

Class Actions, Group Litigation & Other Forms of Collective Litigation in the Norwegian Courts¹

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 Norwegian legal system belongs to the civil law family of legal systems, but it has some common law features. The Norwegian legal system does not operate with separate federal and state systems, neither for the legislature nor for the courts. All statutory law is enacted by our parliament, *Stortinget*, and applies to the whole Norwegian state territory. There are three instances in the Norwegian court system; district courts (73), courts of appeal (6) and a Supreme Court.² All Norwegian courts are governed by the same procedural legislation, although with some adaptations depending on the court's level in the court hierarchy. There is no place for local court rules, neither on a county or municipal level, nor in the different courts.

Although Norway is a civil law system, the volume of Norwegian legislation is not very large. All legislation in force is collected in one volume; currently of about 3500 pages. This is partly due to the fact that Norwegian legislation is generally based on broad principles. This means that the more detailed application of the principles is largely left to the courts. Furthermore, in some areas of law, for instance law of contract for commercial matters, there is very little legislation, and the courts will frequently base their verdicts on commercial custom.

There is therefore considerable room for a doctrine of precedent in Norwegian law. The first element of this doctrine is that the Supreme Court adheres to its own former verdicts. If the Supreme Court finds that it needs to diverge from one of its precedents, the question or the case will be presided over by all Supreme Court Judges, if any of the judges demand it.³ The second element of the doctrine is that verdicts from the Supreme Court are normally seen as binding by the lower courts. However, if a Supreme Court verdict has been widely criticized, especially by legal scholars, or if it is old and based upon values that are no longer current, lower courts, on rare occasions, openly choose to diverge from it on the assumption that the Supreme Court is likely to change its view. When a lower court has chosen to diverge from a precedent, the case will invariably be appealed to the Supreme Court.

It can be argued that the Norwegian doctrine of precedent is not based upon a legal requirement for the lower courts to respect the decisions of the Supreme Court, but rather upon the more pragmatic view that if a district or appellate court strays from what the Supreme Court has decided, it will face the risk of having its verdicts quashed by the Supreme Court. The doctrine of precedent is however also based upon the principle of equality, meaning that it is the right of every citizen to be treated equally with his or her peers: Like cases must be adjudicated alike. Another important factor in the Norwegian doctrine of

¹ The English translations of Norwegian legal terms in this paper are adopted from Ronald L. Craig, *Stor norsk-engelsk juridisk ordbok* (Large Norwegian-English Legal Dictionary) Oslo, 1999.

² There is also an "Interlocutory Committee of the Supreme Court", that screens which cases are allowed to be heard by the Supreme Court, and which handles most appeals on procedural matters.

³ LOV-1926-06-25-2, The Plenary Act, 25 June 1926 no. 2, sections 1, 4 and 7

precedent, as for that of any other country, is that it helps ensure legal certainty for the public and reduces the number of litigated cases.

However, it must be noted that Norwegian legal tradition is based on a fairly pragmatic view of the law. It is built upon the view that the law must develop in accordance with the changes in society. If a precedent is based on values and legal points of view that are no longer current, the Supreme Court will sometimes choose to diverge from it.

Also the courts of appeal have a certain power of precedent over the district courts within their areas of jurisdiction. This is based upon the principles of equality and legal certainty, and upon the pragmatic view, that if a district court wants to avoid having its verdicts quashed by the appellate court, it should follow the guidelines set out by the appellate court.

Norwegian civil procedure cannot be labelled either purely inquisitorial or adversarial, but is to some extent a merge between the two systems with elements from both. However, there are more adversarial elements than inquisitorial. Fact finding is normally the responsibility of the parties, but in some cases, i.e. cases where the dispute raises questions involving elements of public policy, the judge may order the collection of further evidence.⁴ The judge has a more active role during the proceedings, both before and during the hearing, than that of the traditional common law judge. For instance, there is a duty upon the judge to give such guidance to the parties on procedural rules and routines and other formalities “as is necessary to enable them to safeguard their interests in the case”. The judge is also given the discretion to provide some guidance about the material issues in dispute, provided that this is done in a manner that is not liable to impair confidence in the judge’s impartiality. This qualification is of course a substantial limitation for the type and extent of advice. In cases where one or both parties are not represented by counsel, the judge has a more extensive duty to advise the parties.⁵

The current Norwegian Dispute Act was enacted in 1915, but 1 January 2008 a new Dispute Act will enter into force.⁶ Unlike most other Norwegian acts, but similar to its predecessor, the new act is very extensive and regulates all aspects of the court proceedings in civil cases.⁷

2. What formal rules for representative or non-representative group litigation have been adopted in your country?

Norwegian “representative litigation”

⁴ The Dispute Act (2005) sections 11-2 (2) and 21-3 (2). See note 6.

⁵ Op. cit. section 11-5. See note 6.

⁶ LOV-1915-08-13-6, Act Relating to the Litigation Procedure in Civil Disputes (The Dispute Act), 13 August 1915 no. 6 and LOV-2005-06-17-90, Act Relating to Mediation and Procedure in Civil Disputes, (The Dispute Act) 17 June 2005 no. 90.

⁷ For the purpose of this Country Report, I will predominantly refer to the new act. Class actions are not an option under The Dispute Act (1915), but are introduced in the new act, and also for other rules described in this paper I find it more practical and informative to focus on the new Dispute Act, since it will be in force so soon. An English translation of the new act is enclosed. It is not an official translation. However, it is the only translation available at this point.

In Norwegian law, for several decades a form of law suit, which is in Norwegian civil procedure literature referred to by the term “representative litigation”, has existed. This form of lawsuit has developed through precedent. As early as in 1914 a representative lawsuit was the subject of a Supreme Court decision.⁸ “Representative litigation” is, according to Norwegian legal terminology, a term which describes the situation where an organisation, for instance an environmentalist organisation, or another association or interest group, brings an action against for instance a company or the state, with the aim to protect the interests of the general public or a group. In other words, the organisation institutes a legal proceeding in its own name on behalf of its members or an interest of the general public or a specific group. Organisations may be found to have sufficient connection to the subject matter in dispute to fulfil the requirement of “legal interest” when the claim concerns matters and interests, which are within the purpose and normal scope of the organisation to protect.

Norwegian representative litigation is especially a useful tool to protect rights that do not belong to a definite group of people, but rather belong to the general public. A factory’s duty not to violate rules about the handling of toxic waste, does not correspond directly with a right for specific individuals (unless they have a claim for damages against the company), but it can be said that it is a right of the general public that businesses adhere to legislation and other regulation which is enacted to protect the environment. For such rights, individuals will not fulfil the requirement of “legal interest”, as they will not have sufficient connection to the subject matter in dispute, c.f. The Dispute Act section 1-3 (2).

The verdict is only binding on the parties, i.e. the interest organisation and the defendant, but nevertheless a decision in favour of the plaintiff – the interest organisation – is normally enough to ensure the defendant’s compliance.⁹

Since the term “representative litigation” in the questionnaire does not cover the form of litigation described above, it will be referred to as “Norwegian representative litigation” for the purposes of this country report.

