Civil Justice Council

Improving access to justice through collective actions

Developing a more efficient and effective procedure for collective actions

A response by the Association of Personal Injury Lawyers

Dated 18 November 2008

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

The aims of the Association of Personal Injury Lawyers are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

- David Body, Irwin Mitchell, APIL senior litigator, former APIL EC member;
- Martyn Day, Leigh Day & Co, APIL Fellow;
- Richard Langton, Russell Jones & Walker, APIL Fellow, former APIL president;
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- Pauline Roberts, Smith Llewellyn Partnership, APIL multi party action special interest group secretary.

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Executive Summary

- APIL members who have close experience of the current court systems on group actions, multi party actions, test cases and consolidated actions have contributed to reviews and consultations on these issues for many years and we continue to welcome any opportunity to provide input and assistance on behalf of injured people, where appropriate, during the development of this work.
- There is an overwhelming need for a complete overhaul of the procedure for dealing with collective actions. If the Civil Justice Council's (CJC's) recommendation is accepted, APIL recommends that the new collective redress mechanisms should have a broad remit and high level of flexibility to cope with whichever judicial approach is deemed appropriate in the instant case.
- APIL has no objections to there being a trial of a competition law based consumer claim process as suggested providing that it does not slow down the overall work of setting up a new collective action procedure for all types of actions.
- APIL agrees that collective claims should be brought by a wide range of representative parties.
- We agree that the present designation system under the 2005 Order is a disincentive to bodies which may be contemplating a representative action.
- A new procedure which allows the flexibility of an opt-in or opt-out procedure, based upon the court's assessment of the particular issues of the case is welcomed.
- We agree that a strict certification process is absolutely essential to the proposed new process. The *quid pro quo* is that it must be properly managed by the courts.

- The requirements to be satisfied at certification, listed on page 137 of the consultation document, are satisfactory subject to one concern: the requirement that "there is a reasonable expectation that the claimants will recover an acceptable proportion of their claim." A global offer to settle such a collective action taken on their behalf may lead to a small part-payment to each party, but there is a moral dynamic to the claim which also cannot be ignored.
- APIL suggests that during the certification process, when the court will be examining the fairness of any funding arrangement between the parties, at this stage of the process and not later, the court should consider cost shifting issues.
- In order to avoid endless tactical appeals on certification, the CJC's recommendation that certification and other interim decisions should be treated as case management decisions and ought to be treated as such by the court when dealing with permission to appeal is welcomed.
- APIL agrees that a practice direction based on the recommendations of Mr Justice Aikens' working party will act as a good baseline for guiding the case management of collective actions. The recommendations need to be fleshed out into a detailed practice direction which will require careful analysis. Such a practice direction should not be too restrictive. It must give the court as much discretion as possible in order to properly manage the action.
- APIL welcomes the suggestion that the court should have the power to make an aggregate award of damages as a means of avoiding costly, time-consuming and inefficient individual damages determinations. There are plenty of precedents for it already being done and some examples are given on pages 15 and 16 of this response paper.
- We agree that collective action settlements should be approved by the court as recommended.
- APIL does not agree that there should be full costs shifting in all cases.

We suggest that the certification process is the appropriate time for the court to look at whether the parties can afford to take part in the process, and if there is judiciable point, then innovative costs solutions should be available for the judge to apply.

- There is a need for more flexibility on costs within the new procedure and APIL recommends that further thought ought to be given to other ways of dealing with costs, all of which are already discussed in detail in the CJC's consultation paper. Of all the recommendations in the consultation paper, this one causes the most concern to APIL. In our view around 80 per cent of collective actions do not go ahead because of the full cost shifting rule and we urge the CJC to re-think this aspect of its proposals and recommend the use of some of the options discussed in its paper.
- The rules may need to include a protective mechanism which applies up to certification stage, whereby cases can be put before the judge (to ascertain whether there is a judiciable point) without fear of harsh sanction.
- APIL agrees that it is desirable that any new action be introduced by means of primary legislation. It is far better to create a completely new procedure with a new set of rules rather than 'tinker around the edges' of the existing CPR.

Recommendation 1

A generic collective action should be introduced. Individual and discrete collective actions could also properly be introduced in the wider civil context i.e., before the CAT or the Employment Tribunal to complement the generic civil collective action.

