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FUNDAMENTALS OF MULTI-PARTY OR COLLECTIVE LITIGATION:

REFLECTIONS FROM THE PERSPECTIVE OF ENGLAND

Abstract

Fundamental choices are to be made when fashioning a system or combination of systems concerning multi-party and collective relief (see section II of this article). These include:

- economic access to justice (section III),
- opt-out ‘class’ litigation (notably the status of ‘representatives’ suing on behalf of the class of alleged victims, and the availability of claims for compensation or money) (section IV) and opt-in arrangements and group litigation (see section V)).

Subject to controls, England has embraced group litigation (opt-in) and that it continues to offer representative proceedings (opt-out), extending the latter to cover claims for compensation where the global amount is ascertainable and there is a clear criterion for distributing the damages ‘kitty’ amongst individual victims (section IV). But caution should not be thrown to the winds. Arrangements must be carefully controlled and monitored because unduly vigorous and dynamic collective redress can become problematic (section VI).

Key Words

Multi-party litigation; collective redress; group litigation; class actions; access to justice; costs; remedies; damages; civil courts

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1 Revised version of remarks addressed to the colloquium held on 15 January 2014 in Milan at the Palazzo di Giustizia di Milano. I am grateful to the organisers, notably Francesco Fiecconi and Elena Marinucci and Claudio Consolo, for their kind invitation.
I

INTRODUCTION

Not just in England, this is a keenly debated topic.\(^2\) English ‘multi-party’ or ‘collective’ civil litigation can take one of four forms: (i) test case litigation, supported by the staying of related individual actions (a plurality of actions, but with all but the test action stayed pending the outcome of the test case); (ii) consolidated litigation or joinder, so that claims are coupled together into a

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single but long snake of a case (a single action, but a plurality of claimants); (iii) representative proceedings (a single action, but with a represented class, see further below); (iv) numerous claims co-ordinated as a ‘Group Litigation Order’ (a plurality of actions in a co-ordinated collective action).

Representative proceedings (mode (iii) above) in England differ from modes (i), (ii), and (iv) (see above) because the representative claimant brings an action on behalf of himself and others (the represented class). He is the only claimant. Members of that represented class are not parties to the action. Nevertheless, those class members will receive the benefits of a res judicata decision (or be subject to that decision), for example the benefit of a favourable declaration of legal entitlement. This form of proceeding is, therefore, characterised as an opt-out system.

Group Litigation Order litigation has become the main, but not the exclusive, means of handling claims for compensation involving large groups of similarly affected persons or entities. The GLO procedure is an opt-in system.

But we should begin by identifying the fundamental principles and the main policy issues in this area of collective redress.

II

FUNDAMENTAL ISSUES

These are the salient points governing the civil procedural system’s response to the challenge of collective redress or multi-party claims:

(1) There must be a significant number of persons who are allegedly harmed, or whose interests are threatened, in the same or a similar way.

(2) In order to protect those interests, there can be either public enforcement or private vindication. Or there can be a combination of these.
(3) Legal systems can also offer a choice between, or a combination of, opt-in and opt-out systems. For example, England offers a combination.

(4) What of practical or economic access to justice (on this see further section III of this article)? Without this a legal system will be creating merely useless procedural categories, procedures which shine when introduced but which, as the years pass, rust through disuse. However, public funding has fallen away. England and the USA have used contingency funding. Non-party funding is also growing in importance.

(5) Under the opt-out system, there is the central issue: who will be the representative? In the Scandinavian countries, the three models of public representatives, consumer association representatives, and private representative are all found. In the USA and England, the main form of representative is a private individual.

(6) What type of relief is available? Should it be confined to declarations or injunctions: that is, defendant-directed and not capable of being tailored to the claimants’ individual interests? Or should money be open to being awarded and, in particular, compensatory damages? If damages are available, compensatory sums must (a) involve an award of the global amount and (b) provide a criterion for allocation of individual shares (not necessarily equal). Awards made in respect of a collective wrong but not obviously capable of distribution to members of the class and hence paid into court which are to be allocated cy-près are not attractive. Such awards (i) provide a fund for remuneration of the claimant(s)’ lawyers (b) assuage a collective sense

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3 As reported by Laura Ervo (surveying Sweden, Norway, Finland and Denmark) at the Hungary conference, Budapest November 2013.

