**Submission to the Review of Administration of Civil Justice**
**Dr. Joanne Blennerhassett**[1]

The group requests submissions from interested persons or parties in relation to its work. The broad areas to be pursued by the group will, in an overall context of improving access to justice and reducing costs of litigation, be

a. Improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure;

b. Reviewing the law of discovery;

c. Encouraging alternative methods of dispute resolution;

d. Reviewing the use of electronic communications including e-litigation and possibilities for making court documents (including submissions and proceedings) available or accessible on the internet;

e. Achieving more effective and less costly outcomes for court users, particularly vulnerable court users.

# Collective Redress in Ireland and Multi-Party Litigation
# The Need for Reform

## 1. Introduction

The phenomenon of mass harm has become a feature of modern life in today's globalised world. Mass harm is severe or widespread damage usually causing harm to many victims. We are all potential victims of mass harm. Ireland needs a legal procedure that can respond to the legal challenges presented by this reality. Thirteen years have elapsed since the Law Reform Commission (LRC) published its Report on Multi-Party Actions.[2] This is too long without change and needs to be addressed urgently. In the opinion of Justice McGuinness, former President of the LRC, the Irish methods of dealing with multiple cases have led to some 'appalling situations because of the lack of multi-party actions' such as the army deafness litigation.[3]

In recent years there have been a number of cases of mass harm in Ireland, including contaminated blood products, army deafness, asbestos-related ill health, Pyrite damage, the Volkswagen emissions scandal and the recent tracker mortgage rate abuse by banks. Ireland, however, is one of the few common law jurisdictions that does not yet have an effective mechanism for multi-party litigation of mass harm. Instead, occasionally the courts use a

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[2] The Law Reform Commission *Consultation Paper on Multi-Party Litigation* was published in 2003 and its *Report on Multi-Party Litigation* was published in 2005.

[3] Hon Catherine McGuinness, former President of the Irish Law Reform Commission (Address to the 'Globalisation of Class Actions' Conference, Oxford University, December 2007).

confusing array of alternative methods in cases where a multi-party action (MPA) mechanism would have had an obvious role. Evidence shows that the optimum way of achieving collective redress requires a modern holisitic approach. This requires an integrated model comprising a combination of tools from a range of solutions including regulation, alternative dispute resolution (ADR), the courts, ombudsmen, among others. It would appear that MPA litigation is necessary as a remedy of last resort to deal with mass harm where other techniques fail to deliver collective redress and where there is therefore no alternative to the courts.

MPAs, by enabling victims of mass harm to combine their legal actions, can be a key tool in achieving access to justice. They can enable litigants to overcome many of the impediments facing citizens who take legal actions individually.[4] It gives victims 'strength in numbers' and allows them to 'pool their resources' as often they are faced with 'David versus Goliath' type scenarios.

The Multi- Party Action Bill 201, currently before the Oireachtas, aims to reduce the costs of litigation, make better use of court resources and improve access to the courts in these cases.

The lack of MPA procedure raises a number of questions. It is possible to speculate that there are policy reasons for this. It seems that there is almost a *de facto* prohibition on such mechanisms, because of the lack of a procedure providing for them and because of the presence of rules that effectively prohibit them, including for example the prohibition on damages awards for representative actions.[5] Irish policymakers may be exercising caution for fear of opening apocryphal litigation floodgates by having a full-blown collective action procedure, bringing with it the risks that some have alleged this mechanism can unleash where such procedure is abused and is not accompanied by adequate controls.[6] Perhaps there is a concern regarding competitiveness or attractiveness as a location for foreign investors wishing to set up business in Ireland. However, the MPA procedure, as recommended by the LRC, is designed to minimise such risks.

