a class action mechanism.

I argue that class actions depart from what I call 'accurate justice' that has traditionally underpinned civil justice systems, in favour of a 'rough justice' approach that dispenses with the pursuit of accuracy. The justifications for this departure are the principles of access to justice, judicial economy (as well as proportionality), and behaviour modification. I argue that behaviour modification should not be a primary function of class actions, and also that access to justice, judicial economy, and proportionality can remain primary goals of class actions even if accurate compensation for class members cannot be obtained.

(b) Historical Approach

The historical analysis in Chapters 4 and 5 is based on primary and secondary sources. I look to history because no laws can be understood in context without examining their historical origins.[18] I also use the 'law-in-context' method.[19] This looks beyond case law, legislation and doctrine, to 'implied patterns' such as worldviews, influencing the way law is interpreted and handled. This fits well with my investigation of the underlying

[18] Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine' (1998) ICLQ 495 at 496.

[19] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) Law and Method 1.

theoretical bases for each country's approach to class actions.

While Chapter 4 discusses the history of the representative action, my main period of historical review in Chapter 5 is the past 50 years. The brevity of this period allows me to conduct a systematic historical investigation of the collective redress debate, which I explain in terms of access to justice, judicial economy, and behaviour modification. The normative priority I assign to these goals is supported by the historical record, which demonstrates that actors have attempted to balance and reconcile those sometimes competing objectives in order to justify a departure from accurate justice.

I combine my historical approach with theoretical analysis, and this gives rise to certain challenges, such as defining the theoretical concepts. However, my concepts are fairly well-established and have been used as a framework for discussions in numerous contexts. While certain people, documents or decisions can simultaneously reflect more than one theoretical approach, one particular approach will usually be more apparent.

It is also important to define the parameters of the material reviewed, particularly in terms of time period. Too many 'historical' works take in a broad sweep of several centuries, without providing in-depth analysis of key events or even referring to primary materials. Because of the brevity of the history of modern class actions, I am able to cover a narrow period of time in greater depth.

While some legal-historical scholarship has traced aspects of theory through judicial decisions, I extend that methodology to a wider 'external' view of legal history.[20] This involves the use of both legal and 'non-legal' sources; examples of the latter include media reports, publications by key stakeholders such as victims' groups, correspondence between stakeholders and other parties, and historical accounts. This reveals the wider

[20] AWB Simpson, 'The Rise and Fall of the Legal Treatise' (1981) 48 U Chi L Rev 632.

social, political, and economic context in which positions on class actions developed.[21] Finally, throughout the major developments in the debates, I note the underlying themes and the theoretical positions that have been taken. This helps me to explain the class actions debate in terms of competing theories, instead of the black-letter terms used by the participants in the debate and much of the scholarly work on class actions. It also explains much of present-day collective redress practice in England and Canada. My thesis therefore ends with some conclusions on this point, and recommendations for reform in Canada and England.

(c) Empirical Research

The contemporary and comparative analysis in Chapter 6 is based chiefly on empirical research. This feeds into the evaluative analysis in Chapter 7 that assesses and compares the policy choices made in England and Canada and makes recommendations for reform.

I compare England and Canada because they are both common law systems and parliamentary democracies, with similar historical and socio-economic backgrounds and shared legal cultural roots. I also use the analytical method, which looks at system-independent definitions of rights, and then sees how various jurisdictions compare with that definition (Van Hoecke's 'ideal type').[22] This is the approach I take in my evaluative chapter. I compare the collective redress systems in Canada and England with the normative position I take throughout my thesis, and then make recommendations for reform. When evaluating the effectiveness of policies or legislation, one must explain not only their existing state, but also what would have to be done differently for different (and

[21] Michael Lobban, 'Legal Theory and Legal History: Prospects for Dialogue' in Maksymilian Del Mar and Michael Lobban (eds), *Law in Theory and History* (Hart 2016) 21.

[22] ibid.

presumably more desirable, from the standpoint of particular normative goals) outcomes to be achieved.[23] Consequently, I recommend the introduction of class actions in England for certain sectors outside of competition law, I propose reforms for Canadian class actions, and I also make recommendations for group litigation in both countries.

I have gathered my empirical data primarily through semi-structured interviews with lawyers and central figures in the historical debate. Interviewees were selected through purposive sampling (based on their experience) and snowballing (identifying interview subjects, who then identify further subjects) to facilitate identification of key players. Prior to contacting interviewees, ethics approval was obtained from the University of Oxford Central University Research Ethics Committee (CUREC).[24]

The substantive information I was able to obtain was more significant in the English interviews than in the Canadian ones. It appeared that, because the Canadian jurisprudence on class actions is so established and group litigation is in its infancy there, practitioners had accepted a number of principles (such as behaviour modification) that were controversial when class actions were in their infancy. They therefore tended to be less aware of (or interested in) the normative questions underlying their practice. The lawyers that were more aware tended to be more academically minded, or were pushing the boundaries of their field in order to pursue the goals of access to justice, judicial economy, and behaviour modification. In England, by contrast, lawyers were much more aware of the points of controversy in collective redress, and were much more obviously in favour (or against) the concept of class actions. Again, this is almost certainly because class actions are in their infancy in England and, although group litigation is very established, its boundaries (and those of the representative action) are continually being

[23] Elliot Stern, *Evaluation Research Methods* (SAGE Publications 2005).

[24] Application for CUREC 1 research ethics approval obtained 9 November 2018.

pushed because of the absence of class actions outside the competition law sector.

Because of these differences in perspective, the information from the English and Canadian interviews was not directly comparable. The Canadian interviews tended to be useful as an indication of current practice in class actions, while the English interviews were useful as an indication of current practice in group litigation, as well as a barometer of views about the introduction of class actions.

With regard to the specific themes that came out of these interviews, there were several that were useful for my research. In England, a major theme was why barristers tended to use informal group actions instead of GLOs; issues with fitting group litigation into a legal system that is geared primarily to unitary actions; and finally, whether the lawyers I interviewed were in favour of class actions legislation, why or why not, and (if they were in favour) in what areas such legislation should be introduced. In Canada, few practitioners were able to discuss the development of class action legislation in their provinces, and even fewer talked about alternatives to class actions such as group litigation or representative actions. The majority focused on present-day practice: in Ontario, the recent amendments to the CPA, and in all provinces, the issues of fees, costs, and funding; multi-jurisdictional class actions; competition between counsel for carriage of class actions; issues at the settlement stage; and ethical issues. Many of the lawyers whom I interviewed wished to remain anonymous or not have remarks attributed to them directly. I therefore assigned a code to each lawyer, and have kept the list of codes on file. The codes were assigned as follows:

England

Status	Code
Claimant barrister 1	CB1
Claimant barrister 2	CB2
Claimant barrister 3	CB3
Claimant solicitor 1	CS1
Claimant solicitor 2	CS2
Claimant solicitor 3	CS3
Claimant solicitor 4	CS4
Claimant solicitor 5	CS5
Claimant solicitor 6	CS6
Claimant solicitor 7	CS7
Claimant solicitor 8	CS8
Claimant solicitor 9	CS9
Retired claimant solicitor 1	RCS1
Retired claimant solicitor 2	RCS2
Retired claimant solicitor 3	RCS3
Retired claimant solicitor 4	RCS4
Defence barrister 1	DB1
Defence barrister 2	DB2
Defence barrister 3	DB3
Defence barrister 4	DB4
Defence solicitor 1	DS1
Defence solicitor 2	DS2
Defence solicitor 3	DS3
Competition solicitor 1	CompS1
Representative claimant 1	RC1
Litigation Funder 1	LF1
Litigation Funder 2	LF2

Canada

Status	Code
Newfoundland & Labrador plaintiff counsel 1	NFL plaintiff counsel 1
Newfoundland & Labrador defence counsel 1	NFL defence counsel 1
Nova Scotia plaintiff counsel 1	NS plaintiff counsel 1
Alberta defence counsel 1	AB defence counsel 1
Saskatchewan defence counsel 1	SK defence counsel 1
British Columbia plaintiff & defence counsel 1	BC counsel 1
British Columbia plaintiff & defence counsel 2	BC counsel 2
British Columbia defence counsel 1	BC defence counsel 1
Ontario defence counsel 1	ON defence counsel 1
Ontario defence counsel 2	ON defence counsel 2
Québec plaintiff & defence counsel 1	QC counsel 1
Québec plaintiff counsel 1	QC plaintiff counsel 1
Québec defence counsel 1	QC defence counsel 1
New Brunswick defence counsel 1	NB defence counsel 1
Northwest Territories/Nunavut plaintiff counsel	NWT/NU plaintiff counsel 1
Litigation Funder	LF Canada

According to the ‘cab rank’ rule, barristers are obliged to represent whoever retains them. However, that does not prevent certain categories of clients retaining the same barristers, so that in practice, some barristers typically represent claimants or defendants. I note where that is the case by using the terms 'claimant barrister' and 'defence barrister', respectively.

Where I have compiled empirical data from these interviews in charts and graphs (largely in Chapter 6), I have noted the source of that data. Where I have produced charts and graphs on the basis of other data, I have either cited the source of that data (if it was compiled by someone else) or have noted my methodology (if it was compiled by me).

Having addressed my methodological approaches, I will now consider how those approaches – and the findings to which they give rise – contribute to the literature on collective redress.

2. Literature Review

Numerous scholars have considered class actions in their comparative context. However, very few have combined theoretical, historical, and empirical research and, on the basis of their findings, made recommendations for reform. This is how my methodological approach fits into the scholarly field on this subject. I review some of the comparative work on collective redress, before considering the literature on theoretical, historical, and empirical research in the area.

(a) Comparative Studies

Rachael Mulheron is the leading scholar on comparative studies of class action mechanisms. She has assessed the regimes of Ontario, BC, and (at the federal level) Australia and the US, highlighting the components of the class actions device that are the most effective, as well as those that are the most controversial.[25] She has also written

[25] Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart 2004).

extensively on class actions in England and why the device has not been adopted there.[26] In her recent book, *Class Actions and Government*,[27] Mulheron conducts a comparative study of the US, Canada, Australia, and the UK. In her chapter on 'Government as Class Actions Enabler', she looks to the wider social, political, or economic developments in the historical debate, especially the developments that generally precede a push for class action reform. I make very similar points in Chapter 5. However, I focus on comparing England and Canada and therefore go into greater detail regarding developments in the Canadian provinces and territories. I also include a detailed analysis of recent legislative developments in Ontario[28] and their theoretical and practical ramifications. Most importantly, I link my historical analysis to the underlying legal theory on class actions.

Other scholars have conducted comparative research involving common-law jurisdictions and the European Union.[29] Christopher Hodges has observed how differences between the legal systems in the US and Europe provide a normative explanation as to why simply transplanting the class action device from one to the other is problematic.[30] He has also looked briefly at the background to some of the European Commission's recommendations on collective redress, and touches on the differences in legal cultures between European Member States that would affect their implementation.[31] However, and

[26] Rachael Mulheron, 'A Channel Apart: Why the United Kingdom has Departed from the European Commission's Recommendation on Class Actions' (2015) 17 CYELS 36.

[27] (CUP 2020).

[28] *Class Proceedings Act, 1992*, SO 1992, c 6 (Ontario CPA).

[29] Christopher Hodges, 'Objectives, mechanisms and policy choices in collective enforcement and redress' in Jenny Steele and Willem H van Boom (eds), *Mass Justice: Challenges of Representation and Distribution* (Edward Elgar 2011) 101.

[30] ibid 103-104.

[31] Christopher Hodges, 'Collective Redress: A Breakthrough or a Damp Squib?' (2014) 37 JCP 67, 68-75, 78-82.

as discussed on the following page with regard to his work on multi-party actions, Hodges does not delve deeply into the cultural, social, and historical context of class actions.

Other scholars that have considered the importation of US-style class actions to Europe have expressed concern that doing so without the financial incentives that exist in the US (such as contingency fees and third-party funding) will render the device ineffective.[32] Others argue that transplanting that mechanism along with its US trappings will also transplant the problems experienced in the US, including excessive lawyers' fees, 'blackmail' suits, and settlements that fail to represent the best interests of the class.[33]

Generally, however, these studies have focused on the black-letter law and the cultural implications of transplanting the class action device from one legal system to another. They have not combined their comparative approach with theoretical, historical, and empirical research, as I do.

(b) Historical Research

My research fills a gap in the literature by looking at the recent history of class actions in Canada and England from a comparative perspective. There is no recent and comprehensive history of class actions and group litigation in England. Stephen Yeazell and David Marcus have done excellent work on the history of class actions in the US. However, Marcus focuses solely on the US, and Yeazell's history of English group litigation stops in the 19th century, after representative proceedings made their way to the US and before the fusion of the courts of law and equity there.[34]

Most other historical treatments of the class action device have been fairly

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[32] Jürgen G Backhaus et al (eds), *The Law and Economics of Class Actions in Europe* (Edward Elgar 2012) 4, 7.

[33] John Coffee, *Entrepreneurial Litigation: Its Rise, Fall and Future* (HUP 2015) 197-218.

[34] Stephen Yeazell, *From Medieval Group Litigation to the Modern Class Action* (YUP 1987).

superficial. These have consisted of overviews of the case law, or a brief look at the history of class actions in equity, usually to support a point being made about class actions today.[35] While these provide a useful overview of how courts have handled collective redress, they reflect a narrow view that legal history consists purely of court decisions. Such articles do not look at the wider context of class actions, the debate surrounding them, and their underlying theoretical foundations.

For example, Christopher Hodges has written on the rise of multi-party actions in England in the 1980s. He notes that these actions arose from two categories: transport accidents and pharmaceutical/medical device products.[36] His case studies of many of these actions[37] are very detailed, but they focus on the defence perspective and on case management issues. They do not cover the wider impact of these cases on the public consciousness, and on growing support for rules governing group litigation. As a result, the case studies provide a useful basis for a historical enquiry, but I broaden that enquiry.

While many of the deeper historical analyses have come from the US, there have also been fairly detailed histories in Québec. Shaun Finn has discussed the genesis of Québec class actions legislation,[38] demonstrating that, throughout their history, class actions have been not merely a procedural mechanism for aggregating claims, but also a way of providing access to justice in a substantive sense, levelling the playing field for 'ordinary' citizens against traditionally powerful entities.[39] This is why class actions have historically provoked such rapturous support or hostile opposition. Finn writes his history

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[35] eg Michael A Eizenga and Emrys Davis, 'A History of Class Actions: Modern Lessons from Deep Roots' (2011) 7 CCAR 3.

[36] Christopher Hodges, *Multi-Party Actions* (2nd edn, OUP 2020) 4.

[37] ibid ch 16.

[38] Shaun Finn, 'In a Class All Its Own: The Advent of the Modern Class Action and its Changing Legal and Social Mission' (2005) 2 CCAR 333.

[39] ibid 333-334.

with reference to the legislative debates and the reports from the Standing Committee on Justice. He provides a useful analysis of the cultural and political context of the movement for reform, but does not look at Québec in relation to other provinces, or in relation to the theoretical justifications for class actions – particularly the behaviour modification element to which so many business and other interests in Québec objected.

Catherine Piché has also looked at the history of the Québec class action,[40] relating her review to an overarching analysis of the interaction between culture and class actions. She argues that class actions mirror contemporary North American legal culture in their emphasis on access to justice, managerial judging, and the preference for settlement. She also acknowledges the disjuncture between traditional individualised litigation and class actions.[41] However, she does not look at 'non-legal' historical sources, such as newspapers and Parliamentary debates, and relies almost exclusively on case law, academic commentary, and the reports of the provincial Law Commissions.

The most notable historian of class actions is Stephen Yeazell, who looks in depth at the roots of class actions in equity and English history.[42] Yeazell focuses on the use of the representative action in the 16th, 17th, and 18th centuries, and argues that this procedure was fundamentally different to the modern class action, because (a) the groups existed as social entities independent of the lawsuit (whereas aggregation in modern class actions increases the power of previously unconnected individuals by grouping them together), and (b) the issues at stake involved status and declaratory remedies (whereas modern class actions involve individual claims of right which are generally remedied by damages).[43]

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[40] Catherine Piché, 'The Cultural Analysis of Class Action Law' (2009) 2 J Civ Law Stud 101, 120, 123.

[41] ibid 123.

[42] Stephen Yeazell, 'Group Litigation and Social Context: Toward a History of the Class Action' (1977) 77 Colum L Rev 866; Yeazell (n 34).

[43] Yeazell 1977 (n 42) 876-877.

In this sense, according to Yeazell, the modern class action is a different beast from its predecessors and confers substantive rights that previous group litigation did not.[44] In making this argument, Yeazell undermines the assumptions of many other scholars, who state that class actions have an unbroken history that stretches back to the Court of Chancery. Many proponents of class action reform have pointed to this history to legitimise what appears to be a procedural novelty. Yeazell argues persuasively that such arguments are incorrect. This would explain why courts such as the Supreme Court of Canada in *Naken*[45] were so reticent to adopt class actions in the absence of legislative authority, because there was little historical precedent for doing so. It also explains why there was a dearth of group claims for monetary damages in England and Canada in the 20th century after the fusion of the courts, because class actions were overwhelmingly an equitable and declaratory device.[46] The modern class action is therefore fundamentally different from its forbears. This explains why the device has historically provoked such bitter opposition from business interests and other more conservative groups.[47]

Yeazell was not the first to write of the equitable origins of class actions,[48] but his work is so authoritative that it has guided most of the subsequent scholarship. David Marcus has conducted significant original historical research on the genesis of Rule 23 in the US[49] and its political, social, cultural, and economic context.[50] Through the lens of the

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[44] Stephen Yeazell, 'From Group Litigation to Class Action – Part II: Interest, Class, and Representation' (1980) 27 UCLA L Rev 1067, 1100, 1108, 1114-1117, 1119.

[45] *GM (Canada) v Naken*, [1983] 1 SCR 72.

[46] Jillaine Seymour, 'Representative Procedures and the Future of Multi-Party Actions' (1999) 62 MLR 564.

[47] Martin H Redish, *Wholesale Justice – Constitutional Democracy and the Problem of the Class Action Lawsuit* (Stanford Law Books 2009) 5-9, 11-12.

[48] eg Raymond B Marcin, 'Searching for the Origin of the Class Action' (1974) 23 Cath U L Rev 515.

[49] US *Federal Rules of Civil Procedure*, Title IV: Parties, Rule 23: Class Actions, 383 US 1029 (*FRCP*).

[50] Marcus (n 17); David Marcus, 'The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994' (2018) 86 Fordham L Rev 1785.

theoretical tension within class actions (do they confer substantive rights, or are they merely procedural?), Marcus looks beyond the case law and academic commentary relied on by most other scholars of class actions history. He refers to primary 'non-legal' sources such as newspaper articles, records of institutional proceedings, reports and submissions from interest groups, and writings and speeches of key players. He not only looks at the official reports of the committee that drafted the revisions to Rule 23, but also their working papers, notes, and correspondence. In addition, Marcus refers to events occurring in the wider society that affected the development of Rule 23. He draws a compelling contrast between the 'regulatory conception' of class actions (whereby proponents of reform saw Rule 23 as a mechanism for regulation of big business, environmental polluters, and others) and the 'adjectival conception' (whereby more conservative interests held that Rule 23 should not depart from the traditional rules of court and was merely procedural).[51] Marcus' work on US class actions therefore provides a model for a detailed look, in the broader historical sense, at the debate on class actions in other jurisdictions.

My work on the history of the Ontario CPA follows Marcus' example by using a wide array of historical sources to study the development of class actions law in Ontario in relation to its social, economic, political, and legal background.[52] It looks at the legal institutions and players and their work in society, as well as the dynamics of lawmaking in general. It reveals the unique nature of the legislative consultation process, which saw the negotiation of a consensus between business interests and consumer and environmental groups, and the subsequent drafting of the CPA. Although this process was effective, I argue that it led to compromises and a lack of democratic oversight that continue to affect the CPA and its underlying goals.

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[51] Marcus (n 17) 4-11.

[52] Chiodo (n 16).

In my doctoral thesis, I compare the development of the class actions debate in England and Canada. This comparative history is combined with theoretical analysis, linking the various positions taken in the debate with foundational principles of class proceedings – specifically, access to justice, judicial economy, and behaviour modification. While class actions history has given rise to theoretical analysis, as noted above, none of these histories has been combined with an analysis of these particular normative goals. I therefore fill a gap in the literature by looking at class actions in their historical context, the debate surrounding them, and their theoretical foundations.

(c) Theoretical Analysis

A great deal has been written about procedural justice and the various justifications for class actions, and much of the terminology is fairly well-settled. However, crucial debates still continue regarding the definitions of key terms, and the role of these concepts (particularly behaviour modification) are strongly contested. I have therefore carefully defined my terminology in order to avoid confusion as to precisely which theoretical concepts I am tracing through the historical debate.[53] In doing so, I have constructed my own normative approach to the objectives for class actions, prioritising access to justice and judicial economy (as well as proportionality) over behaviour modification.

The class actions debate in England, Canada, and elsewhere has paid little attention to theory, although scholarship in the US has tended to focus on the political theory of class actions.[54] This has made the discussion on reform incoherent and unnecessarily fractious. Jurisprudential perspectives can be useful in widening options and providing

[53] Lobban (n 21) 6.

[54] eg Martin H Redish and Clifford W Berlow, 'The Class Action as Political Theory' (2007) 85(4) Wash U L R 753.

practical possibilities for reform. Putting legal change in historical context can also demonstrate how certain theoretical perspectives may no longer accurately apply to certain areas of the law. In the class actions context in England, this is certainly true for the concept of 'accurate justice' that I outline in Chapter 3. In its *Mastercard* judgment,[55] the UK Supreme Court held that the aggregate damages provisions of the new collective proceedings framework 'expressly, and radically, modified' the compensatory principle of civil claims for damages. As a result, precision in the calculation of individual damages is not necessary in this area,[56] and the theoretical perspective of accurate justice therefore no longer applies to collective proceedings in competition law.

By tracing accurate justice and the justifications for collective proceedings through the history of class actions, I hope to bring multiple theoretical perspectives to that debate and put the changes in legal doctrine and jurisprudence into wider social and political context. Much scholarly treatment of the theoretical justifications for class actions has looked at one or all of the three goals of access to justice, judicial economy, and behaviour modification.[57] With regards to access to justice, Jasminka Kalajdzic has looked at class actions in Canada and whether they meet this goal.[58] Using empirical research such as case studies and survey results, she considers four central components of class actions: case selection, settlements, fees, and costs. She concludes that class actions have provided access to justice in the sense of providing access to a legal process. However, Kalajdzic's definition of the concept is 'thicker' and broader than this: she sees access to justice as

[55] *Mastercard Incorporated & Others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51.

[56] ibid [58].

[57] Matthew Good, 'Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions' (2009) 47 Alta L Rev 185.

[58] Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press 2018).

evoking ‘fundamental concepts such as procedural fairness, a transparent process, and substantive justice.’ In this sense, she says, ‘we can do better’.[59]

While her empirical work is valuable, Kalajdzic does not consider much of the literature on procedural justice to which I refer in Chapter 3, and she makes a number of normative assumptions about what constitutes ‘justice’ in class actions procedure. While acknowledging that the Supreme Court of Canada and the Ontario Law Reform Commission’s *Report on Class Actions*, as well as much of class actions case law, have adopted a view that simply equates access to justice with access to the courts,[60] Kalajdzic defines ‘justice’ as a process that should guarantee a socially just outcome. Such a position has little theoretical basis, and Kalajdzic does not support her argument with references to procedural theory, nor does she sufficiently define the term ‘socially just outcome’.

Michael Molavi has also considered class actions’ role in providing access to justice, and has placed that analysis within a socio-political context.[61] He is critical of the emphasis on procedural aspects of access to justice and, like Kalajdzic, argues that the concept should also include a substantive dimension. However, Molavi’s discussion is from a predominantly political perspective, particularly his consideration of the role of the ‘private attorney general’, and the advantages and disadvantages of having private legal accountability for governmental conduct.[62]

With regard to judicial economy, much of the work has been done by proceduralists. Andrew Higgins and Adrian Zuckerman argue that procedures for determining common issues in one proceeding are a crucial feature of any effective and

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[59] ibid 11.

[60] ibid 55, 59-63, 68-70, 170.

[61] Michael Molavi, ‘Beyond the courtroom: Access to Justice, Privatization and the Future of Class Action Research’ (2015) 10 CCAR 1.

[62] ibid 20-23.

proportionate system of collective redress.[63] Where issues are common to many, a class action is the most effective way of ensuring a proportionate use of court resources, especially in jurisdictions such as England and Wales where costs are high and delays the norm.[64] This view of class actions sees the device as a mechanism of administrative efficiency, whereby the class is merely an aggregation of similar legal claims that does not transform the substantive nature of those claims.[65]

However, another view is that of the 'private attorney general', whereby the class action enables litigation that could not be brought on an individual basis, 'in pursuit of larger social goals such as enforcing government regulations and deterring unsafe or unfair business practices'.[66] This is the behaviour modification argument, upon which the vast majority of class actions literature is focused. I consider this argument, along with the relevant literature, in Chapter 3.

I take the normative position that behaviour modification should play a supplementary role to access to justice (of which compensation is a part) and judicial economy. However, I do not go as far as scholars such as Martin Redish, who only support the opt-in model for class actions because, in their view, it is the only model with the potential for 'meaningful' compensation for class members. According to Redish, any procedural mechanism that deprives an individual of her right to control her own litigation, and which allows her substantive rights to be decided without her input, is a violation of individual autonomy.[67] He also opposes the concept of the *cy-près* award that 'creates the

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[63] Andrew Higgins and AAS Zuckerman, 'Class actions in England? Efficacy, autonomy and proportionality in collective redress' (2013) Oxford Legal Studies Research Paper 93/2013.

[64] ibid 23.

[65] Deborah Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand Institute for Civil Justice 2000) 49.

[66] ibid.

[67] Redish (n 47) 3, 5, 41, 135-136, 148.

illusion of compensation' even though the injured parties are not directly compensated.[68] As noted in Chapter 3, with certain caveats, I support opt-out class actions and *cy-près* distributions if the primary focus is on making best efforts to compensate class members.

I do not support the position of scholars who argue that behaviour modification is paramount. David Rosenberg and Craig Jones are major proponents of this position.[69] Scholars such as David Shapiro and Samuel Issacharoff,[70] who view the class as a stand-alone 'entity' rather than an aggregation of separate individual claims, also prioritise deterrence.[71] Similarly, Kenneth Dam argues that the compensatory principle can be dispensed with entirely in favour of deterrence.[72]

This tug of war between the aims of compensation and behaviour modification can be seen throughout the literature. I shed light on this discussion by placing it in the social, political, and historical context of class actions, where compensation has generally been considered in the context of access to justice, and the role of behaviour modification has proven somewhat controversial. Numerous scholars have researched the history of class actions and made theoretical conclusions on the basis of their findings, although none have looked at the principle aims of class actions in this way.

(d) Empirical Research

Empirical research on collective redress in Canada and England has been relatively sparse.

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[68] ibid 14-15, 25-26.

[69] David Rosenberg, 'Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases' (2002) 115 HLR 831, 831-832; Craig Jones, *Theory of Class Actions* (Irwin Law 2003).

[70] David L Shapiro, 'Class Actions: The Class as Party and Client' (1998) 73 Notre Dame L Rev 913.

[71] ibid 924.

[72] Kenneth W Dam, 'Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest' (1975) 4 JLS 47, 60-61.

In England, much of the empirical work has been completed by Rachael Mulheron,[73] for example in her report for the Civil Justice Council that formed the basis for its 2008 review.[74] Various government departments have also undertaken empirical research to inform their green papers.[75] In Canada, empirical data has been very hard to come by because of the poor state of data collection in many courts. Nevertheless, Jasminka Kalajdzic has undertaken empirical research such as case studies and survey results,[76] and also produced valuable data for the Law Commission of Ontario Report on which she was principal researcher.[77] In addition, some limited empirical research has been undertaken by other scholars.[78] My empirical work builds on this foundation, and I combine my findings with historical research and theoretical conclusions in order to enrich my conclusions and recommendations for reform.

3. Conclusion

The purpose of my thesis is to identify and analyse the theoretical principles that underlie the positions taken in the class actions debate in England and Canada. The aim of doing so is to illuminate that debate and thereby assist future decision-making and reform. I seek

[73] *Reform of Collective Redress in England and Wales: A Perspective of Need* (CJC 2008); 'The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis' (2009) 15 Colum J Eur L 409, 431-434, in which Mulheron reviews the literature on opt-out statistics; *Class Actions and Government* (n 27).

[74] John Sorabji and others (eds), *Improving Access to Justice Through Collective Actions* (Civil Justice Council 2008).

[75] eg Office of Fair Trading, *The Deterrent Effect of Competition Enforcement by the OFT* (OFT 2007).

[76] (n 58).

[77] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms* (LCO 2019). Kalajdzic's co-researcher, Catherine Piché, has also undertaken extensive empirical analysis as part of her class actions lab at the Université de Montréal, eg 'Class Action Value' (2018) 19 Theo Inq L 261.

[78] eg research on take-up rates in class action settlements: Ward Branch and Greg McMullen, 'Take-Up Rates: The Real Measure of "Access to Justice"' (8th Annual Symposium on Class Actions, Toronto, April 2011).

to inform and perhaps alter the nature of the debate by highlighting the theoretical consequences that flow from taking certain positions, so that the procedures under discussion can be evaluated based on their normative purposes.[79]

Class actions theory has never been combined with a historical and empirical analysis of the device in England and Canada. This normative work is the aim of my thesis, which fills an important gap in the literature on class actions, as well as on legal history, comparative law, and procedural justice.

[79] Alexandra D Lahav, 'Multidistrict Litigation and Common Law Procedure' (2020) 24 Lewis & Clark L Rev 531 at 548.

Chapter 3:
The Theoretical Framework – Accurate Justice vs Access to Justice, Judicial Economy, and Behaviour Modification

This chapter lays out the theoretical framework for this thesis, and assesses from a normative perspective the main justifications for class actions[80] in England[81] and Canada. In later chapters, I evaluate the collective redress mechanisms to which these theoretical positions have given rise, and consider how effectively those mechanisms fit with the theoretical positions.

My central argument is that class actions represent a departure from the principle of 'accurate justice'[82] that has traditionally underpinned civil justice systems. Far from being unique, however, this departure is characteristic of the proportionality principle that forms the overriding objective, which has been the lynchpin of the English civil justice system since the Woolf Reforms.[83] In recent decades, similar principles have been incorporated into the civil procedure rules in Canada and around the world.[84] Even before then, and as explained below, there was an acknowledgement that it is impossible to obtain a perfectly accurate outcome under any kind of civil procedure.

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[80] I adopt the definition of class actions as 'a procedural scheme which is based upon opt-out … principles': Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Civil Justice Council 2008) 7.

[81] References to 'England' include England and Wales.

[82] When using this term, I am referring to substantive accuracy and not procedural accuracy (compliance with the relevant rules). My use is equivalent to Bentham's 'rectitude of decision': John Stuart Mill (ed), *Rationale of judicial evidence: from the manuscripts of Jeremy Bentham* (Hunt and Clarke 1827) 46-47. Lord Woolf described the aim as 'substantive justice' (a correct decision on the merits in each case): *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1995). John Sorabji has described it as 'accuracy': 'Prospects for proportionality: Jackson implementation' (2013) 32(2) CJQ 213, 220.

[83] The overriding objective enshrined in CPR 1.1 is also explicitly incorporated into the Competition Appeal Tribunal Rules 2015, SI 2015 No 1648, Rule 4, 'Governing Principles' (CAT Rules).

[84] Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 1.04(1.1); *Mastercard Incorporated & Others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51 [25] (Lord Briggs).

Class actions depart from the principle of accurate justice principally by way of three controversial mechanisms: opt-out classes, aggregate damages, and *cy-près* distributions, all of which necessarily involve a 'rough justice' approach.[85] There are three primary justifications for this departure. Two of them, access to justice and judicial economy, are less controversial, because the former accords with the traditional compensatory objective of civil litigation and allows individuals to enforce their rights at proportionate cost,[86] which has rule of law implications,[87] while the latter is purely a procedural concept that promotes the efficient use of time and resources in resolving disputes. The third, behaviour modification, is controversial because it involves deterrence and the punishment of the defendant, which are not primary aims of the traditional model of civil litigation. Class actions promote behaviour modification in that opt-out classes ensure that the maximum number of claimants are included in the class, and the awarding of aggregate damages and *cy-près* distributions ensure that the defendant is deterred, made to repay its gains, or internalises the full costs of its conduct.

Access to justice has been the primary reason for class actions' departure from the principle of accurate justice, with judicial economy and behaviour modification playing supplementary roles.[88] This chapter identifies the many facets of access to justice; it is not necessarily mutually exclusive with behaviour modification, although there is some tension between judicial economy and behaviour modification, as detailed below.

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[85] *Mastercard* UKSC, ibid [51]: 'in relation to damages, [a] fundamental requirement of justice [is] that the court must do its best on the evidence available [and this] is often labelled the "broad axe" or "broad brush" principle'.

[86] ibid [57].

[87] *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51 [66]-[68], [86], [116]-[117], which held that requiring litigants to spend a disproportionate amount in court fees to vindicate their rights is a breach of the right of access to justice.

[88] These three aims are not mutually exclusive and can justify recourse to different kinds of collective redress (eg common issues can be determined through a Group Litigation Order (GLO), thereby furthering judicial economy).

These three principles have been used throughout the class actions debate in England and Canada to justify the departure from accurate justice. However, the different principles can justify different forms of departure. I argue that the aggregation of individually viable claims (claims which would be economically viable to bring on a unitary basis) tends to be more consistent with access to justice and judicial economy, while the aggregation of individually non-viable claims tends to be more consistent with behaviour modification.[89]

Part I of this chapter explains the concept of accurate justice, and qualifies that concept in the context of the Woolf Reforms and other civil procedure reforms of recent decades that have focused on proportionality. Part II then explains how class actions depart from the concept of accurate justice, and how proportionality interacts with the three objectives of access to justice, judicial economy, and behaviour modification, all of which have been relied upon to justify the use of class actions. Part III demonstrates how, when viewed through the lens of proportionality, the aspects of class actions that depart from the accurate justice model seem much less controversial than they would initially appear. Part IV discusses the normative reasons why behaviour modification should remain a supplementary goal to the objectives of access to justice and judicial economy. Part V articulates how access to justice, judicial economy, and behaviour modification interact with the two main types of claim – individually viable and individually non-viable[90] – that can constitute a class action. Finally, Part VI concludes. I refer throughout to examples of how access to justice, judicial economy, and behaviour modification have been reflected in the collective redress debate in England and Canada. This forms an overture to Chapters

[89] John C Coffee Jr, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action' (1987) 54 U Chi L Rev 877, 915-917.

[90] Although some collective proceedings ('Type C' proceedings) contain both types of claim.

4-6, which pull out some key themes in the historical debate and current practice of collective redress in both countries.

1. Accurate Justice

The purpose of civil litigation in England and Canada is 'the attainment of justice'[91] and the enforcement of civil rights, and its traditional rationale has been accurate justice: to render an accurate decision on the merits of the case, in order to 'do justice between the parties'.[92] According to this philosophy, parties had a right to their day in court and had full control over the manner in which their cases were conducted, within the limits of their financial resources, in order to obtain the substantively correct result.[93]

Since before the Woolf Reforms and back to the time of Bentham, however, there has been an acknowledgement that an accurate outcome cannot be pursued at all costs, but has to be balanced against other important factors, including the cost and time involved in adjudicating rights.[94] This can be seen in processes such as summary judgment, which allows courts to deny even potentially meritorious claims a full trial if they can be assessed on an abbreviated record. The pursuit of high standards of accuracy were seen as contributing to increased cost and delay.[95] This cost and delay meant, in turn, that full accuracy could not be obtained, not least because it privileged well-resourced parties who

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[91] Sir Jack Jacob, 'The Reform of Civil Procedural Law' (1980) 14(1) The Law Teacher 1, 1-2.

[92] *Collins v The Vestry of Paddington (1879)*, (1879) LR 5 QBD 368, 380.

[93] Sorabji (n 82) 220; AAS Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure', in AAS Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 1999) 3.

[94] John Rawls, *A Theory of Justice* (1971 Belknap Press) 85-86, cited in Lawrence B Solum, 'Procedural Justice' (2004) 78 S Cal L Rev 181, 239; AAS Zuckerman, 'A Reform of Civil Procedure – Rationing Procedure Rather Than Access to Justice' (1995) 22 JL & Soc'y 155, 160-161; AAS Zuckerman, 'Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments' (1994) 14(3) OJLS 353, 363, 387.

[95] Zuckerman 1995, ibid, 161; John Sorabji, 'Late amendment and Jackson's commitment to Woolf: another attempt to implement a new approach to civil justice' (2012) 31(4) CJQ 393, 395; John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (CUP 2014) 31-74.

could afford to utilise every procedural mechanism and therefore had the advantage over poorer litigants, no matter the merits of the latter's position.[96] This approach also meant that fewer court resources were available for other litigants, preventing many of them from pursuing redress for breaches of their rights. As a result of escalating expense and delay, 'the legal system [became] simply too expensive, too inefficient and too sclerotic to provide a meaningful forum for dispute resolution'.[97]

This created a problem of access to justice,[98] which the civil procedure reforms of recent decades in England and Canada were intended to address. This was reflected in Ontario in, for example, the reforms to the summary judgment rules, the encouragement of settlement, and mandatory mediation. It was also reflected in the goal of the BC Justice Review Task Force, which was to identify reform measures to 'make the justice system more responsive, accessible and cost-effective'.[99] In Manitoba, the *Civil Justice Review Task Force Report* recommended widespread judicial case management to ensure the timely and cost-effective resolution of disputes and the efficient expenditure of 'the limited financial resources available to the Court … for the benefit of everyone'.[100] Even outside the context of class actions, therefore, the civil justice system has been departing from the goal of accurate justice.

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[96] This phenomenon was facilitated by the 'English rule' of costs-shifting, whereby the successful party received her costs from the losing party: Andrew Higgins, 'The Costs of Civil Justice and Who Pays?' (2017) 37(3) OJLS 687, 707-708.

[97] Samuel Issacharoff, 'Too Much Lawyering, Too Little Law' in AAS Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure – Essays on 'Access to Justice'* (OUP 1995) 245-246.

[98] Higgins 2018 (n 87) 10.

[99] BC Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (BC Justice Review Task Force 2006), cited in Colleen M Hanycz, 'More access to less justice: efficiency, proportionality and costs in Canadian civil justice reform' (2008) 27(1) CJQ 98, 108.

[100] *Manitoba Civil Justice Review Task Force Report* (Manitoba Civil Justice Review Task Force 1996) 11.

These reforms had the goal of proportionality at their core. This goal came to the forefront of English civil justice when the CPR was enacted in 1999.[101] Rule 1.1 states that the 'overriding objective' is to 'enabl[e] the court to deal with cases justly',[102] following Lord Woolf's recommendation that courts be required to deal with cases in a manner 'proportionate to the amount involved, the importance or complexity of the issues, and the parties' financial position.'[103] Later, following Lord Justice Jackson's Review of civil litigation costs in England and Wales,[104] CPR 1.1 also required that courts deal with cases 'at proportionate cost.'[105]

As John Sorabji has pointed out, the principle underlying the Woolf Reforms marked a watershed in English civil procedure. Where previously the guiding objective had been accuracy, now proportionality would prevail.[106] This is based on acceptance that the courts only have a finite amount of resources, and they must therefore be rationed in a proportionate manner to secure access to justice for all.[107] Proportionality means striking a balance 'between the need to achieve an accurate decision, the value and cost of adjudication and the need to secure effective access to limited resources for all litigants.'[108] This will necessarily mean that accuracy in decision-making will be limited by the

[101] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996); Interim Report (n 82).

[102] CPR 1.1.

[103] Woolf Final Report (n 101), Chapter 2 [19].

[104] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (TSO 2009).

[105] Lord Dyson MR, 'The application of the amendments to the Civil Procedure Rules' (2014) 33(2) CJQ 124.

[106] Sorabji (n 82) 220-221.

[107] Sorabji, ibid, 224; Higgins 2018 (n 87) 10; Dyson (n 105) 126.

[108] Sorabji, ibid; Interim Report (n 82), chapters 4, 19.

requirements of proportionality: accurate justice is sacrificed in favour of proportional justice.

This ‘efficiency promotes access’ analysis has also been reflected in Canadian discussions on access to justice and procedural reform.[109] Canadian civil justice reforms in the last two decades have focused on the reduction of cost and delay, both of which deter potential litigants from accessing the courts to resolve their disputes.[110] These reforms reflect an acknowledgement that aiming for perfect accuracy would create a system that would be too expensive (undermining citizens’ ability to vindicate their rights or defend their liberties, and thereby the value of the rights or liberties themselves), but that ‘a process requiring no investment of time or resources would have unacceptably low levels of output accuracy.’[111] The efficient use of resources, allocated according to principles of proportionality, form the middle ground between these two extremes. As Colleen Hanycz has noted, ‘[b]y achieving proportionality, it is assumed that the interests of just, accurate outcomes are balanced with efficient cost-effectiveness, thereby enhancing meaningful access to justice.’[112]

However, the result is not, as Hanycz argues, more access to less justice. Proportionality balances the goals of accuracy and efficiency (of both cost and time), and thereby enables more justice, ‘albeit of a lesser quality’, to be dispensed to a wider segment of society.[113] As Adrian Zuckerman states, compromising accuracy does not compromise

[109] Colleen M Hanycz, ‘More access to less justice: efficiency, proportionality and costs in Canadian civil justice reform’ (2008) 27(1) CJQ 98, 99.

[110] ibid 106.

[111] ibid 101.

[112] ibid 106.

[113] Zuckerman (n 94) 160-162; Higgins (n 96) 694, describing the ‘three dimensional theory’ of procedural justice that balances accuracy, time, and cost.

justice, because cost and time are also elements of justice.[114] Procedure must therefore be rationed to ensure the equitable distribution of court resources – restricting access to procedure by way of proportionality, instead of restricting access to the court by way of prohibitive costs.[115] This rationing, Zuckerman argues, can be done by managerial judges who see themselves not only as 'arbiters of individual disputes but also as guardians of scarce judicial resources which have to be carefully rationed and equitably distributed amongst all litigants, actual and potential.'[116]

The goal of proportionality as expressed in the overriding objective has an effect on all areas of civil litigation, not just collective redress. However, in the context of class actions, proportionality interacts with the three objectives of access to justice, judicial economy, and behaviour modification, all of which have been relied upon to justify the use of class actions. This will be discussed further in the next section. In addition, when viewed through the lens of proportionality, the aspects of class actions that depart from the accurate justice model seem much less controversial than they would initially appear. These include opt-out classes, aggregate damages, and *cy-près* distributions, which will be discussed in section 3.

2. Access to Justice, Judicial Economy, and Behaviour Modification

(a) Access to Justice and Judicial Economy

Access to justice and judicial economy are 'two of the basic tenets of modern civil procedure'[117] and are also two of the justifications for class proceedings. They have proven

[114] Zuckerman (n 95) 162; Zuckerman 1994 (n 94) 353.

[115] Zuckerman, ibid, 158, 167.

[116] ibid 171-173; Dyson (n 105) 127-128, 131.

[117] Rachael Mulheron, 'Justice Enhanced: Framing an Opt-out Class Action for England' (2007) 70 MLR 550, 556.

powerful arguments in favour of class action reform in England. Lord Woolf stated that two of the objectives underlying multi-party actions were to 'provide expeditious, effective and proportionate methods of resolving cases' and to 'provide access to justice where large numbers of people have been affected by another's conduct'.[118] He recommended that courts have the power to progress multi-party actions on an opt-out or opt-in basis, but this was not enshrined in the CPR.[119] Several years later, the Civil Justice Council recommended class proceedings legislation on the same basis.[120] The research on which its report was largely based stated that legislation should be enacted because it 'would assist both (a) the ability of aggrieved persons to "have their day in court" … and (b) the efficiency and effectiveness of the judicial resources at the State's disposal.'[121] Access to justice was a prime motivation when the UK government considered collective proceedings for the competition sector.[122]

The two objectives have also been relied upon heavily to justify the procedure in Canada. The OLRC stated in its Report that two of the three advantages of class actions were 'judicial economy [and] increased access to the courts'.[123] When the Supreme Court of Canada permitted class actions to proceed at common law under the representative rule,

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[118] Woolf Final Report (n 101) [17.2].

[119] Instead, CPR Part 19.III enacted the GLO framework for situations involving multiple claimants.

[120] Civil Justice Council, *Final Report: Improving Access to Justice through Collective Actions* (CJC 2008) 17-19.

[121] Mulheron 2008 (n 80) 158. Mulheron noted that, 'a third possible objective – to achieve better deterrence of culpable behaviour – was mentioned frequently by stakeholders and interested parties'. This is discussed below.

[122] Department for Business, Innovation and Skills, *Private Actions in Competition Law: A Consultation on Options for Reform: Government Response* (TSO 2012) [5.12]; Hansard (HC, 28 Jan 2014, vol 574, col 775), Hansard (HL, 1 July 2014, vol 754, col 1648), both cited in Rachael Mulheron and Douglas E Edlin, 'The Mere Mirage of a Class Action? A Challenge to *Merricks v Mastercard Inc*' (2018) 2 CJQ 216, 226.

[123] Ontario Law Reform Commission, *Report on Class Actions* (Ministry of the Attorney General 1982) 117; *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 [27]-[29].

it also acknowledged that class actions freed up judicial resources and allowed costs to be spread amongst numerous plaintiffs, thereby 'improv[ing] access to justice'.[124] These two justifications have supported a liberal interpretation of class proceedings statutes, in the jurisprudence and law reform reports, over the past three decades.[125]

Access to justice and judicial economy both interact with the concept of proportionality, as enshrined in the overriding objective 'of enabling the court to deal with cases justly and at proportionate cost'.[126] CPR 1.1(2) explains what it means to deal with cases justly and at proportionate cost; many of the factors listed pertain to either access to justice or judicial economy, or both, and all of them are facilitated by class actions. The aggregation of claims (especially small claims) in a class proceeding allows claimants to pool costs and other resources and access third party funding, and thereby face large corporations and other powerful defendants on an equal footing (CPR 1.1(2)(a)), which promotes access to justice. As discussed below, dealing with cases justly also means, in part, ensuring that claimants can have access to the courts by distributing the court's resources fairly and allotting to each case only the share of those resources that is necessary (CPR 1.1(2)(e)).[127] Dealing with cases in ways which are proportionate to the amount of money involved, as well as the importance of the case and the complexity of the issues (CPR 1.1(2)(c)(i)-(iii)), means (in part) not requiring litigants to pay disproportionate amounts to bring their claims before the courts, which would hamper their ability to

[124] *Dutton*, ibid [27]-[28]. The Court also stated that class actions further the goal of behaviour modification.

[125] Manitoba Law Reform Commission, *Class Proceedings, no 100* (MLRC 1998) 22; Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Queen's Printer 1990) 16-17; Federal Court of Canada, *Class Proceedings in the Federal Court of Canada: A Discussion Paper* (FCC 2000) 13; Alberta Law Reform Institute, *Class Actions: Final Report No. 85* (ALRI 2000) [112]-[114]; *Hollick v Toronto (City)*, 2001 SCC 68 [15]; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 [137]; *Pioneer Corp v Godfrey*, 2019 SCC 42 [205].

[126] CPR 1.1(1).

[127] Rachael Mulheron, 'Some Comparative Observations on Res Judicata for Canada's Newest Class Actions Regime' (2003) 30 Man LJ 171, 193-194.

enforce their rights. Class proceedings also save expense (CPR 1.1(2)(b)); because cost is an element of justice and also pertains to the distribution of the court's resources, this factor promotes both access to justice and judicial economy. In facilitating access to the courts (especially for small claims) and spreading costs out amongst numerous claims, class actions promote the objectives of access to justice and judicial economy, and thereby the overriding objective. Finally, the overriding objective requires the court to consider the financial position of each party (CPR 1.1(2)(c)(iv)); by allowing the class to access third party funding through the aggregation of claims, class actions mean that the financial positions of each party are balanced more fairly and access to justice is promoted.

Class actions also promote judicial economy, which interacts with proportionality in that it involves efficiencies of both time and cost, as well as the effective use of judicial resources.[128] It also involves the avoidance of duplicative proceedings for individually viable claims. In Canada, the concept has been interpreted as one that seeks to avoid inconsistent results for similarly-situated claimants.[129] Consistency of judgments for persons with similar claims is a central element of the rule of law, and is also in accordance with the principle of equal treatment according to law; it is therefore crucial to the legal system's claims to legitimacy.[130] This does not mean that the need to avoid inconsistency will always be paramount or harmonious with judicial economy; if a court considering certification of a class action finds that individual proceedings would be cheaper and more cost effective (and therefore more proportionate), then the action will not be certified, despite the risk of inconsistent findings.

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[128] Mathew Good, 'Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions' (2009) 47(1) Alta L Rev 185, 207, 209-218, 220.

[129] ibid 207, 209-218, 220.

[130] Andrew Higgins, 'The Rule of Law Case Against Inconsistency and in Favour of Mandatory Civil Legal Process' (2019) 39(4) OJLS 725, 726, 727.

The interaction of judicial economy and proportionality has been particularly noted in Canada. The Supreme Court of Canada referred in *Marcotte v Longueuil (City)*[131] to two types of proportionality: individual (the resources that are spent on a particular case) and collective (the use of judicial resources relative to other cases in general).[132] Catherine Piché refers to the 'spirit of economy of Quebecoise proportionality'[133] that ensures an optimal and equitable use of judicial services by all citizens.[134] The principle of proportionality has been applied to class actions in that province, in that it is a framework through which the authorisation (certification) test has been analysed.[135] In other provinces, courts have noted this specifically with regard to the preferable procedure stage of the certification test, where a central part of the analysis is judicial economy and how much procedure a litigant needs to obtain access to justice, as well as 'manageability and whether the claimants will receive a just and effective remedy for their claims'.[136]

Access to justice is a more complex concept than judicial economy. It has, for the most part, been defined procedurally. This is because the legal system is one of imperfect procedural justice: it cannot provide procedures that guarantee an accurate outcome. As a result, it is somewhat artificial to see accurate justice as an absolute concept; justice is always relative to cost and time, and this three-dimensional view of justice is discussed further below.

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[131] 2009 SCC 43.

[132] Catherine Piché, 'Comparative Perspectives, Figures, Spaces and Procedural Proportionality' (2012) 2 IJPL 145, 157. In the English context, see Dyson (n 105) 126.

[133] Piché, ibid.

[134] ibid.

[135] *Marcotte* (n 131) [43].

[136] *RG v The Hospital for Sick Children*, 2017 ONSC 6545 [141]; Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms* (LCO 2019) 50.

According to Rawls, procedural justice comes in three forms: perfect, imperfect, and pure.[137] Perfect procedural justice consists of an independent criterion for a correct outcome, and a process that guarantees that outcome. According to this model, the purpose of procedure is the search for accuracy according to pre-determined criteria[138] (the 'accuracy model').[139] Imperfect procedural justice also has an independent criterion for accuracy,[140] but it does not have a procedure that guarantees that outcome.[141] Imperfect procedural justice therefore 'incorporates the notion of an independent criterion for accuracy but adds the notion of "other ends of the law", or considerations of cost that may be balanced against accuracy.'[142] It has therefore been termed the 'balancing model'.[143]

The civil justice system is, by necessity, imperfect: it cannot satisfy the definition of perfect procedural justice for two reasons. First, there is no process for guaranteeing a correct judgment according to pre-determined criteria, even with unlimited resources. Second, no litigant is entitled or should be required to invest unlimited resources in the pursuit of accuracy.[144] Imperfect procedural justice balances the cost of operating the civil justice system against the cost of erroneous judicial decisions.[145] As noted above, an

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[137] Rawls (n 94) 85-90.

[138] Solum (n 94).

[139] ibid 243.

[140] eg that a defendant in a criminal trial only be found guilty if he actually committed the offence with which he is charged.

[141] Solum (n 94) 239-240; Rawls (n 94) 85-86.

[142] Solum, ibid, 240.

[143] ibid 243, 252-259. The third form, pure procedural justice, has no independent criterion for the right result. As long as a correct or fair procedure is followed, the result is presumed to be correct or fair: ibid 243; Rawls (n 94) 86. According to this model, participation in the process, not the outcome, is paramount. Participation matters independent of cost and accuracy, because it confers legitimacy on legal proceedings: ibid 243, 259-274.

[144] Zuckerman (n 95) 161-162; Zuckerman 1994 (n 95) 363, 387.

[145] Richard A Posner, *Economic Analysis of Law* (7th edn, Aspen 2007) 593.

accurate outcome cannot be pursued at all costs because it must be balanced against other factors such as cost and time.[146] The wider policy aim of this three-dimensional theory of justice is the need to ensure the equitable allocation of limited government resources to all who call on the State for the resolution of their disputes.[147] Zuckerman states that this aim is one of distributive justice.[148]

The procedural view of access to justice also sees it as equivalent to access to the courts.[149] Courts and commentators have viewed litigation primarily in economic terms, so that access to justice is facilitated by spreading costs across a greater number of people.[150] According to this view, class actions are the ultimate mechanism for delivering substantive justice in mass litigation at proportionate cost. While the Canadian law reform reports refer to the social and psychological barriers to litigation, these are not explored in depth and Canadian courts rarely refer to them.[151]

In England, access to justice is also defined procedurally, in terms of enabling access to the courts.[152] Access to justice is seen as the fair distribution of court resources so that everyone with a legitimate claim is able to access the system.[153] But it also has implications for what a state can legally demand from litigants seeking to enforce their rights, for if litigants were required to pay disproportionate amounts to bring their claims before the courts it would make litigation irrational, thus diminishing the value of their

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[146] Rawls (n 94) 85-86; Zuckerman 1994 (n 94) 363, 387, 160-161.

[147] Sorabji 2014 (n 95) 3, 112, 118; Zuckerman (n 93) 17.

[148] Zuckerman, ibid 17.

[149] The relevant section in the OLRC Report (n 123) 119 is entitled 'Access to the Courts'.

[150] *Dutton* (n 123) [28]; *Hollick* (n 125) [15]; OLRC Report, ibid 119-122; Good (n 128) 190-191, 192.

[151] Good, ibid 191, 196, 198-199.

[152] *Unison* (n 87) [65].

[153] Woolf Final Report (n 101) Chapter 2 [17]; Zuckerman (n 93) 17.

rights.[154] In this regard, access to justice is also inherent in the rule of law[155] because, without access to the courts, people cannot enforce their civil rights and 'laws are liable to become a dead letter'.[156]

Substantive access to justice – that is, accuracy, the application of right law to right fact by way of a fair process – is never entirely ignored in this analysis. In a system of imperfect procedural justice, cost and other considerations must be balanced against accuracy. Accuracy therefore remains important; it is simply not determinative. Lord Woolf pointed out that substantive and procedural justice should be balanced in this regard,[157] and other judges have also made this observation.[158] However, substantive access to justice should be distinguished from the content of the substantive law, the latter which remains irrelevant to this procedural balancing analysis.[159]

While Canadian commentators have argued that access to justice should also mean access to a just result,[160] 'just results' cannot be independently measured in a system of imperfect procedural justice. Procedure can be improved in order to maximise the chances of a just result, but such a result cannot be guaranteed for the reasons discussed above.[161]

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[154] *Unison* (n 87).

[155] ibid [66]-[68], [71].

[156] ibid [68]; Higgins 2018 (n 87) 8.

[157] Sorabji (n 95) 102.

[158] *Adoko v Jemal*, 1999 WL 477353 (Lord Justice Laws).

[159] Higgins acknowledges that his is an 'exclusively procedural definition of access to justice which does not depend on the content of the substantive law' (n 96) 696.

[160] Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press 2018) 51, 68-70; Michael Molavi, 'Beyond the Courtroom: Access to Justice, Privatization, and the Future of Class Action Research' (2015) 10(1-2) CCAR 7, 11; Good (n 128) 197-198, 204-205.

[161] A just result is different from an effective remedy – the former implies a correct result, while the latter implies a remedy that leads to the effective enforcement of rights: *Unison* (n 87) [106]-[109]; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 13. The two concepts have been confused in Canada: *AIC Limited v Fischer*, 2013 SCC 69 [24]; Kalajdzic (n 160) 69-70; Molavi (n 160) 15.

In light of this discussion, I rely exclusively on the procedural definition of access to justice, which includes substantive access to justice. It will not look at the content of the substantive law or whether procedure has been successful in obtaining just results.

(b) Behaviour Modification

Behaviour modification is a central function of the civil courts, in the sense that people cannot enforce their rights without access to the courts,[162] and without such access, claimants have little recourse when wrongdoers flout the law.[163] If the law does not provide for enforcement of rights and hold wrongdoers accountable, then they (and other potential wrongdoers) are less likely to respect their obligations. Behaviour modification is therefore regarded as a legitimate goal of private law, and even the most ardent corrective justice theorists have accepted that deterrence plays some role.[164] It also interacts with proportionality; since 2013, the overriding objective of dealing with cases justly and at proportionate cost has included 'enforcing compliance with rules, practice directions and orders' (CPR 1.1(2)(f)).

Behaviour modification is part of the core function of the courts.[165] However, it is not an independent function of civil justice, and civil proceedings are generally not brought solely for that purpose. Even where behaviour modification comes to the forefront, it only does so once the compensatory function is exhausted. Punitive damages, for example, will only be awarded if compensatory damages are inadequate. There is generally no role for

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[162] *Mastercard UKSC* (n 84) [68]; Higgins 2018 (n 87) 8.

[163] *Mastercard UKSC*, ibid [71]; Higgins 2018, ibid.

[164] eg Ernest Weinrib accepts that damages can have a behaviour modification effect, in that they deter the violation of the legal norms of private law: 'Deterrence and Corrective Justice' (2002) 50 UCLA L Rev 621.

[165] Frederick Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (HUP 2019), Chapter 1, 'The Problems of Justice'.

behaviour modification alone when compensation cannot be achieved. It is this question, however, that has arisen in the context of class actions,[166] and which will be discussed throughout the rest of this chapter.

The goal of behaviour modification consists of several elements, including deterrence of actual or potential wrongdoers; disgorgement or other reparations; and cost internalisation.[167] These elements are often used interchangeably in the law reform reports, academic commentary, and case law. In Canada, the OLRC Report defines behaviour modification as the deterrence of wrongful conduct by way of disgorgement or other forms of cost internalisation.[168] The Federal Court report states that class actions 'provide additional incentives for compliance with the law by avoiding unjust enrichment of the defendant and by requiring wrongdoers to internalize the costs of their unlawful actions.'[169] Other law reform reports focus on the deterrence of actual or potential wrongdoers.[170] The Supreme Court of Canada has also focused on the deterrence of wrongdoers by forcing them to internalise the costs of their wrongdoing.[171] Ultimately, 'class actions force malefactors to pay for their wrongdoing [so that] defendants will either change their ways or be bankrupted.'[172]

[166] OLRC Report (n 123) 145.

[167] Good (n 128) 206.

[168] OLRC Report (n 123) 140-141, 143, 146.

[169] FCC Report (n 125) 13.

[170] AGAC Report (n 125) 17, 18; MLRC Report (n 125) 28-30; ALRI Report (n 125) [115]; Craig Jones, *Theory of Class Actions* (Irwin Law 2003) 39.

[171] Good (n 128) 211; *Dutton* (n 123) [29]; *Hollick* (n 125) [15].

[172] Good (n 128) 219.

In England, 'achieving better deterrence of culpable behaviour' appears to be the primary way in which behaviour modification is considered.[173] In its 2008 Report, the Civil Justice Council focused predominantly on access to justice, but also found that collective actions 'could be improved considerably to promote better enforcement of citizens' rights'.[174] Similarly, a major objective of the CAT collective action regime is to deter breaches of the law, by making redress for such breaches more effective.[175] Discussion of the enforcement and deterrence objective is also apparent in the Hansard debates.[176] The CAT confirmed this goal in the first certification hearing under the new regime.[177]

In both countries, behaviour modification plays a supplementary role to the goals of access to justice and judicial economy. This is apparent in the Canadian jurisprudence and law commission reports.[178] Until recently in England, policymakers focused largely on compensating victims of civil wrongs, and did not grapple with other potential goals such as behaviour modification.[179] Even when that goal was discussed in the debates on

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[173] Mulheron 2008 (n 80) 158. However, see Andrew Higgins and Adrian Zuckerman, 'Class actions come to England – more access to justice and more of a compensation culture, but they are superior to the alternatives' (2016) 35(1) CJQ 1, 8, which discusses behaviour modification in terms of disgorgement.

[174] CJC Report (n 120) 17, 18.

[175] Office of Fair Trading, *Private actions in competition law: effective redress for consumers and business: discussion paper* (OFT 2007) [2.8]; Department for Business, Innovation and Skills, *Private actions in competition law: a consultation on options for reform* (BIS 2012) 30-31; Commission, 'Green Paper: Damages actions for breach of the EC antitrust rules' COM (2005) 672 final, 3; Mulheron 2018 (n 122) 227; Andrew Higgins, 'Driving with the Handbrake On: Competition Class Actions under the Consumer Rights Act 2015' (2016) 79(3) MLR 442, 465-466.

[176] Rachael Mulheron, 'Restitutionary Relief in Competition Law Class Actions: An Evolving Landscape' (2019) 26 Restitution L Rev 1, 20-21, 28-30; Mulheron 2018 (n 122) 225-227.

[177] *Gibson v Pride Mobility Products Ltd (Application for a Collective Proceedings Order)* [2017] CAT 9 [22].

[178] OLRC Report (n 123) 145; ALRI Report (n 125) [115]; Good (n 128) 222; *Setoguchi v Uber BV*, 2021 ABQB 18 [112].

[179] Susan MC Gibbons, 'Group Litigation, Class Actions, and Collective Redress: An Anniversary Reappraisal of Lord Woolf's Three Objectives' in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009) 119.

collective proceedings in competition law, it was balanced with the goal of redress, so that the new regime was designed to tackle 'unredressed consumer grievances and undistributed profits accruing to cartellists arising from proven unlawful anti-competitive conduct' as well as 'stand-alone' actions in which no unlawful conduct had previously been proven.[180]

Despite this supplementary role, behaviour modification has been important in justifying the more controversial aspects of class actions. These arguments tend to focus on deterrence and cost internalisation. With regard to opt-out classes, these provide for the aggregation of the greatest numbers of class members and therefore the greatest deterrence.[181] Even when class members are permitted to opt-out, very few will; research shows that opt-out rates are minimal[182] because the default option is generally the most popular.[183] Opt-out classes are particularly large in class actions where losses are widespread but individually non-viable from a cost perspective, as in consumer protection cases.[184] Large groups can put much more pressure on defendants to pay for their socially undesirable behaviour, thereby deterring such behaviour.[185] This is the 'private attorney

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[180] Mulheron 2018 (n 122) 225; HC Deb 28 January 2014, vol 574, col 775; HL Deb 1 July 2014, vol 754, col 1648.

[181] Mulheron 2008 (n 80) 41-42, 103, 159-160; Mulheron 2007 (n 117) 556; Alma M Mozetic, 'Collective redress: a case for opt-out class actions in England and Wales' (2016) 35(1) CJQ 29, 31-32.

[182] Theodore Eisenberg and Geoffrey P Miller, 'The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues' (2004) 57 Vand L Rev 1529, 1532. Eisenberg and Miller state that, on average, less than 1 per cent of class members opt out. By contrast, Vince Morabito has published empirical research showing relatively high opt-out rates in Australian class actions (average opt-out rates of 13.78% in Part IVA proceedings at the federal level, and 20.63% in Part 4A proceedings in the state of Victoria). However, Morabito has also found that these opt-out rates are largely due to defendants conducting settlement negotiations directly with individual class members: *An Empirical Study of Australia's Class Action Regimes: Second Report* (Australian Research Council 2010) 31-32.

[183] Mozetic (n 181) 33.

[184] Mulheron 2008 (n 80) 70-71, 100, 102.

[185] David Rosenberg, 'Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases' (2002) 115 Harv L Rev 831, 831-832.

general' view of class actions,[186] where the device is used for the private enforcement of regulatory and other public policy objectives.[187] While the opt-out regime generated 'the most heated debate' during the consultation phase for class actions in UK competition law, the government concluded that this was the best way in which to deter anti-competitive behaviour and enable the private enforcement of competition regulations.[188] As Rachael Mulheron has noted, opt-out regimes more effectively ensure deterrence by fully assessing defendants for the loss and damages they have caused, whereas opt-in regimes tend to under-compensate because of low opt-in rates.[189]

The combination of an opt-out class with an award of aggregate damages provides for cost internalisation. When damages are awarded to the whole class, the defendant is made to internalise all the cost of its conduct, which in turn acts as a deterrent to actual and potential wrongdoers.[190] It may also mean that the defendant has to disgorge or repay its ill-gotten gains. For example, the Supreme Court of Canada in *Pro-Sys* upheld the certification of competition law class actions involving indirect purchasers,[191] even though establishing and quantifying loss on the part of individual class members would be extremely difficult,[192] partly because '[t]he rejection of indirect purchaser actions in such

[186] The model of the private attorney-general is one of deterrence: it is closely associated with class actions in the US, but has been strongly rejected in Europe: Molavi (n 160) 20-23.

[187] Deborah R Hensler, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND 2000) 69-72.

[188] Mulheron 2018 (n 122) 225-227, citing Department for Business, Innovation and Skills, *Private Actions in Competition Law: A Consultation on Options for Reform: Government Response* (BIS 2013) [3.8], [3.11]; Higgins & Zuckerman 2016 (n 172) 11-12.

[189] Mulheron 2007 (n 181) 556.

[190] OLRC Report (n 123) 141.

[191] *Pro-Sys* (n 125); *Pioneer* (n 125).

[192] This is because of the difficulty in quantifying the 'passing-on' of costs from direct purchasers (who purchased directly from members of the cartel) to indirect purchasers (who purchased from the direct purchasers).

cases would increase the possibility that the overcharge would remain in the hands of the wrongdoer.'[193] Similarly, UK competition lawyers and judges considered that the aggregate damages provisions of the new competition law regime 'would be critical to achieving to higher levels of redress for anti-competitive conduct.'[194] In giving effect to the behaviour modification objectives of the legislature by allowing the claim for aggregate damages to proceed, the UK Supreme Court in *Mastercard* followed the Supreme Court of Canada's lead in *Pro-Sys*.[195]

Finally, it is at the distribution stage 'that a determination of the appropriate role for behaviour modification in class actions becomes most critical.'[196] While an award of aggregate damages to an opt-out class would mean the awarding of very large sums, returning the money to the defendant means that it would not have to internalise the full costs of its conduct – which is the *raison d'être* of deterrence.[197] In order to utilise 'monetary awards as an instrument of behaviour modification',[198] then, class actions statutes in Canada allow for *cy-près* distributions – that is, the distribution of funds in a way that is reasonably likely to indirectly benefit some or all class members.[199] In this way, the objective of accurate redress falls into the background as the objective of behaviour modification is emphasised. As Guido Calabresi puts it, 'who gets the amount recovered in the class action may be highly important if we are concerned with

[193] *Pro-Sys* (n 125) [49].