4 The cy-près doctrine (a French phrase, meaning, in effect, ‘as near as possible’) appears in the English law of charitable trusts, but has been adopted vis-a-vis class action settlements in the United States. Generally, Rachael Mulheron, The Modern Cy-Près Doctrine: Applications & Implications (London, 2006).
of dissatisfaction; but (c) do not necessarily lead to individual satisfaction of those who have suffered as a result of the wrong. Punitive damages are not favoured in many systems (for example, breach of contract does not give rise to liability for exemplary damages in English contract law: indeed exemplary damages are not available at all for breach of contract;\(^5\) this topic has stimulated extensive discussion in the USA).\(^6\) A bare declaration of compensatory liability is probably not enough unless individual loss is so substantial that follow-up individual damages claims are inevitable.\(^7\)


\(^{6}\) O Bar-Gill and O Ben-Shahar (2009) 107 Mich L Rev 1479; R Cresswell, ibid, 1501; S Thel and P Siegelman, ibid, 1517.

\(^{7}\) In Prudential Assurance Co Ltd v. Newman Industries Ltd (No 1) [1981] Ch 229, Vinelott J (not disturbed on this point on appeal, [1982] 1 Ch 204, 222-4, CA), Vinelott J identified a two-stage: (i) representative action establishing the defendant’s liability towards members of the represented class, with (ii) individual claims by members of that class to quantify their recoverable loss. And he held that the representative claimant can establish a ‘declaratory’ common basis of liability which might be later invoked by others similarly harmed by the defendant. (On appeal, the Court of Appeal did not disturb the judge’s analysis of the scope of representative proceedings. However, it reversed the decision and found in favour of the defendants. The Court of Appeal held that the action for damages was substantively misconceived and should be struck out on the basis that the shareholders’ rights had not been affected. Essentially, the court’s reasoning on this substantive issue was that the victim
The management of large multi-party or complicated representative proceedings is a specialist judicial responsibility. Judges, chosen for their high ability and flexibility, should be trained to carry it out. This will promote sound practice and consistency.

There is a need for transparency so that the public can: (i) readily discover what are the procedures and how effective are they; (iii) what judgments have been delivered and for how much; and (ii) which actions are pending (there should be a reliable register of such claims for the purpose of supplying details of (ii) and (iii)).

The technique of class/group civil procedure (culminating in civil judgments) can be combined, or co-exist, with:

(a) settlement  
(b) mediated settlement  
(c) judicially ratified settlement (as in the Dutch system)\(^8\)  
(d) class arbitration (outside the USA, where adhesion arbitration clauses have been upheld, such arbitration seems a remote prospect because of the need for free consent to arbitration clauses).

\section*{III}

\textbf{ECONOMIC ACCESS TO JUSTICE}\(^9\)

Without effective economic access to justice, reformers in this field will have composed 'Hamlet' but have left out the Prince of Denmark.

\footnotesize{of any conspiracy to defraud was the company and that there is no necessary factual, and hence no legal, nexus between loss suffered to the company and hypothetical loss claimed by a shareholder. The contrary approach would subvert the salutary rule in \textit{Foss v. Harbottle} (1843) 2 Hare 461 which requires actions to be brought by the company, here N, rather than shareholders, except for narrowly defined situations: \textit{Prudential} case [1982] Ch 204, 210–11, CA, citing Jenkins LJ in \textit{Edwards v. Halliwell} [1950] 2 All ER 1064, 1066–7, CA.)

\(^8\) C Hodges and A Stadler (eds), \textit{Resolving Mass Disputes: ADR and Settlement of Mass Claims} (Edward Elgar, Cheltenham, 2013), ch's 1 to 9 (by various authors, concerning approaches in the Netherlands, England, Canada, the USA, Australia, and China).