A famous case of “Norwegian representative litigation” is the so-called *Alta-case*, Rt. 1980 p. 569. Norges Naturvernforbund, a large, nationwide environmental organisation, brought an action against the state concerning a governmental decree to allow Altavassdraget, a large river with rapids and waterfalls, to be led into pipes in order to utilize it for the creation of hydro-electric power. Norges Naturvernforbund claimed that the decree was void. The state claimed that Norges Naturvernforbund did not have sufficient connection to the claim to act as plaintiff. The Supreme Court found that the plaintiff had sufficient connection to the claim, and it especially emphasized the need for judicial review of administrative decisions.

Another famous case, where the defendant was a private enterprise, is the *Borregaard-case*, Rt. 1992 p. 1618. Two organisations, the Norwegian organisation Fremtiden i våre hender (The Future in Our Hands) and a Swedish environmental organisation for the city Strömstad, close to the border between Norway and Sweden, Naturskyddsforeningen i Strömstad, sued the private enterprises Saugbruksforeningen A/S and Borregaard Industries Ltd claiming damages for environmental damage to recreational areas in Halden. The Supreme Court compared the case with the *Alta-case* and found that there was a need allow “Norwegian

⁸ Rt. 1914 p. 419

⁹ The Dispute Act (2005) section 19-15 (1)

representative litigation” against private enterprises as well as the state or the local authorities, with the aim to protect environmental interests.

“Norwegian representative litigation” is not limited to environmental issues. See question five below for other examples and further description of the scope for this litigation form.

Class Actions

Until recently, class actions have not been an option for Norwegian litigants. In 2001, a law reform commission, with the mandate to propose amendments to the current Norwegian civil procedure legislation, proposed that rules for class actions should be adopted as part of the new Act Relating to Mediation and Procedure in Civil Disputes (The Dispute Act). There was a hearing, where a wide range of institutions, organisations and interest groups were provided an opportunity to offer their point of view, and the feedback varied. Some organisations and interest groups were positive, whereas other had reservations. I will give a summary of the main concerns that were voiced below.

The Ministry of Justice agreed with the law reform commission on all main issues, and the provisions concerning class actions were enacted by Parliament without further amendment. The Dispute Act will be in force from 1 January 2008, and from this date all Norwegian courts will offer the option of class actions to the public.

The rules for class actions form chapter 35 in the new Dispute Act. The rules will be described in response to question 3 onwards.

The policy debate about whether to adopt class actions as a form of litigation in Norwegian courts

In order to decide whether class actions should be an option for Norwegian litigants, the Committee and the Ministry looked at which other options are available which may serve the same purpose.¹⁰

One existing option in the Norwegian system is *joinder of parties*. An action can be brought by several plaintiffs or against several defendants under some circumstances, for instance when the factual and legal foundation of the claims is the same or substantially similar, provided that all claims fall under Norwegian jurisdiction and the court is the correct venue for one of the claims, and the claims can be heard by a court with the same composition and principally pursuant to the same procedural rules. There are no formal limits as to how many parties may participate in such a lawsuit.¹¹

Another option is *consolidation of actions*, which entails that several pending actions relating to the same subject matter are joined to be heard in one hearing and/or be adjudicated jointly.¹² The court can decide to join the lawsuits when this would make the handling of the cases easier or faster.¹³

¹⁰ The discussion of available alternatives to class actions is adopted from Ot. prp. no. 51 (2004-2005) p. 316 ff. (With some additional information from the author.)

¹¹ The Dispute Act, (1915), sections 68-70 and The Dispute Act (2005) section 15-2, c.f. section 15-1 (a) to (c)

¹² Ronald L. Craig, p. 72

¹³ The Dispute Act, (1915), section 98, subsection one and The Dispute Act (2005), section 15-6

The Ministry of Justice states that when the number of affected parties is fairly low, and the potential parties are identifiable, the forms of collective litigation described above can be suitable. The Ministry states that even when there are many potential claimants, joinder of parties may serve the need for collective litigation.¹⁴

Issues that concern many have also been pursued through lawsuits where organisations, interest groups and governmental agencies have acted as claimants. This is what is referred to as “*Norwegian representative litigation*” above. This form of litigation can to some extent meet the need for collective litigation, but the main difference between “*Norwegian representative litigation*” and class actions, is that class actions enable the determination of rights and duties belonging to individuals, and make these individual rights and duties enforceable. The verdict in a lawsuit where an interest organisation acts as a plaintiff is, as mentioned above, only binding on the parties, namely the interest organisation and the defendant, and therefore rights belonging to specific individuals cannot be determined through such a lawsuit.

Another option, which the Ministry mentions, is *pilot or test cases*. If an individual action is brought about an issue that raises factual and legal questions that concern many individuals in the same way, the verdict in the case can provide a basis for settlements of other similar claims. Test or pilot cases are ordinary civil lawsuits, and there are no special rules for such cases. However, such cases are well suited for intervention. For instance an organisation or public body can act as an intervener, and thereby provide financial as well as practical support in such cases. However, this approach also has drawbacks, which will be presented below.

In one specific, limited area, there exists a form of group litigation also today. There was made an amendment to the Act Relating to Interest on Overdue Payments, adding a new section 4 a, which provides specific rules for the handling of unfair standard contracts in commercial relations, through a representative lawsuit. An organisation which represents small or medium-sized businesses may bring an action in order to determine whether standard contract terms regulating the due date for payment, or the consequences of late payment, will have unreasonable effects on the creditor. The court can, if claimed by a party, rule that the verdict in the case shall be binding and decisive for the rights and obligations of all who use the standard contract. This provision was added in 2003 and was in force from 1 January 2004. The new provision was enacted in order to comply with an EU directive.¹⁵

There are also some other claims and lawsuits that will determine the rights of – be binding towards – others than the parties. For instance, the Act on Private Companies and the Act on public Companies provides that a verdict that determines that a decision by the general meeting in the corporation is void, or that changes this decision, is binding on all those who have the right to file a lawsuit about the issue in question.¹⁶

There was a hearing subsequent to the law reform commission’s proposal, where organisations, ministries, public bodies etc. were given the opportunity to provide their views on the proposal before the proposal was considered by the Ministry of Justice. Some of the bodies that offered their view were predominantly positive towards introducing class actions

¹⁴ Ot. prp. no. 51 (2004-2005) p. 317.

¹⁵ LOV-1976-12-17-100, Act of 17. December 1976 no. 100 and EU Directive 2000/35/EC, 29 June 2000, article 3 no. 5, c.f. no. 3

¹⁶ LOV- 1997-06-13-44, The Act on Private Companies, 13 June 1997 no. 44 and LOV-1997-06-13-45, The Act on Public Companies, 13 June 1997 no. 45, section 5-24

in Norway and the proposed rules, whereas others were predominantly negative or had reservations. Ministries, public bodies set to protect the interests of consumers, the workers' union ("Landsorganisasjonen LO") and the Judges' Association were in favour of the proposal to varying extents, whereas trade organisations representing banks and other businesses, the organisation representing the municipalities as employers ("Kommunenes sentralforbund") and the Bar Association were more or less against the proposal. In 2004 the Bar Association's "rettssikkerhetsutvalg", i.e. Due Process and Rule of Law Committee, decided to recommend the introduction of class actions in its Law and Justice Program.

The main cause of the difference of opinion between those who gave their input in the hearing is differing views on whether there is a need for the option of class actions in the Norwegian court system. Some expressed the view that the need for collective litigation would be sufficiently served by those options described above, i.e. joinder of parties, consolidation of actions, "Norwegian representative litigation" and pilot cases.