Irish Supreme Court Judge Denham, when launching the LRC Report in 2005, commented that:

> It is probable that the less well off, those disadvantaged in our society, would be the main beneficiaries of a new procedure enabling multi-party action … It is no easy task- the challenge is to find a just balance in multi-party litigation between procedural efficiency and fairness. The Law Reform Commission has met this challenge

[4] eg problems associated with funding and standing. See for further detail, A Ryall, 'Delivering the Rule of Environmental Law in Ireland: Where Do We Go from here?' in S Kingston (ed), *European Perspectives on Environmental Law and Governance* (Routledge, 2013). That publication also explores international conventions such as Aarhus (The United Nation Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) and highlights the need for access to justice as a key facet of the aim of improving environmental governance in Europe.

[5] There is no explicit reason for this prohibition; it is likely to discourage the taking of such actions to achieve a monetary award. Remedies are limited to injunctive or declaratory relief. The bar on the bringing of representative actions in tort currently exists in ord 6, r 10 of the Circuit Court Rules 2001.

[6] A Miller, 'Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem"' (1979) 92 *Harv L Rev* 664 (outlining these problems while defending class actions and asserting that the problems are overstated).

successfully. Implementation of this Report would bring us a step closer to succeeding in this task.[7]

In these words, Mrs Justice Denham identified the raisons d'être of the MPA. She highlighted three of the key benefits that they are designed to achieve: access to justice; procedural efficiency; and fairness.

## 2. Current Irish Mechanisms for Dealing with Mass Harm- Private Actions

These are private multi-party procedures that currently fall short of MPAs. They are rarely invoked because they are of such restricted use. They comprise the following four mechanisms:

1) *Representative actions*. Irish courts have taken a very restrictive attitude towards these: they are permitted in very limited circumstances in which parties have the same interest and where certain prerequisites are met.[8] They cannot be used for tort claims[9] and it is not possible to get damages. It is not possible to get legal aid for these cases.
2) *Joinder*. This is a process whereby the court can simply join additional litigants to an action where it is necessary in the interests of justice so that the court can hear related cases together. The joinder system is used regularly to combine actions involving two or more parties and can, on occasion, broaden to actions involving many parties.[10]
3) *Consolidation*. This is an alternative to a joinder. It occurs where the court rules that disputes must be tried or consolidated together by a plaintiff uniting several causes of action in the same proceedings.[11] The difference between joinder and consolidation is that consolidation does *not* involve making all the claimants parties to a single set of proceedings. Instead, the plaintiff litigates the consolidated claims on the premise that he represents the other litigants. Any judgment is deemed to be binding on the other litigants.
4) *Test cases* are currently used in Ireland as the favoured means of dealing with mass harm litigation. The test case establishes a benchmark and, while subsequent actions by other litigants are not bound by the result, the test case outcome gives an indicator of the outcome of future litigation both in terms of formal precedent and the similarity of subsequent proceedings.[12] This is uncomplicated where the test case pronounces an

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[7] Ibid.

[8] This 'same interest' has been examined in representative proceedings in other common law jurisdictions, such as those in England and Wales.

[9] Ord 6, r 10 of the Circuit Court Rules 2001 expressly excludes representative actions founded on tort. No further explanation can be found of why this is so but this was also stated by the Supreme Court in *Moore v Attorney General (No 2*) [1930] IR 471.

[10] See eg *Abrahamson v Law Society* [1996] 1 IR 403 (Law students challenged the Law Society's decision to deny them exemption from the entrance examination to the Law Society. Their individual actions were combined in a single action before the High Court as the plaintiffs were a defined group with identical claims for declaratory and injunctive relief, represented by one legal team.)

[11] Ord18, r 1 of the Irish Rules of the Superior Courts (RSC) provides that a plaintiff may unite several causes of action together in the same proceedings.

[12] G Whyte, *Social Inclusion and the Legal System* (Institute of Public Administration, 2002) 104.

administrative or legislative action unconstitutional,[13] but is less straightforward where an individual assessment of damages is necessary. Test cases are unduly costly and result in procedural inefficiencies as well as unnecessary duplication, as illustrated in the examples below.

