

**Global Class Actions Project
Country Report: England and Wales**

Dr Christopher Hodges*
Centre for Socio-Legal Studies, University of Oxford

1. As background for consideration of the context within which your country's group litigation operates, please briefly describe your civil litigation system (e.g. common law, civil law)?

The United Kingdom comprises three jurisdictions, each with a different legal system: England and Wales; Scotland, and Northern Ireland. This chapter deals with England and Wales: references to England include Wales. Scotland has not introduced a group procedure.¹

The English system is the original common law system. The theory is that the common law 'exists' and is declared by being applied by judges in a pragmatic approach to particular problems.² The system involves a hierarchy of rules, as declared by judges. Nowadays, there is also a great deal of primary and secondary legislation, although the application of any legal rule is a matter for the courts.

Decisions on liability and quantum in civil cases are made by judges, not juries.³ The common law approach to civil justice is traditionally adversarial, with the parties controlling the issues in dispute, discovery of documents (which can be extensive and costly), production of experts for each side, and strong emphasis on oral argument at trial. However, significant reforms from 1999 (see Woolf below) have introduced far greater judicial control through case management, with court power to limit numbers of experts (or appoint a single expert), limit documentary evidence and oral argument, and encouragement of settlement through pre-action contact and later mediation. These reforms have had significant impact on lower value cases, but so far less so in larger cases. Further reforms are continuing. Exemplary or aggravated (punitive) damages are very strictly limited and rare.

A Small Claims procedure is mandatory for claims under £5,000, or £1,000 in the case of personal injury cases. In this procedure, lawyers are discouraged (the 'loser pays costs' rule does not apply), the procedure is informal, and the judge is as helpful to the individual parties as is consistent with maintaining independent authority. The courts positively encourage negotiation, mediation, alternative dispute resolution and settlement between the parties. Many special business-to-consumer ADR schemes exist in individual sectors, as does a range of ombudsmen.

2. What formal rules for representative or non-representative group litigation have been adopted in your country? Please include both statutory rules and

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¹ Discussion Paper No. 98, *Multi-Party Actions: Court Proceedings and Funding* (Scottish Law Commission, 1994).

² G. Slapper and D. Kelly, *English Law* (Routledge Cavendish, 2ed, 2006).

³ Save for some few specific types of case, such a defamation.

rules adopted by the judiciary, and include both private law and public law mechanisms (e.g. partie civile). Describe briefly the policy debate and political context for the consideration and adoption of different forms of group litigation, including if relevant the decision to adopt a non-representative form of group litigation and/or a limited form of representative litigation, as alternative(s) to a broadly available representative litigation procedures, along the US model. For each litigation mechanism, please describe what types of claims the mechanism pertains to (for example, all multi-party claims or only some specific type of claims, such as antitrust, consumer protection, investor/shareholder protection, environmental, etc.) and when the rules were adopted. If there have been important amendments to the governing statutes or rules since their adoption, please identify these, describe them briefly and if possible describe why amendments were adopted. Please attach copies of the statutory provisions and/or rules, and an English translation, if possible.

Broadly two types of collective mechanisms exist: first, rules of court that can apply as procedural rules to any types of claim and, secondly, statute-based mechanisms that are principally regulatory in nature, notably in the consumer protection field. These two types are considered separately below.

It should be noted at the outset that the Group Litigation Order (GLO) mechanism, which is the most important of the first type of rules is *not* regarded as *representative* litigation, since it covers *all individual* claims that have been brought, even though at some stage in the process individual test or lead cases may be selected for decision in advance of others. In contrast, the regulatory mechanisms *are* regarded as representative claims.

Policy debates on introduction of mechanisms

The GLO mechanism emerged as a practical necessity, fashioned by the courts as a matter of need. There were heated debates between claimant and defence interests over the substance of the rules, but no wider political debate: no legislation was considered in Parliament.

Almost all of the representative mechanisms were based on national implementation of EU legislation. In general, there were surprisingly few debates over the original introduction of such mechanisms, although significant debate now exists between consumer and business forces over the possible further development of collective actions, as discussed below.

A. Court rules: Primarily a non-representative mechanism

The English rules of court procedure (Civil Procedure Rules 1999, ‘CPR’⁴) include the following mechanisms for multi-party litigation:

1. Four mechanisms that cover particular situations, of which the most relevant for present purposes is where a single representative party can represent all

⁴ http://www.justice.gov.uk/civil/procrules_fin/index.htm

parties with the same interest.⁵ This mechanism has existed for over 100 years, but has been used very rarely,⁶ since the phrase ‘the same interest’ has been interpreted very strictly by the courts.⁷ It was held that this mechanism cannot apply where claimants have different personal rights or defendants have differing defences: thus, the mechanism could not be used for any damages claims.⁸ Accordingly, since this mechanism has been so rarely used, it is not discussed further below. Its restrictive interpretation and scope led directly to the invention of the GLO mechanism, mentioned below, when significant multi-party cases arose.

2. A mechanism for managing multiple similar claims. This mechanism was created spontaneously by the courts during the 1980s and 1990s so that they could be able to manage effectively a succession of large multi-party cases that were before them and would otherwise have been unmanageable. Most of the cases were product liability claims, principally concerning medicines. The practice that was developed by a succession of judges and lawyers in these cases crystallised into a coherent approach. When Lord Woolf undertook his fundamental reform of litigation procedure in the mid-1990s,⁹ the practice in relation to ‘group litigation’, as it was known, was able to be distilled into a specific short new Rule within the new Civil Procedure Rules, when the latter were introduced in 1999.¹⁰ The procedure is known as the Group Litigation Order (GLO) mechanism.¹¹

B. Representative actions: Regulatory mechanisms in consumer protection and competition law

Compensation Orders in criminal proceedings

English legislation empowers public authorities to seek compensation orders from the courts as part of the criminal enforcement process. This mechanism could be used for group cases. Criminal courts possess a general power to order a person convicted of an offence to pay compensation for any personal injury, loss or damage resulting from that offence, or any other offence that is taken into consideration by the court in determining sentence.¹² Such compensation shall be such amount as the court

⁵ In addition to the normal techniques of joinder or consolidation of individual actions, CPR, Part 19.II specifies four different mechanisms:

- Representative parties with the same interest (Rule 19.6);
- Representation of persons who cannot be ascertained in relation to the estate of a deceased person, properly subject to a trust, or the meaning of a document or statute (Rule 19.7);
- Representation of a person who has died (Rule 19.8);
- A claim by one or more members of a company, body, or trade union for the company, body, or trade union to be given a remedy open to it (a ‘derivative claim’: Rule 19.9).

⁶ For a rare case, involving members of a football club, see *Howells and Kelly (on behalf of themselves and all other members of the Hemel Hempstead Football & Sports Club) v The Dominion Insurance Company Limited* [2005] EWHC 552.

⁷ *Duke of Bedford v Ellis* [1901] AC 1, HL.

⁸ *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021, CA.

⁹ Lord Woolf, *Access to Justice: Final Report* (1996).

¹⁰ For the history see C Hodges, *Multi Party Actions* (Oxford, 2001).

¹¹ CPR, Part 19.III.

¹² Powers of Criminal Courts (Sentencing) Act 2000, s. 130. The power originated in the Powers of Criminal Courts Act 1973, before which it was used in serious crime and damage to property: see P. S. Atiyah, J. N. Adams and H. L. MacQueen, *The Sale of Goods* (Pearson Education, 11th ed, 2005)

considers appropriate, having regard to any evidence and representations made.¹³ If a person in whose favour a compensation order is made also claims damages in civil proceedings, such damages shall be assessed without regard to the compensation order, but the claimant may only recover an amount equal to the aggregate of any amount by which the award of damages exceeds the compensation order, or a sum equal to any portion of the compensation which he fails to recover.¹⁴ Despite the fact that a court is required to give reasons on passing sentence if it does not make a compensation order in a case where it is empowered to do so, it seems that the compensation order mechanism has not been widely used.

A recent example of a similar solution in a specific sector is the power of the UK's Financial Services Authority to request the court to order restitution to firms and individuals, as part of its armoury of combined criminal, administrative and civil enforcement powers.¹⁵

Enforcement of the collective interests of consumers

Various similar enforcement provisions originate from European legislation, and are implemented into British domestic legislation. The provisions are essentially regulatory in character, and began by enabling collective action to be taken to defend the collective rights of consumers in specified circumstances. The available remedies would typically be limited to orders related to the defendant's conduct, such as injunctive relief (sometimes referred to as an 'enforcement order'¹⁶), rather than monetary claims.¹⁷ Thus, an injunction might be granted against traders for allegedly breaching consumer protection, fair trading, environmental or competition laws.¹⁸

It is important to recognize that although consumer organizations now possess the right to bring collective actions, both under national law implanting various EU consumer protection measures and under national competition legislation that prefigures possible EU measures, UK policy is firmly that the primary enforcement mechanism rests firmly with the public authorities, especially with the OFT. The role of the few consumer organizations in UK who have been given powers in relation to enforcement of either collective or specific infringements is strictly limited, and sometimes subject to oversight and veto. Although both the public authority and the consumer organization may bring action to enforce breach of a relevant regulatory provision in what may be viewed as a collective situation, the enforcement mechanism does not itself confer any new substantive right.

¹³ Ibid, s. 130(4). Compensation ordered by a magistrates court may not exceed £5,000, but higher courts are not subject to a limit.

¹⁴ Ibid, s. 134.

¹⁵ Financial Services and Markets Act 2000, ss.382 and 383.

¹⁶ Enterprise Act 2002, s. 21.

¹⁷ See: *Background Report: OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace, 19-20 April 2005, Washington, DC* (OECD, Paris, 2005), p 31.

¹⁸ In the United Kingdom, see the Enterprise Act 2002, above, and proposals to introduce a broad "representative claim" mechanism, to enforce consumer fair trading laws, such as the General Product Safety Regulations 2005 or Part III of the Fair Trading Act: *A Fair Deal for All: Extending Competitive Markets: Empowered Consumers, Successful Business* (Department for Trade and Industry, June 2005). Industry bodies such as the Confederation of British Industry raised concerns with government that the introduction of this mechanism could lead to an expansion of unfounded claims, and could be extended to include claims for damages, which would give a bad financial incentive to unscrupulous claimants and claimant lawyers.

Actions in this category can typically be brought only by *approved* consumer representative bodies, rather than an *ad hoc* group of individuals who claim to have suffered loss. The EU legislation specifies that bodies that have a ‘legitimate interest’ must be enabled to bring proceedings, and it is notable that the UK government has interpreted this requirement restrictively, and in general only the Consumers’ Association has been designated as being approved under each measure. Thus, the government has maintained the primacy of enforcement through public authorities, which possess considerable powers, expertise and resources.

The various current EU mechanisms are described in the author’s separate paper on EU law, and the UK implementation is summarized in the following table.

EU legislation	UK legislation
Directive 84/450/EEC on misleading advertising ¹⁹	Control of Misleading Advertisements Regulations 1988, SI 1988 No 915 ²⁰
Directive 93/13/EEC on unfair contract terms ²¹	The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No 2083, Schedule 1, Part Two. ²²
Directive 98/27/EC on cross-border injunctions for breach of specified consumer protection ²³	Enterprise Act 2002, Part 8, especially ss. 212 and 221: Enforcement Order ²⁴
Regulation 2006/2004 on consumer protection cooperation ²⁵	Enterprise Act 2002, Part 8, especially ss. 212 and 221: Enforcement Order
Directive 2005/29/EC on unfair business-to-consumer commercial practices (UCP), article 4 ²⁶	Consumer Protection from Unfair Trading Regulations 2007 ²⁷

Further details will now be given of the individual measures.

Misleading Advertising

The UK’s implementation mechanism was to empower the Director General of Fair Trading, a public official, to apply to the court for an injunction, on his own initiative

¹⁹ replaced as of 12 December 2007 by Directive 2006/114 on misleading and comparative advertising. (OJ L 250, 19.9.1984, p. 17–20), amended by Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ L 290, 23.10.1997, p. 18–23); web link to consolidated version:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31984L0450:EN:NOT>

²⁰ web link: http://www.opsi.gov.uk/SI/si1988/Uksi_19880915_en_1.htm

²¹ OJ L 95, 21.4.1993, p.29–34, web link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:NOT>

²² web link: <http://www.opsi.gov.uk/si/si1999/19992083.htm>

²³ OJ L 166, 11.6.1998, p. 51–55, web link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0027:EN:NOT>

²⁴ web link: <http://www.opsi.gov.uk/acts/acts2002/20020040.htm>

²⁵ OJ L 364, 9.12.2004, p. 1–11, web link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R2006:EN:NOT>

²⁶ OJ L 149, 11.6.2005, p. 22–39, web link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005L0029:EN:NOT>

²⁷ Unpublished at the time of writing. Consultation paper at http://www.offt.gov.uk/shared_offt/reports/consumer_protection/of931con.pdf

or following consideration of a complaint made to him.²⁸ No private person or consumer organization was permitted to take enforcement action under these provisions. However, a designated consumer organization will now have enforcement powers in relation to breach of the misleading advertising Directive under implementation of the Injunctions Directive by the Enterprise Act 2002, discussed below.

Unfair Terms in Consumer Contracts

In the UK the initial legislation was subsequently amended to permit a consumer body that satisfies criteria published by the government to take action against infringements under the Unfair Terms in Consumer Contracts legislation.²⁹ Both the empowered consumer body and the various other sectoral public regulatory authorities which are empowered to act under the legislation, have to notify the primary public body (the OFT) before any action is taken and of the outcome of any proceedings.³⁰

The OFT has been particularly active in attacking unfair contract terms³¹ and the Consumers' Association has referred cases to the OFT but not taken enforcement proceedings itself.³²

The "Injunctions Directive"

The UK implementing legislation is discussed below, since it has now been subsumed in other provisions.

Only one cross-border injunction seems to have been sought or obtained,³³ and this action was instituted by the UK regulator (the OFT) rather than by a consumer organisation.³⁴

²⁸ Control of Misleading Advertisements Regulations 1988.

²⁹ The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No 2083, Schedule 1, Part Two. This was after the Consumers' Association brought a judicial review against the government for failure to implement the Directive correctly, and the government caved in: see Case C-82/96 *R v Secretary of State for Trade and Industry ex parte Consumers' Association and Which? Limited*. Only one body has been designated under the legislation, namely the Consumers' Association.