[194] Higgins & Zuckerman 2016 (n 172) 6.

[195] *Merricks v Mastercard Inc* [2017] CAT 16 [56], [72]-[75], [97]; *Merricks v Mastercard Incorporated & Others* [2019] EWCA Civ 674 [40]; *Gibson* (n 177) [22]; Mulheron 2018 (n 122) 225-227.

[196] OLRC Report (n 123) 559.

[197] Jeff Berryman, 'Nudge, Nudge, Wink, Wink: Behavioural Modification, *Cy-Près* Distributions and Class Actions' (2011) 53 SCLR (2d) 133 [42].

[198] OLRC Report (n 123) 582; CJC 2008 (n 120) 112, 427-430.

[199] The concept of *cy-près* distributions, including the 'narrow' and 'wide' definitions of that term and the mechanisms used in England, is discussed more thoroughly in Section 3(c), below.

compensation and with redress. But it may not be very important if we are concerned with social cost accounting for deterrence.'[200]

Most of the class proceedings statutes in Canada allow for *cy-près* distributions only after reasonable efforts have been made to distribute the monetary award to the class. This proportional approach provides further support for the argument that behaviour modification plays a supplementary role in the justification for class actions. In the wider sense, however, the objective of a distribution can change according to the recipient. BC's statute does not allow for the return of unclaimed damages to the defendant at all, following recent changes to the legislation with the express aim of reinforcing behaviour modification.[201] In addition, scholars such as Craig Jones have asserted that *cy-près* distributions can be justified on the basis of deterrence alone,[202] and this was also the holding of the majority of the Supreme Court of Canada when deciding whether indirect purchasers in *Sun-Rype* should be included in the class.[203] While the majority would have dismissed the appeal and upheld the denial of certification, the two dissenting justices would have allowed the appeal. Justices Karakatsanis and Cromwell stated that a class action in its entirety – not simply the distribution of damages – could be justified on the basis of behaviour modification, because it would permit the disgorgement of the defendant's unlawful gains.[204]

[200] Guido Calabresi and Kevin S Schwartz, 'The Costs of Class Actions: Allocation and Collective Redress in the US Experience' (2011) IEL Paper in Comparative Analysis of Institutions, Economics and Law No 1, 11.

[201] British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 41st Parl, 3rd Sess (22 November 2018) (David Eby).

[202] Jones (n 170) 29-33, 128.

[203] *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 [27].

[204] ibid [97].

The decisions of the Court of Appeal and UK Supreme Court in *Mastercard* also support the behaviour modification objective of the legislature.[205] According to these decisions, even where accurate redress cannot be achieved so that aggregate damages and *cy-près* distributions have to be relied on instead, private enforcement of competition law should still be permitted because of its deterrent function.[206]

3. Class Actions and Proportionality

At first glance, class actions offend two of the key elements of accurate justice: substantive accuracy in the outcome of judgments, and the parties' right to control the course of their litigation. However, when viewed through the lens of proportionality, the aspects of class actions that depart from the accurate justice model seem much less controversial than they would initially appear. These include opt-out classes, aggregate damages, and *cy-près* distributions. Each of these mechanisms will be explored in turn.

(a) Opt-Out Classes

Many collective redress regimes require each affected individual to 'opt in' to join the class. In the first collective actions in competition law in England,[207] for example, consumers had to be identified from the beginning of the action and signed up individually.[208] Conversely, an opt-out regime means that individuals captured by the class

[205] *Mastercard CA* (n 195) [60]-[61]; *Merricks* (n 195) [94]-[95].

[206] Mulheron 2018 (n 122) 253.

[207] Competition Act 1998, 1998 c 41, s 47B (Competition Act 1998), inserted by Enterprise Act 2002, 2002 c 40, sections 19, 279 (Enterprise Act 2002). This enabled organisations to represent groups of consumers in the Competition Appeal Tribunal (CAT).

[208] The resulting difficulties in establishing a sizeable class meant the mechanism was little-used: see Chapter 5.

definition are automatically included in the class, unless they take steps to be excluded. ‘Class actions’ as discussed in this thesis are conducted on an opt-out basis.[209]

Opt-out classes have been a controversial point in recent debates on class actions in England, because they involve the determination of individuals’ rights without their participation in or knowledge of the action, depriving litigants of control over their cases, and, if they fail to opt out, barring them from bringing their own action. In most opt-out class actions, the court will require some form of notice to be distributed so that class members are informed of their rights.[210] However, in some cases this is discretionary so that no notice is given;[211] and in other cases, although inadequate notice may violate the rules of natural justice,[212] Canadian courts have held that notice will be found to be adequate even if it only reaches a part of the class, especially if many of their identities are unknown.[213] Inevitably, then, many class members rights ‘are determined in their absence and, quite possibly, ignorance of the action.’[214]

This approach raises questions about whether absent class members’ rights are adequately represented. In a system that places great importance on each party having its ‘day in court’, a procedure that deprives an individual of litigation autonomy[215] so that they are bound by the decisions of another and cannot later pursue their own case because

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[209] Rachael Mulheron, ‘Opting in, Opting out, and Closing the Class: Some Dilemmas for England’s Class Action Lawmakers’ (2011) 50 CBLJ 376, 379-407.

[210] *Class Proceedings Act, 1992*, SO 1992, c 6, s 17(1) (Ontario CPA).

[211] ibid s 17(2).

[212] *Canada Post Corp v Lépine*, 2009 SCC 16.

[213] Joseph Marcus, ‘National Class Actions in Canada: Yet Another Call for Clarity and Coordination’ (2013) CLPE Research Paper No 20/2013, 50-53.

[214] The Ministry of Justice cited this argument against opt-out class actions in *The Government’s Response to the Civil Justice Council’s Report: ‘Improving Access to Justice through Collective Actions’* (TSO 2009) [31]-[32].

[215] Higgins & Zuckerman 2016 (n 172) 4: ‘This is a very formalistic and limited notion of autonomy that equates it to express individual consent.’

of the principle of *res judicata*, may undermine accuracy and therefore substantive justice.[216] Yet this is the case in an opt-out class action if class members' rights are not adequately represented. Such a proceeding would therefore potentially undermine the principle of accurate justice.

Through the lens of proportionality, however, the opt-out mechanism becomes much more justifiable.[217] It is supported on the basis that it 'sweeps … the vulnerable into the class, which advances … access to justice and efficient allocation of scarce judicial resources.'[218] Opt-out regimes have also been shown to increase efficiencies in the class actions process, making it easier to commence and prosecute a case because they avoid the 'frontloading' of work involved in an opt-in regime (such as the identification of claimants and the preparation of individual pleadings)[219] that can actually render the right to redress nugatory.[220] If the size of the class is easily ascertainable and opt-in is made as simple as possible, then access to justice can be provided in a proportional and cost-effective manner. However, in many circumstances and especially where the class is not easily ascertainable, opt-in actions are very expensive and tend to under-compensate the class as a whole because individuals do not take the necessary steps to opt in.[221]

In terms of access to justice, opt-out classes also reflect the fact that proportionality is not 'calculated exclusively by reference to the financial value of the dispute' but must

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[216] Martin H Redish and Clifford W Berlow, 'The Class Action as Political Theory' (2007) 85 Wash U L Rev 753, 769-770. This is at odds with the case management approach instituted by the Woolf Reforms, analysed below.

[217] However, proportionality has also been relied upon to prevent claims proceeding on a collective basis: *Richard Lloyd v Google LLC*, [2018] EWHC 2599 (QB) [104], revd (n 243).

[218] Mulheron 2007 (n 117) 556.

[219] Mulheron 2008 (n 80) 23-31; Mulheron 2010 (n 209) 383.

[220] Higgins & Zuckerman 2016 (n 172) 5.

[221] Mulheron 2007 (n 218) 556.

also be adjusted to take into account other interests such as those of other similarly situated persons.[222] This approach acknowledges that judicial decisions will inevitably have an impact on persons not before the court,[223] and that class members who may not be able to enforce their rights on an individual basis (or who may not even know about their rights to sue) should still be able to obtain access to justice through the opt-out mechanism.[224] This enables people to enforce their rights in circumstances where there is no other effective means of redress, thereby providing a principled reason for compromising litigant autonomy (and providing a means of exiting the class to protect that autonomy).[225] In opt-out actions, courts are better-positioned to determine what constitutes a proportionate investment in the litigation because there is generally more information about the extent of the population that might be affected by the decision.

(b) Aggregate Damages

In many circumstances, aggregate damages also undermine accuracy. Where redress is sought in the form of compensation, in order to ensure an accurate judgment on the merits, damages must be calculated on an individualised basis so that each claimant is compensated according to the harm suffered at the hands of the defendant. If that cannot be done, then, according to the principle of accurate justice, the claim should not proceed.[226] The calculation of aggregate damages on an average per-capita or proportionate basis, where each class member is given the same amount with no attempt

[222] Higgins (n 113) 695.

[223] *Unison* (n 87) [69]-[70].

[224] Higgins & Zuckerman 2016 (n 172) 4.

[225] ibid 4.

[226] *Merricks* (n 195) [84]-[89].

to assess their individual damage entitlements, inevitably leads to over- or under-compensation[227] and does not reflect the principle of accurate justice.[228]

Aggregate damages therefore involve inaccuracies in the quantification of damages;[229] the only exceptions are where each class member's damages are identical, or where those damages can be accurately determined without need for individual proof. This concept is illustrated in the representative action, addressed in Chapter 4. It is also illustrated in the CAT's initial *Mastercard* decision,[230] where certification was denied because the monetary award could not be tied to individual group members' entitlements and could not, in the Tribunal's view, be calculated with reasonable accuracy.[231]

The CAT also rejected the representative claimant's proposed 'top-down' method of quantifying aggregate damages. This involved calculating the loss to the entire class, and then distributing those damages on a per-capita basis to each class member for each year that they were class members.[232] The CAT found the expert methodology proposed no reliable method of accurately calculating aggregate damages, and the proposed method of distribution would result in class members receiving amounts that bore no relation to their actual loss.[233] As the Tribunal stated, 'there is no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss'.[234]

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[227] Mulheron 2018 (n 122) 241.

[228] ibid 243.

[229] ibid.

[230] *Merricks* (n 195) [84]-[89].

[231] The portion of the judgment regarding distribution of damages will be addressed below.

[232] *Merricks* (n 195) [17], [19].

[233] ibid [85].

[234] ibid [84].

As Mulheron has pointed out, the CAT's conclusion on the aggregate damages issue arose from its focus on the individualised nature of damages.[235] Because there was no way of accurately calculating individual entitlements to damages, the CAT held that an overall award could not be calculated, nor could it be adjusted in the event that class members opted out. The only way the 'pot' could be adjusted in the event of opt-outs was on an average per-capita or proportionate basis, which would not lead to accuracy in compensation.[236]

While the Court of Appeal[237] overturned the CAT's finding and the Supreme Court upheld the Court of Appeal's judgment, the dissenting Supreme Court judges agreed with the CAT on this point. Lord Sales and Lord Leggatt held that, while the calculation of an aggregate damages award does not require an unreasonable degree of precision,[238] defendants should not be required to pay damages which are not based on a reasonable estimate of loss. This estimate requires that the representative claimant have a reasonable and proportionate method of determining loss on a class-wide basis.[239] In this case, the dissenting judges held that no such method had been established, and that the claims were therefore unsuitable for an aggregate award.[240] Because it was common ground that the claims were ill-suited for any other kind of relief, they were found to be unfit for a collective proceeding.[241]

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[235] Mulheron 2018 (n 227) 240.

[236] *Merricks* (n 195) [87].

[237] *Mastercard CA* (n 195).

[238] *Mastercard UKSC* (n 84) [122].

[239] ibid [123].

[240] ibid [142]-[144], [152]-[155], [158]-[166].

[241] ibid [167]-[172]; cf the majority's holding at [51].

Aggregate damages may also undermine an individual's right to control the conduct of her own litigation. If the opportunity to opt out has passed by the time aggregate damages are assessed, an individual might find herself being under-compensated with no way of bringing her own action in the alternative,[242] although in a representative action persons with damages above the lowest common denominator may be able to join themselves as parties to represent their own interests.[243] Aggregate damages may therefore cut across the principle of accurate justice, and have proven controversial as a result.

Again, however, they can be justified when viewed through the lens of proportionality. As noted above, the CAT in *Mastercard* denied certification because it was virtually impossible to calculate each individual's entitlement to damages to reach an aggregate figure (the 'bottom-up' approach). However, the Court of Appeal allowed the representative claimant's appeal, holding that the 'top-down' approach of the representative's experts was sufficient, and that requiring aggregate damages to be calculated in a way that would accurately compensate each class member would run counter to the aggregate damages provisions of the legislation.[244] Instead of a strict adherence to accuracy, aggregate damages could be calculated using a 'sound imagination' and 'the practice of a broad axe'.[245] It was more proportionate 'for the aggregate damages to be paid, and to then be distributed, on a pragmatic basis, amongst consumers who are

[242] Coffee (n 89) 915-917.

[243] *Lloyd v Google* (n 217) [75]-[76]. In an Ontario class proceeding, an aggregate damages award will not necessarily preclude individual damages assessments: *Ramdath v George Brown College*, 2014 ONSC 3066 [50] and [88], affd 2015 ONCA 921.

[244] *Mastercard CA* (n 195) [46]-[47].

[245] ibid [18].

likely to have been affected to some extent.'[246] This is the 'rough justice' approach that dispenses with accuracy in favour of access to justice and the principle of proportionality.

The Supreme Court upheld that judgment, concluding that the suitability of the claims for an award of aggregate damages was just one factor potentially relevant to the question of whether the claims are suitable to be brought in collective proceedings, and that the claims were in fact suitable[247] because the pursuit of aggregate damages avoids the disproportionate and burdensome task of determining individual damages.[248] As the Court of Appeal also concluded,[249] where the action can only proceed if damages are assessed in the aggregate and the alternative is no procedure available to class members at all, then aggregate damages are supported on the basis of proportionality. The CAT in *Mastercard* acknowledged that denial of certification would effectively end the litigation for this reason, yet it nevertheless stated that a class action would not be a suitable vehicle for the claims.[250] As Posner has stated, 'a class action has to be unwieldy indeed before it can be pronounced an inferior alternative … to no litigation at all.'[251]

This conclusion is supported by the Canadian jurisprudence on aggregate damages. The Court of Appeal for Ontario has held that aggregate damages awards should be the norm, primarily for reasons of access to justice.[252] When considering whether to certify aggregate damages as a common issue, courts will ask, *inter alia*, 'whether the denial of

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[246] Jack Williams and Alan Bates, 'A priceless victory for consumers: the Court of Appeal revitalises competition law's collective actions' (2019) 38(3) CJQ 327, 335; Mulheron 2018 (n 122) 233.

[247] *Merricks* (n 195) [61]; CAT Rule 79(2)(f). The Supreme Court held that 'suitable' meant 'preferable' relative to individual proceedings [57].

[248] *Merricks*, ibid [57].

[249] *Mastercard CA* (n 195) [57], [59].

[250] *Merricks* (n 195) [89], [91].

[251] *Carnegie v Household Intl Inc* (7th Cir 2004) 376 F 3d 656, 661, cited in Mulheron 2018 (n 122) 230.

[252] *Ramdath ONSC* (n 243) [1].

an aggregate approach will result in a wrong eluding an effective remedy, and thus a denial of access to justice'.[253] Where the alternative is between no litigation and the collective litigation of numerous individually non-viable claims which may not accurately compensate every single claimant but which come as close as possible to doing so, then access to justice and proportionality militate in favour of certification.[254] The accuracy of the procedure is proportionate to the value of the rights in issue. The availability of aggregate damages not only ensures viability and access to justice for low-value claims; it also ensures the proportionate use of court resources.[255] Indeed, once proportionality is accepted as an element of justice, then choosing aggregation over a bilateral alternative brings about economies of scale that facilitate the pursuit of accuracy.

Finally, the Supreme Court in *Merricks* found the CAT had erred in considering the compensatory principle of civil claims for damages as an essential element in the distribution of aggregate damages.[256] The Court held that the collective proceedings legislation 'expressly, and radically, modified' that principle.[257] It held that nothing in the aggregate damages provisions or in relation to the distribution of a collective award involves the separate assessment of each claimant's loss: '[t]he only requirement, implied because distribution is judicially supervised, is that it should be just, in the sense of being fair and reasonable.'[258] The Court noted that inaccuracy in quantifying damages is a feature

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[253] *Bernstein v Peoples Trust Company*, 2019 ONSC 2867 [301].

[254] Mulheron 2018 (n 122) 225, 252.

[255] Higgins 2016 (n 175) 449.

[256] *Mastercard UKSC* (n 84) [76]-[77].

[257] ibid [58]. The dissenting judges agreed with this point [93]-[97].

[258] ibid [58].

of many areas of the law, especially personal injury damages for pain and suffering.[259] In such cases, 'the court must do its best on the evidence available [which] is often labelled the "broad axe" or "broad brush" principle'.[260]

This approach at the appeal level was consistent with the Canadian aggregate damages jurisprudence,[261] by which an aggregate assessment of reasonable accuracy is sufficient.[262] As Justice Belobaba stated in *Ramdath v George Brown College*, 'the measurement criterion is not what's accurate but what's reasonable. In striking a balance between accuracy … and access to justice … the legislature intentionally tilted the balance in favour of access to justice.'[263] In accordance with the principle of proportionality, the Court of Appeal in *Mastercard* also considered how the resolution of the aggregate damages point might affect other similarly situated persons. It held that 'the power to bring collective proceedings introduced … by the Consumer Rights Act 2015 was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding'.[264] Opt-out classes and aggregate damages increase the amounts of damages available, making a case more viable from a financial perspective, attracting legal representation and third party litigation funding[265] and making the case more likely to reach a courtroom. In a similar manner, the Supreme Court held that collective proceedings are a special form of civil procedure for the vindication of private rights, made available

[259] ibid [46]-[50]. The OLRC Report notes that, where there is inherent uncertainty in assessing an individual damages award, it would be unfair to hold an aggregate assessment to a higher standard: (n 123) vol II, 553-554.

[260] *Mastercard UKSC* (n 84) [51].

[261] *Mastercard CA* (n 195) [40]-[48]; OLRC Report (n 123) vol II, 552-554.

[262] Mulheron 2018 (n 122) 233.

[263] *Ramdath ONSC* (n 243) [44].

[264] *Mastercard CA* (n 195) [60].

[265] Higgins 2016 (n 175) 447.

where ordinary procedures have proven inadequate for the purpose, and that it should not necessarily be presumed that collective proceedings should have restrictions imposed on them that ordinary procedures would not.[266]

Where the two countries' approach to aggregate damages differs, however, is whether that mechanism enables the fact of damages (not just its quantification) to be proven on a class-wide basis. Both the majority and the dissent in the UK Supreme Court's *Mastercard* decision acknowledged that section 47C(2) of the Competition Act 1998 made this possible, which thereby amended the substantive law and expressly departed from the compensatory principle.[267] Conversely, the Supreme Court of Canada has stated that the establishment of loss on a class-wide basis is separate from a calculation of aggregate damages, the latter being purely for the purposes of quantification.[268] In *Pro-Sys*, Justice Rothstein held for the Court that, '[t]he aggregate damages provisions of the CPA relate to remedy and are procedural. They cannot be used to establish liability'.[269]

Nevertheless, the Supreme Court of Canada's interpretation of the aggregate damages provisions and that of the UK Supreme Court have the same practical effect. In *Pro-Sys*, the Court held that it was permissible to certify the common issue of whether damages could be assessed in the aggregate, to be determined only after a finding of liability had been made at a common issues trial.[270] It therefore shifted that aggregate damages question to the trial stage, whereas the CAT will answer it at the certification

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[266] *Merricks* (n 175) [45], [55].

[267] *Mastercard UKSC* (n 84) [93]-[97]. See also Rachael Mulheron, 'Revisiting the Class Action Certification Matrix in *Merricks v Mastercard Inc*' (2019) 30(3) King's LJ 396, 412-414.

[268] Mulheron, ibid, 412.

[269] *Pro-Sys* (n 125) [131]. The aggregate damages provisions of the BC CPA are substantially similar to those in Ontario's CPA and the other provinces. The wording is substantially different from s 47C(2) of the Competition Act 1998: Mulheron, ibid, 415-416.

[270] *Pro-Sys*, ibid [134].

stage. In both instances, an inability to establish loss on the part of each class member will not be an impediment to certification.[271] This approach will therefore allow the aggregate damages provisions in both countries to promote the goals of access to justice (particularly with regard to third party litigation funding) at the certification stage. It is arguably more proportionate to allow for a 'rough and ready' approximation of loss to the class, even if individual class members may not have suffered loss, than to deny access to justice entirely because accurate justice cannot be attained.

(c) *Cy-près* Distributions

Where distribution depends on class members making individual claims from a central fund (an aggregate award or settlement fund), a residue of unclaimed funds may remain. Alternatively, it may be impractical or cost-prohibitive to distribute the entirety of the funds. In either scenario, there are several possibilities for the unclaimed funds:

i. They can be donated to an organisation in a manner that is likely to benefit some or all class members;[272]
ii. They can be distributed by lowering the price of the defendant's goods or services for a set time;[273]
iii. They can be distributed proportionally among class members who have already made claims;[274]
iv. They can be returned to the defendant (reversion); or
v. They can be escheated to the State or donated to a charity designated by statute.[275]

[271] Even where loss is an element of the cause of action, as in tort (a breach of the Competition Act in the UK gives rise to the tort of breach of statutory duty), or in Canada under s 36 of the Competition Act, RSC 1985, c C-34. See Mulheron (n 268) 413.

[272] Rachael Mulheron terms this an 'organisational-benefit' distribution: *The Modern Cy-près Doctrine: Applications and Implications* (Routledge 2006) 222-224.

[273] Mulheron terms this a 'price-rollback' distribution: ibid 218.

[274] This was the CAT's thinking when it stated that if there were 'a million opt-outs' in the *Mastercard* action, then 'it would simply lead to everyone in the class getting more (or less) money out of the total pot': *Merricks* (n 175) [87]. This is also known as plaintiff fund-sharing: Mulheron, ibid 245-247.

[275] This is permitted by the Competition Act 1998.

Where the funds are distributed in a way that is reasonably likely to indirectly benefit some or all class members, this is known as a *cy-près* distribution. Although *cy-près* is an established doctrine, it has until recently been applied in the context of charitable trusts, allowing the court to amend the terms of a trust to comply as closely as possible with the original intention of the testator to prevent the trust from failing. Its application in the class actions context is a US innovation from the early 1970s.[276] Also called the 'fluid class' theory of recovery,[277] this approach was intended to be derived from, and analogous to, the doctrine's application in the area of charitable trusts.[278]

The purpose of *cy-près* distributions is 'to confer a benefit that approaches "as nearly as possible" some form of recompense for injured class members.'[279] As Rachael Mulheron has noted, *cy-près* has two meanings: narrow and wide. The narrow meaning encompasses organizational-benefit and price-rollback distributions (points i and ii above), because both forms of distribution compensate class members to some extent, but are likely to result in under- or over-compensation;[280] they are also very likely to benefit

[276] Mulheron (n 272) chapters 7 and 8.

[277] The 'fluid recovery' doctrine in fact encompasses aggregate damages and *cy-près* distribution: Neil J Williams, 'Consumer Class Actions in Canada – Some Proposals for Reform' (1975) 13 OHLJ 1, 60. Rachael Mulheron notes that the use of the term 'fluid recovery' has caused confusion in the US; she therefore uses the term *cy-près* exclusively: Mulheron, ibid 216-217. I do the same.

[278] Williams, ibid 55.

[279] OLRC Report (n 123) 573.

[280] Over-compensation will result if there has already been a distribution to class members who have claimed their share of the damages or settlement fund, and then the residue is distributed by way of organisational-benefit or price-rollback, when those class members will benefit again.

people who are not class members. This 'narrow meaning' is the version of *cy-près* espoused by Mulheron,[281] the OLRC,[282] and others.[283] It is therefore the meaning I use.

The wide meaning encompasses plaintiff fund-sharing, reversion, and escheat to the government.[284] I do not include these in the 'narrow meaning'[285] for the following reasons:

- Plaintiff fund-sharing: while this does not compensate all class members accurately, it ensures the distribution is made exclusively and directly to class members;[286]
- Reversion to the defendant: this does not attempt to benefit class members at all;[287]
- Escheat to the government: this also does not attempt to benefit class members indirectly. While donation to a charity designated by statute may happen to benefit class members, this is generally not a requirement of such statutory provisions.[288]

While the objective of a *cy-près* distribution is to compensate class members 'as nearly as possible', a purely compensatory purpose would see the unclaimed damages revert to the defendant.[289] However, as discussed below, where a *cy-près* distribution is chosen over reversion, this is because it would force the defendant to fully internalise the costs of its

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[281] Mulheron (n 272) 217-224.

[282] OLRC Report (n 123) 574-582.

[283] eg the South African Law Commission, *The Recognition of a Class Action in South African Law, Working Paper No 57* (SALC 1995) [5.38].

[284] Mulheron (n 272) 224.

[285] Neither do Mulheron ((n 272) 244-252) or the OLRC ((n 123) 567-572, 581).

[286] For the same reasons, coupon settlements are excluded from the definition of *cy-près*, because they are distributed directly to class members: Mulheron, ibid 227-229.

[287] OLRC Report (n 123) 580, 582. The OLRC recommended that *cy-près* distributions be permitted whereby funds revert to the defendant to be applied in a manner that will benefit the class (581); however, these tend to be used for promotional purposes or 'clawed back' through price increases, eg *Garland v Enbridge Gas Distribution Inc*, [2006] OJ No 4273 (SCJ).

[288] eg s 47C(5) of the Competition Act 1998. Rachael Mulheron notes that escheat is more appropriate where the statute promotes the aim of deterrence: (n 272) 249. The objectives of distributions may therefore differ depending on the recipients.

[289] Mulheron (n 272) 251.

conduct, thereby promoting deterrence. A major purpose of *cy-près* distributions, then, is behaviour modification.[290] Early US texts on the subject pointed out that *cy-près* distributions achieve this aim at the cost of accurate (or perhaps even any) compensation.[291]

Cy-près distributions are authorised by class proceedings legislation in Canada; such distributions of settlement funds are also permitted by the competition law class action regime in England, although unclaimed judgment proceeds must be distributed to a charity designated by statute. The provisions under the statutes vary.

The Ontario CPA was recently amended to explicitly allow for *cy-près* distributions. Section 27.2(1) and (2) of the Act allows, respectively, for a *cy-près* distribution of all or part of an undistributed award or settlement amount. Section 27.2(3)(a) specifies that a *cy-près* distribution will be permitted if the parties agree on the recipient (which must be a registered charity or non-profit) and the court determines that the distribution 'would reasonably be expected to directly or indirectly benefit the class or subclass members'. Section 27.2(3)(b) states that, if no agreement is reached, 'payment may be made on a *cy-près* basis to … Legal Aid Ontario'.[292] The British Columbia Class Proceedings Act[293] does not allow for the return of unclaimed damages to the defendant at all. Under s 36.2(1)(a), 50 per cent of any award or settlement amount that remains undistributed within a time set by the court must be distributed to the Law Foundation of BC; under s 36.2(1)(b), the other 50 per cent must 'be applied in any manner that may

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290 Williams (n 277) 58-59.

291 Abraham Pomperantz, 'New Developments in Class Actions – Has Their Death Knell Been Sounded?' (1970) 25(3) Business Lawyer 1259, 1260.

292 Section 27.2(3)(b) does not require that the payment reasonably be expected to directly or indirectly benefit the class or subclass members, fitting this provision within the wider definition of *cy-près*.

293 RSBC 1996, c 50 (BC CPA).

reasonably be expected to benefit class or subclass members, including, if appropriate, distribution to the Law Foundation of British Columbia.'[294] The reasonable reading of s 36.2(1)(a), then, is that the compulsory distribution to the Law Foundation does not have to benefit the class, either directly or indirectly. In Manitoba, s 34(1) of the Class Proceedings Act states that all or part of an aggregate award that has not been distributed within a specified time may 'be applied in any manner that may reasonably be expected to benefit class or subclass members, even if the order does not provide for monetary relief to individual class or subclass members' and even if that would result in over-compensation for some class members or a windfall for non-class members (although the courts are also required to consider whether the distribution would result in unreasonable benefits to non-class members).[295] The class proceedings statutes of the other provinces contain similar provisions.[296] All of them except for Ontario, Alberta, and BC permit undistributed funds to escheat to the Crown.[297]

In England, s 47C(5) of the Competition Act 1998 states that, where the CAT makes an award of aggregate damages in favour of the class in an opt-out collective proceeding, and some or all of these damages remain undistributed within a specified period, then the residue must be paid to a charity prescribed by order of the Lord

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[294] ibid ss 36.1 and 36.2.

[295] *Class Proceedings Act*, CCSM c C130, ss 34(2)(a) and 34(4) (MB CPA).

[296] *Class Proceedings Act*, SA 2003, c C-16.5, s 34 (AB CPA); *Class Proceedings Act*, SNS 2007, c 28, s 37 (NS CPA); *Class Proceedings Act*, RSNB 2011, c 125, s 36 (NB CPA); *Class Actions Act*, SS 2001, c C-12.01, s 37 (SK CAA); *Class Actions Act*, SNL 2001, c C-18.1, s 34 (NFL CAA). Québec and the Federal Court are exceptions. Article 596 of the Québec *Code of Civil Procedure*, CQLR c C-25.01 (CCP) states that the court may dispose of undistributed amounts of aggregate awards 'having regard, among other things, to the members' interests. If the judgment is against the State, the remaining balance is paid into the Access to Justice Fund.' Rule 334.28(2) of the *Federal Courts Rules*, SOR/98-106 (FCR) allows the court to 'make any order in respect of the distribution of monetary relief, including an undistributed portion of an award that is due to a class or subclass or its members.'

[297] Under the Acts that permit funds to escheat to the Crown, the undistributed amounts may also be applied against the cost of the class proceeding or returned to the defendant.

Chancellor under section 194(8) of the Legal Services Act 2007.[298] The Access to Justice Foundation is currently the only such charity, and s 194(8) makes clear that only a registered charity which 'provides financial support to persons who provide, or organise or facilitate the provision of, legal advice or assistance … which is free of charge' will qualify for future prescription. There is therefore no requirement that a prescribed charity must benefit, directly or indirectly, class members in any particular proceeding. However, in the case of a settlement (which must be court approved), the unclaimed portion of any settlement can go anywhere, including back to the defendant.[299]

Even where the court distributes an award or settlement proceeds in a way that can directly or indirectly benefit the class, such a distribution will offend the principle of accurate justice because it will not accurately compensate class members,[300] even if it attempts to do so. As Rachael Mulheron puts it, a *cy-près* distribution 'inevitably means that some recipient[s] of cy-près compensation may not have been harmed at all, whilst others that were harmed will not be beneficiaries of the cy-près distribution'.[301] The CAT raised similar issues in *Mastercard* regarding situations where damages cannot be distributed to class members in a way that will accurately compensate each of them.[302] While a *cy-près* distribution was not considered in that case, the inability to distribute damages according to the compensatory principle meant the CAT denied certification.[303] *Cy-près* distributions have been the most controversial element in the debate on class

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[298] 2007, c 29 (LSA). All or part of the unclaimed damages may also be paid to the representative to meet 'costs or expenses incurred … in connection with the proceedings': Competition Act 1998, s 47C(6).

[299] CAT Rules 94(4)(d) and 94(9)(g).

[300] OLRC Report (n 123) vol II, 582; CJC Report (n 120) 112, 427-430.

[301] Mulheron 2018 (n 122) 248, 256.

[302] *Merricks* (n 195) [84]-[85]; Mulheron 2018, ibid 223-224.

[303] The Court of Appeal and Supreme Court overturned the CAT on this point, as discussed below.

actions, in large part because they undermine the principle of accurate justice in general and accurate compensation in particular.

Nevertheless, *cy-près* distributions reflect a proportionate response to the problem that the cost of distributing a damage award may exceed the amount of the award itself. They 'are designed for a collective purpose and to deal with a general problem that arises after the compensatory part of a distribution scheme has run its course'.[304] The Court of Appeal in *Mastercard* found there was nothing in the legislative scheme that required damages to be distributed in a way that compensated each class member for the actual amount of their loss. To insist on this requirement, as the CAT had, would be to undermine 'the purpose of enabling individual claims to be brought in the form of collective proceedings' and therefore the intention of Parliament.[305] The Supreme Court upheld this finding.[306] As the OLRC stated in its Report, provided the inaccuracies in distribution 'are not unreasonably great', 'inaccuracies in distribution that are incidental to achieving a measure of redress for class members who would not otherwise receive monetary relief may be acceptable'.[307]

The statutes in England and Canada generally contemplate a *cy-près* distribution or distribution to a designated charity only after there has been an attempt to distribute funds to class members and to meet the objective of accurate redress, taking into account principles of proportionality.[308] This was, after all, the original aim of the *cy-près* doctrine as it applied to class actions: that the court's intention of awarding damages should not fail

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[304] *Slark v Ontario*, 2017 ONSC 4178 [61].

[305] *Mastercard CA* (n 195) [61].

[306] *Merricks* (n 195) [64], [76]-[77].

[307] OLRC Report (n 123) vol II, 559.

[308] *Cassano v Toronto-Dominion Bank*, 2009 CanLII 35732 (ONSC) [17]; *Carom v Bre-X Minerals Ltd*, 2014 ONSC 2507 [124]; Berryman (n 197) [49].

simply because individual compensation is impossible or impracticable.[309] As Rachael Mulheron has stated, distributions that do not achieve accurate compensation 'are a pragmatic compromise.'[310]

4. Behaviour Modification: the Normative Argument

On the basis of the above analysis, I make the normative argument that behaviour modification should remain a supplementary goal to the objectives of access to justice and judicial economy. Two premises underlie this argument: that behaviour modification should not be a primary function of class actions, and that access to justice and judicial economy can remain primary goals of class actions even if accurate compensation for class members cannot be obtained. I will address each of these in turn.

Behaviour modification is a generally accepted function of class actions,[311] but it should not be the primary function for several reasons. First, if a class proceeding is only about behaviour modification, then the representative plaintiff and class members are arguably unnecessary.[312] The proceeding is no longer about getting compensation to individuals or groups, but about punishing the defendants for their wrong. This is why, under some manifestations of the 'private attorney general' model, lawyers themselves can function as the private attorney general.[313] Focusing solely on behaviour modification has

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309 Nyal D Deems, 'The *Cy-près* Solution to the Damage Distribution Problems of Mass Class Actions' (1975) 9 Ga L Rev 893, 904.

310 Mulheron 2018 (n 122) 243. According to Lord Briggs in *Mastercard UKSC* (n 84) they are also a principled compromise in accordance with the principle of proportionality [51] and [57].

311 However, the Australian Law Reform Commission did not accept that this should be a function of class actions, except in a purely incidental fashion: *Report No 46: Grouped Proceedings in the Federal Court* (Australian Government Publishing Service 1988) 131-132.

312 John C Coffee Jr, 'Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working' (1983) 42 Md L Rev 215, 229.

313 William B Rubenstein, 'On What a Private Attorney General Is – and Why It Matters' (2004) 57 Vand L Rev 2129, 2144.

two consequences: where a representative plaintiff and class members are involved, they serve simply as the means for holding the defendant accountable (an indefensible position on a Kantian view of private law);[314] and it reduces the accountability of class counsel.[315] As Deborah Hensler puts it, ‘ [a]s long as defendants pay enough to deter bad behavior, economic theorists tell us, it does not matter how their payment is distributed.’[316] If oversight ends once defendants have paid a sum of damages to the plaintiff class, then this will provide perverse incentives for class counsel to prefer their own interests, increasing agency costs and reducing efficiency (another objective of class actions).[317] Indeed, where the only aim is deterrence, there is no reason that the damages must be paid to the plaintiffs at all.[318]

Second, class actions where the only result is the extraction of a payment of damages from the defendants (or a change in policy or practice, or other form of behaviour modification) are akin to a regulatory or quasi-criminal proceeding where a fine or other punishment is levied.[319] Such proceedings already exist in the public sphere, where an emphasis on compensating victims is secondary. In order to properly supplement the role of the regulator, then, class proceedings should focus on compensating victims, with behaviour modification performing a supplementary role.[320]

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[314] Ernest J Weinrib, ‘Kantian Right’, in *The Idea of Private Law* (OUP 2012); Alan Brudner, ‘Private Law and Kantian Right’ (2011) 61 UTLJ 279.

[315] Coffee (n 312).

[316] Hensler (n 187) 427-439.

[317] Coffee (n 89) 882-883.

[318] Kenneth W Dam, ‘Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest’ (1975) 4 JLS 47, 60-61.

[319] Arthur Ripstein & Benjamin C Zipursky, ‘Corrective Justice in an Age of Mass Torts’ in Gerald J Postema (ed), *Philosophy and the Law of Torts* (CUP 2001) 214, 227-228.

[320] Coffee (n 312). Coffee points out that, due to the incentive problems inherent in the private attorney general model, such actions tend to involve inadequate settlements and therefore lack the deterrent effect they might otherwise have (226).

Finally, there is little point in providing individuals with access to redress by way of class proceedings, when no redress or benefit is provided in the end result. As Justice Perell of the Ontario Superior Court of Justice stated in *Eidoo*, reversion to the defendant or distribution *cy-près* achieves behaviour modification, but not access to justice for individual class members.[321] To focus solely on behaviour modification is therefore to deny class members 'their reasonable recovery while at the same time preclud[ing them] from litigating their claim with the defendant individually.'[322]

To turn to my second premise, access to justice and judicial economy can remain primary goals of class actions even if accurate compensation for class members cannot be obtained. As noted above, the prospect of over- or under-compensation in class actions is most pronounced in the aggregate damages context.[323] Several scholars, as well as the CAT in *Mastercard*, have objected to the assessment of damages where such an assessment cannot be undertaken with accuracy.[324]

However, as noted above, the courts in England[325] and Canada[326] have held that an aggregate assessment of reasonable accuracy is sufficient.[327] The UK Supreme Court in *Mastercard* held that (just as in ordinary civil proceedings) once a claimant has established a more than nominal loss, she is entitled to have the court quantify her loss, which it will

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[321] *Eidoo v Infineon Technologies AG*, 2015 ONSC 5493 [26].

[322] Jasminka Kalajdzic, 'The "Illusion of Compensation": *Cy-Près* Distributions in Canadian Class Actions' (2013) 92(2) Can Bar Rev 173, 186.

[323] Coffee (n 89) 879-880.

[324] Ernest Weinrib, 'Causal Uncertainty' (2016) 36 OJLS 135, 152; 137-138; this view was also articulated by Thomas Cromwell in response to the OLRC Report (n 123) in 1983: 15 Ottawa L Rev 587, 590-591, 595-597.

[325] *Mastercard CA* (n 195) [40]-[48]; *Mastercard* UKSC (n 84) [51].

[326] *Ramdath ONSC* (n 243) [44]; OLRC Report (n 123) vol II, 552-554.

[327] Mulheron 2018 (n 122) 233.

do 'the best it can upon the basis of exiguous evidence.'[328] This involves the use of a 'broad axe' or 'broad brush' approach that may defy scientific analysis (and may even involve an element of guesswork), which is analogous to the process used to calculate general damages for pain and suffering in personal injury claims.[329] Such a 'rough justice' approach is more defensible than no justice – in other words, denying redress for such claims altogether. I would agree with the conclusion of the UK Supreme Court that, '[t]he court will not allow an unreasonable insistence on precision to defeat the justice of compensating a claimant for infringement of his rights.'[330]

As discussed throughout this thesis, my normative stance is largely supported by the debates, practice, and jurisprudence on class proceedings in Canada and England.

5. Individually Viable and Non-Viable Claims

The reliance on access to justice, judicial economy, or behaviour modification as a justification for class action reform depends upon the types of claims in question. According to John Coffee, there are three types of class actions.[331] Type A actions involve claims that are individually economically viable; they would be litigated even in the absence of a class action ('Type A claims'). In England, such claims might well be litigated by way of a GLO; in Ontario, 'mass tort' actions are emerging to deal with such claims.[332] Type B actions involve claims that are individually non-viable – they are too small to be economically worth litigating outside of a class action, because the available recovery

[328] *Mastercard* UKSC (n 84) [47].

[329] ibid.

[330] ibid [51].

[331] Coffee (n 89) 904-906.

[332] These two procedures are discussed in detail in later chapters of this thesis.

would be dwarfed by the costs of litigating them ('Type B claims'). Type C class actions involve a mix of Type A and Type B claims. Type C claims must, for the purposes of access to justice, be subject to class action procedures. If they were subject to individualised procedures, then the individually non-viable claims would not be able to proceed – whereas individually viable claims can still proceed as part of a class action (even though it is not a procedure to which they are ideally suited).

This typology reflects what Alexandra Lahav has called the 'continuum of aggregation', with class actions at one end and group litigation (in the US context, 'multi-district litigation' or MDLs) at the other.[333] Within this framework, joinder is just a small-scale form of group litigation, and either can be used to prosecute Type A claims – that is, individually viable claims that share similar issues of law or fact. The boundary between joinder and group litigation (either a formal GLO under the CPR, or the case management of multiple individual claims) lies purely in numbers, and that boundary has been drawn in slightly different places in different jurisdictions.[334]

The arguments in support of Type A claims differ from those in support of Type B claims. Judicial economy (as well as accurate justice) provides a justification for aggregating Type A claims because they would get litigated in any event. The adjudication of common questions through one procedure results in the efficient and effective use of judicial resources and savings of time and expense, because otherwise those claims would

[333] Alexandra D Lahav, 'The Continuum of Aggregation' (2019) 53 Ga L Rev 1393.

[334] England's GLO framework does not contain a minimum number of claims required for a GLO, but 'far more than two claimants are necessary': *Austin and others v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928. The number of claimants that will justify a GLO will depend on the potential damages, the costs involved, and the chances that the claims will succeed. In the Corby Group Litigation, for example, there were fewer than 20 claimants: [2009] EWHC 1944 (TCC). In Canada, where there is no formal group litigation framework, three parties have been found to be too few to justify a representative action (*Champagne v Sidorsky*, 2012 ABQB 522), while joinder has been held to be impractical where it involves 165 parties: *Oakley v Levinter & Levinter*, 2011 ONSC 6326.

be heard individually and burden the court system.[335] This approach also avoids duplication of fact-finding and inconsistent judgments.[336] Behaviour modification is a secondary justification for aggregation of Type A claims, because any modification would occur even without a class proceeding.

Type B claims cannot be justified in terms of judicial economy, because they would not be litigated outside the class action context.[337] However, for that reason, Type B claims can be justified by the objective of behaviour modification (as well as access to justice).[338] Individually non-viable claims, for which defendants would otherwise not be held accountable, can be pursued when they are aggregated in a class action.[339] Both types of claims can be justified from an access to justice perspective. Class proceedings make economical the prosecution of claims 'that would otherwise be too costly to prosecute individually',[340] and by saving costs, class actions improve access to justice.[341] Type B claims are particularly well-supported by access to justice arguments: they would not be prosecuted at all outside of a class action, and the aggregation of those claims enables them to be prosecuted and thereby vindicate rights that would otherwise be illusory.[342] Providing access to justice for Type B claims was in fact a central aim of the Woolf Reforms on

[335] OLRC Report (n 123) 119; AGAC Report (n 125) 17; ALRI Report (n 125) [113]; CJC Report (n 120) 86.

[336] MLRC Report (n 125) 26; FCC Report (n 125) 13; ALRI Report (n 125) [114], [121]; Williams (n 277) 15.

[337] Gibbons (n 179) 119; CJC Report (n 120) 86; Mulheron (n 117) 571.

[338] *Mastercard* UKSC (n 84) [45].

[339] Gibbons (n 179) 119-120, 150-151.

[340] *Dutton* (n 123) [27]-[28]; Coffee (n 89) 904.

[341] *Dutton*, ibid.

[342] OLRC Report (n 123) 120; AAS Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013) ch 12 [38]; Coffee (n 89) 906.

multi-party proceedings,[343] although a generic opt-out mechanism that would have facilitated such claims was never enacted.

The arguments for class action reform rely variously on the goals of access to justice, judicial economy, and behaviour modification, and the basis for these arguments shifts according to which types of claims – Type A or Type B – are being discussed. From a normative standpoint, I argue in later chapters that the class action is not a 'one size fits all' procedure, and that it is generally better suited to Type B claims; for larger, Type A claims, group litigation procedures are generally more appropriate. I suggest reforms accordingly.

6. Conclusion

The next two chapters of this thesis are devoted to the historical debate on collective redress in England and Canada, followed by a discussion of current-day practice in both countries. Throughout these chapters, I draw attention to the ways in which the aims of accurate justice, access to justice, judicial economy, and behaviour modification were seen as either competing or complementary. I demonstrate that arguments against class action reform focus on the traditional rationale for civil litigation (that is, accurate justice), while arguments in favour focus on access to justice, judicial economy, and behaviour modification. The emphasis on these latter aims varies, depending on whether Type A or Type B claims are under discussion.

The theoretical structure laid out in this chapter explains how and why the debate has unfolded in each country the way it has. It also explains the attitudes towards collective redress in each country, and why certain policy directions have been accepted or rejected. The remainder of this thesis has a strong comparative bent, with the final chapters

[343] Woolf Final Report (n 101), Chapter 17[2].

evaluating the policy choices that have been made in England and Canada, and making recommendations for reform. As far as England is concerned, the historical record ultimately supports the argument made by many proponents of class action reform: that the principles that militate in favour of class actions have largely already been accepted, and for that reason the device should be extended beyond the realm of competition law.

Chapter 4:
The History of Representative Actions

The roots of the modern-day opt-out class action lie in the representative action, which is a device whereby one or more persons can bring a claim on behalf of other persons with the 'same interest' in the claim. This creature of equity first emerged in 13th century England[344] and continues today in CPR 19.6. In the course of its evolution, it was exported to common-law Canada, the US, and throughout the British Empire. In England up to the present, and in Canada until the 1970s, the representative rule was generally interpreted restrictively. In the US, a similarly restrictive interpretation led to the creation of Rule 23 of the Federal Rules of Civil Procedure in 1966,[345] which allowed for class actions claiming monetary damages.

While the history of representative actions before 1970 is beyond the scope of this thesis, some background is necessary to provide context for later chapters. This chapter traces the genesis of the representative rule in England, Canada, and the US. It covers the period up to the 1970s in Canada, following which the more liberal interpretation of the rule (as well as the introduction of modern-day class actions in the US) began to create pressure for class action reform. It also looks at England up to the present, where courts have continued to interpret the rule restrictively. Throughout the rest of my thesis, I compare the history of the representative action and class action reform in England and Canada. This chapter concludes with the normative argument that such actions have generally been allowed to proceed where they involve a group with a shared identity that pre-exists the litigation, and relief that is equally beneficial to that group as a whole. By contrast, modern collective redress mechanisms, involving individual damages and

344 Stephen Yeazell, *From Medieval Group Litigation to the Modern Class Action* (YUP 1987).

345 US *Federal Rules of Civil Procedure*, Title IV: Parties, Rule 23: Class Actions, 383 US 1029 (*FRCP*).

disparate groups bound only by the defendant's wrong, are very different and represent a break from the procedure's equitable past.

1. Representative Actions in England and Canada

(a) From its Origins to the Turn of the 20th Century

For most of its history, the representative action was used in the court of equity. Common law courts saw litigation in individual terms and largely for the pursuit of monetary damages, and therefore took a narrow view of the joinder rule. They held that individuals could only be joined to a proceeding if they consented and if their immediate interests would be affected. The court of equity took a wider view. It sought to adjudicate the rights not only of the persons before the court, but also of all those who would be affected by the dispute. Equity therefore called for the compulsory joinder of all interested persons, so any judgment would bind them all and 'to prevent multiplicity of suits.'[346] However, the compulsory joinder rule threatened to prevent the parties from 'coming at justice'[347] if it was not possible or practicable to join to the suit all who would be affected. Equity therefore allowed for the representative action[348] so that one person could represent all those interested, and any judgment would bind all of them.[349]

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[346] *How v The Tenants of Bromsgrove* (1681) 23 ER 277; Neil J Williams, 'Consumer Class Actions in Canada – Some Proposals for Reform' (1975) 13 OHLJ 1, 8-9.

[347] *Duke of Bedford v Ellis*, [1901] AC 1 (HL) 8.

[348] *City of London v Richmond* (1701) 2 Vern 421 ER 870; *Chancey v May* (1722) 24 ER 265.

[349] Suzanne Chiodo, *The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act* (Irwin Law 2018) 16.

The representative action first emerged in about the year 1200,[350] and Stephen Yeazell has identified three phases in its history.[351] While the third marks the development of the modern-day class action in the US, the first two govern the use of the representative rule in England. From its ascendancy in the 17th century until the late 18th century, the representative rule was used to adjust and declare relationships between groups in a largely agrarian society: a manorial lord could seek a declaration against his tenants that he had the right to kill game in the village,[352] and a parish priest could seek a declaration that his parishioners were bound to pay a certain amount in tithes.[353] From the late 18th century until the fusion of the courts in 1873, as society industrialised, the rule was used in disputes between business persons and trade unions. The rule was particularly important for business interests that wished to collectivise, but for whom the modern corporation had not yet been born.[354]

From the mid-19th century, however, the representative action was used less frequently. The birth of the modern corporation and the passing of several business-related statutes meant that businesses could conduct litigation in their own right.[355] Furthermore, equity litigation in general was falling out of favour, due to the delays, expense, and complexity of that system.[356] After several decades of a reform campaign, the Judicature

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[350] Yeazell (n 344) 38.

[351] Stephen Yeazell, 'Group Litigation and Social Context: Toward a History of the Class Action' (1977) 77(6) Colum L Rev 866, 867.

[352] *How* (n 346); *Brown v Howard* (1701), 21 ER.

[353] *Brown v Vermuden* (1676) 22 ER 796; *Brown v Booth* (1690) 23 ER 720.

[354] *Adair v The New River Company* (1805), 32 ER 1153.

[355] Yeazell (n 344) 124-125, 210-212.

[356] John Butt, '*Bleak House* in the Context of 1851' (1955) 10(1) Nineteenth-Century Fiction 1, 3.

Acts fused the courts of law and equity.[357] Representative actions could subsequently be brought at common law under Rule 10, which directed that:

> Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the court to defend in such action, on behalf or for the benefit of all parties so interested.[358]

The equivalent rule in Canada (except Québec)[359] was substantially similar.[360] The fusion of the courts marked a new chapter in the representative action's history. Its use throughout the 20th century illustrates its underlying purpose and the ways in which it is fundamentally different to its successor, the modern-day opt-out class action.

(b) From the Judicature Acts to the 1970s

Following the fusion of the courts, representative actions in England and Canada had to satisfy the 'same interest' test. Several commentators express confusion about the courts' interpretation of this requirement.[361] They note that early cases evinced a 'liberal attitude to class actions' which ended in 1910 with the English Court of Appeal's decision in

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357 Supreme Court of Judicature Act, 1873 (UK) 36 & 37 Vict, c 66; Supreme Court of Judicature Act 1875 (UK) 38 & 39 Vict c 77.

358 Rule 10 of the Rules of Procedure, being scheduled to the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66).

359 Until the enactment of class actions legislation in 1978, Québec's *Code of Civil Procedure*, CQLR c C-25, art 59 (CCP) required any person suing on behalf of others to file with the court a power of attorney from those whom he wished to represent, which effectively precluded an opt-out class action: Williams (n 346) 11.

360 Ontario Rules of Procedure, rule 75, being scheduled to the Judicature Act, 1881, 44 Vict, c 5; Alberta Rules of Court, Alta Reg 390/68, Rule 42; British Columbia Supreme Court Rules, Ord 16, rule 9; Manitoba Queen's Bench Rules, rule 58; New Brunswick Rules of Court, Ord 16, rule 9; Rules of the Supreme Court of Newfoundland, Ord 16, rule 9; Rules of the Supreme Court of Nova Scotia, rule 5.09; Supreme Court Rules of Prince Edward Island, Ord 15, rule 9; Rules of Court of the Province of Saskatchewan, rule 45. Representative actions were also available in the Federal Court of Canada: Federal Court Rules, rule 1711.

361 Ontario Law Reform Commission, *Report on Class Actions* (Ministry of the Attorney General 1982) 10-13.

Markt.[362] The commentators' confusion results from 'easy analogies between [the representative action] and the modern class action'.[363] In fact, the two are fundamentally different.

This difference takes two main forms, both of which are central to the 'same interest' requirement: the constitution of the class, and the remedy sought. While the representative action was used throughout its history by pre-existing groups in order to obtain equitable relief, modern-day class actions are used by disparate groups to seek a range of remedies, particularly monetary damages. First, regarding class constitution, representative actions involved groups whose identity pre-existed and was independent of the litigation, such as members of a union,[364] residents of a parish,[365] or congregants of a church. Because those affected by any judgment were members of a pre-existing group (and had the same interest in the remedy sought), it was considered equitable to determine the rights of one member as a way of determining the rights of all.[366] By contrast, modern class actions involve individuals that are grouped together by the litigation itself, so the only connection between the class members is the defendant's wrong.

Second, representative actions traditionally sought declarations, injunctions, or other equitable remedies. For such remedies, the result would be the same for everyone in the group and they would therefore have the 'same interest' in the action.[367] In fact, the group's identity and the remedy claimed were often directly related, so that '[i]ndividuals claimed or resisted their superior's claim only by virtue of their membership in the

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[362] *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA).

[363] Yeazell (n 351) 876.

[364] *Mercer v Denne* [1905] 2 Ch 538.

[365] *Wyld v Silver* [1963] Ch 243.

[366] Chiodo (n 349) 17.

[367] Williams (n 346) 28.

group.'[368] Modern class actions, on the other hand, generally involve individual claims for monetary damages that differ between class members.[369] Where the relief sought in a representative action was a (non-retrospective) declaration of the law, courts were willing to bind the interests of absent members because any judgment would not directly affect their financial interests;[370] judgments for monetary damages were different.[371]

The 'same interest' test existed to protect the rights of absent class members.[372] If the class members were similarly situated and would benefit in the same way from the remedy, then '[a]s the representative plaintiff has the same interest as class members in the outcome of the action it can be assumed that he will present the claims of the class as effectively as the members would themselves.'[373] As a result, representative actions rarely required notice to class members[374] – unlike modern opt-out class actions.

Representative actions were therefore not 'class actions', but requests by pre-existing groups for equitable relief such as a declaration or an injunction.[375] Following the Judicature Acts, the courts continued to receive favourably representative actions that involved equitable relief only.[376] However, the courts' 'liberal attitude to class actions' ended when they were faced with representative actions involving claims for monetary damages by individuals with no pre-existing legal or other relationship. This can clearly

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368 Yeazell (n 351) 877.

369 ibid.

370 ibid 891.

371 Jillaine Seymour, 'Representative Procedures and the Future of Multi-Party Actions' (1999) 62 MLR 564, 579.

372 *Smith v Swormstedt* (1853) 57 US (16 How) 288, 303.

373 Williams (n 346) 20.

374 ibid.

375 Yeazell (n 351) 888-889.

376 *Ellis* (n 347); *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 (HL).

be seen in *Markt*, analysed below.[377] Actions seeking legal relief were different from those seeking equitable relief, and the courts treated them differently. This explains why the representative action rule began its post-fusion existence promisingly, only to founder a few decades later. This distinction between representative actions for equitable relief and 'class actions' for damages was maintained by the English courts throughout the 20th century.

Following the fusion of the courts of law and equity, the two major representative actions that were brought for equitable relief were *Ellis*[378] and *Taff Vale*.[379] *Ellis* involved growers of fresh produce who sought a declaration of their statutory right to sell their wares in Covent Garden Market, as well as other remedies. While the growers did not have a joint proprietary interest and were held to be a 'large and fluctuating class', it was a class nevertheless 'capable of being ascertained'.[380] This was because the class was defined prior to the litigation, as sellers of produce they had grown themselves, who were entitled to preferential rights under the relevant statute (thus creating a common interest).[381] They were claiming a breach of those statutory rights that were conferred on them because of their identity (a common grievance), and the relief claimed,[382] which was the same across the group, also arose from that identity. A majority of the House of Lords therefore found in the growers' favour, because they satisfied the three criteria for the 'same interest': there

[377] *Markt* (n 362).

[378] *Ellis* (n 347).

[379] *Taff Vale* (n 376).

[380] *Ellis* (n 347) 5.

[381] ibid 13 (Lord Morris), 16 (Lord Shand).

[382] That is, declarations that the growers were entitled to the alleged preferential rights, an injunction to restrain the defendant from doing any acts contrary to those declarations, and an account of the excess sums charged to the growers in the six years preceding the writ: ibid 2.

was a common interest, a common grievance, and the relief sought was beneficial to all whom the plaintiff proposed to represent.[383]

In *Taff Vale*, an employer sought to enjoin a trade union from engaging in illegal activity during a strike. While the main issue was whether the trade union could be sued in its registered name, the House of Lords found in *obiter* that a defendant class action was a viable procedural alternative.

It was in 1910, when a representative action was brought for damages, that the rule began to founder. In *Markt*, the plaintiffs sued for goods that had been damaged when a Russian warship destroyed the defendant's vessel, on suspicion that it was carrying contraband. The plaintiffs sued on behalf of 44 other shippers and sought 'damages for breach of contract and duty in and about the carriage of goods by sea.'[384] The Court of Appeal held that the action failed the three-part *Ellis* test, and therefore the 'same interest' requirement was not satisfied.[385] The group members did not have a common interest (they each had separate contracts with the defendant), they did not share a common grievance (they each had different damages), and relief would not be beneficial to all (the damages sought were personal to each shipper).[386] Fletcher Moulton LJ held that an action for damages could never satisfy the *Ellis* test because damages are individualised and do not benefit the class.[387]

In addition, where there was no pre-existing 'bond or connection uniting the persons whom the plaintiffs affect to represent' (other than the wrong that gave rise to the

[383] ibid 8.

[384] *Markt* (n 362) 1022.

[385] ibid 1035. However, see Buckley LJ's dissent, in which His Lordship held that the representative action was validly constituted because the shippers 'have exactly the same interest [in the ship on which their goods are carried] although it will result in the case of each of them in a different measure of relief' (ibid 1047).

[386] ibid 1029-30, 1035, 1040.

[387] ibid 1035.

claim), there was 'no connection which would justify a representative action'.[388] With no pre-existing group espousing a common interest,[389] the Court was not willing to allow a representative claimant to speak for others not before the court; such a development would bind absent class members without the requirement for obtaining their consent to commence litigation on their behalf. It would also be unfair to the defendants, who would have rights of discovery and costs recovery only against the representative claimant,[390] and who would not be able to raise different defences against different group members.

The Canadian courts also applied this restrictive interpretation of the 'same interest' test. Until the 1970s, representative actions were not permitted to proceed where they were based on separate contracts (because there was no pre-existing commonality of interest),[391] where damages were individual to each class member,[392] or where individual enquiries were otherwise necessary (such as the assessment of individual claims and defences).[393] Just as in England, representative actions were more likely to proceed where they involved a pre-existing commonality of interest and either an equitable remedy,[394] a common fund,[395] or damages that could be easily quantified for the entire group without

[388] ibid 1027. In *Markt*, the only connection between the group members was that they were all shippers of goods on board the same ship that was sunk.

[389] ibid 1040.

[390] ibid 1039, 1040.

[391] *Shields v Mayor*, [1953] 1 DLR 776 (OCA).

[392] *Walker v Billingsley*, [1952] 4 DLR 490 (BCSC) 493-500.

[393] Williams (n 346) 30-35; *Preston v Hilton* (1920), 55 DLR 647 (HC Div); *Turtle v City of Toronto* (1924), 56 OLR 252 (App Div).

[394] *Smart v Livett*, 1950 CanLII 170 (SKCA).

[395] *Barrett v Harris*, 1921 CanLII 434 (ONSC); *Robinson v Adams, Patzalek v Adams, Canadian Multiphone Co v Adams*, 1924 CanLII 406 (ONCA); *AE Osler & Co v Solman*, [1926] 4 DLR 345 (ONSC).

the need for individual assessment.[396] Representative actions were held to be particularly applicable to claims for a declaration of right.[397]

Few representative actions could satisfy the three-part *Ellis* test. It was not until the 1970s that the Canadian provinces began to take a more liberal approach to the 'same interest' test, and gradually open the door for class action reform. In England, meanwhile, the narrow approach to the representative rule has continued almost up to the present day.

2. England to the Present Day

The restrictive interpretation of the representative rule has continued in England throughout the 20th century and beyond. Courts have generally found that claimants have the 'same interest' according to the *Ellis* test[398] where they form part of a group that pre-existed the litigation, and the relief sought is either equitable or involves damages claimed from a common fund or that are easily quantifiable in the aggregate (so that no class member is over- or under-compensated).[399]

In *Moon and Atherton*,[400] for example, the tenants of a block of flats sued the architect for negligent supervision of the building's construction. The tenants constituted a pre-existing group and, although they sought damages, those were easily quantifiable because each tenant had previously paid the same amount towards the cost of fixing the

[396] *Bowen v MacMillan* (1921), 21 OWN 23 (HC Div); *Farnham v Fingold*, [1973] 2 OR 132 (CA).

[397] *Bamber v Bank of NS*, [1943] 2 WWR 529 (Alta CA) 532.

[398] Rachael Mulheron, 'From representative rule to class action: steps rather than leaps' (2005) 24 CJQ 424, 427. As Mulheron points out, the other requirement of the rule is that 'more than one person' has an interest in the claim.

[399] *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229, 255; *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] Ch 204 (interpretation of 'same interest' not questioned on appeal).

[400] [1972] 2 QB 435.

building's roof, and this was the total amount claimed.[401] Lord Denning MR therefore held that the proceeding was properly constituted as a representative action.[402]

EMI Records v Riley, where the action was for injunctive relief and an inquiry as to damages, was somewhat different because it was extremely difficult to determine each class member's entitlement to damages.[403] However, the Court held that damages could nevertheless be awarded because each class member had agreed to have a global damages sum paid to the British Phonographic Industry Ltd (BPI), a body that had represented them both before and throughout the litigation.[404] The class members produced, made, or distributed nearly all the records in the country, so the global damages sum would neither over-compensate class members as a whole nor under-compensate (or fail to compensate) record producers outside of the class, because there were none.[405] There would be no difficulties as to quantum of damages for each individual class member, because they had all agreed to allow BPI to keep any global damages sum for the purposes of preventing the distribution of counterfeit records.[406]

Similarly, in *The Irish Rowan*,[407] the owner of a ship paid out certain cargo claims and obtained a judgment against the charterers, who had then gone into liquidation. The ship owner brought a representative action seeking indemnity from the charterers' insurers (to be paid proportionately according to each insurer's share of coverage).[408] The Court of

[401] ibid 440.

[402] ibid 442.

[403] [1981] 1 WLR 923 (Ch) 926.

[404] Chiodo (n 349) 20.

[405] *EMI Records* (n 403) 926.

[406] ibid 925.

[407] *Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan)* [1990] 2 QB 206 (CA).

[408] ibid 216.

Appeal unanimously held the action could proceed, despite the existence of numerous separate contracts, because the contracts were identical and were governed by a 'leading underwriter clause'. Pursuant to this clause, each insurer undertook to be bound by the acts of the leading underwriter and to be liable for its share for all decisions taken against the leading underwriter.[409] Lord Justice Purchas distinguished *Markt* because in this case there was no dispute as to the proportionate shares of liability and the damages payable, and there was an identified group bound by a pre-existing contractual clause.[410]

Lord Justice Staughton, concurring in the result, held that the nature of the risk assumed and the potential defences were identical. The prospect of separate defences was merely a 'theoretical possibilit[y]' because '[f]or all practical purposes this is one claim upon one contract'.[411] His Lordship further held that damages could be awarded in representative actions.[412] He relied for this assertion primarily on Lord Denning's remarks in *Moon v Atherton*[413] that that case was properly constituted as a representative action. Staughton LJ read Lord Denning's remarks as 'quite contrary to what Fletcher Moulton LJ had said in *Markt* … thus is the law reformed.'[414] It is not clear how Staughton LJ reached this conclusion. Each tenant in *Moon* had previously paid a fixed amount and the representative action was merely seeking damages in that amount.[415] Regarding that representative action as properly constituted therefore seems, far from a reform of the law, properly in line with precedent.

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[409] ibid 219.

[410] ibid 244.

[411] ibid 227.

[412] ibid.

[413] *Moon v Atherton* (n 400), cited ibid 226.

[414] *The Irish Rowan* (n 407) 226.

[415] (n 400) 440.

Independiente Ltd v Music Trading On-Line (HK) Ltd[416] was, by contrast, a departure from previous case law (although courts have not interpreted it as such). The High Court held that damages could be awarded in representative actions in the absence of a pre-existing group and where the global or individual amount of damages was extremely difficult to assess. It held that there was a common interest (regarding the UK copyright in sound recordings to which class members were entitled), a common grievance (arising from the operation of the website that was alleged to be infringing copyright), and relief beneficial to all (in the sense that the relief was equally beneficial to every single class member).[417] With regard to the latter, the Court implied that pecuniary relief could be sought by way of a representative action, even if it was the primary relief claimed, even if the damages per class member were not quantifiable, and even if the class members had not agreed (as in *EMI v Riley*) that damages should be paid to a representative body.[418]

Independiente reflected a change in the law, whereby damages can be claimed as primary relief for a much broader and disparate class than in previous representative actions. Nevertheless, subsequent case law has (albeit incorrectly) interpreted *Independiente* as falling within the same category as *EMI v Riley* and *The Irish Rowan*. In *Lloyd v Google*, the Court held that the class members in *Independiente* had transferred their rights to pecuniary remedies to the representative claimant,[419] when in fact the evidence on that was uncertain and the case would have been allowed to proceed as a representative action anyway.[420]

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[416] *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch) analysed in Mulheron (n 398).

[417] *Independiente* (n 416) [27]-[28].

[418] ibid [28].

[419] *Lloyd v Google* [2018] EWHC 2599 (QB) [87]. The Court of Appeal overturned this decision ([2019] EWCA Civ 1599) [78]), but it still likened *Independiente* (n 416) to *EMI Records* (n 403).

[420] *Independiente* (n 416) [28].