Below, I will present the main concerns which were voiced in the hearing by those opposed to the Committee's proposal and the Ministry's response to these.

The Bar Association argued that the need for class actions is not the same in Norway as in some other jurisdictions, for example USA, since there are public bodies charged with protecting the interests of consumers and the general public, and which have means of ensuring compliance, and out-of-court dispute resolution mechanisms, e.g. the Consumer Ombudsman and the Consumer's Tribunal.

The Bar Association furthermore argued that the need to litigate claims that are too small for an individual lawsuit to be a realistic option is not strong enough to outweigh the cons of class actions. The Association argued that also very small claims are occasionally determined by the courts. The Association stated that although the procedural rules must be such that they enable the public to have their claims enforced by the courts, it is not necessary to strive for procedural rules that enable every claim to be determined by the courts when there are other means to ensure compliance. The Association feared that class actions will lead to litigation about insignificant issues, and also may lead to litigation of issues that are not suitable for it, such as political issues. It furthermore argued that the amount of court resources that class actions will require are out of proportion with the importance of the claims, and that litigation about insignificant issues and claims may reduce the public's respect for the courts. Finally the Association stated that there is a risk that attorneys will instigate class actions that would otherwise never have taken place in order to serve their own financial interests.

NHO (union for businesses) and FHO (union for the banks) argued that the new Dispute Act introduces a separate small claims procedure, which will serve the need for more affordable litigation for small claims.

Several of the heard parties also raised the concern that class actions may place an unreasonable burden on defendants. A loss will in often be fairly insignificant for each claimant in a class action, whereas it will be substantial for the defendant in many cases. This imbalance in terms of process risk between the parties may lead to legal blackmail, which means that even when there is a greater chance that the defendant will win than lose, he or she may choose to settle the case because the risk is too great. Furthermore, the mere risk of being sued in a class action can cause a very insecure situation for businesses causing them to

accept terms and settlements that there is no foundation for. The heard parties refer to the situation in the USA, where such problems are said to have occurred.

Furthermore, several of the heard parties claimed that a class action may lead to substantial media attention, which may harm the defendant significantly, even when the claim is ill founded. In the USA settlements are said to have occurred after negative media attention.

Another concern, which was raised, was that the principles in the law of tort and damages may be “watered out”. When a large number of claimants have their claims determined in one lawsuit, practical difficulties with managing a large number of claims may lead to a situation where the fundamental principle of individual determination for each claimant of whether he or she has a valid claim against the defendant may not be adhered to. There is a fear that there will not be a proper individual determination of each claim, especially of whether the requirement of causation is fulfilled, of the amount of damages, and that the claimant has fulfilled his or her duty to limit his or her losses. This in turn may lead to a change in the law of tort and damages, where defendants face a risk of having to pay for damage that is not (or only partially) caused by the defendants’ actions, and where it is easier for a claimant to win a lawsuit. This in turn may lead to an increase in the number of class actions. Such effects have – according to some of the heard parties – occurred in the USA.

Another concern raised during the hearing, was that the option of class actions in Norway may cause a negative shift in the conditions for Norwegian businesses compared to that of foreign businesses. Furthermore, the risk of being subjected to class actions may cause foreign businesses to choose not to establish in Norway. Lastly, the option of class actions in Norway may cause cross-border disputes to be litigated in Norway even when other jurisdictions would be more appropriate.

Finally, some argued that class actions are not in accordance with fundamental principles of civil procedure. The main concerns are that claimants will be bound by the class’s decisions, and that most claimants will not be given the opportunity to give a statement before the court.

The Ministry addressed all concerns raised in the hearing, but concluded that they were either not lightly to cause problems, or not weighty enough to outweigh the advantages of class actions.

Firstly, the Ministry states that the argument that class actions partly contravene with certain principles of civil procedure should not hinder the development of more up-to-date procedural rules that meet the needs of modern day society. The Ministry also disagrees with the assertion that claimants will not be given the opportunity to give a statement before the court. Class members may be heard as witnesses during the court hearing when this is necessary.

The Ministry states that mass production and mass delivery of goods and services can lead to many small claims from several consumers against the same business, and that experience has shown that such claims are very rarely resolved, although they may have a very strong foundation. Individual lawsuits are too costly, and the rules about joinder of parties and the options of a joint hearing and/or joint adjudication have not been utilized for such small claims in practice. The consequence of this situation is that legislation set to protect consumers is not enforced. Also pilot cases have shortcomings. Firstly, verdicts are not always respected for similar cases. Secondly, one or a few consumers must carry the burden of taking the case to court. Thirdly, the defendant may have more leverage to reach a

settlement in his favour than in a class action where he or she negotiates against a large group of claimants.

The Ministry emphasises the need for access to court also for small consumer claims, both to protect the claim of the individual litigant and to ensure compliance with legislation. The Ministry states that the option of class actions will lower the threshold to the courts, but does not agree with the view that this is a problem. It is one of the motivating factors for introducing class actions to Norway to enable litigants with claims that they would otherwise not be able to bring to court, to have access to court. Furthermore, the risk of a class action lawsuit will be an incitement for businesses to comply with the law, and will provide consumers as a group with negotiation leverage. It will also lead to compliance with the decisions from out-of-court tribunals and verdicts in pilot cases. Another advantage of class actions is that compliance can be ensured through civil lawsuits, and thereby reduce the need to pursue perpetrators through administrative means or criminal prosecution.

The Ministry disagrees with the view that enabling cases concerning very small claims may reduce the public's respect for the courts. When considering the importance of the case, one must consider the value of the claims in total. Furthermore, the Ministry states that "A development where the consumers have to resign because they are not able to be heard with their rightful claims, can in turn cause loss of trust in the courts and lead to lack of compliance with legislation."

The Ministry does not share the concerns that class actions may come at the expense of out-of-court dispute resolution, but rather views it as a supplement. Chapter 5 of the new Dispute Act provides that the parties have a duty to look into the possibility of reaching an amicable solution before filing a case, and this will ensure that class actions do not replace out-of-court settlements for small claims.

The Ministry does furthermore not agree with the assertion that class actions will require substantially larger resources from the courts than individual cases. The legal issues to be determined are not more extensive or complex than in a pilot case, and it is financially favourable, both from a party and a society point of view that many like claims are determined in one verdict. A class action will require more resources than an individual lawsuit, but not more than a case involving many litigants which is litigated in accordance with the rules for joinder of parties.

The procedural rules for class actions will ensure that the case is litigated in a manner that serves the interests of all class members. The class representative is nominated by the court to protect the interests of the parties. Furthermore, it is a lesser burden for a claimant to be a class member than a party directly. If the case settles, the settlement will benefit all claimants, as opposed to only those who are parties in a pilot case. Finally, when faced with a class action the court may choose to determine the case on a principal basis, which will give considerable leverage also to those who were not part of the lawsuit.

Another advantage of class actions as opposed to other forms of collective litigation is the rules on notification. It is sometimes difficult to get an overview of and get in touch with all those who have been affected by an incident or a situation. The rules on notification about class actions make it easier to reach potential litigants than through a random initiative from an individual litigant. Even when all those affected can be reached without problems, it may be difficult to motivate potential litigants to join in a lawsuit with a common attorney. For

class actions there can be rules regulating the financial responsibilities and rights of the class members, both internally and for the defendant's potential claim for costs.