³⁰ The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No 2083, Regs. 10 – 14.

³¹ See Bulletins on many enforcement actions taken and Guidance issued at

http://www.of.gov.uk/advice_and_resources/resource_base/consumer-regulations/443727/446883/443845/445427.

A recent leading example is a test case between the OFT and the consumer banks over whether charges for unauthorised overdrafts are subject to the Unfair Terms in Consumer Contract Regulations, and hence unfair: OFT press release, 31 August 2007.

³² See for example estate agents in 2007,

http://www.which.co.uk/reports_and_campaigns/house_and_home/Reports/utilities_and_services/Estate_agents_c_ontracts_news_article_557_89603.jsp.

³³ Although anecdotal reports refer to communications about infringers between the authorities of different member States, which may have resulted in domestic enforcement action that would have avoided the more cumbersome and costly cross-border mechanism.

³⁴ The case was brought by the Office of Fair Trading against a Belgian company that was sending unsolicited mail order catalogues to UK residents together with notification of a prize win, usually £10,000. The Belgian court issued an order banning the practice as constituting a breach of the Misleading Advertising Directive, on the basis that consumers believed that they had only to make a purchase in order to secure a prize, whereas winners were pre-selected and few recipients would receive a prize. The company was reported to have received about 4,000 orders per day from its catalogues, and many consumers complained: press release at <http://www.of.gov.uk/News/Press+releases/2004/208-04.htm>, and see *Report from the Commission: First Annual*

The Consumer Protection Cooperation Regulation

For the UK, the OFT is designated as the Single Liaison Office for the Consumer Protection Cooperation Regulation. The Department for Business, Enterprise and Reducing Regulation is the Competent Authority for the purposes of the Regulation.

The Enterprise Act 2002

The Injunctions Directive and the CPC Regulation are implemented in UK by Part 8 of the Enterprise Act.³⁵ Part 8 introduces a specific mechanism for enforcement of consumer law: enforcers are given powers to apply to the courts for enforcement orders against businesses infringing any of a wide range of consumer protection laws. Consultation with the business is required unless action is urgent, and consultation should normally last at least 14 days.

Part 8 makes a distinction between general enforcers (the OFT and local authorities),³⁶ enforcers designated by the Secretary of State,³⁷ and Community enforcers.³⁸ The OFT has been given the coordinating role of ensuring that action is taken by the most appropriate body. Some of the designated enforcers have general designation (can bring cases in all matters), others have limited designation (can bring cases within the scope of this designation). The OFT may direct that if an application to the court in respect of a particular infringement is to be made, it must be made only by the OFT or such other enforcer as the OFT directs,³⁹ although this does not prevent an application for an enforcement order being made by a Community enforcer.⁴⁰ Thus, there is a strong emphasis on public enforcement, with only one consumer association being designated so far, and with the OFT retaining overall control and a right of veto save in cross-border Community action.

Enforcers can seek an enforcement order from a court in respect of ‘domestic infringements or ‘Community infringements’ of the collective interests of consumers. Domestic infringements are breaches of law specified by the Secretary of State infringing collective interests of consumers.⁴¹ Community infringements are those breaches infringing collective interests of consumers which breach any of the

Progress Report on European Contract Law and the Acquis Review, COM(2005) 456, 23.9.2005. *OFT v. D Duchesne SA* referred to in *TS Today* February 2006, 4.

³⁵ replacing Part III of the Fair Trading Act 1973 and The Stop Now Orders (EC Directive) Regulations 2001: the latter initially implemented the Injunctions Directive.

³⁶ Enterprise Act 2002, s. 213(1).

³⁷ *Ibid.*, s.213(2). The Secretary of State may designate bodies that have protection of the collective interests of consumers as one of their purposes. To date the following have been designated: The Civil Aviation Authority; The Director General of Electricity Supply for Northern Ireland; The Director General of Gas for Northern Ireland; Ofcom; The Water Services Regulation Authority; The Gas and Electricity Markets Authority; The Information Commissioner; The Office of Rail Regulation; The Financial Services Authority; Consumers' Association (Which?) (the first consumer organization to be designated, May 2005). A public body will only be granted designated enforcement powers if it is independent: DTI guidance at <http://www.dti.gov.uk/files/file11976.pdf>.

³⁸ Enterprise Act 2002, s. 213(5). Community enforcers are qualified entities for the purposes of the Injunctions Directive (based in other EEA states) and specified in the list published in the Official Journal of the European Communities.

³⁹ Enterprise Act 2002, s. 216.

⁴⁰ *Ibid.*, s. 216(6).

⁴¹ Enterprise Act 2002, s. 211.

legislation implementing the Directives specified in the Injunctions Directive or other provisions the existence of which is allowed by the minimum harmonization nature of these Directives, and require cross-border enforcement in the UK.⁴²

An enforcement order must indicate the nature of the conduct objected to and direct the person to comply, by not continuing or repeating the conduct, not engaging in such conduct in the course of any business, or not consenting to or conniving in the carrying out of such conduct by a company.⁴³ Breach of an enforcement order is a contempt of court and can incur a fine or imprisonment. An enforcer or the court has power to accept an undertaking from a person to comply.⁴⁴

The Unfair Commercial Practices Directive

The UCP shall be applied from 12 December 2007, and the UK implementing law is not yet finalised.⁴⁵ An example of the type of situation that concerns the authorities is the failure by a household consumer products company to honour an advertisement, that was widely publicised and attracted many sales, that customers would receive a free flight to the USA. The company reneged on the promise when inundated with sales. The UK authorities wish to seek a co-ordinated and efficient method for resolving compensation claims, many of which might not otherwise be brought, thereby leaving the company with significant ill-gotten profit.

Intellectual property enforcement

The UK government intends to implement Directive 2004/48 by providing a new right for trade associations to institute representative claims.⁴⁶

UK competition law mechanisms

Two significant controls were introduced in UK competition law from 2002.⁴⁷ First, a designated consumer body may make a “super-complaint” to the regulator, the OFT, that any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers.⁴⁸ It is the relevant public authority,⁴⁹ rather than the consumer body, which is empowered to

⁴² Enterprise Act 2002, ss. 212 and 235. The listed Directives are at Schedule 13 of the Act.

⁴³ Enterprise Act 2002, s. 217.

⁴⁴ Enterprise Act 2002, s. 219 and 217(9).

⁴⁵ See Consultation on draft Guidance at http://www.offt.gov.uk/advice_and_resources/resource_base/consultations/ucpd.

⁴⁶ *Consultation Paper: Representative Actions for the Enforcement of Intellectual Property Rights*, The Patent Office, 2006.

⁴⁷ <http://www.ukincorp.co.uk/s-BM-9-enterprise-act-2002.html>.

⁴⁸ Enterprise Act 2002, s11.

⁴⁹ The authorities that have a duty to respond to super-complaints are: OFT (general authority), the Civil Aviation Authority (responsibility for traffic services under the Transport Act 2000), the Office of Gas and Electricity Markets (OFGEM, responsibility for gas and electricity services under the Gas Act 1986 and Electricity Act 1989 amended by Utilities Act 2000), the Office of Telecommunications (OFTEL, responsibility for telecommunications industry under the Telecommunications Act 1984 – role now taken over by the Office of

take any subsequent action, but the OFT must publish a response explaining its position.⁵⁰ The power to designate a consumer body for these purposes rests with the Secretary of State, who may do so only if it appears to him to represent the interests of consumers of any description, and only subject to any other criteria which he has published.⁵¹

A super-complaint must be accompanied by facts and evidence.⁵² Super-complaints have been made in relation to private dentistry, doorstep selling, consolidation of postal services, care homes, home collected credit and payment protection insurance.⁵³ Several of these cases have led to a market study being carried out by the authorities.

This mechanism does not grant consumer organizations the power to institute proceedings against traders. Their role is to alert, and provide information to regulators. It is the regulatory authorities that have been entrusted with the powers to initiate proceedings and take other steps. In the result, consumers are involved in the system as a watchdog, and may bark but not bite: biting is reserved to the public authority. Providing evidence may be quite problematic for consumer organizations – it requires time and resources that consumer bodies do not have in abundance.

Secondly, any person who has suffered loss as a result of an infringement may institute a claim for damages before the Competition Appeal Tribunal (CAT).⁵⁴ Multiple individual claims that all relate to the same infringement may also be brought in a representative capacity by a “specified body”, provided each individual has consented to the claim being brought. A typical example of such a claim is said to be where consumers have bought goods for personal use where the price has been inflated by a price-fixing agreement. Any body may apply to the Secretary of State to be “specified”, on the basis of published criteria.⁵⁵ However, no damages claim may be brought until it has been established (by either the OFT or the European Commission) that an infringement of competition law has occurred.⁵⁶ Thus, there is a two-stage process, which separates the functions of infringement enforcement from the consequential issue of compensation. Further, responsibility for enforcement remains with an independent regulator, not with a consumer organisation.

Communications (OFCOM)), the Northern Ireland Authority for Energy Regulation (OFREG-NI), the Office of Water Services (OFWAT) and the Office of the Rail Regulator (ORR).

⁵⁰ The response must be published within 90 days of the super-complaint being received. Possible consequences include enforcement action, a market study or a market investigation by the authorities, or a finding that the complaint requires no action, is unfounded or frivolous.

⁵¹ Enterprise Act 2002, s11. Guidance for bodies wishing to apply for such designated status is at <http://www.of.gov.uk/NR/rdonlyres/98D1E0AD-11C1-4997-BA27-26C9D93F7487/0/oft514.pdf>. So far the organizations designated are The Consumers' Association, National Consumer Council and Citizens Advice (designated in July 2004), Energywatch and Watervoive (both designated in January 2005), Postwatch, CAMRA and the General Consumer Council of Northern Ireland (all designated in October 2005).

⁵² OFT Guidance *Super-complaints: Guidance for designated consumer bodies* specifies. The facts and evidence do not need to be comprehensive enough for the regulators to immediately start proceedings. They are only to help the OFT or other regulator decide whether and what action is appropriate. They must, however, provide a reasoned case – frivolous complaints will be rejected. An annex to the guidance provides an indicative list of evidence to be.

⁵³ <http://www.of.gov.uk/Business/Super-complaints/cases.htm>

⁵⁴ Competition Act 1998, s47A & B.

⁵⁵ Guidance for prospective specified bodies is available at <http://www.dti.gov.uk/files/file11957.pdf>.

⁵⁶ This is known as a ‘follow on’ claim, as opposed to a ‘stand alone’ claim.

The conditions that the specified body must meet before bringing proceedings are that the claims must relate to the same infringement, each consumer must give consent, and complaints must relate to goods or services received by consumers. If these conditions are met, the specified body can also take over individual claims brought by consumers. An award is normally to be paid to individual consumers; although there is a possibility for CAT to arrange for the award to be paid to the specified body that will then enforce the award (the latter is possible if all individual consumers and the specified body are in agreement). Any award of costs or expenses against a specified body in any proceedings under s47B may not be enforced against any individual on whose behalf a claim was made or continued in those proceedings.⁵⁷

The Consumers' Association has brought one collective damages claim, after a finding by the CAT that various companies were involved in a cartel to fix the prices of replica football T-shirts.⁵⁸ There was initial reluctance by members of the public to sign up to bringing individual claims and the outcome is currently unclear.

- 3. For each litigation mechanism identified above, please provide a general description of the process contemplated by the formal rules. *In most legal systems, there are significant differences between “the law on the books” and “the law in practice.” For this item, we are interested in “the law on the books”; later we will ask about actual practice, and about specific issues, such as standing, appointment of legal counsel, and who is bound by outcomes of the litigation.***

A. Background to the GLO Mechanism: the Case Management philosophy

In England and Wales, the main court mechanism is the Group Litigation Order (GLO),⁵⁹ under which all claims that fall within a definition of the group are included and will be managed together, in the same court and usually by the same judge. This approach is intended to provide consistency, expertise and efficiency.

A court can make a GLO when there are a number of similar claims that “give rise to common or related issues of fact or law”.⁶⁰ A single judge will be appointed to manage the case, and will make directions as the procedure continues, usually at periodic case management conferences. The GLO procedure provides that claimants who wish to join the group must join a register, and may be permitted to serve general statements of their case, thus avoiding some formalities of starting individual claims. The court may appoint lead solicitors, may control any advertising of the case, and may set a cut-off date for people to join the procedure.

The GLO rule in the CPR is deliberately brief. This is for two reasons. First, the general approach of the court is set out elsewhere, in the general principles that govern civil procedure: this is a very important point, which will be discussed further below. Secondly, the approach empowers to managing judge to exercise his or her powers with considerable flexibility, depending on the needs of the specific case.

⁵⁷ Enterprise Act 2002, Schedule 4, cl 7.

⁵⁸ See http://www.which.co.uk/reports_and_campaigns/consumer_rights/campaigns/Football%20shirts/index.jsp.

⁵⁹ http://www.justice.gov.uk/civil/procrules_fin/index.htm

⁶⁰ CPR, Part 19.10.

However, this flexibility cannot be exercised capriciously, and the lawyers and parties must have as high a degree of predictability as possible. It may be that a formal protocol (ie official guidance) will be produced, but meanwhile, the collective experience is collected in a textbook.⁶¹

It was said above that the English approach to a GLO is an integral part of the general approach of the courts towards civil litigation. It is obvious that any procedural rule will be part of, and must operate within the context of, the *corpus* of rules on civil procedure that exists within any jurisdiction. The important point about the English GLO rule is that it is based on new principles that were adopted generally for *all* types of civil litigation claims. Lord Woolf⁶² undertook a comprehensive review of civil litigation procedure in the mid-1990s,⁶³ and proposed a new approach, which was adopted in the CPR 1999, and widely acclaimed. The courts that had needed to invent a new approach to managing multi-party cases during the 1990s had in fact adopted almost identical principles, so the resulting formal fusion of the GLO rule into the CPR was a very good fit.