Other than *Independiente*, there has only been one notable exception to the *Ellis* test. In *Prudential Assurance*, the Court of Chancery interpreted the 'same interest' requirement much more liberally than the court in *Markt*. Vinelott J held instead that 'there must be a common ingredient in the cause of action of each member of the class'.[421] Once those common ingredients were established and determined in favour of the group, the members (shareholders in one of the defendant companies) could then pursue their own claims regarding the individual issues, including quantification of damages.[422] By bifurcating the proceedings in this manner, the Court circumvented the difficulty posed by individual claims for compensation and found the representative action was permissible because the relief sought was not damages, but a declaration of class members' entitlement to damages.[423] Ultimately, the Court held that damages could not be awarded in representative actions.[424]

Prudential Assurance's bifurcated approach has generally not been followed.[425] *CBS Songs Ltd v Amstrad Consumer Electronics plc*[426] has been cited as supporting this concept,[427] but Sir Denys Buckley's approval of the *Prudential* approach was *obiter* and in dissent. A previous decision of the Court of Appeal found no civil liability on the part of the defendants, but found they might have committed the criminal offence of inciting breach of copyright. *CBS Songs* was the subsequent copyright case related to that offence; as in *EMI v Riley*, the relief sought was an injunction, along with an inquiry as to damages

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421 *Prudential Assurance* (n 399) 252, 255.

422 ibid 255.

423 ibid 255; Rachael Mulheron, '*Emerald Supplies Ltd v British Airways Plc*' (2009) 8 Comp Law 159, 162-163.

424 *Prudential Assurance* (n 399) 230.

425 However, see *Columbia Pictures Industries v Robinson* [1986] FSR 367.

426 [1988] 1 Ch 61 (CA).

427 Mulheron (n 398) 435.

and an account of profits.[428] The judge at first instance allowed the claim to proceed because it was the only way of preventing the criminal activity.[429] However, the Court of Appeal found that, in the absence of a civil claim or a claim in equity, it could not enforce the criminal law. As there was no live issue, the claim was struck out.[430]

Sir Denys Buckley dissented and held there could be a claim in equity to enforce the criminal law, noting that the inefficacy of that law had given rise to this action.[431] On the subject of whether this claim was properly constituted as a representative action, he followed the reasoning of Vinelott J in *Prudential Assurance*: provided the plaintiffs' claims for injunctive relief had a common basis, they could pursue their subsidiary claims for damages by way of individual proceedings. Even Sir Buckley noted, however, that it was unlikely any damages claim would be pursued because of 'formidable difficulties' with quantifying individual loss.

This dearth of judicial support, as well as the complexity and cost of representative actions, meant that the bifurcated approach was not widely regarded as realistic for multi-party litigation when the latter rose in prominence in England in the 1980s. Following the mass disasters and pharmaceutical product liability claims of that decade, there was serious consideration of reform in the area of collective redress. While it was acknowledged that representative actions for damages were at least a possibility,[432] the Supreme Court

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428 *CBS Songs* (n 426) 67-69.

429 ibid 69.

430 ibid 76-78.

431 ibid 78-86.

432 eg Russell Campbell, 'Agenda: Out of court' *The Guardian* (London, 3 July 1987).

Procedure Committee stated that 'there remain differing views on the point.'[433] Representative actions were not considered suitable for multi-party actions.[434]

The National Consumer Council recommended an 'extended version of the representative action'[435] for such cases, but the concomitant draft rule[436] was completely different and much more detailed than the representative rule. The extended rule did recommend that individual questions of loss or damage be resolved in separate trials, and replaced the 'same interest' requirement with a reference to 'similar cause[s] of action', recognising there was potential in *Prudential Assurance*'s approach to the representative rule. However, that interpretation was not widely followed and the courts continued to apply the 'same interest' requirement.[437]

Lord Woolf acknowledged the inadequacy of the representative rule in his *Access to Justice* Report.[438] He noted that there was no specific procedure dealing with multi-party actions, and that the mass litigation of the 1980s and 1990s had revealed the weaknesses of the system in dealing with group claims.[439] As a result, he recommended a new procedure, the Multi-Party Situation (MPS), a version of which was enacted in 2000 as the

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[433] Supreme Court Procedure Committee, *Guide for use in Group Actions* (HMSO 1991) 16-17.

[434] Seymour (n 371).

[435] National Consumer Council, *Group Actions: Learning from Opren* (October 1988) 5.

[436] ibid 35, 38-40.

[437] John Sorabji et al (eds), *Improving Access to Justice Through Collective Actions* (Civil Justice Council 2008) 81.

[438] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996).

[439] ibid Chapter 17.

Group Litigation Order (GLO).[440] Following these changes, the representative rule continues to be available under CPR 19.6. The 'same interest' requirement remains:[441]

> (1) Where more than one person has the same interest in a claim –
> (a) the claim may be begun; or
> (b) the court may order that the claim be continued,
> by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

Consultation papers that subsequently advocated for law reform to permit class actions acknowledged that the representative rule continued to be construed narrowly. In 2008, the Civil Justice Council published its recommendations to the Lord Chancellor on developing a collective actions procedure in England. It stated that 't[h]e strict interpretation of the commonality test and the inability to obtain damages has resulted in the representative rule being underused'.[442]

The narrow approach to the 'same interest' requirement was confirmed in the competition law case of *Emerald Supplies Ltd v British Airways Plc*,[443] which explicitly overturned the 'common ingredient' test and bifurcated approach of *Prudential Assurance*. The claimants, on behalf of themselves and other purchasers of air freight services, had applied for a declaration that damages were recoverable in principle from the defendant.

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[440] CPR Part 19.III. The opt-out features of the MPS were not enacted in the GLO: Mark Mildred, 'Group Actions' in Andrew Grubb and Geraint G Howells (eds), *The Law of Product Liability* (Butterworths 2000) 398.

[441] The conversion of the old representative rule to the CPR has involved some changes in terminology, but not in substance: Mildred (n 440) 397.

[442] CJC 2008 (n 437) 34.

[443] [2010] EWCA Civ 1284.

The Court of Appeal rejected such a bifurcation on the questions of liability and damages, calling it a 'bold attempt at keeping a procedural novelty alive'.[444]

The Court held that representative actions were limited to situations where the relevant group shared a pre-existing identity of interest.[445] This was for two reasons: first, the fact that any judgment would bind the class members, even if they did not actively participate in or consent to the proceedings;[446] and second, 'the limited powers of the court to ensure that the proceedings are conducted in the interests of all the represented persons.'[447] The Court also held that defendants should not be prevented from raising defences that could differ between class members, including whether individual members had passed on or absorbed the increased price resulting from the defendants' conduct.[448]

The class members were held not to share the 'same interest' in the proceeding, because their identity could not be established prior to a judgment on liability,[449] and because the proceedings would not be equally beneficial for all of them because not all of them had necessarily sustained damages.[450] The 'passing on' defence inevitably led to a conflict of interest among class members, because only those who had absorbed the increased price could recover in damages.[451] Different defences would also apply to the

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[444] ibid [1]; Rachael Mulheron, 'A Missed Gem of an Opportunity for the Representative Rule' [2012] EBLR 49; Damien Byrne Hill and others, *Class Actions in England and Wales* (Sweet & Maxwell 2018) [13.10]-[13.11].

[445] *Emerald Supplies* (n 443) [4], citing Adrian Zuckerman, *Civil Procedure – Principles of Practice* (2nd edn, Thomson Reuters 2006) [12.22].

[446] Although, unless the court directs otherwise, any judgment or order given in a claim under CPR 19.6 can only be enforced by or against a class member with the court's permission (CPR 19.6(4)(b)).

[447] *Emerald Supplies* (n 443) [4].

[448] ibid; Mulheron (n 444) 56.

[449] *Emerald Supplies* (n 443) [62]-[63], [69].

[450] ibid [64], [69].

[451] Mulheron (n 444) 56.

class members' claims.[452] All this differentiated *Emerald Supplies* from previous representative actions involving pre-existing groups that would benefit equally from the common proceeding. The Court rejected the 'common ingredient' approach in *Prudential Assurance*, going back to the narrower 'same interest' test articulated in *Markt*.[453]

Where representative actions have been brought for damages, the courts have generally only allowed them to proceed where entitlement is the same across the group.[454] Where damage is an element of the cause of action, and some class members may have sustained damages whereas others may not, the defendant will have different defences against different class members and the 'same interest' requirement will not be met.[455] If the claimants do not have the same interest in the remedy, such that they will share equally in any damages award that can be calculated without the need for individual enquiries, then there is a risk of over- or under-compensation and the representative action will not be allowed to proceed.[456] This is one of the reasons why the representative rule has remained 'a procedural backwater'.[457]

This restrictive approach to aggregate damages is beginning to change, however. Such damages are now allowed as part of class actions in competition law.[458] In addition, in the *Lloyd v Google* representative action, the Court of Appeal allowed a claim for aggregate damages to proceed where the 'damage' claimed was in the form of a breach of rights, and that breach was held to be uniform across the class. This approach is analogous

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[452] ibid 53.

[453] ibid 55.

[454] *Millharbour Management Ltd v Weston Homes Ltd* [2011] 3 All ER 1027 [22].

[455] *Rendlesham Estates plc and others v Barr Ltd* [2014] EWHC 3968 (TCC) [88]-[92], [270].

[456] *Lloyd QB* (n 419) [93].

[457] CJC 2008 (n 437) 165.

[458] The Competition Appeal Tribunal Rules 2015, SI 2015/1648, Rule 79(2) (CAT Rules).

to *Independiente*, in that the court found a common breach of rights even though some members may have suffered different damages over and above that breach.[459]

The class in *Lloyd* consisted of an estimated 4.4 million users of the Safari Internet browser. It was claimed that Google had collected their personal information without their consent, in breach of its duty under section 4(4) of the Data Protection Act 1998.[460] The representative wished to serve the claim out of the jurisdiction, and this required the Court to determine whether there was a 'real prospect of success' and a 'good arguable case' that damage had been sustained within the jurisdiction.[461] This raised the substantive legal question of the meaning of 'damage' in data breach actions.

The first instance judge held the representative had not established that any individual class member had suffered 'damage' within the meaning of DPA section 13. Furthermore, because of the variety in class members' circumstances and the defences Google could raise in regard to them, the 'same interest' requirement of CPR r 19.6 had not been met. Justice Warby also exercised his discretion, on the grounds of proportionality, not to permit the claim to proceed.[462] He therefore held there was no good arguable case or real prospect of success.[463]

The Court of Appeal overturned this judgment, taking a very different view of the meaning of 'damage'. The Court held the DPA had to be interpreted according to EU law

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[459] Despite the similarities between the two cases, *Independiente* was referred to in argument as an exception to the 'same interest' requirement, for reasons that are not immediately clear from the Court of Appeal's judgment. By contrast, the Court of Appeal referred to *Lloyd* as 'an application of the rule': *Lloyd CA* (n 419) [78].

[460] 1998, c 29 (DPA 1998).

[461] *Lloyd QB* (n 419) [33]-[36].

[462] ibid [104].

[463] ibid [88]-[92].

– specifically, the Data Protection Directive[464] and the EU Charter. Articles 8 and 47 of the Charter articulated, respectively, the right to protection of personal data and the right to an effective remedy before a tribunal for a violation of that right.[465] The Directive articulated 'the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data'.[466] The DPA was meant to implement the Directive, and the Court therefore interpreted 'damage' in DPA s 13 as encompassing loss of control or loss of autonomy over personal data. Because Google had treated the class members' privacy rights as its own to deal with as it saw fit, it had breached their privacy rights in a non-trivial way, and damages could be awarded to compensate for the loss or diminution of those rights.[467]

The Court further held that the 'same interest' requirement of CPR r 19.6 had been met.[468] Damages were claimed for the breach of the class members' rights, and this breach was held to be uniform across the class. This also meant that the defences were uniform across the class: '[t]he wrong is the same, and the loss claimed is the same.'[469] The Court noted that this would reduce the damages that could be claimed 'to what may be described as the lowest common denominator', but that claimants with significant pecuniary loss or distress could seek to be joined as parties.[470] Furthermore, contrary to Justice Warby's judgment, the Court held that data from Google and self-identification by class members

[464] Council Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/13 (Data Protection Directive).

[465] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, articles 8, 47.

[466] Data Protection Directive, article 1.1; article 23 provides for entitlement to compensation if damage is suffered as the result of a data breach.

[467] *Lloyd CA* (n 419) [15]-[23], [42], [55]-[57], [70].

[468] ibid [75].

[469] ibid.

[470] ibid [76].

would be sufficient to identify the class, and that the only applicable test, citing *Emerald*, is that ‘it must be possible to say of any particular person whether or not they qualify for membership of the represented class’.[471]

Finally, the Court exercised its discretion[472] afresh in allowing the claim to proceed. Justice Warby had dismissed the action on proportionality grounds, stating that the main beneficiaries of the action would be the funders and lawyers.[473] The Court of Appeal, by contrast, found that the alternative to this litigation would be no litigation at all, and the breach of the class members’ rights would therefore go uncompensated and Google would not be called to account.[474] The Court held that the damages, based on the loss of control of the claimants’ personal data, ‘are properly to be regarded as compensatory in nature.’[475]

The Court of Appeal’s decision in *Lloyd* represents a break from precedent. Because the class members were claiming compensation for breach of their rights, without need for investigation of individual claims, the Court found that damages were uniform across the class and that each member had the ‘same interest’ in the claim. It also meant there was no potential for separate defences. However, this is insufficient to give rise to a commonality of interest. As noted above, and especially in regard to *Ellis*, the class must have a common interest, a common grievance, and seek relief beneficial to all. A ‘common interest’ arises from a class that is defined prior to the litigation and shares a pre-existing identity; a common grievance involves a breach of rights that is conferred on the class because of its identity; and relief beneficial to all involves relief that is the same across the

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[471] ibid [80], quoting Mummery J in *Emerald Supplies* (n 443) [62].

[472] CPR Part 19.6(2).

[473] *Lloyd QB* (n 419) [102].

[474] *Lloyd CA* (n 419) [71], [86]-[87].

[475] ibid [66], [68], [75].

class (and usually arises from the group's identity). Only the last criterion is present in *Lloyd v Google*. First, although the Court found that the class members were identifiable, they did not comprise a pre-existing group. The *Google* class members are a huge and disparate group linked only by the defendant's wrong, more akin to a modern class action. Second, the privacy rights in question were individual to group members – they did not constitute a right arising from the group's identity. Third, although the Court allowed for aggregate damages on the basis that the breach of those rights was the same across the class,[476] it also found that some class members could well be entitled to more compensation than others.[477] In this sense, the decision went further even than the bifurcated approach advocated by *Prudential Assurance* and Buckley J's dissent in *CBS Songs*. It also strayed somewhat from the principle of accurate individual compensation. The Court held that this was preferable to no compensation at all,[478] thereby departing from the accurate compensation principle in favour of providing redress for breaches of the class members' rights.

On the aggregate damages point, CPR 19.6 is silent.[479] Specifically, there is no guidance on whether such damages can be calculated on the basis of a per-capita tariff, as was proposed in *Lloyd*. Even if such an approach is legally defensible (I posit above that it is not),[480] there is no guidance on how class members with higher levels of damage can 'top-up' the amount they receive, over and above the lowest common denominator. Aside from noting that class members could seek to be joined as parties if they wished to claim

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[476] ibid.

[477] ibid [76].

[478] ibid [77], [86].

[479] Rachael Mulheron, 'Creating, and Distributing, Common Funds Under the English Representative Rule' (2021) 32 King's LJ 1, 10.

[480] The Supreme Court of Canada held in *Naken* that the representative rule did not allow for the per-capita tariff approach: *GM (Canada) v Naken*, [1983] 1 SCR 72, 73. See also Yanni Goutzamanis, 'Rise of the Privacy Class Action: *Lloyd v Google LLC*' (2020) 39(3) CJQ 203, 214-216.

additional losses (and that the limitation period had expired),[481] the Court of Appeal did not address the issues of *res judicata*, opt-out rights, or limitation periods for such claims (on which CPR 19.6 is also arguably silent).[482] The Court of Appeal's decision not only represents a significant and largely unprecedented broadening of the 'same interest' criterion, then, but it also fails to clarify the workings of CPR 19.6.[483]

Google has appealed this decision.[484] Although the DPA 1998 has been superseded, its interpretation will be relevant to the current legislative regime, including the General Data Protection Regulation[485] and the Data Protection Act 2018.[486] Should the Supreme Court uphold the Court of Appeal's decision, then legislative intervention may be required to determine the scope of the representative rule (whether sector-specific or generic),[487] and to clarify the issues discussed above as well as notice, costs-sharing, and the distribution of damages (none of which were addressed by the Court of Appeal, because there is no provision for them in CPR 19.6). Such legislation is likely to be restricted to the field of data protection.[488] Indeed, an opt-out representative action device for data

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[481] *Lloyd CA* (n 419) [76]. The Court of Appeal's judgment fails to consider the 'complexity of the interplay between limitation periods and the representative rule' (Mulheron (n 479) 21).

[482] The jurisprudence on CPR 19.6(4) (by which a court may be able to make opt-out rights available by declaring, prior to judgment, that any judgment will not be binding on all represented parties) is not conclusive: Mulheron, ibid 18.

[483] For a more detailed discussion of these points, see Mulheron, ibid 13-23.

[484] The Supreme Court heard the appeal on 28-29 April 2021; judgment is pending.

[485] Council Regulation (EC) 2016/679 of 24 May 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L119/1 (GDPR).

[486] 2018 c 12 (DPA 2018).

[487] Interview with Litigation Funder 2 (LF2) (London, 26 February 2020).

[488] The Department for Digital, Culture, Media & Sport has decided not to introduce a new opt-out procedure that would have permitted organisations to bring claims on behalf of individuals who have not given their express authorisation, partly because of the potential that the UK Supreme Court in *Lloyd* will allow representative actions for data-related claims under CPR 19.6: 'UK Government response to Call for Views and Evidence – Review of Representative Action Provisions, Section 189 Data Protection Act 2018' (*DCMS*, 23 February 2021) <https://bit.ly/3tzoJxG> accessed 20 April 2021.

privacy claims was almost introduced as part of the Data Protection Bill in 2018, but the article was pulled from the draft at the last minute.[489] Since the Court of Appeal's decision in *Lloyd*, several representative actions have been commenced in this area, including actions against Marriott International for a data breach, YouTube for unlawful use of children's data, Oracle and Salesforce for unlawful use of third party cookies, Experian for unauthorised sale of users' information for targeted marketing, Facebook with regard to the Cambridge Analytica data harvesting scandal, and Tik-Tok for unlawful processing of children's personal data. All of these actions, like *Lloyd v Google*, claim damages for loss of control of personal data.

In other areas of the law, the 'same interest' requirement has served to restrict claims where individual issues are central to the litigation. The Nigerian claimants in *Jalla v Shell International Trading and Shipping Company Ltd*[490] commenced a representative action under CPR 19.6, seeking remediation to damage to their land allegedly caused by an oil spill. Even though the claimants had abandoned their individual claims for damages,[491] the High Court held this did not change the fact that individual issues of causation and loss had to be proven in order to justify the claims for remediation.[492] It therefore struck out the representative element of the claim. In its judgment, the Court reiterated the 'same interest' test,[493] and stated that common questions of fact or law are not sufficient.[494]

[489] HL Deb 22 March 2018, 7th sitting, col 252 (Liam Byrne).

[490] [2020] EWHC 2211 (TCC), affd (on the nuisance issue) [2021] EWCA Civ 63. The appeal on the representative action issue is to be heard in 2022, although it may be moot in light of the dismissal of the appeal on the nuisance issue.

[491] *Jalla TCC* (n 490) [70].

[492] The Court noted that individual issues that are subsidiary to the common issues will not necessarily defeat a representative action: ibid [43]. In this case, however, the individual issues were integral to the main issue in the proceedings: ibid [33], [60], [71]-[72], [74].

[493] ibid [47], [60].

[494] ibid [47], [60], [75].

Although the 'same interest' requirement is not to be used as an unnecessary technical tripwire, the Court stated, it also cannot be abrogated or substituted by reference to the overriding objective.[495]

Therefore, while there is some possibility that the representative rule may be interpreted to permit modern-day class actions in England, this is likely to be restricted to certain areas of the law. In general, the rule continues to be interpreted fairly restrictively and actions will not be permitted to proceed on a representative basis where a 'same interest' does not exist, or where there are individual issues that are integral to the main issue in the proceedings. This is defensible from a doctrinal perspective, given the inherent complexity and uncertainty of CPR 19.6 as discussed above in the context of *Lloyd*. However, such an approach has implications from the point of view of access to justice and proportionality. Both the first instance and the appeal judgments in *Emerald Supplies* referred to the world-wide nature of the cartel and the litigation in other jurisdictions.[496] However, the restrictive interpretation of the representative rule meant that such litigation could not proceed in the UK on a collective basis. This represents a denial of access to justice. Using the representative rule for data breaches may be proportionate where the alternative is no compensation at all, as the Court of Appeal noted in *Lloyd*. Nevertheless, the more doctrinally coherent approach would be to enact legislation for the pursuit of such claims instead. As discussed later in this thesis, the UK government has done this for competition law class actions and should do the same for data protection.

[495] ibid [44]-[45]; CPR 1.1(1).

[496] *Emerald Supplies Ltd v British Airways Plc* [2017] EWHC 2420 (Ch) [8]; *Emerald Supplies* (n 443) [2].

3. Representative Actions and the Roots of the Class Action in the US

The representative rule has taken a very different jurisprudential course in the US than in England. Nevertheless, because the genesis of the US rule forms the roots of the class action in Canada, it will be covered briefly here.

Representative and class actions in the US have evolved on two levels: state and federal.[497] However, class actions in Québec, Ontario, and elsewhere were influenced much more by developments at the federal level and, at least until the 1980s, far more class action litigation occurred in US federal courts than in the state courts.[498] The federal level will therefore be the focus of this section.

The representative action was first recognised in the US in 1820, when Justice Joseph Story ruled on an estates dispute that involved numerous potential beneficiaries.[499] He did not allow that case to proceed because it was 'multifarious and embraces distinct matters, affecting distinct parties, who have no common interest in the distinct matters'.[500] He later discussed the availability of the representative rule in his *Commentaries on Equity Pleadings*.[501] Although he stated that all those with an interest in a case should be joined as parties, in order to protect their rights and avoid a multiplicity of suits, exceptions to this rule fell into the following categories: (1) questions 'of a common or general interest' where the parties sued or defended 'for the benefit of the whole'; (2) parties forming a

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[497] Chiodo (n 349) 20-26; OLRC Report (n 361) 64-70; Yeazell (n 344).

[498] David Marcus, 'The History of the Modern Class Action, Part I: Sturm Und Drang, 1953-1980' (2013) 90 Wash U L Rev 1, 5.

[499] *West v Randall*, 29 F Cas 718 (RI 1820).

[500] ibid.

[501] Joseph Story, *Commentaries on Equity Pleadings* (8th edn, Little, Brown, and Company 1870).

voluntary association who could 'fairly be presumed to represent the rights and interests of the whole'; and (3) where the parties were too numerous to practicably be joined.[502]

In 1833, Story's analysis was codified in Equity Rule 48. However, absent parties could not generally be bound, rendering the rule ineffective.[503] Although the Supreme Court interpreted the rule so that absent parties could be bound where there was a 'common interest',[504] the effect of such judgments remained uncertain even after the Equity Rules were revised in 1912.[505] In the early 20th century, Equity Rule 48 became 38; the reworded rule omitted the limitation on the binding effect of representative actions, making it much more effective. When the federal courts of law and equity were fused in 1938, the representative rule became Rule 23 of the FRCP.

Rule 23 allowed for representative actions for both legal and equitable relief, and described three types of cases in which such relief could be pursued. These came to be known as 'true', 'hybrid', and 'spurious'.[506] A 'true' action involved rights that were enjoyed jointly (these actions were closest to their equitable forebears because they involved a pre-existing group – property owners – and a common interest in the property); a 'hybrid' action involved rights in specific property that were enjoyed severally (again, a pre-existing group of property owners); and a 'spurious' action involved several rights where 'there is a common question of law or fact affecting the several rights and a common relief is sought.'[507] Unless parties could persuade the court that theirs was a 'true' action,

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[502] ibid 105.

[503] Yeazell (n 344) 221; William J Landers and B Wayne Vance, 'Federal and State Class Actions: Developments and Opportunities' (1975) 46 Miss LJ 39, 42.

[504] *Smith v Swormstedt* (n 372) 288, 303.

[505] Yeazell (n 344) 221-222.

[506] These labels originated in *Moore's Manual of Federal Practice and Procedure*, cited in Landers and Vance (n 503) 43.

[507] US *Federal Rules of Civil Procedure*, Rule 23, 308 US 689 (1939).

they could not aggregate their claims, and this would often mean the claims could not proceed at all.[508] If an action was deemed ‘spurious’, it also had no binding effect on absent group members, rendering that category almost useless.[509] The categories were overly conceptual and proved difficult for the courts to follow.[510]

This led to calls for further reform of the representative rule, and these were answered in 1966. The reform to Rule 23 involved more than procedural tinkering, however. One of the main motivations of the Advisory Committee that drafted the new rule was ‘to create a class action system which could deal with civil rights and, explicitly, segregation’.[511] In creating a new rule, the Committee created the modern opt-out class action. The 1966 rule contained procedural protections for absent class members, and judgments bound all class members (although they could opt out in some circumstances). Actions also had to be certified before they could proceed.[512] The old categories were replaced with a tripartite structure:

- Rule 23(b)(1) class actions are designed to avoid the risk of individual judgments that would impose incompatible standards of conduct on defendants, or be dispositive of or impair the interests of other members of a group;

- Rule 23(b)(2) class actions involve class injunctive and declaratory relief; and

- Rule 23(b)(3) class actions can be maintained where questions of law or fact common to class members predominate over individual issues, and where a class action is superior to other methods for adjudicating the controversy.

[508] Landers and Vance (n 503) 44.

[509] ibid 75.

[510] ibid.

[511] Marcus (n 498) 605.

[512] The certification requirements 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 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: FRCP Rule 23(a).

Rule 23(b)(1) actions largely involve members of a pre-existing group holding certain rights in common, and thus are the closest to the 'true' actions under the old rule. Rule 23(b)(2) actions involve equitable relief only. For both kinds of actions, the class is 'mandatory' – that is, there is no right to opt out. This is because the relief sought in such actions is generally indivisible for all class members. Where a declaration or injunction would apply across the class as a class, then an individual right to opt out would be illusory. In this sense, Rule 23(b)(1) and (2) actions are closest to the old representative action rule.

It was Rule 23(b)(3), however, that effected the real change, because it allowed the aggregation of claims that would have been 'spurious' under the old rule: claims by class members who were only connected by the conduct of the defendant, and who were claiming monetary damages. This constituted the birth of the modern opt-out class action. Permitting the aggregation of monetary claims by group members with no pre-existing identity or interest, together with contingent fees and no-way costs that were already part of the US system, opened up the opportunities for class litigation in a massive way.[513]

From 1966 until the early 1970s, there was a boom in class action litigation as lawyers used the new provisions to their full effect. Rule 23 was used in actions touching on civil rights, consumer protection, and to supplement government regulations in securities and competition law.[514] Plaintiff lawyers styled themselves as 'private attorneys general', using the class action device for the private enforcement of regulatory and other public policy objectives.[515]

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[513] Linda Silberman, 'The Vicissitudes of the American Class Action – With a Comparative Eye' (1999) 7 Tul J Int'l & Comp L 201, 204.

[514] John C Coffee Jr, 'Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working' (1983) 42(2) Md L Rev 215.

[515] Marcus (n 498) 4-11.

Unlike many courts in Canada and England, the US courts were initially liberal in their willingness to certify class actions.[516] However, several decisions in the early 1970s slowed that progress.[517] By the late 1970s, the courts were much more measured in their approach to class actions. It was around this time that the Québec and Ontario legislatures were debating class action reform. Québec picked up on the social justice aim of US class actions, passing legislation on 8 June 1978 out of a desire to bring about more effective redress for consumers. Ontario's debate was somewhat more measured, but was still influenced by Rule 23 and its promise of access to justice for consumers and others.

In England, as noted above, the representative rule has not led to class action reform. While class actions have been introduced in competition law, this has not arisen from a more liberal interpretation of the representative rule, and courts have for the most part continued to interpret that rule restrictively. If class action reform is extended in England, therefore, that is likely to be a matter for the legislature.

4. The Normative Position

The analysis in this chapter and the evolution of the case law in Canada and England forms the basis for my normative position on the role of the representative action. While at first glance the representative rule may appear to be an earlier form of the class action, there are important differences between the two devices. Class actions and group litigation are procedural innovations designed to provide redress where breaches of individual rights have been inflicted at scale, and can be placed on a 'continuum of aggregation'.[518] Representative actions, on the other hand, do not involve individual rights; they are group

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[516] Silberman (n 513) 205.

[517] *Zahn v International Paper Co*, 414 US 291 (1973); *Eisen v Carlisle & Jacquelin*, 417 US 156 (1974); *Alyeska Pipeline Service Co v Wilderness Society*, 421 US 240 (1975).

[518] Alexandra D Lahav, 'The Continuum of Aggregation' (2019) 53 Ga L Rev 1393.

actions to vindicate group rights. They therefore do not share the same normative objectives as class actions and group litigation. The representative rule is not a procedure that involves the aggregation of individuals for the purposes of access to justice, judicial economy, or behaviour modification; it is a procedure that involves a group pursuing redress for the breach of its collective rights.

The group in a representative action derives its commonality from an identity that pre-exists the litigation (for example, an Indigenous group), the rights pursued arise from that communal identity and are indivisible (such as rights to the use of land), and the relief in which the group members have an interest also arises from that identity and applies to the group as a whole. Conversely, the group in a class action (as well as in group litigation), derives its commonality from the issues at the heart of the litigation, pursues rights that are individual and divisible (such as the right to be made whole following a physical injury), and group members have an individual interest in redress against the defendant (such as damages). Put simply, a representative action has traditionally involved one communal claim, rather than an aggregation of individual claims.

As detailed in Chapter 5, courts in Canada and other Commonwealth countries have used the representative action to craft a common-law class action mechanism.[519] This step has been based on the same objectives on which class action legislation has been based: access to justice, judicial economy, and behaviour modification. However, it has given rise to a host of procedural complications arising from the fundamental differences between representative actions and class actions. Because of those complications, I take the position that representative actions should be confined to their traditional purposes and should not be used to craft a common-law class action procedure; where a need for class

[519] *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 (Canada); *Lloyd CA* (n 419) (England); *Southern Response Earthquake Services Limited v Ross* [2020] NZSC 126 (New Zealand).

actions is apparent, the response should be legislative rather than judicial. Class action legislation in Canada and elsewhere has addressed the aforementioned procedural complications through the three controversial elements discussed in this chapter: opt-out classes, aggregate damages, and *cy-près* distributions.

(a) Opt-Out Classes

Representative actions involve the litigation of group rights, and the remedy flows to the group as a whole. The indivisible nature of the claims means that the right to opt out is illusory, because the decision on the collective rights applies to everyone in the group no matter what action they take. Class actions for damages are a different matter. The class is a creation of the litigation, and the rights being litigated are not held communally; they are separable and can be litigated individually. Including everyone with a damages claim against the defendant, so they are bound by any judgment, would prejudice their right to control their own litigation. Opt-out rights are therefore crucial to making the collective procedure compatible with due process rights where the represented persons have their own individual legal rights. In the debate on whether the representative rule is compatible with a class action for damages, several commentators have noted that CPR 19.6(4) could be used as an opt-out mechanism, although the jurisprudence is inconclusive.[520]

(b) Aggregate Damages

In representative actions, aggregate damages are only awarded if damages are the same across the group such that individual damages assessments are unnecessary – damages are

[520] Mulheron (n 479) 18; Rachael Mulheron, 'Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers' (2010) 50 CBLJ 376, 388–391. See also *John v Rees* [1970] Ch 345 and *The Irish Rowan* (n 407) 239, both of which provide support for a limited opt-out mechanism under the predecessor to CPR 19.6.

awarded to the group *as a group*.[521] This concept is much more problematic in class actions involving personal injury and other damages that tend to be different for each individual class member. Such actions have therefore proven a poor fit with the representative action. Until recently, the representative rule was 'a procedural backwater' in England largely because of the courts' aversion to aggregate damages.[522] Where damage is an element of the cause of action, and some group members may have sustained damages whereas others may not, the defendant will have different defences against different group members and the 'same interest' requirement will not be met.[523] If the claimants do not have the same interest in the remedy, then there is a risk of over- or under-compensation and the representative action will not be allowed to proceed.[524]

Similarly, until the Supreme Court of Canada's decision in *Dutton*,[525] the representative rule in Canada was interpreted restrictively where damages differed between individual group members because such actions were held not to fit the rule's 'same interest' requirement.[526] Differences in the extent of each group member's damages meant such damages could not accurately be quantified in the aggregate, and the inability to reach a judgment with any degree of accuracy meant the action could not proceed.[527]

There are signs in the Court of Appeal's approach in *Lloyd v Google*[528] that England's restrictive approach to aggregate damages is beginning to change. However,

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521 *Millharbour* (n 454) [22].

522 Sorabji (n 437) 165.

523 *Rendlesham* (n 455) [88]-[92], [270].

524 *Lloyd QB* (n 419) [93].

525 *Dutton* (n 519).

526 *Naken* (n 480).

527 *Lloyd QB* (n 419) [93].

528 *Lloyd CA* (n 419) [75], [77].

based on my normative interpretation of the representative rule, I argue that this decision is wrong for several reasons. First, the class was not defined prior to the litigation, and is identified only by the wrong committed by the defendant.[529] They are not a pre-existing group pursuing a breach of their collective rights. Second, the privacy rights that were breached did not arise from the group's identity, but were individual to group members. Third, the Court of Appeal acknowledged that some class members could be entitled to more compensation than others, due to sustaining significant pecuniary loss or distress over and above the breach of privacy rights.[530] Those class members could seek to be joined as parties to claim their additional losses; however, not only had the limitation period expired, but CPR 19.6 contains no requirement for notice, so it is unclear how claimants with significant pecuniary loss or distress would even know that they could seek to be joined. Differences in individual loss within the group would therefore undermine the 'same interest' requirement and would also lead to injustice in a mechanism that is meant for indivisible group claims. The group in *Lloyd v Google* therefore fails the three-part *Ellis* test: there is no common interest or common grievance, and the relief sought is not beneficial to all whom the plaintiff proposes to represent.

(c) *Cy-Près* Distributions

Unclaimed damages were traditionally not an issue in representative actions, where either damages were not claimed or they were awarded to the group as a whole. In class actions, however, monetary damages tend to be awarded to a class that is disparate in interest, where the identity of all members is less likely to be known and distribution much more difficult. The response in many class action statutes has been to allow *cy-près* distributions

[529] DPA 1998, s 13.

[530] *Lloyd CA* (n 419) [76].

of unclaimed awards. As noted in Chapter 3, these are an innovation taken from the law of trusts and are motivated largely by the objective of behaviour modification. Because they allow for distributions to recipients other than those injured by the defendants, they are more akin to a fine and arguably modify the substantive law. *Cy-près* distributions should therefore not be part of any common-law mechanism (including any interpretation of the representative rule) and should only be permitted by way of legislation.

5. Conclusion

Decisions that have attempted to craft a common-law class action from the representative rule have failed to address many of the resulting procedural complications, including opt-out classes (and issues of notice) and the quantification and distribution of damages. In Canada, where most jurisdictions have class actions legislation, the representative action has largely assumed its traditional role involving a limited and clearly ascertainable class, asserting a common statutory or collective right, or seeking a common declaration or remedy. Collective proceedings involving more disparate classes bound together purely by the issues at the heart of the litigation have been pursued under statute. I therefore take the normative position throughout this thesis that, in light of the poor fit between representative actions and modern-day opt-out class actions, the former should be confined to their traditional role.

Chapter 5:
The Historical Debate on Class Actions, Group Litigation, and Representative Actions

This chapter will look at the historical debate on class actions and group litigation in England and Canada. In the late 20th century, both countries experienced an access to justice crisis because litigation was too expensive and too slow. With regard to collective redress, however, the roots of the crisis were different in each country and this meant the responses were different.

In Canada, numerous high profile court decisions frustrated efforts to litigate group rights through the representative action. This led to a combination of legislative and court intervention to remove the barriers to the use of that device; the result was the modern-day class action. In England, procedural difficulties were instead presented by the multi-party action. MPAs were not class actions, but instead a collection of individual claims arising from similar issues of fact or law; these claims were judicially case managed in an effort to increase efficiency and reduce cost. The difficulties they presented were addressed in the Woolf Reforms of the late 1990s, and resulted in the GLO framework, which focused on a proportionate method for litigating multiple individual claims.

The two countries' different approaches provide evidence of differing outlooks on collective redress, and these are still evident today. Contemporary collective redress mechanisms in England and Canada will be considered in the next chapter. This chapter will investigate the history of those mechanisms, the problems of access to justice to which those approaches gave rise, and the different ways in which each country responded. In developing those responses, each country was also influenced by the approaches in other jurisdictions, especially the United States.

Recently, England has enacted legislation to enable opt-out class actions in competition law. This development has not arisen from the representative action rule, but instead is a response to EU policy that seeks greater enforcement of competition law to ensure a more effective market. Similarly, the earliest debates on class actions in Canada were in competition law, where in the late 1970s the federal government proposed new legislation – including a class actions procedure – to respond to changes in US anti-trust policy and make the Canadian market more attractive to foreign investment. In interpreting its class actions scheme under the Consumer Rights Act 2015,[531] England was directly inspired by the Canadian class actions framework.

This chapter will continue the history of representative actions begun in Chapter 4, covering the rule's development from 1970 onwards in Canada. It will then look at the collective redress debate over the next few decades. In Canada, this took the form of comprehensive opt-out class actions legislation in most provinces, as well as rule changes at the federal level. Some of the most controversial elements in this process involved opt-out classes and aggregate damages, as well as the concept of *cy-près* distributions. The chapter will then turn to England, where the debate revolved around the issues arising from the multi-party actions of the 1980s and 1990s, which led to the Woolf Reforms and the GLO framework. It will finish with an analysis of class actions in competition law in Canada and England. This history reveals why, in responding to the issues of collective redress at the turn of the millennium, England and Canada took different directions.

[531] 2015 c 15, Schedule 8 (Consumer Rights Act 2015).

1. Representative Actions in Canada (1970-present)

(a) Introduction

The evolution of the representative action created pressure for class action reform in Canada. The representative action involved one claimant representing a class that had to have the 'same interest' in the action, a term that, apart from a period in the 1970s, courts interpreted restrictively. This procedural deficiency led to fears that claims were going uncompensated and that defendants were not being held accountable for their actions.[532] Cases such as the GM Firenza litigation in Ontario, the pine shakes litigation in Alberta, and the Hiland Insurance bankruptcy in Newfoundland, all contributed to a general impression that the legal system was not keeping up with the realities of a modern mass-production economy, where the wrongdoing of one corporation could injure many. The more liberal interpretation of the rule in the 1970s, followed by the Supreme Court of Canada's return to the restrictive approach in the *Naken* decision in 1983,[533] was accompanied by calls for class action reform.

In England, however, the representative action rule continues to be interpreted restrictively and, for the most part, has not inspired calls for reform. Why is this? Firstly, as discussed in Chapter 4, English courts have acknowledged that the representative action and the modern-day opt-out class action are two very different devices. Secondly, England has responded to the issues posed by multi-party litigation by focusing on the case

[532] The inadequacy of existing procedural devices, including the representative action, as a trigger for class action reform has also been highlighted by Rachael Mulheron in *Class Actions and Government* (CUP 2020) 42-53.

[533] *Naken et al v General Motors of Canada Ltd et al*, [1983] 1 SCR 72.

management of multiple individual claims (essentially an opt-in system) instead of an opt-out class action system. This policy choice will be considered later in this chapter.

In giving the green light to class actions in 2001[534] and overturning its decision in *Naken*, the Supreme Court of Canada confused all three mechanisms: the representative action, case management of multiple claims, and the modern-day class action. The reason for the restrictive interpretation of the representative rule, as I explain in Chapter 4, was because it was historically used for the litigation of group rights; it was not designed for the aggregation of claims involving individual rights, as in a class action.

Nor did the Court consider the collective redress mechanisms that already existed in Canada, and especially in Alberta. These mechanisms for the case management of multiple individual claims were fairly similar to England's GLO rules. The GLO rules are conceptually and procedurally different from class actions, but the Court simply listed them along with other 'comprehensive class action legislation'.[535] The confusion between representative actions, case management of multi-party actions, and class actions, gave the appearance that the Court was just giving its imprimatur to something that was already in *de facto* existence. In fact, it was giving the green light to a complex, controversial and novel device that was still being debated in many provinces, including Alberta.[536]

This section will look at the development of the representative action in Canada from the 1970s onwards. Contrary to the restrictive approach pursued in England,[537] the Canadian courts interpreted the rule liberally in the 1970s. This ended in 1983 with the

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[534] *Western Canadian Shopping Centres Inc v Dutton,* 2001 SCC 46.

[535] ibid [30]. Lord Woolf, whose recommendations formed the basis for the GLO framework, has also committed this error: *Boake Allen Limited v Her Majesty's Revenue and Customs* [2007] UKHL 25, where he described class actions as 'the United States equivalent of GLOs' [28].

[536] Class proceedings legislation had already been passed in Ontario, BC, and Québec by this point.

[537] The exceptions to this restrictive approach, including *Prudential Assurance* and *Lloyd*, are analysed in Chapter 4.

Naken decision,[538] which sounded the death knell for the introduction of modern-day class actions via the representative rule. This decision, and the precedent it set for the lower courts, led to pressure on the provincial legislatures to bring about class action reform. This included Alberta, although some of its courts distinguished *Naken* and interpreted the representative action rule liberally. This interpretation eventually found its way to the Supreme Court of Canada and culminated in its decision in *Dutton*.[539]

(b) The Liberal Interpretation

In the 1970s, Canadian courts became more receptive to collective redress mechanisms following the introduction of class actions south of the border, and as the need for such mechanisms became more apparent. The first signs of a more expansive interpretation of the representative rule were seen in BC, where such actions were governed by Ordinance 16, Rule 9 of the Rules of the Supreme Court (1961), which was very similarly worded to its counterparts in other provinces and was almost identical to its English equivalent:[540]

> 9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued … on behalf or for the benefit of all persons so interested.

The more liberal interpretation of the representative rule consisted of two strands.[541] First, the bifurcated approach involved obtaining a declaration of liability that could then form

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[538] (n 533).

[539] (n 534).

[540] In 1976, this rule became Rule 5(11) of the Supreme Court Rules, but the substance remained the same.

[541] These could also be seen in the English case of *Prudential Assurance* (n 399).

the basis for actions for monetary damages; and second, the liberal interpretation of the 'same interest' test.[542] These are exemplified in two cases.

In *Chastain*,[543] the plaintiff sought a declaration that the defendant had no authority to request a security deposit from new customers with low incomes, as well as an injunction forbidding the defendant from keeping deposits already collected. The Court allowed the representative action to proceed, even though it was essentially a claim for a monetary remedy that would require the return of different amounts to each customer, because the group members all had the 'same interest' in the success of the action.[544]

Shaw[545] was also an important precedent. A group of estate agents brought a representative action for an accounting, alleging the defendant had wrongfully withheld portions of their sales commissions. The Court of Appeal held the matter was properly constituted as a representative action, even though it sought the return of sums that differed for each group member, because the relief sought was equitable and not for personal damages. Although calculating the entitlement of each group member would involve 'long, detailed and difficult accountings',[546] this was held not to be a bar to a representative action. Furthermore, the Court found that the 'same interest' requirement was satisfied by the group members' common interest in the success of the action.[547]

BC's approach heavily influenced the evolution of the case law in Ontario, where Rule 75 was substantially the same as BC's Rule 9. *Cobbold v Time Canada*[548] expanded

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[542] Suzanne Chiodo, *The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act* (Irwin Law 2018) 27-28.

[543] *Chastain v British Columbia Hydro and Power Authority* (1973), 32 DLR (3d) 443 (BCSC).

[544] ibid 443.

[545] *Shaw v Real Estate Board of Greater Vancouver*, (1973), 36 DLR (3d) 250 (BCCA).

[546] ibid 255.

[547] ibid 254.

[548] *Cobbold v Time Canada Ltd*, (1976), 13 OR (2d) 567 (HCJ).

the interpretation of the 'same interest' test, so that, as in BC, it was interpreted to mean 'the same interest in the success of the action'. Even though the claimants had separate contracts with the defendant, the Court held those contracts were essentially identical, and that a claim for damages was not fatal to a representative action because the primary consideration was common success.[549]

The case of *GM (Canada) v Naken*[550] also attempted to circumvent the barriers of individual contracts and individual damages. The representative action was brought on behalf of nearly 5,000 purchasers of the 1971 and 1972 models of the Firenza, which were notoriously unreliable. The plaintiffs alleged breach of the manufacturer's collateral warranty, seeking pro-rata damages for the reduced resale value of each vehicle in the amount of $1,000. The defendants brought a motion to strike the action on the basis that the claims involved individual contracts (the collateral warranty claim was based on the allegation that GM had induced the class members to purchase their vehicles through their representations), and that damages would have to be individually assessed. The Court of Appeal allowed the case to proceed as a representative action. Arnup JA held there was a common interest among the class members who had relied on GM's advertisements, and the class would have to be narrowed to include only those people. Damages could therefore be sought on behalf of the class as a class (that is, aggregate damages), and individual assessments would not be required. Individual questions of reliance on the advertisements would still remain, but these could be determined after a trial of the common questions, so the 'same interest' test did not pose a barrier to proceeding.[551]

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[549] ibid 568.

[550] *Naken et al v General Motors of Canada Ltd et al*, 1975 CanLII 498 (ONSC); revd 1977 CanLII 1317 (Div Ct); revd (1979) 21 OR (2d) 780 (CA); revd [1983] 1 SCR 72.

[551] *Naken* (OCA) (n 550).

This liberal interpretation of the 'same interest' test led to a general perception that courts were willing to interpret the representative rule to allow opt-out class actions for damages to proceed. This was certainly the view in Québec. The result was the first generic opt-out class actions regime in Canada.

(c) Québec

The introduction of class actions in Québec was a plank of the social justice platform of the newly-elected Parti Québécois.[552] It was partly motivated by the existence in other provinces of the representative rule,[553] which was then being interpreted quite expansively.[554] Pierre Marois, the Minister for Social Development who introduced Bill 39 respecting class actions[555] in December 1977,[556] referred in the National Assembly debates to *Chastain* in BC,[557] as well as representative actions in Ontario. Interestingly, while those in other provinces saw Québec's class action reform as pioneering, Marois himself stated that 'we're behind the others' – that is, the other provinces that had the representative rule, as well as the US and England, which he (incorrectly) stated had 'class actions' for 100 years and 300 years respectively.[558]

Québec's class action legislation was also intended to mirror the socially progressive agenda facilitated by class actions in the US, and was heavily based on Rule 23 of the US Federal Rules of Civil Procedure, as well as the Civil Practice Law and Rules

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552 The Parti Québécois was elected on 15 November 1976.

553 Québec, Journal des débats, Troisième session – 31ième Législature: audition des memoires sur le project de loi no 39 (Québec Hansard): 7 March 1978 (Fabien Roy); 9 March 1978 (Pierre Marois).

554 Québec Hansard, 7 March 1978 (Pierre Marois).

555 Projet de Loi 39, *Loi Sur Le Recours Collectif.*

556 Marois (n 553).

557 *Chastain v British Columbia Hydro* (n 543).

558 Québec Hansard, 16 May 1978 (Pierre Marois).

of the State of New York.[559] It followed other initiatives designed to facilitate access to justice, including the introduction of legal aid and the Small Claims Court.[560]

The main aim of the statute, however, was the enforcement of consumer protection legislation.[561] Following the passage of the *Consumer Protection Act* seven years previously, organisations in the province campaigned for class action reform to allow consumers to more effectively pursue their rights[562] and hold companies to account for unconscionable business practices.[563] Québec's class action legislation was the culmination of those efforts.[564] The debate was informed by writings on consumer protection from other jurisdictions, mainly Ontario,[565] as well as the wording of Bill C-13 (proposing class actions in competition law) that was then being debated by the federal government.[566] While consumer protection was the main aim of the legislation, however,

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559 *Federal Rules of Civil Procedure*, Title IV: Parties, Rule 23: Class Actions, 383 US 1029 (FRCP); NY CPLR § 9; Shaun Finn, 'In a Class All Its Own: The Advent of the Modern Class Action and its Changing Legal and Social Mission' (2005) 2:2 CCAR 333, 352.

560 Québec Hansard, 7 March 1978 (Fernand Lalonde).

561 *Consumer Protection Act*, RSQ, c P-40, replaced in 1978 by the *Consumer Protection Act*, CQLR c P-40.1.

562 Québec, Journal des débats, Deuxième session – 30ième Législature: dépôt du deuxième rapport annuel de la Commission des services juridiques (le 30 octobre 1974) (Jérôme Choquette). During the debates on the *Consumer Protection Act*, ministers pointed out that procedural issues would prevent consumers (especially groups) from enforcing their rights under the *Act*: Journal des débats, Première session – 29ième Législature: audition des memoires sur le project de loi no 45 (le 25 novembre 1970) (Marcel Léger, Claude Charron).

563 Québec Hansard, 9 March and 16 May 1978 (Pierre Marois).

564 Lalonde (n 560); Québec Hansard, 7 March 1978 (Nicolle Forget, Consumers' Association of Canada (Québec); Lionel Laprade, Canadian Bankers' Association; Serge Fontaine); Québec Hansard, 9 March 1978 (Philippe Edmonston, Association pour la protection des automobilistes); Québec Hansard, 1 June 1978 (Pierre Marois).

565 Lalonde (n 560), citing Neil J Williams, 'Consumer Class Actions in Canada – Some Proposals for Reform' (1975) 13 OHLJ 1.

566 Québec Hansard, 7 March 1978 (Yves Dupré, Canadian advertising associations).

the motivations of the Bill's authors indicate that it was also intended for other types of claims, including claims for personal injury.[567]

The government maintained that the class action was purely a procedural device that did not change the substantive law, which was why the changes were being introduced into the Code of Civil Procedure.[568] However, while Bill 39 enjoyed a wide base of support amongst all the political parties,[569] business organisations,[570] and the legal profession,[571] the Bâtonnier (President) of the Barreau du Québec emphasised that it should not create new substantive rights. He stated that class actions were an extraordinary remedy that 'should be treated with as much seriousness as possible to avoid abuse'.[572] The Barreau's fears revolved specifically around the provisions on aggregate damage awards and *cy-près* distributions; these will be considered in the next section.

The Act Respecting the Class Action was passed on 8 June 1978, adding Book IX to the CCP.[573] The procedure was on an opt-out basis, and collective recovery (aggregate damages) was permitted, with discretion given to the Court as to the distribution of any residue. While Québec's legislation differed in important ways from subsequent legislation in other provinces, it paved the way for reform in the rest of Canada.

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[567] Québec Hansard, 9 March 1978 (Pierre Marois).

[568] Québec Hansard, 16 May 1978 (Pierre Marois); *Code of Civil Procedure*, RSQ c C-25, Book IX (Class Action) (CCP).

[569] Québec Hansard, 9 March 1978 (Harry Blank).

[570] Québec Hansard, 8 March 1978 (Ghislain Dufour, Québec Employers' Council; Pierre Morin, Québec Chamber of Commerce); Québec Hansard, 9 March 1978 (Pierre Comtois, General Motors of Canada Ltd).

[571] Barreau du Québec, *Mémoire à la Commission parlementaire de la justice sur le projet de loi 39: Loi sur le recours collectif* (Barreau du Québec 1978).

[572] Québec Hansard, 7 March 1978 (Viateur Bergeron, le bâtonnier du Barreau du Québec). Marois (n 553) also noted that the class action was 'an exceptional procedure'.

[573] *An Act Respecting Class Actions*, RSQ, c R-2.1 (Québec Act); 'Class action suits' *The Globe and Mail* (Toronto, 14 June 1978) B4.

(d) *Naken*

The Supreme Court of Canada's decision in *Naken*[574] halted the liberal interpretation of the representative action rule in its tracks. Prior to the release of that decision, the Ontario Law Reform Commission had recommended generic opt-out class actions for the province.[575] The prospect of reform had engendered debate amongst lawyers and the public, and there was a certain amount of expectancy regarding the Supreme Court's judgment. Those who had hoped for reform, however, were disappointed.

Justice Estey for the Court held that representative actions under Rule 75 could not proceed where they involved separate contracts and individualised damages. With regard to the separate contracts, Justice Estey found there was an infinite variety of individual differences in GM's representations in its advertisements as well as individual class members' reliance on them, such that there was no 'same interest' even though the claims arose from the same vehicle model.[576] Furthermore, damages would be different for each class member, and Justice Estey held this could not be circumvented by capping each member's claim for damages at $1,000.[577]

Naken stymied class actions not only under Rule 75, but also under other provinces' representative rules. Justice Estey agreed with the OLRC Report which found that, 'the skeletal nature of Rule 75 suffers from a host of procedural deficiencies that … can be addressed only by wholesale reform of the law of class actions in Ontario.'[578] This 'skeletal nature' arose from the fact that, according to Justice Estey, Rule 75 was not meant to

[574] *Naken* (n 533).

[575] *Report on Class Actions* (Ministry of the Attorney General 1982).

[576] ibid 103-104.

[577] *Naken* (n 533) 99.

[578] OLRC Report (n 575) 76, cited ibid 93.

accommodate novel procedural devices such as modern class actions for damages.[579] He found that the 30-word rule lacked any provisions on costs, discovery, *res judicata*, limitation periods, and other issues.[580] The creation of this 'new and distinct method of proceeding' was a job for the legislature.[581] Nearly 20 years would pass before the Supreme Court would overturn its decision and allow class actions at common law to proceed.[582] Meanwhile, pressure for reform continued to build in Ontario and elsewhere.

(e) Representative Actions in the Provinces

Following *Naken*, there was a perception among law reformers and the general public that the Supreme Court had let an opportunity pass by, and that the onus was now on the provincial legislatures to enact class actions legislation. This section will look at the provinces where the narrow interpretation of the representative rule was particularly remarkable; it was perceived by many to be a scandalous denial of justice that called for legislative intervention.

i. Ontario

After *Naken*, there were very few further attempts to use Rule 75 in Ontario, other than those cases that claimed a common interest in a common fund or a statutory right.[583] The handful of representative actions that involved neither were dismissed on the basis of *Naken*.[584]

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579 *Naken* (n 533) 104.

580 ibid 97, 100.

581 ibid 102.

582 *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46.

583 eg *Sparling et al v Royal Trustco Ltd et al*, 1984 CanLII 2040 (ONCA).

584 eg *Canning et al v Governing Council of University of Toronto*, 1984 CanLII 2061 (ONSC).

Law reformers[585] and the general public expressed dismay at the Supreme Court of Canada's decision. Newspaper reports focused particularly on the injustice of the fact that large groups of consumers and other victims would be denied redress.[586] The Attorney General responded by stating that class actions had become a priority for his Ministry, and that he hoped to introduce legislation within the next year.[587] No such legislation was introduced, however, and several Members of the Provincial Parliament (MPPs) questioned whether it ever would be.[588] Just one year after *Naken*, Premier Bill Davis announced his resignation, and the Conservative government was defeated the next year. The Liberal government that followed included an activist Attorney General, Ian Scott, who would go on to become one of the main authors of class action reform in Ontario.[589]

ii. Atlantic Canada

Nearly 20 years after *Naken*, Newfoundland and Labrador became the fourth Canadian province to enact class actions legislation; New Brunswick and Nova Scotia introduced legislation several years after that. The impetus for Newfoundland's statute,[590] however,

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[585] William A Bogart, 'Naken, the Supreme Court and What Are Our Courts For?' (1984) 9 CBLJ 280; Jennifer K Bankier, 'Class Actions for Monetary Relief in Canada: Formalism or Function?' (1984) 4 Windsor YB Access Justice 229; J Robert S Prichard, 'Class Action Reform: Some General Comments' (1984) 9 CBLJ 309. Bogart, Bankier, and Prichard were all involved in the OLRC Report (n 575).

[586] Marina Strauss, 'Supreme Court bars Firenza buyers from launching a class-action suit' *The Globe and Mail* (Toronto, 9 February 1983) 2; Jacob Ziegel, 'Class action dealt a legal blow' *The Globe and Mail* (Toronto, 29 March 1983) 7; Editorial, '10 Years is Enough' *Kitchener-Waterloo Record* (March 1983); Editorial, 'We need class-action suits' *Toronto Star* (10 February 1983).

[587] Letter from Simon Chester to DW Montgomery, Director, Government Relations and Legislation, Canadian Manufacturers' Association, 9 February 1983, Box No B502275 – Consultations, Archives of Ontario.

[588] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 32nd Parl, 4th Sess (30 March 1984) (Marion Bryden).

[589] For the legislative history of the *Class Proceedings Act, 1992*, SO 1992, c 6 (Ontario CPA), see Chiodo (n 542).

[590] All references to Newfoundland will be to the province of Newfoundland and Labrador.

was the same as in Ontario: a restrictive interpretation of the representative rule that led to a high-profile denial of justice.

Representative actions in Newfoundland were available under Rule 7.11, which was similar to its Ontario and BC equivalents, with the same requirement that 'numerous persons have the same interest' in a proceeding.[591] One of the few representative actions to be brought around this time was allowed to proceed, based on the precedent in *Shaw*.[592] In *Hillyard v St John's (City)*,[593] a taxpayer group sought an injunction against the Municipal Council of St John's to restrain it from allowing the construction of buildings in their neighbourhood. Because the group did not claim monetary damages, and success for the plaintiff meant success for all, the Court found the *Ellis* test was met and a representative action was appropriate.[594]

After *Naken*, there were very few attempts to use Rule 7.11, and most of them were dismissed on the basis of the Supreme Court of Canada's decision.[595] In *West End Electronics*,[596] the Newfoundland Supreme Court (Trial Division) refused to permit a representative action for flood damage, finding that, '[t]he practical problems which can spring up on all sides of a proceeding like this were considered in *Nakin et al v General Motors of Canada Ltd* [sic] and found to be insurmountable.'[597]

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591 *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Sch D, Rule 7.11(1). Until 1986, the Newfoundland rule was identical to the English rule. Rule 7.11(1) was slightly different in that it provided for the discontinuation of a representative action.

592 (n 545).

593 *Hillyard v St John's (City)* (1982), 30 CPC 176 (Nfld TD).

594 ibid [18]-[23].

595 *West End Electronics Ltd v St John's (City)*, 1992 CanLII 7389 (NLSC); *Inshore Fishermen's Bonafide Defence Fund Association v Canada* (1994), 132 NSR (2d) 370 (CA).

596 (n 595).

597 ibid [14].

Courts elsewhere in Atlantic Canada also interpreted the representative rule very narrowly.[598] In Prince Edward Island, *Horne v Canada (Attorney General)*[599] illustrated the difficulties of trying to craft a class action procedure from a representative rule which did not provide for notice, opting out, assessment or distribution of damages, or settlement approval. A settlement offer had been accepted by 299 plaintiffs (potato growers who alleged they had sustained losses from the federal government's misdiagnosis of a potato virus), but that represented only 33 per cent of all the province's potato growers, some of whom had objected to the settlement.[600] The Court held that some members of the class therefore had interests antagonistic to the other members,[601] and that it could not unilaterally take away the legal rights of any one member.[602] Furthermore, because the growers would each receive a proportionate interest of the common fund, the compensation 'may bear no similarity to their loss or damages.'[603] The Court therefore refused to approve the settlement and found the case was not properly constituted as a representative action.[604]

On 12 March 1997, Bill 20, the Class Proceedings Act, was introduced in PEI in order to overcome the limitations of the representative action regime, and to facilitate access to justice, efficiency, and 'impress … on wrongdoers the totality of their potential

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[598] *Guarantee Co v Caisse Populaire de Shippagan et al* (1988), 86 NBR (2d) 342, 349.

[599] [1995] PEIJ No 60. The only other representative action commenced in PEI is *King & Dawson v Government of PEI*, 2019 PESC 27.

[600] *Horne* (n 599) [18].

[601] ibid [24].

[602] ibid [42], [103].

[603] ibid [28], [39]-[40].

[604] ibid [117].

liability'.[605] The Bill was based on the ULCC Uniform Act that had been promulgated in 1996.[606] However, Bill 20 did not reach second reading. It died on the order paper when the next provincial election took place on 17 April 2000.[607] There was subsequently very little further discussion of class actions in eastern Canada until Newfoundland and Labrador took up the question.

In addition to the narrow interpretation of the representative rule, plaintiffs in several actions were ordered to pay significant costs when their actions failed, giving rise to arguments that the system was unfairly stacked against them.[608] In Newfoundland, this occurred in the litigation that followed the Hiland Insurance bankruptcy.[609]

Hiland Insurance went into provisional liquidation in October 1994, leading to the cancellation of 22,000 policies. Policyholders' unrefunded premiums totalled approximately $20 million, and JJ Lacey, the agent and broker that had sold the policies, went into bankruptcy.[610] One policyholder, Bill Kelly, formed the Hiland Consumers' Association[611] and commenced a representative action against JJ Lacey's insurer in March 1996, for damages equivalent to the amount of unrefunded premiums for each

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[605] PEI, Legislative Assembly, Official Report of Debates (Hansard), 60th General Assembly, 1st Sess (12 March 1997) (Minister of Community Affairs and Attorney General Mitchell Murphy).

[606] Uniform Law Conference of Canada, *Uniform Class Proceedings Act* (1996) <www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/82-josetta-1-en-gb/uniform-actsa/class-proceedings-act/1395-uniform-class-proceedings-act-1992> accessed 8 April 2021. The ULCC Act was a model Act that was drafted in order to provide guidance to provinces wishing to enact class actions legislation, and was heavily influenced by the British Columbia *Class Proceedings Act*, RSBC 1996, c 50 (BC CPA): it did not, in itself, have the effect of legislation.

[607] Margaret A Shone, 'The Modern Class Action Comes to Alberta' (2005) 42(3) Alta L Rev 913, 915.

[608] *Palmer v Nova Scotia Forest Industries* (1983), 2 DLR (4th) 397 (SCTD), in which approximately $250,000 in costs was awarded against the 15 plaintiffs.

[609] Suzanne Chiodo, 'Local Representation and Litigant Voice: The Story of Class Actions in Newfoundland and Labrador' (2020) 71 UNBLJ 204.

[610] *Kelly et al v Lacey (JJ) Insurance Ltd (Bankrupt)*, 1997 CanLII 16039 (NLSC) [4]-[11].

[611] Newfoundland, Legislative Assembly, Official Report of Debates (Hansard), 44th General Assembly (Newfoundland Hansard), 2nd session, vol XLIV, No 32 (13 December 2000).

policyholder. Just over a year later, the representative action was dismissed.[612] The Newfoundland Supreme Court (Trial Division) held the claims did not involve the 'same interest' because they would necessitate individual enquiries into when Lacey and the policyholders knew or ought to have known of Hiland's precarious financial situation, as well as the manner in which Lacey handled each class member's premium payments.[613] In addition, the Court held that many class members might have damages exceeding the amount of unrefunded premiums, and that the *res judicata* effect of the representative action would effectively bar those claims, leading to injustice.[614] As a result, the representative aspects of the plaintiff's claim were struck out.[615] Costs were ordered against Bill Kelly in the amount of $15,000.[616]

The failure of the representative action infuriated the policyholders and the public.[617] The defendants pursued Kelly for the recovery of the costs (for which he was personally liable), to the point where he took to the streets to ask people to contribute and sign a petition calling for class actions legislation.[618] On 6 July 2001, the provincial government announced plans to draft a class actions statute, acknowledging Bill Kelly's central role[619] and the Hiland Insurance scandal as evidence of the need for such

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612 *Lacey* (n 610).

613 ibid [61]-[64].

614 ibid [67]-[69].

615 ibid [89]-[93].

616 *Kelly v Lacey (JJ) Insurance Ltd*, 2000 CanLII 28326 (NLSC).

617 'Supreme Court says no to class action' (*CBC News*, 7 June 1999) <www.cbc.ca/news/canada/supreme-court-says-no-to-class-action-1.181718> accessed 8 April 2021.

618 Newfoundland Hansard (20 November 2001) (Jack Harris; Tom Rideout).

619 Government of Newfoundland and Labrador, News Release, 'Government to draft new class action legislation' (Executive Council (Justice), 6 July 2001) <www.releases.gov.nl.ca/releases/2001/exec/0706n07.htm> accessed 8 April 2021.

legislation.[620] Class actions were seen as a much-needed replacement for an outdated, inflexible, and nebulous representative rule.[621] The fact that the three largest provinces already had class actions was also mentioned in the debates, with the implication that Newfoundland was missing out on the benefits of such legislation.[622]

On 19 November 2001, Bill 34, "An Act To Permit An Action By One Person On Behalf Of A Class Of Persons" was introduced.[623] It was nicknamed the "Kelly Bill",[624] and passed in December 2001 without amendment.[625] Since then, Newfoundland's Act has influenced the common-law development of class actions in PEI. In *King & Dawson*,[626] the province's Supreme Court allowed a representative action to proceed under Rule 12.01 of the PEI Rules of Civil Procedure (the wording of which is substantially similar to Newfoundland's representative rule). In an effort to provide a procedural framework for the prosecution of the action, the Court appended the wording of Newfoundland's Class Actions Act to its decision, while calling for the PEI legislature to enact its own statute.[627] The PEI Court of Appeal upheld this judgment and echoed the Supreme Court's call for

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620 ibid; Newfoundland Hansard 20 November 2001 (n 618); Newfoundland Hansard (22 November 2001) (Roland Butler).

621 6 July 2001 news release (n 619).

622 Newfoundland Hansard (13 December 2000) (John Ottenheimer). The impression that residents of one jurisdiction were having their legal rights determined in another jurisdiction, in the absence of 'anything better back home', has also been highlighted by Rachael Mulheron as a trigger of class action reform: (n 532) 67-71.

623 Newfoundland Hansard (19 November 2001) (Kelvin Parsons); Government of Newfoundland and Labrador, News Release, 'Justice Minister announces Class Actions Legislation' (Executive Council (Justice), 21 November 2001) <www.releases.gov.nl.ca/releases/2001/just/1121n05.htm> accessed 8 April 2021.

624 Newfoundland Hansard (22 November 2001) (n 620).

625 *Class Actions Act*, SNL 2001, c C-18.1, s 37 (NFL CAA).

626 (n 599).