There is an overwhelming need for a complete overhaul of the procedure for dealing with collective actions. Access to justice issues are not well served by the current legal processes. If the Civil Justice Council's (CJC's) recommendation is accepted, APIL would recommend that the new collective redress mechanisms should have a broad remit and high level of flexibility to cope with whichever judicial approach is deemed appropriate in the instant case.

The procedures should be able to deal with a broad range of types of action, from the facilitation of representative actions to conventional GLOs as we now know them. Procedures would need to be able to deal with claims such as those arising from transportation disasters, to dealing with more imaginative trials of issues in pharmaceutical drug claims, for example.

Until that type of framework in put in place, many other issues which are linked to GLOs such as funding and costs sharing, for example, are never going to be satisfactorily resolved: the funding of multi party actions is inextricably linked to the procedures available to potential claimants. The current procedures make it difficult, expensive and inefficient to succeed. Two recent court decisions (overleaf) illustrate the problems.

- **Anti depressant drug Seroxat: pharmaceutical claims**

Senior Master Turner required the claimants to deliver statements of case in five individual actions rather than to allow generic pleadings which would examine the issue of whether or not the drug was defective within the meaning of the Consumer Protection Act. The claimants argued that the best way of dealing with the litigation would be to determine whether the drug's propensity to cause a withdrawal reaction could be said to be defective within the meaning of the Act and only after that had been determined, to look at the individual cases. This was rejected: Master Turner indicated that in a common law litigation must be dealt with by reference to individual cases and case facts.

- **Anti-convulsant (FACS) litigation - Epilim**

In this case, the claimants were allowed public funding to pursue preliminary points, and only if the claimants were successful on those preliminary points would further funding be considered.

To deal with the generic issue on a preliminary basis the claimants suggested that two cases could be selected 'to illustrate factual matters' and that there should be renewed generic statements of case dealing with these preliminary issues. The initial point considered was whether in fact the claimants could overturn a previous case management decision of Master Leslie who had ruled against a preliminary issues trial.

The judge decided that the assumptions contained in the proposed preliminary issues did not provide a clear and precise factual basis upon which to determine the issues. The judge also identified that some of the assumptions made by the claimants were contentious issues. He accepted the defendant's contention that a number of these

questions could not be decided without evidence and that it was unreasonable to make a determination based upon hypotheses.

As the court would not allow the case to proceed by way of examining generic issues on all claims as preliminary points, funding was withdrawn. The claimants could not pursue their case with public funding. The claimants (who are mostly children) were forced to Judicially Review (JR) the decision to revoke their funding. The JR was successful and the claims are proceeding to trial next year. But the process of ensuring the claims continue has been very bureaucratic and the claims were halted for a whole year while the JR was pursued to its successful conclusion, causing frustration to all involved. Even at this stage, there has yet to be guidance from the court as to the sequence in which the various issues of defects, causation and so on will be examined.

Lawyers for the claimants in this latter group action have tried their best to manage the litigation efficiently and to have a trial of issues – a strategy which was supported by the Legal Services Commission (LSC) which saw it as the most effective and easiest way of disposing of the issues. Unfortunately the trial judge simply wouldn't agree to this course of proceeding, which lead to the funding issues and subsequent delays – a strategy which has a number of drawbacks and which means the cases as a whole will prove to be far more expensive for all those involved.

Second sub-recommendation: there is merit in introducing for a short period of time a discrete, rather than generic, collective action within the civil courts ahead of the scheduled introduction of the generic action.

APIL has no objections to there being a trial of a competition law based consumer claim process as suggested providing that it does not slow down the overall work of setting up a new collective action procedure for all types of actions. If the trial provides some valuable practical experience which helps to inform the main process, APIL would welcome it. However, we caution that such a trial process should not be used as

a de-railing mechanism and we welcome the comments in the final paragraph of this recommendation that it would not be used to assess whether full implementation should go ahead.

APIL can only comment on the proposals from the perspective of personal injury and similar claims such as those for pharmaceutical damage claims and so does not comment on the wider civil context proposals made here.

Recommendation 2

Collective claims should be brought by a wide range of representative parties: individual representative claimants or defendants, designated bodies, and *ad hoc* bodies.

APIL agrees with this recommendation. In fact-based litigation groups, especially drug/pharmaceutical claims, this type of arrangement would work extremely well to facilitate the claim.

We agree that the present approach under the Special Body (Consumer Claims) Order 2005 (the 2005 Order) procedure should be incorporated into any new collective action and that the principle in CPR 19.6 is extended to allow new types of representative parties.