The problems which Lord Woolf sought to overcome were excessive complexity, delay, and cost in all civil procedure. His principles are that:

1. Enabling the court to deal with cases justly (the overriding principle).⁶⁴ It is particularly important to note the requirement of proportionality, in relation to costs. The new approach was influenced by the finding that the most common outcome is that the vast majority of cases are settled by agreement between the parties, not by any final decision of the court. Accordingly, the primary objective of procedure should be to put the parties in a position where they can settle the litigation swiftly and cheaply by agreement, whilst of course enabling the court to be in a position to decide the case if it should need to do so.
2. The parties should undertake standard actions (set out for some types of cases in 'Pre-Action Protocols'⁶⁵) in advance of commencing proceedings: this would facilitate verification of the facts and evidence, establishment of the nature of a case and defence, and encouragement of early settlement (note, however, that no pre-action protocol has yet been established for the GLO situation, since the circumstances of case types can vary).

⁶¹ C Hodges, *Multi-Party Actions* (Oxford, 2001).

⁶² Lord Woolf was then a member of the Judicial Committee of the House of Lords, the UK's supreme court, and subsequently became Lord Chief Justice.

⁶³ Lord Woolf, *Access to Justice: Interim Report* (1995) and *Access to Justice: Final Report* (1996).

⁶⁴ CPR 1.1(2) specifies the following aspects of what this means:

"Dealing with a case justly includes, so far as is practicable –

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate-
 - i. to the amount of money involved;
 - ii. to the importance of the case;
 - iii. to the complexity of the issues; and
 - iv. to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

⁶⁵ http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm

3. Courts should adopt a strong, interventionist case management approach. This is discussed further below.

Judges are, therefore, expected to be robust in handling cases, to decide what issues and evidence are necessary or unnecessary, to require parties to state their historic and estimated costs, to order caps or reductions on costs or reduce the evidence or issues accordingly, to call as many case management conferences as necessary so as to keep effective managerial control on the litigation and its speed of progress, and to encourage the parties to mediate or settle cases, for example by giving informal indications of possible future managerial decisions and the relevant strengths and weaknesses of their cases. The goal is that cases should be resolved with the minimum of delay, at low and proportionate cost, usually by agreement of the parties outside court. The approach that needs to be adopted necessarily involves the court and the parties making *compromises* in traditional principles, in order that the group can make the orderly progress that is required.⁶⁶

Adoption of the new ‘Woolf’ approach to managing litigation has required some considerable re-education of judges and lawyers. But it has been surprising how widespread the support for this modernisation process has been, and how quickly it was achieved. Lord Woolf’s Reports were published in 1995 and 1996, during which time there was extensive debate and consultation on them, and the new Rules were formally introduced in 1999, but their general principles and approach had already been adopted by then. The approach and details have continued to evolve since then, and they are generally regarded as being a considerable success.

Only a relatively small number of judges and lawyers, however, would normally, be involved in managing the more complex cases that are made GLOs. It is recognised that these larger cases can be challenging and need special training and expertise. Perhaps 6 of the 200-odd High Court judges would handle GLOs, and one senior judge in each region for the smaller local cases. A small number of law firms quickly emerged who have expertise in representing either claimants or defendants, and these firms would nearly always be involved in any GLO.

General description of the GLO procedure

The specific features of the GLO mechanism, operating within the case management context of the wider Woolf principles, are now set out. It is a feature of the GLO Rule in the CPR that it is brief, and affords considerable flexibility in case management to judges, so as to enable the judge appointed to manage an individual case to craft a procedure that is appropriate for the particular case. The Rule is supplemented by Practice Direction, and textbooks record the principles, practice and experience so as to form a practical resource for practitioners and judges.⁶⁷

⁶⁶ *AB and Others v John Wyeth & Brother Ltd* [1996] 7 Med LR 267, 273. Lord Woolf himself said that “the effective and economic handling of group actions necessarily requires a diminution, compromise or adjustment of the rights of individual litigants for the greater good of the action as a whole”: Lord Woolf, *Access to Justice Inquiry: Issues Paper (Multi-Party Actions)* (1996).

⁶⁷ C. Hodges, *Multi-Party Actions* (Oxford, 2001), 2nd edition in preparation; M. Mildred, ‘Group Actions’ in G. Howells (ed), *The Law of Product Liability* (Butterworths, 2ed, 2007).

1. The main objective is to be as informal and facilitative as possible, but to operate within controls that are firmly set by the managing judge. Whilst some criteria need to be satisfied, there should not be unnecessary bureaucratic requirements, since these delay progress and add to expense. Robust, expert, informed and effective case management by the judge is absolutely required. Equally, however, any flexibility needs to operate within a predictable general approach that is understood by practitioners and litigants.
2. **Application.** Any party to a claim (claimant or defendant) may apply to the court for a GLO, or the court may itself start the procedure.⁶⁸ This broad approach gives the court and the parties the ability to start the management process at the earliest opportunity. The application should include:⁶⁹
 - a. A summary of the nature of the litigation;
 - b. The number and nature of claims already issued;
 - c. The number of parties likely to be involved;
 - d. The common issues of fact or law (the ‘GLO issues’) that are likely to arise in the litigation; and
 - e. Whether there are any matters that distinguish smaller groups of claims within the wider group.
3. **GLO Order.** The court to which the application is made will usually be the court to make the Order that all claims that come within the criteria defined in the order are to be subject to its managerial control. Instead, the Order could be made centrally by a senior judge or court, since it needs to have the effect, where this is required, of transferring all cases that are proceeding, or may subsequently be started, in *any* court anywhere in the country to the coordinating court. An Order will only be made if consultation has taken place behind the scenes between the judges (and any others who may be potentially involved) and either the Lord Chief Justice (for the Queen’s Bench Division) or the Chancellor (for the Chancery Division),⁷⁰ so as to ensure that an appropriately experienced judge is to take control of the case. This cuts down a need for an appeal mechanism. Managing a GLO requires particular expertise, which many judges do not have, so it is only done by a small number of judges, who are usually senior and experienced.
4. **Criteria for making an Order.** These are deliberately simple, so as to allow the courts a wide discretion over whether or not to order a GLO. The English criteria are simply that there are a number of similar claims that “give rise to common or related issues of fact or law”.⁷¹ The court will examine the facts alleged, and will wish to satisfy itself that the case has substance, and is not hypothetical. There are two further important points. First, the Court of Appeal is known to be very unlikely to interfere with an order making or refusing to make a GLO. Secondly, if the court decides not to make a GLO, the individual cases will still be managed on similar principles of case management. It may be that the judge decides that it

⁶⁸ Practice Direction – Group Litigation, cl 4.

⁶⁹ Practice Direction – Group Litigation, cl 3.2.

⁷⁰ Practice Direction – Group Litigation, cl 3.3.

⁷¹ CPR, Part 19.10.

is too early for individual cases to be coordinated formally within a GLO, but coordination may be ordered later.

The absence of formal criteria in the English GLO system contrasts with a number of other jurisdictions, which have defined criteria. The other systems may wish to provide clarity and transparency, but they may only end up in encouraging what may be a considerable amount of satellite litigation (hearings and appeals) over whether the criteria have or have not been satisfied. Such extra litigation has been a feature of the US and Canadian class action systems. All this is avoided in the English system, where the GLO is regarded simply as one of the court's management tools. The English approach has received some academic criticism, but there have been no calls from practitioners or judges for any other approach.

It is, however, necessary for the Order to define the group, so that it is clear which individual claims are, or are not, inside the coordinated arrangements. This will usually be a generalised description, but it is important to get it right. An example might be "any claims against AB Limited in relation to [alleged effects of autism arising from] use of the drug X".

5. **Representation.** Where there are many parties, the court must be able to deal with a small number of lawyers who can speak definitively for the parties. The effective coordination of many parties will break down if too many voices are heard at once, for example if various groups of claimants are represented by different lawyers. Thus, the GLO judge has a power to order that only specified lawyers are to represent specified parties in the group.

The existence of this power has meant that lawyers (and parties, but the problem rests usually with the claimants' lawyers who compete amongst themselves) come to some agreement on who is to represent whom.⁷² An unofficial coordination service has been provided by the Law Society (bar association) to mediate on this issue, and judges have hardly ever needed to exercise this residual power to reduce the number of lawyers. Where a claim has the benefit of some public funding, the result in practice will be that the solicitors firm that is awarded the contract by the Legal Services Commission will be appointed as lead or generic firm (or sole firm). In straightforward cases, there may simply be a single lawyer who coordinates all the claimants. In complex cases, there may be a 'steering group' of lawyers, each of whom are responsible for different aspects (eg coordination with the court, coordination of individual claimants, liaison with the defendants, focussing on experts, or factual evidence), perhaps with a larger group of lawyers who deal locally with local clients.

6. **Case management.** The following paragraphs deal with various aspects of case management in a GLO situation. The broad principles are that the managing judge has considerable discretion, and is entitled to make robust orders so as to ensure that the litigation makes "orderly progress".⁷³ This means that the judge has to proceed in whatever way seems to him or her will resolve the litigation as

⁷² There has only been one public fight over who should be appointed lead firm, in the Alder Hay child organs case.

⁷³ *AB v Wyeth & Brother Limited and Another* [1991] 2 Med LR 341.

efficiently, swiftly and fairly as possible. One cannot get “bogged down” in dealing in an orderly sequence with every issue that may arise, especially if there are some issues that only affect a minority of cases in the group. Of course, all relevant issues might theoretically have to be dealt with at some stage, but the principal aim is to decide what issues will be really important in leading to the effective early disposition of the litigation as a whole, so that these are decided as swiftly and decisively as possible. In practice, many group cases settle (this is consistent experience from USA, Canada and now UK) so if the court can assist in resolving one or more principal issues, then this will assist in achieving settlement. It also needs to be remembered that a group is composed merely of individual cases, and that the overriding purpose is to resolve each of the individual cases, by taking sensible short-cuts that will assist as many as possible as quickly as possible. The courts are providing a dispute resolution service to private parties, albeit within the context of the definitive power of the state, and need to be accountable for the level of service that is provided.

The judge will hold case management conferences at periodic intervals, at which the parties will tell him or her what has been going on, what they would propose to do next, and the judge will make orders on what is to happen next, setting time limits. The judge may also give ‘indications’, which are non-binding statements of what he or she is thinking on subjects that are likely to be the subject matter of orders at a future conference. This approach can act as an early-warning system for the parties, who may nevertheless seek to persuade the judge at the next hearing that the view expressed in the indication should be altered and a different order made.

7. **Clarifying the issues.** The managerial approach to civil procedure requires the judge to clarify what the cases are about. He or she may do this in a number of ways. There will always be close liaison between the judge and the lead counsel for both sides, so that there is full communication on facts, opinions and possible future action. The emphasis is on the judge having flexibility and wide discretion, so as to be able to depart from the normal rules where this is sensible. The main options are as follows.

The traditional approach if each of the cases were to proceed individually would be that each claimant would have to serve a Statement of Case. Instead, in a group context, it may be decided to have a single Master Statement of Case, which sets out all the generic issues that are common to all (or most) of the claims, so that any matters in that document do not need to be repeated in every individual claimant’s statement of case.⁷⁴ If individual statements of case are ordered to be produced, they might therefore only include aspects that concern each individual claimant (eg individual facts or causation or quantification of damage). Alternately, it might be decided that individual statements of case are unnecessary, or should be delayed, or that a Master statement of case is inappropriate or premature.

It may be decided that all cases should be stayed except for one, or a small number of, test case(s). Alternatively it may be necessary to proceed for some

⁷⁴ Practice Direction – Group Litigation, cl 14.

time with pleading and investigation of all individual claims, and then select one or more as ‘lead cases’ to be tried first, on the basis that they may illustrate aspects that appear in many cases (but not necessarily all cases), and their resolution will assist resolution of those others. The management court has simply a general power to direct trial of the common issues and/or of individual issues.⁷⁵

The practice that has emerged, at least in the product liability GLOs, has overwhelmingly been that of test cases. Thus, as in the most recent cases (Seroxat and foetal anti-convulsant medication) the court has ordered some individual cases to be pleaded fully so that a view could be taken of the issues that are common to most cases and resolved, on the basis that that would be the most effective way of resolving the greatest number of individual cases in the group. Trial of preliminary issues on hypothetical facts in a product liability case has explicitly been held to be inappropriate.⁷⁶

There have been cases where extensive media interest in a case leads to there being many people who seek to bring claims and join the group, but whose cases are weak (or even fraudulent). It can appear that there is a strong case against the defendant, and a possibly serious public health issue, but in fact the strength of many individual cases has not been investigated, and if they are investigated, the entire case can collapse. The claimants’ lawyers will be arguing that the case should proceed by the court deciding a generic issue, such as whether the product is capable of causing harm, and that no evidence need be produced on individual cases. Their tactic would be that a finding on generic causation against the defendant might lead to a settlement, whereas they may know that the individual cases are weak, and would argue that the cost of investigation would be prohibitively expensive. However, judges have consistently taken the line that the function of a GLO is to resolve compensation claims, and they are strongly resistant to cases being run as a quasi public enquiry.

The evidence from England, which mirrors that of USA, is that certain types of cases may be appropriate for certain management approaches, but not others. Thus, in product liability cases, especially alleging damage caused by pharmaceuticals or tobacco, individual issues usually predominate over generic issues. For example, there may be issues in all individual cases over whether the product caused the type of damage, or the actual damage alleged, or whether a carcinoma found in the claimant is one type or another type and whether it is capable of being caused by the product, or whether the claimant was personally aware of the risks, or whether the claim is barred by limitation. In contrast, where it is clear that there are few issues that need to be verified, and that most issues are generic, there is little problem: thus, the claimants injured in a transport disaster may need little formal hurdles to qualify to join, and the only issue may be liability or quantification of individual.

Therefore, it may be dangerous to attempt to codify a single approach to all cases. This would squeeze all types of cases into the same procedural straitjacket, and the current evidence is that this would not be suitable for all cases.

⁷⁵ Practice Direction – Group Litigation, cl 15.

⁷⁶ *Multiple Claimants v Sanofi-Synthelabo Ltd* [2007] EWCA 1860 (QB).

As and when sufficient evidence is available, it may be possible to identify that certain types of approach are most suitable for certain types of case. Hence, some sort of standard approach may evolve, which could become set out in guidelines or codified. However, it currently seems premature to undertake such a classification exercise in Europe.

