

**THE LAW REFORM COMMISSION FOR IRELAND**

**CONSULTATION PAPER ON MULTI-PARTY LITIGATION  
(CLASS ACTIONS) (LRC CP 25-2003)**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS**

**OCTOBER 2003**

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5,000 members in the UK and abroad, with 63 members based in the Republic of Ireland. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

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

Colm Barry	Executive committee member, APIL
Peter McDonnell	Republic of Ireland Regional Secretary, APIL
Mark Mildred	Member, APIL

Any enquiries in respect of this response should be addressed, in the first instance, to:

Miles Burger  
Policy Research Officer  
APIL  
11 Castle Quay  
Nottingham  
NG7 1FW

Tel: 0115 958 0585

Fax: 0115 958 0885

E-mail: [miles.burger@apil.com](mailto:miles.burger@apil.com)

## MULTI-PARTY LITIGATION (CLASS ACTIONS)

### Introduction

1. APIL welcomes the opportunity to comment on the Law Reform Commission's project on multi-party actions. APIL hopes its suggestions and comments will help formulate recommendations for reform of the current procedures governing one form of multi-party litigation, namely, cases involving multiple plaintiffs with similar claims against the same defendant or defendants.
  
2. APIL concurs that the current Irish legal system lacks a comprehensive procedure that would tackle class claims in a uniform and consistent manner. The problems being faced due to the lack of such a system are as follows:
  - The plaintiffs in a multi-party action may opt for one of several procedures, each of which has its own limitations from the standpoint of both the litigants and the courts;
  - In light of this diversity, the manner in which multi-party actions are instituted is uncertain and unpredictable;
  - The representative action, theoretically the most appropriate procedure, has proved virtually redundant, at least in modern practice;
  - Representative proceedings in tort are not available in the circuit court;
  - The vast majority of multi-party actions are dealt with individually which involves needless duplication of legal proceedings in relation to common issues;
  - This "individual claim" approach increases the amount of litigation and the overall cost of proceedings and is a considerable drain on court time and resources;
  - The test case, the most popular route in practice, operates in an *ad hoc* fashion without regard to the suitability or typicality of the lead case and

is premised on an individual rather than collective resolution of common claims;

- Settlement – the most common means of resolving multiple claims – is negotiated on an individual basis without any need for court approval or cross-referencing to other similar claims;
- From the standpoint of plaintiff and defendant alike, litigation is unpredictable in terms of its conduct, duration, cost and outcome;
- For defendants, further vagaries include uncertainty over the finality of claims tried or settled and the absence of an estimated cut-off point for the commencement of new claims;
- The courts have no special powers in relation to multi-party actions (although some courts have introduced informal case management techniques);
- The relationship between tribunals and litigation is uncertain and has resulted in the duplication of proceedings;

3. Naturally the above detailed problems indicate that Irish practice in respect of multi-party actions are in need of reform within this area of law.

4. Thus APIL broadly welcomes the recommendations proposed in the consultation document as they will go a long way to remedying many of the faults (as detailed above) within the current system. Due to the fact that the recommendations are mostly positive and plaintiff-focused, APIL intends to only highlight the recommendations that it feels need to be commented on. *(A full list of recommendations is attached – Appendix A)*

## **Provisional Recommendations**

### **Recommendation 5.12**

**Limitation periods should be suspended as against class members on the filing of an application for certification of a class action, regardless of whether the proceeding is ultimately certified. [Paragraph 4.68]**

5. APIL approves of the Commission's views that the limitation period should be suspended as against class members on the filing of an application for certification of a class action, regardless of whether the proceeding is ultimately certified. The adoption of this principle is similar to a conventional action where the issue of the first summons in a matter suspends the relevant limitation period against the plaintiff.
6. The suspension of the limitation permits further investigation into the number of class members. It will also allow all members of the class to be properly identified and contacted. This will naturally increase people's access to justice.

### **Recommendation 5.13**

**The Commission seeks views as to whether class members who wish to join a class action should be required to opt-into the proceedings or, alternatively, whether class members who do not wish to join a class action should be given an opportunity to opt-out of the proceedings. [Paragraph 4.77]**

7. An important issue is how membership in a class should be determined. There are two principle options considered by the commission, with a third compromise position also suggested. The first option is that potential class members should be automatically included in the class but given the opportunity to opt-out of the proceedings, if they so wish. The other option is that class members should be required to take positive action to join in the proceedings.

8. APIL concurs with the Commission's views that "*on balance the arguments in favour of an opt-out system outweigh those favouring an opt-in procedure*"<sup>1</sup>. We favour the 'opt-out' approach due to its simplicity. Such a policy would hopefully reduce costs and increase efficiency in determining the membership of a particular class. The strongest justification, however, is that an 'opt-out' policy would allow all class members to be included, thus providing a more conducive access to justice.

**Recommendation 5.16**

**The settlement or discontinuance of a class action should be subject to the approval of the court. [Paragraph 4.89]**

9. APIL strongly supports the need for any settlement or discontinuance of a class action to be subject to the approval of the court. The need for court approval will mean that the class plaintiff cannot act to modify the elements of the action by himself thus potentially fundamentally affecting the rest of the class. This will prevent an imprudent or unfair settlement or discontinuance from occurring outside of the interests of the class members.