As the representative party would be subject to court approval and certification, this would ensure that while the representative could be any of a number of types of organisation, the court will have to be satisfied that whoever or whatever it is, it properly represents the interests of the class.

The proposed certification procedure should then ensure that an adequate degree of control is being exercised upon that party and that any potential for conflict in the context of the interests of those who are within the group is avoided.

We agree that the present designation system under the 2005 Order is a disincentive to bodies which may be contemplating a representative action and agree that formal designation by the Lord Chancellor should not be the norm. The proposals remove some of the restrictions which currently apply.

Recommendation 3

Collective claims may be brought on an opt-in or opt-out basis. Where an action is brought on an opt-out basis the limitation period for class members should be suspended pending a defined change of circumstance.

A new procedure which allows the flexibility of an opt-in or opt-out procedure, based upon the court's assessment of the particular issues of the case is welcomed. For example, where there is a Which?/JJB sports football shirts type action, an opt – out for such single issue claims may well be the best way to go ahead. It is well known that Which? struggled to find a cohort of claimants for the action, even though it knew that there was an issue which needed to be addressed. Likewise there will be other cases, where for particular reasons, someone wants to disassociate themselves from a group and to pursue their own remedy. A mechanism which allows both approaches, judged by what is most appropriate for the issue before the court is refreshing.

As for the suspension of limitation in certain circumstances, the reference to Woolf signposts the right way to deal with this issue. Ultimately this drives the action towards the certification procedure which APIL views as the one of the most important aspects of the proposed new procedure.

Recommendation 4

No collective claim should be permitted to proceed unless it is certified by the court as being suitable to proceed as such. Certification should be subject to a strict certification procedure.

We agree that a strict certification process is absolutely essential to the proposed new process. The *quid pro quo* is that it must be properly managed by the courts.

The requirements to be satisfied, listed on page 137 of the consultation document, are satisfactory subject to one concern: the requirement that "there is a reasonable expectation that the claimants will recover an acceptable proportion of their claim." The reason for our concern relates to the type of collective action we can envisage for personal injury claimants. For example, suppose that a hospital has an outbreak of *Clostridium difficile* (C-Diff) and large numbers of elderly patients die as a result. Their estates would be entitled to claim in negligence against the hospital, but while they would usually be small claims individually, collectively the claim could be quite large. A global offer to settle such a collective action taken on their behalf may lead to a small payment to each party, but there is a moral dynamic to the claim which also cannot be ignored.

APIL is particularly interested in the fact that one of criteria on this page relates to the funding arrangements of the parties. We have expanded on this in our response to recommendation nine, below, but would add here that during the certification process, the court will be examining the fairness of any funding arrangement between the parties and so will be almost obliged to look at whether the parties can afford to take part in the process. At this stage of the process, and not later, APIL suggests that the court should consider cost shifting issues. The court should be considering how to deal with costs in the particular case: is full costs shifting appropriate, or should there

be *Corner House*[1] type procedures when considering protective costs or cost capping orders? Should there be costs caps and if so how are they to be dealt with? Consideration has to be given as to how costs are dealt with, at this early stage, otherwise the issue of costs will poison the future conduct of the action.

We would also suggest that there is a need for some protective mechanism which applies up to certification stage which allows cases to be put before the judge without fear of harsh costs sanction. That is not to say that there should not be penalties for bringing something which is completely frivolous, but if the group or representative body go before the judge at certification stage, bearing the penalty of the costs of that stage may be a sizable disincentive to bringing the action at all.

Certification criteria

We agree with the certification criteria suggested.

Recommendation 5

Appeals from either positive certification or a refusal to certify a claim should be subject to the current rules on permission to appeal from case management decisions. Equally, all other appeals brought within collective action proceedings should be subject to the normal appeal rules. Class members may seek to appeal final judgments.

In other jurisdictions, endless tactical appeals on certification lead to expense and delay. The CJC's recommendation that certification and other interim decisions should

[1] R. (on the application of Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192. See also the recent Court of Appeal decision in R (on the application of Buglife - The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation & Rosemound Developments Ltd (Interested Party) [2008] EWCA Civ 1209 which reiterates the procedures as set out in *Corner House*.

be treated as case management decisions and ought to be treated as such by the court when dealing with permission to appeal is welcomed as a means by which to avoid these types of cases becoming derailed. Where permission to appeal is sought for what are patently tactical reasons APIL agrees that the court should use its power to make a 'totally devoid of merit' order under CPR 52.10(6).