The effective management of a group of cases can involve making some difficult decisions and compromises. In some types of case, decisions that are made on some management issues can make the difference between the success or failure of a case, or a defence. Accordingly, a judge should be aware of the tactical position of the parties, and anticipate that expect strong views will be put by those whose commercial interests are affected - especially claimant lawyers, and defendant companies. The judge, of course, needs to remain strictly impartial, and to adopt a balanced approach that seeks to resolve and progress the dispute fairly.

It will be seen that there is not a formal requirement in the English GLO criteria for ‘predominance’, i.e. that generic issues should predominate over individual issues (as in US class action criteria, but differing under the MDL mechanism). In this respect, the GLO mechanism is a wide and flexible case management tool. However, the English experience of some types of cases, notably product liability, is that individual issues may not predominate and hence, since the Norplant case, there has been a huge presumption that trying to select generic issues from the (differing) individual cases will not be the most effective approach. In other words, the experience of these cases has been that individual cases cannot be taken to be representative of the group, so a *de facto* ‘predominance’ test has been applied. There has been some tension here between the Legal Services Commission, who prefer only to spend their limited budget on resolving generic issues, and the courts, who may feel that a generic approach is simply inappropriate in a given case.⁷⁷

Deciding whether to take the case forward on an individual or generic basis is one of the most difficult decisions to be taken. The court needs to be sure that it has full information from the parties on what the individual cases are about. The court may need to have the benefit of having formal or informal discussions with the parties’ representatives (all being present at the same time) or written documents from them.

It must also be remembered that defendant companies usually need to know the extent of the financial risk of liability that is being claimed against them, in order to comply with accounting and company law requirements. They may need to set aside financial reserves, and to notify insurers. It may be difficult for them to confirm insurance cover or to adequately manage the company unless they know how many claims are being made against them, and what the size of those claims are, and whether the claims are essentially sound or of poor quality. These considerations support a managerial strategy in group litigation of requiring claims to be clarified, rather than remain shadowy.

⁷⁷ *Hobson v Ashton Morton Slack Solicitors* [2006] EWHC 1134.

Equally, it may be important for claimants to be able to assess the scale of their individual costs' liability and risk. The financial viability of the group enterprise is as equally important as the financial situation of each individual.

8. **The formality for commencing a claim.** There needs to be some formal step for a claimant to join the group, and be bound by the collective procedure. In England, a Register of claimants is usually kept,⁷⁸ either by the court or by one of the lawyers. The court may order that each claimant should institute proceedings in the normal way (or be excused from the cost and expense of doing so and just join the Register). The major reason why each individual is required to start an action by filing proceedings with the court in the normal way is that this permits the court service to collect a fee for the use of its facilities. A further point is that it is sometimes necessary to verify that a claimant satisfies criteria for joining the group. In this case, the court may order prospective claimants to produce a certificate, or even specified evidence, which demonstrates that they qualify. People may sometimes be confused about historical facts, which could easily be verified as the price of joining the group: examples might be to verify dates of birth or purchase of products or services, or a medical report confirming that a certain condition was suffered and when.
9. **Cut-off dates.** In order to be able to make orderly progress, the court and the parties need to know how many claims are in the group. There are managerial and financial reasons for this, and it is true of both opt-in and opt-out approaches. It is an established feature in England that the court will assess whether sufficient notice has been given to the existence of a group, and may order the claimants to pay for or arrange further publicity. Any such notice or publicity will normally include a date by which a claimant needs to have joined the group (or to have taken other steps, such as applied for legal aid, or served pleadings or evidence).⁷⁹ Failure to meet these deadlines will mean that the court may (and usually does, possibly after a short extension of time) refuse to admit any claimant who is in default.⁸⁰ The court tries to avoid setting cut-off dates that give claimants too short a time to investigate their claims, since this can produce a rush of bad claims that have to be weeded out later, and give a false impression of the viability of the group as a whole. There can sometimes be good reasons for *not* imposing a cut-off date, such as where there are difficulties over bringing the case to the attention of people who may be affected.
10. **Limitation.** There needs to be clarity over whether joining a group suspends the limitation period or not: what steps will or will not have this effect? The normal position is that a claim needs to have been commenced within the limitation period. In a group situation, the law or the court should make clear that if prospective claimants take certain steps, they will have preserved whatever limitation rights they may have been entitled to. If they merely join a register, will that be enough? (In normal circumstances, it should be enough.) This is a

⁷⁸ CPR, Part 19.11(2)(a); Practice Direction – Group Litigation, cl 6.

⁷⁹ Practice Direction – Group Litigation, cl 13.

⁸⁰ The court has found in one case that being too liberal in admitting claimants may only lead to difficulties. In *Nash and Others v Eli Lilly & Co and Others* [1991] 2 Med LR 169 and subsequent hearings the court extended cut-off dates several times, with the result that four groups of claimants were formed. Most of these claims were subsequently held to be out of time on limitation grounds. The psychological effect on the claimants was unfortunate.

different issue from deciding that particular claimants are out of time in taking certain steps, and that a claim is time-barred. England has had the situation that the court has been able to decide a group case on the basis of deciding whether a sample of representative test cases were or were not time-barred has led to the resolution of the entire litigation, without need for expensive further work on the 'normal' aspects of the cases.

11. **Striking out.** Similar to the position with cut-off dates, the court has the power to strike out a group, or individual claims, where the case does not satisfy the normal requirements, such as that it is oppressive, vexatious, bound to fail, involves inordinate and inexcusable delay, and is unjust to the defendants. In a group case, these criteria take on added significance, and an additional criterion of 'viability' has evolved: a case will be struck out if it appears that it is unviable on a cost-benefit basis. The early decisions on application of a viability test in group cases have been strengthened by a general amendment to the Rules applicable in all cases that courts are required to consider 'whether the likely benefits of taking a particular step justify the cost of taking it'.⁸¹ In the group situation, the viability criterion can be regarded as one which is necessary to counter-balance the power that a large group of claimants can have in bringing cases: where many cases may be of limited merit, or would involve excessive costs for limited benefits, the courts will not wish to be used as providing a mechanism for the 'blackmail' of defendants to settle cases of little net worth. This is an important contrast to the general perception of class actions in USA, where 'blackmail settlements' are said to exist.
12. **Evidence.** In accordance with normal case management principles, which now apply to every English case, the court may decide to order that certain evidence is, or is not, required, either at all or at certain stages of a case. This would apply to either factual evidence or expert evidence. There is no difference of approach here between a normal unitary case and a group of cases, except that the scale of the circumstances and consequences may be larger.
13. **Costs.** The normal principles of civil litigation apply in a group setting, especially 'loser pays winner's costs'. The arrangements in a group situation can, however, be complex. It is important that the rules and arrangements are clear as early as possible, since lawyers need to be able to advise clients on the financial implications, which can be significant. By joining a group, claimants have the considerable advantage of being able to share the financial costs and risks. But the costs of a large enterprise can still be huge, and the liability of an individual in investing in the enterprise may therefore be considerable.

Costs are usually divided into 'generic' costs and 'individual' costs: the former are any aspects that relate to all claims generically (and can be large), and the latter relate to any aspects that relate only to each claimant's individual case (and are usually small). Claimants are always subject to an agreement that generic costs will be divided up and shared on this basis (whether under a contract or under the court's order at the start). The arrangements usually provide that people who join the group late accept liability for the generic costs that have been incurred before

⁸¹ CPR, 1.4(h).

they join, but that people who leave the group have their liability for costs frozen or limited or continued, depending on the circumstances: this is a complex area. The court usually orders that the costs of a test or lead case shall be treated as generic costs, since they are for the purpose of advancing the whole group's cases. It is not thought fair that a single claimant (who would be in a test or lead case) should be liable for the entirety of the defendants; costs if he should lose his case: that liability should be shared with the others in the group. The issue of liability for defendants' costs if the enterprise is lost has been contentious, but the normal principles of liability have generally been applied.

Issues on costs are complex in group cases, and can have a significant impact. It may be, for example, that a generic case may succeed but one or more individual claimants may fail on their individual issues. The resultant reduction in what the defendant has to pay may have a significant effect on the overall result.

Even though the above solutions are specific to the English tradition, it would be possible to codify the rules further than they have been, or to provide a codification of rules, based on the essential aspects that need to be covered, that would fit another tradition.

B. Description of representative procedures

These are described at Q 2B above.

4. **In representative litigation**, who may come forward to represent groups of claimants, in what circumstances? Must class members all come forward individually ("opt in") to join the litigation, in some or all circumstances? *What interests and organizations have availed themselves of the procedure? What roles have public justice officials and private lawyers played in prosecuting cases? What are the barriers to individuals and groups using the representative mechanism (e.g. funding problems, difficulty communicating with potential class/group members, lack of independence of officially-appointed representatives, judicial attitudes)? Are there features of your country's civil litigation system that either facilitate or deter representative litigation?*

Please see answer to Q 2. In overview, collective representative claims may be brought, depending on the area of legislation, either by public authorities or by a very small number of consumer organizations that have been designated by a minister. Only the lead consumer association, Which?, has so far been designated in most of the possible situations. To date, and although this may develop, government policy is to ensure that markets remain vibrant and competitive, and are primarily subject to consistent and expert oversight by public authorities, rather than excessive litigation brought by private individuals or bodies.

Apart from the legislative barriers to designation of private actors in bringing collective actions, those already designated have found funding to be the principal impediment to taking action.

5. **In non-representative group litigation**, who may initiate group litigation, and in what circumstances? *In what types of cases have parties/lawyers attempted to use the group litigation process? What role have judges played in conferring group litigation status on cases? What are the barriers to parties/lawyers using the group litigation mechanism (e.g. funding problems, difficulty determining whether group litigation would be efficient & effective, judicial attitudes)? Are there features of your country's civil litigation system that either facilitate or deter group litigation (presence or absence of contingency/speculative fee system, limits on lawyer advertising, etc.)?*

As discussed above, initiation of a GLO may be (a) by the solicitors who act for any party who may be included in the group, (b) by the court of its own motion, or (c) be the prospective or actual defendant. The trigger is where it can be shown that there are a number of similar claims that “give rise to common or related issues of fact or law”.⁸²

Types of cases: The situations in which the GLO procedure has been used have broadened out. Initially, almost all claims were product liability cases: technically these cases may have preceded the formal introduction of the GLO rule, but that rule was based on the practice that was developed in such cases, and they were product liability cases. Since around 2000, the types of cases have also included abuse in child care homes, holiday disasters, transport crashes.⁸³ Several GLOs have been brought against the government in respect of UK tax issues, especially whether UK law complies with EU rules on non-discrimination between UK and non-UK companies and subsidiaries.⁸⁴ The financial implications are significant and issues have been referred to the European Court.

In all GLOs, approval of the court is required for designation as Group Litigation through the making of a GL Order. In at least one case, the court has refused an application, on the ground that insufficient consideration had been given to pursuing more cost-effective means of resolving the dispute, such as test cases or consolidation of individual actions, as well as failure to identify ‘a group litigation issue’ as required under the Rule.⁸⁵

The major barrier to use of the GLO procedure is said by claimant lawyers to be gaining access to adequate funding. This is discussed further at Qs 12 and 13. Funding litigation, especially a group or collective action, may involve significant cost, and will expose all individual claimants in the group to the risk of liability for defence costs in the event that all or even some parts of the claim are unsuccessful. The risk involved is a function of the size of costs involved and of the chances of success. A logical approach to litigation requires an initial screening mechanism for the merits so as to permit a risk assessment of financial viability for both individual and generic cases, but such a process would lead to significant cost.

⁸² CPR, Part 19.10.

⁸³ L. Christian, ‘Rail Crash Litigation – Southall and Ladbrooke Grove’ [2001] J.P.I.L. 4/01, 339-355.

⁸⁴ See S. Whitehead, ‘Group Litigation and the European Court of Justice’ [2006] *E. C. Tax J.* 8(3), 13; L. Fichardt and P. Freund, ‘The UK Tax group Litigation orders – The Current Status’ [2007] *E. C. Tax J.* 9(2)2.

⁸⁵ *Hobson v Ashton Morton Slack Solicitors* [2006] EWHC 1134 (QB).

Getting litigation off the ground in England in practice now requires obtaining ATE insurance (see below), but for a group such cover may be expensive and difficult to procure without adequate investigation and risk assessment (a Catch 22 situation). Some cash-limited public funding is in principle available for generic issues (or their initial investigation) but tends to be granted only for certain types of cases, such as child care homes abuse (a political issue) rather than product liability.

Some argue forcefully that the absence of a contingency fee system (or the existence of the current 100% cap on success fees under the CFA system), coupled with the ‘loser pays costs’ rule, are major impediments to access to justice, and should be reformed.⁸⁶ This is an issue that would provoke heated debate.

There are no specific restrictions on advertising by lawyers,⁸⁷ and this ability has had an impact on the ability of lawyers to advertise the possibility or existence of group litigation.⁸⁸ The absence of such restrictions in UK since 1968 contrasts with a general ban across continental Europe on any advertising by lawyers, which is set to end shortly.⁸⁹

6. How many lawsuits have proceeded in each litigation form over the past 5 years? If representative or group litigation requires judicial approval, please indicate the number of representative or group actions that have been attempted and the number in which approval was granted. Please indicate the source of any numbers you provide. If no “hard” numbers are available, please provide estimates.

A. Numbers of GLOs

Data from the Legal Services Commission on the number and names of GLOs made as at 2005 is at Appendix A (this might only capture cases in which a request for funding has been made to the LSC). An update as at September 2007 is at Appendix C. One type of claim that has not been historically present involves claims by investors, but the National Association of Pension Funds issued advice on 15 March 2007 to pension fund trustees that they have a duty to claim in class actions, whether in UK or other jurisdictions.⁹⁰

B. Consumer organization claims

The number of representative actions brought by public authorities or consumer organizations has so far been very low, but the mechanisms are fairly recent. As mentioned, the OFT successfully brought the *Duchesne* cross-border misleading advertising injunction case. The consumers’ association has brought its first

⁸⁶ “Improved Access to Justice – Funding Options & proportionate Costs” *The Future Funding of Litigation – Alternative Funding Structure*, Civil Justice Council, 2007.

⁸⁷ Normal controls apply on misleading or unfair comparative advertising, and on professional decorum.