\(^9\) Andrews on Civil Processes (Intersentia, Cambridge), volume 1 (Court Proceedings), ch's 20, 18, and nch 25 at 25.18 to 25.34.}
Certainly public funding of civil litigation has become a fundamental problem in the field of multi-party litigation. In English civil litigation in general, ‘economic access to justice’\textsuperscript{10} is no longer significantly supported by public expenditure on legal aid. For example, in \textit{AB} \textit{v. Ministry of Defence} (2012)\textsuperscript{11} Lord Phillips noted that the Legal Services Commission had initially funded claims brought by ex-servicemen. These claims concerned alleged illness caused by alleged exposure to radiation during nuclear weapons testing many decades before, but the public plug was later pulled.\textsuperscript{12} The experience in that litigation typifies the general shift within English modern civil litigation towards the ‘privatised’ ‘no-win-no-fee’ arrangements. This shift has also affected multi-party litigation. Formally, the rules and guidance permit public financial support of unusually deserving group litigation.\textsuperscript{13} In fact public funding for group litigation is seldom granted.\textsuperscript{14}

\textsuperscript{10} The distinction between formal and economic or ‘effective’ access to justice was acknowledged in \textit{Hamilton v. Fayed (No 2)} [2002] 3 All ER 641, CA, at [65], by Chadwick LJ, and [81], by Hale LJ; on ‘access to justice’ and conditional fees and the decline of legal aid, see Neil Andrews, \textit{English Civil Procedure} (Oxford University Press, 2003), ch’s 9, 35; for observations in the context of multi-party proceedings, C Hodges, ‘The Europeanisation of Civil Justice: Trends and Issues’ (2007) 26 CQ 96, 98 ff.

\textsuperscript{11} [2012] UKSC 9; [2013] 1 AC 78.

\textsuperscript{12} ibid, at [152]: ‘Some funding appears to have been obtained from the Legal Services Commission to carry out investigations and proceedings were instituted with this assistance at the end of 2004. The Treasury Solicitor then agreed to an extension of the time for service of particulars of claim because of difficulties arising out of the funding certificate. The Legal Services Commission withdrew funding on 17 August 2005. This led to a hiatus in the proceedings. Ultimately a conditional fee agreement backed by after-the-event insurance was obtained. Although this was limited to the limitation issue alone this may have had some influence upon the fact that master particulars of claim were settled and were served on 29 December 2006.’


\textsuperscript{14} Besides Mulheron Report, ‘Reform of Collective Redress in England and Wales’ (2008), ch 11 at p 74 (www.civiljusticecouncil.gov.uk/files/collective_redress.pdf), see the following comment by Chris Hodges at the 2006 Oxford conference on multi-party actions, cited with his permission: ‘The previous freedom with which Legal Aid was dispensed has disappeared. Public funding is restricted, made available for cases only on a prioritised basis, and subject to considerable bureaucracy. The Legal Services Commission is now very wary of funding large cases, and prefers to fund test cases. Only one case (Sabril, alleged visual field constriction, made by Sanofi-Aventis) is currently funded by the LSC: the action is proceeding with test cases.’
However, from 1 April 2013, claims in respect of personal injury, do not involve a costs risk to the claimant unless (the element of ‘qualified’ costs immunity) (a) the claim has been struck out as hopeless or an abuse of process or (b) the claim is found to be fundamentally dishonest. This change in the costs rules, which was recommended by Sir Rupert Jackson, is known as ‘qualified one-way costs shifting’: it is one-way in the sense that the defendant will be liable for costs if the claim succeeds. And it is ‘qualified’ in respect of (a) and (b), as already explained. The result is that a major exception is introduced to the reciprocal principle of the ‘loser pays’. For this privileged cohort of claimants (alleged victims of personal injury), no doubt inspired by a sense of humanity and wider civil justice, one barrier to access to justice is removed: the prospect of liability for the opponent’s costs if the case is lost.

IV

REPRESENTATIVE PROCEEDINGS (‘OPT OUT’)

The current English rule (CPR 19.6(1) and (4)) provides:

(1) Where more than one person has the same interest in a claim—
a. the claim may be begun...by or against any one or more of the persons who have the same interest as representatives of any other persons who have that interest...(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule—a. is binding on all persons represented in the claim; but b. may only be enforced by or against a person who is not a party to the claim with the permission of the court.