**Recommendation 5.17**

**The court should have the authority to make an order for an aggregate award of damages with respect to all or a part of the defendant's liability, subject to certain conditions. [Paragraph 4.97]**

10. APIL supports any mechanism that will enable plaintiffs to receive just, fair and full compensation. As such APIL is pleased to note that the Commission has identified the use of aggregate payments as an effective mechanism of delivering monetary compensation. It limits the inquiry to a single determination of a defendant's total monetary liability

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<sup>1</sup> Page 83, paragraph 4.77

as opposed to multiple individual assessments of the defendant's liability.

11. APIL, however, considers that an award of aggregate damages should only be made in certain prescribed circumstances, so as to not disadvantage individual members of the class. The stipulation that aggregate damages are only appropriate in circumstances where the class members can be identified and the amount of their individual claims easily determined without their assistance is fully supported.

12. In particular APIL would like to emphasise condition three (as detailed in paragraph 4.92), and what the court should consider:

- Whether the class members can be identified and the amount of their individual claims easily determined without their assistance;
- Whether the defendant's partial or total liability can be established without determining each member's share;
- Whether the defendant's partial or total liability can be determined with reasonable accuracy by some other means.

13. It is vital that an award for aggregate damages should only be considered with the full realisation of all three of these conditions having been met.

14. In relation to how the any monetary award should be distributed, APIL feels that the primary concern should be the wishes of the class members. Indeed the Commission states that “[c]learly the method of distribution should benefit the class members in a fair, efficient and economical fashion.” We are encouraged to note that the Commission feels that a simple two-option process is the most efficient and effective.

15. Finally, in respect of any undistributed residue, APIL feels that the court should have the power to order the residue disbursed so as to benefit the interests of the members of the class. As such APIL supports the following purposes:

- A *cy-pres* distribution – i.e. a purpose that will benefit the class generally;
- Payment of the costs of the class action

16. APIL is concerned, however, by the suggestion that the residual funds will be returned to the defendant or default to the Government. Any award for monetary damages should be used to restore the injured plaintiff, in this case class of plaintiffs, to the position that he enjoyed prior to the negligent unlawful act of the defendant. The returning of monetary compensation to the defendants would contradict the prohibitive intention of court action.

**Recommendation 5.18**

**The Commission seeks views as to whether class members, other than the class representative, should be liable for the costs of the class. [Paragraph 4.111]**

17. APIL believes that funding for class actions should not operate along the lines of ‘costs follow the event’. That being the case neither the liability of the class representative or any other members of the class are in question.

**Recommendation 5.19**

**The Commission seeks views as to the enactment of legislative provisions which would allow the court to approve contingency, speculative or uplift fee arrangements in class actions. No restrictions should be placed on the ability of lawyers to represent class**



**representatives on a “no foal, no fee” basis within the framework of the Law Society Regulations. [Paragraph 4.122]**

18. APIL considers the issue of costs as paramount in ensuring that plaintiffs have access to the appropriate legal representation, and thus access to justice. Indeed, as the Ontario Law Reform Commission has noted, *“the matter of costs will not merely affect the efficacy of class actions, but in fact will determine whether [the chosen] procedure will be utilized at all.”*<sup>2</sup> This is important due to the public interest nature of many class actions. For example, in the United States, class actions have served as a mechanism for pioneering civil rights and other public interest litigation. As such funding needs to be available so that there is an incentive for class plaintiffs to litigate, particularly in account of the absence of adequate external funding sources.

19. APIL proposes that funding should be dealt with by the discretion of the court during judicial certification of the class action (as detailed in paragraph 4.53). It is at this stage that the court will make a recommendation that the class action being considered is in the public interest. Thus in the event that the plaintiffs lose the case they will not be liable for the defendants costs.

20. In respect of costs of the plaintiff’s lawyers, they will take the case on a “no foal, no fee” basis. This entitles the lawyer to claim back the normal fees incurred during the case if they win. If they do not win, then the law firm absorbs the cost of the case. The use of this funding method will ensure that plaintiffs are not afraid to join a class action due to the possible monetary ramifications if they lose. Yet any award will be fully given to the members of that class.

21. In addressing and proposing the use of ‘no foal, no fee’ as a form of funding arrangement, APIL feels that it is ironic that whilst the funding

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<sup>2</sup> Ontario Law reform Commission, Report on Class Actions (volume III, 1982) at page 647

device is accepted, the promotion of a 'no foal, no fee' service by a lawyer is strictly prohibited by Law Society Regulations. The public interest nature of multi-party actions, combined with the large number of class members that need to be located and identified in such a case, would seem to facilitate the need of some form of advertising. In addition to this, a class member may not want to join a multi-party action unless they are reassured that they will not be liable for legal costs. A lack of appropriate advertising and promotion to promote the fact that the case will run on a 'no foal, no fee' basis may well restrict the numbers of class members who enter the action, thus ultimately denying appropriate access to justice.