⁸⁸ C. Hodges, *Multi-Party Actions* (Oxford, 2001), ch 6.

⁸⁹ Directive 2006/123 on services in the internal market, which must be implemented by 28 December 2009.

⁹⁰ *Securities Litigation - Questions for Trustees*, National Association of Pension Funds
http://www.napf.co.uk/documentarchive/Policy/0010_2007/070315_Securities%20Litigation%20-%20Questions%20for%20Trustees.pdf

competition damages cartel follow-on claim in relation to replica football shirts: it is unclear whether this will have been financially viable. However, this type of case may well increase, given the good prospects of success in succeeding in a case that follows determination of infringement by a public regulatory authority, even though there are some aspects of the mechanism that may need to be considered, such as access to evidence on quantum, the need for individual claimants to join and to produce proof of loss, and issues of cost.

7. **In representative litigation**, must possible class members be informed of the initiation of the litigation and, if so, how? *Do courts have oversight authority for the notification process? Please provide any information you have about the types of notification used, their scale, and costs. If parties are required to opt-in, what has been the experience with regard to that? What are the barriers to participation in representative suits? How are class members kept informed of developments, and to what extent can they exercise control over decisions, or take part in the process if they wish?*

In the consumer protection cases, notification or consent of consumers is not required, because the action constitutes enforcement of a regulatory infringement, typically through requesting a court to issue an injunction.

In the competition damages case, the collective action is brought on behalf of individual consumers whose damages must generally be quantified and paid individually, so the action can only be brought for the benefit of those individuals who have given written consent.⁹¹ The initial experience with the football shirts case is that consumers were reluctant to opt-in in view of the small amounts claimed. It is an interesting question whether individual complainants can exercise control over a case, or would want to: such matters have not been investigated.

8. **In non-representative group litigation**, must the named parties be informed that the litigation is proceeding in group form? Can parties/lawyers whose cases are similar to others that are proceeding in group litigation form exclude themselves from the group litigation and proceed independently, and if so how? *Are group members kept informed of developments, and to what extent can they exercise control over decisions?*

In a GLO, every individual claimant must, in principle, be kept informed of progress by his or her own lawyer, and must take all relevant decisions. In a group situation, a fully informed democratic approach is, however, in practice unrealistic. Claimants may simply not understand the complex issues at stake. It is probably true to say that, in practice, group litigation is controlled by the core team of lawyers. In some early cases, a central team of lawyers (if more than one firm was involved, a steering committee was formed with members responsible for different aspects) was responsible for generic issues (including strategic control of the case, representation in court, and liaison with the defence and where necessary with the funding or insurance authorities) and local law firms continued to advise their clients on individual issues

⁹¹ Competition Act s. 47B.

(such as production of individual evidence). This division of labour has not been seen in most recent cases, possibly because of the ability of specialist firms to cope with all aspects, partly because of the need to avoid unnecessary communication or duplicative costs, but also because of tight control of public funding for cases. The Law Society has performed a useful function in advertising amongst solicitors the existence of possible group litigation and then in facilitating the agreement of firms involved on coordination of representation.

In the last resort, the court has the ability to order who shall represent whom, but this power has never been invoked. Clients or lawyers who disagree with strategic decisions made by the principal lawyers could in theory arrange for separate advice. However, public or private funders might impose some limitation on this freedom, and ultimately insist on maintaining unitary representation. The court may also require representation before it to be unified, or as rationalized as possible, in order to ensure that the litigation stayed efficient and effective. These issues have so far not arisen in practice, at least in public.

It is an interesting question whether individual group members are in fact kept as fully informed as they should be. A pragmatic response might be that, although theoretically desirable, full information is simply not compatible with efficient management and resolution of a case within sensible price constraints. On the other hand, the issue is important in the context of controlling potential conflicts of interest between clients and lawyers that undoubtedly arise in relation to the economic aspects of a case. There has been some consideration of appointment of an independent expert trustee to represent the interests of lay claimants, but this has not occurred in practice.

9. **In group litigation, are there special case management procedures (e.g. case pleadings, scheduling, development of evidence, motion practice, test cases, preliminary issues)?** *Are there features of your country's civil litigation system that either facilitate or hinder the development of cases that proceed in representative or non-representative group form?*

The special case management techniques for GLOs are described at Question 3 above. All of the features of a register of claimants, generic pleadings, flexible case management, test cases or preliminary issues are available, and tend to facilitate efficiency and lowering of costs. Overall, the procedure is notably streamlined and flexible.

10. **In group litigation, what proportion of cases is resolved through party/attorney negotiation and settlement, and what proportion is resolved through judicial or jury decision?** *If cases are settled, who participates in negotiating settlements? Does the court or do other public officials have responsibility for assuring fairness of any negotiated outcomes, and if so what procedures exist to address the fairness issue? What has the experience of oversight been? Have there been controversies over the fairness or reasonableness of settlements? If cases are tried, how is evidence presented on behalf of the class or grouped claimants?*

A. Resolution of GLOs

Almost all of the initial multi-party product liability cases failed before full trial. Negotiated settlements were reached in only a small number.⁹² Defendants defended the cases as a matter of principle in the belief that the merits of the vast majority of individual claims brought were at best low. Most individual claimants withdrew or were struck out before trial. So the success rates were very low.

However, since then, other types of claims have been successfully settled,⁹³ notably the succession of care homes child abuse cases, holiday or transport cases,⁹⁴ prostheses implant cases, and other one-off cases such as mass murder by healthcare professionals. Lawyers play the central part in the negotiations. Complaints over potential conflicts have not been heard.

There is no formal requirement for Court oversight of the fairness or reasonableness of settlements. There have been no controversies over such matters.

Evidence is presented in the normal way in litigation. If the court decides to try a common issue, whatever generic factual or other expert evidence may be required will be presented by the coordinating counsel, as normal. Similarly, if one or more individual issues are being tried, then normal rules of evidence apply.

B. Resolution of representative actions

No meaningful comments can be made since very few cases have so far been brought.

11. What remedies are available in representative and non-representative group litigation? When group litigation is resolved with the payment of monetary damages, how are damages allocated among claimants? Do judges exercise oversight of fairness or process of allocation? Please provide data on outcomes of representative and non-representative group litigation over the past five years. Please indicate the source of any outcome data you provide. If no “hard” data are available, please describe the diversity or range of outcomes to the best of your ability.

A. Remedies in GLOs

Any remedy open to the court may be claimed in a GLO. The normal principle applies in relation to monetary damages, namely that each claimant must prove his or her own damage. The court has no power to award estimated sums. In settlements, however, division of a lump sum amongst a pool of individual claimants may occur.

B. Remedies in Representative Actions

⁹² notably Myodil contrast medium, Opren, haemophiliacs with HIV, Gamagard, human growth hormone.

⁹³ Information provided by participants at the conference on Group Actions held at the Centre for Socio-Legal Studies, Oxford on 14 December 2006.

⁹⁴ L. Christian, ‘Rail Crash Litigation – Southall and Ladbrooke Grove’ [2001] J.P.I.L. 4/01, 339-355.

The available remedies are usually specified in the legislation, or general law, and are usually limited to injunctive relief. No meaningful data are available in view of the absence of cases.

12. Who funds group litigation: the state, legal services organizations, NGOs, private lawyers, or the claimants themselves? *Is funding perceived to be a problem, and if so, is the problem perceived as too much funding or too little? What problems have those who wish to proceed in representative or non-representative group litigation encountered in obtaining funding?*

There are various possible sources of funding for civil litigation in England. The subject is complex, and has been subject to considerable change. The following are the main options:

1. Pay yourself. Only the very rich can afford to do this. The traditional approach is for a lawyer to charge on an hourly rate basis plus disbursements. Some lawyers may be willing to act on a *pro bono* basis, but this is unlikely in group cases.
2. Trade Union. Coverage for legal fees, especially for personal injury claims, is usually a benefit of membership. Unions are able to negotiate reduced costs through bulk buying from selecting a panel of solicitors.
3. First party insurance (Legal Expenses Insurance, also known as Before-the-event (BTE)). BTE policies have grown in number considerably during the past 10 years, as cheap add-ons to household or motor insurance policies, that would cover household or motor claims or liabilities but possibly not general tort claims, but few consumers remember that they have such cover. Policies will be subject to a financial limit and effective control of a case will lie with the insurer, who will usually instruct a panel lawyer. BTE and trade union insurance may not cover group cases, and may well be difficult to operate in a group context. But solicitors are required to ascertain whether clients have BTE coverage before recommending other forms of insurance.
4. Public-NGO or charity-funded provider(s), such as: Law Centres, Citizens' Advice Bureaux, Shelter (housing), JUSTICE. These might typically cover specialist cases, such as housing, welfare benefits, human rights or immigration. They might be prepared to take some role in group cases within their areas of expertise.
5. Public funding. This is now controlled by the Legal Services Commission. It is generally referred to as Legal Aid. The English funding landscape is heavily influenced by the fact that Legal Aid was widely available from 1949 until 1999. The UK paid far more in Legal Aid than any other EU Member States.⁹⁵ The

⁹⁵ Council of Europe (European Commission for the Efficacy of Justice), *European Judicial Systems 2002*, CEPEJ (2004) 30 (Strasbourg, 2004), Tables 4-5, see http://www.justiceinitiative.org/db/resource2?res_id=102527: this surveyed 40 states and quoted expenditure per inhabitant as €53.80 for England and Wales, €43.11 for Scotland, €13.96 for Ireland, €11.59, €5.59 Germany, €4.64 France and €0.78 Italy, amongst others; E. Bankenburg,

weakness of the system was that Legal Aid was ‘supplier led’, and involved insufficient control over expenditure. The merits and means tests for individual cases and applicants that were applied were insufficient to regulate the system: the suppliers themselves applied the merits test.⁹⁶ The government was unable to cap this expenditure, and ultimately deconstructed the system,⁹⁷ and introduced private funding plus insurance as the primary mechanism.⁹⁸ However, the availability of Legal Aid during the 1980s and 1990s had a significant impact on the development of the group action phenomenon.

Since 1999, public funding has been available on a basis of administrative discretion within a cash-limited annual budget (currently £3 million), rather than as of right on satisfaction of a merits test. The money is administered by the Legal Services Commission (LSC) through its fund for high cost cases (those likely to cost over £25,000).⁹⁹ The LSC has been wary of funding group cases since its predecessor’s experience of paying out very large sums of money under the previous legal aid system, in which the largest cases failed. The LSC applies three criteria: public interest, affordability and merits. It prefers to fund investigation of a generic case, not individual cases, on the basis that once it has been established that a case has merit individual cases can be funded by CFAs (see below). It also requires a detailed case plan to be provided, and claimant lawyers find the (perhaps understandable) level of bureaucracy inhibiting.

6. Conditional fee agreement (CFA). CFAs were first introduced in England and Wales in 1995,¹⁰⁰ and extended in 1999 as the solution to maintaining access to justice when Legal Aid was deconstructed for most damages and money claims.¹⁰¹ They are now permissible in all civil cases, including arbitrations, but not family cases if no finance or property claim is involved.¹⁰² Collective CFAs are also permitted for trade unions, commercial organizations and others providing or purchasing legal services for groups.¹⁰³

A CFA consists of two elements: a ‘no win no fee’ provision and an increased fee if the case is successful. In the latter case, the fee will consist of the ‘normal’

‘Judicial Systems in Western Europe: Comparative Indicators of Legal Professionals, Courts, Litigation, and Budgets in the 1990s’ in E. Jensen & T. Heller (eds.), *Beyond Common Knowledge. Empirical Approaches to the Rule of Law* (Stanford, 2003), 83; E. Blankenburg, ‘Lawyers’ Lobby and the Welfare State: The Political Economy of Legal Aid’, in F. Regan, A. Patterson, T. Goriely & D. Fleming (eds.), *The Transformation of Legal Aid* (Oxford, 1999).

⁹⁶ Department for Constitutional Affairs, *A Fairer Deal for Legal Aid* (HMSO, 2005) Cm 6591, para 2.9.

⁹⁷ Legal Aid also deconstructed by Sweden and replaced by LEI, but note widespread compensation schemes for medical and drug injuries: F. Regan, ‘The Swedish Legal European Judicial Systems 2002: Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expenses Insurance’ (2003) 30 *JLS* 49. C Hodges, ‘Nordic Compensation Schemes for Drug Injuries’ *Journal of Consumer Policy* (2006) 29:143-175.

⁹⁸ Access to Justice Act 1999, s 27; Conditional Fees Agreements Regulations 2000. The new English system was, however, complicated by the need for development of a new market for provision of after-the-event insurance to cover the risk of having to pay a winning opponent’s costs. This system has encountered significant teething troubles but is gradually stabilising: see *New Regulation for Conditional Fee Agreements (CFAs): Response to Consultation* (Department for Constitutional Affairs, 2005) CP[R] 22/04 and *Improved Access to Justice – Funding Options & Proportionate Costs: Report & Recommendations*, Civil Justice Council, 2005.

⁹⁹ Access to Justice Act 1999; *The Funding Code*, Legal Services Commission

http://www.legalservices.gov.uk/civil/guidance/funding_code.asp.

¹⁰⁰ Courts and Legal Services Act 1990, s 58; The Conditional Fee Agreements Order 1995, SI 1995/1674, The Conditional Fee Agreements Regulations 1995, SI 1995/1675.

¹⁰¹ Access to Justice Act 1999.

¹⁰² Access to Justice Act 1999, s 27, substituting new ss. 58 and 58A in the Access to Justice Act 1990.

¹⁰³ Collective Conditional Fee Agreements Regulations 2000, SI 2000/2988.

basic fee, calculated on an hourly rate basis, plus the uplifted success fee, which is a proportion of the basic fee. The percentage uplift in an individual case is regulated by statute, contract, the court, and the regulator of professional conduct (the professional rules require risk to be taken into account, and other factors can be considered).¹⁰⁴ The reasons for the agreed uplift must be set out in the agreement.¹⁰⁵ The percentage uplift is capped at 100% of the normal fee, and should not exceed 25% of the damages recovered.¹⁰⁶

There is a growing standard practice for uplifts to be standardised for particular types of cases, so as to increase predictability, but one would normally anticipate that group lawyers in multi-party cases would claim and be awarded 100% uplifts.