627 ibid [14]-[16].

class action legislation,[628] but overturned the procedural framework based on the CAA because the parties had not had an opportunity to make submissions on this point. This issue has now been remitted back to the Supreme Court for redetermination.[629]

Nova Scotia was the last province to introduce class actions legislation. Following the Supreme Court of Canada's decision in *Dutton*,[630] lawyers in the province attempted to prosecute actions under the representative rule[631] without success.[632] One of the most disastrous attempts was the Sydney Tar Ponds case.[633] Previous representative actions that had tried to obtain compensation for environmental infractions had been unsuccessful and very expensive,[634] and the Tar Ponds case was no exception. The representative action was commenced on 27 March 2004,[635] and was fraught with uncertainty from the start. Plaintiff counsel described it as a 'procedural nightmare'.[636]

Counsel in the Sydney Tar Ponds case, and others in the legal community including the Bar and Bench Rules Committee, called for clarification of the rules surrounding class actions.[637] In response, and because class actions statutes were available in most other

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628 *King & Dawson v Government of PEI*, 2020 PECA 13 [97]-[103], [122]-[123].

629 ibid [94]-[95].

630 (n 534).

631 Rule 5.09(1) of the *Nova Scotia Civil Procedure Rules*, Royal Gaz 19 Nov 2008, which is substantially similar to the Ontario rule.

632 Murray Brewster, 'VLT addicts launch suit; Class-action lawsuit targets NS government, Atlantic Lottery Corp' *Telegraph-Journal* (Saint John, 22 September 2004).

633 *MacQueen v Sidbec Inc*, 2006 NSSC 208 [1].

634 *Palmer* (n 608).

635 Interview with NS plaintiff counsel 1 (by telephone, 16 April 2019).

636 ibid.

637 ibid.

provinces,[638] the Conservative government introduced the Nova Scotia CPA.[639] The Bill was commended for increasing access to justice for Nova Scotians, particularly in areas giving rise to small-value claims such as consumer protection.[640] The opposition and local lawyers objected to the 'preferable procedure' requirement under the Act,[641] as well as the application of traditional costs rules to class actions,[642] maintaining that those provisions would make it harder to bring class proceedings. Nevertheless, they survived the Committee stage,[643] and the Bill was passed without amendment.[644]

iii. Alberta

The Alberta courts' interpretation of the representative action rule was more mixed. Alberta was one of the last provinces to introduce class action reform,[645] and its jurisprudence on representative actions therefore became one of the most developed in Canada. Alberta's Rule 42 was worded slightly differently from the representative rules of the other provinces, requiring a 'common interest' rather than the 'same interest'.[646] Although some cases held that Rule 42 could be read more generously than its provincial

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[638] Nova Scotia, Legislative Assembly, Official Report of Debates (Hansard), 60th Parl, 2nd Sess (NS Hansard) (30 November 2007) (Murray Scott).

[639] *Class Proceedings Act*, SNS 2007, c 28 (NS CPA); NS Hansard (26 November 2007) (Cecil Clarke), (30 November 2007) (Graham Steele).

[640] NS Hansard (30 November 2007) (Graham Steele, Michel Samson).

[641] ibid (Graham Steele).

[642] NS CPA (n 639) s 40(1); NS plaintiff counsel 1 (n 635).

[643] NS Hansard (11 December 2007) (Cecil Clarke).

[644] NS Hansard (13 December 2007) (Cecil Clarke).

[645] *Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions: Consultation Memorandum No 12.9* (ALRI 2004) 78. The Alberta *Class Proceedings Act*, SA 2003, c C-16.5 (AB CPA) was passed in 2004, and only New Brunswick and Nova Scotia introduced class proceedings legislation after that.

[646] *Alberta Rules of Court, Alta Reg 390/68*, Rule 42.

counterparts,[647] most courts and commentators held that the requirements were the same.[648] Nevertheless, the Alberta courts distinguished *Naken*[649] and thereby allowed groups to continue to use the representative rule. Indeed, it was an Alberta case that would cause the Supreme Court to reconsider its position and overturn *Naken*.

In *Alberta Pork Producers*,[650] a representative action for price-fixing in the hog industry, the plaintiffs sought declaratory relief and damages of $73 million for 2,000-10,000 class members. The Court allowed the action to proceed, because there was a commonality among class members who all belonged to the plaintiff marketing board and sold their hogs through the same scheme.[651] The damages for each class member would be different, but the Court held that the same methodology could be used to establish the quantum of damages for each class member.[652] The defendants would be able to obtain all relevant information from the plaintiff marketing board, which would be able to meet any costs award.[653] The Court of Appeal upheld the decision,[654] holding that the Supreme Court had distinguished this case from *Naken*[655] because the class members and defendants were all engaged in the same enterprise, and the issue of determining the common fund

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647 *Lunney v Agostini*, 1983 CanLII 1066 (ABQB) [10]-[11]. The Supreme Court of Canada in *Naken* (n 533) 78, noted the 'subtle differences' between Alberta's Rule 42 and Ontario's Rule 75.

648 John Kazanjian states that the phrase 'same interest' and 'common interest' were used interchangeably in equity: 'Class Actions in Canada' (1973) 11 OHLJ 397, 416-418.

649 (n 533).

650 *Alberta (Pork Producers Marketing Board) v Swift Canadian Co* (1981), 129 DLR (3d) 411 (ABQB).

651 ibid [17].

652 ibid [18]-[19], [26]-[28]. The Supreme Court of Canada would use the same reasoning more than 30 years later in *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57.

653 *Pork Producers* (n 650) [32]-[34].

654 *Swift Canadian Co Ltd v Alberta Pork Producers Marketing Board*, 1984 ABCA 175.

655 ibid [17]; *Naken* (n 533) 95-96.

and individual class members' entitlement to their share was common across the class. This was enough to establish a 'common interest'.[656]

The Court of Appeal's distinction of *Naken* meant that representative actions in Alberta continued to flourish in ways they did not in other provinces. The Alberta courts applied the four requirements of a representative action that appear to be consistent with *Naken*, but did so in a much more liberal and expansive way:[657]

> (a) The class must be capable of clear and definite definition;
> (b) The principal issues of fact and law must be the same;
> (c) Success for one of the plaintiffs will mean success for all;
> (d) No individual assessment of the claims of individual plaintiffs need be made.[658]

Proposed representative actions were held to satisfy those requirements even where they involved separate contracts and differing levels of damages that would have to be calculated for each individual class member.[659]

The Alberta courts' interpretation of the rule was not always consistent, however, and this led to unpredictability and 'ambigu[ity] as to many of its procedural aspects.'[660] A prime example of this, and a major catalyst for class action reform, was *Holtslag v Alberta*.[661] In public profile and sense of frustration at a missed opportunity, *Holtslag* was Alberta's *Naken*. The case involved homeowners who had a defective roofing material

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[656] *Naken* (n 533) 96.

[657] *Korte v Deloitte, Haskins & Sells*, 1993 ABCA 78 [14].

[658] In *Interclaim Holdings Ltd v Down*, [1999] AJ No 1381 (QB), the Court added a fifth requirement: judgment in the action must be binding on the parties [19].

[659] *Korte* (n 657) [19].

[660] Alberta Law Reform Institute, *Class Actions: Final Report No 85* (ALRI 2000) 17 (this assessment was based upon feedback from lawyers practicing in the province). Lawyers also reported that the rule was unclear regarding issues such as examination for discovery, limitation periods, settlement, and costs.

[661] *Holtslag v Alberta*, 2000 ABQB 351 [4].

(pine shakes) installed in their homes. The Court struck out the representative action because it would require individual damages assessments regarding whether and when class members sold their homes, and how much damage the defective material had caused.[662] The Court also stated that it was unclear whether the questions of fact or law were the same; and the issues of reliance and the relevant standard of care varied between class members.[663]

The Court stated that it was unfortunate that Alberta had not yet passed class actions legislation, because the alternative to a representative action was thousands of individual actions.[664] Indeed, in the month following the Court's decision, approximately 2,000 individual actions were commenced, to be case managed by the court and litigated by way of test cases.[665] In December 2000, the Alberta Law Reform Institute's *Class Actions* report cited the pine shakes litigation as an example of the 'costly, complex and cumbersome' nature of multi-party actions.[666] Four years later, nearly 4,000 individual actions had been filed and were subsequently dismissed on the merits.[667] By this time, the Alberta legislature was on the verge of passing class actions legislation following the Supreme Court of Canada's *Dutton* decision.

[662] ibid [10].

[663] ibid [13]-[14], [17]-[21], [23]-[25].

[664] ibid [5]-[6]. Rachael Mulheron has pointed out the existence of burdensome and duplicative litigation as a trigger for reform, and specifically mentions the 'voluntary informal grouping' in *Holtslag*: (n 532) 51, 58-62.

[665] *Holtslag* (n 661) [28]; ALRI Report (n 660) 23.

[666] ALRI Report (n 660) xx.

[667] *Holtslag v Alberta (Non-Suit)*, 2004 ABQB 268 (affd 2006 ABCA 51, leave to appeal dismissed 14 September 2006).

iv. *Dutton* and Class Actions at Common Law

In *Dutton*,[668] the Court of Appeal of Alberta adopted a permissive approach to Rule 42. Writing for the majority, Russell JA relied on *Korte* to dismiss the defendants' argument that reliance was essential to the claim of breach of fiduciary duty.[669] She also held that courts must proceed cautiously when asked to strike a claim under Rule 42, because striking the pleadings would mean that the 229 unnamed class members would have to file individual actions and many of their claims would be statute-barred.[670] She acknowledged the complex and potentially cumbersome nature of the action and commented on the need for class action reform, mirroring the Court of Appeal for Ontario's plea in *Naken*.[671]

Some guidance from the Supreme Court of Canada was therefore desperately needed. However, it went further. In a unanimous decision written by Chief Justice Beverley McLachlin, the Court overturned *Naken*. In doing so, it modified the requirements for bringing a representative action:[672]

1. The class is capable of clear definition;
2. There are issues of law or fact common to all class members;
3. Success for one class member means success for all; and
4. The proposed representative adequately represents the interests of the class.

The Court held that countervailing considerations that may outweigh the benefits of a class action also had to be considered, with a balance to be struck between efficiency and

[668] *Western Canadian Shopping Centres Inc v Bennett Jones Verchere*, 1998 ABCA 392.

[669] ibid [15].

[670] ibid.

[671] ibid [20]; *Naken* (n 533).

[672] *Dutton* (n 534) [38]-[41], [43], [48]. cf the test in *Korte* (n 657) in which the last requirement of the test is that '[n]o individual assessment of the claims of individual plaintiffs need be made' [14].

fairness.[673] It also articulated the requirements for notice (including the right to opt out) and the consideration of individual issues.[674]

As noted above, the Court's decision rested on a misunderstanding of the fundamental principles of the representative action. Because it did not appreciate that representative actions had been used throughout history for the litigation of group rights, it showed frustration and impatience with a requirement (the 'same interest' test) that it perceived as technical, formalistic, and unnecessary. The abolition of this requirement by stating that representative actions should not be refused based on the existence of traditional bars to their use, such as separate contracts or individualised damages,[675] was an understandable consequence of this frustration.

The Court distinguished *Naken* on its facts[676] and found that the modern class action was no longer an untested procedure.[677] Ontario, BC, and other jurisdictions had passed class actions legislation since *Naken*, and the Court held that, when interpreting the representative action rules of the various provinces, attention should be paid to that legislation.[678] Underlying the Court's decision and accelerating the acceptance of class actions were the numerous legal, political, and social changes that had fundamentally altered the civil justice system as well as the perception of the courts' role in society. I have detailed these changes elsewhere.[679] They include the growing movement for

[673] *Dutton* (n 534) [42], [44]. This was the 'cost-benefit' test that the Ontario and BC legislatures had rejected.

[674] ibid [49]-[50].

[675] ibid [43].

[676] The Court found that *Naken* (n 533) would have required particularised fact-finding for liability and damages, which 'would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims' ibid [47].

[677] ibid [46].

[678] ibid [46]-[47], [51].

[679] Chiodo (n 542) 47-69.

consumer protection and environmental rights, and legal procedures to enforce those rights; the acceptance of contingency fees in Ontario, which would promote access to justice in general and class actions in particular; and the advent of the Canadian Charter of Rights and Freedoms.[680] This latter development entailed a more activist judiciary, as well as a challenge to the two-party model of adversarial litigation, with the rise of public interest standing, intervention, and the court's ability to strike down legislation.

Several other points of interest can be drawn from *Dutton*, particularly with regard to the Court's consideration of collective redress in other jurisdictions. In fact, the radical nature of the *Dutton* decision is most clear when it is seen with a comparative eye.

v. *Dutton* and Group Litigation in England

The Court affirmed the three purposes of class actions that had been highlighted in the OLRC Report: judicial economy, access to justice, and behaviour modification.[681] While the first two objectives had been recognised in other jurisdictions as primary aims of the civil justice system (for example, in Lord Woolf's *Access to Justice* Report),[682] the third was a relative novelty. In fact, other law commissions had explicitly disavowed this aim.[683]

More remarkably, the Court suffered from a fundamental misperception when it came to developments in England. Part of its reasoning in allowing the representative action rule to be used for modern opt-out class actions for damages was the fact that 'many jurisdictions have enacted comprehensive class action legislation.'[684] England's GLO

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[680] Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[681] *Dutton* (n 534) [27]-[29]; OLRC Report (n 575) 117-146.

[682] *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996).

[683] eg Scottish Law Commission, *Multi-Party Actions* (Scot Law Com No 154) (HMSO 1996) [2.23].

[684] *Dutton* (n 534) [30].

framework was included in this list, even though it does not constitute comprehensive class action legislation. This was appreciated by the Law Reform Commissions of Manitoba and Alberta, as noted below, but not by the Supreme Court of Canada. The same mistake is evident in the debates on class action reform in Newfoundland.[685]

The Court's entreaty that 'it would be advantageous if there existed a legislative framework addressing these issues'[686] was heeded by the majority of the remaining provinces. Those that continued to use the representative action encountered significant procedural obstacles. Provinces such as New Brunswick struggled on with common law class actions for a few more years before making the law more predictable and workable with statutes of their own. The exceptions to this rule were Canada's Indigenous communities.

vi. Representative Actions and Canada's Indigenous Peoples

Even today, litigants in Canada's territories continue to rely upon the representative action (as well as class actions under the Federal Courts Rules,[687] when the matter comes under federal jurisdiction), which has historically been well-suited to, and widely used by, Indigenous communities.[688] This is demonstrated by those communities' protests following the revocation of the representative rule in the Federal Court.

Representative actions at the federal level were governed by Rule 1711, which was interpreted restrictively following *Naken*.[689] After the BC CPA was introduced in May

[685] Newfoundland Hansard (22 November 2001) (Roland Butler).

[686] *Dutton* (n 534) [33].

[687] *Federal Courts Rules*, SOR/98-106 (FCR).

[688] The term 'Aboriginal' is used in this thesis only when it is reflected in the name of the organisation, eg the Aboriginal Law Section of the Canadian Bar Association; otherwise I use the word 'Indigenous'.

[689] eg *Cairns v Farm Credit Corp*, [1992] 2 FC 115 (TD).

1995, the Rules Committee of the Federal Court of Canada[690] began a comprehensive review that resulted in the FCR.[691] However, class actions were left for a subsequent project.

In June 2000, the Rules Committee released its Discussion Paper on class proceedings.[692] It recommended the enactment of comprehensive class action rules, drawing inspiration from the class action statutes of Québec, Ontario, and BC,[693] the ULCC Model Act and the draft Act attached to the Report of the Manitoba Law Reform Commission,[694] as well as Rule 23 of the US Federal Court.[695] The Committee found the creation of such rules was permissible, even though it could only act in respect of matters of 'practice and procedure',[696] because '[c]lass proceedings are much less controversial now than they were when reform initiatives began over two decades ago.'[697] Nevertheless, the draft rules did not address limitation periods, precisely because of concerns about changing the substantive law.[698]

[690] The jurisdiction of the Federal Court of Canada (since 2003, the Federal Court and the Federal Court of Appeal) consists of matters within the federal power under *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s 91. These include immigration, intellectual property, and employment matters involving federal employees, as well as jurisdiction conferred by federal statute.

[691] Canada, Federal Court Rules Committee, *Federal Court of Canada, Rules Revision Project – Discussion Paper* (Government of Canada 1995) 1. The representative rule was Rule 114 of the new FCR.

[692] Canada, Federal Court Rules Committee, *Class Proceedings in the Federal Court of Canada: A Discussion Paper* (Government of Canada 2000).

[693] eg the criteria for certification were taken from the BC CPA.

[694] ULCC Act (n 606); Manitoba Law Reform Commission, *Report on Class Proceedings* (MLRC 1999).

[695] FRCP Rule 23; FC Discussion Paper (n 692) 3.

[696] FC Discussion Paper (n 692) 25.

[697] ibid 27.

[698] ibid 95. Limitation periods are treated as a matter of substantive law in Canada, because the underlying cause of action is generally extinguished with the expiry of the limitation period.

Class actions were enacted as Rule 299 of the FCR in 2002. The representative action rule (Rule 114) was repealed on 21 November[699] on the assumption that such actions could simply proceed as class actions.[700] Representative actions were ordered to proceed under the new Rule 299, pending formal certification.[701]

The repeal and the lack of a transitional rule betrayed an ignorance of the fundamental distinction between representative actions and class proceedings. It was not long before members of the Indigenous bar pointed out this distinction.[702] They stated that representative actions are ideally suited to Indigenous claims because Indian[703] bands are recognised entities in Canadian law and can bring actions as a group, to assert *sui generis* rights that are held communally by the group as a whole.[704] In other words, Indigenous claims fit perfectly into the historical use of representative actions, and representative actions are a reflection of Indigenous group identity.[705] Because Bands were asserting rights held by the Band as a whole, an additional certification hearing would be redundant; experience had shown that the requirement of the new Rules added delay and cost to litigation that was already 'notoriously arduous' in the Indigenous context.[706] The new class action Rules also did not allow for the awarding of costs, putting Indigenous litigants

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[699] *Federation of Newfoundland Indians v Canada*, 2003 FCT 383 [4].

[700] *Gill v Canada*, 2005 FC 192 [11].

[701] ibid [6].

[702] Letter from Jeffrey F Harris, Chair of the National Aboriginal Law Section, The Canadian Bar Association, to Éloïse Arbour, Secretary to the Rules Committee, Federal Court of Appeal, 10 August 2004.

[703] 'Indian' in this context refers to entities recognised under the *Indian Act*, RSC 1985, c I-5, including Bands.

[704] Harris letter (n 702) 1; the Honourable Allan Lutfy and Emily McCarthy, 'Rule-Making in a Mixed Jurisdiction: The Federal Court (Canada)' (2010) 49 SCLR (2d) 313 [36]-[37]; *Gill* (n 700) [12].

[705] ibid 2 [footnotes omitted].

[706] ibid 3, 4; *Gill* (n 700) [13].

at a further disadvantage.[707] Being forced to pursue the new Rules would not only impede access to justice for Indigenous peoples, but would also fail to meet the other two objectives of class actions: judicial economy and behaviour modification.[708]

As a result of these submissions, the Rules Committee convened a subcommittee,[709] which also noted that the opt-out provisions of the new Rules were problematic. The indivisible nature of the claims meant that opting out would be illusory, because the decision on the collective rights would apply to the whole group regardless.[710] The subcommittee therefore recommended a reinstatement of Rule 114, with procedural safeguards including Court powers to replace the group representative, to require that notice be given, and to impose conditions on the settlement process.[711] They did not confine it to Indigenous litigants, reasoning that it could also be used by unincorporated associations or for labour litigation.[712] Rule 114 was reinstated on 13 December 2007, in a different form that contained certain conditions for a representative action to proceed.[713]

The changes to the federal representative rule reveal the qualitative differences between representative actions and class proceedings, a difference that was frequently overlooked in the provincial class action debates. The differences explain the controversial

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707 Harris letter (n 702) 3-4.

708 *Dutton* (n 534); Harris letter (n 702) 4.

709 Lutfy (n 704) [35].

710 ibid [37]-[38].

711 ibid [41]-[47]; FCR 114(4).

712 Lutfy (n 704) [39]-[40]. Rule 114 is optional, and bands/nations have sued in their own right and not just as group representatives: *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517.

713 These are: (a) the issues asserted by the represented persons (i) are common issues of law and fact and there are no issues affecting only some of those persons, or (ii) relate to a collective interest shared by those persons; (b) the representative is authorized to act on behalf of the represented persons; (c) the representative can fairly and adequately represent the interests of the represented persons; and (d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.

nature of mechanisms that were largely foreign to a system tailored to individual actions for damages; these included opt-out classes and aggregate damages.

2. Class Actions in Canada

(a) Introduction

All the Canadian provinces except PEI now have class action legislation. The debates took various forms. While there were quite extensive debates in the provinces that passed legislation earlier, the issue became much less controversial after *Dutton*.[714] Nevertheless, the points of controversy that did arise were similar across provinces.

As noted previously, class proceedings are fundamentally different from representative actions, and the proposed enactment of class proceedings legislation therefore brought with it a whole host of questions that were irrelevant to a representative action. Should class members opt in or opt out (a redundant question in a representative action, when any relief would apply to the group as a whole, no matter what action individual members took)? Could damages be awarded to the group where individual claims might differ (irrelevant to a representative action, where relief was claimed for the group *as a group*)? What should be done with unclaimed damages (not an issue where equitable relief was claimed for the group)? One of the only concerns that the two mechanisms shared in common was the issue of costs; this became more of an issue when class proceedings were being debated, because of the concurrent aim of increasing access to justice. The ways in which the provinces addressed these controversial issues: opt-out classes, aggregate damages, *cy-près* distributions, and costs, will now be discussed in turn.

[714] *Dutton* (n 534).

(b) Opt-Out Classes

Because the representative action involved the litigation of group rights, and the remedy would flow to the group as a whole, there was therefore little point in allowing opt-outs because the declaration would affect everyone in the group whether or not they opted out. Class actions for damages were a different matter. The class was a creation of the litigation, and the rights being litigated were not held communally; they were separable and could be litigated individually. Including everyone with a damages claim against the defendant, so that they would be bound by any judgment, would therefore prejudice their right to control their own litigation. The ability to opt-out was therefore crucial.

In Ontario, the authors of the OLRC Report[715] decided against an opt-in regime because it would exclude people with social or psychological barriers to bringing a claim,[716] and those with very small claims or claims of which they were unaware.[717] In fact, the Report recommended that participation in class actions be almost mandatory, with leave of the court required to opt out.[718] It stated that, in certain class actions, the right to opt out would be illusory because the individual interest would be small (for example, in a consumer class action) or non-existent (as in a class action seeking injunctive or declaratory relief)[719] – in other words, the sorts of cases that were the subject of representative actions. In addition, the Report stated that any individual interest in

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[715] (n 575).

[716] Rachael Mulheron has also highlighted this ‘human element’ in class action reform (n 532) 73-76.

[717] OLRC Report (n 575) 478-483.

[718] ibid 486.

[719] ibid 486, 488.

controlling the litigation could be outweighed by considerations of judicial economy and consistency of judgments.[720]

When class action reform was debated in Ontario later that decade, business interests opposed opt-out class actions because they would raise the spectre of indeterminate liability and bind the rights of unwilling class members.[721] They later said they would be willing to support the opt-out mechanism if it remained within the court's discretion.[722] However, the terms of reference of the Attorney General's Advisory Committee on Class Action Reform, released the following year, stated that class actions would be on an opt-out basis only.[723] The hybrid model therefore appears to have been lost in the negotiations that gave rise to the Ontario CPA.

Similarly, the BC Ministry of the Attorney General expressed a preference for opt-out classes on the grounds of access to justice.[724] The only other point of controversy on opt-out classes in BC was the fact that the draft Act required non-residents to opt in.[725] The MAG Consultation Document states that this option was chosen to avoid national overlapping cases, which could undermine judicial economy.[726] However, some Ministers took the position that the opt-in requirement for non-residents would actually undermine efficiency, if non-residents wanted to sue in the BC courts.[727] The ULCC Conference, from

[720] ibid 487, 489.

[721] Submissions of the Canadian Manufacturers' Association to the Ontario Ministry of the Attorney General, cited in Chiodo (n 542) 76, 107.

[722] Meeting between Michael Cochrane and stakeholders, 22 December 1988, cited in Chiodo (n 542) 107.

[723] Chiodo (n 542) 124.

[724] Ministry of the Attorney General, *Consultation Document: Class Action Legislation for British Columbia* (MAG 1994) 8-9.

[725] BC CPA, s 16.

[726] MAG Consultation Document (n 724) 22.

[727] British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 4th Sess (BC Hansard) (8 June 1995) (Jeremy Dalton).

whose model statute this provision was taken,[728] would come to agree with this latter argument; its consequent changes to its model statute,[729] as well as developments in class actions jurisprudence across Canada, would cause BC to convert to an entirely opt-out jurisdiction in 2018.

The Manitoba Law Reform Commission, for its part, was heavily influenced by the Woolf Report,[730] in which Lord Woolf recommended that courts have the power to progress cases on an opt-in or opt-out basis. Despite this recommendation, the MLRC chose the opt-out option for the same reasons as BC.[731] This commitment to the opt-out mechanism (with some variations where non-residents of the province were required to opt-in) was reflected in class proceedings legislation across Canada.

(c) Aggregate Damages and *Cy-Près* Distributions

In representative actions, aggregate damages were only awarded if damages would be the same across the group such that individual damages assessments would not be necessary. This concept became much more problematic in class actions involving personal injury and other damages that tended to be individualised. *Cy-près* distributions were a corollary of aggregate damages awards, in that they provided a mechanism for the distribution of unclaimed awards. As noted in chapter 3, however, they were an innovation taken from the law of trusts and were motivated in large part by the behaviour modification objective.

[728] ULCC Act (n 606) s 16.

[729] Uniform Law Conference of Canada, *Consolidated Uniform Class Proceedings Act* (2006) s 16 <www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/82-josetta-1-en-gb/uniform-actsa/class-proceedings-act/1397-consolidated-uniform-class-proceedings-act-2006> accessed 8 April 2021.

[730] (n 682).

[731] MLRC Report (n 694) 66, quoting the MAG Consultation Document (n 724). The Manitoba *Class Proceedings Act*, CCSM c C130, s 6(3) (Manitoba CPA), also went in the opposite direction of the ULCC Act (n 606), in explicitly including non-residents of the province without requiring them to opt in.

When class actions were being debated in Québec, the President of the Barreau, Viateur Bergeron, pointed out that class actions should not create new substantive rights and must be compensatory rather than punitive, because civil and criminal liability should not be confused; to do otherwise would be to transform civil damages into a fine.[732] This fear was partially raised by the provisions on aggregate damage awards and *cy-près* distributions. The Barreau was of the view that a global payment of damages under article 1034 was not justified in civil law if it could not benefit individuals or a certain number of class members,[733] and in fact would amount to a criminal fine if that amount went to the State.[734] This objection regarding the *cy-près* provisions was echoed by numerous groups making submissions to the legislature.[735] Proponents of aggregate damages and *cy-près* distributions stated that they were 'essential to avoid the defendant's conviction becoming illusory' where class members' claims were difficult to assess or where some class members did not make claims,[736] and that making the defendant pay out the whole of its liability in compensatory damages was not punitive.[737]

Similarly, in Ontario, one of the most controversial issues for the Ontario Law Reform Commission was *cy-près* distributions, on which the Chair himself wrote a reservation.[738] Later in the decade, when Attorney General Ian Scott was putting together his Advisory Committee on Class Action Reform, a major point in the tug-of-war between

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[732] Barreau submission (n 571) 1, 3; Bergeron (n 572); Dupré (n 566); Comtois (n 570).

[733] Barreau submission (n 571) 12.

[734] Bergeron (n 572).

[735] Québec Hansard, 7 March 1978 (Wayne McCracken, Canadian advertising associations; Jean Lanctôt, Order of Chartered Accountants of Quebec), 8 March 1978 (Philippe Casgrain and Serge Guérette, Québec Employers' Council; Pierre Morin and Jean-Paul Létourneau, Québec Chamber of Commerce; Association provinciale des Marchands d'automobiles du Québec Ltée, 9 March 1978 (Nicole Duval-Hesler).

[736] Forget (n 564).

[737] Marois (n 553); Québec Hansard, 8 March 1978 (Yves Lafontaine), 9 March 1978 (André Legault).

[738] OLRC Report (n 575) 851-854.

business interests and consumer/environmental groups was unclaimed damage awards.[739] This point was left open in the final drafting of the CPA, such that the court may direct any means of distribution of aggregate damages awards that it considers appropriate.[740]

The BC branch of the Canadian Bar Association (BC-CBA) also opposed *cy-près* distributions because they could result in windfalls to non-class members.[741] The Attorney General based the justification for *cy-près* distributions on the defendant's guilt,[742] while opponents objected that this went against the justification for civil proceedings, which was to compensate the plaintiff.[743] The drafters of the Act eventually left the choice to the courts.[744] The legislature would return to this issue more than 20 years later, when a clear choice would be made in favour of *cy-près* distributions in order to modify defendants' behaviour. This development will be discussed in the next chapter.

(d) Costs

The issue of costs was also controversial in the debates on class proceedings. In Québec, traditional 'loser-pays' costs rules continued to apply.[745] In addition, the province set up the *Fonds d'aide aux recours collectifs* (Class Action Assistance Fund) that paid the plaintiff lawyer's fees, the costs of notice, and general disbursements.[746]

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739 Chiodo (n 542) 97-104.

740 Ontario CPA, s 26(1). Cy-pres distributions are now explicitly permitted by the new s 27.2 of the CPA.

741 Canadian Bar Association, BC Branch, Civil Litigation (Vancouver) Section, *Submission to the Ministry of the Attorney General of BC on the Proposed Class Action Legislation* (CBA 1994); BC Hansard (13 June 1995) (Jeremy Dalton).

742 BC Hansard (13 June 1995) (Colin Gabelmann).

743 ibid (Jeremy Dalton).

744 Andrew Borrell and Ward K Branch, 'Power in Numbers: BC's Proposed Class Proceedings Act' (1995) 53 The Advocate 515, 525.

745 The CCP (Book VI, Title III) contains a provision that dictates the losing party pay costs, but the costs payable in a class action are based on the small claims court tariff and are therefore vastly reduced.

746 Chiodo (n 542) 39-44.

In Ontario, the OLRC and other commentators recommended that traditional costs rules not apply to class actions, and this was also in the original terms of reference for the Attorney General's Advisory Committee. However, in the negotiations with the business groups in early 1989, this was quietly dropped.[747] The compromise between the business interests and consumer and environmental representatives was that the 'loser pays' costs rule was retained, but that this burden on plaintiffs would be lessened by way of contingency fees, s 31(1) of the Ontario CPA (which allows for the court to waive costs in certain circumstances, such as where the action is brought in the public interest),[748] and the Class Proceedings Fund (similar to the Québec *Fonds*, except it did not cover lawyers' fees). The Fund would reimburse plaintiffs for disbursements and would provide an indemnity against any adverse costs award.[749]

BC, by contrast, departed from the traditional costs rules.[750] Manitoba and the Federal Court also chose a no-costs rule. Manitoba rejected the Ontario route of keeping the traditional 'loser-pays' costs rule and setting up a special fund to assist those litigating class actions.[751] Ultimately the MLRC Report recommended that, because no special fund would be set up, class actions should be exempt from costs rules.[752] Similarly, the Federal Court Rules Committee recommended a no-costs rule and also permitted contingency fees,

[747] ibid 116-118.

[748] Ontario CPA, s 31.

[749] Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (MAG 1990); Chiodo (n 542) 122-131.

[750] Section 37 of the BC CPA is a 'no-costs' provision.

[751] This was also Lord Woolf's recommendation for multi-party actions: *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996) 242 [68].

[752] MLRC Report (n 694) 76, 86.

finding that the creation of a fund to assist litigants would raise policy issues that should be decided by Parliament.[753]

In Alberta, the most controversial aspect of class action reform was that class actions would be subject to the traditional costs rules.[754] Alberta's draft Act had no protections akin to BC's no-costs regime or Ontario and Québec's quasi-public funds, which went against the recommendations of the ALRI Report.[755] To many proponents of reform, the possibility of crippling adverse costs awards would deter meritorious litigants, thereby rendering the proposed legislation useless.[756] The government's position was that traditional costs rules were necessary to deter frivolous or unmeritorious actions.[757] The lack of protection against costs awards has arguably hampered the development of class proceedings in Alberta; this will be addressed in the next chapter.

(e) Conclusion

The controversies in the provincial debates on class proceedings largely revolved around opt-out classes, aggregate damages, and the novel mechanism of *cy-près* distributions. Costs were also a central issue of controversy. The provinces dealt with these issues in slightly different ways. Nevertheless, the aim of the legislation in each jurisdiction was to remove the barriers to group redress posed by the representative action, and increase access to justice by way of class proceedings legislation. The ways in which that legislation has

[753] ibid 102-106.

[754] Alberta, Legislative Assembly, Official Report of Debates (Hansard), 25th Parl, 3rd Sess (12 March 2003) (Brent Rathgeber), (16 April 2003) (Laurie Blakeman, Raj Pannu, Don Massey), (12 May 2003) (Hugh MacDonald, Brian Mason); Shone (n 607) 920.

[755] (n 660) 143-154.

[756] Tom Barrett, 'Class-action bill draws criticism' *The Calgary Herald* (Calgary, 7 March 2003) A8.

[757] Legislative Assembly, Official Report of Debates (Hansard), 25th Parl, 3rd Sess (12 May 2003) (Brent Rathgeber).

been interpreted, and the current-day practice of class actions in Canada, will be addressed in the next chapter.

3. Multi-Party Actions and Group Litigation in England

In England, the representative action has remained 'a procedural backwater' until very recently.[758] Procedural difficulties were instead presented by the multi-party actions of the 1980s and 1990s. MPAs were a collection of individual claims arising from similar issues of fact or law; these claims were managed together in an effort to increase efficiency and reduce cost. The difficulties they presented resulted in the GLO framework.

This framework was based on Lord Woolf's report, in which he recommended rules for a 'Multi-Party Situation'.[759] In Canada, Manitoba and Alberta showed particular interest in Lord Woolf's recommendations; however, they rejected the opt-in approach to collective redress because each plaintiff was required to participate fully in the litigation, which made it 'cumbersome, expensive, and [gave rise to] ethical questions for lawyers, especially in the event of inter-client conflict.'[760] The MLRC perceived test cases to be of limited use, because they were not binding on cases involving similar subject-matter, plaintiffs had no obligation to consider other plaintiffs' interests when dealing with their cases, and test case plaintiffs tended to reap a damages windfall compared to subsequent litigants.[761] The ALRI gave serious consideration to the alternative approach of facilitating the judicial case management of group litigation (similar to GLOs).[762] A significant portion

[758] Civil Justice Council, *Final Report: Improving Access to Justice through Collective Actions* (CJC 2008) 165. Recent developments in representative actions will be discussed in the next chapter.

[759] Woolf Final Report (n 751) chapter 17.

[760] MLRC Report (n 694) 9.

[761] ibid 10-12.

[762] ALRI Report (n 660) 38-42.

of the ALRI Report is devoted to a consideration of the 'Alberta model', and a consultation session to compare class actions with this model was held a few months before the Report was issued.[763] The 'Alberta model' consisted of three approaches:[764] commencing a separate action for each claimant and then trying test cases to determine the common issues; including all the plaintiffs with a common claim in one 'multi-party action';[765] or proceeding with a representative action under Rule 42.

While the Report noted some advantages to the group litigation approach, including flexibility and litigant autonomy,[766] it also noted the inherent uncertainties (because procedures were re-created case by case), and the delays caused by the parties' need to come to agreement on various steps.[767] In addition, group litigation lawyers in Alberta expressed a strong interest in class proceedings legislation,[768] and class actions were seen as superior to existing procedures in promoting access to justice and judicial economy.[769] For these reasons, the Canadian provinces that did consider a GLO-type framework rejected it in favour of class actions.[770]

In England and Wales, multi-party actions began to emerge around the mid-1970s. They involved intractable procedural problems and severely tested the civil justice

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[763] ALRI, *Invitational Consultation Session on Multiple-Plaintiff Similar-Claim Litigation: Relationship between Class Actions and Case Management* (Edmonton, September 2000).

[764] *Metera v Financial Planning Group*, 2003 ABQB 326 [11].

[765] These two approaches were used in the residential schools litigation.

[766] ALRI Report (n 660) 24.

[767] ibid 24-25.

[768] ibid xxii, 1-2.

[769] ibid 48, 53.

[770] MLRC Report (n 694) 36; ALRI Report (n 660) 51, 64-65. Rachael Mulheron has compared the GLO to pre-class action group litigation in Canada, especially Alberta, and has noted the disadvantages referred to above: *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart 2004) 101.

system,[771] forcing the courts to improvise new procedures. These were developed on an *ad hoc* basis over the ensuing decades, and were enshrined in the GLO framework introduced in 2000. As noted previously, however, these actions were not class actions in the North American sense. Instead, they involved groups of identified plaintiffs, each of whom advanced a claim. This multi-party approach grouped individual claims together and processed them in an ostensibly more efficient and cost-effective manner; it was 'opt-in' and remained focused on individual compensation.[772] In that sense, multi-party actions and GLOs are simply an extension of traditional litigation devices to multiple claims and, as such, focus on individual compensation over deterrence.[773]

In the Myodil litigation, Justice Steyn called for formal rules for multi-party actions.[774] In the absence of such rules, he stated that English courts had to apply the rules of individual litigation to group actions, and use their discretionary powers to deal with issues as they arose.[775] Justice Steyn's call was answered 10 years later with the GLO framework. That framework has not substantially changed the procedures laid down by multi-party actions; instead, it merely formalises them on the basis of the proportionality objective that was central to the Woolf Reforms.

This section will review the development of group litigation procedures in England, and the way those procedures have been considered in policy documents and formalised in CPR Part 19.III; the present-day use of the GLO is covered in the next chapter. This historical review will demonstrate that the GLO was not intended to depart

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[771] Hazel J Hartley, *Exploring Sport and Leisure Disasters: A Socio-Legal Perspective* (Cavendish 2001) 54.

[772] Mulheron (n 770) 99.

[773] Susan MC Gibbons, 'Group Litigation, Class Actions, and Collective Redress: An Anniversary Reappraisal of Lord Woolf's Three Objectives' in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009) 152.

[774] 'Procedures in group litigation' *The Times* (London, 16 March 1990).

[775] *Chrzanowska v Glaxo Laboratories Ltd* The Independent, 13 March 1990 HC (QB) 3.

from the tradition of unitary litigation, and was intended simply as an efficient and proportional mechanism for the litigation of individually viable claims.

The restrictions surrounding the GLO[776] have meant that it has not been widely used and parties often prefer to use informal case management procedures instead.[777] In that sense, it is only the experience of courts and practitioners, as well as the availability of precedent, that differentiates the current situation from the one that existed in the later part of the 20th century. This section consists of two parts. Part (a) looks at the history of multi-party actions in the 1980s and 1990s. The analysis revolves largely around the Opren case, which raised many of the issues that were later addressed in the Woolf Reforms. Part (b) then looks at the Woolf Reforms themselves, as well as the GLO framework that was subsequently enacted.

(a) The History of Multi-Party Actions

Multi-party actions emerged in the latter decades of the 20th century due to a series of disasters that dominated the headlines. These took two forms:[778]

> (a) 'Sudden' disasters, such as the Zeebrugge ferry disaster, that arose from a single, sudden event that affected a discrete and easily identifiable group of people.
>
> (b) 'Creeping' or 'rolling' disasters that arose from a single drug or product, such as Thalidomide or Opren, which affected people in different ways and at different times. The groups affected tended to be much larger and more diffuse, often numbering in the thousands.

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776 These restrictions are also noted in *CJC: Improving Access to Justice through Collective Actions – A response by the Association of Personal Injury Lawyers* (APIL 2008) 14.

777 This is discussed further in Chapters 6 and 7.

778 Hartley (n 771) 53-54; Michael Napier, 'Group Litigation: Past, Present and Future' (1993) 2 Nottingham LJ 1, 2.

Because the sudden disasters of the 1980s and 1990s arose from a single, often catastrophic, incident, they tended to result in personal injury or fatal accident claims, as well as inquests and public inquiries.[779] Liability was usually much more clear-cut and causation rarely in issue, and the claimants were easily identified at an early stage.[780] These factors, as well as the intense media and political pressure on the corporations involved, meant that liability was often admitted and only damages remained to be determined. Because damages tended to be individual to claimants, these issues were much more likely to be resolved through arbitration, settlement, or other alternative mechanisms.[781] The shocking events involved were also more likely to attract public sympathy than the 'slow burning' pharmaceutical liability cases.[782]

The 'creeping' disasters, on the other hand, were procedurally much more complex[783] because they affected many more people (often thousands) in a wide variety of circumstances. Because injuries could take time to manifest, claimants would continue coming forward throughout the litigation, causing problems with defining the parameters of the class. This phenomenon also inhibited settlement, because it was difficult to assess the defendant's total liability or be sure that a settlement would end the litigation. The multiple claims that arose in these cases also involved complex issues of individual causation, and were therefore much more difficult to resolve on a common basis.

The claims arising from creeping disasters were therefore more likely to become

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[779] Hartley (n 771) 54.

[780] Interview with retired claimant solicitor 1 (RCS1) (London, 19 February 2019).

[781] ibid.

[782] Interview with retired claimant solicitor 2 (RCS2) (London, 30 May 2019).

[783] James Erlichman, 'When legal aid hinders the victims' *The Guardian* (London, 5 June 1987).

ensnared in procedural difficulties.[784] These resulted from the paradox of groups of litigants seeking to have their claims resolved in a system tailored to individualised, bipolar litigation.[785] Claimant lawyers attempted to overcome these difficulties in various ways. Many of these difficulties arose in the Opren case, which was a creeping disaster involving an anti-inflammatory drug. It is considered the paradigmatic example of the multi-party actions that preceded the Woolf Reforms,[786] and the procedures created in that case continue to be used in group litigation today.

In its efforts to fit an unprecedented number of claims into a system geared to individual actions, Opren was the first truly 'mass' litigation that generated precedents for the coming decades. The case had several features, including the number of claimants and cost of the litigation, that 'give this dispute a character which is unique in English legal history'.[787] The procedural issues that arose in Opren and other cases and the ways they were addressed, as well as the form in which they were finally included in the GLO framework, will be analysed in this section.

i. Costs

The issue of costs in Opren demonstrated the clash between the group nature of the claims and the individualised nature of English civil litigation. As many commentators have noted, the legal aid system is itself individualist.[788] Opren was the first case in which the

[784] National Consumer Council, *Group Actions: Learning from Opren* (NCC 1988) 5; Supreme Court Procedure Committee, *Guide for use in Group Actions* (HMSO 1991) 6.

[785] *Learning from Opren* (n 784) 2.

[786] Interview with claimant solicitor 1 (CS1) (by telephone, 13 February 2019); *Owen v Eli Lilly* [1987] 1 WLR 1136.

[787] *Owen* (n 786) 1138-1139.

[788] Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge 1992) 116-118.

procedural rules on costs were rigorously applied.[789] Previous litigation involving the determination of test cases had either been underwritten by trade union support, such as the asbestosis and silicosis cases of the late 1960s and early 1970s,[790] or were entirely supported by legal aid.[791] In Opren, however, only about two-thirds of the claimants were legally aided, raising the question of who would bear responsibility for costs. This posed a significant problem for the test case approach, whereby approximately 20 cases were chosen in order to determine key common issues, the results of which could then be used to determine liability and quantum in the remaining cases. The plaintiff steering committee decided to select those 20 cases from among the legally aided plaintiffs, so there would be no exposure to adverse costs. However, the defendants argued this would give the non-legally aided plaintiffs (of which there were about 500) a 'free ride', and the defendants would not be able to obtain their costs even if they were successful.[792] Justice Hirst agreed, ordering that where claimants incurred costs pursuing lead actions, every other claimant should contribute proportionately, whether legally aided or not.[793] He gave plaintiffs a month's grace period to leave the action without liability for costs.[794] The 500 non-legally aided claimants would have left the action[795] if it had not been for a wealthy benefactor and consumer advocate, Godfrey Bradman, who offered to fund the litigation.[796]

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[789] *Learning from Opren* (n 784) 25.

[790] eg *Central Asbestos Co Ltd v Dodd* [1971] 3 WLR 206 (CA); affd [1972] 3 WLR 333 (HL); interview with retired claimant solicitor 3 (RCS3) (London, 13 March 2019); interview with claimant solicitor 2 (CS2) (by telephone, 6 March 2019).

[791] *Learning from Opren* (n 784) 25.

[792] ibid 27-28.

[793] *Owen* (n 786); *Learning from Opren*, ibid 25-29.

[794] 'Law Report: Allocating liabilities in Opren action' *The Times* (London, 8 May 1987).

[795] Frances Gibb, 'Opren payoff withdrawn' *The Times* (London, 2 June 1987).

[796] James Erlichman, '"Fairy godparent" to fund appeal' *The Guardian* (London, 23 June 1987).

Following a sustained media campaign, the claims of all but a few of the 1500 plaintiffs were settled in February 1988.[797]

Costs were an issue even for those claimants that were legally aided. Although such a claimant would not have to worry about adverse costs, if she was successful and her costs were not all recoverable from the defendants, the Legal Aid Board would deduct any remaining costs from her damages award.[798] That deduction could obliterate any award,[799] especially in a case like Opren, where the scale of the litigation significantly drove up costs.[800]

As a result of Opren, there were calls in the media for 'the introduction of a scheme to handle group actions for damages'.[801] Funding was also a problem. It was group actions such as Opren that showed the limitations of the legal aid system, which was designed to deal with 'one-off' cases.[802] This phenomenon raised issues of access to justice and led to calls for US-style contingency fees[803] as well as proposals that mimicked ATE insurance.[804] There were also Law Society proposals for a Contingency Legal Aid Fund, similar to Ontario's Class Proceedings Fund and the Québec Fonds,[805] although these were

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797 *Learning from Opren* (n 784) 30; 'UK News In Brief: Opren offer accepted' *The Guardian* (London, 22 December 1987).

798 'Allocating liabilities' (n 794).

799 *Owen* (n 786) 1139-1141; ibid.

800 *Learning from Opren* (n 784) 26-27.

801 'Leading Article: When the law fails' *The Times* (London, 5 June 1987).

802 Clare Dyer, 'Who gets a discount in court?' *The Times* (London, 17 July 1985).

803 Ann Scurfield, 'Once lawyers were on a percentage, they would wake up' *The Guardian* (London, 26 October 1985).

804 Staff reporter, 'Law Society plan to ease civil claims' *The Guardian* (London, 3 July 1987).

805 ibid.

criticised by the Legal Action Group as being 'inept' because the schemes would be expensive and inadequately financed.[806]

Several other proposals were put forward on these issues. Ultimately, the Legal Aid Act 1988[807] allowed the Legal Aid Board to enter into contracts with firms of solicitors for the purposes of certain types of litigation, including multi-party actions.[808] The Act also allowed the Board to dispense with contributions, and to impose the statutory charge proportionately on legally aided plaintiffs in a multi-party action.[809] Nevertheless, Opren and later cases such as the Benzodiazepine litigation[810] raised fundamental questions as to the ability of the English legal system to cope with group claims, especially in product liability actions. Commentators noted that the courts' treatment of multi-party actions as a collection of individual claims tended to lead to an 'open-ended escalation of costs.'[811]

In 1995, a working party of the Law Society's Civil Litigation Committee reflected on the procedural difficulties inherent in multi-party litigation. *Group Actions Made Easier* especially noted 'the worst problem' of spiralling costs and called for reforms 'to ensure that the central issues are brought to trial or settlement within a reasonable time and at an affordable cost.'[812] The report also called for clear 'ground rules' on costs so parties could accurately assess their potential costs liability.[813] This lack of clarity stemmed from the

[806] Clare Dyer, 'Lawyers condemn legal aid proposals as inept' *The Guardian* (London, 4 January 1988).

[807] Legal Aid Act 1988, 1988 c 34.

[808] Law Society Civil Litigation Committee, *Group Actions Made Easier: A Report* (Law Society 1995) 48; Napier (n 778).

[809] HL Deb 29 February 1988, vol 494, col 21; *Learning from Opren* (n 784) 31.

[810] *Issues Arising for the Legal Aid Board and Lord Chancellor's Department from the collapse of the Benzodiazepine litigation* (Legal Aid Board 1994).

[811] Clare Dyer, 'Sad Story of the Happy Pills' *The Guardian* (London, 5 April 1994) 21, quoting the legal adviser to the Legal Aid Board.

[812] *Group Actions Made Easier* (n 808) 40.

[813] ibid.

relative novelty of group actions and their unique characteristics. These features included many of the issues that arose in the Opren litigation and were subsequently addressed by Lord Woolf and the GLO framework.[814] They included disputes on cost sharing between solicitors' steering groups and individual solicitors; between common costs and individual costs;[815] on cost sharing at various stages of the litigation; and on sharing the costs of advertising.

Group Actions Made Easier recommended that plaintiffs' liability for the defendants' costs should be several, rather than joint,[816] and that, if there was success on the common issues, all plaintiffs should recover their common costs in full.[817] Finally, it stated presciently that 'legally-aided group actions as we know them are no longer viable: if the procedure is not successfully reformed, such actions will disappear.'[818] Indeed, following Lord Woolf's *Access to Justice* report and the subsequent costs reforms recommended by Lord Justice Jackson, legally-aided group actions were to become increasingly rare.[819]

ii. Other Issues Relating to Multi-Party Actions

In addition to the developments on cost-sharing, other crucial innovations arose from parties' and courts' attempts to fit multi-party actions into a system designed for individual litigation.

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[814] ibid 40-42.

[815] Legal Aid Board, *The Funding Code: A New Approach to Funding Civil Cases; Report to the Lord Chancellor Following Consultation* (Legal Aid Board 1999) 16.

[816] *Group Actions Made Easier* (n 808) 44.

[817] ibid 44-47.

[818] ibid 49.

[819] Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Civil Justice Council 2008) 74.

Chief among these was the rise in judicial case management. Adapting procedures created for individual cases and fitting them into the multi-party model required a more active, interventionist judicial style to shape the litigation, devise new procedures and move the parties towards a resolution.[820] The Court of Appeal endorsed this approach in the Opren litigation, congratulating Justice Hirst for his ingenuity 'in a novel and highly complex situation'.[821] For example, under Hirst J's direction, the parties developed a system of 'master pleadings' by which short two-page specimen pleadings setting out the matters relevant to each claim were prepared for each plaintiff, incorporating by cross-reference a Master Statement of Claim, and the defendants prepared Master Defences as well as defences to the individual plaintiff pleadings.[822] This avoided unnecessary repetition of common issues, while also providing defendants with the information needed to prepare their defences.[823] In addition, Justice Hirst pioneered the test case approach,[824] whereby 20-30 actions would be selected for trial and all other actions stayed to decide the common issues raised in the litigation. The lead actions would form a precedent for all the other actions.[825] These practices were adopted by Lord Woolf in his *Access to Justice Report*,[826] and thereafter found their way into the CPR.[827]

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[820] *Guide for Use in Group Actions* (n 784) 29-30.

[821] *Owen* (n 786) 1139, 1143; Damian Grave and Gregg Rowan (eds), *Class Actions in England and Wales* (Sweet & Maxwell 2018) 19.

[822] *Walker v Eli Lilly & Co* [1986] ECC 550 HC (QB).

[823] Anne Ware, 'Opren Litigation' in Christopher Hodges (ed), *Multi-Party Actions* (OUP 2001) 327, 329.

[824] This is akin to the 'bellwether' approach in US multi-district litigation (MDL), whereby certain cases from the group are selected for trial to determine causation or other issues. The results are often used to value the remaining cases for settlement purposes.

[825] This was known as the 'Opren Scheme': Ware (n 823) 330.

[826] Woolf Final Report (n 751) [17.27]-[17.30], [17.11], [17.40].

[827] CPR 19.13, 19.15; 19B PD 14.

Solicitors' steering committees also became important with the rise of large-scale litigation.[828] These committees were formed when numerous solicitors commenced multiple claims after a mass disaster. In order to ensure the coordinated conduct of the litigation, the solicitors' group would usually elect a steering committee[829] (or one would be appointed by the court),[830] creating an efficient structure to communicate information and receive instructions. *Group Actions Made Easier* recommended that courts appoint the steering committee, in order to avoid conflict between firms.[831] This approach was endorsed by Lord Woolf and is now part of the GLO framework.[832]

Many of the issues arising in the Opren litigation formed a precedent for multi-party litigation throughout the 1990s, and heavily influenced Lord Woolf's recommendations and the GLO reforms. The discussion will now turn to those reforms.

(b) The Woolf Reforms and the GLO Framework

Creeping disasters such as Opren led to calls for procedural reform, including the first suggestions that US-style class actions might be the answer.[833] The 1987 Hodgson Report referred explicitly to Opren in calling upon the Lord Chancellor to commission a study for potentially expanding the availability of representative[834] or class actions.[835]

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[828] Martyn Day and others, *Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim* (Legal Action Group 1995) 16-19.

[829] *Group Actions Made Easier* (n 808) 8-9; RCS2 (n 782).

[830] Napier (n 778) 4-5.

[831] This occurred in the Vibration White Finger litigation, diverting the litigation for nearly a year: *Group Actions Made Easier* (n 808) 27.

[832] Woolf Final Report (n 751) 248-249 [87]; 19B PD 2.2; CPR 19.13(c).

[833] *Owen* (n 786) 1139.

[834] Civil Justice Review, *Report of the Review Body on Civil Justice* Cm 394 (HMSO 1988) 49.

[835] ibid; Lord Scarman, 'A better deal for accident victims; Argument for law reforms concerning compensation claims' *The Times* (London, 21 June 1988).

The National Consumer Council's *Learning from Opren* report also considered class actions; however, it recommended them only for certain types of cases. It divided multi-party actions into three categories: consumer claims arising from defective goods or services, involving a relative uniformity of damages; disaster claims for personal injury or death, where many people suffer loss arising from one event; and product liability claims relating largely to pharmaceutical drugs.[836] Class actions were only recommended for the first category, because of the uniformity of damages. Such reform was deemed inappropriate for the other two categories – the sudden and creeping disasters at the forefront of multi-party actions in the 1980s. For disaster claims, the report instead recommended using a form of the representative action (where issues of liability could be determined in common, but damages would be determined individually), and for product liability claims, an extended version of the representative action (where liability issues could be determined in common, but causation and damages would be determined individually).[837] In both instances, the emphasis was on individual claims and individualised compensation. This was reflected in the observation that, in disaster and product liability claims, the victims were more easily identified and therefore the opt-in approach was most appropriate.[838]

In class actions for consumer claims, by contrast, an opt-out approach was recommended.[839] The authors linked this approach directly with the aim of deterrence; because many class members would be unaware that the class definition included them or that there was any litigation at all, few would join the action and its capacity 'to prevent

[836] *Learning from Opren* (n 784) 5.

[837] ibid 5, 34-35.

[838] ibid 22.

[839] ibid 21-22, 37.

and redress wrongdoing' would be greatly reduced. This connection between class actions and the deterrence function can also be seen in the report's recommendations on remedies. It was recognised that where an aggregate damages award had been made, it could be difficult to distribute that award 'fully and accurately so as to compensate the individual losses.'[840] Nevertheless, damages could be distributed *cy-près*, or pro-rata to the class members who had been identified. The court could also make an order that the defendants reduce their prices until they had foregone the sum that would otherwise have been awarded in damages.[841]

Group Actions Made Easier also used the lessons from Opren and Benzodiazepine to make recommendations regarding the management of multi-party actions. These formed the foundation for Lord Woolf's later proposals, and included recommendations on costs-sharing, case management, court approval of a solicitors' steering committee, advertising, group definition and cut-off dates, and the use of test or lead cases.[842] However, the report did not recommend the enactment of generic class actions legislation, and its emphasis remained on litigation that required individuals to opt in.[843]

Following the multi-party actions of the 1980s and 1990s, then, there were very few voices calling for generic opt-out class actions. Either opt-out class actions were recommended for certain sectors (as in *Learning from Opren*), or cross-sectoral reform was recommended on an opt-in basis (as in *Group Actions Made Easier*). Certain key stakeholders such as the Law Society declined to consider any reform of multi-party

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[840] ibid 24.

[841] ibid 25. Rachael Mulheron refers to this as a 'price-rollback' *cy-près*: *The Modern Cy-près Doctrine: Applications & Implications* (UCL Press 2006) 218-222.

[842] *Group Actions Made Easier* (n 808).

[843] ibid 52-53.

procedures.[844] Lord Woolf's interim report, released in June 1995, barely mentioned multi-party actions. It was the publication of *Group Actions Made Easier* in September 1995 that influenced his thinking and led to the publication of an issues paper in January 1996,[845] and thereafter the inclusion of Chapter 17 in his final report. Nevertheless, those recommendations 'attracted miniscule attention compared with the larger policy questions of access to and administration of civil justice generally.'[846]

Like *Group Actions Made Easier*, Lord Woolf's emphasis was not on US-style class actions, but on the management of multiple individually viable claims arising from similar circumstances. He stated that any rules on multi-party actions should aim to:[847]

> (i) provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;
>
> (ii) provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure; and
>
> (iii) achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner.

One of the few recommendations that was not enshrined in the CPR was Lord Woolf's proposal that '[t]he court should have power to progress the MPS on an 'opt-out' or 'opt-

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844 Mark Mildred, 'Group Actions' in Andrew Grubb and Geraint G Howells (eds), *The Law of Product Liability* (Butterworths 2000) 379.

845 Lord Woolf, *Access to Justice Inquiry: Issues Papers, Multi-Party Actions* (LCD 1996).

846 Mildred (n 844) 378.

847 Woolf Final Report (n 751) [17.2].

in' basis, whichever contributes best to the effective and efficient disposition of the case.'[848] In the context of his general recommendations, however, this phrase appeared as an afterthought. It did not account for the larger ramifications of an opt-out class action, including costs and funding, quantification and distribution of awards, and access to justice for individually unviable claims. Instead, the opt-out mechanism was simply considered in the context of case management and entry on the group register, and as a corollary to the opt-in approach.

It is little surprise, therefore, that a Working Party of the Lord Chancellor's Department,[849] which eventually translated Lord Woolf's recommendations into the GLO framework, expressed a preference for the opt-in approach.[850] There are indications that this decision was influenced by business and other conservative interests;[851] however, there was also very little demand for generic opt-out class actions amongst consumer groups and claimant lawyers. The demand for sector-specific opt-out class actions was to be picked up again after the enactment of the Access to Justice Act, and in the context of consumer and competition law. These developments will be considered later in this chapter. This section will consider the GLO framework and the extent to which it followed Lord Woolf's recommendations.

[848] ibid [17.87], recommendation 9.

[849] Lord Chancellor's Department, *Access to Justice – Multi Party Situations: Proposed New Procedures* (LCD 1997).

[850] ibid 13, para 30(b).

[851] Interview with retired claimant solicitor 4 (RCS4) (by telephone, 18 March 2019).

i. Costs

In terms of costs, Lord Woolf took note of the lesson on proportionality taught by the Benzodiazepine litigation and *Group Actions Made Easier*.[852] In his Final Report, he stated that the central problem in cases such as the Benzodiazepine litigation was that 'escalation of costs in such cases can put the initial cost benefit analysis at risk.'[853] That is why, according to Lord Woolf, one of the prime objectives of the GLO regime was to reduce unnecessary costs. This was exemplified in the GLO test case of *Boake Allen*,[854] in which his Lordship held that claim forms need to be read in the context of the GLO register and 'need be no more than the simplest of documents'.[855] To require the parties to plead their cases in detail at the outset would lead to disproportionate cost. This would undermine the objective of the GLO regime, which was to protect litigants with a common interest from incurring unnecessary costs[856] by enabling them to take certain steps collectively.[857]

As discussed in the next chapter, due to spiralling front-end costs, satellite litigation, and other issues, that objective has not been met.

ii. Other Issues Relating to GLOs

One of Lord Woolf's main recommendations was the appointment of a case management judge for multi-party actions[858] in order to further the overriding objective in the CPR.[859]

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[852] Woolf Final Report (n 751) [17.4].

[853] ibid [17.12].

[854] *Boake Allen Limited v Her Majesty's Revenue and Customs* [2007] UKHL 25 [31] (Lord Woolf).

[855] ibid [33].

[856] ibid [31].

[857] ibid [30].

[858] Woolf Final Report (n 751) [17.87], recommendation 5.

[859] CPR 1.4 (the overriding objective is in 1.1). General case management powers are in CPR 3.1.

For the purposes of group litigation, case management is dealt with in CPR 19.13, where the judge is given a great deal of discretion in the orders she can make (although a group register is mandatory). The non-exhaustive list includes many of the powers exercised by courts in Opren and elsewhere, and discussed in Lord Woolf's recommendations. These include the following:

- The selection of test claims;[860] Lord Woolf noted that such selection needed to be done carefully as weak or atypical test cases could be problematic for the group;[861] as Opren demonstrated, test cases can also pose difficulties with regards to legal aid due to the sharing of costs between privately paying and legally aided clients;[862] and

- Specifying cut-off dates (after which no claim can be added to the group register without the court's permission).[863] Lord Woolf noted the quandary with cut-off dates; while an early cut-off provided an idea of the size of the group and gave some certainty to defendants, it also resulted, as it did in Opren, 'in a rush to register which encourages many weak or hopeless claims to be registered and inflates the pool of potential claimants.'[864] Cut-off dates can exclude legitimate claimants, creating an access to justice issue.[865] However, late claimants may still be permitted to join the register.[866]

[860] Woolf Final Report (n 751) [17.40]; CPR 19.15, 19.13(b); 19B PD 12.3. Cases can be stayed pursuant to CPR 3.1(2)(f). The court can also consolidate proceedings under CPR 3.1(2)(g). Test cases are used in group claims that are not subject to a GLO, subject to the court's general powers of case management: CPR 3.1(2). While these have precedential effect, they are not binding unless the parties agree otherwise.

[861] eg the Pertussis litigation: *Kinnear v Renton* (Stuart-Smith J, Spring 1986), cited in Mulheron (n 770) 103.

[862] Woolf Final Report (n 751) [17.40].

[863] CPR 19.13(e); 19B PD 13.

[864] Woolf Final Report (n 751) [17.44].

[865] *T (formerly H) v Nugent Care Society (formerly Catholic Social Services)* [2004] EWCA Civ 51.

[866] CPR 19.13(e), (f); 19B PD 13.

In his *Access to Justice Report*,[867] Lord Woolf stated that the court should have the power to approve a lead solicitor if difficulty arises in appointing one. In doing so, he followed the guides to conducting multi-party actions that proliferated in the late 1980s and 1990s, which all recommended the steering committee structure in some form.[868] This recommendation also found its way into the GLO framework.[869] Lord Woolf also noted the key role of victims' groups, particularly with regard to settlement.[870] He recommended that 'the court could require an identified and finite group of claimants to have in place from the outset a constitution including provisions relating to acceptance of settlement, such as majority voting.'[871] Where a minority opposed the settlement, the judge could hear their objections.[872] However, although victims' groups remain a feature of GLOs and other group litigation,[873] the CPR contains no specific provisions regarding their role or constitution.

With regard to advertising, Lord Woolf recommended that the court should have discretion as to who undertakes the advertising, as well as its timing, placement and content.[874] A GLO may allow claimant solicitors to advertise in numerous media, including on websites, social media, the Law Society Gazette and newspapers.[875]

[867] Woolf Final Report (n 751) 248-249 [87].

[868] *Learning from Opren* (n 784), Draft Amended Rule for Group Claims, 4(g); *Guide for Use in Group Actions* (n 784) 8-9; *Group Actions Made Easier* (n 808) 23 [6.3.2].

[869] 19B PD 2.2 recommends the formation of such a group as a preliminary step, and the case management court may appoint the solicitor of one or more of the parties to be the lead solicitor of the group: CPR 19.13(c).

[870] Victims' groups played a key role in the multi-party actions of the 1980s and 1990s: Day (n 828) 27-29.

[871] Woolf Final Report (n 751) [17.87].

[872] ibid.

[873] eg the shareholder action group in the Lloyds/HBOS group litigation (Lloyds Action Now).

[874] Woolf Final Report (n 751) [17.50].

[875] CPR 19.11(3)(c) and 19B PD 11.

However, the CPR rules on advertising a GLO are deliberately open-ended, with no guidance given on issues such as who should pay for the advertising.[876]

Finally, with regard to settlements, Lord Woolf stated that, '[t]here is a strong case for court approval of all multi-party settlements', especially where a lump-sum is offered, because of the danger that lawyers will compromise the cases for a lower amount in order to secure their fee.[877] In light of this, it is curious that the GLO framework contains no specific provisions regarding settlement. This is a reflection of the individual nature of the claims in a GLO, so that a settlement will never bind all members of the group without their individual consent.[878]

(c) Conclusion

A comparison of the procedures arising in multi-party actions such as Opren and Benzodiazepines, as well as Lord Woolf's recommendations and the GLO framework, show a great deal of continuity. Several group litigation lawyers in England and Wales also take this view.[879] Procedures such as cost sharing orders, test cases, generic pleadings, the identification of common issues, the group register, and advertising were all developed in the years leading up to the reforms, and these were simply codified in the GLO framework.[880] One difference is the ability to publicise the GLO.[881] However, given the

[876] Gibbons (n 773) 126.

[877] Woolf Final Report (n 751) [17.79].

[878] ibid [17.81].

[879] cf Grave (n 821) 13.

[880] Interview with defence barrister 1 (DB1) (by telephone, 22 March 2019); interview with claimant solicitor 6 (CS6) (by telephone, 15 March 2019); interview with claimant barrister 3 (CB3) (by telephone, 11 March 2019); interview with claimant solicitor 3 (CS3) (by telephone, 8 March 2019).

[881] CPR 19.11(3)(c).

widespread publicity that many multi-party actions received in the 1980s and 1990s, and continue to receive today, this is not such a significant difference.[882]

The procedures surrounding group litigation would exist today even without the GLO framework. The lessons learned in the 1980s and 1990s, described by one veteran claimant solicitor as 'painful' and full of uncertainty because of the time needed to educate judges, have been normalised.[883] The roadmap to the GLO was drawn up in Opren and other cases, and 'was the obvious way to go.'[884] The enactment of the GLO framework was helpful in that it clarified procedures and gave a moniker to a phenomenon that was relatively novel to English courts, but ultimately it is not 'as if there's some kind of magic' to the process.[885] The true innovations were made by case management judges in multi-party actions, and these were simply formalised in the CPR. This continuity can also be seen in the practice of group litigation following the Access to Justice Act.[886] The current-day practice of group litigation in England will be covered in the next chapter.