The Ministry does not share the view that a small claims procedure will serve the same purpose as class actions, as there will be claims that are too small even for a small claims procedure. Another shortcoming of the small claims procedure compared to class actions is that only the claims of the plaintiffs will be determined in an action under the small claims procedure.

In addition to consumer claims, the Ministry predicts that there may be scope for class actions for lawsuits concerning discrimination.

The Ministry also addresses the concern that class actions may place a too heavy burden on the defendant and lead to legal blackmail. The Ministry asserts that there are substantial differences between US and Norwegian legislation, which means that those problems encountered there will not occur in Norway:

- Legal costs: Norway has the principle of "loser pays", which will serve to prevent ill-founded lawsuits
- In Norway a claim for damages can as a main rule only include the financial losses of the party, and there is very little scope for punitive damages. The legal requirements are strict, and the amounts that can be awarded are limited. This means that the potential financial consequences of a class action are easier to predict in Norway than in the USA.
- The court costs are higher in the USA than in Norway.
- Civil cases in Norway are always determined by judges, based on the law, whereas in the USA juries are frequently used. Judge trials are more predictable for the parties.
- The Norwegian rules on class actions include safeguards against abuse. In addition to the general principle of "loser pays", there is a provision for class actions that the class representative is responsible in case the class must pay the other party's costs. It is a condition to be nominated as a class representative that he or she is able to cover the class's and the other party's costs. The defendant can appeal the nomination of the class representative.

The Ministry does not share the concern that class actions may cause the law of tort and damages to be "watered out". This issue must be viewed in light of the rules for who may become a class member. It is a condition for class actions that the claims have the same or substantially similar factual and legal basis, and that a class action is the best procedure to determine the claims. There are also provisions giving the court discretion to divide the hearing and adjudication of the claims, so that individual circumstances and assertions may be handled and taken into account by the court, c.f. sections 35-10 (1) and 35-11 (2). This means that it is possible to combine the requirement of individual determination of claims for damages with a class action procedure. This approach can be suitable in situations where the basis of the claims is similar for all claims, whereas the amount of damages must be determined individually for each litigant.

The Ministry states that those cases most suitable for class actions are cases where the rules determine standard amounts of damages, and where the parties disagree on the question of

whether the defendant is responsible for the damage or loss. Also a case where the amount of damage has to be determined individually for each litigant can be suited for a class action, c.f. above. However, cases where an important issue is whether the defendant's actions can be said to have caused the alleged damage, and where this has to be determined individually for each litigant, will rarely be found suitable for class actions. Furthermore, the Ministry states that cases where there are many claims for damages that are all caused by a single event or decision, will generally be better suited for class actions than claims that are based on damage caused over time due to hazardous products or pollution.

However, if the requirements of individualisation are too comprehensive, this may cause litigation to be too costly, and the Ministry therefore states that some degree of standardisation of the determination of the amount of damages is acceptable. It can for instance be an option to divide the class members into sub-groups according to certain criteria and determine the amount of damages for each sub-group instead of each class member.

The fear that class actions may lead to lawsuits that are predominantly politically motivated is according to the Ministry neither more nor less valid for class actions than other lawsuits. Claims in class actions must fulfil the same requirements as claims in other lawsuits. The claim must concern a legal matter and there must be a live controversy, i.e. a controversy that is neither moot, nor hypothetical. There must furthermore be a sufficient connection between the claimant and the subject matter in dispute, as well as between the defendant and the claim.¹⁷ The rules for legal costs, especially the principle of "loser pays" will prevent ill-founded actions to be brought.¹⁸

The Ministry does not agree with the view that introducing class actions will cause problems for establishing businesses in Norway and for businesses in Norway to compete with businesses that reside in jurisdictions without class actions. The same concerns were voiced in Sweden prior to introduction of class actions in 2003. An analysis was done, and the conclusion was that for serious businesses the introduction of class actions should not affect the willingness to invest in Sweden. Experiences from certain provinces in Canada and some states in Australia, where class actions have been introduced during the last decades have not shown such negative consequences for businesses as feared. These provinces and states are comparable to Sweden and Norway in terms of population and procedural law, as well as law on torts and damages.

3. For each litigation mechanism identified above, please provide a general description of the process contemplated by the formal rules.

"Norwegian representative litigation"

"Norwegian representative litigation" is not a specific type of court process. It is only a description of a type of case where the plaintiff is an organisation or interest group who brings an action in its own name to protect the interests of a group or the general public, see question

¹⁷ The Dispute Act (2005) section 1-3 (2), Ronald L. Craig, p. 205

¹⁸ The Dispute Act (2005) chapter 20. Section 20-2 (1) provides that "A party who is successful in an action is entitled to full compensation for his legal costs from the opposite party".

two above. This means that there are no specific procedural rules for this type of case, except from section 1-4, which sets out the requirements for such law suits, namely that the plaintiff must (1) be an organisation or association or (2) be a public body “charged with promoting specific interests”, and that the action must fall within the purpose and natural scope of the organisation or public body. Once these requirements are fulfilled, the process proceeds in the same manner as any other civil action and is governed by the same procedural rules.

Class Actions

Introduction

Unlike for Norwegian “representative litigation”, there are specific rules governing class actions, and such specific regulation was necessary to introduce class actions as an option within the Norwegian court system. The rules form chapter 35 in the Dispute Act of 2005. Chapter 35 has specific rules for appeal as well as the procedure in the District Courts, see section 35-1 (1).

Class actions are defined as follows in section 35-1 (2):

“A class action is an action that is brought by or directed against a class on an identical or substantially similar factual and legal basis, and which is approved by the court as a class action.”

The court has the discretion to ultimately decide which legal subjects (natural persons and legal entities), are part of the class. It does so by providing a description or definition of the claims or obligations included in the lawsuit, see section 35-1 (4).¹⁹

Conditions and requirements for class actions

Section 35-2 sets out the conditions for bringing a class action. Firstly, several legal persons must have claims or obligations, which have identical or substantially similar factual and legal basis (litra a), and secondly the claims must be such that they can be heard by a court with the same composition and mainly pursuant to the same procedural rules (litra b). Thirdly, the court must find that a class action is the most appropriate way of dealing with the claims (litra c), and finally, it must be possible to nominate a class representative pursuant to section 35-9 (litra d).²⁰

The first requirement, that *several legal persons* must have claims or obligations whose factual or legal basis is identical or substantially similar, c.f. litra a), deserves some further comment. The Ministry of Justice says about this requirement that although there is no requirement for a minimum or maximum number of parties, if there are few potential parties, this may be a factor in the court’s decision about whether class action is the most appropriate way of dealing with the claims, c.f. litra c).

Litra a) also has a *requirement of equality*. The Ministry of Justice says about this requirement, that it is a fundamental requirement that the claims and obligations have the same or substantially similar factual or legal basis. However, the option of a class action is not excluded although there are individual circumstances in each party’s case. When deciding

¹⁹ However, it is of course up to any person, who falls within the court’s group definition, to decide whether he or she wishes to be part of the group. See question 4 about “opt-in” and “opt-out”.