In addition, insurance is required to cover risk of liability for winner's costs if the party loses. If LEI/BTE or other insurance cover is not available, claimants must seek much more expensive after-the-event (ATE) policies from insurers. The result is that CFAs with ATE insurance is a complex system for both claimants and lawyers, even though both basic and success fees, and reasonable insurance premia, are recoverable from losing defendants.¹⁰⁷ It is now quite difficult to obtain insurance cover at reasonable rates from ATE insurers in group actions.

CFAs are capable of covering generic costs in a multi-party situation even where no costs-sharing order has been made.¹⁰⁸

The position on litigation funding is still evolving. Various further significant developments may emerge, such as the spread of commercial third party funders.¹⁰⁹ Serious complaints are voiced by claimant lawyers that the position on group cases is highly unsatisfactory and results in significant denial of access to justice. For some types of case, public funding is practically unavailable and, when granted, is subject to considerable bureaucratic requirements. Whilst expert practitioners would be prepared to assume considerable risk in acting on a full and uncapped contingency basis, whether across the board¹¹⁰ or merely for class claims,¹¹¹ the maintenance of the 'loser pays' rule requires claimants to be insured, and commercial insurance can be difficult to obtain and very costly in group cases.

¹⁰⁴ Law Society, *Guide to Professional Conduct of Solicitors*, 8th edn (1999), Annex 14F, para. 17. See also Bar Council, *Guidance on Conditional Fee Agreements* (London, 2002). Society of Advanced Legal Studies, *The Ethics of Conditional Fee Arrangements* (London, 2001); S. Yarrow & P. Abrams, 'Conditional Fees: The Challenge to Ethics' (1999) 2 *Leg. Ethics* 192.

¹⁰⁵ The Conditional Fee Agreements Regulations 2000, SI 2000/692, reg 3(1)(a).

¹⁰⁶ The Conditional Fee Agreements Order 2000, SI 2000/823.

¹⁰⁷ Access to Justice Act 1999, s. 29.

¹⁰⁸ *Brown v Russell Young & Co* [2007] EWCA Civ 43.

¹⁰⁹ The government is concerned that intermediaries should not be able to indulge in uncontrolled profit-making that causes widespread consumer detriment, after unhappy experiences with claims-harvesting intermediaries who arose after CFAs were permitted and required the imposition of regulation: see "*Improved Access to Justice – Funding Options & Proportionate Costs*" Report & Recommendations, Civil Justice Council, 2005; Compensation Act 2006 http://www.opsi.gov.uk/acts/acts2006/ukpga_20060029_en.pdf.

¹¹⁰ The Better Regulation Task Force, *Better Routes to Redress* (2004). See M Zander, 'Will the Revolution in the Funding of Civil Litigation in England eventually lead to Contingency Fees?' [2002] *De Paul L Rev* Vol 52: 260-298; J. Peysner, 'What's Wrong with Contingency Fees?' (2001) 10 *Nottingham LJ* 22.

¹¹¹ "*Improved Access to Justice – Funding Options & Proportionate Costs*" Report & Recommendations, Civil Justice Council, 2005, Recommendation 11.

On the other hand, government policy supports CFAs¹¹² and maintains the importance of the ‘loser pays’ rule as a defence against excessive or ill-considered litigation. Insurance will be available for group cases that have reasonable chances of success.

Since the losing or settling defendant became liable to pay the bonus (uplift) element of the claimant's costs there has been a plethora of satellite litigation on the validity of the CFA itself, given the highly technical requirements of the form of Agreement. The position is further complicated by the unresolved question how the CFA arrangement is compatible with the indemnity principle: that a party may only recover from the paying party costs in respect of which she has made herself liable to her own legal advisers.

13. Costs and benefits. How are attorneys in group litigation paid? Please indicate whether there are special rules for paying attorneys in representative and non-representative group litigation that do not pertain in ordinary civil litigation. Do courts have responsibility for determining or approving fees in these cases? How do the private costs of group litigation compare to the costs of ordinary civil litigation, or any other available methods for resolving such situations? Do attorneys make more, the same, or less, in proportion to their time, effort and risk, by comparison to ordinary civil litigation? How do costs compare with the outcomes achieved? Please provide any quantitative data available on litigation costs over the past five years, and any available data comparing costs to outcomes. Please indicate the source of any cost and outcome data you provide. If no “hard” data are available, please describe the range of costs to the best of your ability, and share your perceptions of the relationship between costs and outcomes.

The methods of payment for lawyers are set out above. Costs in litigation may always be reviewed by the court on the objection of a paying party. The courts have power under the Woolf approach to litigation generally to reduce costs. This can include power to cap future costs.¹¹³ A significant recent decision occurred in a GLO in the County Court, where the judge capped future costs of both sides at £215,000 each in a case involving gastroenteritis and other personal injuries allegedly contracted at a Tunisian hotel by 151 claimants (some 62 cases having been settled at an average of £158 each) where the total damages were likely to be around £400,000.¹¹⁴

In ordinary litigation, the amount of activity that will be reimbursed has increasingly been made subject to standardization under official pre-action protocols, and standard

¹¹² There is an extensive literature that would support the proposition that it is possible to combine an increase in access to justice with a success fee element that is regulated and remains proportionate to the suMs and risk involved: S Yarrow, *Just Rewards? The outcome of conditional fee cases* (University of Westminster, 2000); *Consultation Paper: Simplifying CFAs. A consultation on the Conditional Fee Agreements regime including the: Conditional Fee Agreements, Collective Conditional Fee Agreements, membership Organisation Regulations June 2003*, Department for Constitutional Affairs, 2003; *Making simple CFAs a reality: A summary of responses to the consultation paper ‘Simplifying Conditional Fee Agreements’ and proposals for reform*, Department for Constitutional Affairs, 29 June 2004, CP22/04; *New Regulation for Conditional Fee Agreements (CFAs)*, Department for Constitutional Affairs, 10 August 2005, CPR 22/04; .

¹¹³ *King v Telegraph Group Ltd* [2005] 1 WLR 2282; *Smart v East Cheshire NHS Trust* [2003] EWHC 2806; *Solutia UK Ltd v Griffiths* [2002] PIQR P176.

¹¹⁴ *Dawson & Others v. First Choice Holidays & Flights Limited* judgment of Judge MacDuff, 12 March 2007. The claimants’ solicitors had estimated future costs to be £726,000.

CFA uplifts for particular types of cases. The aim is to increase predictability and so facilitate the expansion of before-the-event legal expenses insurance, along the German model. Further steps are being implemented to continue this trend.¹¹⁵ It will be interesting to see whether such developments increase the ability to fund GLOs. Meanwhile, the courts have been persuaded to limit claimants' exposure to costs, and hence to facilitate the quantification of insurance risk, by making Costs Capping Orders¹¹⁶ and Protective Costs Orders.¹¹⁷

The costs in large cases can be very high. The benzodiazepine litigation cost public funds £40 million for the unsuccessful claimants' lawyers and experts¹¹⁸ and presumably a similar sum for the defendant companies. The recently concluded MMR vaccine litigation cost the public purse £15 million for the unsuccessful claimants' advisers, presumably a similar sum for the defendant companies, and lasted 8 years.¹¹⁹

14. Is the burden that group litigation places on the court more, the same, or less, than in comparable non-representative, non-group litigation? What is the average time to dispose of a group case, and how does this compare to comparable non-representative non-group litigation? Please provide any quantitative data available on court costs and time to disposition over the past five years. Please indicate the source of any data you provide. If no "hard" data are available, please describe the range of outcomes to the best of your ability.

Any individual group action may involve considerable burden and resource on the court and lawyers involved. Large cases can appear almost unmanageable, but it remains the case that judges seek to exercise their extensive managerial powers in robust fashion so as to make cases viable and controllable. Large GLO cases can take some years to resolve, but might be unmanageable if pursued individually. The experience of several GLO cases has been that delays can occur when cases are of low merits, and either the Legal Services Commission or individual claimants need time to consider their position and options in deciding whether or how to continue.

It is not possible to state an average time for GLOs: the answer depends on the individual case. Cases that involve many individual claimants will obviously need some time for communications between the generic team of lawyers and the

¹¹⁵ Ministry of Justice, Consultation on Case track limits and the claims process for personal injury claims, CP 8/07, 20.4.2007, <http://www.dca.gov.uk/consult/case-track-limits/cp0807.htm>.

¹¹⁶ An advanced directive limiting recoverable costs to a fixed amount. In *Various Ledward Claimants v Kent & Medway Health Authority* [2003] EWHC 2551, Mrs Justice Hallett commented, in making a costs capping order in a GLO involving claims by 59 patients arising out of rape or sexual assault by a gynaecologist, that it was "a classic example of litigation driven by the lawyer acting for the claimants in which there is a real risk that costs have been and will be incurred unnecessarily and unreasonably". In the 'Torremolinos Beach Club Group Litigation' case, brought by holidaymakers over whether the spread of Norovirus should have been prevented by hotels at a Spanish resort, a request for claimants' lawyers fees of £1.6 million was capped at £650,000, order of Master Hurst, 11 August 2005 (unrep.)

¹¹⁷ In public law cases, where the issues raised are of general public importance and the applicant has no private interest in the outcome of the case: *The Queen (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, CA.

¹¹⁸ *The Funding Code: A New Approach to Funding Civil Claims* (Legal Aid Board, 1999), 16.

¹¹⁹ J. Meltzer at the Group Actions conference, Centre for Socio-Legal Studies, Oxford, 14 December 2006. *Re MMR and MR Vaccine Litigation* [2007] EWHC 1335 (QB), 8 June 2007; Queen's Bench Practice Direction, 11 July 2007, Sir Igor Judge P.

individual claimants. The essence of the GLO approach, however, involves some form of economic short-circuiting of normal procedures in those cases where individual issues do not predominate and need to be investigated and considered by the court in any depth,¹²⁰ and resolving major dispositive issues at an early stage, on the basis of test cases or a preliminary issue.

15. What are the current debates in your jurisdiction over the application of collective litigation rules and their consequences? How intense are the debates, how pressing is any need for reform? Have there been important evolutionary steps or trends? What major developments might follow?

The GLO procedure is stable and widely accepted. Its flexibility, and hence a level of inherent uncertainty,¹²¹ is criticized by some, but there is no strong call or need for reform of the GLO procedure. Indeed, it could be said to have been a singular success. Its stability and utility has formed the basis for parties increasingly negotiating claims or specific aspects of claims themselves, without necessarily needing to invoke the formal GLO procedure, save in order to manage specific issues.¹²² It is important to recognize that the context of the GLO procedure within the case management approach of the Woolf principles has also been a major factor in this success.

The lesson of this story is that courts have need of a mechanism for coordinated efficient management of multiple similar cases. The history of the ‘same interest’ rule illustrates the problem of designing a mechanism that is too restrictive, and this was overcome by the adoption of the far wider ‘common or related issues of fact or law’ GLO rule, operated in the context of the Woolf case management context.

There are, however, significant ongoing debates over the availability of *funding* for multi-party actions. These debates occur within the wider context of major developments in relation to the funding of litigation as a whole. Views tend to be polarized depending on whether the individual believes that there is insufficient ‘access to justice’ or, conversely, a ‘compensation culture. Unsurprisingly, claimant lawyers are prominent in supporting the case for increased funding, or new sources of funding, for litigation on the basis of increasing access to justice, whereas business opposes such developments.

Representative Actions are experimental and have not existed for long in UK. Some consumer voices – and prospective claimant lawyers – argue that the rules should be eased so as to permit more claims, especially damages claims. In addition to the issue of funding noted above, the big issue is whether damages claims should be made more widely available, especially in competition law and consumer protection law. The debate is complicated by differing views on whether private litigation is effective

¹²⁰ Individual issues do not predominate in cases such as pharmaceutical or tobacco product liability cases, where it is usually a false economy to avoid investigation of individual medical issues.

¹²¹ R. Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004).

¹²² Examples are (1) claims arising out of the major fire at an aviation fuel facility in 2006 (Buncefield) were progressed some way by the lawyers without the need to invoke the court’s assistance or the GLO procedure; once various aspects had clarified, the GLO procedure was invoked in order to manage specific disputes; (2)

or appropriate as a mechanism for enforcement of public regulation.¹²³ There are some views that consumer organizations are both ineffective and inappropriate as regulatory enforcement actors.

Possible future reforms

There is considerable debate on possible reform. It is important to understand this debate in the context of policy discussions that have been taking place in the European context, which are discussed in a separate report.

The UK government has three times announced proposals to introduce general 'representative claims' for damages, first in 2001¹²⁴ and then revived separately in 2006 in relation to consumer claims and competition claims. On the first occasion, the initiative was effectively dropped and the recent initiatives are still under consideration, but have run into problems.

The 2006 consumer protection proposal was that, in cases where a breach of consumer protection legislation affects a number of consumers, a consumer group or similar organisation might be entitled to take legal action on behalf of the affected individuals, including claim damages.¹²⁵ The rationale for the proposal was simply the assertion that "many consumers feel unable to bring a court case on their own, while those who do may consider the size of their losses are outweighed by the potentially high legal costs." The mechanism would cover all business to consumer infringements of and consumer legislation. However, following the consultation period, the government has as yet brought forward no formal proposal but has investigated the extent to which evidence of need in fact exists.

In relation to all the proposals, the principal concerns have been an absence of evidence of the extent of any need, plus the risk of encouraging lawyer-led and excessive litigation. The government is highly sensitive to any move that would tend to encourage a 'compensation culture', since there has been extensive media assertion that the country has been in the grip of such a culture. Despite both official¹²⁶ and academic¹²⁷ analysis finding that there has been no statistical increase in general litigation (in fact, rather the reverse since the Woolf civil procedure reforms), there

¹²³ See differing views expressed in W. van Boom and M. Loos (eds) *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (Europa Law Publishing, 2007).

¹²⁴ *Representative Claims: Proposed New Procedures, A Consultation Paper*, Lord Chancellor's Department, 2001. The proposal for a horizontal new mechanism was dropped in view of concerns about engendering excessive litigation, on the basis that certain vertical, and therefore more limited, measures, would be considered: *Consultation Response: Representative Claims: Proposed New Procedures*, Lord Chancellor's Department, 2002.