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15 As defined at CPR 44.13(1); for a sophisticated defence of qualified one way costs shifting, A Higgins, ‘A Defence of Qualified One Way Cost Shifting’ (2013) 32 CJQ 198.
16 CPR 44.15.
17 CPR 44.16.
19 CPR 44.13 to 44.16; PD (44) (General Rules About Costs) 12.4 to 12.7.
20 CPR 19.6.
It is unnecessary for the representative to have been appointed or elected by the relevant group. In short, he can be a self-appointed general. However, ‘the court may direct that a person may not act as a representative’. This allows the court to bar an unsuitable representative. Another control is that, if some represented members of the class are discontent with the manner in which the proceedings are being conducted by the head representative, a segment of the represented group can secede from the main group and become co-defendants.

The representative claimant or defendant (CPR 19.6(1) permits the defendant to be sued as a representative of other alleged co-wrongdoers or civil defaulters) is dominus litis (Latin for ‘the one who calls the procedural shots’). It follows that the representative can compromise the claim or defence. The position here is as follows:

(a) such a settlement will not bind represented persons unless they specifically assent and become parties to it;
(b) but a settlement which is constituted as a judgment by consent would appear to bind represented persons because (CPR 19.6(4), as fully cited above): ‘… any judgment or order given in a claim in which a party is acting as a representative under this rule (a) is binding on all persons represented in the claim…’;
(c) the court does not approve settlements of representative proceedings, unless the represented persons are either under a mental disability or are minors.

Representative proceedings can provide an efficient means of gaining ‘closure’ of a dispute affecting a host of persons. A notorious example is the Equitable Life case (2002), where a defendant life insurance company sponsored a representative action. However, the defendant’s strategy back-

\[\begin{align*}
21 & \text{ CPR 19.6(2).} \\
22 & \text{ CPR 19.6(4).} \\
24 & \text{ CPR 21.10(1) (proceedings by or on behalf of a child or patient). cf the US practice where the need to obtain judicial approval for class action settlements is standard, although it has not escaped criticism: N Andrews, English Civil Procedure (Oxford University Press, 2003), 41.90 to 41.109.}
\end{align*}\]
fired calamitously. Ultimately, the House of Lords issued a declaration in this action, but in favour of the representative claimant.\textsuperscript{25} That declaration provided a binding interpretation of a disputed clause in the defendant company’s life assurance policy. Ninety thousand policy-holders were bound by this decision. It is widely accepted that the House of Lords got the substantive point wrong. The company later collapsed because of this decision, which provided ‘closure’ is a wider sense than intended by the defendant.

Apart from declarations and injunctive relief, representative proceedings are relatively uncommon in England.\textsuperscript{26} Representative proceedings for pecuniary relief remain distinctly marginal in England. This is so for two reasons. First, there is the claimant’s personal ‘costs risk’. A representative must bear the entire cost of the litigation if the case is lost. He will then be required to pay the defendant’s costs. The second impediment to damages litigation in representative proceedings has been the courts’ traditionally narrow interpretation of the notion of a common interest (‘same interest’). However, it is now clear that damages can be awarded where (a) the court can ascertain the total sum payable in respect of the global loss suffered by the class; and (b) there is a criterion for distribution of that global sum amongst the represented class. These criteria are supported by Akenhead J’s decision in \textit{Millharbour Management Ltd v. Weston Homes} (2011).\textsuperscript{27} That decision also confirms the


\textsuperscript{27} [2011] EWHC 661 (TCC); [2011] 3 All ER 1027.
modern approach that representative claimants can validly seek damages for their own personal loss and for the loss suffered by other members of the class (this and similar modern cases have broken free from the shackles of a 1910 Court of Appeal decision). In the Millharbour case, numerous purchasers of flats, and sub-purchasers of flats, each of whom had bought leasehold interests in these dwellings, complained that the defendant builder had failed to construct satisfactory accommodation. Because of these defects, expensive repair work would be required. At first the cost of this work would be incurred by the management company responsible for maintaining the accommodation on behalf of leaseholders. That cost would then be passed on to individual tenants as increased ‘service charges’ in accordance with the contracts between the management company and the leaseholders. The present representative action would operate to enable the representatives of these different cohorts of leaseholders to obtain compensation. That compensation would be the amount of the extra service charges payable by the leaseholders to the management company as a result of the repair costs.