²⁰ See question 4

whether a class action is the most appropriate way of dealing with the claims, the court must consider whether the most important questions of the case are common for all parties. It is also an important factor whether it is possible to rule on common questions and individual questions separately. This is for instance an option in cases concerning tort and damages, where the amount of damages may be decided upon separately for each individual claimant or subgroups within the class.²¹ The higher the degree or frequency of individual circumstances and questions, the more lightly it is that the requirement of equality is not fulfilled. The frequency or degree of individual circumstances and questions may also be deciding for the court's decision about whether or not class action is the most appropriate way of dealing with the claims.²²

The requirement that the court must find that a class action is the most appropriate way of dealing with the claims necessitates that the court evaluates the case complex as a whole with the purpose of ascertaining whether a class action will be the most appropriate procedure for the case, compared with other collective or individual litigation forms. One available alternative is joinder of parties; see question two above and The Dispute Act section 15-2. A main difference between this and a class action is that when the cases are dealt with through joinder of parties each party handles his or her case and makes his or her own decisions throughout the trial, whereas in a class action decisions are made collectively for the whole class. Another alternative is "Norwegian representative litigation"; see description under question two above. This may suffice and be a good alternative in situations when each of the potential claimants does not require a decision that makes his or her individual claim enforceable.

The court must also ascertain that a class action will ensure a safe and proper handling of the claims. Relevant factors are how many legal subjects may be affected by the case, and whether there are such a large number of parties involved that other types of coordinated litigation may be impractical. Furthermore, the extent of individual circumstances relevant to the claims of the litigants may be a deciding factor. Another relevant factor may be whether the case involves legal subjects that are easily identifiable, or whether there is a need to utilize the specific class action rules of notification, see question seven below.²³

If the court discovers later on that it is "clearly inappropriate to hear the case pursuant to the class procedure", or that "the scope of the claims in the class action ought to be redefined", the court may on its own motion reverse or amend its ruling. Those who are no longer included in the class action after such reversal or amendment, can, within a month after the decision is final and enforceable, "require the court to continue to hear their claims as individual actions".²⁴ The significance of this provision is that the parties do not need to start from square one and bring a new action.

The Court's Definition of the Class and Claims etc.

The court shall "as soon as possible" determine whether to approve or reject the class action.²⁵

If the court decides to approve the class action, it is required to make several decisions:

²¹ The Dispute Act (2005) sections 35-11 (2) and 35-10 (1)

²² Ot. prp. no. 51 (2004-2005) p. 492, c.f. section 35-2 (1) litra c)

²³ Op. cit.

²⁴ The Dispute Act (2005) section 35-4 (3)

²⁵ Op. cit., section 35-4 (1)

- Describe “the scope of the claims that may be included in the class action”.
- Decide whether the class action shall pursue as an opt-in or opt-out class action
- In the case of an opt-in class action:
 - o Fix a time limit for registration in the class register
 - o “where appropriate, fix a maximum financial liability and an advance on costs pursuant to section 35-6(3)”.
- Nominate a class representative²⁶.

Who may initiate a class action?

The Dispute Act (2005) section 35-3 determines who may initiate a class action lawsuit. There are two alternatives: Firstly, the class action lawsuit can be brought by “any person” (a natural person or a legal entity), “who fulfils the conditions for class membership, if approval to bring the action is granted”, see section 35-3 (1). Secondly, the lawsuit may be initiated by “an organisation, and association, or a public body charged with promoting specific interests, provided that the action falls within its purpose and natural scope pursuant to section 1-4”, see question two above. The Ministry of Justice predicts that consumer or business and industrial organisations will be lightly and natural initiators for class actions. An organisation may, similar to its members, have its own claim within the scope of the lawsuit and will then be able to initiate a lawsuit under the first alternative in section 35-3 (1). However, as the second alternative indicates, there is no requirement that the organisation has its own claim similar to that of potential class members in order to initiate a class action lawsuit, i.e. there is no requirement of typicality.

The Ministry of Justice emphasizes that not only an organisation’s members, but also others with claims within the scope of the class action are allowed to be part of the class action. And if the case is approved as an opt-out class action, non-members may be included in the court’s definition of the class.

For public bodies, it is only those who have been assigned the responsibility to promote specific interests regarding individual rights and obligations directly, who may initiate a class action, and the class action must be within the public body’s purpose and normal scope pursuant to section 1-4, c.f. section 35-3 (1) litra b). “Forbrukerrådet”, a public body working to promote the interests and rights of consumers, and which also offers assistance to consumers with their individual claims, is mentioned by the Ministry of Justice as a public body which may initiate a class action.

Organisations, trusts and public bodies as mentioned above may also be nominated class representatives by the court. This will in many cases be a practical and workable solution.²⁷ See question 4 below.

The action can be brought to any district court where a class member could have brought an individual action about the claim in question. The writ of summons must provide the court with the information necessary to ascertain whether the requirements and conditions for class actions are fulfilled, and to make the decisions prescribed by section 35-4 (2).²⁸ See above.

²⁶ The Dispute Act, section 35-4 (2)

²⁷ Ot. prp. no. 51 (2004-2005) p. 493

²⁸ Note 26, section 35-3 (2) and (3)

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?

Who may come forward to represent groups of claimants?

Any person who fulfils the requirements to initiate a class action, c.f. section 35-3(1), and who is willing, may be serve as class representative.²⁹ It is, however, the court which appoints the class representative, c.f. section 35-9(3), and it is a requirement to be appointed that the representative is “able to safeguard the interests of the class in a satisfactory manner and to account to the opposite party for the class’s potential liability for costs.

The class representative is responsible for ensuring that the class members “are kept properly informed about the class action”, c.f. section 35-9(1). It is emphasised in the provision that the class representative’s duty to keep the class members informed is especially important for “any procedural steps and rulings that may have consequences for the class members’ claims”.³⁰ The Ministry of Justice states that such information is very important to ensure that the class members have sufficient information to be able to consider whether to withdraw as a class member, and the amount of information must be adequate for this purpose. The Ministry especially emphasises the need for information about circumstances that may affect the class members’ claims, and that the class representative should ensure that the class members are provided with the opportunity to evaluate the consequences of a settlement before it is entered into, in order for them to have the option of withdrawing their class membership if they do not wish to be bound by the settlement. The Ministry states that for *opt-in* class actions the class representative should as a main rule provide such information.³¹

The court, can, if necessary, revoke its appointment of the class representative and appoint another in its place.³²

As a main rule the class is required to be legally represented by counsel, who is an advocate, in addition to the class representative.³³

Opt-in or opt-out?