¹²⁵ *Representative Actions in Consumer Protection legislation: Consultation*, Department of Trade and Industry, 2006: <http://www.dti.gov.uk/consultations/page30259.html>.

¹²⁶ *Better Routes to Redress*, Better Regulation Task Force, 2004. *Tackling the "Compensation Culture": Government Response to the Better Regulation Task Force Report 'Better Routes to Redress'*, (Department for Constitutional Affairs, 2005). The Compensation Act 2006, s 1 was an attempt to clarify that a duty of care should not prevent desirable activities: the government stated that the provision did not alter the standard of care, although this statement was controversial. The Business Plan 2005/06 of the Legal and Judicial Services Group of the Department for Constitutional Affairs included a section headed "Tackling perceptions of a compensation culture and improving the compensation system".

¹²⁷ K Williams, 'State of fear: Britain's 'compensation culture' reviewed' [2005] *Legal Studies* 499. A. Morris, 'Spiralling or Stabilising? The 'Compensation Culture' and our Propensity to Claim Damages for Personal Injury' *Modern Law Review*, 70 (3) (2007) 349-378.

remains a public perception of a problem and political sensitivity of any measure that might inflame the position.

Accordingly, the government's cautious approach can be seen throughout the legislative mechanisms that have been adopted and in the consultation papers. For example, various safeguards have been mooted. First, only consumer organisations that are designated by the Secretary of State may bring representative claims.¹²⁸ Secondly, the consumers on whose behalf the claim is brought must be individually named. Thirdly, the court must give permission for an action (save possibly in Scotland), in order to exclude weak or spurious cases.¹²⁹ Fourthly, the consumer body would normally pay losers' costs.

Proposals on the competition enforcement area emanate from the Office of Fair Trading (OFT), which issued a Consultation Paper¹³⁰ in April 2007 as part of considering the European Commission's Green Paper on competition damages claims. As often, the UK authorities were here trying to put in place pre-emptive national legislation before formal proposals emanated from Brussels, so as to influence the general shape of the Community proposals. The OFT noted that the UK already has in place the main structural and legal elements for effective private actions in competition law.¹³¹ However, it seeks to encourage more claims, particularly by consumers and SMEs, without giving rise to a 'litigation culture'. Political support for identifying and eliminating any barriers to redress for parties injured by anti-competitive behaviour had already been given by the Chancellor in December 2006.¹³²

The OFT attempted to balance the proposed extension of private claims with some safeguards. It suggested that in order to facilitate a greater number of private competition damages claims the availability of representative actions should be broadened, so as to achieve economies of scale (reduction in the cost will facilitate the body to represent more people) and address barriers to individual action. Designated bodies would be permitted to bring standalone representative actions on behalf of consumers, and to bring follow-on and standalone actions on behalf of businesses. "A representative action system will only operate successfully if the bodies permitted to bring those actions are credible, reputable, and committed to acting in the interests of those they represent."¹³³ The OFT also stated the view that, whether brought on behalf of named individuals or consumers at large, any representative action must enable effective identification of claimants.¹³⁴ Business records of customers could be produced in pre-action disclosure. In the named claimant model, claimants could be given a further opportunity to join the action at a later stage, eg after liability but

¹²⁸ Criteria for designation might be: good reputation; the ability to handle a case; having the well being of consumers, rather than of profit, at the centre of their ethos.

¹²⁹ A permission stage may, of course, merely lead to proliferation of preliminary litigation through the requirement for examination of the merits of cases, even if merely to satisfy an "arguable case" test, as with judicial review.

¹³⁰ Private actions in competition law: effective redress for consumers and business, Office of Fair Trading Discussion Paper, April 2007

¹³¹ S 47B of the Competition Act 1998 permits designated bodies to bring representative competition follow-on actions in the Competition Appeals Tribunal. This does not cover claims by businesses, or standalone claims.

¹³² *Pre-Budget Report, December 2006, Investing in Britain's potential: Building our long-term future*, Cm 6984, paras 3.11 et seq, at www.hm-treasury.gov.uk/pre_budget_report/prebud_pbr06?prebud_pbr06_index.cfm

¹³³ Para 4.14.

¹³⁴ Para 4.29.

before quantum.¹³⁵ Any undistributed funds should be used for the benefit of consumers generally, on a *cy pres* basis.¹³⁶

However, the OFT noted that the courts already have effective case management powers (the GLO procedure) and are “capable of ensuring that a balance is struck between the need to encourage an appropriate level of redress and the desire not to introduce any measures that might result in courts and businesses being burdened with ill-founded actions.”¹³⁷

The OFT recognised the importance of funding in providing access to justice, and said that since potential exposure to costs may act as a major disincentive to bringing well-founded private competition law actions, the current cap of 100% on success fees under conditional fee agreements (CFAs) should be sufficient for follow-on actions, but should be increased for standalone actions. Alternatively, the success fee should be recoverable up to 100% from the opponent, but over that from the damages. Further, greater guidance should be given on *ex ante* costs capping orders. Courts might consider capping the claimant’s liability for the defendant’s costs at a lower level than the defendant’s liability for the claimant’s costs.¹³⁸ Nevertheless, the OFT stated that the rule that costs follow the event is a discipline against the bringing of ill-founded cases, and should remain.¹³⁹

In current debate, the absence of substantiating evidence of detriment or need is striking. The OFT stated that it is difficult to determine the extent of demand for greater redress, and noted that individual losses may be so small that it is not in an individual’s interest to pursue them. It noted that, so far, consumers have obtained virtually no redress in private competition actions, and the extent of any claims by businesses is unknown.¹⁴⁰ It did cite three examples of cartel behaviour:

- Price fixing of toys between a leading supplier and major retailers, in which consumers would have been overcharged £40 million without OFT intervention.
- Price fixing of replica football shirts, estimated to have cost consumers £50 million had it not been ended.
- An ongoing bid-rigging cartel investigation involving thousands of tenders with a combined estimated value approaching £3 billion.

However, these examples of regulatory infringements are not as such evidence of viable private damages claims. Which? (the Consumers’ Association) has instituted a representative claim in the football shirt case (it only had power to do so against one of the defendants under the empowering legislation because of a limitation issue) and

¹³⁵ This suggestion ignores that fact that business defendants need to establish the extent of claims against them for sound accounting reasons and notification to insurers. Experience has also shown that claims need to be vetted since many can be ill-founded, irrespective of the merits of any generic issue. If there are only a small number of genuine claims, the court will stop the litigation as unviable, but the true position of viability or smoke-screen needs to be established.

¹³⁶ Para 4.37. This suggestion mirrors the views of R. Mulheron, *The Modern Cy-Pres Doctrine: Applications and Implications* (Cavendish UCL Press, London, 2006).

¹³⁷ Para 4.9. This strikingly naïve assertion flies in the face of the courts’ recent inability to control the BCCI litigation against the Bank of England, which continued on an unfounded basis for several years at huge cost.

¹³⁸ Para 5.13.

¹³⁹ Para 5.10.

¹⁴⁰ Para 2.12.

the outcome is as yet unclear. Initial indications were that very few individual consumers have been bothered enough to sign up as claimants, but Which? may succeed in reaching an acceptable negotiated settlement.

The situation illustrates what appears to be a widespread issue, that whilst total market detriment may be substantial, individual losses are so small that the cost-benefit ratio is too low for people to be bothered to make individual claims or to join a collective claim. If that is correct, it significantly undermines the argument for collective redress mechanisms, but supports the argument that the proper approach is to take public enforcement action. It would follow that making changes so as to produce 'economies of scale' in group actions will reduce the costs of bringing such claims but may well not of itself affect the motivation of individual consumers or businesses to get involved. If the nature of the problem is essentially one of effective market regulation, some commentators have proposed that the solution should lie in regulatory enforcement policy, rather than civil litigation.¹⁴¹ Private restitution for consumer or SME claims could be provided for within the sentencing process – or, if the amounts or costs are too high – simply be ignored as being a waste of money.

16. Overall, how would you evaluate the mechanism(s) success in achieving major changes in behavior, activities or policy, relative to the costs incurred by public and private actors?

Evaluation of outcomes: No impact of litigation on governmental or corporate behaviour

Those cases under the GLO procedure and before it have resulted in no changes in behaviour by defendants (governmental or corporate). Most of the large product liability cases were lost by claimants, and this raises important questions about having funding systems or procedural systems that do not filter cases that have poor merits.¹⁴² Perhaps more importantly, strong but complex regulatory systems and active regulatory authorities operate entirely separately from the liability world, and are little understood by the liability community. Regulatory decisions have certainly been made promptly by regulators in all relevant cases, irrespective of whatever activity may have occurred in relation to compensation claims. No argument could be made out for there having been any deterrent effect imposed by the liability or litigation system on corporate or authorities' behaviour.

It is salutary to observe that several major developments have occurred in European or British regulation of safety, yet none of these have occurred as a result of litigation but as political and administrative responses to significant events. It is well known that the Thalidomide disaster of the early 1960s led swiftly to the introduction of medicines regulation in the EU and UK, and that the requirements have continued to grow and be refined ever since,¹⁴³ but these developments occurred as a result of initiatives by medical, industrial and civil service personnel, rather than as a result of

¹⁴¹ C. Hodges, 'Encouraging Enterprise and Rebalancing Risk: Implications of Economic Policy for Regulation, Enforcement and Compensation' *Eur Bus LR* (in press, 2007).

¹⁴² The counter argument is that claimants who would lose or could not be funded to bring cases in England succeed in USA. This is said by some to evidence a gap in access to justice in England, but by others to be a balanced solution and to evidence an unbalanced US system.

¹⁴³ See C. Hodges, *European Regulation of Consumer Product Safety* (Oxford, 2005).

litigation. Publicity surrounding the scandalous inability of the civil legal system to produce compensation for the Thalidomide victims after 10 years led instead not to regulatory developments but to a change in substantive civil law through the introduction of strict product liability.¹⁴⁴ The BSE crisis of the 1980s led to over 10 years of legislative activity in reform of EU food law.¹⁴⁵ The primary source of a comprehensive matrix of regulation of health and safety in the workplace was development of the European social dimension, established under the Community's Social Charter and Action Programme of 1989.¹⁴⁶ Litigation over the safety of blood products and contamination by viruses, notably HIV and Hepatitis C, did not itself lead to changes in the regulatory regime, which was tightened by the authorities in any event. In UK, scandals over the use of children's organs (the Bristol and Alder Hey) led to new regulatory frameworks.¹⁴⁷ The unnoticed ability of a general medical practitioner (Dr Harold Shipman) to kill many of his patients over several years is producing a new regulatory framework for all professionals in healthcare.¹⁴⁸ The authorities moved swiftly in considering amendment of regulatory requirements after significant injuries to subjects involved in the clinical trial of a new medicinal product in 2006.¹⁴⁹

The essence of the debates that are emerging at European and national levels concern the best ways of, firstly, delivering restitution or compensation to those who deserve it and, secondly, affecting behaviour so as to achieve compliance with desired norms. In relation to the compensation issues, the choice already exists between one extreme of private litigation and another alternative of oversight of restitution by public authorities.

In relation to the 'behaviour modification' issue, the questions are:

- do or will public authorities have sufficient resource to oversee restitution as part of their enforcement activities?
- should the provision of compensation be a function of a public authority or should it be left to private actors; will 'private enforcement' of regulation be effective in altering behaviour?
- what forces are in fact best or optimal at affecting behaviour; will sufficient 'private enforcement' be achieved in any event in the absence of significant financial incentives for private actors, or third parties (especially lawyers) to become involved?
- will the costs and adverse consequences of such incentives outweigh, possibly significantly, any advantages that might ensue?
- is a 'mixed economy' of both public and private mechanisms possible and desirable?

Existence of alternatives to litigation

¹⁴⁴ Directive 85/374/EEC. It is ironic, however, that Thalidomide victims would not succeed in a claim under this legislation.

¹⁴⁵ Commission of the European Communities, *White Paper on Food Safety* COM (1999) 719 final, 12 January 2000.

¹⁴⁶ See the framework Directive 89/391/EEC, and associated Directives 89/654, 89/655, 89/656, 90/269, 90/270, 90/374 and a number of subsequent measures.

¹⁴⁷ Human Tissue Act 2004: see *Explanatory Notes to Human Tissue Act* (HM Stationery Office, 2004).

¹⁴⁸ *Shipman Inquiry: Safeguarding patients – lessons from the past, proposals for the future*, The Stationery office, 2004. R Smith, 'A remedy for the soul of medicine' (*Guardian*, 25 October 2006).

¹⁴⁹ G. Duff et al, *Expert Scientific Group on Phase One Clinical Trials: Final Report* (The Stationery Office, 30 November 2006). *Early Stage Clinical Trial Taskforce: Joint ABPI/BIA Report* (ABPI and BIA, July 4, 2006).

One should also note a rich matrix of options for dispute resolution other than the official court channels, involving significant reliance on alternative procedures.¹⁵⁰ These mechanisms provide powerful routes to resolve mass issues. Important ombudsmen, for example, are the Financial Services Ombudsman, the Parliamentary and Health Service Ombudsman, and the Local Government Ombudsman. Important regulators include the Office of Fair Trading and the Financial Services Authority, the Medicines and Healthcare products Regulatory Agency, and the Vehicle Certification Agency. There is also a strong tradition of self-regulation by industry,¹⁵¹ involving codes of conduct, which may be formally approved by the OFT,¹⁵² under a Consumer Codes Approval Scheme.¹⁵³

England is proposing to introduce a medical injury scheme.¹⁵⁴ The English development is in response to annual expenditure on clinical negligence having spiralled from £1m in 1974 to £446m in 2002. By 2004, legal and administrative costs exceeded compensation paid in the majority of claims under £45,000. The proposed new approach might cap compensation at £30,000,¹⁵⁵ but offer a quick resolution, after an inquiry by the authorities, and an apology and offer of a package of care plus monetary award (equivalent to the amount of damages which a court would award).¹⁵⁶ The basic aim would be to cut administrative and especially legal costs, and cut delay and disruption.

It will be interesting to see whether any reform of the rules on collective actions for competition¹⁵⁷ or consumer protection leads to greater enforcement or compliance. One suspects that the area that deserves attention is that of international jurisdiction for enforcement of regulation, rather than of changes in liability or litigation procedure or funding.