A generic opt-out mechanism, capable in appropriate cases of yielding class-wide compensation, already exists in English law. But some would like this instrument to be more visible, more flexible, and more effective as a means of

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28 Markt & Co Ltd v. Knight SS Co Ltd [1910] 2 KB 1021, 1030, 1035, 1040, CA; the majority suggested that it is not enough that the suggested class of claimants is suing in respect of the same cause of action (for example, in contract or in the tort of negligence); nor that their claims raise strikingly similar factual issues, perhaps arising from the same incident. The presence, or even the possible presence, of different defences (for example, individual contractual clauses imposing limitations upon liability or, in the case of negligence claims in tort, the possible presence of different degrees of contributory negligence), would preclude a representative claim. Vaughan-Williams LJ, at 1030, emphasised the possibly heterogeneous nature of the set of (contractual) bills of lading applicable between the cargo-owners and the carrier. Fletcher-Moulton LJ, at 1035, took the severe view that an individual claim for damages (whether or not founded on breach of contract) is by definition not a claim for common relief, and therefore incompatible with the spirit of representative proceedings, as earlier expressed by Lord Macnaghten in Duke of Bedford v. Ellis [1901] AC 1, 8, HL, who said: ‘Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.’ The dissentient on the representative action point in the Markt case, Buckley LJ, [1910] 2 KB 1021, 1048, considered that a representative action could proceed on the basis of a declaration of liability for breach of contract; Buckley LJ’s suggestion foreshadowed Vinelott J’s decision in the Prudential case [1981] Ch 229, on which see above.
providing compensation in respect of collectively suffered civil wrongs. Such proposals were, however, rejected by the British Government in July 2009.\textsuperscript{29} Instead the Government, in its July 2009 response, proposed that possible reform should proceed on a ‘sector by sector’ basis, and that a (more vigorous) opt-out class action device should be introduced only if, in the relevant context, such a litigation tool would be justified as cost-effective and proportionate, and superior to regulatory powers.\textsuperscript{30}

V

GROUP LITIGATION ORDERS (‘OPT IN’)\textsuperscript{31}

Such orders (‘GLOs’) were intended to become the mainstay of the English system’s treatment of multi-party litigation (an ‘opt-in’ system). But it is possible that relaxation of representative proceedings, to accommodate some pecuniary claims, might cause GLOs to become less important during the next decade.

A GLO is a special form of joinder, by listing of claims on a group register. The Senior Master and the Law Society maintain a list of GLOs.\textsuperscript{32} But the listing process has become neglected.

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\textsuperscript{29} Ministry of Justice, July 2009: \textit{the Government’s Response to the Civil Justice Council’s Report Improving Access to Justice Through Collective Actions.}

\textsuperscript{30} \textit{ibid}, at [11].

\textsuperscript{31} R Mulheron, ‘Some Difficulties with Group Litigation Orders - And Why a Class Action is Superior’ (2005) 24 CJQ 40, 45 neatly lists six prerequisites for a GLO: (1) a number of claims; (2) common or related issues of fact or law; (3) consistency with CPR Part 1, the ‘Overriding Objective’; (4) consent of the Lord Chief Justice, Chancellor (of the Chancery Division) or Head of Civil Justice; (5) neither consolidation nor representative proceedings would be appropriate; (6) class needs to be defined; on this last point Mulheron notes PD 19B, para’s 3.2(2), (3), where the text refers, respectively, to the need to specify the ‘number and nature of claims already issued’ and ‘the number of parties likely to be involved’; Mulheron Report (2008) (‘Reform of Collective Redress in England and Wales’ www.civiljusticecouncil.gov.uk/files/collective_redress.pdf) pp 9 ff; 144 ff.