The main rule for Norwegian class actions is the opt-in alternative. The parties must come forward and actively decide to become members of the class.³⁴ It is a condition to be accepted as a class member that the legal person in question has a claim or an obligation that is included in the court’s definition of the lawsuit.³⁵ The court will however not determine whether the person in fact *has* the claim he or she asserts to have, as part of its decision about whether to include the person in the class, but will rely on the party’s assertions. Whether the

²⁹ The Dispute Act (2005) section 35-9 (2)

³⁰ Op. cit., section 35-9 (1)

³¹ Ot. prp. no. 51 (2004-2005) p. 496

³² Note 29, section 35-9 (3)

³³ Op. cit., section 35-9 (4)

³⁴ Op. cit., section 35-6 (1)

³⁵ Op. cit., section 35-6 (1) and note 31 p. 495

claim in fact exists, is a material question which will be decided upon as part of the adjudication of the case.³⁶

Opt-out class actions are an alternative under certain conditions. If the individual claims “on their own involve amounts and interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions”, *and* “are deemed not to raise issues that need to be heard individually”, the court may decide that those who have claims within the scope of the class action, are to be considered as class members without registration in the class register.³⁷

The court’s decision about whether the lawsuit should be handled as an opt-out class action is based on the court’s appreciation, and involves comprehensive consideration of the case as a whole. The court can therefore take into consideration whether the opt-out alternative is the best procedure to handle the case, compared to the opt-in alternative, cf. section 35-5 (1) *litra c*.³⁸

The requirement in *litra a*; that a considerable majority of the claims cannot be expected to be brought as individual actions because they involve such small amounts or interests, does not hinder an opt-out class action where some of the claims concern larger amounts and more important interests. The deciding factor is whether a considerable majority of the claims fulfil the requirement in *litra a*. To allow an opt-out class action may be the most appropriate way to handle the claims in cases where all the claims have the same factual and legal foundation, but where the amount of damages may vary, for instance in cases of void or illegal regulation of interest rates, where the amount of damages for each individual litigant will vary in accordance with the size of their loans.

Whether a claim concerns such a value and such interests that it can realistically be expected to be litigated through an individual action must be determined in each case, and the evaluation is lightly to evolve over time.³⁹

For opt-out class actions it is however not enough that they fulfil the requirement in *litra a*. In addition there is stricter requirement of similarity than for claims within an opt-in class action. If any of the claims need to be heard individually by the court, an opt-out class action is not an available alternative. However, this does not exclude the alternative of an opt-out class action where the only difference between the claims is that the amount of compensation will differ from one claim to another.⁴⁰

Those who are class members according to the court’s decision in an opt-out class action may withdraw from the action in accordance with the rules in section 35-8. The court keeps a record of those who have opted out in a withdrawal register.

Even a party who has joined an opt-in class action may withdraw, c.f. section 35-8. Any class member may withdraw, and this can be done at any time, as long as his or her claim has not been finally determined. The withdrawal is effective from the time the court receives notice

³⁶ Ot. prp. no. 51 (2004-2005) p. 495

³⁷ The Dispute Act section 35-7 (1)

³⁸ Note 36

³⁹ Op. cit.

⁴⁰ Op. cit., p. 496

thereof.⁴¹ The party can withdraw without waiving his or her substantive claim, provided that he or she withdraws before a judgement which determines the case on its merits, and that is binding on the class members pursuant to section 35-11, has been handed down.⁴² This is an exception from the main rule, which applies to other civil actions, except the small claims procedure. According to the main rule, a party cannot withdraw his or her action without also waiving his or her claim, unless the defendant consents with the withdrawal of the claim. The purpose of the main rule is to avoid that actions are brought against somebody as a threat. Once an action is brought before the court, the other party has a reasonable expectation to obtain a final determination of the issue in dispute. In the case of class actions, where each claimant must accept the decisions made for the class as a whole, it is a reasonable legal safeguard that a claimant can withdraw from the class without having to waive his or her claim.

5. In non-representative group litigation, who may initiate group litigation, and in what circumstances?

Who may initiate “Norwegian representative lawsuits”?

There is a requirement for “Norwegian representative lawsuits” that the organisation is a *natural representative* to raise a claim concerning the interests in question. The organisation must firstly show that the interests in dispute concern the organisation’s core values or aims. The requirement is that the action falls within the organisation’s “purpose and normal scope”. The organisation “Save The Trees” may be seen as a natural representative to raise a claim in a case concerning land development in a forest area, but will very unlikely be seen as a natural representative in a case against a power-plant which wants to utilize a waterfall for hydro-electric power, by leading the water into pipes. An organisation may also not be found to fulfil the requirements in § 1-4 (1) because its aims or interests are too general. For instance, a political party will never be found to fulfil the criteria in § 1-4 (1). In the *Borregaard-case*, Rt. 1992 p. 1618, it was a disputed issue whether the organisation The Future in Our Hands had a scope that was so wide and comprehensive that the organisation could not be said to be an environmental organisation that could serve as a natural representative in the lawsuit in question. It was argued that the organisation had a general political platform.

Secondly, the court will determine whether the organisation has enough members, and whether those members are representative enough for the interests in dispute. For instance: A very small organisation may not be seen as a natural representative to bring an action against a private enterprise or the state with a claim that concerns the interests of a fairly large portion of the population, and an organisation will not be “a natural representative” for a claim concerning a geographical area in which it has none, or very few members. In Rt. 1974 p. 1272, *Fri Film*, the association Fri Film, which worked to promote that adults were allowed absolute freedom to choose which movies to see without censorship, was not seen as a natural representative to seek judicial review of an administrative decision by the Norwegian State Movie Control to forbid the viewing of two movies. Fri Film was not seen as a sufficiently

⁴¹ The Dispute Act (2005) section 35-8 (1)

⁴² Op. cit., section 35-8 (2)

large and significant organisation to be regarded as a natural representative for the general movie audience, due to its low member count.

In addition to fulfilling the above mentioned requirements, an organisation wishing to bring a representative lawsuit – must also have the legal capacity to sue or be sued, c.f. The Dispute Act section 2-1.

The rules for representative litigation are codified without amendment in the new Norwegian Dispute Act, which will be in force 1 January 2008. The provision, section 1-4 (1) states:

“If the conditions in section 1-3 otherwise are fulfilled, an organisation or association may bring an action in its own name in relation to matters that fall within its purpose and normal scope.”

Not only private organisations can be plaintiffs in representative litigation. The Dispute Act, section 1-4, (2) states:

“Public bodies charged with promoting specific interests may in the same manner bring an action in order to safeguard such interests.”

In what circumstances – and for which types of cases – can “Norwegian representative litigation” take place?

As the above mentioned court cases show, the “Norwegian representative litigation” is not limited to for instance environmental issues, but can be used to protect very diverse interests. The claims can be for either declaratory judgements or judgements for repressive judicial relief. A claim can be regulatory, for instance a claim for judicial review, or be a claim for damages. A famous case, exemplifying the diversity of interests and claims for which “Norwegian representative litigation” may be applicable, is Rt. 1952 p. 554. In this case a teacher’s union for high school teachers with the Norwegian title “lektor” (Lecturer) were found to have “legal interest” to seek judicial determination of whether the teachers at seamen’s and machinist’s schools were entitled to use the title “lektor”.

What are the barriers to parties/lawyers using “Norwegian representative litigation”?

The frequency of “Norwegian representative lawsuits” has not – to my knowledge – been very high, although such lawsuits are facilitated by the Norwegian litigation system. Contingency fees for attorneys are not allowed, and it seems to be a reasonable assumption to make that this may lead to some restraint among smaller organisations and interest-groups to bring actions. However, Norway has many organisations and interest-groups with large member counts and substantial financial means, so it is reasonable to conclude that the lack of contingency fees is not a deciding factor.