## 3. Cases exemplifying the problems of mass harm litigation in Ireland

These cases are a clear illustration of what occurs when some of the above private action procedures are used and there is no appropriate MPA procedure. The particular difficulty that these cases exemplify is that of enormous inefficiency both in financial terms and delay. They support the contention that by proceeding on the basis of such fragmented and piecemeal procedures, access to justice is impeded, and gross procedural inefficiencies and procedural unfairness result.

*i. Social Welfare Equality Cases*

An early example is the two cases of *Cotter and McDermott v Minister for Social Welfare and Attorney General.*[14] These resulted from the failure by Ireland to implement the 1978 Directive on Equal Treatment in Social Welfare.[15]

*ii. Army Deafness Claims*

*iii. Pyrite Construction Dispute*

In 2011, the Irish High Court finished hearing this case that had been running for over two years with claims of more than €100 million. 550 homeowners who had purchased houses that developed structural faults, due to the use of pyrite infill during construction. This was the longest running case in the history of the Commercial Court and one of the most expensive court cases in the history of the State. The plaintiffs all had to take separate actions and each had to instruct their own lawyers. This case typifies the problems inherent in the current procedure whereby plaintiffs must initiate separate and individual claims seeking

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[13] See G Hogan and G Whyte, *Kelly: Irish Constitution* (4th edn, Butterworths, 2003) 487–97 (such a declaration nullifies the impugned act or legislation in all situations including those where litigation is pending).

[14] Case 286/85 *Cotter and McDermott v Minister for Social Welfare (No 1)* [1987] ECR 1453 and Case 377/89 *Cotter and McDermott v Minister for Social Welfare (No 2*) [1991] 1 ECR 1155. These cases arose from the fact that until 1986 Ireland's social welfare policy had discriminated against married women. Married men were the automatic recipients of child benefit and received higher rates of welfare payment based on a presumption that their wives were dependent on them. For married women to receive these payments, they had to prove that their spouses were incapable of supporting themselves. In 1984, a Directive obliged Ireland to remove these practices of sex discrimination, but it did not do so until 1986. The Free Legal Advice Centre (FLAC) (a pro bono NGO) took a case arguing the entitlement of married women to back-payments during the 2-year period when Ireland's discriminatory policy was in breach of EU law. Their victory had far-reaching consequences, making it possible for 69,000 women to claim their entitlement.

[15] Council Directive (EC) 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ 1979 L 6/24. The two cases were test cases for 11,200 married women who instituted proceedings, out of a total 69,000 who had been disadvantaged by this failure. The State settled these two cases along with another 2,700 without admission of liability. However, this ignored approximately 8,500 claims initiated as well as the remaining 58,000 married women who had not yet initiated proceedings. This was followed by the case of *Tate v Minister for Social Welfare* involving 70 of these women, in which Miss Justice Carroll ruled in the High Court that they too were entitled to relief. So far the total cost of the litigation for final claims amount to a cost of €278m, of which €184.5m comprises awards or settlements and €94m was paid by the State in legal costs. The overall cost borne by the Irish taxpayer has been €300m.This decision resulted in the Government announcing that the required payments would be made to the entire group of 69,000 women, with this amount totalling £265 million including interest.

damages particular to his or her situation. The cost, delay and wasteful inefficiencies of this system are self-evident and work only to the advantage of lawyers, whose fees are mounting as long as the litigation continues.

These examples suggest that it is in the interests of the State, in the interests of litigants, and in the interests of justice to embrace some form of MPA procedure to avoid the anomalous situations illustrated above. Such a procedure would enhance access to justice and help surmount prohibitive obstacles such as the high litigation costs faced by individuals.