#### **Recommendation 5.20**

**Class representatives who are otherwise eligible should be entitled to apply for civil legal aid. [Paragraph 4.125]**

22. APIL has always supported the use of government funds to provide adequate access to justice for all people. In relation to class actions, the public interest nature of most multi-party actions makes this type of litigation vital for legal aid funding. We strongly support the Commission's view that all class plaintiffs who are otherwise eligible should be entitled to apply for civil legal aid. In particular the bar that currently exists on the provision of legal aid to representative actions should not be extended to class actions and that positive provision should be made for the provision of legal aid to class representatives.

#### **Conclusion**

23. In conclusion, APIL considers the Commission recommendations to be very positive with the emphasis on the needs and wishes of the plaintiffs. In particular, the above highlighted recommendations are strongly supported by APIL. The addition of class actions will make a welcome addition to the legal system in Ireland.

24. APIL would be very interested in attending any colloquium on this subject, and feel that we have a valuable contribution to add.

## APPENDIX A: SUMMARY OF PROVISIONAL RECOMMENDATIONS

5.01 The provisional recommendations contained in this Paper may be summarised as follows:

5.02 The Commission recommends the introduction of a class actions procedure. [Paragraph 3.23]

5.03 Jurisdiction over class actions should be shared by the High Court and Circuit Court in the first instance. [Paragraph 4.14]

5.04 The bar to the bringing of representative actions in tort in Order 6 rule 10 of the *Circuit Court Rules 2001* should not be extended to class actions. [Paragraph 4.14]

5.05 The courts should exercise a supervisory role over class proceedings. [Paragraph 4.21]

5.06 Under the new procedure, the court should have the authority to deal with common issues and individual issues within the framework of a single proceeding. [Paragraph 4.24]

5.07 The point at which an action becomes a class action should be subject to judicial certification. [Paragraph 4.56]

5.08 Before issuing an order certifying class proceedings, a judge must be satisfied that the following criteria have been met:

- The pleadings disclose a cause of action; [Paragraph 4.28]
- There is an identifiable class of ten or more persons at the time of certification; [Paragraph 4.32]
- The claims or defences of the class raise common issues of fact or law; [Paragraph 4.36]
- There is a class representative who will fairly and adequately represent the interests of the class; [Paragraph 4.42] and
- The class action is an appropriate, fair and efficient procedure. [Paragraph 4.46]

5.09 Provision should be made for the creation of subclasses where appropriate. [Paragraph 4.49]

5.10 The procedure should specify that the following factors will not be a bar to certification of a class action:

- The number of class members or the identity of each class member is not known;
- The class includes a subclass whose members have claims that raise common issues not shared by all class members;
- Different remedies are sought for different class members;

- The relief claimed relates to separate contracts involving different class members; and
- The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues. [Paragraphs 4.50 and 4.52]

5.11 The court should have the power to amend the certification order or to decertify the proceedings at the application of any party or of its own motion at any time during the course of the proceedings. [Paragraph 4.63]

5.12 Limitation periods should be suspended as against class members on the filing of an application for certification of a class action, regardless of whether the proceeding is ultimately certified. [Paragraph 4.68]

5.13 The Commission seeks views as to whether class members who wish to join a class action should be required to opt-into the proceedings or, alternatively, whether class members who do not wish to join a class action should be given an opportunity to opt-out of the proceedings. [Paragraph 4.77]

5.14 The class representative should be required to notify all class members of:

- The filing of an application for class certification and the subsequent certification of class proceedings;
- A proposed settlement of any common issues;
- A judicial resolution of any common issues;
- The discontinuation or abandonment of the class action;
- Any other matter, notice of which the court deems necessary. [Paragraph 4.80]

5.15 As a general rule, the ordinary rules of evidence should apply to class actions. With the leave of the court, non-party class members (*ie* class members who have opted in to the proceedings or, alternatively, have failed to opt-out of the proceedings) may be subject to discovery and examination, after discovery and examination of the class plaintiff, respectively. [Paragraph 4.86]

5.16 The settlement or discontinuance of a class action should be subject to the approval of the court. [Paragraph 4.89]

5.17 The court should have the authority to make an order for an aggregate award of damages with respect to all or a part of the defendant's liability, subject to certain conditions. [Paragraph 4.97]

5.18 The Commission seeks views as to whether class members, other than the class representative, should be liable for the costs of the class. [Paragraph 4.111]

5.19 The Commission seeks views as to the enactment of legislative provisions which would allow the court to approve contingency, speculative or uplift fee arrangements in class actions. No restrictions should be placed on the ability of lawyers to represent class representatives on a "no foal, no fee" basis within the framework of the Law Society Regulations. [Paragraph 4.122]

5.20 Class representatives who are otherwise eligible should be entitled to apply for civil legal aid. [Paragraph 4.125]

5.21 The Commission seeks views in relation to liability for costs of class proceedings. [Paragraph 4.140]

5.22 The court should have a residual authority to make any order it considers appropriate at any stage during the course of class proceedings. [Paragraph 4.20]

5.23 There should be a modified system of appeals in relation to class actions. [Paragraph 4.143]

5.24 The proposed procedure should make provision for defendant class actions. [Paragraph 4.150]