\textsuperscript{32} PD(19B), para 11: After a GLO has been made, a copy of the GLO should be supplied—(1) to the Law Society, 113 Chancery Lane, London WC2A 1PL; and (2) to the Senior Master, Queen’s Bench Division, Royal Courts of Justice, Strand, London WC2A 2LL.
The GLO system attractively expanded multi-party litigation to cover (CPR 19.10) ‘claims which give rise to common or related issues of fact or law’, and hence to go beyond the ‘same interest’ constraint of representative proceedings (CPR 19.6(1), quoted in the text earlier). CPR 19.10 states that: ‘A Group Litigation Order (“GLO”) means an order... to provide for the case management of claims which give rise to common or related issues of fact or law’ (the “GLO issues”).

By contrast, CPR Rule 19.6 provides as follows for representative parties with same interest: (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.

There are the main components of the GLO system.33

First, there are two levels at which preliminary judicial permission must be granted for a group litigation order, a two-stage procedure: there must be an (i) application to a specified judge34 (or the court can itself make such an order of its own initiative;35 thereafter, further ratification is necessary (the ‘making’ of the GLO), by a senior judge, depending on the court in which the GLO is to be lodged.36

Secondly, group litigation involves ‘opting-in’ by each individual.

33 See also the summary by Lord Walker in Autologic Holdings plc v. Commissioners of Inland Revenue [2005] UKHL 54; [2006] 1 AC 118, at [86]: ‘The key features and normal effect of any GLO are that it identifies the common issues which are a pre-condition for participation in a GLO; it provides for the establishment and maintenance of a register of GLO claims; it gives the managing court wide powers of case management, including the selection of test claims and the appointment of a lead solicitor for the claimants or the defendants, as appropriate; it provides for judgments on test claims to be binding on the other parties on the group register; and it makes special provision for costs orders.’

34 PD(19B), para 3.3: A GLO may not be made—(1) in the Queen’s Bench Division, without the consent of the Lord Chief Justice, (2) in the Chancery Division, without the consent of the Vice-Chancellor, or (3) in a county court, without the consent of the Head of Civil Justice.

35 PD(19B), para 4.

36 PD(19B), para’s 3.5 to 3.9.
Thirdly, a group member enjoys both membership of the group and the general status of a fully-fledged ‘party to civil proceedings’.

Fourthly, during the progress of the GLO, the court will exercise extensive case management and issue directions.

Fifthly, if the group loses the case, each group member is liable to the victorious party both for that member’s share of the common costs of the proceedings and for any individual costs specifically incurred with respect to his claim.

Finally, decisions on ‘common’ issues are binding on, and in favour of, the group. Such a ‘common’ issue will normally concern questions of liability or the availability of a particular head of loss.

The former Senior Master Robert Turner, in a report sent to the author in 2007 (and amplified at a Cambridge seminar in 2012), stated that he had dealt with the following GLOs:37

- a hotel in Spain to which tour operators sent parties long after they allegedly knew of the serious risk of food poisoning that existed;
- the Alder Hey hospital organ removal litigation involving hundreds of deceased young children and their grieving families;
- the (then) Senior Master of the Queen’s Bench Division sent this to mediation with huge success (as the author has explained elsewhere);38

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37 Other collectively suffered wrongs which might produce (in some instance have already produced) such claims are: defective pharmaceutical drugs; insidious industrial injuries; child abuse cases affecting large numbers, often spread over many years; defective educational, health or other public services; over-charging or defective provision of banking, financial or pensions services (however, here there is good access to justice provided by various ombudsmen; but multiple claims against the banks are pending in England (2008). See Mulheron Report, ‘Reform of Collective Redress in England and Wales’ (2008), ch 17 (www.civiljusticecouncil.gov.uk/files/collective_redress.pdf); at ch’s 8, 9 and 10, she notes the moderate success of consumer protection initiated by the Office of Fair Trading or the Consumer Association under the Competition and Unfair Terms legislation or Regulations.