4. Class Actions in Competition Law

In England, opt-out class actions were first introduced in competition law, in the form of the Consumer Rights Act 2015. Similarly, in Canada in the 1970s, proposed changes to the Combines Investigation Act included a class action mechanism for private actions in competition law. Some interesting parallels can be drawn between the two debates, with implications for class action reform in England and elsewhere. This section first gives an

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[882] CS6 (n 880).

[883] CS3 (n 880).

[884] ibid.

[885] CB3 (n 880).

[886] 1999 c 22.

overview of the history of competition law class actions in the two countries, and then highlights the similarities between the debates.

(a) The History of the Competition Law Debates

i. The Debate in Canada

The prospect of class action reform in Canada first arose at the federal level in the context of competition law. Amendments to the Combines Investigation Act[887] were first proposed in June 1971,[888] in the form of Bill C-256, the Competition Act.[889] Because of considerable opposition to the proposals, the Minister of Consumer and Corporate Affairs divided the amendments into two phases,[890] with the first phase dealing with less controversial amendments.

For the second phase, the Minister appointed an Advisory Committee and commissioned a series of policy studies.[891] The Committee's report, submitted on 31 March 1976, made numerous recommendations for an overhaul of the competition law framework[892] but failed to discuss the potential role of private enforcement.[893] This lacuna was filled by the Williams-Whybrow Report commissioned by the Department of

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[887] RSC 1970, c C-23.

[888] Bruce C McDonald, 'Canadian Competition Policy: Interim Report of the Economic Council of Canada' (1970) 15 Antitrust Bull 521.

[889] Canada, Legislative Assembly, Official Report of Debates (Hansard), 28th Parl, 3rd Sess, 7434 (15 June 1971) (Ron Basford).

[890] Martin J Rochwerg, 'Proposed Stage II Amendments to Canadian Combines Legislation – Bill C-42' (1977) 15 OHLJ 51, 51; WT Stanbury, 'Half a Loaf: Bill C-29, Proposed Amendments to the Combines Investigation Act' (1985) 10(1) CBLJ 1, 5.

[891] Paul K Gorecki and WT Stanbury, *The Objectives of Canadian Competition Policy, 1888-1983* (Institute for Research on Public Policy 1984) 96-97.

[892] Lawrence A Skeoch, Bruce C McDonald, and others, *Dynamic Change and Accountability in a Canadian Market Economy* (Minister of Supply and Services Canada 1976).

[893] WT Stanbury, 'Dynamic Change and Accountability in a Canadian Market Economy: Summary and Critique' (1977) 15 OHLJ 1, 49.

Consumer and Corporate Affairs.[894] It recommended a class actions procedure for the new Competition Act, and several of its proposals found their way into the draft legislation introduced in March 1977.[895]

This was the first time any comprehensive class actions legislation had been introduced in Canada.[896] The procedure was an opt-out mechanism, to which traditional 'loser-pays' costs rules would apply except for the common issues trial.[897] The opposition to these proposals was vehement,[898] and the Standing Senate Committee on Banking, Trade and Commerce therefore recommended that the class action amendments be scrapped.[899]

In response, the federal government introduced a new version of the Competition Act (Bill C-13) on 18 November 1977. This still included the class action amendments, but the representative plaintiff was required to prove that a certain portion of the class supported the action and that the claims were large enough to justify the cost in administering them.[900] Even this was strongly opposed by corporate interests.[901] Eventually, the statute died on the order paper when a federal election was called in 1979. The Conservatives formed a minority government and kept their election promise not to

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894 Neil J Williams and Jennifer Whybrow, *A Proposal for Class Actions under Competition Policy Legislation* (Department of Consumer and Corporate Affairs 1976).

895 Government of Canada, 'Class actions: recent developments in Canada' (1978) 4 CLB 128, 128.

896 ibid 146.

897 Department of Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada, Second Stage* (Supply and Services Canada 1977) 73-77.

898 W T Stanbury and G B Reschenthaler, 'Reforming Canadian Competition Policy: Once More unto the Breach' (1981) 5 CBLJ 381, 384-385.

899 *Interim Report on Bill C-42: Proceedings of the Standing Committee on Banking, Trade and Commerce, July 6, 1977* (Supply and Services Canada 1977) Section 18: Class Actions.

900 Bruce Wildsmith, 'An American Enforcement Model of Civil Process in a Canadian Landscape' (1980) 6 Dalhousie LJ 71, 91-92.

901 Stanbury (n 890) 6.

revive the legislation.[902] When the prospect of competition law reform was raised again in later years, the provisions on class actions were notably absent.[903] To this day, the Competition Act does not contain any class action procedure, because (following *Dutton*)[904] that procedure is now universally available across Canada.

ii. The Debate in England

In the years following the introduction of GLOs, several proposals for class actions were advanced. While some of these recommended generic (ie cross-sectoral) class actions, the majority focused on consumer rights and competition law.[905] Many also involved an opt-out mechanism. In the end result, it was an opt-out (or opt-in) class action regime for the private enforcement of competition law, in the form of the Consumer Rights Act 2015, that was ultimately enshrined in law.[906]

Shortly after the introduction of the CPR in 1999, followed by the GLO framework in 2000 as CPR Part 19, it became apparent that the new regime would not work well for group actions involving low-value claims.[907] The Lord Chancellor's Department therefore published a consultation paper in February 2001, which proposed that the scope of representative claims be widened so that organisations could represent groups of claimants

[902] ibid.

[903] Stanbury (n 898) 430.

[904] (n 534).

[905] eg *Class Actions* (The Society of Labour Lawyers 2007) 6.

[906] Competition law enforcement and consumer protection are closely intertwined, as evidence reveals that the more effective the enforcement of competition law, the more money is saved for consumers: Office of Fair Trading (OFT), *The deterrent effect of competition enforcement by the OFT*, OFT962 and OFT963 (OFT 2007) 13.

[907] Grave (n 821) 27.

in certain types of action, even if the organisation itself lacked standing in private law.[908] The UK government published its response in April 2002, stating that it would take the initiative forward on a sector-by-sector basis, which would allow the most appropriate selection of representative organisations[909] and enable the government to tailor reforms to sector-specific issues regarding the substantive law, as well as remedies and costs.[910]

There was little further discussion of generic class actions procedures until 2008, when the Civil Justice Council released its *Final Report: Improving Access to Justice through Collective Actions*, which recommended generic class actions for England, on an opt-out or opt-in basis.[911] It identified the same mischief that the opt-in regime under the Enterprise Act 2002 (discussed below) failed to address: access to justice for individually non-viable claims.[912] The CJC's report was influenced by the examples of Ontario and other Canadian jurisdictions,[913] an influence that has continued in the courts' interpretation of the competition law class action framework, discussed in the next chapter.

The UK government's response to the CJC report was somewhat lukewarm.[914] It did not support the CJC's recommendation that generic (cross-sectoral) class actions legislation be introduced. The government gave two reasons for this response. First, it

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[908] Lord Chancellor's Department (LCD), *Representative Claims: Proposed New Procedures* (LCD 2001) [16].

[909] LCD, *Consultation Response: Representative Claims: Proposed New Procedures* (HMSO 2002) Conclusion [10]-[11].

[910] ibid.

[911] CJC 2008 (n 758). At around the same time, the Law Society recommended a generic collective redress mechanism, although not necessarily in the form of opt-out class actions: Jonathan Rayner, 'Chancery Lane adopts policy on class actions' (2008) 5 LS Gaz 2 (27 March 2008).

[912] CJC 2008 (n 758) 51.

[913] ibid 123, 254.

[914] Ministry of Justice, *The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'* (TSO 2009).

found that there was no evidence of need for a generic opt-out class actions mechanism,[915] summarily dismissing the extensive evidence of need that was contained in the CJC's report. Secondly, it stated that the introduction of such a mechanism could have numerous economic and other impacts;[916] the main impact considered by the government seems to have been on the cost of doing business. Nevertheless, the government did encourage the CJC to work with individual government departments in preparing primary legislation to introduce class actions sector-by-sector.[917] In response, in February 2010 the CJC published draft court rules for class actions.[918]

The government's sector-by-sector approach continues to affect the development of class actions reform in England to this day. As evidenced by the genesis of the competition law class action regime, it takes several years to debate, introduce, and pass legislation, and then have it tested by the courts. The Department for Business, Innovation and Skills (BIS) first recommended the introduction of class actions in competition law in January 2013, and the UK Supreme Court will not hand down its judgment in *Mastercard* until late 2021 – a delay of almost nine years. To test the device in various sectors, therefore, will take many decades and effectively stall the process of reform.

In the 2000s, however, the pressure for reform continued to mount. In the years leading up to the government's response to the CJC report, the consumer rights organisation Which? led an awareness campaign about unfair banking charges, which precipitated a flood of financial services claims before the courts and the Financial Ombudsman's Service. By August 2007, the number of claims in county courts totalled

[915] ibid 5.

[916] ibid 5.

[917] ibid 3, 16.

[918] CJC, *Draft Court Rules for Collective Proceedings* (CJC 2010).

more than 50,000.[919] The sheer number of these claims gave rise to several problems, including the inefficiency in deciding the same issues numerous times, the risk of inconsistent judgments,[920] delays,[921] ongoing adverse publicity for defendants,[922] and potentially predatory behaviour by claims management companies.[923] The Office of Fair Trading commenced a test case in the Commercial Court against several banks.[924] However, the courts denied an individual consumer's attempt to amend his claim to become a representative of a consumer class, on the basis that any declaration that the imposition of bank charges levied on his account was unfair and/or a penalty would only apply to his own contract with the bank.[925] The Treasury's concern about these developments prompted its report on *Reforming Financial Markets*, which recommended opt-out class actions for financial services claims.[926]

As a result, when the following year the government was discussing sector-by-sector class actions legislation, the financial sector was an obvious candidate. In November 2009, the Treasury introduced a bill that included class actions[927] along the lines proposed by the CJC, and included a provision for aggregate damages; courts would have discretion

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[919] Mulheron (n 1486) 121-123.

[920] ibid 126-127.

[921] ibid 127.

[922] ibid 128.

[923] ibid 121, 124-125.

[924] ibid 124.

[925] ibid 125-126, citing *Brennan v National Westminster Bank Plc* [2007] EWHC 2759 (QB) (27 Nov 2007) [42].

[926] HM Treasury, *Reforming Financial Markets* Cm 7667 (TSO 2009) 113-115, 146-148. See also Rachael Mulheron, 'Recent Milestones in Class Actions Reform in England: A Critique and a Proposal' (2011) 127 LQR 288, 297-299.

[927] Financial Services HC Bill (2009) cll 18-25. This was based on the Treasury's report, ibid.

to determine whether a proceeding should be opt-in or opt-out.[928] The Conservative opposition proposed several amendments, including a stricter certification test and only allowing opt-out proceedings where opt-in proceedings were impracticable.[929] However, the Bill was caught up in the 'wash-up' period prior to the 2010 election. In order to ensure timely passage of the Bill before the dissolution of Parliament, the class actions provisions were dropped.[930] The 2010 election ushered in a Conservative-Liberal Democrat coalition government, and the class action provisions were never reconsidered.[931]

The first collective actions in competition law were ushered in by the Enterprise Act 2002, which introduced s 47B into the Competition Act 1998[932] and enabled organisations to represent groups of consumers in the Competition Appeal Tribunal (CAT).[933] However, this was not an 'opt-out' action.[934] This was problematic for several reasons. First, signing up consumers individually would drive up costs. Second, the emphasis on individual participation detracted from any deterrent impact, because it was difficult to gather a sizeable class that would require the defendant to pay substantial damages. Third, the difficulties in gathering claimants would also affect funding, because few funders would be attracted to an action with a handful of low-value claims, where any

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[928] Financial Services Bill, ibid cl 19(2) and 22.

[929] 'Financial Services Bill – Amendments to be debated in the House of Lords' (Parliament, 9 March 2010), lines 207-244 <http://www.publications.parliament.uk/pa/ld200910/ldbills/026/amend/ml026-id.htm> accessed 9 April 2021.

[930] Rachael Mulheron, 'Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers' (2011) 50 CBLJ 376.

[931] Grave (n 821) 32.

[932] Competition Act 1998, 1998 c 41, s 47B (Competition Act 1998), inserted by Enterprise Act 2002, 2002 c 40, sections 19, 279 (Enterprise Act 2002).

[933] This was introduced in the context of efforts to increase private enforcement of competition law across the EU: Grave (n 821) 38. These are discussed below.

[934] This is despite the fact that the Department of Trade and Industry published a White Paper in 2001, suggesting the possibility of opt-out class actions: DTI, *A World Class Competition Regime* (TSO 2001).

damages award would be negligible. In addition, the device was limited to 'follow-on' actions; it only applied to consumers and not businesses; and only certain organisations could act as group representatives.[935] The mechanism was therefore under-used. A subsequent DTI report recommended representative actions for consumer claims generally, although opposition from business interests led the government to conclude that further research was needed to examine the evidence for reform.[936]

In March 2007, Which? brought an action against JJB Sports Plc,[937] which followed on from a decision by the Office of Fair Trading (OFT) that JJB Sports had overcharged consumers for replica football shirts.[938] The relief sought included exemplary or restitutionary damages in the amount of 25 per cent of the defendant's turnover. However, this element of the claim was unlikely to have been successful, given the Court of Appeal's holding in *Devenish Nutrition*[939] that restitutionary damages and accounts of profits are not available in competition law cases, nor can punitive damages be claimed where the defendant has already paid a regulatory fine. This reduced the pool of potential recovery, because damages would be restricted to the compensation claimed by individuals opting in to the action.[940]

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[935] Grave (n 821) 33.

[936] DTI, *Extending Competitive Markets: Empowered Consumers, Successful Business* (TSO 2005); DTI, *Representative Actions in Consumer Protection Legislation* (TSO 2006); Department for Business Enterprise and Regulatory Reform, *Representative Actions in Consumer Protection Legislation: Responses to the Government consultation* (TSO 2008).

[937] *The Consumers' Association v JJB Sports Plc* (Case No 1078/7/9/07, CAT).

[938] Decision of the Office of Fair Trading No CA98/06/2003, Price-fixing of Replica Football Kit (1 August 2003, Case CP/0871/01).

[939] *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086, cited in Rachael Mulheron, 'The impetus for class actions reform in England arising from the competition law sector', in Stefan Wrbka and others (eds), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (CUP 2012) 393-394.

[940] Mulheron (n 939) 394.

The action settled a couple of years later, with the defendants paying Which?'s significant costs[941] as well as a nominal payout to consumers of just £21,000, in the form of a payment of £5-20 for each consumer that claimed. This was just a fraction of the estimated £50 million loss to consumers. Only 130 claimants opted in to the action (0.00067 –0.00083 per cent of the total affected), despite extensive publicity surrounding the case.[942] 'Which?' stated that it would not be bringing another action until the opt-in provisions changed.[943]

Around the same time, a US class action firm announced it was abandoning plans to pursue compensation for consumers affected by the price-fixing of dairy products, even though the OFT had imposed fines of £116 million and damages to consumers were approximately £270 million. The firm said it was abandoning the case because of difficulties in attracting funding; in any opt-in class action, the damages would inevitably be too small to justify the significant investment required.[944]

The OFT subsequently released a discussion paper on making representative actions under s 47B of the Competition Act 1998 more effective.[945] Its recommendations were published in November 2007.[946] The most notable of these was that s 47B allow for

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[941] *The Consumers' Association v JJB Sports Plc* [2009] CAT 2 [31].

[942] Grave (n 821) 34. The poor opt-in rate was at least partly because JJB Sports contacted consumers directly to offer them a free mug in exchange for a waiver of liability, and more than 12,000 customers accepted: interview with competition solicitor 1 (CompS1) (by telephone, 21 March 2019); Mulheron (n 819) 43.

[943] Mulheron (n 819) 40-42. This is almost certainly why Which? did not commence an action on behalf of consumers for the airline cartel in *Emerald Supplies Ltd v British Airways Plc*, [2010] EWCA Civ 1284, even though it had previously considered doing so.

[944] 'Cohen Milstein Drops Dairy Price-Fixing Action' *The Lawyer* (London, 28 January 2008); Mulheron (n 939) 397-398. For other examples of collective actions in competition law that were not pursued because of the lack of an opt-out regime, see Mulheron (n 819) 64-65.

[945] OFT, *Private actions in competition law: effective redress for consumers and business: discussion paper* (OFT 2007). Rachael Mulheron has also highlighted the role of prior legislative reforms that have failed to address deficiencies in collective redress mechanisms as a trigger for class action reform: Mulheron (n 532) 65-67.

[946] OFT, *Private actions in competition law: effective redress for consumers and business: recommendations from the Office of Fair Trading* (OFT 2007).

opt-out (as well as opt-in) class actions. Several years later, the Department for Business, Innovation and Skills (BIS) also consulted on the possibility of allowing opt-out class actions in competition law.[947] In January 2013, the BIS provided its response to the consultations,[948] and recommended that class actions be introduced in the CAT.[949] The result was the Consumer Rights Act 2015,[950] Schedule 8 of which amended the Competition Act 1998 to introduce an opt-out class actions regime.[951]

On 1 October 2015, the Consumer Rights Act 2015 came into force. This introduced a class actions regime into UK competition law, which can be opt-out or opt-in,[952] is not limited to follow-on actions, and allows for the approval of collective settlements and voluntary redress schemes even where no class action has been brought. This model includes a two-step certification test, consisting of an assessment of:

- The adequacy of the class representative (which assesses, among other things, whether the representative would act fairly and adequately in the interests of class members, whether they have a conflict with class members on the common issues, their ability to pay the defendant's costs, and their plan to manage the proceedings);[953] and

- Whether the claims are suitable for collective proceedings (which assesses, among other things, whether the claim is brought on behalf of an identifiable class of persons, raises common issues, is suitable from a cost-benefit perspective,

[947] BIS, *Private actions in competition law: a consultation on options for reform* BIS/12/742 (BIS 2012).

[948] ibid.

[949] ibid 26.

[950] Consumer Rights Act 2015 (n 531).

[951] This accorded with the CJC's recommendation in its 2008 Report (n 758) 139, that the UK might wish to introduce class actions in competition law to begin with, then gather evidence to determine whether the mechanism should be expanded to other sectors.

[952] Non-residents of the UK must opt-in.

[953] Rule 78 of the Competition Appeal Tribunal Rules 2015 (2015 No 1648) (CAT Rules).

should be brought as an opt-in or opt-out action, and is suitable for an aggregate damages award).[954]

In addition, costs can be awarded to or against the class representative,[955] and, while CFAs and ATE insurance are permitted, DBAs are not.[956] The CAT has a great deal of discretion regarding costs.[957] Unclaimed damages at the conclusion of the proceedings can be awarded to the class representative 'in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings', or can be awarded to a designated charity (currently the Access to Justice Fund).[958]

(b) Comparing the Debates

There are numerous points of comparison between the debates on competition law class actions in England and Canada, and these are instructive in considering the future trajectory of debates for class action reform in England and elsewhere.

i. The Impetus for the Reforms

Firstly, the reforms were introduced in Canada and England for very similar reasons. Canada's competition proposals addressed increasing concerns about foreign investment in Canada and the restrictive trade practices of foreign entities.[959] In England, the reforms

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[954] CAT Rule 79.

[955] CAT Rule 98.

[956] Competition Act 1998, s 47C(8).

[957] CAT Rule 104(2).

[958] CAT Rule 93.

[959] Roy M Davidson, 'The Canadian Response to the Overseas Reach of United States Antitrust Law: Stage I and Stage II Amendments to the Combines Investigation Act' (1979) 2 Can-US LJ 166, 170-171.

were partly a response to European Commission reports indicating that it would be introducing collective redress mechanisms for breaches of EU competition and consumer protection laws.[960] Such innovations were driven by 'principally *economic* policy goals – notably, enhancing competitiveness and consumer protection – rather than *compensation* per se'.[961] The 2013 BIS Report also emphasised the consumer protection function of enforcing competition law.[962]

The goals of enhancing competitiveness and consumer protection were also central to the Canadian competition reforms.[963] The Interim Report of the Economic Council of Canada[964] called for far-reaching changes to supplement Canada's notoriously weak anti-trust laws.[965] The goal behind the class action changes was also to enable consumers with individually low-value claims to combine forces and be compensated for their losses.[966] Where individual claims were so small that even a class action would not be a feasible means of obtaining compensation, or where a court refused certification, the amendments allowed the Competition Policy Advocate to step in and bring a substitute action on behalf of class members; damages would be paid to the Federal Treasury to prevent the unjust

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960 Commission, 'Damages actions for breach of the EC antitrust rules' COM (2005) 0672 final; Commission, 'EU Consumer Policy strategy 2007-2013, Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them' COM (2007) 99; Commission White Paper, 'Damages actions for breach of the EC antitrust rules' COM (2008) 165 final; Commission, 'Commission Work Programme 2012' COM (2011) 777 final.

961 Christopher Hodges, 'From Class Actions to Collective Redress: A revolution in Approach to Compensation' (2009) 28 CJQ 41, 50-1.

962 BIS, *Private actions in competition law: a consultation on options for reform – government response* (BIS 2013) 6, 39.

963 McDonald (n 888) 521-523.

964 Economic Council of Canada, *Interim Report on Competition Policy* (Queen's Printer 1969).

965 Stanbury (n 890) 5.

966 Rochwerg (n 890) 67.

enrichment of the defendant.[967] In such cases, the primary aim of a class action would be deterrence.[968]

Deterrence was also central to the English reforms. In the early years of the 21st century, the UK and EU governments wanted to encourage healthy competition and strong markets by making redress for breaches of competition law more effective,[969] including through private enforcement.[970] The OFT's 2007 Discussion Paper discussed survey evidence revealing that, among the initiatives that could improve deterrence of competition law infringements in the UK, encouraging private damages actions was perceived to be one of the most effective.[971] Several years later, the Department for Business, Innovation and Skills consulted on the possibility of allowing opt-out class actions in competition law.[972] The BIS was particularly concerned about the OFT's findings that private enforcement was the least effective aspect of the competition law enforcement regime.[973] In January 2013, the BIS provided its response to the consultations.[974] It considered the weakness of the provisions under s 47B of the Competition Act 1998 and the ineffectiveness of the representative action framework under CPR 19.6, and found that a private enforcement regime should play a supplementary role in the deterrence of anti-competitive behaviour.[975]

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[967] Recent Developments (n 895) 145.

[968] Rochwerg (n 890) 67.

[969] OFT discussion paper (n 945); BIS consultation paper (n 947); COM (2005) paper (n 960) 3; HM Treasury, *Budget 2007*, HC 342 (TSO 2007) 53.

[970] OFT recommendations (n 946) 10-11.

[971] OFT962 (n 906) 11; ibid 5.

[972] BIS consultation paper (n 947).

[973] BIS response (n 962) 3; Mulheron (n 819) 48-65; OFT962 (n 906) [5.84]–[5.96].

[974] BIS response (n 962).

[975] BIS response (n 962) 59-60; John Sorabji and others (eds), *Improving Access to Justice Through Collective Actions* (Civil Justice Council 2008) 158. Rachael Mulheron has noted that the weakness of public

It was the enforcement and deterrent aspects of the legislation in each country, however, that provoked the fiercest opposition from business and other interests.

ii. Opposition to the Reforms

Although they are four decades apart, the competition law reforms in England and Canada were opposed on very similar bases. In Canada, industry representatives disagreed with the findings of the Williams-Whybrow Report that there was a pressing need or public demand for civil enforcement of the Competition Act,[976] and stated that class actions in the USA had 'proved to be highly beneficial to lawyers and of little use to anyone else'.[977] Similarly, in England, opponents of class action reform have argued that there is no evidence of need or demand for collective proceedings in competition law or anywhere else.[978]

Industry interests in England have also raised the spectre of abusive class proceedings and 'blackmail litigation'.[979] In responding to the CJC Report, the UK government expressed concerns that such legislation could encourage unmeritorious claims and drive up the costs and incidence of litigation, and stated that regulatory options should be considered first.[980] In Canada, business groups making submissions in June 1977 to the Standing Senate Committee talked of 'legalized blackmail' and the 'undesirable

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enforcement and failure to address culpable conduct is a major trigger for class action reform: Mulheron (n 532) 71-73.

[976] Canada, Legislative Assembly, Minutes of Proceedings and Evidence of the House of Commons Standing Committee on Finance, Trade and Economic Affairs, Bill C-42, The Competition Act (Canada Hansard): (2 and 9 June 1977) (Mr Maxwell, Canadian Pacific), (2 June 1977) (Canadian Chamber of Commerce).

[977] Canada Hansard (2 and 9 June 1977) (RF Booth, Canadian Chamber of Commerce).

[978] Christopher Hodges, Response to Consultation on *Private Actions in Competition Law: A Consultation on Options for Reform* (BIS 2012).

[979] Hodges (n 978) 6-11. Hodges' research is funded in large part by the European Justice Forum, a body consisting of insurers and other commercial interests.

[980] ibid 3.

temptation to have litigation' posed by class actions.[981] The representatives that did not entirely oppose class actions argued that they should be restricted to prevent abuse.[982]

Anti-US sentiment has informed many of these objections. In response to the CJC report calling for generic opt-out class actions, some commentators rejected calls for a 'US-style class action system'.[983] In Canada, the Canadian Bar Association stated that the provisions could place the enforcement of the Competition Act 'in the hands of aggressive and innovative plaintiffs' counsel and the courts', as had apparently occurred in the US.[984]

Finally, there was strident opposition in both countries to the proposals for aggregate damages and *cy-près* distributions. In Canada, business interests insisted that, if class actions were to proceed, then class members should be required to prove their damages individually and not in the aggregate.[985] The *cy-près* and forfeiture provisions were seen as the equivalent of a fine in criminal proceedings, and led to accusations that the government had a 'prejudice against business'.[986]

Similarly, in responding to the CJC Report, the UK Ministry of Justice expressed particular concern regarding opt-out class actions. It recognised that the aggregation of individually non-viable claims could drive up the value of a group action so that it could attract funding.[987] However, it also found that such actions went against the grain of the individualistic nature of English civil litigation, because individuals would have claims

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[981] Canada Hansard (15 June 1977) (HG Batt, QC, Imperial Oil Limited), (29 June 1977) (HG Wilson, Dominion Foundries and Steel).

[982] Canada Hansard (2 June 1977) (Canadian Manufacturers' Association and Retail Council of Canada).

[983] Sir Anthony Clarke MR, quoted in Joshua Rozenberg, 'Put your shirt on: power of a united front in a courtroom' *The Evening Standard* (London, 12 February 2008) A31.

[984] Canada Hansard (7 June 1977) (Canadian Bar Association).

[985] CMA submission (n 982) 2-3; RCC submission (n 982) 3, 8-11.

[986] Canada Hansard (8 June 1977) (Independent Petroleum Association of Canada).

[987] MOJ Response 2009 (n 914) 9.

commenced on their behalf without their action or even knowledge,[988] and damages could be assessed without reference to individual claims.[989] The government stated that aggregate damages, in particular, undermined the compensatory principle of most civil damages and were arguably punitive.[990] According to a BIS report in 2013, respondents stated that *cy-près* distributions would 'cross the line from compensation to punishment'.[991] Instead, most respondents stated that any funds that could not be distributed to class members should be donated to the Access to Justice Foundation in order to support the aims of access to justice and deterrence.[992]

In the end result, the Consumer Rights Act 2015 allowed the CAT to decide whether an action should be opt-in or opt-out and whether damages should be awarded in the aggregate; *cy-près* distributions of damages awards are not permitted, and unclaimed damages must be distributed to a prescribed charity.[993] The subsequent interpretation of those provisions is a subject for the next chapter.

5. Conclusion

Collective redress mechanisms in Canada and England have evolved from different roots. In Canada, the difficulties with using the centuries-old representative rule to litigate modern opt-out claims led to the enactment of class proceedings legislation across the

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[988] Opponents to class actions in Canada also objected to opt-out mechanisms: Stanbury (n 890) 5; RCC submission (n 982) 3, 8-11.

[989] MOJ Response (n 914) 9-10.

[990] ibid 12. However, just two years earlier, the OFT 2007 Report (n 946) had recommended allowing for aggregate and restitutionary damages, in order to further the deterrent aims of competition law (28).

[991] BIS Report 2013 (n 962) [5.49]. Less than 10% of respondents supported *cy-près* distributions [5.46]-[5.49].

[992] ibid [5.46]-[5.49], [5.64], [5.67], [5.70].

[993] Consumer Rights Act 2015 (n 531).

country. In England, the challenges of using an *ad hoc* case management device to litigate multi-party claims led to the enactment of the GLO framework. In essence, the histories of the two countries have led to different responses to the difficulties inherent in collective redress.

However, the recent English debates on class actions in competition law display a marked similarity to the earliest Canadian debates on similar provisions. In addition, and as will be explored in the next chapter, England's nascent class action regime has referred extensively to the Canadian legislation and case law. Canada's past and present experiences with class proceedings, then, may well hold the key to broader class action reform in England's future.

Chapter 6:
Current Practice in Class Actions, Group Litigation, and Representative Actions

Following the previous chapter on the evolution of collective redress in Canada and England, this chapter will focus on the current-day practice in this area.

In Canada, the initial approach to class actions was, for the most part, restrictive: courts were less willing to certify class proceedings, especially outside the small claims context; third party litigation funding was in its infancy; there was uncertainty regarding the constitutionality of national class actions and whether certain groups of potential class members were required to opt in; and remedies such as aggregate damages and *cy-près* distributions were much more narrowly available. Lawyers too, were more uncertain about class actions, and until recently only a small circle of firms have been willing to enter this field. As the class actions framework has matured in the provinces, the attitude of courts and lawyers has become more liberal, such that class proceedings have become fully entrenched in the Canadian legal system. While aspects of the device are sometimes debated, its existence is very rarely, if ever, disputed.

In England, courts and lawyers have also displayed a distrust of and unfamiliarity with class actions, with initial decisions at the Competition Appeal Tribunal (CAT) exhibiting a very restrictive approach. Similarly, only certain law firms were willing to take on the financial risk of class actions or Group Litigation Orders (GLOs), and only for certain types of claim. However, just as the Canadian approach became broader and more permissive as the class actions regime became more established, there are signs that this is happening in England as well.

The second part of this chapter will compare the problems that have been encountered in Canadian class actions with those encountered in English class actions and group litigation. The commonality between these problems on both sides of the Atlantic reveals that they are endemic to collective redress generally, and that many of them will be encountered in England even without widespread class action reform.

Finally, this chapter will also look at the present day use of the representative action in England and Canada, and the ramifications for the future practice of collective redress in both countries. I will then conclude with some thoughts about where Canada and England might go from here. These thoughts will be developed further in the final chapters of this thesis.

1. The Reaction to Class Actions

Class actions have represented a significant procedural innovation everywhere they have been introduced, and Canada and England are no exception. In both countries, class actions involved much more than a procedural rule change; they required legislation[994] and changes regarding the assessment and distribution of damages, amongst other matters. For lawyers bringing cases and judges interpreting the legislation, such a novelty has taken time to get used to. This section will discuss courts' and lawyers' reactions to class actions in England and Canada, and draw parallels between the two jurisdictions.

Québec, Ontario, and British Columbia have seen the most class action activity in Canada, and activity outside those provinces has been relatively sparse. This is so for several reasons. First, those three provinces are the main financial and population centres in Canada, and therefore corporations and other potential defendants are more likely to be based there. Second, they were the first to enact class proceedings legislation, and therefore overcame the reticence towards that procedure sooner. The Canadian portions of this section will therefore focus on those provinces, with some references to class actions in other provinces.

[994] With the exception of the change in 2002 to the Canadian *Federal Courts Rules*, SOR/98-106 (FCR).

(a) Initial Reluctance and Restrictive Approach

In Canada there was a lag of about a decade between the introduction of class actions and their widespread use (BC being an exception). Québec courts in particular were very cautious in their treatment of class actions, and the way they interpreted the new provisions was reminiscent of the common-law provinces' approach to the representative rule before the 1970s.[995] The initially restrictive use of class actions has also been reflected in England, although the UK Supreme Court's judgment in *Mastercard* reflects a more permissive attitude influenced by the Canadian jurisprudence, as discussed below.

The slow launch of class actions was due to a combination of restrictive interpretations of the legislation and lawyers' reticence to use the procedure. Each of these causes will now be addressed in turn.

i. Restrictive interpretation of the legislation

Several themes emerge when comparing Canada and England's initially restrictive approach to class proceedings. In the early days of class proceedings, courts in Canada denied certification based on the perception that: class proceedings legislation had been enacted primarily for claims that were not individually viable – in other words, small claims; class actions were not feasible where differences between class members outweighed the issues they had in common; alternative methods of proceeding, such as joinder, were preferable; and class proceedings were not just procedural but were a mechanism for social change that should only be used in exceptional circumstances. With regard to the mechanics of class actions, funding and opt-in requirements also restricted

[995] Bruce Wallace, 'The failed promise of class actions' *Maclean's* (Montréal, 11 March 1985) 50.

their use, and the remedies – particularly aggregate damages and *cy-près* distributions – were only narrowly available.

Similarly, in England, even class action reformers have recommended that 'brakes' be put on the device, in the form of the preferable procedure test. Lower courts have tended to be dismissive of actions in which individual damages are small, non-existent, or cannot be calculated with accuracy. Costs and funding rules have also restricted the use of class actions and GLOs. In competition law class actions specifically, the CAT has narrowly interpreted the legislative provisions regarding the assessment and distribution of damages. Each of these points, with a comparison between the English and Canadian approaches, will be addressed in turn.

In both England and Canada, as noted in the previous chapter, two of the main goals of class actions were access to justice for claims that were individually too small to be economically viable; and judicial economy for claims that, whatever their size, had significant issues of law or fact in common.[996] Two of the main restrictions on class actions in the early days, then, were the requirements that the claims be sufficiently small to justify aggregation, and that common issues outweigh individual issues.

The focus on small claims first arose when class action legislation was being debated in Québec. Pierre Marois, the Minister of Social Development who had introduced the bill, stated several times that its provisions would only apply to groups whose members could not all easily be identified and/or joined; in other words, large classes 'the composition of [which] makes the application of article 59 or 67 difficult or

[996] *Abdool v Anaheim Management Ltd*, 1993 CanLII 5430 (ONSC); Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996) [17.2]; Susan MC Gibbons, 'Group Litigation, Class Actions, and Collective Redress: An Anniversary Reappraisal of Lord Woolf's Three Objectives' in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009) 152, 110.

impracticable'.[997] Others made similar observations.[998] This focus on small claims was also demonstrated in the courts' approach. In *Tremaine c AH Robins Canada inc*,[999] the court of first instance dismissed the motion for authorisation.[1000] This was partly on the basis that the purpose of class proceedings in Québec was to facilitate access to justice for individually non-viable claims and that, because the product liability claims were each significant, they should be prosecuted individually.[1001]

There was also a perception in Ontario that class proceedings statutes were meant to facilitate small claims only, and that significant damages claims should proceed by way of individual actions.[1002] In *Abdool v Anaheim Management Ltd*, the claim of each individual investor was $300,000. The Court therefore refused to certify the action, holding that, 'as each plaintiff had a very substantial claim the goal of the Act in advancing small claims was not met by the individual plaintiffs.'[1003]

Individual issues were also a significant impediment to class proceedings. In Québec, the courts focused not on the common issues but on the differences between class members, such as different contracts[1004] or different interests in the outcome,[1005] and

[997] *Code of Civil Procedure*, CQLR c C-25, Book IX, Title II, 1003(c) (CCP). This is part of the certification test in Québec: Québec, Journal des débats, Troisième session – 31ième Législature: audition des memoires sur le project de loi no 39 (Québec Hansard) 7 March 1978 (Pierre Marois).

[998] Québec Hansard, 7 March 1978 (Serge Fontaine).

[999] *Tremaine c AH Robins Canada inc*, [1987] JQ no 299.

[1000] The approximate equivalent to a certification motion in Québec.

[1001] *Tremaine* (n 999) [61]-[62], [66]-[68].

[1002] This was also the intention behind the 1966 changes to the US *Federal Rules of Civil Procedure*, Title IV: Parties, Rule 23: Class Actions, 383 US 1029 (FRCP): Martin H Redish, 'Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals' (2003) U Chi Legal F 71, 102.

[1003] *Abdool* (n 996).

[1004] *Nault v Canadian Consumer Co Ltd*, [1981] 1 SCR 553, 354-355.

[1005] *Comité de citoyens et d'action municipale de St Césaire c Ville de St-Césaire*, [1986] RJQ 1061.

therefore held that a class action was not the appropriate vehicle for the resolution of the claims.[1006] Another reason for the denial of authorisation in the *Tremaine* case was that causation and damages were both complex issues that would inevitably differ between class members.[1007]

Causation and reliance also prevented the certification of class proceedings in Ontario. In *Mouhteros v DeVry Canada Inc*,[1008] for example, the court held that the students' reliance on the defendant's representations would give rise to 'a multitude of individual trials, which would completely overwhelm any advantage to be derived from a trial of the few common issues.'[1009] In *Sutherland v Canadian Red Cross Society*,[1010] certification was denied because causation was necessarily an individual issue that would have to be tried for each class member. By contrast, courts in later cases were much more willing to leave such questions to individual issues trials.[1011] This pattern of liberalisation was also observed in Newfoundland and Labrador.[1012] Such an approach is reminiscent of the liberal approach to representative actions discussed in the previous chapter, whereby courts used a bifurcated process to determine questions in common first, then assess individual issues such as damages later.[1013]

[1006] Canadian Press, 'Court denies class action' *The Globe and Mail* (Toronto, 12 May 1981) 11 (with regard to the *Nault* case).

[1007] *Tremaine* (n 999) [49]-[60].

[1008] *Mouhteros v DeVry Canada Inc*, 1998 CanLII 14686 (ONSC).

[1009] ibid; see also *Abdool* (n 996).

[1010] *Sutherland v Canadian Red Cross Society*, 1994 CanLII 7243 (ONSC).

[1011] eg *Ramdath v George Brown College*, 2010 ONSC 2019 [100]-[104]; *Kirsh v Bristol-Myers Squibb*, 2020 ONSC 1499 [44]-[68].

[1012] Interview with Newfoundland & Labrador defence counsel (NFL defence counsel 1) (by telephone, 11 April 2019).

[1013] See *Shaw v Real Estate Board of Greater Vancouver*, (1973), 36 DLR (3d) 250 (BCCA).

England has also exhibited a restrictive approach to common questions in the context of GLOs. Difficulties in identifying common questions can create interlocutory skirmishes at an early stage.[1014] Furthermore, GLOs have not been granted where courts have held there are insufficient common or related issues of fact or law.[1015] For example, in *Hobson v Ashton Morton Slack Solicitors*,[1016] the claimant group of miners sought recovery of sums deducted from their compensation awards by firms of solicitors and a trade union. The court held the agreements with the union, the terms of engagement with the solicitors, and the allegations of misrepresentation were all individual and fact-specific, and that '[n]o group litigation issue has been sufficiently or precisely identified'.[1017]

The 'preferable procedure' stage has also been the focus of a restrictive approach. In *Comité de citoyens*,[1018] for example, the court pointed to alternative avenues of redress, such as joinder, that were deemed to be preferable to a class action.[1019] Similarly, in Ontario, courts in the early days of the CPA were much more willing to find that other procedures were preferable to a class proceeding. These included complaints procedures established by the regulator,[1020] compensation packages established by the province,[1021]

[1014] Interview with claimant barrister 1 (CB1) (by telephone, 1 March 2019); interview with claimant solicitor 7 (CS7) (by telephone, 6 March 2019).

[1015] CPR 19.10.

[1016] [2006] EWHC 1134 (Admin).

[1017] ibid [71]; *Various v Barking, Havering and Redbridge University Hospitals NHS Trust*, unreported 21 May 2014 HC (QB), cited in Damian Grave and Gregg Rowan (eds), *Class Actions in England and Wales* (Sweet & Maxwell 2018) 122, where the claimants alleged that their injuries arose from systemic failures at the defendant hospitals, but Master Leslie noted those injuries may have each arisen from a completely different systemic failure.

[1018] (n 1005).

[1019] The relevant provisions of the Québec CCP do not contain any requirement that a class proceeding be the preferable procedure (art 575).

[1020] *Halabi v Becker Milk Co*, 1998 CanLII 14681 (ONSC).

[1021] *Sutherland* (n 1010).

small claims funds established by the defendant,[1022] and applications for judicial review by which the plaintiffs could seek their desired declaration.[1023] Another reason certification was denied in *Sutherland*[1024] was because at least 84 individual actions had already been commenced, each with an average damages claim of $1.75 billion.[1025] The court therefore held that the plaintiffs would not be denied access to justice if the class proceeding was not certified.

Although the interpretation of class proceedings in Québec and Ontario has since become more generous, the latter may be circling back to its initial restrictive position. In the recent changes to the Ontario CPA, two major modifications to the 'preferable procedure' certification criterion under s 5(1)(d) could make it more difficult to bring class proceedings. The modifications mean that a class proceeding will only be found to be a preferable procedure if (at a minimum) it is 'superior to all reasonably available means of determining the entitlement of the class members to relief', and if 'the questions of fact or law common to the class members predominate over any questions affecting only individual class members'.[1026]

These requirements are almost identical to the wording in Rule 23(b)(3) of the US Federal Rules of Civil Procedure,[1027] and alter the preferable procedure test as articulated by the Supreme Court of Canada in 2013.[1028] They could therefore affect the evolution of class actions in Ontario. The prediction that these requirements will import the restrictive

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1022 *Hollick v Toronto (City)*, 2001 SCC 68.

1023 *SR Gent (Canada) Inc v Ontario (Workplace Safety and Insurance Board)*, 1999 CanLII 14813 (ONSC).

1024 (n 1010).

1025 These actions were case managed together under Rule 37.15 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194.

1026 *Class Proceedings Act*, 1992, SO 1992, s 5(1.1) (Ontario CPA).

1027 FRCP, Rule 23.

1028 *AIC Limited v Fischer*, 2013 SCC 69 [16]-[20].

US approach is unlikely to be fulfilled, however, given that the same judges will still be deciding certification motions in Ontario and they must abide by the Supreme Court of Canada's holding that class action statutes should be 'construed generously'.[1029] Furthermore, the 'some basis in fact' evidentiary standard will continue to apply to each certification requirement,[1030] which is lower than the US standard of a balance of probabilities.[1031] In light of all this, there may not be a great deal of change.

In England, GLO applications have been denied where alternative procedures would be more appropriate for resolving the claims. 19B PD 2.3 specifically requires that '[i]n considering whether to apply for a GLO, the applicant should consider whether any other order would be more appropriate' such as consolidation or representative procedures.[1032] In *Hobson*,[1033] the court denied the GLO application in part because alternative procedures had not been sufficiently considered – procedures which, the court held, would have led to a more timely and cost-effective resolution of the litigation.[1034]

The preferable procedure stage has also been seen as a 'brake' on class actions in competition law, and potential reform in other areas of English law. The Rules of the Competition Appeal Tribunal require the Tribunal to consider, when deciding whether claims are suitable for certification as part of a collective proceeding,[1035] 'whether collective proceedings are an appropriate means for the fair and efficient resolution of the

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[1029] *Hollick* SCC (n 1022) [14]-[15].

[1030] ibid [25]; *Fischer* (n 1028) [48]. This standard does not apply to CPA s 5(1)(a) (reasonable cause of action).

[1031] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 [101].

[1032] 19B PD 2.3.

[1033] (n 1016).

[1034] ibid [2]. The court also considered test cases as a possible alternative procedure: [32].

[1035] The Competition Appeal Tribunal Rules 2015, SI 2015/1648, Rule 79(1)(c) (CAT Rules).

common issues',[1036] 'whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class',[1037] and 'the availability of alternative dispute resolution and any other means of resolving the dispute'.[1038] In discussing class action reform in other areas of English law, Rachael Mulheron has proposed similar requirements.[1039]

Another early restriction on the class action in Québec was the view that it was an 'exceptional' procedure. This was first noted during the debates on Bill 39, including by the Minister who introduced the Bill.[1040] The initial jurisprudence therefore followed this reasoning. The court in *Tremaine* held that, due to the 'exceptional' nature of this social remedy, the legislature intended that the authorisation criteria be applied rigorously.[1041] However, later decisions departed from this approach,[1042] and these reflected a more liberal approach to class actions in Québec that will be discussed below.

Costs and funding have also placed barriers in the way of class actions in Québec and elsewhere. When class actions were introduced in Québec in 1978,[1043] a Class Action Assistance Fund (*Fonds d'aide aux recours collectifs* or the 'Fonds') was set up to help with the fees of the petitioner's (claimant's) lawyer, the costs of notification, and general

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[1036] CAT Rule 79(2)(a).

[1037] CAT Rule 79(2)(c).

[1038] CAT Rule 79(2)(g).

[1039] Rachael Mulheron, *Sixty (60) Design Issues for an Opt-Out Collective Action Regime* (CJC 2008) 2 (superiority is requirement number 6); 'Justice Enhanced: Framing an Opt-out Class Action for England' (2007) 70 Mod L Rev 550, 569.

[1040] Québec Hansard (7 March 1978) (Pierre Marois, Viateur Bergeron, Lionel Laprade, Georges Dessaulles); (1 June 1978) (Pierre Marois).

[1041] *Tremaine* (n 999) [38]-[39].

[1042] *Tremaine c AH Robins Canada Inc*, 1990 CanLII 2808 (QCCA); *Comité d'environnement de La Baie inc c Société d'electrolyse et de chimie Alcan ltée*, [1990] RJQ 655 (QCCA); *Syndicat national des employés de l'Hôpital St-Ferdinand c Curateur public du Québec (CSN)* [1994] RJQ 2761 (QCCA); affd [1996] 3 SCR 211.

[1043] *An Act Respecting Class Actions*, RSQ 1978, c R-2.1.

disbursements. However, this was barely used – in 1979, the first year of the legislation, only $15,500 of the $100,000 available was used.[1044] Following consultation with consumer groups and the Fonds, legislative amendments were therefore made in 1982,[1045] whereby the Fonds was given extended powers to finance class actions and a supplementary counsel fee was removed. These changes made it much easier for petitioners to bring class actions, and protected them financially when they did so.[1046]

In other provinces, the 'loser-pays' costs rule has prevented the widespread use of class actions. Ontario's Class Proceedings Fund has existed since the passage of the CPA to assist plaintiffs with disbursements and indemnify them against adverse costs. However, the costs rules in other provinces (as well as the opt-in requirement for non-residents, discussed below) have made them something of a backwater.[1047] According to class action lawyers in Alberta, for example, at least 60-70 per cent of class proceedings are 'copycat litigation' that is filed in each jurisdiction after the flagship claim is commenced in Ontario (or, to a lesser extent, Québec). Such cases sit in abeyance until the flagship claim settles or is otherwise advanced, upon which class counsel receives a payment of their fees in exchange for discontinuing the claim.[1048]

In England, too, spiralling costs have been one of the main difficulties encountered in the GLO framework.[1049] Applications for GLOs have been declined where the costs

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[1044] Canadian Press, 'Class action fund plan needs better publicity, Québec officials say' *Canadian Press* (Montréal, 31 January 1981).

[1045] Bill Bogart, 'Questioning Litigation's Role – Courts and Class Actions in Canada' (1987) 62(3) Ind LJ 665, 687.

[1046] Suzanne Chiodo, *The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act* (Irwin Law 2018) 42-44.

[1047] Interview with Alberta defence counsel (AB defence counsel 1) (by telephone, 5 September 2019).

[1048] ibid.

[1049] Interview with claimant barrister 2 (CB2) (by telephone, 4 March 2019); interview with claimant solicitor 1 (CS1) (by telephone, 13 February 2019); interview with litigation funder 1 (LF1) (by telephone, 21 March 2019); interview with defence solicitor 1 (DS1) (by telephone, 14 March 2019); interview with claimant would dwarf the recovery, or where there is no or insufficient funding or After the Event (ATE) insurance.[1050] As noted later in this chapter, the book-building and up-front work required to prosecute a GLO increases the claimant's costs and makes such litigation even more prohibitive.

In the context of opt-out class actions in competition law, the first action following the Consumer Rights Act 2015, involving price-fixing of mobility scooters, was discontinued due to economic considerations.[1051] The action was not certified because the proposed class definition included retail outlets that had not been subject to an infringement decision from the Office of Fair Trading.[1052] Including only those retail outlets that had been subject to the infringement decision would have reduced the class to just 950 members, rendering it economically unviable because the costs of the action would be disproportionate to any damages awarded.[1053] The ability to obtain funding and insurance for an action also dovetails with the availability of aggregate damages, in that third party funders can recover their success fee from the unclaimed portion of an aggregate award by virtue of s 47C(6) of the Competition Act. This was confirmed by the CAT in *Mastercard*,[1054] and, following the UK Supreme Court's liberal and purposive

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solicitor 8 (CS8) (by telephone, 18 March 2019); interview with defence barrister 3 (DB3) (by telephone, 1 April 2019).

[1050] *Austin v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928.

[1051] *Gibson v Pride Mobility Products Ltd* [2017] CAT 9.

[1052] Lianne Craig et al, 'Living up to expectations? The Consumer Rights Act 2015, a year on' (2017) 10 GCLR 31, 35.

[1053] Lucy Rigby and Wessen Jazrawi, 'The UK Consumer Rights Act 2015 Two Years On: the Reforms to Collective Actions and CAT Procedure' (*Lexology*, 9 August 2017) <www.lexology.com/library/detail.aspx?g=1ed5eac4-0558-44d7-8838-a30b573fc2e7> accessed 9 April 2021.

[1054] *Merricks v Mastercard Inc* [2017] CAT 16.

interpretation of those aggregate damages provisions,[1055] numerous other cases are now proceeding as detailed below.

Finally, one of the main 'brakes' on class actions regimes in Canada and England has been the requirement to opt in. For example, although courts in BC were much more willing to grant certification in the first 15 years of class actions in that province,[1056] very few class proceedings were commenced in that timeframe,[1057] with an average of only seven commenced each year between 1995 and 2009. The annual average between 2010 and 2020 was higher at 24, but these numbers pale in comparison to an opt-out jurisdiction such as Ontario, in which an average of 64 class proceedings were commenced annually between 1995 and 2017.[1058] The difference can be explained by BC's opt-in requirement for non-residents. Because BC was unable to conduct national opt-out class actions, these were concentrated in Ontario (Québec has always remained something of an outlier because it is a civil law jurisdiction).[1059] This only changed in October 2018, when BC became a fully opt-out jurisdiction. It is now one of the few opt-out jurisdictions (along with Manitoba and the Federal Court) in which the US-style no-costs rule, rather than the traditional 'loser-pays' costs rule, applies to class proceedings. As a result, it has become

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[1055] *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)*, [2020] UKSC 51 [57]-[58], [61], [76]-[77].

[1056] Mathew P Good, 'Appeals from Certification: A Review of the BC Court of Appeal, 1997 to 2017' (2017) 11(4) Class Action Def Q 42, 43.

[1057] The following statistics for BC are taken from my analysis of the Canadian Bar Association class actions database from 2005 to 2020: <http://cbaapp.org/ClassAction/Search.aspx> accessed 17 March 2021. The database is extremely sparse for the period from 1995 to 2004. For that period, I noted up s 4 of the *Class Proceedings Act*, RSBC 1996, c 50, s 4(2) (BC CPA) on the CanLII site (www.canlii.org), to determine the number of cases that had proceeded to a certification motion (filtering out cases that were listed more than once, and those from other jurisdictions).

[1058] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms* (LCO 2019) 5.

[1059] Interview with British Columbia plaintiff & defence counsel 1 (BC counsel 1) (Vancouver, 16 August 2019); interview with British Columbia plaintiff & defence counsel 2 (BC counsel 2) (by telephone, 2 August 2019).

a very attractive jurisdiction for plaintiff lawyers,[1060] as demonstrated by the number of class proceedings commenced there since the changes were made.[1061]

Apart from BC, four provinces originally had an opt-in requirement for non-resident class members: Alberta, Saskatchewan, New Brunswick, and Newfoundland and Labrador. All four have remained something of a backwater of class actions activity,[1062] even though two of them have now become opt-out jurisdictions.[1063]

Similarly in England, only one action was commenced under the prior opt-in competition law regime. This was because signing up individual consumers drove up the claimant's costs (as noted above with regard to GLOs), and the inability to gather a sizeable class had implications for funding and access to justice. The JJB Sports case[1064] only had 130 opt-ins (approximately 0.00067 –0.00083 per cent of the total consumers affected), and settled for a tiny fraction of the estimated £50 million loss to consumers. The consumer organisation Which? stated that the opt-in nature of the regime meant it would not be bringing another action until the law was changed.[1065] Another proposed case regarding the price-fixing of dairy products was abandoned shortly afterwards because of difficulties in obtaining funding.[1066]

[1060] BC counsel 1 (n 1059).

[1061] An average of 19 class actions were commenced annually between 2010 and 2018, while more than twice that number (39) were commenced in 2019, and 54 were commenced in 2020 (see Figure 1, below).

[1062] Interview with New Brunswick defence counsel 1 (NB defence counsel 1) (by telephone, 9 April 2019).

[1063] Alberta removed its opt-out requirement in March 2011, and Saskatchewan did so in April 2008.

[1064] *The Consumers' Association v JJB Sports Plc* [2009] CAT 2 [31].

[1065] Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Civil Justice Council 2008) 40-42.

[1066] Rachael Mulheron, 'The impetus for class actions reform in England arising from the competition law sector', in Stefan Wrbka and others (eds), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (CUP 2012) 393-394.

Even under the new opt-out competition law class action regime, initially hailed as a landmark for access to civil justice,[1067] class actions in England were slow to launch. Only a handful of actions were initially commenced under the Act, although more have been filed in the past couple of years and are now proceeding following the UK Supreme Court's judgment in *Mastercard* (discussed below). The first action, *Gibson*, was discontinued for the reasons discussed above. The second action, the *Mastercard* case involving interchange fees on credit cards, was denied certification by the CAT in July 2017.[1068] The third and fourth, competing actions involving price-fixing of transport trucks, were commenced in May and July 2018.[1069] The fifth and sixth actions (the first that do not involve a prior regulatory decision and are therefore 'stand-alone'), involving 'double payment' of rail fares, were commenced in February 2019.[1070] The seventh and eighth, involving cartel activity in the foreign exchange market, were commenced in July 2019.[1071] The ninth action, involving shipping costs of cars on Roll-On Roll-Off ('RORO') ships, was commenced in April 2020.[1072] The tenth, involving claims that British Telecom charged excessive prices to certain of its residential landline customers, was commenced in January 2021.[1073] The most recent, a stand-alone action involving abuse of dominance in the Long-Term Evolution (LTE) chipset market that is alleged to have affected the price

[1067] Rachael Mulheron, 'The United Kingdom's New Opt-Out Class Action' (2017) 37 OJLS 814.

[1068] *Merricks* (n 1054).

[1069] *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others* [2018] 1282/7/7/18 (opt-out class action); *Road Haulage Association Limited v Man SE and Others* [2018] 1289/7/7/18 (opt-in class action).

[1070] *Justin Gutmann v First MTR South Western Trains Limited and Another* [2019] 1304/7/7/19; *Justin Gutmann v London & South Eastern Railway Limited* [2019] 1305/7/7/19 (both opt-out class actions).

[1071] *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others* [2019] 1329/7/7/19; *Mr Phillip Evans v Barclays Bank PLC and Others* [2019] 1336/7/7/19.

[1072] *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* [2020] 1339/7/7/20.

[1073] *Justin Le Patourel v BT Group PLC* [2021] 1381/7/7/21.

of certain smartphones, was commenced in February 2021.[1074] The rail fares, foreign exchange, LTE chipset, and car shipping actions all involve US law firms – an indication that the UK's new class action regime is attracting attention from across the Atlantic.[1075]

The CAT's refusal to grant a Collective Proceedings Order (CPO) in *Mastercard* action was overturned on appeal,[1076] and that decision was upheld by the UK Supreme Court,[1077] suggesting that the English regime is liberalising in the same way that the Canadian class action regime has. This case has been seminal in determining the scope and form of collective proceedings in the CAT, and will be addressed further below.

ii. Lawyers' reluctance to use new procedures

Despite the restrictive approaches described above, the slow start to class proceedings in Canada and England appears to have been equally due to lawyers' reluctance to use the new procedure; this can also be seen in the English group litigation context.

In Ontario, from the passage of the CPA on 1 January 1993 until the turn of the millennium, each year saw an average of only 20 class actions being commenced (compared to more than five times that in 2017).[1078] The annual number of class actions did not exceed 60 until 2005. Similarly, in Québec, an average of only 20 class actions per year were commenced in the five years following the enactment of the legislation in

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[1074] *Consumers' Association v Qualcomm Incorporated* [2021] 1382/7/7/21. Another action, involving overcharging on Apple products sold through the App Store, was recently filed at the CAT, although at the time of thesis submission it was not listed on the CAT website.

[1075] The *Gutmann* actions, as well as *Evans* and *Qualcomm*, are being co-run by Hausfeld & Co LLP, a US firm with offices in London. *O'Higgins* is being run by Scott & Scott Europe LLP; its US affiliate is co-lead counsel in the parallel US proceedings. Scott & Scott UK LLP is running the *McLaren* action.

[1076] *Merricks v Mastercard Incorporated & Others* [2019] EWCA Civ 674.

[1077] *Mastercard UKSC* (n 1055).

[1078] LCO Report (n 1058) 5.

1978.[1079] Despite this initial reluctance to use class actions, Ontario and Québec now see nearly 100 class proceedings commenced annually.[1080] This indicates that lawyers will use the procedure once they have grown accustomed to it and witnessed its benefits.

This can also be seen in BC, where the courts construed the CPA generously from its earliest days. Of the first four cases brought under the new statute, three were certified.[1081] Even here, however, lawyers' caution towards the procedure was apparent. According to the graph below,[1082] in 1995 only four class proceedings were brought, whereas by 2020, this had increased to 54 class actions commenced annually. This number is likely to continue to increase, given the fact that BC is a no-costs jurisdiction and, since October 2018, no longer requires non-residents to opt-in.

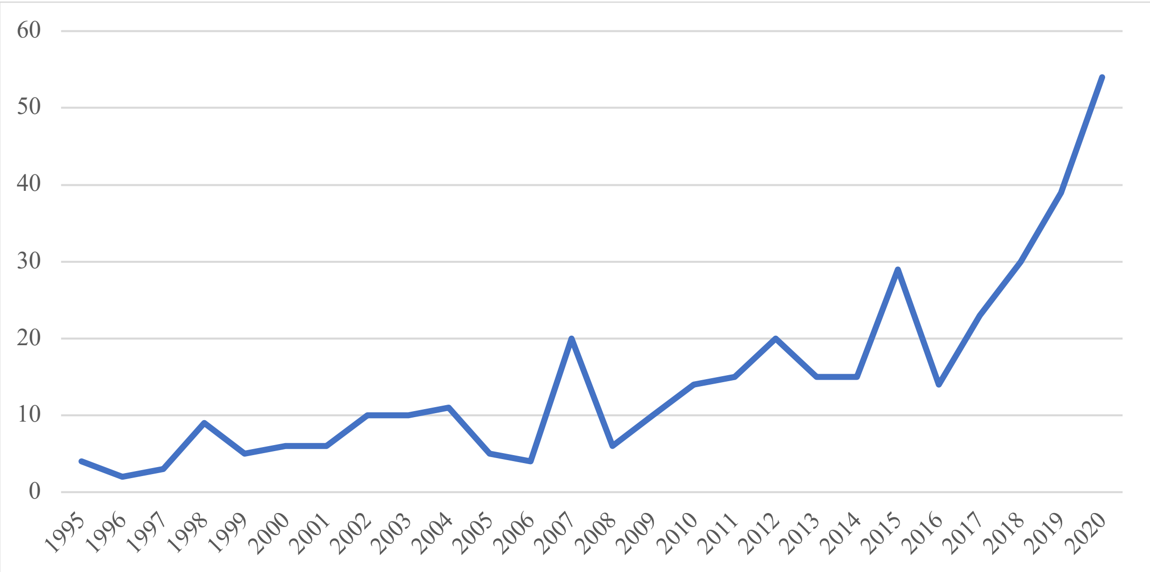

Figure 1 – Number of class proceedings commenced annually in BC (certified and non-certified), 1995-2020

[1079] H Patrick Glenn, 'Class Actions in Ontario and Québec' (1984) 62(3) Can Bar Rev 247, 255.

[1080] LCO Report (n 1058) 5; Superior Court of Québec, 'Registry of Class Actions' <www.registredesactionscollectives.quebec/en> accessed 9 April 2021.

[1081] Rodney L Hayley, 'Class action must be appropriate means to bring claim' *Lawyers' Weekly* (Victoria, 18 October 1996).

[1082] My methodology for compiling this chart can be found above (n 1057).

In England, however, lawyers' reluctance to make use of the procedure appears to be based on the legal profession's traditional resistance to change and dependency on how litigation has been conducted in the past. Interviews with English group litigation practitioners show that they continue to view the civil litigation system as primarily individualistic and compensatory.[1083] The interviews also reveal a preference for developing individual relationships with clients, and a belief that a focus on individual claimants leads to better outcomes in court. Barristers and solicitors note that there are numerous problems with the system, but these problems can largely be addressed with changes to the rules on costs and funding, and not the enactment of class actions legislation. Opposition to class actions may also be based on cultural reservations, although the 'Americanisation' of litigation arose very rarely in the interviews.

Group litigation practitioners in England generally do not favour the adoption of opt-out class actions legislation across all sectors; this would form a barrier to the use of class actions should widespread reform be introduced, although, as in Ontario and Québec, it is likely that such reticence would eventually be overcome. Where practitioners are in favour of class actions legislation, it is generally only for certain areas involving numerous claimants with individually low-value claims, such as consumer protection, competition law or data breach claims.[1084] The Volkswagen Diesel Emissions group litigation was held up as an example of the kind of case that would benefit from the opt-out class action approach.[1085]

[1083] Chapter 2 describes the methodology used in conducting these interviews.

[1084] Interview with defence barrister 2 (DB2) (London, 18 March 2019); interview with claimant solicitor 3 (CS3) (by telephone, 8 March 2019); interview with claimant barrister 3 (CB3) (by telephone, 11 March 2019); interview with retired claimant solicitor 4 (RCS4) (by telephone, 18 March 2019); LF1 (n 1049); CB1 (n 1014); CB2 (n 1049); CS8 (n 1049); CS1 (n 1049).

[1085] Interview with defence barrister 4 (DB4) (by telephone, 8 March 2019); interview with claimant solicitor 6 (CS6) (by telephone, 15 March 2019); LF1 (n 1049); CS7 (n 1014).

Many practitioners expressed scepticism of group actions that do not involve 'real' clients: in other words, litigation that involves thousands of low-value claims that have been generated through 'book-building'. They see this as the commoditisation of clients[1086] by solicitors who may be inexperienced or, worse, inept.[1087] Competition between solicitors for claims, most recently seen in the VW Dieselgate GLO, is seen as giving group litigation a bad name.[1088] The activities of claims management companies and others seeking out claims have also been viewed with suspicion.[1089] One case where such activities were particularly rife was the Sonae GLO,[1090] in which Mr Justice Jay dismissed the more than 16,000 claims as inaccurate, exaggerated, and generated by 'pop-up shops and cold-calling' of potential claimants.[1091] By contrast, practitioners expressed preference for cases involving 'real', individual, named clients.[1092]

Many practitioners who support the introduction of opt-out class actions do not think the device would suit their own areas of practice, which they perceive to be more individualised and therefore persuasive.[1093] One claimant barrister stated that, '[i]n cases that I do they tend to be individuals who turn up and say they want to sue. Class actions feel slightly different to what I do.'[1094] Another stated that, with the possible exception of

[1086] Interview with defence solicitor 2 (DS2) (by telephone, 22 March 2019); interview with claimant solicitor 5 (CS5) (by telephone, 21 March 2019).

[1087] Interview with claimant solicitor 4 (CS4) (by telephone, 29 March 2019); DB4 (n 1085); CS7 (n 1014).

[1088] Interview with claimant solicitor 9 (CS9) (by telephone, 5 March 2019); interview with retired claimant solicitor 3 (RCS3) (London, 13 March 2019); CS6 (n 1085); CS1 (n 1049); DB4 (n 1085).

[1089] eg Mulheron (n 1065) 124 (re: aggressive solicitation of claims in bank charges litigation); Maina Waruru, 'British lawyers on the hunt for Mau fighters in Kenya' *New Internationalist* (Kenya, 1 October 2012); 'Iraq War: Public Interest Lawyers closes down' *BBC* (London, 15 August 2016).

[1090] DB4 (n 1085); CB1 (n 1014).

[1091] *Saunderson & Ors v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB) [456].

[1092] CB1 (n 1014); CS3 (n 1084); CS5 (n 1086).

[1093] DB2 (n 1084); CS3 (n 1084).

[1094] CB1 (n 1014).

funding, class actions do not offer any particular advantage to a group of his own clients (as opposed to the country at large) wanting to litigate.[1095]

The graph below illustrates the resistance to generic opt-out class actions legislation amongst group litigation practitioners in England:[1096]

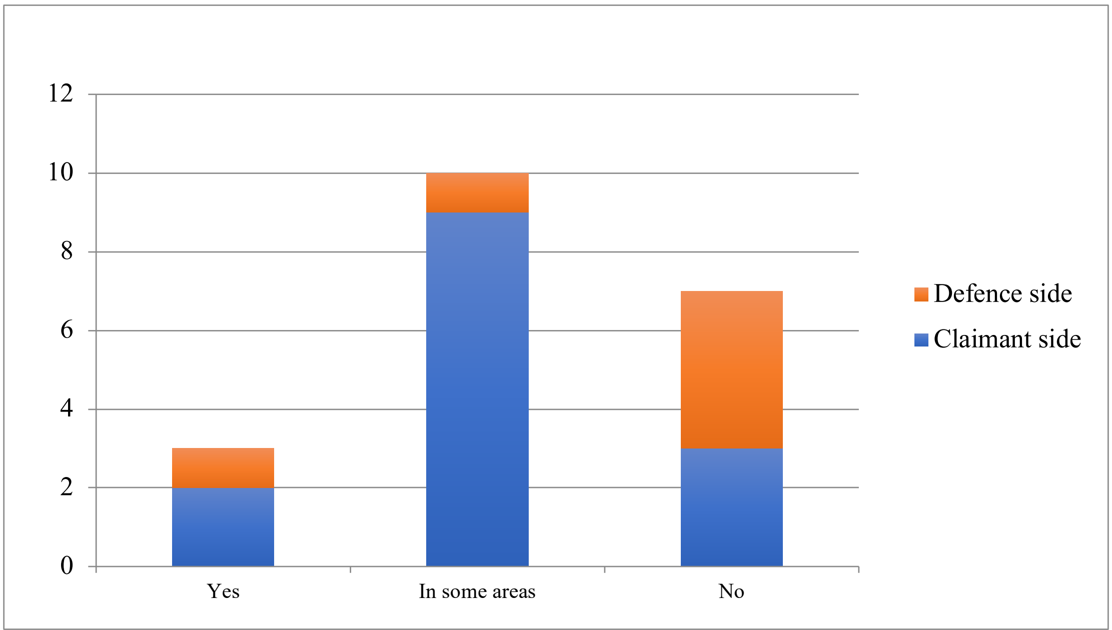

Figure 2 - Should England enact opt-out class actions legislation?