## 4. Particular Difficulties with Multi- Party Litigation in Ireland

Funding cases is a crucial problem. Owing to the failure of the Irish authorities to invest public resources in facilitating private civil litigation, the question of funding is a factor not only in relation to the issue of access to justice but also to considerations of fairness and the efficiency of the civil court system. In particular:

*i. Legal Aid*

Ireland does not have a comprehensive and effective system for civil legal aid as it is limited to means-tested parties in family law and some limited civil litigation matters.[16] The Irish civil legal aid scheme specifically excludes test cases and MPAs of any sort, so it is not available for representative actions.[17] In order to avoid the risk of ruinously expensive legal costs, litigants commonly proceed by using the device of 'men of straw'[18]

*ii. Insurance*

Litigation insurance is not generally available in Ireland because professional third- party funding is not permitted in Ireland as it offends against the rules on maintenance and champerty.[19]

*iii. Costs Follow the Event*

Crucially, the loser of a case usually has to pay the entire amount of the costs, which is a double financial burden, having to meet both sets of costs in the action. However, this is at the discretion of the presiding judge and is not a statutory requirement. The main problem with this serious litigation risk is that of having to meet the other side's costs as well as one's own. If MPAs were to be introduced there would have to be changes to how costs are currently decided.

*iv. Conditional Fee Arrangements (CFAs)*

In Ireland it is illegal for barristers and solicitors to charge contingency fees based on a percentage or proportion of any award or settlement for a case, despite this being a common

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[16] For detail please see the section on Civil Legal Aid on the website for the Legal Aid Board at www.legalaidboard.ie

[17] The Civil Legal Aid Act 1995, s 28(9)(a)(ix) specifically excludes legal aid for 'matters as respects which the application for legal aid is made by or on behalf of a person who is a member and acting on behalf of a group of persons having the same interests in the proceedings concerned'.

[18] Those with extremely limited financial means, hence, no assets to risk losing if costs are awarded against them. It is possible to speculate that the more relaxed approach of the Irish courts to the proprietary interest requirement for *locus standi* in nuisance actions is a tacit recognition of the 'man of straw' plaintiff.

[19] This rule was reaffirmed in the case of *Persona Digital Telephony Limited and Another v Minister for Public Enterprise Ireland and Others* [2017] IESC27 where the Supreme Court upheld the law that precludes persons with no interests or connection in proceddings from funding the litigation of one of the parties.

practice in other common law jurisdictions.[20] However there are occasions on which lawyers agree to represent clients on the basis of CFAs, which is permitted and is a common method of deferred payment for legal services.[21]

## 5. Irish Law Reform Commission Report on Multi-Party Litigation 2005

The LRC Report highlighted the need for procedural fairness as a core element in any multi-party litigation and cited Hodges' call for a 'managerial mechanism to move forward resolution of all the individual claims'.[22] The LRC recommended that any reform in this area should be based on principles of procedural fairness, efficiency and access to justice. In particular, the LRC recommended that there should be active case management by the courts. It may be unwise to adopt a collective action procedure without having case management and one or more very experienced judges who could conduct and control such litigation effectively.

The LRC also drafted an amendment bill to provide for civil legal aid for MPAs for those eligible for legal aid funding. The LRC recommended that costs should be shared equally among a group so, in this way, it did not find a solution to the general problem of funding. It did, however, address the civil legal aid aspect of this barrier, by providing eligibility requirements for this aid for those who would otherwise qualify for civil legal aid and drafting amendments to provide for this in the Rules of Court.

## 6. Europe

In January 2018, the European Commission published its report on the implementation of its 2013 Recommendation on collective redress.[23] Many of the Recommendation's provisions have been taken into account in Member State laws though, it is fair to say, not to the extent hoped for. The provisions as to the standing required to bring collective action and precluding punitive damages have been followed in the Member States. In total, currently nineteen Member States have implemented compensatory collective actions across various sectors.

According to the report, *"in the Member States where [collective redress mechanisms] do not formally exist there appears to be an increasing tendency of claimants attempting to seek collective redress through the use of different legal vehicles like the joinder of cases or the*

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[20] Code of Conduct of the Bar of Ireland, s 12.1(e): 'Barristers may not accept instructions on condition that payment will be subsequently fixed as a percentage or other proportion of the amount awarded'.