6. How many lawsuits have proceeded in each litigation form over the past 5 years?

Class actions will not be an option within the Norwegian court system before 1 January 2008. It is hard to predict how popular class actions will be, but my guess is that such lawsuits will not be a common occurrence. Firstly, the Norwegian civil litigation system also has the option of lawsuits where an organisation or interest-groups files a case to protect the interests of its members or the general public, which is referred to as “Norwegian representative litigation” above. Secondly, Norway has public bodies charged with protecting the interests of consumers, for instance Forbrukerrådet, that in many cases will be able to effectively deter banks, insurance companies and businesses from exploiting consumers, without the aid of a class action. Thirdly, in cases involving administrative decisions – for instance to allow land development – the interest organisations which are allowed to act as claimants or class representatives in class actions and “Norwegian representative litigation”, also have the right to appeal administrative decisions involving the same matters. This means that many cases are solved through administrative appeal.

There are no statistics available for the use of “*Norwegian representative litigation*”, or for the number of cases which have not been granted approval by the courts. For the same reasons as mentioned above for class actions, it is a fair assumption to make that there are not many lawsuits in this category each year. A very rough estimate would be around 10 cases annually in total for all Norwegian courts, including also cases that are not approved by the court due to lack of legal interest, c.f. sections § 1-3(2) and § 1-4.

7. In representative litigation, must possible class members be informed of the initiation of the litigation and, if so, how?

Once the class action is approved by the court, the court must make the lawsuit known to those who may become class members in the case of an opt-in class action, or who are already class members in the case of an opt-out class action. This may be done in different ways, depending on what is appropriate and possible.⁴³ Alternatives include for instance individual letters or announcement in one or several local newspapers. The Ministry of Justice states that when it is possible and not impractical, notification should take the form of individual letters to each potential class member.⁴⁴

It is the court’s responsibility to ensure that the lawsuit is announced properly to those affected, but it may decide to leave the practical execution of the notification to the class representative. It may also decide that the class representative must pay the notification costs.⁴⁵ The class representative can retrieve these costs from the opposing party or the class members, see section 35-13.

⁴³ The Dispute Act section 35-5 (1)

⁴⁴ Ot. prp. no. 51 (2004-2005) p. 494

⁴⁵ Note 43 section 35-5 (3) and note 44

The court cannot force the defendant to help with the notification of potential plaintiffs, but whenever possible, the Ministry of Justice suggests that the court looks into the possibility of asking the defendant to notify the customers in the defendant's registers.⁴⁶

The notification must convey clear information about what the class action and the class procedure implies, including:

- “the consequences of registering or deregistering as a class member”,
- “the potential liability for costs that may be incurred”,
- “the authority of the class representative to settle the action”, and
- “the time limit for registering on the class register”.⁴⁷

The Ministry of Justice emphasises that it is important that the notification is conveyed in terms and language that are understandable for the potential class members.⁴⁸ This is the class members' only way to exercise control over the decisions made during the proceedings.

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?

This question is not applicable for the Norwegian system, because in the Norwegian equivalent to non-representative group litigation – what has been referred to as “Norwegian representative litigation” above, only the organisation or interest group that brings the action and the defendant, are parties. See question two above.

Parties and lawyers with similar cases can therefore proceed independently by bringing their own actions. Also in the case of class actions parties with similar cases to those included in the class action can proceed individually, c. f. sections 35-6 (1), 35-7 (2) and 35-8, which provide that a party can choose not to opt-in, or can opt-out or withdraw from the class. See question 4 above.

9. In group litigation, are there special case management procedures (e.g. case pleadings, scheduling, development of evidence, motion practice, test cases, preliminary issues)?

⁴⁶ Ot.prp. no. 51 (2004-2005) p. 495

⁴⁷ The Dispute Act section 35-5 (2)

⁴⁸ Note 46 p. 494

There are few rules prescribing special case management procedures for group litigation. However, the court has the duty and discretion to decide whether a lawsuit shall be approved as a class action, and to define the class and claims to be included. It also decides whether the class action should be defined as an opt-in or opt-out class action. See the replies to questions 3 and 4 above. The court can on its own initiative – under certain conditions – revoke its former decision to approve the lawsuit as a class action, or change the definition of the class and the claims to be included.⁴⁹ These examples show that the court plays a fairly active role in terms of ensuring that the claims are managed in the way that best serves the interests of the parties. However, it is the class representative that has the main responsibility for taking care of the class's interests, c.f. section 35-9 (1). See question 4 above about the class representative.

“Norwegian representative litigation” is governed by the same procedural rules as other civil actions, and consequently there are no specific case management procedures. Once the court has determined that the lawsuit fulfils the requirements in section 1-4, and consequently approved the lawsuit, the action will proceed in the same manner as any other civil action.

Both types of actions are facilitated by the Norwegian litigation system. Class actions are introduced in the new Dispute Act and are subject to detailed regulation. Actions in the form of “Norwegian representative litigation” have been approved for several decades and will continue to be so under the new act. The Norwegian legislature has made a clear and unambiguous decision to allow considerable room for both class actions and “Norwegian representative litigation” in Norwegian courts.

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?

Class actions have yet not occurred in Norway, due to the fact that the new legislation will not be in force before 1 January 2008. There are no statistics for non-representative litigation, i.e. “Norwegian representative litigation”.

The court has no power to oversee the fairness of *out-of-court* settlements. For *in-court* settlements, the court's power and responsibility depends on whether it is an opt-in or an opt-out class action.

In opt-out class actions, the court must approve the settlements, c.f. section 35-11 (3). The Ministry of Justice states that the court may, if necessary, nominate an expert to assist the court in evaluating the settlement. The Ministry emphasises that the court must make sure that the class members – to the extent possible – have been informed about the settlement proposal, in order for those who do not wish to be bound, to be able to withdraw from the class before the settlement is final.⁵⁰

For opt-in class actions, the court has the same responsibility and power as for an in-court settlement in any other type of lawsuit. The court oversees that the settlement does not

⁴⁹ The Dispute Act section 35-4 (3). See question 3 above.

⁵⁰ Ot.prp. no. 51 (2004-2005) p. 497

infringe peremptory law, i.e. rules of law, the operation of which cannot be dispensed with by private parties, and that the settlement is consensual, i.e. that no party has been tricked or forced into agreement.⁵¹

The Ministry of Justice states that it is important, also in opt-in class actions, that all class members are informed about the settlement proposal, so that they can choose to withdraw from the class if they do not wish to be bound by the settlement proposal. Therefore the court should ensure that the class members have received adequate information about the settlement proposal also in opt-in class actions.⁵²

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?

Class Actions

In class actions, all the same remedies are available as in any other civil lawsuit. The claimants may claim monetary damages, if they have a monetary claim, or they can claim injunctive relief, for instance that a certain activity must cease, or that there is a duty upon the defendant to do something.

There are no special rules about how to allocate damages in class action lawsuits. Damages are – as in any other lawsuit where damages are claimed – awarded by the court to claimants individually, according to the size of their loss. However, some degree of standardisation may occur. See question two above, in fine.

“Norwegian Representative Litigation”

In “Norwegian representative litigation” it is not possible for the plaintiff – an organisation or an interest group – to file a claim for damages for damage or loss endured by individuals, for instance the organisation’s members. As a main rule – with only very few exceptions – it is not possible bring an action with a claim that belongs to someone else than the plaintiff. This also applies to representative litigation. However, there is an exception for claims that do not belong to a definite group of people. It is for this type of claim that “Norwegian representative litigation” serves its most important purpose. Environmental issues – for instance the protection of a waterfall or a forest – are good examples of issues that benefit from “Norwegian representative litigation”.