This resistance to class action reform has also manifested itself in resistance to other new procedures. The GLO framework, introduced in 2000, has been infrequently used because practitioners have been able to litigate their cases in a more informal and flexible way, without having to use the new procedure which they regard as restrictive. To date, only 109 GLOs appear on the Courts and Tribunal Service website,[1097] with another four not

[1095] CB2 (n 1049).

[1096] These responses are taken from my interviews of group litigation and class action practitioners in England; the methodology for conducting these interviews is discussed in Chapter 2.

[1097] HM Courts & Tribunals Service, 'Group Litigation Orders' <www.gov.uk/guidance/group-litigation-orders> accessed 9 April 2021. The website lists 110 orders, but numbers 57 and 63 are the same order.

listed on the website,[1098] averaging about five to six GLOs per year. GLOs have been brought in several categories:

Category	Number of GLOs to date
Personal injury	26
Product liability	15
Financial services	18
Privacy	4
Environmental	15
Employment	7
Institutional Abuse	19
Human Rights	7
Other	2
Total	**113**

As shown in the graph below, while the device was initially popular when it was first enacted, it subsequently tailed off up to 2011, when only one GLO was made; in 2019, too, only one GLO was made.

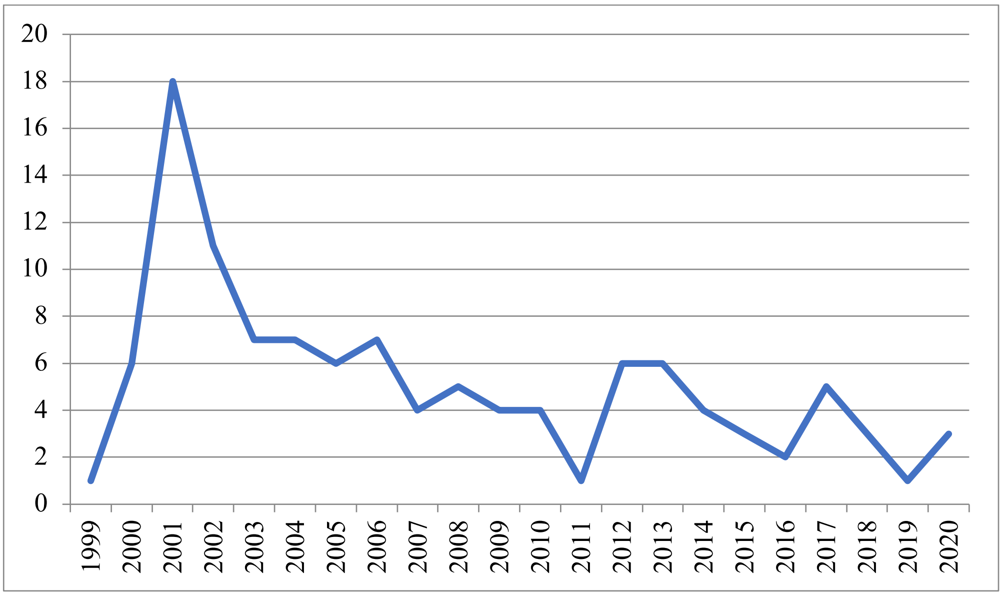

Figure 3 – Number of GLOs certified per year, 2000-2020

[1098] The four GLOs not listed are the WM Morrison Payroll Information GLO (made 24 November 2015), the Kenyan Emergency Group GLO (made 22 October 2013), the EasyJet Data Breach GLO (brought 22 May 2020), and the Daimler AG (Mercedes) Dieselgate GLO (brought 25 June 2020). These were found through an online search; the Morrison and Kenyan GLOs are also listed in Grave (n 1017) 13.

Scholars such as Rachael Mulheron have observed that the GLO's lack of popularity arises from structural defects inherent to the device, such as 'frontloading, difficulties with limitation periods, the use of the test case versus the generic issue approach, the costs–benefit analysis at the outset of an opt-in action, and the judicial attitude towards those who do not opt in at the early stages of the litigation.'[1099] Mulheron states that these defects are discouraging meritorious litigation that would otherwise be brought.[1100]

In fact, the list of GLOs referred to above does not present the whole picture. Interviews with 20 group litigation lawyers[1101] indicate that half of them rarely, if ever, bring applications for formal GLOs, and only about one-third do so frequently. Instead, most practitioners prefer to use more informal multi-claimant procedures. According to these interviews, the advantages to formal GLOs are few and the disadvantages significant. Such disadvantages include the following:[1102]

- Advertising, which creates unpredictability for claimant lawyers because competing solicitors and many weak claims may come forward, and also has reputational ramifications for defendants; [1103]
- Delays, as well as bureaucracy and the unwieldy nature of the litigation;[1104]
- The requirement that consent for a GLO be sought from the President of the Queen's Bench Division, the Chancellor of the High Court, or the Head of Civil Justice;[1105] and

[1099] Mulheron (n 1065) 25.

[1100] ibid 32-35.

[1101] The methodology for conducting these interviews is discussed in Chapter 2.

[1102] Many, but not all, of these issues are raised in Mulheron (n 1065) 25-31. Mulheron identifies these issues based on her review of GLO judgments up to 2008.

[1103] Interview with defence barrister 1 (DB1) (by telephone, 22 March 2019); interview with claimant solicitor 2 (CS2) (by telephone, 6 March 2019); CB1 (n 1014); CS7 (n 1014); DB2 (n 1084); CB3 (n 1084); DB4 (n 1085); CB2 (n 1049); CS1 (n 1049); DS2 (n 1084); LF1 (n 1049); CS4 (n 1087).

[1104] CS7 (n 1014); DB4 (n 1085); CB2 (n 1049); CS1 (n 1049); LF1 (n 1049).

[1105] CS7 (n 1014); CB3 (n 1084); 19B PD 3.3.

- The risks involved in class closure, whereby claimant solicitors can be sued by additional claimants who are excluded from the class.[1106]

There are advantages to formal GLOs, including cost-sharing,[1107] clarifying the lead solicitor and steering committee structure,[1108] advertising (where the entirety of the claimant class has not yet been identified),[1109] gathering claims for the purpose of obtaining third-party funding,[1110] helping the defendant know the size of the class,[1111] and providing finality in the litigation by binding the class and providing cut-off dates for making claims.[1112] However, many of these benefits can be negotiated by consent between the parties;[1113] where the constituency of the claimant class is known, finality is more certain and there is no need to advertise.[1114] Furthermore, the High Court noted in a recent GLO decision that the costs of substantial advertising for the purposes of attracting claimants will no longer be recoverable if the claims succeed,[1115] thereby removing another incentive to use the formal procedure.

1106 CS1 (n 1049).

1107 CB1 (n 1014); DB4 (n 1085); CS6 (n 1085); CB2 (n 1049); CS8 (n 1049).

1108 CB1 (n 1014); CS7 (n 1014); DS1 (n 1049); CS6 (n 1085); CB2 (n 1049); CB3 (n 1084); CS9 (n 1088).

1109 CB3 (n 1084); DB2 (n 1084); CS6 (n 1085); DS1 (n 1049); CS1 (n 1049).

1110 CB2 (n 1049); DB1 (n 1103).

1111 CS6 (n 1085); DS1 (n 1049); DB1 (n 1103); CS1 (n 1049).

1112 CS6 (n 1085); DS1 (n 1049); DB1 (n 1103); CS1 (n 1049); CS3 (n 1084). The High Court recently emphasised the importance of cut-off dates in providing defendants with some degree of certainty regarding their exposure: *Weaver v British Airways Plc* [2021] EWHC 217 (QB).

1113 CS7 (n 1014); CS3 (n 1084); CB3 (n 1084).

1114 DB1 (n 1103); CB3 (n 1084).

1115 *Weaver* (n 1112).

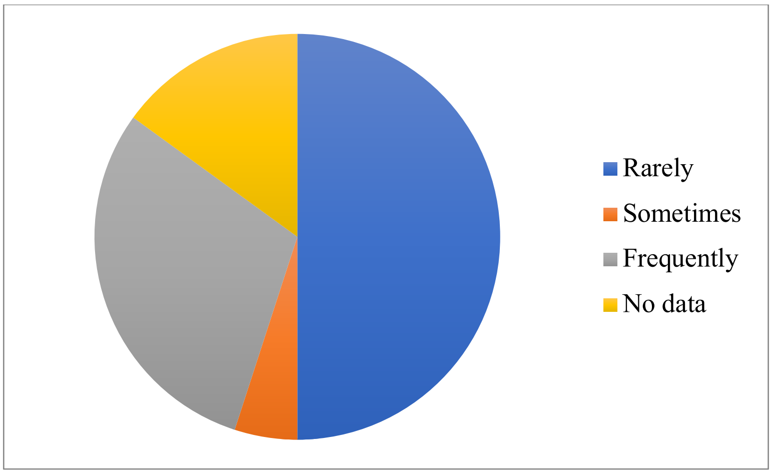

Figure 4 – Use of Formal GLOs by 20 Group Litigation Practitioners

Where procedures such as the GLO are seen as overly restrictive, cumbersome, and expensive, then group litigation lawyers will simply continue using the procedure that existed beforehand – that is, the multi-claimant procedures that arose *ad hoc* from cases such as Opren and Benzodiazepines that were prosecuted in the 1980s and 1990s. In other words, any class action reform that is introduced in England will have to address needs that cannot be filled by any current procedure.[1116] That is where the GLO has failed, and that explains its lack of popularity.

This does not mean that informal group litigation is without its problems, and these will be analysed in the next section. Such issues, however, are endemic to collective litigation generally and must be managed within any such framework.

(b) A More Liberal Approach to Class Actions

Developments since the introduction of class action legislation in Canada indicates that it takes about 10 years for practitioners to become familiar with the legislation and begin using it in earnest. While some distrust towards class actions was apparent in the early

[1116] What these needs are, and how class action reform can address them, will be discussed in chapter 7.

days, they had become commonplace in the relevant provinces within approximately a decade. This has important ramifications for jurisdictions that show a cultural resistance to class actions, particularly England, and reveals that novel procedures become tolerated and even embraced once practitioners become familiar with them.

In Québec, it was the Court of Appeal that precipitated a more permissive approach to class proceedings. In the appeal of the Dalkon Shield case, the Court disagreed that the class action was 'an exceptional social remedy', finding that it was simply a procedural vehicle that could be used whenever the requirements were met.[1117] They were met as long as the class members' claims raised some questions of law or fact that were sufficiently similar or related, and these did not have to outweigh the individual issues.[1118] The Court further held that differences between class members should not prevent the authorization of a class action, that the legislature did not intend to 'limit the class action to stereotypical cases',[1119] and that class actions were not limited to individually non-viable claims.[1120]

Around the same time, the Court of Appeal also allowed an environmental class action to proceed despite differences in individual class members' circumstances that might outweigh the common issues, on the basis that the legislation should be interpreted with its progressive social purpose in mind.[1121] Similarly, in *Syndicat national des employés*, the Court of Appeal confirmed that class actions were simply a procedural vehicle and were not 'exceptional'.[1122] This was part of a trend whereby the courts interpreted Québec's class proceedings regime in an increasingly liberal fashion,

[1117] *Tremaine CA* (n 1042).

[1118] ibid [67].

[1119] ibid [62].

[1120] ibid [77].

[1121] *Comité d'environnement de La Baie* (n 1042).

[1122] (n 1042) [124].

consistent with the socially progressive aims of the legislature. This trend is also reflected in the statistics: in 1990, just before the above-mentioned Court of Appeal judgments, there were eight reported class actions decisions in Québec, and less than 50 per cent of motions for authorization were granted. By 1998, there were 31 reported class actions decisions, and 80 to 90 per cent of authorization motions were granted.[1123]

In Ontario too, class actions became more frequently used after about a decade. An example of the courts' more liberal approach can be seen in the 2000 case of *Brimner v Via Rail Canada Inc*,[1124] where the court engaged in a detailed comparison and analysis of the class action and the proposed alternative, and found that the class action was the preferable procedure. The province also saw an expansion of class actions, first after *Hollick* in 2001,[1125] and then more markedly after the Supreme Court of Canada's *Pro-Sys* trilogy in 2013. *Hollick* articulated the standard of proof on certification motions ('some basis in fact') and confirmed that certification presented a very low evidentiary hurdle. The year before that decision, the annual number of class actions filed annually in Ontario jumped from 38 in 1999 to 50 in 2000.[1126] That number remained fairly steady until the next major jump in 2005-2006, which was probably precipitated by changes to Ontario's securities regime at the end of 2005.[1127] These introduced Canada's first statutory cause of action for secondary market misrepresentation, without the need to prove individual reliance on misrepresentations. A second trilogy from the Supreme Court of Canada,

[1123] Christopher Atchison, 'Class-action floodgates open' *The Lawyers' Weekly* (Montréal, 8 September 2000).

[1124] *Brimner v Via Rail Canada Inc*, 2000 CanLII 22404 (ONSC).

[1125] *Hollick* (n 1022).

[1126] LCO Report (n 1058) 5.

[1127] *Securities Act*, RSO 1990, c S.5, Part XXIII.1; Bradley A Heys and others, 'Trends in Canadian Securities Class Actions: 2013 Update' (*NERA Economic Consulting*, 19 February 2014) <www.nera.com/publications/archive/2014/trends-in-canadian-securities-class-actions-2013-update-filing.html> accessed 10 April 2021.

which clarified (and arguably lowered) the standard of proof at certification, was handed down in 2013.[1128] Following this second trilogy, the number of class actions commenced in Ontario annually jumped 36%.[1129] This reflects an increasingly generous interpretation of the CPA, consistent with the Supreme Court of Canada's guidance in 2001 that class proceedings statutes should be 'construed generously … in a way that gives full effect to the benefits foreseen by the drafters.'[1130]

Alberta also experienced a lag of approximately 10 years between the passage of the CPA[1131] and the more widespread commencement and certification of class actions. Between April 2004 (when the CPA was proclaimed into force) and 2013, only 54 class proceedings were commenced.[1132] However, in March 2011, the CPA was amended to make Alberta an 'opt-out' jurisdiction, meaning that national class actions could be prosecuted in Alberta and non-residents were no longer required to opt-in. This precipitated a sharp rise in class actions in the province, from just 2 in 2011 to 11 in 2012.[1133] In Saskatchewan, where class proceedings legislation was enacted in 2002,[1134] defence counsel were initially successful in rebuffing cases at certification.[1135] However, the courts of that province have been increasingly responsive to the guidance provided by

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[1128] *Pro-Sys* (n 1031); *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58; *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59.

[1129] LCO Report (n 1058) 5.

[1130] *Hollick* (n 1022) [14]-[15].

[1131] *Class Proceedings Act*, SA 2003, c C-16.5 (AB CPA).

[1132] David Tupper and others, 'The State of Class Actions in Alberta – May 2013' (*Blakes*, May 2013) <www.blakes.com/English/WhatWeDo/Practices/LitigationAndDisputeResolution/Pages/Class-Actions-in-Alberta-May-2013.aspx> accessed 9 October 2019.

[1133] ibid.

[1134] *The Class Actions Act*, SS 2001, c C-12.01 (SK CAA).

[1135] Randy C Sutton, 'A rigorous approach to certification - the Saskatchewan experience' *The Lawyers' Weekly* (Regina, 8 July 2005).

the Supreme Court of Canada, especially in the 2013 trilogy, and they now take a much more relaxed approach to certification.[1136]

Similarly, after a slow start to Newfoundland's CAA,[1137] courts have become much more receptive to the class procedure and novel ways of using it.[1138] Lawyers have also become much more open to using the device, especially given the no-costs regime which is attractive compared to the increasingly rigorous approach to costs that courts have pursued in unitary actions.[1139] Lawyers in Nova Scotia, who have historically been reluctant to bring class actions because of the 'loser-pays' costs rule, as well as courts who were previously inexperienced and lacked confidence with class actions, are now also beginning to warm up to the procedure.[1140] In New Brunswick, all contested class actions were denied at the certification stage, until certification was first granted in 2014 – seven years after the legislation was enacted.[1141] In *Gay et al v Regional Health Authority 7 and Dr Menon*, Chief Justice Drapeau for the majority held that the decision under appeal, which had denied certification on all parts of the statutory test except for the adequacy of the representative plaintiff, 'reflects an impermissibly narrow interpretation and a less than generous application of the statutory provisions applicable to certification.'[1142]

This liberalising tendency has shown itself in England too, in certain respects. Although competition law class actions in England were slow to launch, the Court of

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[1136] Interview with Saskatchewan defence counsel 1 (SK defence counsel 1) (Toronto, 5 April 2019).

[1137] *Class Actions Act*, SNL 2001, c C-18.1 (NFL CAA).

[1138] Interview with NFL defence counsel 1 (n 1012).

[1139] ibid.

[1140] Interview with Nova Scotia plaintiff counsel 1 (NS plaintiff counsel 1) (by telephone, 16 April 2019); *Class Proceedings Act*, SNS 2007, c 28, s 4(5) (NS CPA).

[1141] 2014 NBCA 10. The New Brunswick *Class Actions Act*, SNB 2006, c C-5.15 (NB CAA), came into force on 30 June 2007.

[1142] *Gay* (n 1141) [47].

Appeal and the Supreme Court allowed the *Mastercard* appeal and set aside the order of the CAT refusing certification.[1143] In its December 2020 decision, the Supreme Court found that the Canadian jurisprudence on class actions was 'persuasive in the UK not only because of the greater experience of their courts in the conduct of class actions but also because of the substantial similarity of purpose underlying both their legislation and ours.'[1144] It specifically referred to the three purposes of class proceedings in Canada, namely, access to justice, judicial economy, and behaviour modification.[1145] Nevertheless, the Court's analysis was based on the statutory construction of the UK legislation against the background of common law and civil procedure in which it was situated.[1146]

The Supreme Court held that in the absence of an ability to bring otherwise viable individual claims for damages, a collective proceeding will generally be preferable ('suitable' in the wording of the Competition Act),[1147] meaning 'preferable' relative to individual proceedings.[1148] Such an approach supports the access to justice aims of the legislation, its purpose in deterring anti-competitive behaviour,[1149] and the principle of proportionality where the determination of individual damages would be disproportionate and burdensome.[1150] The Court's liberal and purposive approach to the quantification of damages means that class proceedings in competition law will face a much lower threshold at certification. This is consistent with the 'broad brush' approach to damage quantification

[1143] *Mastercard CA* (n 1076); *Mastercard UKSC* (n 1055).

[1144] *Mastercard UKSC* (n 1055) [42].

[1145] ibid [37].

[1146] ibid [42].

[1147] ibid [56]-[57]; [70]-[71]; Competition Act 1998, 1998 c 41, 47B(6) (Competition Act 1998).

[1148] ibid [57]. In coming to this interpretation, the Court relied on s 4(1)(d) of the BC CPA [56].

[1149] *Mastercard UKSC* (n 1055) [1]-[2].

[1150] ibid [57].

in other areas of the law.[1151] With regard to the suitability of aggregate damages, this was held to be one of many relevant factors to be weighed in the assessment of whether the claims are suitable to be brought in collective proceedings (as opposed to a hurdle to be surmounted, as the CAT had found).[1152] The majority acknowledged that the compensatory principle had nothing to do with the assessment or distribution of aggregate damages, and that the legislature had intended to change the substantive law by explicitly casting this principle aside.[1153] This will make the threshold at certification much lower for claimants in future CAT cases.

The CAT will now hear the other CPO applications before it, and to rehear *Mastercard* itself.[1154] The cases commenced to date, and particularly *Mastercard*, reveal some interesting points. First is the Canadian influence. Both the Court of Appeal and the Supreme Court looked to class proceedings legislation from Canada, and particularly the BC CPA,[1155] which was 'regarded by the UK government as the best model for the collective proceedings regime introduced in 2015.'[1156] In terms of the case law, both the Supreme Court and the CAT looked to the Supreme Court of Canada's 2013 *Pro-Sys* trilogy[1157] and its application of the 'some basis in fact' standard.[1158] The UK Supreme Court held that this standard presented a low hurdle at certification,[1159] not least with

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[1151] ibid [46]-[51].

[1152] ibid [61], [67]-[69]; CAT Rule 79(2).

[1153] *Mastercard UKSC* (n 1055) [58], [76]-[77].

[1154] The rehearing of the CPO application took place on 25 March 2021.

[1155] *Mastercard UKSC* (n 1055) [37].

[1156] ibid.

[1157] *Pro-Sys* (n 1031) [118]. The other two cases in the trilogy are *Sun-Rype* (n 1128) and *Infineon Technologies* (n 1128). See also ibid [58] and *Mastercard CA* (n 1076) [39].

[1158] *Mastercard UKSC* (n 1055) [39].

[1159] ibid [41].

regard to the expert methodology put forward in support of the claim.[1160] In reference to the latter, the UK Supreme Court held that it was enough if the expert evidence demonstrated a methodology that ‘offer[ed] a realistic prospect of establishing loss on a class-wide basis’ that was not ‘purely theoretical or hypothetical’ and included ‘some evidence of the availability of the data to which the methodology is to be applied’.[1161] While the UK Supreme Court based its analysis on a construction of the relevant UK legislation, it regarded the Canadian jurisprudence as ‘persuasive’.[1162]

The second point of interest is the jurisprudence on funding. The Court of Appeal in *Mastercard* explicitly condoned the practice of third party litigation funding, stating that Parliament intended to facilitate redress for breaches of competition law in a way that would attract such funding,[1163] and this was echoed by the UK Supreme Court.[1164] The jurisprudence also confirms the power of the CAT to order ‘that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings’,[1165] and that these ‘costs or expenses’ include a funder’s fee.[1166] Combined with the Supreme Court’s liberal approach to aggregate damages, this will make opt-out class actions for breaches of competition law attractive to third-party litigation funders in future.

[1160] ibid [40].

[1161] ibid, citing *Pro-Sys* (n 1031) [118].

[1162] *Mastercard UKSC* (n 1055) [42].

[1163] *Mastercard CA* (n 1076) [60].

[1164] *Mastercard UKSC* (n 1055) [2], [73].

[1165] Competition Act 1998, s 47C(6).

[1166] *Merricks v Mastercard* [2017] CAT 16.

Finally, the representative claimants have been carefully selected. Dorothy Gibson in *Gibson* was Secretary of the National Pensioners' Convention; Walter Merricks in *Mastercard* is a solicitor and ex-financial ombudsman; Justin Gutmann in the rail fares action was head of research and insight at Citizens Advice; Michael O'Higgins in the foreign exchange action is former chairman of the Pensions Regulator; Justin Le Patourel in the British Telecom action has held consumer policy roles at telecommunications regulator Ofcom; and the representative claimant in the *Qualcomm* action is Which? (the Consumers' Association). These high-profile individuals and entities have, presumably, been selected so that they will be found able 'to act fairly and adequately in the interests of the class members',[1167] whether or not they are class members.[1168] Indeed, the CAT made those findings in *Mastercard* and *Gibson*.[1169]

The UK Supreme Court's decision in *Mastercard* reflects a much less cautious approach to class actions in competition law than has hitherto been seen, and a willingness to interpret the new scheme generously and in accordance with the intent of the legislature. This intent was that, even where strict compensatory principles could not be complied with so that aggregate damages (and potentially a *cy-près* distribution) had to be relied on instead, private enforcement of competition law should still be permitted because of its access to justice and deterrence functions. This intent is evident in the government documents detailed in the previous chapter, as well as the Hansard debates on the

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[1167] As required by CAT Rules 78(2)(a) and 78(3).

[1168] Competition Act 1998, s 47B(8); CAT Rule 78(1)(a); *Gibson* (n 1051) [128].

[1169] *Mastercard CA* (n 1076) [93]-[94]; *Gibson* (n 1051) [128]-[139]. Similarly, the representative claimant in *Richard Lloyd v Google LLC*, [2018] EWHC 2599 (QB), revd [2019] EWCA Civ 1599, was Richard Lloyd, Executive Director of Which? from April 2011 to February 2016.

legislation.[1170] As a result of the Supreme Court's judgment, opt-out class actions in competition law are now looking increasingly promising.

2. Problems Encountered in Class Actions and Group Litigation

However, other problems have manifested themselves in collective redress in Canada and England. One issue that is unique to opt-out class actions is whether and how courts can assert personal jurisdiction over non-resident class members, a problem that has arisen in Canada, Australia, South Africa, and the United States, as well as in England in the European context.[1171] Nevertheless, this section will focus on issues that are common to collective redress as a whole (including group litigation), such as costs, funding, and rivalry between firms for carriage of cases. Each of these issues will be addressed in turn.

(a) Costs

Costs rules pertaining to class actions are not uniform across Canada. In Ontario, the 'loser-pays' costs rules that apply to unitary civil litigation also apply to class proceedings, although CPA s 31(1) allows courts to consider whether the proceeding was a test case, raised a novel point of law or involved a matter of public interest in exercising their discretion with regard to costs. Other 'loser-pays' jurisdictions include New

[1170] HC Deb, 28 Jan 2014, vol 574, col 775; HL Deb, 3 Nov 2014, col GC583; both cited in Rachael Mulheron, 'Restitutionary Relief in Competition Law Class Actions: An Evolving Landscape' (2019) 26 RLR 1, 30.

[1171] Rachael Mulheron, 'Asserting Personal Jurisdiction over Non-resident Class Members: Comparative Insights for the United Kingdom' (2019) 15 JPIL 445; Rachael Mulheron, 'In Defence of the Requirement for Foreign Class Members to Opt In to an English Class Action' in Duncan Fairgrieve and Eva Lein (eds), *Extraterritoriality and Collective Redress* (OUP 2012) chapter 14.

Brunswick,[1172] Saskatchewan,[1173] Alberta,[1174] and Nova Scotia.[1175] In Québec, normal costs rules apply to class proceedings, but costs are capped at small claims court levels[1176] and are therefore minimal. Because class proceedings activity has been fairly limited in New Brunswick, Saskatchewan, Alberta, and Nova Scotia (in part because of the opt-in requirement for non-residents in some of those provinces) this part will focus on Ontario.

The discretion not to award costs under Ontario CPA s 31(1) was used fairly widely until the mid-2000s. Where costs awards were made against plaintiffs, they tended to be in the low range of $5,000 to $15,000.[1177] Since then, however, courts have made much larger costs awards and s 31(1) has been used much more rarely.[1178]

In the past 15 years, costs have continued to spiral in class actions in Ontario.[1179] Stakeholders consulted by the Law Commission of Ontario for its report on class actions agreed that 'costs orders have risen exponentially over the past several years.'[1180] In its submission to the LCO and as shown in Figure 5 below, the Class Proceedings Committee

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[1172] NB CPA, s 39(1).

[1173] The *Class Actions Amendment Act*, 2015, SS 2015, c 4, s 2. Until 2015, Saskatchewan was a no-costs jurisdiction: SK CAA, s 40.

[1174] Alberta CPA, s 37.

[1175] NS CPA, s 40. Only Saskatchewan and Nova Scotia have a provision similar to s 31(1) of the Ontario CPA regarding discretion to award costs.

[1176] CCP, art 1050.1.

[1177] Jon Bricker, 'Ontario's Class Proceedings Fund: A Good (If Less Than Perfect) Class Action Costs Model' (2008) 4(4) CCAR 399, 417; David Gourlay, 'A Class Act Comes of Age: Costs and Certification as the OLRC Report Turns Twenty' (2004) 1(2) CCAR 273, 298-299.

[1178] Bricker (n 1177) 403-408; Gourlay (n 1177) 298-299, 301-302.

[1179] *Heller v Uber Technologies Inc*, 2018 ONSC 1690 [1].

[1180] LCO Report (n 1058) 79.

analysed 146 funded cases, in which costs increased from an average of $50,000 a case in 2001 to an average of almost $450,000 in 2017.[1181]

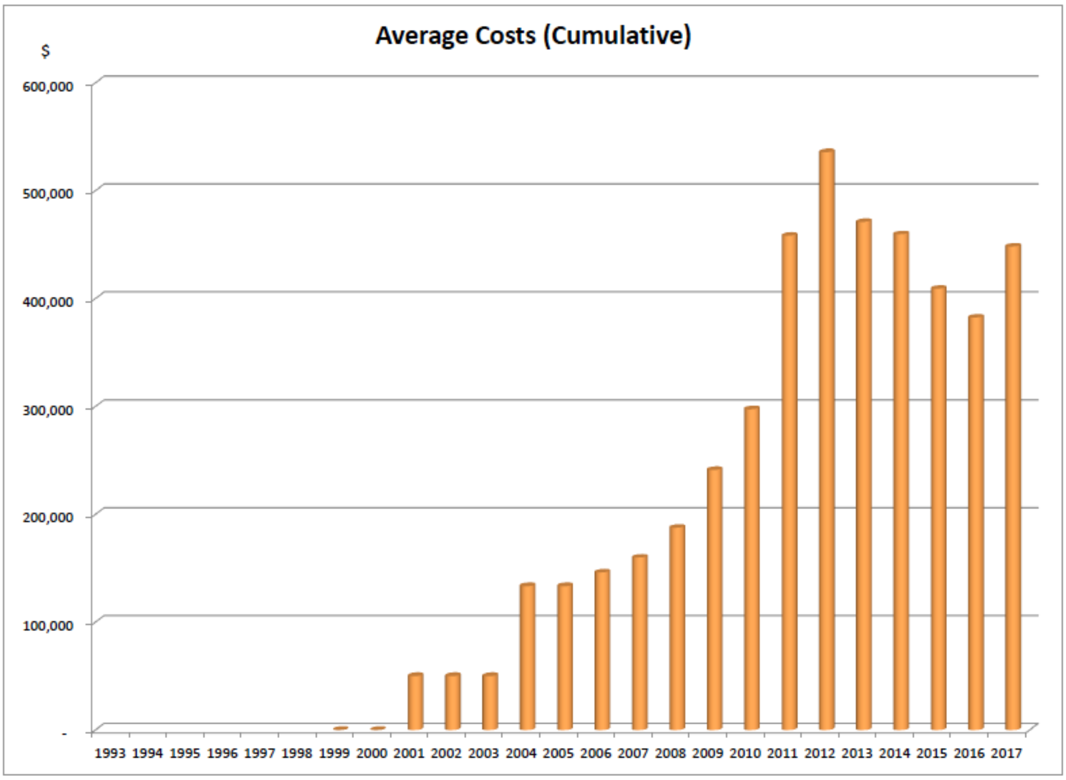

Figure 5 – Average costs award in actions funded by the Class Proceedings Committee, Ontario

As a result of these increasing costs awards, the LCO recommended in its Report that loser-pays costs rules no longer apply to certification and ancillary motions in class proceedings.[1182] However, this recommendation was not included in the 2020 amendments to the CPA.

In England, too, costs have become a major impediment to civil litigation generally. This is especially obvious in group litigation, where the up-front costs of book-building and signing clients up to the group litigation register is often prohibitive. The

[1181] Class Proceedings Committee, *Submission to Law Commission of Ontario for its Project Considering Ontario's Experience with Class Actions in Ontario* (CPC 2018) 116.

[1182] LCO Report (n 1058) 88.

major factor in pursuing group litigation, noted by almost every single lawyer interviewed, is the issue of costs and funding.[1183] Both issues are 'inextricably linked to the procedures available to potential claimants.'[1184]

Even though one of the prime objectives of GLOs is to reduce the costs of litigation,[1185] the costs rules in GLOs have done little to address this issue and have merely formalised the rules established in prior case law. CPR 46.6 refers to costs-sharing orders, distinguishing between common costs and individual costs, with several liability on each litigant for an equal proportion of the common costs,[1186] as well as provisions for early leavers and late joiners.[1187] There is no guidance on the complexities that arose in cases such as Opren, discussed in the previous chapter.[1188] The rules about costs generally[1189] were ineffectual for group litigation, meaning that costs in GLOs could spiral as wildly as they did in Benzodiazepines, making it difficult to predict costs for the purposes of insurance or funding. This may prevent claimants from obtaining either, and creates an access to justice issue.[1190]

This continues to be the case even following the Jackson Reforms, which recommended qualified one-way costs shifting (QOCS) for certain actions including

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[1183] DS1 (n 1049); CB2 (n 1049); CS8 (n 1049); CS1 (n 1049); LF (n 1049); DB3 (n 1049).

[1184] *CJC: Improving Access to Justice through Collective Actions – A response by the Association of Personal Injury Lawyers* (APIL 2008) 6.

[1185] *Boake Allen Limited v Her Majesty's Revenue and Customs* [2007] UKHL 25 [31] (Lord Woolf).

[1186] While this is the default rule under the CPR, in the RBS Rights Issue Litigation the High Court decided that adverse costs should be shared on a several basis in proportion to the size of the individual's subscription cost in the rights issue, relative to the total subscription cost for all the claimants on the group register: *Greenwood v Goodwin Trustees of the Mineworkers Scheme Ltd v Royal Bank of Scotland Group* [2014] EWHC 227 (Ch).

[1187] CPR 46.6.

[1188] Gibbons (n 996) 139.

[1189] CPR 44.

[1190] Gibbons (n 996) 140; LF (n 1049); Adrian Zuckerman, 'Lord Woolf's Access to Justice: Plus Ça Change' (1996) 59 MLR 773, 784-787, 795-796.

personal injury actions, but which retained traditional costs rules for group litigation in other areas of the law.[1191] The cost of investigating individual claims, necessitated by the ‘opt-in’ nature of a GLO, adds to expense. For example, in the VW Dieselgate GLO, one solicitor group has signed up 100,000 claimants – at the cost of £1.5 million.[1192] Exposure to adverse costs is also a serious issue; in making a security for costs order in the RBS Rights GLO, Hildyard J noted that the defendants’ costs to date were ‘extraordinary (indeed, in my experience, unparalleled)’ and in the amount of approximately £129 million.[1193] Costs in other cases have also dwarfed the total damages. For example, in the Phurnacite Workers Group Litigation, the total damages and interest paid to the claimants was between £2-3 million, while costs totaled more than £13 million. Similarly, in the British Coal Coke Oven Workers Group Litigation, the total damages are predicted to be £4-5 million, and the costs are already more than £13 million.[1194] Similar costs were run up by the defendants in the DePuy Pinnacle Metal on Metal Hip GLO; the average cost per claimant was approximately £108,000.[1195] These costs amounts indicate that, despite the scale and economy ostensibly provided by the GLO framework, the system is still incapable of delivering justice in a cost-effective or proportionate fashion.

Because of the inordinate cost of pursuing group litigation, full costs-shifting (other than in personal injury cases) makes it a very risky enterprise,[1196] and ATE insurance to

[1191] Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (TSO 2010) xxii [5.12]. Justice Jackson made these recommendations despite his criticism of the tendency of the costs-shifting rule to create perverse incentives and generate disproportionate costs: 47 [3.23]. Adrian Zuckerman discusses this point in ‘Plus Ça Change’ (n 1190) 778.

[1192] LF (n 1049).

[1193] *In re RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch) [129], [131].

[1194] DB3 (n 1049).

[1195] CS4 (n 1087).

[1196] A funder’s liability for adverse costs used to be limited to the amount of funding provided to the claimant (*Arkin v Borchard Lines (Nos 2 and 3)* [2005] 1 WLR 3055). However, courts have recently held that the Arkin cap is not an invariable rule to be applied in every case, with the result that funders may be held liable cover that risk is either prohibitively expensive or unavailable.[1197] To make that risk worthwhile, cases must involve very high per-claimant damage awards, or very large classes, or both. The areas of substantive law that have been hardest hit by the Jackson costs reforms are therefore those that tend to involve smaller groups of claimants with the potential for lower individual damage awards.[1198] For example, seven environmental GLOs were made in the five years leading up to and including 2013; in the five years following, only two were made. Solicitors in that area have noted that, because damages are typically low and costs extremely high, claimants are only going to be able to obtain enough damages to pay for a very expensive insurance product if there is a very large group of claimants indeed.[1199]

Similarly, in the area of international human rights, two GLOs were made in the five years leading up to and including 2013; in the five years following, none were made. In that area, too, costs tend to be extremely high and individual damages low. It should be noted, however, that informal group litigation for international human rights violations has actually increased in the past few years; these cases tend to be brought against UK parent companies of overseas subsidiaries, and involve very large numbers of claimants.[1200]

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for the full amount of adverse costs if the case they have supported is unsuccessful: *Davey v Money & Anor* [2019] EWHC 997 (Ch).

[1197] APIL Response (n 1184) 17. The APIL estimated that '80 per cent of collective actions do not go ahead because of the full cost shifting rule' (18). See also letter from Mark Harvey (APIL Secretary) to Colin Stutt, Head of Funding Policy at the Legal Services Commission (20 June 2003). Mr. Harvey pointed to the inability to obtain ATE coverage in the Potters Bar and Ladbroke Grove rail crash cases.

[1198] From this perspective, there has been a significant shift in the most common categories of claims as noted by Rachael Mulheron in her 2008 *Perspective of Need* report (n 1065) 9-14: environmental claims and institutional abuses are no longer the most common categories (15% and 21% respectively in 2008). Issues with legal aid funding meant that the numbers of multi-party actions had begun to decline even before 2013: Mulheron (n 1065) 74.

[1199] DS2 (n 1084); CS1 (n 1049).

[1200] eg *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20 [this case became subject to a GLO on 16 March 2020]; *Okpabi and others v Royal Dutch Shell plc and another*, [2021] UKSC 3; *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532 (leave to appeal to UKSC refused).

The costs issue therefore plays a significant role in the number and type of cases brought in class actions and group litigation. The issue of funding has a similar impact.

(b) Funding

Funding for class actions in Canada can be provided by the law firm itself (US-style contingency fees are permitted in Canada), which often includes an indemnity for payment of any adverse costs; and, in Ontario and Québec, the quasi-public Class Proceedings Fund and the Fonds d'aide aux actions collectives respectively.

Private third-party litigation funding has been a feature of the Canadian class actions landscape for several years. A third party funding agreement was approved in Ontario for the first time in *Dugal v Manulife Financial Corp.*[1201] The agreement in that case included a cap on the compensation the funder would receive, an explicit acknowledgement that class counsel's duties were to the plaintiff and not to the funder, and a clause whereby funding would only be withdrawn if the plaintiffs breached the funding agreement.[1202] In addition, the funder was required to post security for costs.[1203] Similarly, in *Fehr v Sun Life Assurance Co of Canada*,[1204] a litigation funding agreement was approved, with Justice Perell holding that such agreements had to be disclosed promptly to, and approved by, the court.[1205]

Despite the guidance from the courts, however, numerous questions regarding third-party litigation funding remained outstanding. These concerned the potential for

[1201] *Dugal v Manulife Financial Corp*, 2011 ONSC 1785.

[1202] *Dugal* (n 1201) [6].

[1203] ibid [35]-[37].

[1204] *Fehr v Sun Life Assurance Co of Canada*, 2012 ONSC 2715.

[1205] ibid [89].

over-compensation of funders,[1206] the potential that such funding could interfere with the conduct of the action and the solicitor-client relationship,[1207] the financial ability of funders to satisfy any adverse costs awards,[1208] and whether third party funders would be precluded from disclosing any confidential or privileged information.[1209] Some of these concerns were also raised in the LCO's report on class actions,[1210] and were subsequently addressed in the 2020 amendments to the Ontario CPA.[1211] Pursuant to these amendments, the funded party must seek court approval at the earliest opportunity, the court is given supervisory capacity over the funding agreement, and the defendants are able to recover any cost award directly from the funder. Arrangements must be disclosed in the notice of certification that is distributed to class members. Third-party litigation funding is now a codified part of the Ontario class actions regime, and is also permitted in other provinces including BC,[1212] Québec,[1213] Saskatchewan,[1214] Alberta,[1215] and New Brunswick.[1216]

Funding has also been central to class actions and group litigation in England. One of the key considerations in enacting opt-out class actions in competition law was to increase the size of the class and the pool of potential damages, and thereby attract third

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[1206] Jasminka Kalajdzic and others, 'Justice for Profit: A Comparative Analysis of Australian, Canadian and US Third Party Litigation Funding' (2013) 61(1) AJCL 93, 122.

[1207] ibid 121-122.

[1208] ibid 118.

[1209] ibid 125.

[1210] LCO Report (n 1058) 86-87.

[1211] Ontario CPA, s 33.1.

[1212] *Stanway v Wyeth Canada Inc*, 2013 BCSC 1585.

[1213] *Marcotte v Banque de Montréal*, 2015 QCCS 1915.

[1214] *Schneider v Royal Crown Gold Reserve Inc*, 2016 SKQB 278.

[1215] *Hobshawn v Atco Gas and Pipelines Ltd* (14 May 2009), case No 0101-0499 (ABQB), cited in Dugal (n 1201) [21].

[1216] *Hayes v The City of Saint John et al*, 2016 NBQB 125.

party funding to increase access to justice.[1217] The UK Supreme Court in *Mastercard* recognised this link, finding that, in the absence of certification, no follow-on proceedings would be brought against Mastercard because individual proceedings would be cost-prohibitive.[1218] Similarly, the Court of Appeal found not only that Parliament intended to facilitate redress for breaches of competition law, but to do so in a way that would attract third party funding.[1219]

This mechanism was given a further boost in October 2019, when the CAT[1220] held that services provided under litigation funding agreements were not 'claims management services' under section 4 of the Compensation Act 2006,[1221] and therefore did not satisfy the definition of a Damages-Based Agreement (DBA)[1222] even though the funders' compensation would be determined by the amount of damages paid.[1223] DBAs are not enforceable in competition law class actions,[1224] so a finding that a litigation funding agreement is a DBA would have had serious consequences for the prosecution of those actions. Such funding is now an established part of English class actions.[1225]

[1217] This function is performed by s 47C(6) of the Competition Act, as confirmed by the CAT in *Mastercard* (n 1166). See also Rachael Mulheron, 'Third Party Funding and Class Actions Reform' (2015) 131 LQR 291, 307-310.

[1218] *Mastercard UKSC* (n 1055) [73].

[1219] *Mastercard CA* (n 1076) [60].

[1220] *UK Trucks Claim Limited v Fiat Chrysler & Ors; Road Haulage Association Limited v Man Se & Ors* [2019] CAT 26.

[1221] Compensation Act 2006, c 29.

[1222] Under the Courts and Legal Services Act 1990, c 41, s 58AA.

[1223] In the consultation proposal regarding the draft DBA Regulations, litigation funding agreements are expressly excluded: Rachael Mulheron and Nicholas Bacon QC, *The Damages-Based Agreements Regulations Reform Project 2019: An Independent Review of the DBA Regulations 2013* (3 March 2019), Section 1.

[1224] Competition Act 1998, s 47C(8).

[1225] The CAT's decision (n 1220) went on appeal by way of judicial review and was affirmed unanimously in *Paccar Inc v Road Haulage Association Ltd* [2021] EWCA Civ 299.

Funding has been much more problematic in group litigation. Conditional Fee Agreements (CFAs) and ATE insurance had already become part of the tapestry of multi-party actions by the mid-1990s.[1226] However, the CFA uplift and the ATE premium could previously be recovered from the defendant. Following the Jackson Reforms in April 2013,[1227] the uplift and the premium must both be taken out of the claimants' damages.[1228] As discussed below, this can swallow up the claimant's damages altogether.

Other changes in 2013 that had an impact on group litigation included Qualified One-Way Costs Shifting (QOCS). These were implemented for personal injury actions, with the effect that claimants in such actions will be able to recover their costs from the defendants in the event of success, but, except in certain circumstances,[1229] successful defendants will not be able to recover their costs from claimants. QOCS were implemented as a concession to personal injury claimants who would no longer be able to recover their lawyers' success fees and ATE premiums from defendants.[1230] In addition, DBAs were permitted for the first time, so that a lawyer could be paid a percentage of the claimant's damages in the event of success. The percentage is capped at 25% in personal injury actions, 35% in employment actions and 50% in commercial and other claims.[1231]

Following the Jackson Reforms, therefore, the struggle with costs and funding

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[1226] The Conditional Fee Agreements Order 1995, 1995 No 1674. Under a CFA, a 'basic fee' is payable in the event of success, along with an optional additional uplift or 'success fee', that cannot be more than 100 percent of the basic fee.

[1227] These proposals and other changes were implemented by way of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 2012 c 10 (LASPO), and came into force on 1 April 2013.

[1228] Jackson Report (n 1191) 463; Grave (n 1017) 332; LASPO (n 1227) sections 44, 46.

[1229] These circumstances include where the claim is struck out as disclosing no reasonable grounds for bringing the proceedings, as an abuse of process, or for conduct likely to obstruct the just disposal of the proceedings (CPR 44.15), or if a claim if found to be 'fundamentally dishonest' (CPR 44.16(1)).

[1230] Jackson Report (n 1191) 88, 464; Grave (n 1017) 322-323; CPR 44.13 to 44.17.

[1231] LASPO (n 1227) s 45.

continues. The result of the changes is that the options for funding group litigation are very limited.[1232] Claimants are usually funded by a CFA (and sometimes third-party funding) combined with ATE insurance,[1233] or more rarely, by a DBA combined with third-party funding (known as a 'funder hybrid DBA').[1234] In the former instance, however, the combination of the success fee and the ATE premium can consume the claimant's damages entirely;[1235] in many cases, the amount of the ATE premium will be equivalent to the amount of the defendants' costs had the claimants been unsuccessful.[1236] Similarly, third party funding is expensive and can consume a significant part of claimants' damages. In addition, funders will be looking to make a certain return on their investment, which will necessitate a significant award in damages across the group.[1237]

This generally means that only certain types of claims are economically viable; namely, group actions that involve very large numbers of claimants or very high individual damages awards or both, so that either third party funders can recoup their investment,[1238] or so the success fee and the premium can be spread across a larger number of claims. Personal injury actions are an exception, because they are subject to QOCS and therefore do not require ATE insurance. However, they will still involve a success fee, because the litigation funder still runs the risk of losing its investment.

1232 Damon Parker, 'Aspects of the Administrative and Financial Challenges of Group Litigation in the Courts in London' (unpublished, on file with the author) 1.

1233 CS3 (n 1084); CB2 (n 1049); CS2 (n 1103); CS4 (n 1049); CS8 (n 1049).

1234 Grave (n 1017) 335; CS7 (n 1014).

1235 The same can happen if the claimants' costs are assessed at less than the agreed amount under the DBA; the claimant will then have to make up the shortfall from their damages – they will not be recoverable from the defendant, because of the indemnity principle: Grave (n 1017) 335-336.

1236 Parker (n 1232) 8.

1237 CS3 (n 1084).

1238 Parker (n 1232) 5-6.

This point is key to understanding the declining popularity of formal GLOs, discussed above. Of the 26 GLOs made since April 2013,[1239] most of them are either claims involving very large numbers of claimants (including financial services claims, actions for privacy breaches, and diesel emissions-related consumer actions), or personal injury actions (including product liability claims that allege personal injury).

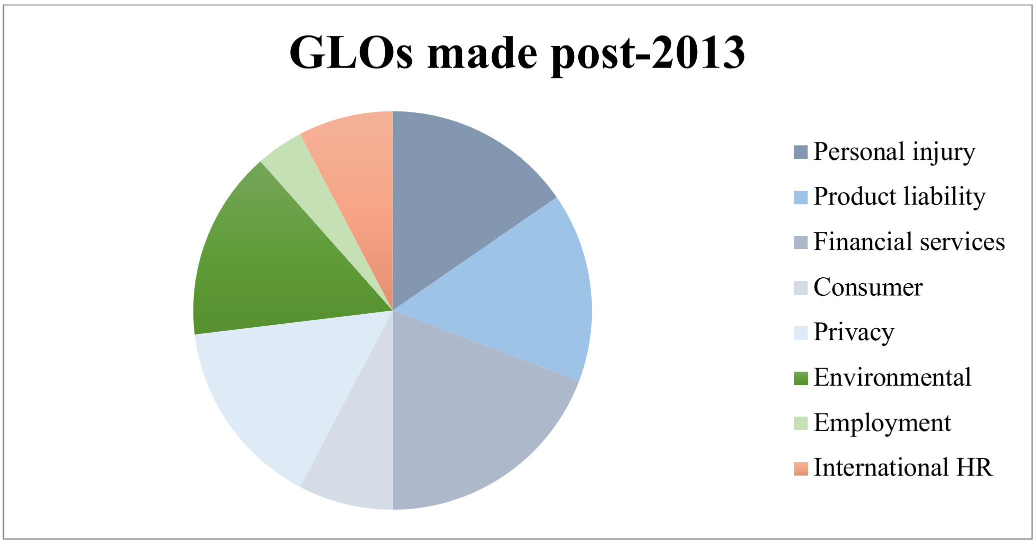

Figure 6 – Types of GLO made from 2013 onwards

The soaring costs of group litigation, as well as the 2013 Jackson Reforms which now require the success fee and ATE premium to be taken out of claimants' damages, mean that group litigation activity in certain areas has reduced drastically.[1240] In order to afford greater access to justice, therefore, it is the issue of costs and funding that must be addressed, as it has been in the context of competition law class actions.

[1239] This information and Figure 6 is based on the list of GLOs on the HM Courts & Tribunals Service website (n 1097).

[1240] Interview with defence solicitor 3 (DS3) (by telephone, 18 March 2019); CS1 (n 1049).

(c) Carriage and Firm Rivalry

Competition between law firms for carriage of the same class or group action has increased cost and delay on both sides of the Atlantic. In Canada, 'carriage fights' have proliferated as firms jostle for position on the most potentially lucrative proceedings – these are usually national class actions, and so the competition develops on the national stage between class proceedings commenced in different provinces. As noted above, various legislative amendments have been passed in order to address this issue, although they are likely to be of limited success given Canada's constitutional structure and the inherently provincial nature of civil litigation, which prevents the establishment of a central federal authority on the matter.

Uncertainty regarding the criteria on which courts will rely in determining carriage[1241] has increased the delay caused by these motions, which can often derail the main litigation for more than a year. Stakeholders consulted by the Law Commission of Ontario for its 2018 Report stated that the process was inefficient and unpredictable.[1242] The amendments to the CPA therefore imposed timelines and established guidelines for determining carriage.[1243] Motions must be brought within 60 days of the issuance of the first action, following which competing proceedings may not be brought without leave of the court. There will be no appeal from carriage decisions, and counsel will not be able to recoup the costs of such motions from class members.

[1241] Prior to the recent amendments to the Ontario CPA, there were sixteen factors the courts might consider in awarding carriage; the factors were not exhaustive and the courts frequently articulated new factors in different cases: Gerald Antman, 'Carriage Motions in Ontario: Inconsistent Application of an Indeterminate Test' (2018) 13(1) CCAR 101.

[1242] LCO Report (n 1058) 23.

[1243] Ontario CPA, s 13.1; ibid 5, 23-29.

Currently there are no similar legislative amendments in other provinces; however, given BC's recent conversion to an opt-out jurisdiction, and the fact that it is a no-costs regime, class action activity is likely to increase dramatically there in future, making the carriage issue more pressing. In Québec, the 'first to file' rule established in *Hotte c Servier Canada*[1244] makes the carriage issue simple: the first party to file an application is permitted to seek the authorisation to proceed with the class action, and all subsequent applications are stayed. If the party fails to obtain authorisation, then subsequent parties may attempt to replace the first party. While this reduces cost and delay, it can also encourage sloppy materials and is not determinative where there is competition with actions commenced in other jurisdictions.[1245]

Similar issues have caused cost and delay in English class actions and group litigation. In the class actions context, one of the first 'carriage fights' arose between two claimant law firms in a case involving the price-fixing of transport trucks.[1246] Following the UK Supreme Court's *Mastercard* decision, the two CPO applications have now been heard and the CAT's judgment is pending. In light of the Supreme Court's decision, it seems that many more firms will enter this space and more 'carriage fights' will ensue.

In the GLO context, the most notorious carriage fight involved the Volkswagen Diesel Emissions litigation. In that case, Your Lawyers Limited, a relatively small and inexperienced firm, joined forces with Harcus Sinclair LLP, a larger and more experienced firm. On 11 April 2016, Harcus Sinclair signed a non-disclosure agreement with a non-compete clause, by which it undertook 'not to accept instructions for or to act on behalf of any other group of Claimants in the contemplated Group Action' without the express

[1244] 1999 CanLII 13363 (QCCA).

[1245] *Micron Technology Inc c Hazan*, 2020 QCCA 1104.

[1246] *UK Trucks* (n 1069); *Road Haulage* (n 1069).

permission of Your Lawyers. Harcus Sinclair then gathered approximately 43,000 clients of its own. Your Lawyers successfully obtained an injunction from the High Court, which held that Harcus Sinclair had breached the non-compete clause.[1247] The Court awarded Your Lawyers an injunction for six years from the NDA, requiring that Harcus Sinclair and its affiliates cease acting in the VW Emissions Litigation.[1248] The Court of Appeal discharged this injunction, holding that the NDA was unenforceable as an unreasonable restraint of trade.[1249]

In the meantime, Harcus Sinclair's application for a GLO in November 2016 was held to be premature because the dispute between the solicitors' firms had not yet been resolved.[1250] The GLO was eventually granted in March 2018, with Slater and Gordon and Leigh Day as the Lead Solicitors, and Your Lawyers joining them on the Steering Committee.[1251] The dispute between the solicitors distracted time and resources from the main litigation for approximately 18 months.

The issues regarding competition between claimant firms has not been overcome by the GLO framework or the enactment of opt-out class actions in competition law. In fact, as demonstrated by the Canadian experience, such issues are likely to worsen as class actions become more commonplace, law firms more sophisticated, and the market more competitive.

With regard to all the problems in class actions and group litigation outlined above, the enactment of generic opt-out class actions in England will address only some of those

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[1247] *Harcus Sinclair LLP v Your Lawyers Limited*, [2019] EWCA Civ 335 [13].

[1248] ibid [49].

[1249] ibid [81]-[89], [100].

[1250] *VW Nox Emissions Group Litigation* [2018] EWHC 2308 (QB).

[1251] *VW Nox Emissions Group Litigation* [2018] EWHC 2006 (QB) [4]-[5].

problems. Certainly the issue of funding would be much more straightforward in the class actions context. However, costs would continue to be an issue (as demonstrated by Ontario and other jurisdictions), unless class proceedings were exempt from traditional costs rules. Given that the current competition law framework does not include such a provision, it is unlikely that it will be enacted for any generic scheme. Furthermore, with regards to rivalry between law firms, the Canadian experience demonstrates that this is just as much of a problem – if not more so – within a generic class actions regime.

3. Representative Actions

While the bulk of this chapter has focused on class actions and group litigation, one historical procedure continues to persist in both England and Canada. As discussed in Chapter 4, the Court of Appeal's broad interpretation of the 'same interest' test in *Lloyd v Google*[1252] indicates the possibility that the class action regime may be extended beyond competition law. This section will look to Canada, to see what happens to the representative action procedure once generic class actions legislation is introduced.

Representative actions are now a relative rarity in Canada (they have never been available in Québec). The country's jurisdictions can be divided into four groups: the first have always relied on representative actions, having never had class proceedings legislation (these include PEI, Northwest Territories, Nunavut, and Yukon); the second group of jurisdictions retained their representative action rules even after they enacted class proceedings legislation (BC, Alberta, Saskatchewan, New Brunswick, and Newfoundland); the third group retained their representative action rule in a different form, either adding conditions to be met in order to proceed, or restricting them to classes of defendants (Federal Court and Ontario); and the fourth group repealed their representative

[1252] (n 1169).

action rules upon the enactment of class proceedings legislation (Manitoba and Nova Scotia). The chart below shows the limited number of representative actions (if any) that have been brought in each group of jurisdictions since class proceedings legislation was enacted there.[1253]

Jurisdiction	Representative Action	# of rep actions since class proceedings legislation
PEI	PEI *Rules of Civil Procedure*, s 12.01	2
Northwest Territories	*Rules of the Supreme Court of the Northwest Territories*, NWT Reg 010-96, Rule 62	4
Nunavut	*Rules of the Supreme Court of Northwest Territories*, NWT Reg (Nu) 010-96, Rule 62	3
Yukon	*Rules of Court*, Yuk Reg OIC 2009/65 (Judicature Act), s 5(11)	2
British Columbia	*Supreme Court Civil Rules*, BC Reg 168/2009, s 20-3(1) (formerly Rule 5(11))	21
Alberta	*Alberta Rules of Court*, Alta Reg 124/2010, s 2.6 (formerly Alta Reg 390/1968, Rule 42)	6
Saskatchewan	*Sask QB Rules 2013*, Pt 2, s 2-10 (formerly Rule 70)	5
New Brunswick	*Rules of Court of New Brunswick*, NB Reg 82-73, Rule 14.01	1
Newfoundland & Labrador	*Rules of the Supreme Court*, 1986, SN 1986, c 42, Sched D, s 7.11	4
Federal Court	*Federal Courts Rules*, SOR/98-106 (Rule 114) Repealed 21 Nov 2002; reinstated 13 December 2007	9
Ontario	Representative action rule repealed and replaced with *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 12.07 (representative defendants)	11
Manitoba	Representative action rule repealed on enactment of class proceedings	0
Nova Scotia	Representative action rule repealed on enactment of class proceedings	0

Why has the representative action been used in such a limited fashion, even in jurisdictions which have no class proceedings legislation? First of all, such jurisdictions have often been included in a national class from another province, usually BC or Ontario. Second and

[1253] This chart was created by noting up the relevant Rules of Court/Rules of Civil Procedure for each jurisdiction, and counting the cases that had been commenced since the date of the enactment of class proceedings legislation in that jurisdiction. If no class proceedings legislation was enacted, then all the representative actions commenced in that jurisdiction were counted.

more importantly, litigants that continued to use the representative rule, even after *Dutton*[1254] essentially transformed it into the common-law form of the class action, encountered significant procedural obstacles.

In BC, for example – the province that has seen the most frequent use of the representative action – such actions can be brought under Rule 20-3 of the BC Supreme Court Civil Rules, which is worded in a very similar fashion to equivalent rules in other jurisdictions.[1255] However, such actions are restricted to claims made by limited and clearly ascertainable classes of persons, asserting a common statutory or collective right (such as Aboriginal or language rights), or those who seek a common statutory declaration or remedy (such as members of unions or a housing cooperative).[1256] The requirements are similar in Saskatchewan,[1257] New Brunswick,[1258] and Alberta.[1259] In BC, Aboriginal rights claims commonly proceed as a representative action.[1260] Similarly, in the Federal Court, such claims have been historically well-suited to the representative rule; this is demonstrated by those communities' protests following the revocation of that rule when class actions were enacted.

As can be seen from the chart below, the majority of representative actions brought in Canada now are for Indigenous claims.[1261] Labour and pension claims also feature

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[1254] *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46.

[1255] *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 20-3(1).

[1256] *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856 [499], [524].

[1257] *UFCW Local 1400 v Saskatoon Co-operative Association Ltd*, 1992 CarswellSask 117.

[1258] *Rules of Court of New Brunswick*, NB Reg 82-73, Rule 14.02.

[1259] *Champagne v Sidorsky*, 2012 ABQB 522 [67]; *Canada (Attorney General) v Lameman*, 2008 SCC 14.

[1260] *Cowichan Tribes v Canada (Attorney General)*, 2018 BCSC 2254 [26].

[1261] This chart is based on the cases recorded for the table above.

heavily, followed by actions against the government (including for breaches of human rights), and by co-owners of real property.

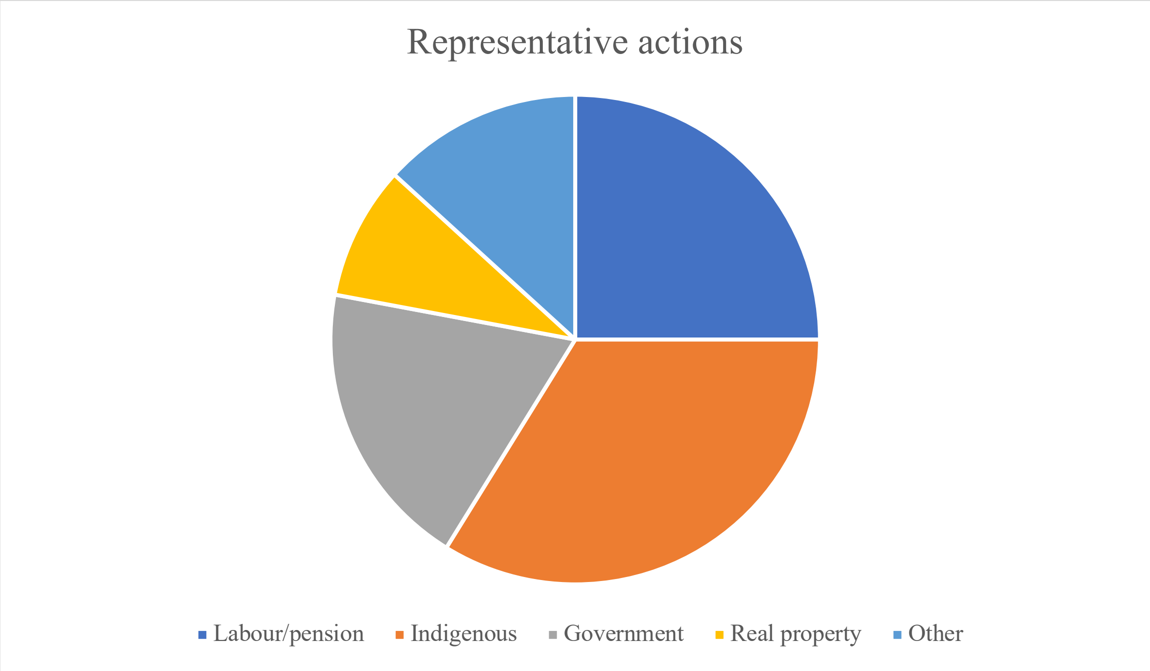

Figure 7 – Representative actions commenced since class proceedings legislation enacted

All of these, with the possible exception of some actions against the government, meet the above-noted requirement of a limited and clearly ascertainable class, asserting a common statutory or collective right, or seeking a common declaration or remedy. This has historically been the requirement for representative actions, as discussed in Chapter 4: a pre-existing group seeking a common right or remedy. Following the liberalisation of the representative rule in the 1970s, then, it has come full circle and is now fulfilling the purpose for which it has been used for centuries.

4. Conclusion

A comparison of the current-day practice of collective redress in Canada and England provides some useful insights. The initially restrictive approach to class actions in Canada has also been seen in England, and the increasingly liberal approach by courts and practitioners in the former provides encouragement for reformers in the latter.

The problems endemic to collective proceedings are less encouraging. The Canadian experience reveals that class proceedings do little to reduce cost and delay, although in a class action the class members do not have to bear the risk of adverse costs (unlike in group litigation). Furthermore, the wasteful and unseemly rivalry between law firms in English group litigation has also been seen in class proceedings on both sides of the Atlantic. However, class actions do make a difference in the context of funding – and it is apparent that this can make the difference between commencing a proceeding and having no access to justice at all.

Finally, the fate of the representative action in Canada is interesting. While the *Lloyd v Google* decision of the England & Wales Court of Appeal[1262] indicates a more liberal interpretation of the rule, this is no longer the approach in Canada as it was in the 1970s. Instead, with class proceedings legislation having been passed in most provinces, the representative rule has resumed its historical place in Canada as a device for the declaration of the rights of pre-existing groups to which a common remedy will apply. It remains to be seen whether the representative rule will experience the same fate in England.

The next chapter evaluates the policy choices on collective redress that have been made in England and Canada. Based on that evaluation, I make recommendations for reform which implicate the collective proceedings framework on both sides of the Atlantic. Canada would benefit from importing some of the approaches from the English group litigation regime, in order to ensure greater compensation for larger individual claims while continuing to litigate common questions efficiently. England would benefit from

[1262] (n 1169).

generic opt-out class proceedings for smaller claims below a certain threshold, which would provide access to justice for individually non-viable claims. Representative actions in both countries should be used for the purposes for which they have historically been used: for the litigation of the rights of pre-existing groups seeking a common remedy. These recommendations are supported and developed further in the final chapters of this thesis.

Chapter 7:
Evaluation of Class Actions Policy Choices and Recommendations for Reform in Canada and England

This chapter evaluates the policy choices made in collective redress in Canada and England, and makes recommendations for reform in both countries. This process takes place through the lens of access to justice, judicial economy, and behaviour modification which have justified a departure from the traditional model of accurate justice. Chapters 4-6 have also delineated the different roles played by class actions, group litigation, and representative actions, and this chapter continues that analysis.

The first section focuses on group litigation in Canada. As noted in Chapter 6, this mechanism fell out of use following the enactment of class proceedings legislation, in contrast to its enduring popularity in England. However, group litigation has begun to rise in popularity again in Canada due to the ability to work with US counsel to settle 'inventories' of claims, the cost and delay that have arisen in the class actions process, and the potential difficulties with claims that contain numerous individual issues under Ontario's amended CPA.[1263] I conclude that, in cases involving significant individual damages, group litigation will often be a more proportionate way of proceeding, and will more effectively advance the aims of access to justice, judicial economy, and even behaviour modification. This will be facilitated by a more formal group litigation structure, similar to England's GLO framework, for claims involving significant individual damages.

The chapter then moves on to an evaluation of the class action regimes in Canada, and whether and how they have balanced the aims of access to justice, judicial economy, and behaviour modification. This analysis focuses on the recent amendments to the

[1263] *Class Proceedings Act, 1992*, SO 1992, c 6 (Ontario CPA).

Ontario CPA, which represent the first major piece of reform in Canada since class actions were enacted. In light of this evaluation, I will make recommendations for reform, including the enactment of class proceedings legislation in Prince Edward Island and the territories; stronger and more meaningful opt-out rights to protect class members' interests and litigant autonomy; and the increased use of technology and other tools to get compensation more effectively to class members. As explained below, these reforms will promote access to justice and judicial economy and, to a lesser extent, behaviour modification.