[21] This label though is potentially misleading and must be explained further. Where costs follow the event, this term suggests that where the client is unsuccessful in the action, the solicitor will absorb the fees and if no damages are awarded then there is no fee. However, in fact, these agreements do not insulate the client from costs in the event that their case is unsuccessful. Instead, they merely defer the payment of these costs until the close of the action. This means that the client does not have to pay for representation at the beginning of the litigation, but the solicitor can later pursue the client for these costs as they remain as a debt due between the client and solicitor, although the solicitor may decide against the pursuit of these costs, which is often the case.

[22] C Hodges, *Multi-Party Actions* (Oxford University Press, 2001) 68 ch 5 [11].

[23] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), Brussels, 25.1.2018 COM(2018) 40 final

*assignment of claims. This may raise issues concerning effective prevention of abusive litigation, since safeguards against abuse that are usually present in collective proceedings, e.g. concerning legal standing or contingency fees, may not apply in relation to such alternative avenues".*

Currently Ireland is one of 8 Member States that do still not provide for any possibility to collectively claim compensation in mass harm situations as defined by the Recommendation. (Croatia, Cyprus, Czech Republic, Estonia, Ireland, Latvia, Luxembourg and Slovakia).

## Conclusions

As demonstrated by the Irish experience of mass harm redress, it is evident that there are cases of mass harm and multi-plaintiff personal injury litigation occurring. Undoubtedly there have been advances in collective redress techniques in other jurisdictions in the thirteen years since LRC Report. In that time here have been increasing cases of mass harm, more victims are unable to effectively obtain a remedy. It is only a matter of time before other such mass harm will need to be litigated on a large-scale level. There is an urgent need for an efficient procedural mechanism to manage this reality as there are many flaws inherent in the current techniques of dealing with mass harm. These mechanisms are inefficient and result in widespread injustice. The Irish experience indicates that owing to the lack of such mechanism, other methods have to be used by way of improvisation in order to actuate this. The appalling delay, cost and injustice evidenced by the experience of victims of Thalidomide, for example, shows that this current practice is causing much difficulty. The MPA experience from other jurisdictions illustrates that MPA procedural mechanisms can enhance procedural justice, in appropriate cases.

It is important to note that collective actions alone are an outdated approach for dealing with the problem of mass harm and they are clearly not the most efficient route to justice. Introducing MPAs is not a panacea to mass harm collective redress but this legislation is urgently needed to fill a gap in Irish legal procedure. It should not, however, be introduced in isolation. MPAs are part of the solution but others are also needed as the area of collective redress in Ireland is greatly in need of modernisation. In summary, it seems that MPA litigation is a remedy of last resort to deal with mass harm, in appropriate cases, where other techniques fail to deliver collective redress and where there is therefore no alternative to the courts.

I wholly endorse and welcome the referral of the MPA question to Mr. Justice Peter Kelly as part of the Review of Civil Justice Administration. The updating of Ireland's collective redress methods needs to be a core aspect of this Review of the Administration of Civil Justice. A potential problem may be, however, that this Review will only look at a litigation mechanism – not any other mechanism, and especially not regulatory or ombudsmen. This area needs to be examined more widely. MPAs are not 'a one size fits all' solution. The courts are obviously not the only forum in which to resolve legal disputes.

An additional problem is the limited vision and comparators of looking only at litigation tools such as Test Cases – none of these works well enough in isolation. One needs a wider vision. MPAs are part of suite of remedies that ought to be available as routes to redress. As part of this solution, consideration ought to also be given to new techniques of collective redress such as ombudsmen and regulatory redress. There is growing evidence of the effectiveness

of these and they need to be incorporated into Ireland's system of collective redress alongside other remedies such as MPAs.

If the objective is to truly deliver collective redress to people, it is crucial to look at this area in a modern holistic way and to introduce these new mechanisms in addition to MPAs. I would urge the Review to address routes to collective redress in this way and to create an integrated model comprising a combination of tools from a range of solutions including regulation, ADR, courts, ombudsmen, among others.

This Review is a much- needed opportunity for Ireland to finally address and overhaul its collective redress approach and to remedy the severe lacuna in its mechanisms for collective redress.