38 N Andrews, The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England (Mohr Siebeck, Tübingen, Germany, 2008), 10.13: ‘An example of mediation’s flexibility concerns a group litigation action brought by parents of deceased children against a children’s hospital trust (Alder Hey Hospital,
the hot drinks claims against McDonalds; these claims failed (in England);
long distance flight thrombosis claims;\textsuperscript{39}
removal of indigenous inhabitants from the Chagos Islands in the Indian Ocean;\textsuperscript{40}
the unexploded (munitions) shells cases from the British Army’s former training areas in Kenya;
pension cases where long-serving employees were allegedly cheated out of their final salary pension entitlements;
Ivory Coast contamination claims, involving alleged dumping of toxic chemicals from a ship: \textit{Motto v. Trafigura Ltd} (2011);\textsuperscript{41}
the Buncefield disaster (explosion at oil depot; devastation of vicinity; property claims; 3,400 claimants);\textsuperscript{42}
and more recently, see the claims brought by ex-servicemen concerning illness caused by alleged exposure to radiation during nuclear weapons testing many decades before (limitation or prescription problems proved decisive: \textit{AB v. Ministry of Defence}, 2012).\textsuperscript{43}

\section*{VI \hfill CONCLUDING REMARKS}

There are three main obstacles to expansion of the opt-out system of civil redress in the collective context.

\textit{Liverpool). The hospital had removed organs from dead children without their parents’ permission. The claim for damages proceeded for some time. The procedural judge (Senior Master Robert Turner) then successfully recommended mediation before an outsider. A settlement was agreed, consisting of five elements: a very modest amount of compensation; a grant by the hospital towards relevant research; an undertaking by the Government to issue better guidelines for hospitals; a memorial to the children; a public apology by the doctors concerned.’

\textsuperscript{39} \textit{Deep Vein Thrombosis and Air Travel Group Litigation} [2005] UKHL 72; [2006] 1 AC 495.
\textsuperscript{40} G Scanlan, ‘The Chagos Islanders’ Case - A Question of Limitation?’ (2007) 26 CJQ 292.
\textsuperscript{42} [2008] EWHC 1729 (Comm); [2008] 2 CLC 258.
\textsuperscript{43} [2012] UKSC 9; [2013] 1 AC 78.
First, within Europe, including in Brussels, a ‘sectorial’ preference, as distinct from uniform or general introduction of private group/class procedural techniques.\textsuperscript{44}

Secondly, three factors tend to sap the vitality of these methods: (i) entrusting ‘standing’ to public or quasi-public bodies, such as consumer associations; (ii) withholding or restricting pecuniary remedies; (iii) restrictions on contingency fees or private commercial funding (it remains to be seen whether contingency fee funding, now validated in England and Wales for civil litigation, following the Legal Aid, Sentencing, and Punishment of Offenders Act 2012,\textsuperscript{45} effective since 1 April 2013, will inject dynamism into the representative proceedings style of litigation).

Thirdly, there is a xenophobic fear of the USA system. The fear is strong in the United Kingdom but rises to terror in some Member States of the European Union. But a fresh and objective appraisal of procedural techniques is required.

However, there are three dangers in adopting an ‘opt out’ system:

(a) \textit{abuse and overkill:} a generic opt-out class action for damages would involve claimants’ rights being championed by the joint enterprise of law firms (including foreign firms fishing in England for work) and commercial funders (or syndicates of funders) interested in profiting from others’ litigation; this might involve potentially aggressive collective litigation and very large gains being made by law firms; in short, this might heap more public opprobrium on lawyers whose rating in England seems at times to be level with grave-robbers;

(b) \textit{defensive behaviour:} the fear of commercial and public entities being exposed to expensive and protracted litigation; the culture of claims defensiveness (often expressed caustically as

\textsuperscript{44} As reported by Professor Burkhard Hess, Max Planck Institute, Luxembourg, to the Budapest conference on class actions, November 2013.

\textsuperscript{45} Andrews on Civil Processes (Intersentia, Cambridge, 2013), vol 1, Court Proceedings, ch 20.
`Health and Safety’) is already strong within the United Kingdom;

(c) *increase in liability costs:* inevitable increases in the cost of potential defendants’ defensive measures; in particular, consumers and businesses paying more for insurance cover.