The second section focuses on England. It begins with an evaluation of the GLO framework under CPR 19.III, and group litigation generally. Given the preference amongst group litigation practitioners for less formal procedures as demonstrated in the previous chapter, this section considers whether changes need to be made to the GLO framework in order to increase access to justice and improve judicial economy. It also argues that requiring the commencement of individual claims, even if those claims are managed together, is disproportionate in certain cases and is undesirable from the perspective of all three justifications for class actions. The VW 'Dieselgate' litigation will be used as a case study here. Consequently, I recommend that individually non-viable claims, and other small claims under a certain monetary amount, should be subject to a class action regime. This would be particularly applicable to certain areas such as consumer protection, data breaches, and financial services. I also consider whether any changes should be made to the nascent collective proceedings framework at the Competition Appeal Tribunal.

Finally, this chapter considers the representative action in Canada and England. As noted in Chapters 4-6, the representative action is suited to the litigation of group rights. While Canadian courts initially attempted to expand its function to that of the modern class action, the enactment of class proceedings legislation has largely halted this effort. In

England, there have been signs of some expansion of the representative action in the *Lloyd v Google* case.[1264] While the Court of Appeal ostensibly continued to restrict such actions to situations in which group members share the 'same interest', the decision departed from precedent and involved a somewhat artificial interpretation of that test. Restricting the device to its traditional boundaries is preferable from the perspective of doctrinal coherence, given that the functions performed by class and representative actions are quite different. I recommend that representative actions should not be reformed at all, and should continue to fulfil their traditional narrow purpose in both countries, with class proceedings performing a more expanded role.

1. Group Litigation in Canada

(a) Evaluation

The group litigation mechanisms in Canada are limited and infrequently used. There are no rules or statutes that pertain to group litigation or which are equivalent to the English GLO. However, there are rules for consolidation of proceedings. Under Rule 6.01(1) of the Ontario Rules of Civil Procedure,[1265] where two or more proceedings are pending in the court and it appears they have a question of law or fact in common,[1266] the court may order that the proceedings be consolidated, or heard at the same time or one immediately after the other, or that any of the proceedings be stayed until after the determination of any other of them.[1267] Since the enactment of the Ontario CPA, only 65 actions have cited this

[1264] *Lloyd v Google* [2019] EWCA Civ 1599.

[1265] *Rules of Civil Procedure*, RRO 1990, Reg 194.

[1266] Or that the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences, or for any other reason an order ought to be made under this rule.

[1267] Or that any of the proceedings be asserted by way of counterclaim in any other of them.

rule, and in only six of them have the court considered that the actions could have been brought as a class proceeding. A similar rule exists in BC,[1268] and it has only been cited four times (one of which involved the appeal of a certified class proceeding) since the BC Class Proceedings Act[1269] was enacted.

Although these mechanisms have fallen out of use since the enactment of class proceedings legislation across Canada,[1270] there are indications that they may be on the rise again, particularly in Ontario. As discussed in Chapter 6, the recent addition of the superiority and predominance requirements to the 'preferable procedure' criterion of the Ontario CPA[1271] may make it more difficult to bring class proceedings where a common issue makes up a very limited aspect of the liability question and many individual issues remain to be decided (for example, in cases involving systemic negligence).[1272] In cases where the common issues do not predominate, Ontario courts may now find that another way of proceeding is superior: this could include joinder, or consolidation or hearing together under Rule 6.01(1).

This may lead to more 'mass tort'-style litigation in the province, and many practitioners have been anticipating such a development[1273] by pursuing numerous individual claims in parallel (either as a multi-plaintiff action, or through individual actions) and settling them *en masse* or one by one. Such cases usually involve significant

[1268] *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 22-5(2).

[1269] RSBC 1996, c 50 (BC CPA).

[1270] This has also occurred in Alberta: interview with Alberta defence counsel 1 (AB defence counsel 1) (by telephone, 5 September 2019).

[1271] Ontario CPA, s 5(1.1).

[1272] Such as *Cloud v Canada (Attorney General)*, 2004 CanLII 45444 (ONCA).

[1273] Valérie Lord, 'Alternatives to Class Actions' (The Fundamentals of Class Actions seminar, Ontario Bar Association, Toronto, 26 November 2020).

potential damages (usually $50,000 or more)[1274] and typically involve personal injury as a result of defective products which have also been the subject of litigation in the US.[1275] Lawyers in Canada will amass an 'inventory' of claims in their jurisdiction, and will often work with other lawyers to share information, resources, and costs of experts. They will also have close contact with lawyers working on parallel litigation in the US.[1276] Depending on the progress of the US litigation (usually after a number of 'bellwether' test trials, the results of which are generally persuasive in the settlement of related claims), the Canadian lawyers will begin negotiating with the defendants to settle their inventory of claims.

Canadian firms that pursue this approach have reported numerous advantages, including higher rates of recovery for their clients,[1277] as well as being able to maintain control of their cases instead of having them subsumed into a class action of which they might not have carriage.[1278] The revival of this 'mass tort' approach is therefore something of a return to accurate justice, as defined in Chapter 3, with more accurate compensation[1279] and increased litigant autonomy. Compensation is much more likely to get to group members, because they are all identified individually and in advance of

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1274 ibid.

1275 In the US, mass tort actions – usually involving personal injury – are handled through Multidistrict Litigation (MDL), which works in a similar way to the GLO.

1276 Borden Ladner Gervais, 'Class Action and Mass Tort Defense: Don't Get Caught Off Guard in Canada' (*BLG*, 15 October 2015) <www.blg.com/en/News-And-Publications/publication_4358> accessed 14 February 2021.

1277 Lord (n 1273); Marg Bruineman, 'Opting out of class action can have its rewards' *Law Times* (Toronto, 29 October 2018).

1278 Lord (n 1273); BLG (n 1276) 2.

1279 Certified Podcast, 'Cheryl Woodin on Relief Available in Class Actions' (13 January 2021) <https://certified.simplecast.com/episodes/cheryl-woodin-on-relief-available-in-class-actions> accessed 10 April 2021.

settlement or trial,[1280] even though this 'opt-in' approach generally results in smaller groups and therefore less deterrence for the defendant.[1281]

The mass tort approach is also a more proportionate way of litigating individually viable claims. Claimants with individually strong claims can receive the benefits of a class action, including litigating common issues in common and sharing costs, without the need for lengthy and expensive certification proceedings.[1282] The approach can also be advantageous for defendants, because they can address the issues that are usually central to mass torts – particularly causation and damages – sooner than in a class proceeding.[1283]

The benefits of mass tort litigation are similar to some of the benefits of class actions, including 'increased leverage in settlement negotiations, economies of scale in litigation costs, equalization of plaintiffs' and defendants' financial risks, and conservation of defendants' assets.'[1284] Balanced against these, however, are some of the drawbacks to the mass tort approach; as detailed in Chapter 6, many of these disadvantages are common to both group litigation and class actions. The remainder of this section will address these issues, and the next section will recommend a group litigation structure for Canada that takes them into account.

i. Ethical Issues

Mass tort litigation raises many of the agent-principal issues that exist in class actions. In larger cases, there is the potential for individual claimants to lose control of their own

[1280] The other benefits of opting-in are noted in Susan MC Gibbons, 'Group Litigation, Class Actions, and Collective Redress: An Anniversary Reappraisal of Lord Woolf's Three Objectives' in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009) 152, 122.

[1281] Craig Jones, *Theory of Class Actions* (Irwin Law 2003) 3.

[1282] BLG (n 1276) 2.

[1283] ibid 2-3.

[1284] Lynn A Baker, 'Mass Torts and the Pursuit of Ethical Finality' (2017) 85 Fordham L Rev 1943, 1966.

litigation, because management is transferred to a central steering committee.[1285] These issues are apparent in the interviews discussed in Chapter 6. There is then the danger that the steering committee will enrich itself and its clients at the cost of the claimant group; and unlike in class actions, there is no explicit duty for the steering committee to guard the interests of the claimant group.[1286] In many cases, the conflict is between securing a global settlement for all the cases, thereby keeping the settlement amount higher even for the weaker cases (but potentially watering down the amount for the stronger cases), and settling the stronger cases while leaving the weaker cases for a much lower global settlement.[1287]

In this way, the interests of some members will be traded off against the interests of others.[1288] This is a particular danger in 'inventory' settlements, which are usually resolved according to a matrix whereby claimants will get a certain amount according to the category of damages into which they fall.[1289] However, inventory settlements where each case is settled on its own merits and for its own amount are much less risky than entire inventories that are settled for a lump sum. Where the claimant lawyers have the discretion to divide up that sum amongst their inventory, the temptation is to give some claimants a greater share of the settlement amount in order to 'buy' their consent to the settlement.[1290] Lump-sum settlements where the defendants can buy finality will generally

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[1285] Alexandra D Lahav, 'The Continuum of Aggregation' (2019) 53 Ga L Rev 1393, 1398.

[1286] ibid 1398-1399, 1407.

[1287] ibid 1407. Nevertheless, one of the arguments in favour of collective redress is that the loss in terms of litigant control and compensation is balanced by the gain in costs savings (and risk mitigation) from litigating as a group.

[1288] ibid 1405.

[1289] This was the approach used to settle individual claims in Ontario's trans-vaginal mesh litigation: Lord (n 1273).

[1290] Charles Silver & Lynn Baker, 'I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds' (1998) 84 Va L Rev 1465.

attract a premium as the price for that finality, and therefore be more attractive to claimants' counsel.[1291] It may therefore be very difficult for counsel to give impartial advice to a client who wishes to decline the offer.[1292]

Generally, however, it is much more difficult to buy 'global peace' by way of settlement in mass tort litigation than it is in class actions. While the suggestion has been made in both England and the US that claimant groups could vote on any global settlement,[1293] these have not been formalised as part of England's GLO mechanism, and the ethics rules in the US forbid this approach.[1294] I recommend below that such voting mechanisms be part of any Canadian group litigation framework, as well as the English GLO. This would facilitate the achievement of 'global peace' and would make the group litigation framework more attractive to defendants.

ii. Establishing Causation

As Alexandra Lahav has pointed out, mass torts illustrate numerous tensions 'between the day-in-court ideal and the realities of the mass market.'[1295] Mass torts arise from many of the same scenarios from which class actions arise, the archetypal ones being defective products and defective pharmaceutical drugs. While these cases require that individual causation be established, such a requirement is in tension with the collective nature of the

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[1291] Baker (n 1284) 1946.

[1292] ibid 1948-1949.

[1293] Samuel Issacharoff and others, *Principles of the Law of Aggregate Litigation* (American Law Institute 2010) 265-270; Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996) [17.87].

[1294] Nancy J Moore, 'Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule' (2013) 81 Fordham L Rev 3233, 3236-3237.

[1295] Lahav (n 1285) 1408.

litigation.[1296] This is demonstrated by the 'predominance' requirement under US Federal Rule 23[1297] and s 5(1.1) of the Ontario CPA. Issues of individual causation have meant that mass tort class actions have rarely been certified in the US,[1298] and may not be certified in Ontario in future. A compelling alternative, then, is group litigation in the style of the US MDL or the English GLO – that is, a formal, regulated framework that is subject to court review, as detailed below.

In such litigation, issues of individual causation are normally reflected at the settlement stage. When negotiating a settlement of an individual case, the amount agreed upon will reflect the chances that causation could be established at trial. When negotiating the settlement of an inventory of cases, the agreed upon amounts will reflect the statistical probability that the defendant's actions caused the claimants' injuries. Therefore, while there is a departure from accurate justice in this approach to causation and damages in inventory settlements, this is counterbalanced by the efficiency and judicial economy of this approach and its role in encouraging settlement, thereby increasing access to justice.

In certain species of class actions in Canada, however, the question of causation has not been a barrier at certification. For such proceedings, the class action continues to be a viable mechanism, especially where numerous small claims make individual actions less economically viable. In competition law class actions, for example, the Supreme Court of Canada held in *Pro-Sys*[1299] that indirect purchasers should not be prevented from claiming losses simply because of the difficulty in proving that those losses had been passed on to them; the risk of double or multiple recovery as between direct and indirect

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[1296] Samuel Issacharoff, 'Class Actions and State Authority' (2012) 44 Loy U Chi LJ 369, 387.

[1297] US *Federal Rules of Civil Procedure*, Title IV: Parties, Rule 23: Class Actions, 383 US 1029 (FRCP).

[1298] Alexandra D Lahav, 'Mass Tort Class Actions - Past, Present, and Future' (2017) 92 NYU L Rev 998, 1009-1010.

[1299] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57.

purchasers could be managed by the court. Furthermore, the Court held that in many cases an action by indirect purchasers might be the only way in which overcharges can be claimed and deterrence promoted. In securities class actions, there is no requirement under the Ontario or BC Securities Acts that claimants show they relied on the responsible issuer having complied with its disclosure requirements,[1300] which makes it much easier to prove causation and damages on a class-wide basis. In these circumstances, the substantive law has been amended in order to facilitate the class action procedure.[1301]

These issues in Canadian mass torts will be addressed in the next section that makes recommendations for reform.

(b) Recommendations for Reform

The lack of specific rules or statutes pertaining to group litigation is not necessarily an impediment to the creation of informal procedures. As detailed in Chapters 5 and 6, group litigation in England arose from the *ad hoc* procedures created by judges in the multi-party actions of the 1980s and 1990s. Even today, practitioners exhibit a preference for informal collective case management under the CPR than the use of formal GLOs under CPR 19.III. Similarly, in the US, the Multidistrict Litigation Act[1302] is drafted in such a way that judges have been able to create *ad hoc* rules for the cases before them, leading to an evolution of procedure that mimics the development of the common law.[1303]

[1300] *Securities Act*, RSO 1990, c S.5, s 138.3(4); *Securities Act*, RSBC 1996, c 418, s 140.3(1). Reliance need not be demonstrated in England either, pursuant to the Financial Services and Markets Act 2000, 2000 c 8, s 90.

[1301] Under several of the provincial tobacco healthcare costs recovery statutes in Canada, causation can also be proven on the basis of statistical information: *Létourneau c JTI-MacDonald Corp*, 2015 QCCS 2382 [929], affd *Imperial Tobacco Canada ltée c Conseil québécois sur le tabac et la santé*, 2019 QCCA 358.

[1302] *Multidistrict Litigation Act*, 28 USC § 1407.

[1303] Alexandra D Lahav, 'Multidistrict Litigation and Common Law Procedure' (2020) 24 Lewis & Clark L Rev 531, 533.

Nevertheless, some rule-based structure should be provided for the growing number of mass tort cases in Canada (and particularly Ontario), for several reasons. First, in the US and England, there is some structure even for the most informal procedures. The *ad hoc* rules that have arisen have been used repeatedly in various cases, and the pattern in the US and England has been remarkably similar. For example, judges will:[1304]

- Appoint a steering committee to run the litigation;
- Issue orders permitting master pleadings;
- Issue orders regarding disclosure of information;
- Issue orders with regard to costs (such as costs sharing orders) and fees; and
- Permit the use of test cases to determine common issues of fact or law.

Second, as noted in previous chapters, England's informal procedures work well because they evolved through a long, convoluted, and 'painful'[1305] process that gave rise to calls for a more formal structure (even though the structure that eventually transpired was arguably too restrictive). Informality has therefore been buttressed by experience.[1306] Because of Canada's reliance on class proceedings over the past few decades, it has very little such experience on which to rely. For example, in a recent case before the Ontario Superior Court of Justice that involved a class action and a number of 'mass tort' litigants, Justice Glustein made certain directions to address the latter's concerns with the notice and opt-out procedures proposed by class counsel.[1307] While these directions demonstrated resourcefulness and ingenuity, the proposals put forward by the mass tort counsel

[1304] Chapters 5 and 6 discuss this practice in England; Lahav (n 1303) 536-540 discusses this practice in the US.

[1305] Interview with claimant solicitor 3 (CS3) (by telephone, 8 March 2019).

[1306] Lahav (n 1303) 539, 546, notes that judges assigned an MDL look to other judges to determine what they have done in their cases, and this was also the case in England.

[1307] *Arsalani v Islamic Republic of Iran*, 2021 ONSC 1334.

(including providing opt-outs on behalf of litigants without evidence of their knowledge or consent) showed the conceptual blurring between class actions and group litigation, and therefore the need for some structure with regard to the latter. The development of the MDL and GLO frameworks reflects a recognition that certain kinds of cases need to be aggregated to avoid duplicative litigation and the wasting of judicial resources, even if (in the US) they would not be appropriate for a class action.[1308]

Finally, the structure of group litigation in Canada should be tailored to the type of claim under consideration. As noted below in the context of English group litigation, the formal GLO structure works well for more complex claims involving numerous common questions, where claimant groups are less well-defined, where competition for control of the litigation is more likely, and where agreement cannot be reached on key case management issues. The more informal group litigation structure is more effective where there is more agreement between the parties, there are fewer common questions, and where a well-defined constituency is represented by only one or a few law firms. For certain types of claim, then, informal group litigation will continue; for others, a more formal structure is needed.

To encourage the use of group litigation procedures for certain cases, specific rules for mass torts should be introduced in Canada. As this would have to be done on a provincial level, and the need for a mass tort mechanism appears most prevalent in Ontario, the following recommendations will focus on that province.

This raises an additional complication, one that does not exist in either the US or England. According to Canada's constitutional structure, civil procedure is a provincial matter.[1309] As a result, there can be no federal rules of multi-district litigation as exist in

[1308] Chapter 5; Lahav (n 1285) 1398.

[1309] *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s 92.

the US (because this would be *ultra vires* the federal power), and no central GLO mechanism as exists in England. Any group litigation rules in Canada must be developed province-by-province; yet class actions are increasingly national in scope, and this necessarily leads to some duplication. Efforts to overcome this phenomenon in the class action context have met with limited success; a group litigation mechanism would encounter the same limitations. Nevertheless, such a mechanism would still provide benefits that would make its enactment worthwhile. This section will therefore provide a framework for mass tort litigation in Ontario.

i. Starting the Process

The process in a mass tort in Ontario would be commenced in the same way it is now – by starting an individual claim on behalf of each claimant. In order to promote efficiency and reduce the administrative burden, master pleadings could be used for the claimant group, as they are used in English GLOs.[1310] Individual details could then be disclosed by way of 'a schedule containing entries relating to each individual claim specifying which of the general allegations are relied on and any specific facts relevant to the claimant.'[1311] These entries could be based on claimant questionnaires or fact sheets, as have frequently been used in mass tort and class action litigation in Ontario. Later in the process, when a group litigation order is made, the order may specify the details that must be included in the individual questionnaires to show that the criteria for entry onto the group register have been met.[1312]

[1310] CPR 19.13(d), 19B PD 14.

[1311] 19B PD 14.1(2).

[1312] CPR 19.13(d).

ii. Case Management

As soon as possible after starting the process, counsel for the claimant group should write to the court and request that a case management judge be appointed.[1313] It is to this judge that the motion for a group litigation order will be made. The subject-matter of the claim and the name of counsel for the group must also be placed on a central registry, in order to reduce the risk of overlapping groups. This is currently the practice in class actions in Canada,[1314] and is also a requirement of the English GLO framework.[1315]

Either before or at the motion for a group litigation order, the case management judge will also decide who will represent the claimant group (if leadership is contested), and appoint a steering committee. As noted in the previous chapter, these are common practices in English GLOs,[1316] Canadian class actions,[1317] and US MDLs.[1318] This level of judicial oversight will address much of the agent-principal problem identified above,[1319] and will reduce the delays and satellite litigation that arise from leaving the steering committee question to the lawyers. In addition, as detailed below, any inventory settlement of claims subject to a group litigation order will also require court approval.

[1313] This is the current practice in Ontario upon commencing a class action (although it is not required by statute). See also 19B PD 12.

[1314] Ontario CPA, s 2(1.1); *Class Proceedings Act*, RSBC 1996, c 50, s 2(2)(b) (BC CPA); *Class Proceedings Act*, SA 2003, c C-16.5, s 2(2)(b) (AB CPA); *The Class Actions Act*, SS 2001, c C-12.01, s 4(2)(c) (SK CAA). The central registry is the Canadian Bar Association's Class Action Database <https://www.cba.org/Publications-Resources/Class-Action-Database> accessed 10 April 2021.

[1315] 19B PD 2.1, 11(1).

[1316] CPR 19.13(c).

[1317] Ontario CPA, s 13.1.

[1318] Lahav (n 1285) 1398-1399.

[1319] ibid 1396-1397.

iii. Motion for a Group Litigation Order

The motion for a group litigation order will be similar to a motion for certification in Ontario, although the requirements will be somewhat different. The motion should be made to the court in which the claims are being case managed, and any order made will include a provision that related claims be transferred to that court.[1320] Such an order will also require that all claimants be placed on a group register (as required by the GLO framework in England),[1321] so that any judgment or settlement will bind all those on the register. However, the decision regarding the advertising of any group litigation should be within the court's discretion. In the interviews detailed in Chapter 6, numerous English group litigation practitioners stated that advertising creates unpredictability for claimant lawyers because competing lawyers and many weak claims may come forward, and it also has reputational ramifications for defendants. Giving the court discretion with regard to advertising will therefore encourage more parties to use the group litigation mechanism. In addition, cut-off dates should be imposed only on a rolling basis,[1322] so that potential claimants who have previously been unaware of the litigation can join at a later date; towards the conclusion of any settlement or judgment, the cut-off dates may have to be imposed more rigidly. This would mitigate another risk of formal group litigation identified by English interviewees: that class closure can lead to satellite litigation and negligence proceedings by subsequent claimants who are excluded from the class.

Before granting a group litigation order, the court will require that the claims in the group raise 'common or related issues of fact or law'. This wording can be found in the

[1320] CPR 19.11(3)(a)(i).

[1321] CPR 19.11(2)(a), 19.13(f); 19B PD 6.

[1322] 19B PD 13.

English GLO criteria[1323] although, in light of Ontario's class action case law, it will be applied less stringently in Ontario. For example, in *Rumley v British Columbia*, the Supreme Court of Canada upheld the decision certifying the class action even though there was only one primary common issue.[1324] By contrast, in *Hobson v Ashton Morton Slack Solicitors*,[1325] the High Court held that the agreements in question and the allegations of misrepresentation were necessarily individual and fact-specific, even though the claimants had made some effort to identify common issues. Difficulties with identifying issues that are common or related across the group can be addressed in certain circumstances by dividing the claimant group into sub-groups. This is a feature of England's GLO framework[1326] and class proceedings in most provinces.[1327]

As noted in Chapter 6, the court in *Hobson* also considered the issue of preferability – whether any order other than a GLO would be appropriate and whether, as required by PD 19B 2.3, the claimants had considered such a possibility. The application for a GLO was declined in part because the claimants had failed to consider alternative procedures which, the court held, would have led to a more timely and cost-effective resolution of the litigation.[1328] An Ontario equivalent of the GLO framework should also contain a 'superiority' requirement. However, as in the Ontario case law prior to the recent amendments to the CPA, this requirement should be interpreted flexibly. If there are substantive and procedural access to justice concerns that a group litigation order can

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1323 CPR 19.10.

1324 *Rumley v British Columbia*, 2001 SCC 69 [34].

1325 [2006] EWHC 1134 (Admin). This case is discussed in Chapter 6.

1326 19B PD 3.2(5).

1327 Ontario CPA, s 5(2); BC CPA, s 6(1); *Class Proceedings Act*, CCSM c C130, s 6(1) (MB CPA); AB CPA, s 7(1); *Class Proceedings Act*, SNS 2007, c 28, s 9 (NS CPA); *Class Proceedings Act*, RSNB 2011, c 125, s 8 (NB CPA); SK CAA, s 8; *Class Actions Act*, SNL 2001, c C-18.1, s 7 (NFL CAA).

1328 *Hobson* (n 1016) [2], [32].

address, and these concerns remain even when alternative avenues of redress are considered,[1329] then group litigation is superior to another form of proceeding and the order should be granted.

There should be no requirement that the common issues predominate over the individual issues. However, such a requirement has been applied very flexibly in Canada. In *Rumley*,[1330] the Supreme Court held that the common issue predominated over the individual issues because it concerned negligence on a systemic basis.[1331] This is in stark contrast to systemic negligence claims under England's GLO framework. In *Various v Barking, Havering and Redbridge University Hospitals NHS Trust*,[1332] the claimants also alleged that their injuries arose from systemic negligence (in this case, at the defendant hospitals) but the court refused to grant a GLO, holding that those injuries may have each arisen from a completely different systemic failure.

Finally, any group litigation order should address the issue of costs. As in English GLOs, costs will be divided into two categories: individual costs and common costs. Individual costs relate to costs incurred in the prosecution of an individual claim, while common costs relate to costs incurred in relation to the common issues, in administering the group litigation, and in an individual claim where it is prosecuted as a test case.[1333] The general rule in English group litigation will apply: that any claimant in the group will be liable for her share of the common costs as well as her individual costs.[1334] In addition, the

[1329] *AIC Limited v Fischer*, 2013 SCC 69 [26]; *Hollick* (n 1272) [33].

[1330] *Rumley* (n 1324).

[1331] ibid [36].

[1332] Unreported 21 May 2014 HC (QB).

[1333] CPR 46.6(2).

[1334] CPR 46.6(4), (6) and (7); 19B PD 16.2.

case management judge can give any other directions regarding the sharing of common costs.[1335]

iv. Test Cases

Currently, mass tort cases in Ontario are generally settled according to the progress of the litigation in the US. As noted above, the outcome of bellwether trials in the US has a considerable influence on Canadian lawyers' assessments of their cases, whether in a mass tort or class action. However, given the differences in procedural and substantive law between the US and Canada, it would be more just and lead to more accurate outcomes to determine Canadian settlements on the basis of Canadian test cases. A group litigation framework for Ontario, then, should permit the use of test cases to determine common or related issues of fact or law, as is currently permitted under CPR 19.13(b) in England.[1336] The outcome of these test cases would be binding on all the claims on the group register. Following these findings on the common or related issues, individual issues would be determined in follow-on trials.[1337] This would be similar to the bifurcated approach that was pursued in representative actions in the Canadian common-law provinces in the 1970s or the 'two-step' approach pursued in some European countries.[1338]

[1335] 19B PD 12.4.

[1336] CPR 19.15 and 19B PD 12.3.

[1337] This would be subject to directions from the case management judge, as provided for in 19B PD 15.

[1338] Duncan Fairgrieve and Geraint Howells, 'Collective Redress Procedures: European Debates' (2009) 58(2) ICLQ 379, 390-391. The Supreme Court of New Zealand endorsed a similar two-stage approach in *Southern Response Earthquake Services Limited v Ross* [2020] NZSC 126.

v. Finality and 'Buying Global Peace'

The settlement of mass tort litigation raises numerous ethical issues, very few of which have been addressed in the US,[1339] let alone in England or Canada. In England, the GLO framework does not address the aggregate settlement of claims, because they are generally settled on an individual basis.[1340] In the US outside the class actions context, the Model Rules of Professional Conduct require disclosure to clients of all terms of an aggregate settlement, and unanimous consent by all clients to all settlement terms.[1341] In Ontario, there is no provision in the relevant Rules of Professional Conduct regarding aggregate settlement;[1342] while section 27.1(1) of the Ontario CPA requires court approval of a class action settlement, there are no equivalent requirements for the aggregate settlement of mass tort litigation.

Any group litigation order framework in Ontario would therefore have to articulate certain pre-requisites for settlement, particularly for aggregate or 'inventory' settlements. At a minimum, this should include a requirement for court approval of such settlements, to ensure that the interests of the claimants have been sufficiently represented, and would also include judicial oversight of counsel fees, to ensure that such fees are proportionate to the work done for the claimants and the amount they are recovering.[1343] This would give

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1339 Moore (n 1294) 3236.

1340 Interview with defence solicitor 2 (DS2) (by telephone, 22 March 2019); Competition Act 1998, 1998 c 41, sections 49A and 49B (as amended by Schedule 8 of the Consumer Rights Act 2015, 2015 c 15) (Competition Act 1998).

1341 American Bar Association, *Model Rules of Professional Conduct* (ABA 2020) Rule 1.8(g).

1342 Law Society of Ontario, *Rules of Professional Conduct* (LSO 2014). Rule 3.2-4 governs compromise or settlement, but does not mention aggregate litigation.

1343 See sections 32(2.1) and (2.2) of the Ontario CPA.

rise to greater access to justice and would address many of the agent-principal issues that can arise at the settlement and fee approval stage.[1344]

Subject to judicial approval, an order for settlement would be binding on all claimants on the group litigation register, as currently required by CPR 19.12(1), although individual claimants on the register would have a right to appeal the order.[1345] This would address the issues of finality and 'buying global peace', identified above, which is typically much more difficult in mass torts than in class actions.[1346] Another way to address the finality question is to allow for voting amongst claimants on the group register, so that a settlement would be accepted if the majority of the group voted for it,[1347] in addition to court approval. There would have to be some caution in this approach, however: for example, if the majority of the low-value claims voted for the settlement, then this would pre-empt the rights of those with much higher-value claims who may not wish to take the settlement. This problem could be addressed through the creation of 'voting blocs' for claims within certain value ranges, such that a majority of each bloc would be required in order for the settlement to be accepted.[1348] In order to further protect claimants' rights and facilitate access to justice, the court could hear the objections of any group members who vote against the settlement.[1349]

[1344] Lahav (n 1285) 1396.

[1345] CPR 19.12(2).

[1346] For the reasons that defendants value such finality, see Silver (n 1294) 760-763.

[1347] Such a method would have to be agreed in advance of any settlement, as recommended by Lord Woolf: Woolf Final Report (n 1293) [17.81].

[1348] Silver (n 1294) 778.

[1349] Woolf Final Report (n 1293) [17.81].

(c) Conclusion

The establishment of a group litigation framework in Ontario would fill a lacuna currently left by the CPA. Given the risk that the changes to the preferable procedure test will be interpreted restrictively, a group litigation mechanism would provide an avenue for certain claims that may not be certified as class actions. This would facilitate access to justice, and would also promote judicial economy because the claims would not have to be brought individually; it would furthermore promote behaviour modification because the efficiencies in a group litigation framework would allow litigants to band together and exert pressure against the defendants as a larger group.

The recommendations above also indicate how the GLO framework in England could be reformed, which would make lawyers more likely to use the formal framework rather than informal case management of multiple claims. Such reforms will be addressed later in this chapter. First, however, reforms to Canadian class actions will be considered.

2. Class Actions in Canada

(a) Evaluation

Since their enactment across Canada, class actions have flourished. But how successfully have they met their primary aims of access to justice, judicial economy, and behaviour modification? Have class actions focused on behaviour modification at the cost of access to justice (particularly the compensation of claimants) and judicial economy (burdening the courts with claims that would not be individually viable), as many of the debaters described in Chapter 5 feared they would? These concerns are still alive today in Ontario, as demonstrated by the recent debates over Bill 161, an omnibus bill that included amendments to the CPA.[1350]

Despite these concerns and although class actions have the theoretical potential to focus on behaviour modification over compensation, the development of class actions in Canada reveals that courts have not done so.[1351] In fact, access to justice (of which access to compensation forms a part)[1352] is usually the dominant consideration for courts,[1353] with judicial economy and behaviour modification playing supplementary and often supporting roles. This is encouraging for English reformers, who have had to contend with many of the fears expressed towards class proceedings, and especially the possibility that class actions may undermine the compensatory goal of civil litigation.[1354]

In a survey of Canadian certification decisions, Mathew Good has demonstrated that 'the lower courts have indicated a preference for access to justice over the other terms [behaviour modification and judicial economy] to justify certification.'[1355] Only rarely is behaviour modification determinative at certification.[1356] In fact, Good's survey reveals that behaviour modification is mentioned the least out of all three goals of class actions.[1357]

[1350] Bill 161, *Smarter and Stronger Justice Act, 2019*, 1st Sess, 42nd Leg, 2020 (assented to 8 July 2020), SO 2020, c 11.

[1351] Mathew Good, 'Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions' (2009) 47(1) Alta L Rev 185, 223.

[1352] As Good points out, judges at certification usually focus on the economic aspects of access to justice, which are usually the costs of accessing compensation: ibid 187. See also Catherine Piché, 'Class Action Value' (2018) 19 Theo Inq L 261, 273; *Western Canadian Shopping Centres Inc v Dutton,* 2001 SCC 46 [28].

[1353] Catherine Piché, 'The Cultural Analysis of Class Action Law' (2009) 2 J Civ L Stud 101, 127; Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press 2018).

[1354] As Rachael Mulheron has noted, '[c]ompensatory redress is, and always has been, the primary motivator of [class action] regimes': *Class Actions and Government* (CUP 2020) 77-79.

[1355] Good (n 1351) 188, 214.

[1356] ibid 219.

[1357] ibid 221-222.

Courts have repeatedly stated that access to justice is the overriding consideration in class actions.[1358]

However, Good only surveys certification decisions. He himself acknowledges that behaviour modification is a substantive consideration that involves a judgment of the defendant's actions,[1359] and such considerations do not come into play on certification,[1360] which is not a determination of the merits of the proceeding.[1361] Because behaviour modification implies there is unlawful behaviour to modify, it is more likely to be determinative at the resolution of the dispute – either at settlement or at trial.[1362] This is implicitly acknowledged in the Law Commission of Ontario's recent review of class actions under the Ontario CPA.[1363] Behaviour modification is treated in a fairly cursory manner, and the LCO Report simply concludes that more data is needed in order to determine the effect of class proceedings on modifying defendants' behaviour. It therefore recommends that reports be filed on motions for settlement approval and fee approval ('outcome reports'), both of which only occur following the resolution of the dispute.

Even at settlement, defendants are very unlikely to concede fault,[1364] although the costs of settling may provide an incentive to defendants (and those similarly placed) to

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[1358] ibid 222; Ontario Law Reform Commission, *Report on Class Actions* (Ministry of the Attorney General 1982) 119-140, 144-146; AB defence counsel 1 (n 1270).

[1359] As well as those of similarly situated potential defendants. Behaviour modification can therefore also involve general deterrence, as the credible threat of enforcement should make more potential defendants comply with the law.

[1360] Good (n 1351) 223; *Metera v Financial Planning Group*, 2003 ABQB 326 [84].

[1361] Ontario CPA, s 5(5).

[1362] *Eaton v HMS Financial Inc*, 2008 ABQB 631 [178]; *Rideout v Health Labrador Corp*, 2007 NLTD 150 [66]. Behaviour modification can nevertheless perform a role at certification; courts have asked whether behaviour modification will be brought about *if* there is a finding of liability following a common issues trial: Eaton [179]; *Ayrton v PRL Financial (Alta) Ltd*, 2005 ABQB 311 [97].

[1363] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms* (LCO 2019).

[1364] Interview with British Columbia plaintiff & defence counsel 2 (BC counsel 2) (by telephone, 2 August 2019). However, a settlement may still bring about behaviour modification because the defendant agrees to change its practices: *Rideout* (n 1362) [15], [160]; *Merlo v Canada*, 2017 FC 53 [10], [33].

change their behaviour. Fault will generally only be established at trial, and relatively few class proceedings have gone to trial even in jurisdictions with more established regimes.[1365] The goal of behaviour modification, therefore, will necessarily play a supplementary role to the primary goal of access to justice (including compensation). This will be so especially where a class action is commenced when behaviour has already been modified (for example, in a 'follow-on' action where a regulatory finding has already been made against the defendant and a fine paid).[1366] This would explain why the in-house lawyers of several high-profile European and US companies report that they do not believe class actions modify their companies' behaviour.[1367]

Perhaps because the goal of behaviour modification is supplementary, it is also now much less controversial than it was when class action reform was originally debated across Canada. The submissions to the Law Commission of Ontario that informed its recent report,[1368] as well as interviews with defence lawyers, reveal that the goal of behaviour modification is almost universally accepted amongst defence counsel and their

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[1365] Catherine Piché, *Fairness in Class Action Settlements* (Carswell 2012) 202.

[1366] *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)*, [2020] UKSC 51 (Lord Briggs); Joint Submission of the Canadian Bankers Association and Canadian Life and Health Insurance Association to the LCO, 31 May 2018, 24.

[1367] It seems that the same observation would not be made for individual litigation: Piché (n 1352) 276. See also BC counsel 2 (n 1364); AB defence counsel 1 (n 1270); Submission of the US Chamber Institute for Legal Reform to the LCO, 31 May 2018, 20.

[1368] LCO Report (n 1363); Law Commission of Ontario, 'Public Submissions' (*LCO*, May 2018) <www.lco-cdo.org/en/our-current-projects/class-actions/submissions-to-the-consultation-paper/> accessed 10 April 2021.

clients.[1369] It is also accepted by parties across the political spectrum, including the provincial Conservative government that made the recent changes to the CPA.[1370]

Therefore, although some Canadian class actions scholars state that behaviour modification is a legitimate objective of class proceedings even where little or no compensation reaches class members,[1371] the courts and law reform commissions do not agree.[1372] The workings of Canadian class actions in practice emphasise access to justice (including compensation) over behaviour modification, and the cases where the latter is emphasised over redress for victims of wrongdoing are rare.

Judicial economy also remains an important concern in class actions in Canada, albeit a lesser one than access to justice. Certain recent amendments to the Ontario CPA were made in order to promote this aim. For example, the filing of the certification motion (or certain other steps) must take place within one year of the filing of the Statement of Claim, or face the threat of dismissal for delay, with costs consequences.[1373] The LCO Report made this recommendation explicitly in order to improve judicial economy.[1374] Similarly, the LCO's recommendations on carriage motions highlighted in the previous chapter, imposing timelines and establishing clear guidelines for determining carriage, were made 'to promote high-quality representation for class members, improve judicial

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[1369] Submission of the 'Big Six' Accounting Firms to the LCO (31 May 2018) 17; Submission of the Canadian Vehicle Manufacturers' Association to the LCO (31 May 2018) 1; Submission of Innovative Medicines Canada and MEDEC to the LCO (31 May 2018) 18-19; Submission of Insurance Bureau of Canada to the LCO (31 May 2018) 5. Exceptions include the ILR Submission (n 1367) 19-20; interview with Ontario defence counsel 2 (ON defence counsel 2) (Toronto, 30 August 2019); interview with Saskatchewan defence counsel 1 (SK defence counsel 1) (Toronto, 5 April 2019).

[1370] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 42nd Parl, 1st Sess (19 February 2020) (Doug Downey).

[1371] Piché (n 1352) 277; Jones (n 1281). Other (primarily US-based) scholars are cited in Chapter 4.

[1372] eg *Setoguchi v Uber BV*, 2021 ABQB 18 [112]: '*[B]ehaviour modification* alone is not a sufficient basis for certifying a class proceeding' [emphasis in original].

[1373] Ontario CPA, s 29.1.

[1374] LCO Report (n 1363) 18.

economy, and increase predictability and finality in carriage decisions.'[1375] These recommendations are now part of the CPA.[1376] Finally, the LCO Report made specific recommendations on multi-jurisdictional class proceedings, also with the aim of improving judicial economy,[1377] and these are now included in the CPA.[1378] It can be seen, therefore, that legislators, commentators, and courts consider judicial economy as much, if not more than, behaviour modification when discussing class action reform.

This section will examine three historically controversial aspects of class proceedings in which, as discussed in Chapter 3, the goals of access to justice, judicial economy, and behaviour modification have often acted in tension: opt-out classes, aggregate damages, and *cy-près* distributions. For opt-out classes and aggregate damages, behaviour modification has rarely assumed priority and the emphasis on access to justice (including compensation), for the most part, remains strong. *Cy-près* distributions, which have the strongest theoretical link to behaviour modification, are a possible exception.

i. Opt-Out Classes

The Canadian class action regimes allow for opt-out classes, whereby those fitting the class definition are included in the class unless they choose to opt out. As noted in Chapters 5 and 6, the exceptions are those provinces where non-residents (ie residents not of that particular province, but elsewhere in Canada) have been required to opt-in. These were originally BC, Alberta, Newfoundland and Labrador, and New Brunswick, all provinces which, as noted in Chapter 5, based their legislation on the Uniform Law Conference of

[1375] ibid 6, 23.

[1376] Ontario CPA, s 2(1.1); s 13.1(3), (5), and (6).

[1377] LCO Report (n 1363) 30.

[1378] Ontario CPA, sections 5(7) and 5.1.

Canada's (ULCC) model Class Proceedings Act.[1379] While opt-in classes tend to lead to more accurate compensation, whereas opt-out classes increase the class size and therefore provide more effective behaviour modification,[1380] the ULCC did not refer to these considerations. Instead, the policy choice for requiring non-residents to opt-in was based on judicial economy (to avoid people becoming class members in more than one class action),[1381] increasing certainty for defendants regarding class size,[1382] and constitutional issues.[1383]

As noted in Chapter 5, the ULCC subsequently changed its Model Act to recommend that all provinces allow non-resident class members to be included on an opt-out basis, again in the interests of judicial economy and efficiency – allowing one national opt-out class action to proceed would be more efficient than allowing multiple provincial actions for the same case.[1384] At that stage, behaviour modification *was* considered, although it seems to have been secondary to the issue of judicial economy.[1385] Since the amendment to the Model Act, Alberta (in December 2010) and BC (in October 2018) have changed their class proceedings statutes to allow for national opt-out classes.

1379 Uniform Law Conference of Canada, *Uniform Class Proceedings Act* (1996) <www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/82-josetta-1-en-gb/uniform-actsa/class-proceedings-act/1395-uniform-class-proceedings-act-1992> accessed 8 April 2021.

1380 This concept is discussed in more detail in Chapter 3.

1381 Ruth Rogers, 'A Uniform Class Actions Statute', 41 (Uniform Law Conference of Canada 1995) <www.ulcc.ca/en/annual-meetings/430-1995-quebec-qc/civil-section-documents/250-class-actions-statute-1995> accessed 8 April 2021.

1382 ibid.

1383 Uniform Law Conference of Canada, *Consolidated Uniform Class Proceedings Act* (2006), commentary to s 16 <www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/82-josetta-1-en-gb/uniform-actsa/class-proceedings-act/1397-consolidated-uniform-class-proceedings-act-2006> accessed 8 April 2021.

1384 Rod Hayley, *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations* (Vancouver 2005) [17]-[18].

1385 ibid [29].

The decision in favour of the opt-out mechanism was therefore based on a combination of access to justice, judicial economy, and behaviour modification. The Canadian experience demonstrates that those goals continue to be balanced today, with access to justice and judicial economy receiving significantly more emphasis over behaviour modification.

This can be seen in the recent debates over Bill 161, and the continuing concerns of courts, academics, and practitioners that compensating class members is of paramount importance. One of the concerns is that, although an opt-out mechanism sweeps members into the class who may not know about the action or be able to take steps to join it, that simply delays the inevitable: unless compensation is provided directly to class members (via their bank accounts or in some similar way), they will have to step forward at some point to make a claim from any settlement or judgment; and it seems that very few of them do so.

Numerous studies have shown that the take-up rate in class actions (that is, the rate at which all eligible class members apply for and receive compensation pursuant to a settlement or judgment) is very low. While the available data in Canada is very sparse, the empirical studies that exist reveal take-up rates that vary wildly, with some as low as 1% and many lawyers reporting rates of less than 50% take-up for their actions.[1386]

The desire to address this phenomenon and increase the compensation that reaches class members (and therefore meaningful access to justice) provides the backdrop to many of the recent changes brought about by Bill 161. The new amendments emphasise

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[1386] Kalajdzic (n 1353) 26. A survey by Catherine Piché and André Lespérance showed take-up rates ranging from less than 1% to more than 70%: 'L'action collective comme outil de prévention, d'évitement et de dissuasion' in Barreau du Québec, *National Conference on Class Actions: Recent Developments in Québec, in Canada and in the US*, vol 810 (Yvon Blais 2016) 87; Ward Branch and Greg McMullen, 'Take-Up Rates: The Real Measure of "Access to Justice"' (8th Annual Symposium on Class Actions, Toronto, April 2011); F Paul Morrison and H Michael Rosenberg, 'Missing in Action: An Analysis of Plaintiff Participation in Canadian Class Actions' (Accessing Justice Class Actions Conference, University of Windsor Faculty of Law, 28-29 March 2011); Piché (n 1352) 292-293.

compensation at the settlement distribution stage. Parties must file an outcome report within 60 days of the end of the distribution period, which should contain information on notice, take-up rates, amounts of *cy-près* distributions, opt-outs and objections, the range of per-claimant recoveries, and amounts paid to counsel and third parties.[1387] Courts may also hold back a percentage of counsel fees pending a mandatory final report on the outcome of the proceeding.[1388] In other words, counsel fees will not necessarily be calculated as a percentage of the settlement amount – they may be adjusted or reduced based on the compensation that is actually received by class members, in order to incentivise counsel to make sure such compensation is maximised. All this will go some way to determine take-up rates on a more accurate basis and, in the long term, to increase those rates as well.

ii. Aggregate Damages

Another controversial aspect of class proceedings are aggregate damages – that is, the court's ability to award damages to the class as a whole, instead of individual class members. In Ontario, the initial interpretation of the aggregate damages provisions of the CPA held that aggregate damages could not be certified as a common issue under s 24 of the CPA unless liability could be established without resort to individual proof.[1389] This was particularly a problem in competition law class actions, where plaintiffs were generally unsuccessful in establishing that inflated prices resulting from price-fixing were 'passed on' to indirect purchasers (that is, purchasers who bought the product from the direct purchasers, who bought directly from the defendant). These 'insurmountable

[1387] Ontario CPA, s 26; LCO Report (n 1363) 69-70.

[1388] Ontario CPA, s 32; LCO Report (n 1363) 76.

[1389] *Bywater v Toronto Transit Commission* [1998] OJ No 4913 (Gen Div) [17], [18]; *Chadha v Bayer Inc*, 2001 CanLII 28369 (ON SCDC) [56]-[60], affd 2003 CanLII 35843 (ONCA).

problems of proof'[1390] meant that the fact of individual damage could not be established. Where damage was an element of the cause of action (as it was generally held to be under the Competition Act), this meant that class-wide liability could not be established and aggregate damages could not therefore be certified as a common issue.[1391]

This began to change in 2007, when the Court of Appeal for Ontario held that, once a common issue on liability had been answered, 'potential' liability would have been established on a class-wide basis (even though the defendant would be actually liable only to some class members). This was held to be sufficient to certify aggregate damages as a common issue.[1392] The Court recognised that some class members who did not suffer damage might share in the award, and that compensation might not reflect the actual amounts owing. However, it held that reviewing individual entitlement to damages would be inefficient and impractical.[1393] It further reasoned that certifying the issue of aggregate damages promoted the aims of access to justice and behaviour modification. The claims were too small to be economical to litigate individually, such that if there was no class action there would be no claims.[1394] In terms of behaviour modification, failure to certify would mean that the defendant could keep the gains of its illegal conduct, which would lead to 'the potentially unconscionable result of a wrong eluding an effective remedy'.[1395]

[1390] *Chadha* (SCDC) (n 1389) [23].

[1391] *Chadha* (ONCA) (n 1389) [49]; *Price v Panasonic Canada Inc*, [2002] OJ No 2362 [28]-[29]; Jennifer M Lynch, 'Utility at Last for Sections 23 and 24 of the *Class Proceedings Act, 1992*' (2008) 4(2) CCAR 492, 497-498.

[1392] *Markson v MBNA Canada Bank*, 2007 ONCA 334 [48]-[49]; *Cassano v The Toronto-Dominion Bank*, 2007 ONCA 781 [45]-[49].

[1393] *Markson v MBNA Canada Bank*, 2007 ONCA 334 [42], [46]-[49], [53].

[1394] ibid [72]; *Cassano v The Toronto-Dominion Bank*, 2007 ONCA 781 [57].

[1395] *Markson* ONCA (n 1393) [42], [71]-[72]; *Cassano* CA (n 1394) [49]-[52].

The Court concluded that aggregate damages were exceptional because they were akin to determining the whole of the litigation through the common issues trial.[1396] By contrast and more recently, the Ontario Superior Court has held that aggregate damages awards should be the norm, primarily for reasons of access to justice.[1397] In upholding that decision, the Court of Appeal confirmed that an aggregate damages methodology will be reasonable even if some members of the class are over-compensated and some are under-compensated.[1398] The court will consider whether an aggregate damages award will result in injustice to the defendant (for example, by overstating the amount of the defendant's liability), and 'whether the denial of an aggregate approach will result in … a denial of access to justice',[1399] as well as a denial of behaviour modification by allowing a defendant to keep monies improperly charged.[1400]

Recent cases have confirmed, however, that the establishment of loss on a class-wide basis is separate from a calculation of aggregate damages. In the *Pro-Sys* case, Justice Rothstein held for the Court that, '[t]he aggregate damages provisions of the CPA relate to remedy and are procedural. They cannot be used to establish liability'.[1401] To establish that liability can be established on a common basis, the plaintiffs must produce an expert methodology that is sufficiently credible or plausible, with 'some evidence of the availability of the data to which the methodology is to be applied.'[1402] Aggregate damages can be certified as a common issue only if the resolution of the other common issues would

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[1396] *Cassano* CA (n 1394) [60].

[1397] *Ramdath v George Brown College*, 2014 ONSC 3066 [1].

[1398] *Ramdath v George Brown College of Applied Arts and Technology*, 2015 ONCA 921 [115].

[1399] *Bernstein v Peoples Trust Company*, 2019 ONSC 2867 [301].

[1400] ibid [303].

[1401] *Pro-Sys* (n 1299) [131].

[1402] ibid [118].

be determinative of liability, and not if the resolution of the other common issues would still leave individual questions relevant to liability (such as causation).[1403] Nevertheless, whether damages could be assessed in the aggregate could be certified as a common issue, to be determined only after a finding of liability had been made at a common issues trial.[1404] This means that the standard of proof at a certification motion, for establishing liability on a class-wide basis and for certifying a question of aggregate damages, is relatively low.

Aggregate damages cannot be used to establish liability because class proceedings statutes are purely procedural.[1405] They will only be considered when all common issues regarding liability have been determined. With regard to assessment of aggregate damages, the courts have endorsed a 'rough and ready' approach.[1406] As a result, while the compensatory principle has not been strictly adhered to, it is nevertheless a guiding principle that has been balanced with proportionality, in order to achieve access to justice and (to a lesser extent) behaviour modification.[1407] The more restrictive recommendations of the OLRC Report ('can the damages be assessed without proof by members of the class with the same degree of accuracy as in an ordinary action?'), were explicitly rejected in the Ontario CPA, which asks if aggregate liability 'can reasonably be determined without proof by individual class members'.[1408] Aggregate damages case law therefore continues to comply with the compensatory principle (at least on a 'rough and ready' basis) and the concept of access to justice, although behaviour modification is a supplementary

[1403] ibid [127]-[135].

[1404] ibid [134].

[1405] ibid [131]-[132].

[1406] *Mastercard UKSC* (n 1362) [51].

[1407] *Ramdath ONSC* (n 1397) [44].

[1408] ibid [43]; OLRC Report (n 1358), vol 2, 555 and 869; Ontario CPA, s 24(1)(c).

consideration. This case law has inspired a similar approach to aggregate damages in English competition law class actions.

iii. *Cy-près* Distributions

As stated in Chapter 3, *cy-près* distributions are the element of class proceedings most strongly associated with behaviour modification. When unclaimed monies are not returned to the defendant, either because of a *cy-près* distribution (in the narrow sense described in Chapter 3) or because of some other form of distribution, that defendant is prevented from keeping its ill-gotten gains and is made to internalise the entire amount of the harm that it has caused.[1409] A survey of the legislation and case law in Ontario, Québec, and British Columbia reveal that this element of class proceedings is the most problematic when it comes to balancing access to justice and behaviour modification. While the balance seems to have been maintained in Ontario, especially in light of recent legislative amendments, the picture from Québec and BC is more mixed.

The case law from Ontario indicates that *cy-près* distributions are 'meant to enhance access to justice by directly or indirectly benefitting class members'.[1410] Where *cy-près* distributions have strayed from the goal of compensation (albeit indirect compensation), they have been heavily criticised by judges,[1411] academics, and others, even though they nevertheless aim to achieve behaviour modification.[1412] The Ontario CPA was recently amended to confirm the authority of the court, long recognised in the

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[1409] *Slark v Ontario*, 2017 ONSC 4178 [41]; LCO Report (n 1363) 91.

[1410] *Slark* (n 1409) [38], [41]; *Sorenson v easyhome Ltd*, 2013 ONSC 4017 [30].

[1411] *Emond v Google LLC*, 2021 ONSC 302 [25].

[1412] Downey (n 1370); Jeff Berryman, 'Nudge, Nudge, Wink, Wink: Behavioural Modification, Cy-Près Distributions and Class Actions' (2011) 53 SCLR (2d) 133; Jasminka Kalajdzic, 'The 'Illusion of Compensation': *Cy-près* distributions in Canadian class actions' (2013) 92 Can Bar Rev 173.

case law,[1413] to order *cy-près* distributions 'if the court is satisfied that, using best reasonable efforts, it is not practical or possible to compensate class or subclass members directly.'[1414] Furthermore, the outcome report that parties must now file at the settlement distribution stage should include information on the amounts of *cy-près* distributions and the range of per-claimant recoveries.[1415] In other words, access to justice and getting compensation directly to the class members is the priority over any behaviour modification objective.

Cy-près distributions are explicitly permitted under Québec law.[1416] Ostensibly, the aim there is also to prioritise compensation and access to justice.[1417] However, concerns have been expressed where *cy-près* distributions have been ordered even where direct compensation to class members is practicable and possible.[1418] In her study of class action settlements and judgments in Québec between 2004 and 2016, Catherine Piché found that an average of 19 per cent of funds available to the class in those cases was distributed *cy-près*.[1419] More worryingly, in Chris Trivisonno's survey of 41 decisions in which a *cy-près* distribution was ordered under articles 1034 or 1036,[1420] he found only

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[1413] *Slark* (n 1409) [35]-[36].

[1414] Ontario CPA, s 27.2(1). The permissible recipients of *cy-près* funds are any registered charity or non-profit organisation (if the parties agree, and if the court determines that the distribution would reasonably be expected to benefit class members directly or indirectly), or Legal Aid Ontario in any other case.

[1415] Ontario CPA, s 26.

[1416] See Québec CCP, articles 596 (permitting the *cy-près* disposition of the unclaimed residue of an aggregate award 'having regard, among other things, to the members' interests. If the judgment is against the State, the remaining balance is paid into the Access to Justice Fund') and 597 (permitting the *cy-près* distribution of the entire amount of damages, where distribution to individual class members 'is impracticable, inappropriate or too costly').

[1417] *Létourneau* (n 1301) [929].

[1418] Chris Trivisonno, 'Developing a Consistent Approach to Balance Distributions in Québec' (2016) 11(2) CCAR 321, 330.

[1419] Piché (n 1352) 298.

[1420] Trivisonno (n 1418).

one decision that assessed the practicality of distributing compensation directly to class members prior to approving a *cy-près* distribution.[1421] Furthermore, many *cy-près* distributions have little or no relation to the class members' interests, which would undermine the purpose of indirect compensation.[1422] In almost two-thirds of the Québec *cy-près* cases Trivisonno surveyed, he found that there was no reasoning as to why a particular organisation was chosen and how that distribution would serve class members' interests[1423] above those of society more broadly.[1424] Even where there was a link between the subject-matter of the action and the recipient of the distribution (for example, Special Olympics Canada in a case involving misleading advertising of sportswear),[1425] the vast majority of class members would be unlikely to receive funds or other support from that organisation. The most that could be said is that most class members would support the aims of the organisation, thereby making the *cy-près* distribution a charitable donation on behalf of the class – arguably even more indirect than 'indirect compensation'.[1426]

In BC, amendments to the CPA in 2018 require that if the amount of any settlement or judgment remains undistributed after a time ordered by the court, 50 per cent must be distributed to the Law Foundation of BC, and 50 per cent must 'be applied in any manner that may reasonably be expected to benefit class or subclass members'.[1427] Such an order may be made even if the award or settlement does not provide for monetary relief to

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[1421] ibid 340. The decision was *Tremblay v Confédération des Caisses populaires et d'économie Desjardins du Québec*, 1998 CarswellQue 2669 (QCSC) [11].

[1422] Kalajdzic (n 1412) 183.

[1423] Trivisonno (n 1418) 335.

[1424] ibid 341-342.

[1425] *Markus c Reebok Canada inc*, 2013 QCCS 549.

[1426] Trivisonno (n 1418) 343-344.

[1427] BC CPA, s 36.2(1). The other 50 per cent may also be distributed to the Law Foundation of BC (s 36.2(1)(b)).

individual class or subclass members,[1428] and even if the order would benefit non-class members, or provide additional monetary relief to class members who have already received compensation.[1429] In other words, amounts of a settlement or judgment that remain undistributed after a certain amount of time must be distributed *cy-près* (and to the Law Foundation of BC) even if direct compensation is possible.

In allowing monetary relief to flow to people outside the class and/or allowing class members to be overcompensated, these amendments significantly depart from the compensatory principle. Furthermore, there is no possibility that any undistributed part of a settlement or judgment will be returned to the defendant, thereby ensuring that the defendant has to fully internalise the costs of her conduct.[1430] The province's Attorney General confirmed this aim of behaviour modification when the amendments were being debated.[1431]

The changes have received a mixed reception amongst the province's lawyers. Some welcome the recognition of *cy-près* and other similar distributions, on the grounds that abuses have been rare and the concept is useful where distribution is cost prohibitive.[1432] Others see such distributions as a means of last resort.[1433] How the BC courts will interpret these amendments remains to be seen. What is clear, however, is that

[1428] ibid s 36.2(4)(a).

[1429] ibid s 36.2(5).

[1430] The amendment only applies to amounts that remain undistributed after a time set by the court, indicating that, before that time, the amounts may be distributed however the parties please. It is doubtful that 'distribution' would include reversion to the defendant, although there is not yet any case law on this point.

[1431] British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 41st Parl, 3rd Sess (22 November 2018) (David Eby).

[1432] BC counsel 2 (n 1364).

[1433] Interview with British Columbia plaintiff & defence counsel 1 (BC counsel 1) (Vancouver, 16 August 2019).

they are unique in Canada for their explicit affirmation of the aim of behaviour modification, over the principle of access to justice and compensation.

While behaviour modification is an important consideration in Canadian class actions, for the most part it remains supplementary to the goals of access to justice and judicial economy. The exceptions in the context of *cy-près* and other similar distributions are BC and possibly Québec. Other than these exceptions, it seems that behaviour modification has not been emphasised at the cost of access to justice and compensation.

(b) Recommendations for Reform

i. Legislation and Harmonisation

In light of the fact that the Canadian class action regimes have succeeded in balancing the three aims of class proceedings, the first recommendation must be to enact legislation in the remaining provinces and territories. These are PEI, Nunavut, Northwest Territories, and the Yukon. Class action reform in PEI has recently come under the spotlight in Canada, following a decision from the province's Court of Appeal. In *King & Dawson v Government of PEI*,[1434] the PEI Court of Appeal called on the legislature to enact class proceedings legislation, largely on the basis of access to justice and judicial economy.[1435]

There have been no similar calls for class action reform in the territories, largely because the low population numbers rarely justify the pursuit of collective redress.[1436] However, as discussed in Chapter 6, those jurisdictions also rely on representative

[1434] *King & Dawson v Government of PEI*, 2020 PECA 13.

[1435] ibid [99], [103] (Justice Murphy).

[1436] Interview with Northwest Territories/Nunavut plaintiff counsel 1 (NWT/NU plaintiff counsel 1) (by telephone, 16 October 2019).

actions.[1437] While these are few and far between,[1438] they still rely on cases such as *Dutton* as well as *ad hoc* processes that are created by analogy with class proceedings legislation in other provinces.[1439] This lack of legislative guidance, as well as lack of familiarity with the process on the part of the judiciary, staff, and lawyers, creates something of a 'Wild West' situation,[1440] similar to the experimentation that took place with representative actions in Canada in the 1970s and multi-party actions in England in the 1980s. It also means that the territories struggle to find an equal footing when class actions are settled on a national basis, as in the Indian Residential Schools litigation, where concerns were raised in the territories that local circumstances (for example, when determining individual settlement amounts) would be overlooked in favour of the dominant provinces such as Ontario.[1441] Enacting comprehensive class action legislation would provide more protection for local interests (thereby supporting the aim of access to justice) and more certainty with regard to procedure (supporting judicial economy). Behaviour modification would continue to be a consideration, as would the efficiency of 'sweeping the vulnerable' into opt-out classes, especially in Indigenous populations that live in remote communities and have been historically disadvantaged.

Access to justice and judicial economy would also be promoted by harmonising the provinces' class proceedings statutes. While constitutional issues mean that such harmonisation cannot be mandated,[1442] the Uniform Law Conference of Canada has

[1437] ibid.

[1438] See chart in Chapter 5, Section III: Representative Actions.

[1439] NWT/NU plaintiff counsel 1 (n 1436).

[1440] ibid.

[1441] ibid.

[1442] Each province has power over its own civil procedure, pursuant to s 92 (13) and (14) of the Constitution Act (n 1309). As a result, the federal government cannot impose civil procedure rules on the provinces, and neither can one province on another.

provided guidance through its Uniform Class Proceedings Acts.[1443] Increased harmonization would reduce the 'patchwork' of legislation across the country, which creates rights in one province that may not be available in another (thereby impeding access to justice), and creates the risk of overlapping and conflicting actions (thereby impeding judicial economy). Such changes should also be included in any class proceedings legislation in PEI and the territories.

Canada's jurisdictions should therefore follow the ULCC's recommendation that courts be required to consider whether to defer to another province or territory before certifying a class proceeding,[1444] in order to improve judicial economy and resolve the problem of multiplicity in national class actions.[1445]

In addition, the provinces and territories should be harmonised with regards to costs rules. As noted in Chapters 5 and 6, of the Canadian jurisdictions that have class proceedings legislation, five currently apply the traditional 'loser-pays' costs rules to class proceedings except in certain circumstances, while four apply a 'no-costs' rule whereby each party bears its own costs except in certain circumstances (Québec's costs for class proceedings are assessed on the tariff that applies to small claims, and are therefore negligible). The ULCC provides these two alternatives for costs.[1446] However, there are strong access to justice arguments in favour of the 'no-costs' rule, given that costs form a significant barrier to the bringing of class actions,[1447] and (as noted in the previous chapter) the level of costs awarded against unsuccessful plaintiffs has skyrocketed in recent years.

[1443] ULCC 2006 (n 1383); ULCC 1996 (n 1379).

[1444] ULCC 2006 (n 1383) s 4(2) and (3).

[1445] This change has already been made in BC, Saskatchewan, Alberta, and Ontario.

[1446] ULCC 2006 (n 1383) s 37(1).

[1447] LCO Report (n 1363) 78; OLRC Report (n 1358) 647.

Such significant cost awards also reduce the number of firms that are willing to take on the risks of a class action.[1448] The fact that adverse costs form a substantial deterrent to class actions is also evidenced by the increasing popularity of BC as a jurisdiction which has the 'no-costs' rule as well as a low barrier to certification. At the same time, there is little evidence from Canada's no-costs jurisdictions that the rule has led to a proliferation of unmeritorious cases.[1449] Finally, having a no-costs rule in class proceedings would reduce the costs incurred by each party; the costs-shifting rule has been criticized in several quarters as creating perverse incentives and generating disproportionate costs.[1450]

I would therefore recommend that the no-costs rule in the Uniform Class Proceedings Act[1451] be followed in all Canadian jurisdictions. Exceptions to this rule are detailed in s 37(2) of the Act, and include circumstances where there has been vexatious, frivolous or abusive conduct on the part of any party; where an improper and unnecessary step has been taken for an improper purpose; or where exceptional circumstances exist that would make it unjust to deprive the successful party of costs. Any modification to the costs rules in Ontario would have to consider the role of the Class Proceedings Fund. Because the Fund was only established to cushion the blow of the application of normal costs rules,[1452] removal of the normal costs rules would justify the elimination of the Fund in Ontario, and possibly its equivalent in Québec.[1453] The rise of third-party litigation funders across Canada, many of whom do not impose the onerous 10 per cent levy on any

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[1448] LCO Report (n 1363) 83-84.

[1449] LCO Report (n 1363) 83.

[1450] Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (TSO 2010) 47; Adrian Zuckerman, 'Lord Woolf's Access to Justice: Plus Ça Change' (1996) 59 MLR 773, 778.

[1451] ULCC 2006 (n 1383) s 37(1).

[1452] Suzanne Chiodo, *The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act* (Irwin Law 2018) 134-137.

[1453] The *Fonds d'aide aux actions collectives*.

settlement or judgment which the Class Proceedings Fund is obliged by regulation to impose,[1454] make the Fund's existence somewhat redundant in any event.

With regard to other amendments to the Ontario CPA, the majority of those changes simply codified the case law in Ontario, and those requirements are also part of the case law in other Canadian jurisdictions. Exceptions include the requirement to file outcome reports following a distribution of an aggregate award or settlement proceeds, the ability to hold back lawyer fees pending the filing of a mandatory report on the outcome of a proceeding, the stricter timelines with regard to certification motions, the ability to hear certain motions prior to certification, and the guidelines regarding carriage motions.[1455] Each of these would promote access to justice and compensation for class members, as well as efficiency and judicial economy. They should be codified in the class proceedings statutes of other Canadian jurisdictions.

However, the recent changes to the preferable procedure test regarding predominance and superiority[1456] should be reversed for the reasons discussed below. Although the courts have not yet interpreted these provisions, they threaten to make the certification test in Ontario more onerous than in the rest of Canada, and thereby restrict access to justice for Ontarians. The satellite litigation which these provisions will spawn will also impede judicial economy.

ii. Other Reforms

Other reforms should be made to facilitate the use of technology for the distribution of awards, and to encourage an emphasis on compensation in *cy-près* distributions.

[1454] *O Reg 771/92: Class Proceedings*, s 8(4)(c) (made under the *Law Society Act*, RSO 1990, C L.8).

[1455] Ontario CPA, sections 26(12), 27.1(16), 32(6), 29.1, 4.1, and 13.1, respectively.

[1456] ibid s 5(1.1). Pursuant to prior case law, however, the courts should still consider whether the class action is preferable to other procedures such as joinder, test cases, regulatory procedures, or compensation schemes.

Canadian lawyers and claims administrators should make more use of technology and other tools to facilitate the distribution of awards or settlement amounts and increase access to justice. As noted above, take-up rates vary significantly, but in many cases the rate is below 50%, and is often much lower. A wide-ranging empirical study of consumer settlements, conducted by the US Federal Trade Commission (FTC), has noted several factors that affect take-up rates.[1457] These include the mode of notice,[1458] the clarity of notice,[1459] the steps required to make a claim,[1460] and the amount of recovery per class member.[1461]

With regard to the mode of notice, direct emails would intuitively seem to be the most effective form of notice, as defendants often have class members' email addresses on file (if the class members are customers, clients, or patients, for example) and the notice reaches the class member directly. However, the FTC study found that email notice raises serious issues of comprehension: of a sample of consumers who were sent an email about a class action settlement, only 49.3% correctly understood the nature of the email when viewing the actual email, and 40.5% correctly understood the next steps required to receive a refund.[1462] The study did find, however, that cases in which multiple communications are sent to class members have claims rates that are more than twice as high as cases that attempt to reach class members just once.[1463] The most beneficial use of email, then, may

[1457] Federal Trade Commission, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* (FTC 2019) 1-2.