Appendix A

Group Litigation Orders

A Group Litigation Order can be made in any Claim where there are multiple parties or Claimants to the same cause of action. The Order will provide for the case management of claims which give rise to common or related issues of fact or law. These will be specified in the Order as the GLO Issues. The Law Society may be able to assist in putting the applicant in touch with other parties who may also be interested

¹⁵⁰ reflecting the position across EU Member States: J. Stuyck and others, Study on alternative means of consumer redress other than redress through ordinary judicial proceedings, (Catholic University of Leuven, January 17, 2007) published by the European Commission, April 2007.

¹⁵¹ *United Kingdom, Challenges at the Cutting Edge*, (OECD, Paris, 2002). I Bartle and P Vass, *Self-Regulation and the Regulatory State - A Survey of Policy and Practice* (Centre for the Study of Regulated Industries, University of Bath School of Management, 2005). The government's Better Regulation Task Force published a sequence of reports pressing the advantages of self-regulation between 1999 and 2005.

¹⁵² Enterprise Act 2002, s8.

¹⁵³ *Consumer Codes Approval Scheme: Core Criteria and Guidance* (OFT, 2004).

¹⁵⁴ NHS Redress Act 2005.

¹⁵⁵ Except for babies who suffer brain damage; birth related brain damage cases accounted for 5% of medical litigation in 2003/3 but 60% of annual expenditure.

¹⁵⁶ *Making Amends*, Report by the Chief Medical Officer (2003). Explanatory Notes to the NHS Redress Bill, <http://www.publications.parliament.uk/pa/ld200506/ldbills/022/en/06022x--.htm>.

¹⁵⁷ Claims should be brought against British Airways and Virgin Atlantic in relation to the fuel surcharge cartel, but only *after* the conclusion of regulatory activity and imposition of penalties: August 2007.

in applying for a Group Litigation Order in their case. When an Order has been made a Group Register will be set up and maintained in the Management Court, of all the parties to the group of claims being managed. A Group Litigation Order will normally be publicised through the Law Society.

GLO Reference Number	Name of Group Litigation	Date of Order
2001 Folio 398	Prentice Ltd/DaimlerChrysler UK Ltd Litigation	30/04/2001
1	Redbank	10/11/2000
1A	Redbank Group Litigation Order	13/06/2001
2	Royal Liverpool Children's	12/11/2000
3	Kerr/N. Yorks. H.A	18/10/2000
4	Cape plc	03/11/2000
5	Gower Chemicals	18/11/2000
6	JMC Holidays	07/11/2000
7	JMC Holidays/Club Aguamar	08/02/2001
8	McDonalds Hot Drinks	22/05/2001
9	Nationwide Organ	16/06/2001
10	Esso Collection Litigation	27/06/2001
11	West Kirby Residential School Group Litigation	27/06/2001
12	The DePuy Hylamer Group Litigation	10/08/2001
13	Nantygwyddon litigation	15/08/2001
14	Gerona Air Crash Group Litigation	18/08/2001
15	Longcare Group Litigation	21/11/2001
16	ACT (Advance Corporation Tax) Group Litigation	26/11/2001
17	Lower Lea Special School Group Litigation	12/12/2001
18	Coal Mining Contractors Contribution Group Litigation	07/01/2002
19	Trecatti Group Litigation	26/11/2001
20	Ryanair Agents' Group Litigation	17/01/2002
21	Persona Group Litigation	28/01/2001
22	Manchester Childrens Homes Group Litigation	12/06/2001
22A	Manchester Childrens Homes Group Litigation	01/07/2003
23	United Utilities Sandon Dock Group Litigation	20/03/2002
24	The Deep Vein Thrombosis and Air Travel Group Litigation	08/03/2002
25	Havelock Group Litigation	19/06/2001
26	St Leonard's Group Litigation	12/06/2002
27	The Chagos Islanders Group Litigation	03/07/2002
28	Scania 4 Series Group Litigation	22/07/2002

GLO Reference Number	Name of Group Litigation	Date of Order
29	The Kenya Training Areas Litigation	04/11/2002
30	Loss Relief Group Litigation	23/05/2003
31	South Wales Children's Homes Litigation (Local Authority)	28/11/2002
32	South Wales Children's Homes Litigation (NCH)	28/11/2002
33	Thin Cap Group Litigation	30/07/2003
34	CFC Dividend Group Litigation	30/07/2003
35	Franked Investment Income Group Litigation	08/10/2003
36	Kirklees Group Litigation	01/09/2001
37	Park West Group Litigation	04/01/2002
38	The Trilucent Breast Implant Litigation	01/07/2003
39	Newton Longville Group Litigation	27/03/2003
40	Sabril Group Litigation	04/02/2004
41	Lloyd's Names UK Government Group Litigation	16/04/2004
42	Calderdale Group Litigation	16/04/2004
43	FIDs Group Litigation (Foreign Income Dividends)	20/07/2004
44	St George's Group Litigation	19/04/2004
45	British Telecommunications Pensions Group Limited	04/08/2004
46	Evolution Films Group Litigation	20/12/2004
47	Staffordshire Children's Homes Litigation	11/02/2005
48	Torremolinos Beach Club Group Litigation	21/04/2005
49	Dexion Deafness Group Litigation	28/04/2005
50	The DePuy Hylamer Group Litigation	08/08/2005
51	FAC Group Litigation	25/08/2005
52	Mogden Group Litigation	21/12/2005

Appendix B

Costs in Multi-Party Actions funded by the Legal Services Commission

Information disclosed to the Association of Personal Injury Lawyers under a Freedom of Information Act Request

The following analyses of actions show the gross cost of an action, either at legal aid or *inter partes* rates depending upon the outcome, and net cost to the fund at legal aid rates. The outcomes of the actions are recorded. The costs have been deduced from

the historic accounting records. Due to changes in the Accounts computer system and the identification methods over the past 10 years, these figures represent the best estimate at the costs, and are used for business planning and policy development. The absolute number of claimants in each action is estimated as the court, rather than the Commission, maintains the absolute record of the number of claimants in a particular actions, whether privately funded or legally aided.

Up to September 2004, the Commission had recorded 955 potential and actual Multi-Party Actions over the past 15 years. A review of the records shows the following categories of potential or actual actions:

Child Abuse	212
Environmental	147
Drug/Pharmaceuticals	119
Holiday	94
Accident/Disaster	69
Financial	60
Healthcare/Treatment	52
Industrial	38
Prison	28
Housing	23
Military	22
Product defects	12
Employment	7
Education	1
Other/Unidentified	71

The Commission bands Multi-Party actions (MPAs) depending on their likely total costs. Analyses of Major (£5 million plus) and Medium (£250,000 to £5 million) sized MPAs have been carried out. No analysis of minor MPAs has been carried out. The costs have been considered excessive.

Major Cost Multi-Party Actions

The following Major MPAs have been traced as completed over the past 10 years. Their gross costs exceed £5 million.

	Millions		Gross		Outcome
	Gross	Nett	Generic	Individual	
Benzodiazepene side-effects	£30.0	£30.0	£10.0	£20.0	Abandoned proceedings. ~7,000 claimants.
Third Generation Contraceptive Pill side-effects	£11.5	£11.5	£9.5	£2.0	Lost at trial. ~300 claimants.
MMR side-effects	~£21.0*	£21.0*	£15.0*	£6.0*	Abandoned in proceedings. ~1,350 claimants. *Final bills yet to be paid.
Gulf War Syndrome	~£5.0*	£5.0*	£3.0*	£2.0*	Abandoned during investigation, but subject to funding appeal by claimants. ~800 claimants. *Final bills yet to be paid.
PTSD for Servicemen	£6.0*	£6.0*	£5.0*	£1.0*	Lost at trial. ~450 claimants. *Final bills yet to be paid.

Blood products infected with HIV or Hepatitis	£5.3	£0.6	£3.5	£1.5	Won at trial. ~450 claimants.
Human Growth Hormone infected with vCJD	£5.0	£2.5	£3.5	£1.5	Partially Won trial. ~150 claimants. ~60 claimants won.
BCCI Employees	£13.5*	£3.0	£11.5	£2.0	Settled in proceedings. ~700 claimants. *Final bills yet to be paid.
Emphysema for Miners	£5.6	£0.6	£4.2	£1.4	Won trial. ~3,000 claimants.
CAPE Employees with asbestosis	£8.0	£2.5	£7.7	£0.3	Settled in proceedings. ~6,000 claimants.
TOTAL COSTS	£110.9	£82.7			25% Money paid by opponents.
TOTAL ACTIONS	10	5			50% Actions won in part of full.

*Several actions above have yet to have the bills assessed by the Court or the Commission. Estimates are provided.

Medium Cost Multi-Party Actions

The following major MPAs have been traced as completed over the past 10 years. Their gross costs are between £250,000 and £5 million.

Actions	Millions		Gross		Conclusion
	Gross	Nett	Generic	Individual	
Home Income Loans	£4.3	£0.2	£1.6	£2.7	Won – stage unknown. ~1,000 claimants.
Myodil	£2.6	£0.8	£1.7	£0.9	Won – stage unknown. ~250 claimants.
RAGE	£2.8	£2.8	£1.9	£0.9	Lost at trial. ~100 claimants.
Christies Hospital Radiation Overdoses	£0.3	£0.3	£0.1	£0.3	Abandoned in proceedings. ~15 claimants.
Cervical Smear Test Failures	£0.3	£0.0	£0.0	£0.3	Settled in proceedings. ~40 claimants.
LSD Treatment of Psychiatric Patients	£0.5	£0.1	£0.2	£0.3	Settled in proceedings. ~100 claimants.
Norplant Contraceptive Implants	£1.4	£1.4	£0.5	£0.9	Abandoned in proceedings. ~350 claimants.
Steroids	£0.9	£0.7	£0.1	£0.8	Abandoned in proceedings with v small minority won. ~340 claimants.
Volclay Plant Pollution	£1.0	£0.0	£0.4	£0.6	Won – stage unknown. ~3,000 claimants.
Docklands	£1.7	£1.7	£1.7	£0.0	Lost in proceedings. ~1,000 claimants.
Flexsys Plant Pollution	£0.6	£0.0	£0.3	£0.3	Won – stage unknown. ~250 claimants.
VIWF	£2.2	£0.1	£1.3	£0.9	Won trial. ~1,000 claimants.
Thor Mercury Poisoning of Miners	£0.5	£0.0	£0.5	£0.0	Won – stage unknown. ~20 claimants.
Leicester Child Abuse	£1.7	£0.2	£1.1	£0.8	Won – stage unknown. ~90 claimants.
Stoke Place	£1.0	£0.0	£0.6	£0.4	Settled in proceeding. ~50 claimants.
Danesford	£0.8	£0.1	£0.6	£0.2	Settled in proceeding. ~40 claimants.
Kilrie	£0.4	£0.1	£0.2	£0.1	Settled in proceeding. ~20 claimants.

Forde Parke	£0.7	£0.1	£0.7	£0.1	Settled in proceeding. ~80 claimants.
TOTAL COSTS	£23.7	£8.6	64% Money paid by opponents.		
TOTAL ACTIONS	18	13	72% Actions won in part or full.		

Minor MPAs

Of the 955 potential or actual actions recorded, the vast majority are minor actions with costs below £250,000. The Commission does not have systems to automatically report on the outcomes and costs of these actions.

Child Abuse Multi-Party Actions

Child abuse certificates are not identified separately in our computerised records. Instead an analysis of the group actions recently concluded.

The following child abuse actions have been settled over the past 3 years.

Action	Average Damages Per Successful Claimant	Legal Aided Claimants Successful of Total Funded
Badgeworth Court	£10,714	14 of 17
Bar Lavington	£9,625	8 of 13
Barnardos – Springhill	£41,000	17 of 18
Cambridge 1 & 2	£29,889	39 of 61
Danesford	£11,429	35 of 43
Derwent House	£8,955	11 of 18
Forde Park	£26,027	£52 of 79
Greystone Heath & Dyson Hall	£18,929	112 of 145
Kilrie	£11,044	9 of 21
Kirklees	£11,061	43 of 104 (not all presently reported)
Knowle Park	£17,778	9 of 14
Newton Hall	£6,500	2 of 11
Queen Elizabeth II	£24,500	5 of 5
St Leonards	£24,075	54 of 55
South Wales NCH	£16,891	25 of 30
Stoke Place	£14,481	52 of 52
Sunderland	£9,816	42 of 48
Tennel	£11,989	79 of 107 (not all presently reported)
West Kirby	£11,080	11 of 11

There are a number of actions not included in the above analysis. The precedent setting Bryn Alyn action has not concluded. The Wessington Court action failed at preliminary issue trial on insurance liability, but the individual certificates have yet to be concluded. The Cambridgeshire 3rd Wave has not been formally reported as settled.

David Keegan
Director, Special Cases Unit

Appendix C

MULTI-PARTY ACTION – FOI INFORMATION SEPT 2007

Following the introduction of the Access to Justice Act in 2000, the volume of Multi-Party Actions recorded by the LSC has been as follows:

Year	Number of actions
2000/01	133
2001/02	67
2002/03	45
2003/04	16
2004/05	20
2005/06	8
2006/07	4

NB. The year on year reduction is primarily due to the decrease in the number of child abuse actions being brought. There were substantial police investigations in the 1980s and 1990s following the identification of abuse in children's homes. These police investigations and criminal prosecutions resulted in claims. The peak in these actions has now passed.

Of the 293 actions, the main categories of action are:

Child Abuse	156
Health, Medical and Pharmacological	34
Prisoner Actions	27

There have been a limited number of major multi-party action, defined namely those which are either likely to cost the Fund more than £1,000,000 or where the total inter partes costs are likely to exceed £5,000,000, assuming in each case that the action proceeded at least as far as a contested trial.

The LSC has funded in part or full each of the following major actions:

Veterans of the UK Atomic Tests. Veteran suffering from cancer and other problems. Action discontinued.

Vigibatin. An anti-epileptic drug that causes eye damage.

Seroxat. An anti-Depressant Drug with withdrawal effects.

Miners Knee. Industrial injury to miners from their working condition.

Foetal Anti-Convulsant Syndrome. Injury to children in the womb caused by sodium valproate based anti-epileptic drugs taken by the mother.

David Keegan
Director, High Cost Case Contracting