Recommendation 6

Collective claims should be subject to an enhanced form of case management by specialist judges. Such enhanced case management should be based on the recommendations of Mr Justice Aikens' Working Party which led to the Complex Case Management Pilot currently in the Commercial Court.

APIL agrees that a Practice Direction based on the recommendations of Mr Justice Aikens' working party will act as a good baseline for guiding the case management of collective actions. We believe that the recommendations need to be fleshed out into a detailed practice direction which will require careful analysis.

There is a need to be careful, because the courts will be required to manage a large variety of group actions, depending on the issues, deciding whether opt in or out, whether the parties or the court want to apply for a trial of issues, or of a preliminary point. There will be a whole series of permutations which follow depending on what the judge determines is the best route to resolve the issues. For example, the timing of disclosure of witness statements, whether e-disclosure is to be ordered and so on. In the more complex cases the court might want to ensure that there are periodic case reviews and trials on specific points simply to try to move the litigation along and efficiently dispose of issues along the way.

For these reasons, any Practice Direction should not be too restrictive. It must give the court as much discretion as possible, because one of the current problems with GLOs is that there is very little discretion within the rigid confines of the rules.

In the case of *AB v John Wyeth and Brother Ltd* [1993] 4 Med LR 1, page 6, Steyn LJ suggests that the judge involved in managing a GLO should use whatever discretion he has , in order to manage the case fairly.

> "Inevitably High Court Judges assigned to the control of such litigation must depart from traditional procedures and adopt intervention case management techniques. If the judge charged with the control of such actions did not undertake this innovative role, the system of justice in respect of such cases would break down entirely … A court of record has an inherent power to control its procedure so as to promote the achievement of justice and to avoid an injustice insofar it is reasonably practicable to do so."

He added,

> "Subject to the duty to act fairly, the judge may and often must improvise: sometimes that will involve the adaptation of entirely new procedures. The judge's procedural powers in group actions are untrammelled by the distinctive features of the adversarial system. The judge's powers are as wide as may be necessary to control the litigation fairly and efficient."

Even in the face of that encouragement and exhortation, APIL's members do not see that flexibility or discretion used in practice, despite it being the correct interpretation of CPR 19. In practice judges fail to exercise sufficient discretion to allow the case to move forward efficiently. For example in the *Seroxat* cases, the judge recognised that

he had discretion, but found himself bound by precedent and adopted a particularly restrictive approach.

Recommendation 7

Where a case is brought on an opt-out basis, the court should have the power to aggregate damages in an appropriate case. The Civil Justice Council recommends that the Lord Chancellor conduct a wider policy consultation into such a reform given that it effects both substantive and procedural law.

There is no suggestion that the CJC is proposing changes to the law of damages, but "one of the reasons identified as to why the present representative rule has remained 'a procedural backwater rather than a flourishing style of multi-party litigation' is the absence of a general power to aggregate damages. The general rule in English law is that each individual claimant should prove their own particular loss according to established principles." Under opt-out regimes in other jurisdictions, the power to make an aggregate award of damages is generally endorsed as a means of avoiding costly, time-consuming and inefficient individual damages determinations.

APIL welcomes this approach. There are plenty of precedents for it already being done in cases such as those involving multiple holiday-makers all struck down with food poisoning, for example. In those cases, the defendant tends to make a global offer to the claimant group, which is then apportioned among them by consent.

There does need, however, to be a mechanism in the rules to enable the court to assess the individual entitlements of the class members, as is suggested in the first paragraph on page 146 of the consultation document.

Such aggregate damages were also involved in the Myodil litigation where a class of 325 claimants was made a global offer to settle. The claimants' lawyers obtained the consent of all 325 parties, before dividing up the global offer between them, gaining court approval of the settlement.

APIL's view is that there has to be a flexibility of approach by the judge to this issue: there may be an insurance cap for example which may limit the amounts available for division between the parties: in shipping claims, where the carrier's insurance liability may be in the form of a global sum insured per ship for example, or increasingly this issue is being seen in asbestos disease related claims.

Recommendation 8

To protect the interests of the represented class of claimants any settlement agreed by the representative claimant and the defendant(s) must be approved by the court within a 'Fairness Hearing' before it can bind the represented class of claimants. In approving a settlement or giving judgment on a collective claim the court should take account of a number of issues in order to ensure that the represented class are given adequate opportunity claim their share of the settlement or judgment.