The organisation may claim that certain damage is rectified, for instance environmental damage, that certain activity ceases, or that the defendant fulfils his obligation to do something. An example of the latter is Rt. 1955 p. 1011. Here a local sport fishing association and several landowners brought an action against a business, successfully claiming that it had a duty to build a so-called “salmon staircase” (which helps the salmon move up and down the river) in accordance with an order by the public authorities.

⁵¹ The Dispute Act section 19-11 (3). Ronald L. Craig, p. 185.

⁵² Ot. prp. no. 51 (2004-2005) p. 497

12. Who funds group litigation: the state, legal services organisations, NGOs, private lawyers, or the claimants themselves?

In the case of “Norwegian representative litigation” the action is funded by the organisation or interest group that brings it before the court.

In the case of class actions, there is neither direct public funding, nor a foundation similar to that in Canada.⁵³ In principle each litigant must pay for his or her share in the costs, unless he or she is eligible for legal aid. However, since there have been no class actions in Norway yet, it remains to be seen who pays for the litigation in practice. Interest organisations – for instance consumer organisations – are likely to instigate most class actions and act as class representatives, and it is not unlikely that some organisations will choose to fund class actions about issues which are important to many of their members. Norway has many interest organisations of considerable size, and which have considerable financial resources. Sometimes interest organisations choose to act as interveners for a party in cases concerning one or several of their members when the cases raise legal issues of a principal nature, and where a court decision about these issues will be of importance to many of the organisation’s members.⁵⁴ Such organisations may choose to instigate and pay for class actions.

13. Costs and benefits.

There are no special rules or practices for the payment of attorneys in “Norwegian representative litigation”. The same rules apply as for other civil actions. However, the court has some responsibility for determining and approving costs in all civil lawsuits. When one of the parties is awarded costs, for instance as a consequence of the principle of “loser pays”, the party is only entitled to be remunerated for such costs that the court deem were “necessary” costs of the case. When deciding whether the costs were “necessary”, the court must take into account whether “it was reasonable to incur” these costs “in view of the importance of the case”, c.f. section 20-5 (1). The court will review even items in the statement of costs which have been approved by the opposite party, c.f. section 20-5 (5). These rules also apply to class actions.

For class actions section 35-13 (1) provides that the court determines the class representative’s and the legal counsel’s fees and coverage of expenses.

⁵³ The Committee discussed the option of a foundation, but found that since there is very little scope for punitive damages in Norway, it would be difficult to build a foundation that is large enough to be able to cover the costs of class actions, c.f. NOU 2001: 32 Volume A, p. 491 f.

⁵⁴ A famous Norwegian example is the “Fusa-case”, Rt 1990 p. 874 where a disabled elderly lady, Kari Austestad, who was dependant of extensive help and nursing, fought for her right to be able to live at home instead of in a nursing home. Social services had decided that they could not afford give Ms. Austestad the extensive help she needed at home and therefore made substantive cutbacks on the extent of her help, with the consequence that she would soon have to move into a nursing home. Ms. Austestad argued that she was entitled by law to a minimum of help, regardless of the financial situation of the Social Services, and that this meant that she – because of her particular needs – was entitled to receive the help at home. The Norwegian organisation for the disabled, Norges Handikappforbund, decided to act as an intervener in the case.

The remaining part of question 13 is not applicable to Norway, as class actions have not yet occurred in Norway. There are no statistics available for “Norwegian representative litigation”.

However, it can be noted that the hourly rate of a Norwegian attorney normally ranges from about 100 to about 300 Euros. The expensive end of the scale applies to attorneys who are very experienced, and who are typically partners in large law firms that predominantly represent large companies and corporations. In cases where a party is eligible for legal aid, the attorney retrieves an hourly rate determined annually by the state, currently about 100 Euros. Most attorneys’ hourly rates will lie somewhere in the middle of these two extremes.

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?

The class representative has the main responsibility of safeguarding the rights and obligations of the class, c.f. section 35-9 (1). However, the court has some responsibilities and tasks in class actions that are more or less unparalleled in other civil lawsuits.

Firstly, the court has the responsibility to decide whether a class action lawsuit is the most appropriate ways of dealing with the claims compared to individual lawsuits, joinder of parties or consolidation of actions, c.f. section 35-2(1) litra c). The court can, as mentioned under question 3 above, revoke its decision to approve the class action lawsuit if it would be “clearly inappropriate hear the case pursuant to the class procedure”, and it can redefine the scope of the claims in the class action when this ought to be done, c.f. section 35-4 (3).

The court also has the responsibility to nominate the class representative and to revoke the appointment if the class representative is not able to safeguard the interests of the class, c.f. section 35-9 (3). See question 4 above. The court furthermore has the responsibility ensure proper notification of potential class members – or those who are included in the class in an opt-out class action – of the lawsuit, c.f. section 35-5 and question seven above. Finally, the court must determine the remuneration of the class representative’s and attorney’s fees and expenses, c.f. section 35-13 (1).

Apart from these special features of class actions, the burden placed on the court in a class action is in principal equal to that of any other civil lawsuit. It must however be noted that the new Dispute Act prescribes that the judge should more actively manage any action than what normally has been the case under the Dispute Act of 1915.⁵⁵ What consequences such active case management will have for class actions compared to other civil actions remains to be seen.

There are no statistic data available to determine the court costs and time spent on “Norwegian representative litigation”. It is, however, a fair assumption to make that since such lawsuits concern the interests of people who are not parties in the lawsuit, the court may feel obligated to monitor the proceedings more closely than in other civil cases.

⁵⁵ This is not to say that the process is to be dominated by the courts rather than the parties. Norwegian civil procedure has been, and shall under the new act be, dominated by the parties. Norwegian civil procedure is predominantly adversarial, not inquisitorial. Se the English summary in NOU 2001:32 p. 1100.

15. What are the current debates in your jurisdiction over the application of collective litigation rules and their consequences?

Since the Norwegian rules about class actions are not yet in force, see question two above, where the policy debate about the adaptation of class actions is described.

“Norwegian representative litigation” has not been the subject of much debate, but is widely recognized as a necessary feature of Norwegian civil procedure.

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

As stated under question six above, “Norwegian representative litigation” is not a common occurrence in Norwegian courts. Those cases that have been approved by the courts have all concerned important issues, and some of the cases have caused the High Court to lay down important principles. One of the greatest achievements is perhaps that environmental organisations can bring actions with the aim to protect the environment. Since environmental interests do not always correspond with individual rights, individual lawsuits would not be an option in these cases.

However, it is difficult to say for certain which effect “*Norwegian representative litigation*” has had, since there are also other effective mechanisms that have been established, and which serve the same purpose. Interest organisations have the right to administrative appeal, and there are public bodies specifically charged with protecting the interests of consumers, the environment etc. See question six above.

These mechanisms will similarly serve the same purpose as *class actions* in many cases. Consequently, it is hard to predict how important class actions will be for achieving behavioural changes and changes in activities and policies. See question two above, for further information about the predictions by The Ministry of Justice and others about the scope and need for class actions.