[1458] Direct notice is a notice delivered directly to the class member via post, email, or some other means; publication notice is a notice published in a newspaper, on a website, or in some other publication that can reasonably be expected to come to the attention of class members: ibid 11, 25.

[1459] ibid 12, 27-28.

[1460] ibid 7, 21, 28.

[1461] ibid 11-12.

[1462] ibid 2, 53-54.

[1463] ibid 26.

be as a second form of notice to follow up on a mailed notice.[1464] With regard to clarity of notice, studies by the Law Commission of Ontario and numerous others have supported the FTC's recommendation for 'plain language' in class action notices.[1465] This plain language requirement has been codified in the recent changes to Ontario's CPA,[1466] although it has also become part of the case law of other provinces.[1467] Whether statutory or common-law, the requirement should be more keenly supervised by judges to make sure that class members are aware of their rights, especially the compensation that might be available to them if they claim.

Finally, with regard to the steps required to make a claim, technology could be used to distribute compensation much more directly to class members. For example, compensation could be distributed directly to class members' bank accounts or by email transfer;[1468] as a second-best option, cheques could be mailed directly to class members.[1469] Such distributions are ideal, because research shows that reducing the steps required to make a claim leads to higher take-up rates, with direct and automatic distributions (which require no effort on the part of class members in order to make a

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[1464] Catherine Piché, 'The Coming Revolution in Class Action Notices: Reaching the Universe of Claimants through Technologies' (2016) 16(2) CJLT 227, 248.

[1465] LCO Report (n 1363) 63; Option consommateurs, 'Recours collectifs: des modèles de formulaires de réclamation afin de faciliter l'accès à la justice. Une étude de cas' (*Option consommateurs*, June 2012) <https://option-consommateurs.org/wp-content/uploads/2017/08/recours-collectifs-formulaires-juin-2012-1.pdf> accessed 11 April 2021; Federal Judicial Center, 'Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide' (*FJC*, 1 January 2010) <www.fjc.gov/content/judges-class-action-notice-and-claims-process-checklist-and-plain-language-guide-0> accessed 11 April 2021.

[1466] Ontario CPA, s 20(1).

[1467] eg *Canada Post Corp v Lépine*, 2009 SCC 16 [42].

[1468] Piché (n 1464) 249, 274. Compensation was distributed directly to class members in *Christiansen v Mettrum Ltd*, 2021 ONSC 515 [27]-[31]. E-transfer is a well-established form of bank transfer in Canada, and simply requires the recipient's email address.

[1469] This would be a second-best option because, even when cheques are mailed directly to class members, only 55% of them are cashed. The rate is higher (77%) where the class member has to make a claim to get that cheque: FTC Study (n 1457) 31.

claim) having the highest rates.[1470] These steps ensure that more compensation reaches class members, and thereby promote the objective of access to justice.

With regard to *cy-près* distributions, the requirement in BC that 50 per cent of an undistributed award or settlement amount be distributed to the Law Foundation of BC[1471] is not related to a compensatory purpose at all,[1472] because there is no requirement that the distribution must reasonably be expected to benefit class or subclass members. In order to maintain the balance between the three aims of class proceedings, then, this provision should be removed and s 36.2(1)(b) ('50% of the undistributed amount be applied in any manner that may reasonably be expected to benefit class or subclass members, including, if appropriate, distribution to the Law Foundation of British Columbia') should apply to the entirety of the undistributed amount. The legislation should also, as in Ontario, contain an explicit provision that such a distribution would only be permissible 'if the court is satisfied that, using best reasonable efforts, it is not practical or possible to compensate class or subclass members directly.'[1473] Such a direction would be consistent with the principles of access to justice, proportionality, and judicial economy, while maintaining behaviour modification as a supplementary objective.

In Québec, article 596 of the Code of Civil Procedure[1474] currently only lists class members' interests as one factor among many in the distribution of unclaimed amounts of an aggregate award; article 597 permits a *cy-près* distribution where distribution to individual class members 'is impracticable, inappropriate or too costly', but says nothing

[1470] Piché (n 1464) 267 and 274.

[1471] BC CPA, s 36.2(1)(a).

[1472] As demonstrated by the Hansard debates on this issue (n 1431).

[1473] Ontario CPA, s 27.2(1) and (2).

[1474] *Code of Civil Procedure*, CQLR c C-25, Book IX, Title II, 1003(c) (CCP).

about the recipient of that distribution. These provisions should be amended to more explicitly require that unclaimed amounts be distributed in a manner that may reasonably be expected to benefit class or subclass members. This would go some way to counteracting the danger, noted in the discussion above and in Chapter 3, that distributions are made to third parties unrelated, or only tangentially related, to the interests of class members.

Finally, there should be no option in any of the class proceedings statutes or rules that undistributed amounts may escheat to the government.[1475] As noted in Chapter 3, such a distribution does not aim to compensate class or subclass members directly or indirectly, and therefore emphasises the behaviour modification objective over the compensatory element of access to justice. In order to maintain the balance between these three aims of class proceedings, all distribution options should aim to benefit class or subclass members directly if practical and proportionate, or indirectly where direct benefits would be disproportionate.

The discussion will now turn to the reform of class proceedings in England, and whether and how class actions (currently only available in competition law cases) could be expanded to other areas of the substantive law.

3. Group Litigation in England

(a) Evaluation

As discussed in Chapter 6, group litigation lawyers in England express a strong preference for informal methods of case management over formal GLOs. This is so for several reasons, which indicate that GLOs and informal group litigation are suited to different

[1475] ULCC 2006 (n 1383) s 34(5)(b).

spheres of operation. Informal group litigation will provide more access to justice and judicial economy in simpler cases: where the parties can agree on case management issues such as costs-sharing, where there is less of a need to define numerous common questions, where the constituency of claimants is well-defined, and where the claimants are represented by only a few law firms. Informal group litigation provides less procedural certainty, but it is advantageous for access to justice and judicial economy because it tends to be more flexible, cheaper, and move more quickly towards a decision on the merits (which can also contribute to behaviour modification). Interestingly, several claimant-side interviewees noted that they prefer informal group litigation for these reasons but, if agreement cannot be reached on case management issues, they will threaten to apply for a GLO (which is often undesired by defendants because of the concomitant publicity). Informal group litigation may therefore involve bargaining that takes place 'in the shadow of the GLO'.[1476]

A formal GLO will provide more access to justice and judicial economy in more complex litigation: where agreement cannot be reached on case management issues; where numerous common questions need to be identified; where the claimant group is less well-defined and the certainty of cut-off dates is required (at least by defendants);[1477] and where there is more competition between law firms for control of the litigation. The GLO provides more procedural certainty from a judicial economy perspective, but it gives rise to delays, costs, and bureaucracy which are undesirable in terms of access to justice. Advertising tends to be more prevalent in GLOs, which leads to larger classes and is more conducive to behaviour modification.

[1476] 'Bargaining in the Shadow of the Law' refers to the impact of the legal system on negotiations that occur outside the courtroom: Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) Dispute Resolution 950. In the same way and in at least some instances, the threat of a GLO appears to have an effect on the bargaining between parties in informal group litigation.

[1477] *Weaver v British Airways Plc* [2021] EWHC 217 (QB).

Both informal group litigation and GLOs can therefore contribute to the three objectives of collective redress: access to justice, judicial economy, and behaviour modification. However, they do so in different ways and in different circumstances, which will be detailed throughout the rest of this section. I then go on to make recommendations for reform of these procedures, to provide more clarity in terms of when either procedure should be used.

i. Advertising, Cut-Off Dates, and Competing Claims

As noted in chapters 5 and 6, advertising in GLOs is used to attract claimants so they can take steps to protect their rights, and also to make sure the universe of claims is as fully known as possible, thereby facilitating the goals of access to justice and judicial economy. It also tends to lead to bigger classes, which increases the potential for behaviour modification as the defendant has to answer to a fuller extent for any damage it has caused. However, advertising is not necessary where the claimant group is already known and well-defined. Advertising can create unpredictability as competing solicitors and additional claims come forward, adding cost and delay to the process and giving rise to reputational ramifications for defendants.[1478] In some circumstances it can therefore raise obstacles to access to justice and judicial economy, and it should therefore be confined to the form of litigation to which it is more suited: the more complex litigation and larger classes that tend to be the subject of a formal GLO.

With regard to carriage, the current GLO framework states that the management court may give directions 'appointing the solicitor of one or more parties to be the lead

[1478] The costs of substantial advertising for the purposes of attracting claimants to a GLO will no longer be recoverable if the claims succeed: ibid.

solicitor for the claimants or defendants'.[1479] However, there is very little other guidance in this regard. More detailed guidance, as well as strict timelines, would inject more certainty into the process and reduce the costs and delay that arise from competition for cases.[1480] This would also make formal GLOs more attractive for complex cases where such competition is more likely. Such guidance would be unnecessary for simpler cases involving just a few solicitors' firms, which would be more suitable for informal group litigation.

ii. The GLO Criteria

As noted in Chapter 6, there are several requirements that must be satisfied before a court will make a Group Litigation Order. Consent for a GLO must be sought from the President of the Queen's Bench Division, the Chancellor of the High Court, or the Head of Civil Justice (as appropriate).[1481] Several lawyers noted that this added an unnecessary layer of bureaucracy, adding time and delay that could be circumvented by proceeding more informally.

In addition, and as discussed above, the requirement that the claims 'give rise to common or related issues of fact or law'[1482] has been interpreted fairly restrictively. Cases such as *Hobson v Ashton Morton Slack Solicitors*,[1483] in which the court denied a GLO because common issues had not been sufficiently identified and because there was a more efficient method of proceeding, and *Barking v NHS*,[1484] in which a GLO was denied

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[1479] CPR 19.13(c); 19B PD 2.2.

[1480] See Chapter 5, which details the fight for carriage of the Volkswagen Dieselgate group litigation.

[1481] 19B PD 3.3, 3.4.

[1482] CPR 19.10.

[1483] (n 1016) discussed in Chapter 5.

[1484] (n 1332).

because claims of systemic negligence were outweighed by individual issues, reveals the restrictive approach to formal GLOs. Lawyers have observed that more informal avenues tend to be better suited to cases where individual questions outweigh common ones (provided the parties can agree on the various case management issues, as noted above). This goes some way towards explaining the unpopularity of the formal approach.

iii. Settlement

As noted earlier in this chapter, there are no guidelines in the GLO framework for the settlement of claims in an aggregate fashion. Such settlements must therefore proceed informally, which can lead to procedural uncertainty, exacerbating conflicts of interest between lawyers and the group and between group members. It can also lead to other agent-principal issues, namely, the prospect that individual claimants (usually whose solicitor has very few other clients, and therefore little if any role on the steering committee) will lose control of their own litigation and be subject to decisions from lawyers they have never met and have never retained.[1485] In the next section I therefore suggest reforms to the GLO framework which will promote procedural certainty and therefore judicial economy and behaviour modification (although it may cause delays, which are an access to justice issue).

iv. Costs and Funding

Finally, and as detailed in Chapter 6, the issues of costs and funding continue to plague group litigation in England (both formally and informally), despite efforts at reform. The spiralling costs of group litigation determine the nature and number of claims that are initiated, and present a serious obstacle to access to justice. In particular, it has become

[1485] Interview with claimant solicitor 5 (CS5) (by telephone, 21 March 2019).

disproportionate in terms of cost and effort to litigate individually non-viable claims by way of group litigation.[1486] This is demonstrated in cases referred to in the previous chapter, where costs in several cases have dwarfed the total damages awarded to the claimants. The disproportionate nature of costs in these cases points to the need for a class action procedure that would accommodate individually non-viable claims – a prospect that will be discussed later in this chapter. With regard to costs, some of the reform efforts will be discussed in the next section, although extensive recommendations regarding costs and funding are beyond the scope of this thesis as the costs issues discussed apply to all litigation, including individual proceedings.

(b) Recommendations

A number of changes could be made to the CPR and Practice Directions in order to reduce the delays, costs, and bureaucracy associated with formal GLOs and thereby improve their ability to deliver access to justice, as well as making GLOs more efficient (thereby promoting judicial economy) and attractive to claimants and their lawyers. These recommendations will occupy the balance of this section and will predominantly concern formal GLOs as opposed to more informal proceedings.

i. Advertising, Cut-off Dates, and Competing Claims

The advertising of a GLO is largely within the court's discretion.[1487] In cases where the claimant group is not well-defined, as in many formal GLOs, advertising is necessary for the reasons outlined in the previous section. In such cases, it would be better to impose

[1486] For examples of court commentary on the disproportionate nature of certain group claims, see Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (CJC 2008) 144-145.

[1487] CPR 19.11(3); PD 19B 11.

cut-off dates on a rolling basis (ie the further imposition of additional cut-off dates after the first date), in order to increase access to justice for the full universe of claimants.[1488] For example, in a 'creeping' disaster involving defective medical products, injuries may not manifest immediately, or potential claimants may not be aware that their injuries might be due to the defective products. Where the constitution of the group is unknown or changeable, however, a class action would in many cases be more appropriate than a GLO. As discussed in the next section, class proceedings should be made available in England for certain types of claim, and such an alternative should be considered at the application for a GLO.[1489]

Where the claimant group is well-defined and the constitution of the group is known from an early date, the GLO should not be advertised. Advertising in such an instance would bring about unnecessary uncertainty, thereby making settlement at an earlier stage less likely. In such cases and for the same reasons, the cut-off dates should also be imposed more strictly. Such an approach would be consistent with judicial economy, as well as reducing cost and delay and thereby increasing access to justice.

With regard to competing claims, and as referred to in Chapters 5 and 6, the GLO framework requires more guidance and stricter timelines in determining the composition and leadership of the steering group. One of the advantages of formal GLOs is the additional certainty they bring, which, in appropriate cases, facilitates access to justice and judicial economy. The CPR and Practice Directions should therefore be amended to reflect the recent changes to the Ontario CPA. Section 13.1 of the CPA requires that a carriage motion be brought within 60 days of the issuance of the first action, following which

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[1488] 19B PD 13 supports this approach.

[1489] 19B PD 2.3 requires the applicant, in considering whether to apply for a GLO, to 'consider whether any other order would be more appropriate'.

competing proceedings cannot be commenced without leave of the court.[1490] On such motions, the court can order that one or more of the proceedings be stayed.[1491] The CPA also lists a number of factors that the court must consider in determining carriage,[1492] and this injects more certainty into the process. Finally, there should be no rights of appeal from such orders[1493] (thereby reducing cost and delay), and the lawyers should not be able to recoup the costs of such motions from group members.[1494] This will increase the efficiency of formal GLOs, promoting judicial economy and ensuring that costs and delay do not impede the access to justice available to claimants.

While the forming of solicitors' committees should be encouraged as this will decrease the likelihood of competing claims, the court should closely monitor agreements between solicitors in order to guard the best interests of the group members and promote access to justice and judicial economy. This would prohibit any agreements in restraint of trade (as in the Volkswagen case, discussed in Chapter 6),[1495] and any agreements in which competing counsel are paid, out of any proceeds that would otherwise go to the group, to refrain from bringing or pursuing competing actions.[1496] Such a supervisory function would best be performed as early as possible by the managing judge appointed for the purpose of the GLO,[1497] or at the hearing of the GLO application itself.[1498]

[1490] Ontario CPA, sections 13.1(3), (8) and 13.1(6).

[1491] ibid s 13.1(2).

[1492] ibid s 13.1(4).

[1493] ibid s 13.1(5).

[1494] ibid s 13.1(7).

[1495] *Harcus Sinclair LLP v Your Lawyers Limited*, [2019] EWCA Civ 335.

[1496] *Bancroft-Snell v Visa Canada Corporation*, 2016 ONCA 896.

[1497] 19B PD 8, 12.

[1498] CPR 19.11, 19.13.

Although there are no statutory prohibitions of this practice in Canada, several courts have expressed disapproval of consortium agreements that have compromised the interests of class members. *Bancroft-Snell v Visa Canada Corporation* involved a fee-sharing agreement between class counsel and another law firm (Merchant Law Group or MLG) in settlement of a carriage dispute, by which MLG was to receive up to an $800,000 share of the fees recovered by class counsel, in exchange for agreeing to stay its rival proceedings in two provinces. The Court of Appeal for Ontario largely upheld the motion judge's decision to reduce class counsel's fees by 10 per cent, to order that the relevant paragraph of the fee-sharing agreement was unenforceable, and to enjoin class counsel from paying any sums to MLG from the settlement funds or fees approved in relation to the class action.[1499] While this decision was made at the settlement and fee approval stage of the proceeding, such agreements in Canada can also be monitored at a carriage motion[1500] or pursuant to the court's inherent jurisdiction to control its own process.[1501] A similar stage in the GLO framework would be the initial case management hearing or the hearing of the GLO application.

ii. The GLO Criteria

There are several changes that could also be made to the criteria for granting a GLO, or the interpretation of them, that would make the formal process more efficient and reduce costs and delay, thereby increasing access to justice and judicial economy. First of all, there should be no requirement that consent for a GLO be sought from the President of the Queen's Bench Division, the Chancellor of the High Court, or the Head of Civil Justice.

[1499] *Bancroft-Snell* (n 1496) [4].

[1500] Ontario CPA, s 13.1.

[1501] ibid sections 12, 13. The class proceedings statutes of other provinces have equivalent provisions.

The need to apply for a GLO to one of the judges listed in PD 19B 3.5-3.9 is sufficient, because there is no reason to think that a High Court or County Court judge cannot competently and properly apply the relevant GLO criteria. The application process for a GLO should remain, however, in order to ensure that the claims are most efficiently managed as part of a GLO, instead of some other procedure such as consolidation; to delineate the issues that will be resolved as part of the GLO, which will make the procedure more efficient going forward; to determine how the claims will be determined, including the possibility of test cases; to protect the rights of the claimants who will be bound by a GLO (and which claimants will be bound); and to determine other procedural matters such as master pleadings and the disclosure of documents. These issues must be resolved even if the procedure is informal, and it is more efficient to resolve them early on and in a single hearing. Again, dealing with these issues early on promotes judicial economy, and safeguarding the rights of claimants facilitates access to justice.

With regard to the substantive points that will be considered on an application for a GLO, the courts should interpret these more broadly. There is some evidence that these are interpreted more broadly in informal group litigation,[1502] and to do the same in formal GLOs would increase access to justice for claimants proceeding under that framework. For example, the requirement that the claims 'give rise to common or related issues of fact or law'[1503] should be met even if there is only one common or related issue, as is the case under the Canadian case law.[1504] This is because the goals of collective redress apply whether there is one common issue or several, particularly with regard to judicial economy (and, if the alternative is no litigation at all, to access to justice and behaviour

[1502] Interview with claimant barrister 2 (CB2) (by telephone, 4 March 2019).

[1503] CPR 19.10.

[1504] *Rumley* (n 1324) [33]-[34].

modification). In considering 'whether any other order would be more appropriate',[1505] the courts should follow the Supreme Court of Canada's lead and find that a GLO is the appropriate procedure if there are substantive and procedural access to justice concerns that a group litigation order can address, and if these concerns remain even when alternative avenues of redress are considered.[1506]

Finally, there should be no requirement that the common issues predominate over the individual issues.[1507] Instead, it should be sufficient that the adjudication of the common issue would significantly advance the action,[1508] as is the case in most of the Canadian class action jurisprudence. To significantly advance the action, the common issue(s) must be of 'primary importance in the action as framed',[1509] must be 'fundamental to the action'[1510] and must 'move [it] a long way.'[1511] This is not a quantitative exercise whereby the number of common issues is weighed against the number of individual issues, but a qualitative exercise that considers whether a single trial of the common issues will achieve substantial judicial economy and enhance access to justice.[1512]

iii. Settlement

For the approval of settlements that are concluded on an aggregate basis (ie 'inventory' settlements whereby a lump sum is offered for the claims of the entire group), claimants

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[1505] 19B PD 2.3.

[1506] *Fischer* (n 1329) [26]; *Hollick* (n 1272) [33].

[1507] Ontario CPA, s 5(1.1); *Barking v NHS* (n 1332).

[1508] *Cloud* (n 1272) [76]-[78].

[1509] ibid [81].

[1510] ibid [83].

[1511] ibid [82].

[1512] ibid [84]-[88].

that are subject to a GLO should be able to vote. This would only be indicative, and would not be binding on the minority without court approval. This would improve the finality of group litigation and would therefore incentivise more defendants to settle, thereby increasing judicial economy. As noted above, this could be done by way of voting blocs (so that numerous weaker claims could not outvote fewer stronger claims), and the case management court could hear any objections from the minority. Such objections would be heard at a court approval hearing, thereby protecting claimants' rights and facilitating access to justice.

Inventory settlements should require court approval in order to protect the interests of group members, especially those with stronger claims – again, this would be more conducive to access to justice. Court approval would involve an application to the court in which the GLO is being case managed. For the same reasons, any fee agreements with group members should also be subject to court approval.

iv. Costs and Funding

A number of efforts have been made at reforming the costs regime under the CPR, in group litigation and in general, and some of these efforts have been discussed in Chapter 6. Other initiatives have included costs budgeting for multi-track cases (cases worth more than £25,000) that was introduced in 2013 and extended to cases worth less than £10 million in April 2014;[1513] and fixed recoverable costs[1514] for cases on the fast track (worth up to £25,000),[1515] which Lord Justice Jackson has recommended be extended to a new

[1513] The Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report, Fixed Recoverable Costs* (Judiciary of England and Wales 2017) 9, 25.

[1514] ibid 6.

[1515] Jackson Report (n 1450).

‘intermediate’ track for claims up to £100,000 that could be tried in three days or less.[1516] However, their success in preventing the spiralling costs of group litigation have so far been extremely limited.

With regard to funding, it is the increased upward pressure on costs that has made third party litigation funding and After the Event (ATE) insurance much more expensive. Only a comprehensive and effective reform of the costs of civil justice in England will help to make litigation funding more accessible, and more realistic for a wider variety of cases. This would facilitate claimants’ pursuit of their rights, thereby increasing access to justice and, in enabling them to hold defendants accountable, behaviour modification. As noted above, however, such comprehensive recommendations for reform of civil costs are beyond the scope of this thesis.

(c) Conclusion

This section has made numerous recommendations for reform of the GLO framework, in order to make the mechanism more attractive and efficient and its process more certain, thereby promoting the aims of access to justice and judicial economy (and, to a lesser extent, behaviour modification). However, the limitations of that framework for smaller claims will remain, largely because of the disproportionate nature of costs in such cases. As noted in Chapter 6, GLOs are not suitable for individually non-viable claims because of the costs created by the GLO procedure, including the risk of adverse costs. This points to the need for a class action procedure for substantive areas of the law in which smaller and individually non-viable claims are more likely to arise. It is to such a procedure that the discussion will now turn.

[1516] ibid 97-98.

4. Class Actions in England

(a) Evaluation

As discussed in Chapter 5, one of the reasons that the UK's competition law class action regime was created was because, following the introduction of the CPR in 1999 and the GLO framework in 2000, it became clear that the new regime would not work well for group actions involving low-value claims.[1517] In addition, the Enterprise Act 2002, which enacted an opt-in regime for competition claims, demonstrated that opt-in mechanisms were also ineffective for low-value claims.[1518] It was the combination of this and other factors[1519] that led to the enactment of the Consumer Rights Act 2015, which brought into being the UK's first opt-out class action regime. This section will briefly discuss that regime, before evaluating the need for further expansion of opt-out class actions to other areas of the substantive law.

i. Class Actions in Competition Law

It is too early to perform a meaningful assessment of the effectiveness of the new class action regime, given that the Supreme Court has only just considered one of the earliest cases commenced under it.[1520] However, some preliminary comments can be made.

[1517] Damian Grave and Gregg Rowan (eds), *Class Actions in England and Wales* (Sweet & Maxwell 2018) 27; Gibbons (n 1280) 120; John Sorabji and others (eds), *Improving Access to Justice Through Collective Actions* (Civil Justice Council 2008) 51; Department for Business, Innovation and Skills, *Private actions in competition law: a consultation on options for reform – government response* (BIS 2013) 6, 39.

[1518] *The Consumers' Association v JJB Sports Plc* [2009] CAT 2 [31].

[1519] Including the desire to increase private enforcement against anti-competitive conduct: Office of Fair Trading, *Private actions in competition law: effective redress for consumers and business: discussion paper* (OFT 2007) 10-11; BIS 2013 (n 1517) 59-60, [3.11], [5.24] and [7.17]; CJC Report (n 1517) 158.

[1520] *Mastercard UKSC* (n 1362).

First, in its recent *Mastercard* decision, the majority of the Supreme Court acknowledged the roles played by access to justice and behaviour modification. The majority acknowledged that collective proceedings under the Competition Act are crucial for access to justice, because the high cost of bringing a claim compared with the low amount of individual damages, together with the much greater resources available to defendants, means that individual actions for breaches of competition law are simply not viable.[1521] The Supreme Court took this into account when considering the suitability of a collective proceeding relative to individual proceedings,[1522] as well as the suitability of an aggregate damages award relative to the disproportionate and burdensome task of determining individual damages.[1523] The Court also observed that facilitating collective redress of consumer rights acts as a deterrent for potential wrongdoers, thereby serving the function of behaviour modification,[1524] which was one of the aims of the legislation.[1525]

Second, as a result of the Supreme Court's judgment, the Competition Appeal Tribunal will have to interpret the aggregate damages provisions of the legislation and questions regarding the distribution of damages much more generously.[1526] The Supreme Court held that the suitability of aggregate damages was not a hurdle to be surmounted, but simply one of a list of relevant factors in the assessment of whether the claim was suitable to be brought in collective proceedings under CAT Rule 79(2).[1527] Furthermore,

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[1521] ibid [1].

[1522] ibid [57]. There is no requirement under the Competition Act 1998 or the Competition Appeal Tribunal Rules 2015, SI 2015/1648 (CAT Rules) that the common issues should predominate over the individual issues: ibid [65].

[1523] *Mastercard UKSC* (n 1362) [57].

[1524] ibid [2].

[1525] ibid [20].

[1526] The Supreme Court remitted the *Mastercard* matter to the CAT for reconsideration; the Collective Proceedings Order application hearing was heard on 25-26 March 2021.

[1527] *Mastercard UKSC* (n 1362) [61].

the Court held that collective proceedings are a special form of civil procedure for the vindication of private rights, made available where ordinary procedures have proven inadequate for the purpose. It should not necessarily be presumed, then, that collective proceedings should have restrictions imposed on them that ordinary procedures would not.[1528] In this case, a breach had already been established, so in an individual claim the claimant would only have to establish more than a nominal loss. As such, an individual claimant would have an entitlement to trial, and would not be deprived of that right simply because damages could not be quantified in advance. The Court noted that inaccuracy in quantifying damages is a feature of many areas of the law.[1529] In such cases, 'this fundamental requirement of justice that the court must do its best on the evidence available is often labelled the "broad axe" or "broad brush" principle'.[1530]

Third, the Supreme Court acknowledged that the collective proceedings legislation 'expressly, and radically, modified' the compensatory principle of civil claims for damages.[1531] Nothing in the aggregate damages provisions or in relation to the distribution of a collective award involves the separate assessment of each claimant's loss: '[t]he only requirement, implied because distribution is judicially supervised, is that it should be just, in the sense of being fair and reasonable.'[1532] The Supreme Court did not expand on what it meant by 'fair and reasonable'. However, it is clear from its statements regarding access to justice that, although the legislature has eschewed accuracy in terms of compensation,

[1528] ibid [45], [55].

[1529] ibid [46]-[50].

[1530] ibid [51].

[1531] ibid [58]. The dissent agreed on this point: ibid [93]-[97].

[1532] ibid [58].

one of the aims of the class action framework is nevertheless to get *some* compensation to class members.[1533]

The Supreme Court's decision reflects a much less cautious approach to class actions than has hitherto been seen in England. As noted in Chapters 5 and 6, the English courts have traditionally been wedded to the individualistic and purely compensatory approach to litigation. Aggregate damages and *cy-près* distributions, which are not tied to individual compensation, have been viewed with suspicion, as the CAT demonstrated in its decision in the *Mastercard* action. This has begun to change with the introduction of competition law class actions. However, it remains to be seen how many of the 46.2 million class members in the *Mastercard* class action will claim against any settlement or judgment. If the majority of the proceeds is awarded to the Access to Justice Foundation[1534] (or to another *cy-près* recipient if the case settles),[1535] then serious questions may be raised as to the compensatory and access to justice purposes of the new opt-out regime.

Such questions should be asked. The legislative regime is too young to determine the potential for any abuse of the *cy-près* mechanism[1536] or any emphasis on behaviour modification over compensation. However, if the regime does not exist to provide access to justice and some attempt to compensate consumers, then it merely exists as a

[1533] Rachael Mulheron and Douglas E Edlin, 'The mere mirage of a class action? A challenge to *Merricks v Mastercard Inc*' (2018) 37(2) CJQ 216, 232-233.

[1534] Any unclaimed residue of an aggregate award is to be given to a charity specified by the Lord Chancellor, or used to meet the litigation costs and expenses of the representative: *Mastercard UKSC* (n 1362) [3]; Competition Act 1998, s 47C(5). The only charity currently specified by the Lord Chancellor is the Access to Justice Foundation: CAT Rule 93(6).

[1535] CAT Rules 94(4)(d) and 94(9)(g); Competition Act 1998, s 47C(6).

[1536] However, in consultations by the Department for Business, Innovation and Skills, half of respondents favoured distribution to the Access to Justice Foundation, in order to avoid 'the associated lobbying of judges and potential satellite litigation'. Very few respondents (less than 10 per cent) were in favour of giving courts and parties full discretion in appointing *cy-près* recipients: BIS 2013 (n 1517) [5.46]-[5.50].

supplement to the regulatory framework, whereby lawyers act as private 'attorneys general' and are paid accordingly. This may be an incidental function of certain private law rights of action, but it should not be the sole or even the primary function, as discussed in Chapter 3.

ii. Class Actions in Other Areas

As noted above, GLOs do not work well for group litigation involving low-value or individually non-viable claims. This is demonstrated by the Volkswagen Diesel Emissions GLO which, as detailed in Chapter 6, involved the expenditure of a disproportionate amount of costs on the front end due to the book-building required by an opt-in regime. Numerous practitioners cited the VW Diesel Emissions GLO as an example of the kind of case that would benefit from the opt-out class action approach.[1537] They further indicated that, where they are in favour of class actions legislation, it is for areas involving low-value claims, such as consumer protection, competition law, or data breach claims.[1538]

The need for class action reform in these areas is emphasised by recent developments in Europe. On 4 December 2020, the 'Directive on Representative Actions' was published.[1539] This is a key component of the European Commission's 'New Deal for Consumers' that was launched in April 2018. The Directive sets out minimum standards for Member States to implement collective redress and injunction mechanisms aimed at

[1537] Interview with claimant solicitor 7 (CS7) (by telephone, 6 March 2019); interview with defence barrister 4 (DB4) (by telephone, 8 March 2019); interview with claimant solicitor 6 (CS6) (by telephone, 15 March 2019); interview with litigation funder 1 (LF1) (by telephone, 21 March 2019).

[1538] Interview with claimant barrister 1 (CB1) (by telephone, 1 March 2019); interview with defence barrister 2 (DB2) (London, 18 March 2019); interview with claimant solicitor 8 (CS8) (by telephone, 18 March 2019); interview with claimant solicitor 1 (CS1) (by telephone, 13 February 2019); interview with claimant barrister 3 (CB3) (by telephone, 11 March 2019); interview with retired claimant solicitor 4 (RCS4) (by telephone, 18 March 2019); LF1 (n 1537); CB2 (n 1502); CS3 (n 1305).

[1539] Council Directive 2020/1828/EC of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1 (RA Directive).

consumer protection. It will allow Qualified Entities (consumer interest organisations that comply with certain requirements)[1540] to bring claims on behalf of consumers in certain areas. These include data protection, financial services, travel and tourism, telecommunications, and the environment.[1541] There have also been developments in Scotland, where the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 came into force on 31 July 2020. This introduces a generic collective proceedings regime, initially on an opt-in basis (although the Act also contains an option for an opt-out mechanism). These reforms in neighbouring jurisdictions provide a strong argument for reform in England.

The Directive on Representative Actions focuses on areas such as data breach, consumer protection, and other sectors giving rise to individually low-value claims, such as financial services. It is in these areas that the need for reform in England has been particularly demonstrated. With regard to data breaches, these are a prime example of harms that affect a large number of people, but where it is not economically viable to pursue individual claims. The only means of redress that is currently available for such claims is a representative action under CPR 19.II. As noted in Chapter 4, in *Lloyd v Google*, the Court of Appeal allowed a claim for aggregate damages to proceed where the 'damage' was in the form of a breach of rights, and that breach was uniform across the class.[1542] The Supreme Court heard Google's appeal at the end of April 2021.[1543] Should the decision be upheld, then opt-out class action legislation for data privacy claims is very

[1540] Qualified Entities must meet additional criteria to bring claims in a Member State in which they are not domiciled: RA Directive, recital 23.

[1541] ibid annex I. Other areas include products liability and food safety.

[1542] *Lloyd v Google CA* (n 1264) [75].

[1543] *Lloyd (Respondent) v Google LLC (Appellant)* UKSC 2019/0213.

likely to follow.[1544] Without such legislation (or a means of redress under CPR 19.II, which claimants would have if the Supreme Court upholds the *Lloyd* decision), data breach claims will not be pursued because, without specific financial loss or distress,[1545] they are not economically viable on an individual basis.

Several attempts to introduce such legislation have already been made. An opt-out class action device was almost introduced as part of the Data Protection Bill in 2018, but the article was pulled from the draft at the last minute.[1546] In addition, under the General Data Protection Regulation 2016/697 (GDPR) and section 189 of the Data Protection Act 2018, 2018 c 12, individuals may ask a non-profit organisation to help them bring a claim against an organisation which they believe is processing data in breach of the law. As noted in Chapter 4, the Department for Digital, Culture, Media & Sport (DCMS) has decided not to introduce new 'representative action' provisions to permit organisations to bring claims on behalf of individuals who have not given their express authorisation. Among their reasons, they cite the possibility that the UK Supreme Court will find in *Lloyd* that opt-out collective actions for data-related claims can proceed under CPR 19.6 (a development which the DCMS will 'continue to monitor').[1547]

Despite the response of the DCMS, then, there are indications of a need for opt-out class actions in the area of data protection. As noted above and in Chapter 4, the representative action is unsuited to claims (as in *Lloyd v Google*) where groups are

[1544] Interview with Litigation Funder 2 (LF2) (London, 26 February 2020). In the meantime, as noted in Chapter 4, several representative actions have been commenced in this area.

[1545] For individual claims pursued for specific financial loss or distress, see *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), affd [2015] EWCA Civ 1291; *Vidal-Hall v Google Inc* [2015] EWCA Civ 311.

[1546] HL Deb 22 March 2018, 7th sitting, col 252 (Liam Byrne). Baroness Kidron attempted to introduce a similar procedure in January 2020 by way of the Data Protection (Independent Complaint) Bill, although this attempt was unsuccessful.

[1547] DCMS, *UK Government response to Call for Views and Evidence – Review of Representative Action Provisions, Section 189 Data Protection Act 2018* (DCMS 2021).

disparate, broadly constituted, and share no pre-existing communal identity, and group members do not therefore share the 'same interest'. From the perspective of doctrinal clarity, it would be preferable to maintain the traditional interpretation of the 'same interest' test and allow class actions for the broadly constituted classes that generally arise in the field of data protection.

Attempts at class action reform have also been made in the area of financial services. As detailed in Chapter 5, the Treasury introduced a bill in November 2009 that included class actions on an opt-in or opt-out basis.[1548] However, the Bill was caught up in the 'wash-up' period prior to the 2010 election and the class actions provisions were dropped to allow the legislation to be passed before the dissolution of Parliament.[1549]

Since then, 18 GLOs have been brought for financial services claims,[1550] several of which have involved very large groups and smaller individual claims:

[1548] Financial Services HC Bill (2009) ibid cll 18-25.

[1549] Rachael Mulheron, 'Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers' (2011) 50 CBLJ 376.

[1550] This list of GLOs is taken from HM Courts & Tribunals Service, 'Group Litigation Orders' <www.gov.uk/guidance/group-litigation-orders> accessed 9 April 2021. Further details of each GLO can be found in the sources footnoted throughout the chart.

GLO	Date Granted	No. of Claimants
RBS Rights Issue[1551]	19 September 2013	~20,000 shareholders and >170 institutional investors
Lloyds/HBOS[1552]	6 August 2014	~6,000 retail investors
Lloyd's Names UK Government[1553]	16 April 2004	>1,000 underwriting names
Berkeley Burke SIPP[1554]	23 January 2018	>800 claims
CF Arch Cru[1555]	November 2013	>1,000 investors
Evolution Films[1556]	2004	>100 investors
Loss Relief[1557]	23 May 2003	~85 groups of claimant companies
Franked Investment Income[1558]	8 October 2003	>200 company groups
Foreign Income Dividends[1559]	20 July 2004	30 company groups
Thin Cap[1560]	30 July 2003	16 company groups
Controlled Foreign Companies (CFC) Dividend[1561]	30 July 2003	20 company groups

Where these have been brought on behalf of shareholders, they have generally been brought under s 90 of the Financial Services and Markets Act 2000.[1562] This provides a remedy for misstatements or omissions in listing particulars and prospectuses, without the

[1551] *RBS Rights Issue Litigation* [2014] EWHC 227 (Ch).

[1552] Jane Croft, 'Lloyds Bank defeats £600m shareholder lawsuit' (*Financial Times*, 15 November 2019).

[1553] Katharine Streatfield, 'Lloyd's Names Lose Compensation Case' (2008) FSA Journal No 115.

[1554] Jack Gilbert, 'FSCS faces £158m bill from Berkeley Burke Sipp collapse' (*Citywire*, 18 November 2019) <https://citywire.co.uk/new-model-adviser/news/fscs-faces-158m-bill-from-berkeley-burke-sipp-collapse/a1295372> accessed 6 February 2021.

[1555] Sinclair Gibson, 'Investor Group Litigation' (https://sinclairgibson.com/practice-areas/litigation/investor-group-litigation) accessed 11 April 2021.

[1556] ibid.

[1557] *Claimants in the Loss Relief Group Litigation Order v Revenue and Customs Commissioners* [2013] EWHC 205 (Ch) [32].

[1558] Simon Whitehead, 'Group Litigation and the European Court of Justice' (2006) 8(3) ECTJ 13, 16.

[1559] ibid 20-21.

[1560] ibid.

[1561] ibid.

[1562] Financial Services and Markets Act 2000, 2000 c 8.

need to show reliance on the misstatement or omission, but is silent on a collective actions procedure (as is the rest of the FSMA). Formal GLOs or informal group litigation have therefore been pursued. Because of the costs involved, these tend to be more realistic for institutional investors with bigger losses than retail investors with much smaller individual losses. For these reasons, such proceedings would have been better brought as a class action.

Another collective redress mechanism that is available for financial services claims is the Financial Markets Test Case Scheme under paragraph 6 of Practice Direction 63AA – Financial List. Pursuant to this scheme, courts may address 'issues of general importance in relation to which immediately relevant authoritative English law guidance is needed'.[1563] The first use of this scheme was the determination of whether business interruption insurance covers claims related to the COVID-19 pandemic.[1564] While approximately 370,000 policyholders benefitted from the Supreme Court's finding in January 2021, the test case scheme only applies to generally applicable questions of fact or law, and not the payment of damages based on the answers to those questions. The scheme is therefore very limited in the access to justice and behaviour modification it provides.

A strong case can therefore be made for a class actions framework for sectors involving low-value claims, including consumer protection, data breach, and financial services. The next section will discuss the form that such a framework should take.

[1563] 63AA PD 6.1.

[1564] *The Financial Conduct Authority v Arch Insurance (UK) Ltd & others* [2021] UKSC 1.

(b) Recommendations

Class action legislation should be enacted in England for the consumer protection, data breach, and financial services sectors. Why not enact a generic class action framework that can be applied across all areas of the substantive law? First, recommendations for reform should be relatively realistic, and it has become clear in the past two decades that the government is resistant to cross-sectoral reform. More importantly, group litigation lawyers are also resistant.[1565] However, as described above and in Chapter 6, both the government and group litigation lawyers have shown openness to class action reform for sectors giving rise to small claims. Such reform would also achieve Lord Woolf's aim to provide access to justice for individually non-viable claims.[1566] Class actions would therefore be available in sectors that tend to give rise to such 'Type B' claims.[1567] Because of the sometimes blurred boundary between Type A claims (which are better suited for group litigation) and Type B claims (for which class actions are recommended in this section), as well as the existence of Type C claims which involve a mixture of both, courts should have the discretion to decide whether a procedure should be opt-in or opt-out.

Second, there is clear evidence of need in these sectors, as discussed in the previous section. The evidence of need in sectors involving larger claims, such as personal injury and medical device liability, is less compelling. Either the GLO framework has handled such claims fairly well,[1568] or underlying issues such as costs or differences in the

[1565] The response of the government and group litigation lawyers to the idea of cross-sectoral reform is discussed in Chapter 5.

[1566] Woolf Final Report (n 1293) [17.2].

[1567] The concept of Type A, B, and C actions is discussed in Chapter 3, where I also discuss the distinction between group litigation and joinder.

[1568] For example, as described in Chapter 5, personal injury actions constitute many of the actions subject to a formal GLO, because Qualified One-Way Costs Shifting (QOCS) reduces the financial risk of such actions.

substantive law would make the effective prosecution of such claims difficult under any procedure.[1569] They are therefore excluded from any consideration of an opt-out class action regime in this section. Such a regime would work best for small claims, which under the relevant legislation would be defined as claims with a value up to £10,000, that would otherwise be assigned on an individual basis to the small-claims track in the civil courts.[1570]

In addition to restricting opt-out class actions to certain areas of the substantive law, what would be the other parameters of such a framework? The English legislation should take the Ontario CPA as its example, with the exception of the recently-introduced requirements of predominance and superiority discussed above.[1571] The Ontario regime would be a preferable example to the CAT regime, because it was designed to be generic and cross-sectoral, and can therefore be tailored more easily to the requirements of certain sectors as needed. However, for comparative purposes, several aspects of the CAT regime will be considered in the following analysis. The new legislation would have a number of elements that facilitate access to justice and/or judicial economy and, to a lesser extent, behaviour modification.

i. Inspiration from Ontario – Access to Justice

The English legislation should include the elements of the Ontario CPA that are intended to encourage take-up and accountability for getting compensation to class members. That

[1569] Rachael Mulheron gives examples of products liability cases that have struggled in England as compared to the US because of differences in the substantive law: (n 1486) 111.

[1570] CPR 27.

[1571] In addition, there should be no provision in the English legislation for a defendant class action, as there is in Ontario CPA, s 3. The next section recommends the continued existence of the representative action under CPR 19.II, and this performs essentially the same function as the defendant class action in Ontario.

is, on the distribution of settlement funds[1572] or an aggregate damages award,[1573] the entity that administered the distribution should be required to file with the court a report regarding the amount that ultimately reached class members.[1574] Furthermore, in order to counter the adversarial void whereby the court does not have the benefit of an independent perspective because both plaintiff and defendant have an interest in the approval of the settlement or of the lawyers' fees, courts should be able to appoint an Advocate to the Court to provide such a perspective.[1575] Finally, the court should be permitted to hold back all or part of the lawyers' fees until it is satisfied with the distribution of the aggregate award or settlement funds, as well as with the distribution reports discussed above.[1576]

The English legislation should allow for aggregate damages and *cy-près* distributions, which would promote the aims of access to justice as well as behaviour modification. With regard to aggregate damages, these are already permitted by the class actions regime in competition law.[1577] As noted in the previous section and in Chapter 6, the UK Supreme Court has held that aggregate damages may be pursued in a collective proceeding even if this results in over- or under-compensation for individual class members.[1578] This is the departure from 'accurate justice' in favour of 'rough justice' that is discussed in Chapter 3: the pursuit of aggregate damages avoids the disproportionate and burdensome task of determining individual damages,[1579] especially where the action

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[1572] Ontario CPA, s 27.1(16).

[1573] ibid s 26(12).

[1574] ibid sections 26(12), 27.1(16).

[1575] ibid sections 27.1, 32.

[1576] ibid s 32(6).

[1577] Competition Act 1998, s 47C(2).

[1578] *Mastercard UKSC* (n 1362) [51].

[1579] ibid [57].

can only proceed if damages are assessed in the aggregate and the alternative is no procedure (and therefore no compensation) available to class members at all.[1580] As the majority of the Supreme Court held, the compensatory principle is always subject to the requirement to do the best with the evidence available to the court and in a way that is proportionate.[1581]

The English legislation in the spheres of data protection, consumer rights, and financial services should therefore contain the same aggregate damages provision which should be interpreted in the same way. However, the legislation should not support a departure from the compensatory principle altogether. Specifically, the aggregate damages provisions should not permit liability to be established on a class-wide basis (whereby individual members are not required to establish loss even if this is an essential element of their claim),[1582] as is the case under the Competition Act and the CAT Rules,[1583] as this would allow the class actions procedure to change the substantive law, as the minority of the Supreme Court acknowledged in *Mastercard*.[1584] While this would support the goal of behaviour modification, because it would make the defendant internalise the full costs of its wrongdoing,[1585] allowing damages to be awarded on a class-wide basis even where some class members have not suffered loss would not advance the compensatory principle (because, in some cases, there would be no loss to compensate). Instead, as in Canada, 'an antecedent finding of liability [should be] required before resorting to the aggregate damages provision of the CPA. This includes, where required by the cause of action … a

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[1580] *Merricks v Mastercard Incorporated & Others* [2019] EWCA Civ 674 [57], [59].

[1581] *Mastercard UKSC* (n 1362) [51], [54].

[1582] ibid [95].

[1583] ibid [94]-[95].

[1584] ibid.

[1585] *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 [97] (Karakatsanis J).

finding of proof of loss.'[1586] For the most part, then, the aggregate damages provisions would only be available in the case of follow-on actions.[1587] The aggregate damages provisions of the English legislation should be used purely in the remedial sense and not for the establishment of liability.

However, it should be noted that, according to the Canadian jurisprudence, this prohibition will not prevent the question of aggregate damages being certified as a common issue, even though ultimately at trial it may be answered in the negative.[1588] This approach will therefore allow the aggregate damages provisions to promote the goals of access to justice (particularly with regard to third party litigation funding) at the certification stage.

With regard to *cy-près* distributions, these should also be permitted under the English legislation, subject to certain requirements that promote access to justice and the compensatory principle (including the distribution reports discussed above).[1589] As in the Ontario CPA and as discussed in Chapter 3, prior to approving a *cy-près* distribution, the court should be 'satisfied that, using best reasonable efforts, it is not practical or possible to compensate class or subclass members directly'[1590] and that the distribution will be made to a 'registered charity or non-profit organization [that] would reasonably be expected to directly or indirectly benefit the class or subclass members'.[1591] This means that such distributions should be made to organisations with aims that are directly related

[1586] *Pro-Sys* (n 1299) [131]; *Godfrey* (n 1403) [113].

[1587] *Mastercard UKSC* (n 1362) [45]-[47].

[1588] *Godfrey* (n 1403) [119]-[121].

[1589] In addition, and as discussed above in relation to class proceedings in Ontario, technology should be used to enable class members to make claims, or to distribute damages directly to them.

[1590] Ontario CPA, s 27.2(1) and (2).

[1591] ibid s 27.2(3).

to the aims of the legislation: the promotion of data rights, consumer protection, or rights in the sphere of financial services. Organisations with more generalised objectives[1592] should only be recipients as a last resort, as such distributions are less likely to benefit class members, even indirectly,[1593] and are tied more closely to the objective of behaviour modification because they prevent the undistributed residue from being returned to the defendant. In the same vein, there should be no option that undistributed amounts of an award or settlement fund may escheat to the government, as such a distribution would not aim to benefit class members directly or indirectly. Such a distribution is more in the nature of a fine and, as discussed in Chapter 3, only furthers the objective of behaviour modification.

A class action procedure for England should therefore contain a number of elements that would advance the objective of access to justice; similarly, several requirements of the Ontario CPA could also be imported into an English procedure for the purposes of facilitating judicial economy.

ii. Inspiration from Ontario – Judicial Economy

The English legislation should include strict time limits and guidelines for certain steps in the class proceeding, in order to reduce cost and delay. These include time limits for filing materials for the certification motion; if such limits are not complied with, the court will be able to dismiss the proceeding for delay.[1594] The court should have the discretion to do

[1592] This includes the Access to Justice Foundation, which is currently designated to receive undistributed portions of an aggregate award under s 47C(5) of the Competition Act 1998, CAT Rule 93(6), and s 194(8) of the Legal Services Act 2007, 2007 c 29.

[1593] Justice Morgan took this view of the distribution to the Law Foundation in *Emond* (n 1411) [24]-[25]. The Ontario CPA states that distribution to Legal Aid Ontario should only occur if the parties cannot agree on a recipient (and if the distribution would not reasonably be expected to directly or indirectly benefit the class or subclass members): s 27.2(3)(b).

[1594] Ontario CPA, s 29.1(1)(a).

this on its own motion, as this would further reduce procedural complexity and delay. The English legislation should also contain guidelines and time limits for motions to determine the constitution of the steering committee and the lawyers who will have carriage of the action. As in Ontario and as discussed in Chapter 6, such motions must be brought within 60 days of the issuance of the first action, following which competing proceedings may not be brought without leave of the court.[1595] New proceedings must also be registered on a central database,[1596] run by either the Law Society or the tribunal in which the proceedings will be brought (for example, the General Regulatory Chamber of the First-Tier Tribunal for data protection proceedings).[1597] For similar reasons of judicial economy, the court should also be able to hear motions in advance of the certification hearing if, as in Ontario, they 'may dispose of the proceeding in whole or in part, or narrow the issues to be determined or the evidence to be adduced in the proceeding'.[1598]

Although multi-jurisdictional class actions are less of an issue for England than they are in Canada, as discussed in Chapter 6, any English legislation allowing for class proceedings should require non-residents to opt in. This is a requirement of the Consumer Rights Act 2015,[1599] and would fit more efficiently within the wider European framework formed by the Directive on Representative Actions detailed above.[1600] The alternative would be potential overlapping actions, satellite litigation and jurisdictional challenges, all

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[1595] ibid 13.1(3) and (6).

[1596] ibid s 2(1.1). See also 19B PD 2.1, 11.

[1597] It may be that specialist tribunals will need to be established in order to adjudicate class actions under the proposed legislation: the consideration of such an administrative structure is beyond the scope of this thesis.

[1598] Ontario CPA, s 4.1.

[1599] Competition Act 1998, s 47B(11)(b).

[1600] Pursuant to that Directive, only consumers habitually resident in the Member State can be included in an opt-out proceeding – non-residents will have to opt in: RA Directive, recital 45; Rachael Mulheron, 'In Defence of the Requirement for Foreign Class Members to Opt In to an English Class Action' in Duncan Fairgrieve and Eva Lein (eds), *Extraterritoriality and Collective Redress* (OUP 2012) chapter 14.

of which undermine the goal of judicial economy. In addition, increased certainty about the scope of the class serves the compensatory objective, even though, as discussed in Chapter 3, larger classes would better support the goal of behaviour modification. In the domestic context, the court or tribunal should have the discretion to decide whether a proceeding will be opt-in or opt-out, as is currently the case at the Competition Appeal Tribunal.[1601]

iii. Other Recommendations for English Class Actions Legislation

Any class action reform in England should include a certification requirement, as this will provide a predictable and predominantly objective set of criteria to determine whether a class action will be permitted to proceed. It will also 'ensure, in the interests of the claimant class, defendants and the court that a collective action is the most appropriate procedural mechanism in terms of efficiency, economy, fairness and access to justice'.[1602] The certification requirements should follow the criteria in section 5(1) of the Ontario CPA, minus the predominance and superiority criteria. However, the requirements should include a preferable procedure criterion that would require the court to consider procedural alternatives (especially regulatory ones), and whether class members would be compensated sufficiently by that alternative. There should be no cost-benefit or preliminary merits test at certification. A cost-benefit test was proposed in the OLRC Report,[1603] and a preliminary merits test was proposed in the Civil Justice Council's 2008 Report that recommended generic opt-out class actions for England.[1604] However, such

[1601] Competition Act 1998, s 47B(7)(c).

[1602] CJC Report (n 1517) 92.

[1603] OLRC Report (n 1358) volume III, 323-324.

[1604] CJC Report (n 1517) 93, 155.

tests would be unduly onerous and complex at the certification stage, and would lead to expensive and protracted proceedings.[1605] It would be better to maintain certification as merely a procedural requirement, to determine whether the proceeding is suitable to be determined on a class basis, rather than subject the litigation to substantive requirements that are not placed on unitary litigation.[1606]

With regard to costs and funding, ideally the English legislation would have the same 'no-costs' rules as I have recommended for the Ontario legislation, and for the same reasons. However, the current combination of litigation funding (for which the market is mature and well-established in England) and the loser-pays rule means that there is at least some access to justice. In addition, successful defendants can recover their costs, which will minimise the perception of the risk of abuse. The minority of the Supreme Court referred indirectly to this form of 'grand bargain' in the *Mastercard* decision.[1607]

Consequently, parties to class actions in England should be able to fund their litigation through third party litigation funding, as is currently the case under the CAT collective actions regime.[1608] As detailed in Chapter 6, litigation funding increases access to justice by mitigating the risk of taking on the substantial administrative burdens and litigation costs posed by class actions.[1609] Because it is available for private actions in competition law, it should be available for collective proceedings in other areas.

[1605] LCO Report (n 1363) 45.

[1606] *Mastercard UKSC* (n 1362) [45] and [55].

[1607] ibid [98].

[1608] ibid.

[1609] ibid.

(c) Conclusion

Class actions legislation for low-value claims should be enacted in England. These frameworks should include elements from the Ontario CPA that promote access to justice and judicial economy, including aggregate damages and *cy-près* distributions, as well as a certification procedure and the availability of third-party litigation funding.

While such legislation would not comply with the principle of accurate justice, in that it would be difficult – particularly in the aggregate damages context – to make sure each class member is compensated with accuracy, it would comply with the principles of rough justice and proportionality. In other words, class members who have experienced an infringement of their rights would receive *some* compensation, even if that compensation is not precisely calculated. However, the legislation should not place behaviour modification on a higher footing than compensation, otherwise the class action regime would cross the line from private law right of action to public law regulation. As discussed in Chapter 3, this would be undesirable from a normative perspective.

5. Representative Actions in Canada and England

(a) Evaluation

In interpreting the representative action rule, courts in Canada, England, and elsewhere have acknowledged that it is ill-fitted for modern-day class proceedings for damages. As discussed in Chapter 5, they have made such an acknowledgement even where they have allowed class actions to proceed under that rule, because there is no other procedure available. For example, in the case of *King & Dawson v Government of PEI*,[1610] the PEI Supreme Court allowed a representative action to proceed under Rule 12.01 of the PEI

[1610] *King* (n 1439).

Rules of Civil Procedure, while also calling for the province to enact its own class proceedings statute.[1611] The Court of Appeal echoed this call.[1612] Following the Supreme Court of Canada's decision in *Dutton*,[1613] which allowed class actions at common law, provinces that attempted to use the representative action rule encountered significant procedural issues and consequently introduced legislation.[1614]

In England and as discussed in Chapter 4, the High Court in *Lloyd v Google* implicitly agreed with the defendants' submissions that the representative action was an attempt to bring in class actions by the back door, and did not allow the action to proceed.[1615] The Court of Appeal overturned this judgment and found that the 'same interest' requirement of the representative action rule had been met.[1616] It acknowledged that an alternative to a representative action would be no litigation at all, and the breach of the class members' rights would therefore go uncompensated and the defendant would not be called to account.[1617] Although the Court of Appeal did not call for class actions legislation, neither did it address any issues regarding the scope of the representative action rule[1618] (whether sector-specific or generic), or clarify issues such as opt-out, notice, costs-sharing, and the distribution of damages.[1619] Should the Supreme Court uphold the Court

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[1611] ibid [14]-[16].

[1612] *King CA* (n 1434) [103].

[1613] *Dutton* (n 1352).

[1614] eg Nova Scotia's experience as discussed in Chapter 4: *MacQueen v Sidbec Inc*, 2006 NSSC 208.

[1615] *Lloyd v Google* [2018] EWHC 2599 (QB) [52].

[1616] *Lloyd CA* (n 1264) [75].

[1617] ibid [71], [86]-[87].

[1618] LF2 (n 1544).

[1619] The Court of Appeal in *Lloyd CA* (n 1264) addressed none of these issues.

of Appeal's judgment, then legislative intervention may well be required to determine those issues.

Lloyd v Google aside, the English courts have generally recognized that representative actions and class actions for damages are two very different procedures. As discussed in more detail in Chapter 4, the English jurisprudence shows the fundamental and principled differences between the representative action rule and the modern opt-out class action as developed in the US and the Commonwealth jurisdictions.[1620] Contrary to the arguments of John Sorabji and others, the representative rule is not the hidden class action in English civil procedure.[1621] To conclude that the courts have gradually been interpreting the representative rule to reflect the modern opt-out class action is to misread the case law. Almost all the cases involve equitable relief or easily quantifiable damages that can be apportioned among a pre-existing group, contrary to class actions for damages that are brought on behalf of broader and more disparate classes. Because of these fundamental differences, making seemingly small changes to the representative action to turn it into an opt-out class action would involve changes to the substantive law, including the use of aggregate and *cy-près* damages and the rules on standing.[1622] Such substantive changes would require the introduction of legislation, as recognised by various law reform reports.[1623]

Most recently, the Supreme Court of New Zealand allowed a representative action on behalf of 3,000 policyholders to proceed on an opt-out basis.[1624] Although the

[1620] AAS Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013) [12.22].

[1621] John Sorabji, 'The hidden class action in English civil procedure' [2009] CJQ 498; Rachael Mulheron, 'A Missed Gem of an Opportunity for the Representative Rule' [2012] EBLR 49.

[1622] CJC Report (n 1517) 104-105.

[1623] ibid.

[1624] *Southern Response* (n 1338).

defendants had argued that the action should proceed on an opt-in basis, the Supreme Court determined that an opt-out approach was sufficient, primarily for reasons of access to justice, judicial economy, and behaviour modification.[1625] It disagreed with the defendants that there were fundamental distinctions between the representative action rule and a modern-day class action, and held that any procedural lacunae in the former could be filled by 'the usual armoury provided by the High Court Rules'.[1626] However, it also acknowledged that there were situations where opt-out/opt-in rights would not be relevant – that is, in situations akin to the more conventional use of representative actions, 'where the only relief sought is declaratory or injunctive and where the outcome will affect all class members identically.'[1627] The Court allowed the action to proceed, while acknowledging that the lack of a detailed regulatory framework meant that 'there will inevitably be some uncertainty as issues proceed through the courts.'[1628] The New Zealand Law Commission is currently reviewing the representative action rule, and is expected to report by the end of 2021.[1629]

(b) Recommendations for Reform

It would be more coherent from a doctrinal perspective to maintain representative actions for the purpose for which they have traditionally been used: that is, for groups bound together by a pre-existing identity, indivisible rights, and an interest in relief that is equally beneficial to the group as a whole. It is for this reason that many of the representative

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[1625] ibid [40].

[1626] ibid [41].

[1627] ibid [100].

[1628] ibid [89], [94].

[1629] The Rules Committee, 'Consultation on Representative Proceedings' (*Rules Committee*, 6 September 2018) <www.courtsofnz.govt.nz/assets/4-About-the-judiciary/rules_committee/new/consultationpaper-representativeproceedings.pdf> accessed 12 April 2021.

actions in Canada (and in New Zealand)[1630] have involved indigenous groups. Class action legislation would fulfil the more expanded function required by broad-ranging and disparate groups that wish to litigate divisible rights arising from a single event or similar transactions.

It is therefore recommended that representative actions should not be reformed at all in Canada or England. They should continue to fulfil their traditional narrow purpose in both countries, with class proceedings performing a more expanded role. While there may be a transition period where the courts allow representative actions for the purposes of access to justice, judicial economy, and behaviour modification, as the Supreme Court of Canada did in *Dutton* and the New Zealand Supreme Court did in *Southern Response* (and, to a lesser extent, as the Court of Appeal has done in *Lloyd v Google*), ultimately class action legislation should fulfil those objectives.

6. Conclusion

This chapter has evaluated the law and practice of collective redress in Canada and England as discussed in Chapters 4-6, and has made recommendations for reform in those areas, with the aim of advancing the normative position outlined in Chapter 3. That chapter put forward the normative position that class actions should focus on access to justice and judicial economy over behaviour modification and that, even where compensation is not accurate, it is better to focus on getting some compensation to class members than allowing class actions to proceed purely for a behaviour modification objective.

The recommendations in this chapter show that Canada has lessons to learn from England with regard to group litigation, while England can learn from Canada with regard to class actions. With regard to group litigation, Canada (and, in particular, Ontario) should

[1630] *Southern Response* (n 1338) [27].

adopt a framework along the lines of the English GLO, with some modifications. With regard to class actions, England should adopt class actions for individually non-viable claims and in certain areas of the substantive law.

This chapter also makes recommendations for the reform of class actions in Canada and group litigation orders in England. These recommendations again promote the underlying normative position that access to justice (including compensating class members, even on a 'rough and ready' basis) and judicial economy should be encouraged over behaviour modification.

Finally, representative actions in both countries should be restricted to their historical and narrow function, and should not be used for the purposes of allowing class actions to proceed. The legislature should instead permit class proceedings and delineate their process, which will allow for more certainty and doctrinal coherence.

Having made these recommendations, the next chapter will move on to provide some concluding thoughts. Essentially, lawyers, reformers, and stakeholders in both countries need to consider the normative basis for the collective redress regimes in their countries, to evaluate the manner in which the current regimes are fulfilling those normative goals, and then to reform those frameworks in order to more closely align with those goals.

Chapter 8:
Conclusion

This thesis has put forward a number of normative positions that are supported by the historical record, empirical research, and comparative insights drawn between England and Canada with regard to their approaches to collective redress. Firstly, I argue in Chapter 3 that arguments against class action reform focus on the traditional rationale for civil litigation in England and Canada (that is, accurate justice), while arguments in favour focus on access to justice, judicial economy, and behaviour modification. I further argue that access to justice should be the primary motivator of class proceedings legislation, with behaviour modification playing a supplementary role. Having argued that that *should* be the case, I establish in Chapters 5-7 that for the most part it *is* the case in the class actions legislation and jurisprudence on both sides of the Atlantic. The recommendations I make as a result promote the underlying normative position that access to justice (including compensating class members, even on a 'rough and ready' basis)[1631] and judicial economy should be encouraged over behaviour modification.

Secondly, I argue in Chapters 3 and 4 that class actions and group litigation occupy a 'continuum of aggregation' and are each ideally suited to different types of claims. Class actions are better suited to 'Type B' claims (that is, claims that are individually non-viable), while group litigation is better to suited to 'Type A' (individually viable) claims. Representative actions, on the other hand, are not a mechanism for the aggregation of claims, but instead are a procedure for the prosecution of indivisible group rights. These arguments are supported by the historical evolution and current-day practice of class actions and group litigation as discussed in Chapters 5 and 6. Class actions and group

[1631] Also described as a 'broad axe' or 'broad brush' approach: *Mastercard Incorporated & Others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51 [51] (Lord Briggs).

litigation in Canada and England have evolved from different roots. In Canada, the difficulties with using the centuries-old representative action rule to litigate modern opt-out claims led to the enactment of class proceedings legislation across the country. In England, the challenges of using an ad hoc case management device to litigate multi-party claims led to the enactment of the GLO framework. In essence, the histories of the two countries have led to different responses to the difficulties inherent in collective action. This research in turn supports the evaluation I conduct and recommendations that I make in Chapter 7.

Finally, the normative arguments that I put forward in Chapters 3 and 4 regarding the role of representative actions have been borne out by the findings in Chapters 5 and 6. Class proceedings are fundamentally different from representative actions, because the class members in a class action are bound together not by a pre-existing identity, indivisible rights, and an interest in relief for the group as a whole (as in a representative action), but by issues arising from the litigation, divisible individual rights, and an interest in redress against the defendant. I take the normative position that, in light of the poor fit between representative actions and modern-day opt-out class actions, the former should be confined to their traditional interpretation. Decisions that have attempted to craft a common-law class action remedy from a representative action rule have failed to address many of the resulting procedural complications, including opt-out classes (and concomitant issues of notice) and the distribution of damages. In Canada, where most jurisdictions have class actions legislation, the representative action has largely assumed its traditional requirements of a limited and clearly ascertainable class, asserting a common statutory or collective right, or seeking a common declaration or remedy. Collective proceedings involving more disparate classes bound together purely by the issues at the heart of the litigation have been pursued under class actions legislation. These developments inform the recommendations that I make in Chapter 7.

On a concluding note, the historical development of collective redress in both countries is instructive for both current-day practice and future potential for reform. In Canada, the initial approach to class actions was, for the most part, restrictive: courts were much less willing to certify class proceedings, especially outside of the small claims context; third party litigation funding was still in its infancy; there was uncertainty regarding the constitutionality of national class actions and whether certain groups of potential class members were required to opt in; and remedies such as aggregate damages and *cy-près* distributions were much more narrowly available. Lawyers too, were more uncertain about class actions, and until recently only a small circle of firms has been willing to practice regularly in this field. As the class actions framework has matured in the provinces, the attitude of the courts and lawyers has become much more liberal, such that class proceedings have become fully entrenched in the Canadian legal system. While aspects of the device are sometimes debated, its existence is very rarely, if ever, disputed.

In England, courts and lawyers have also displayed a distrust of and an unfamiliarity with class actions, with initial decisions at the Competition Appeal Tribunal exhibiting a very restrictive approach. Similarly, with both class actions and Group Litigation Orders (GLOs), only certain law firms were willing to take on the financial risk of such proceedings, and only for certain types of claim. However, just as the Canadian approach became broader and more permissive as the class actions regime became more established, there are signs that this is happening in England as well. The increasingly liberal approach by courts and practitioners in Canada (with the possible exception of Ontario) can provide encouragement for reformers in England.

Given that England's nascent class action regime has referred extensively to the Canadian legislation and case law, Canada's past and present experiences with class proceedings may well hold the key to broader class action reform in England's future. While England can learn from Canada with regard to class actions, Canada also has lessons to learn from England with regard to group litigation. The keys to the reform of collective redress to further the aims of access to justice and judicial economy, with a supplementary role for behaviour modification, therefore lie on both sides of the Atlantic.

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