We agree that collective action settlements should be approved by the court as recommended here. In particular the fairness hearing addresses concerns we have about winners and losers in the class (for example where aggregate damages are being apportioned) and also absent claimants, all of which must be addressed.

It is important that the outcome of the claim is given 'finality' by the court to avoid satellite litigation.

Recommendation 9

There should be full costs shifting.

APIL does not agree that there should be full costs shifting in all cases.

At the certification process, the court will be looking at funding issues, to ascertain whether the funding arrangements are fair as between the parties. We suggest that this is the appropriate time for the court to look at whether the parties can afford to take part in the process, and if there is judiciable point, then innovative costs solutions should be available for the judge to apply.

Justice gap

The funding of collective actions is inextricably linked to the procedures available to potential claimants.

At present, the majority of potential claimants in a collective or multi party action rely upon legal aid in order to proceed.

In the Epilim cases, for example, the claimants are a cohort of children. It is the claimants' solicitor's duty to maximise the costs protection afforded to child claimants, as evidenced by the decision to JR the revocation of legal aid funding for these cases.

CFAs are invariably inappropriate in such cases. Very little after the event (ATE) or legal expenses insurance (if any) is available. Full costs shifting makes funding a collective or multi party action extremely risky to all concerned.

This is particularly the case with the LSC which asks a committee to decide whether it would be in the wider public interest to allow the case to be heard, and also decides

whether the case is affordable. Affordability, of course, can be affected by the procedures likely to affect the claim during its lifetime.

This is one of the main reasons for the 'access to justice gap' identified in the consultation paper. APIL's multi party action working group identified a number of claims where funding and procedural difficulties conspired to deny access to justice, including, over 4,000 people involved in Seroxat litigation in the UK (2007); 275 claimants who could not pursue their cases concerning Norplant (a contraceptive) when funding was withdrawn; at least 900 people involved in Vioxx litigation (2006); over 170 families involved in the foetal anti-convulsant syndrome (Epilim) litigation (2007).

There is a need for more flexibility on costs within the new procedure and APIL recommends that further thought ought to be given to other ways of dealing with costs, all of which are already discussed in detail in the CJC's consultation paper. Of all the recommendations in the consultation paper, this is the one which causes the most concern to APIL. In our view around 80 per cent of collective actions do not go ahead because of the full cost shifting rule and we urge the CJC to re-think this aspect of its proposals and recommend the use of some of those options discussed in its paper.

Deterrent effect

The assertion that cost shifting is a deterrent against speculative or so-called blackmail litigation is too simplistic and the recommendation that full costs shifting should be the only option available to the court is too restrictive. No-one wants to encourage unmeritorious litigation, but there are meritorious cases which might not otherwise be heard where there is an access to justice issue at stake if full cost shifting is applied. APIL suggests that the whole point of the certification procedure is to look at individual potential collective actions and recognise where there is an issue which merits court attention, even if the claimants are impecunious.

Furthermore, the prospects of success are sometimes obscure at the beginning of an action and only become apparent upon disclosure if 'all the cards' are held by the defendants. We suggest that during the certification process the claimants would need to show there is a judiciable point worth investigation, and if there is, then the parties should be permitted to go to the next stage of the process. With robust case management, if it later appears that there is no meritorious issue, then the court has the power to bring the case to an end.

What APIL would not want to see is a threshold set on day one of the action which is so high that no cases will progress beyond it.

We have also already suggested that the rules might need to include a protective mechanism which applies up to certification stage, whereby cases can be put before the judge (to ascertain whether there is a judiciable point) without fear of harsh sanction. (See our final comments to recommendation four on page 12, above).

Recommendation 10

Unallocated damages from an aggregate award should be distributed by a trustee of the award according to general trust law principles. In appropriate cases such a *cy pres* distribution could be made to a Foundation or Trust.

We agree with this recommendation.

Recommendation 11

While most elements of a new collective action could be introduced by the Civil Procedure Rule Committee, it is desirable that any new action be introduced by primary legislation.

APIL agrees that this is the best method to ensure that the level of flexibility and detail required is created. It is far better to create a totally new procedure with a new set of rules in order to ensure it has been done properly. There are risks associated with 'tinkering' with the existing CPR19 and other rules: that by doing so, the breadth of reform necessary to be properly implemented will not be possible.

APIL agrees that there is a need to create a comprehensive mechanism capable of dealing with a wide range of cases running from small value consumer disputes to regulatory issues, transport disasters, pharmaceutical claims.

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20 November 2008

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