a class of their own

why scotland needs a class actions procedure
About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors’ clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

• carrying out research into consumer issues and concerns;
• informing key policy and decision-makers about consumer concerns and issues;
• influencing key policy and decision-making processes;
• informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC’s Chairman and Council members are appointed by the Secretary of State for Trade and Industry in consultation with the Secretary of State for Scotland. Future appointments will be in consultation with the First Minister.

Martyn Evans, the SCC’s Director, leads the staff team.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS
Can consumers actually get the goods or services they need or want?

CHOICE
Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION
Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS
If something goes wrong, can it be put right?

SAFETY
Are standards as high as they can reasonably be?

FAIRNESS
Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION
If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

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It is a truism of consumer policy that one of the chief areas of difficulty is redress. In the UK we now have a well-developed set of consumer rights. The rights of buyers of goods and services have over the last two generations been gradually extended and improved. For example, the Sale of Goods Act has been updated in important respects, consumer credit law has been recast and is in the course of being further reformed, legislation has been enacted to reduce the incidence of unfair contractual terms and other legislation has been passed to control unfair marketing practices.

The Scottish Consumer Council (SCC) has from its foundation been conscious of the need not only to produce such legislation but also of the importance of effective enforcement of consumer rights. Shortly after its inception SCC commissioned a report from Mr Matthew (now Lord) Clarke on the state of consumer law. An important conclusion of that report was the need for proper procedures to allow consumers to enforce their rights. Attention was drawn to the absence of effective court procedures to enable individual consumers to assert their rights and this led to the SCC’s involvement in the movement to establish a small claims court, an objective which was attained in 1988.

SCC has always been aware that court procedures, valuable as they can be in enabling individuals to assert their rights, have limitations. Individuals can, for many reasons, be reluctant to go to court. It was with this in mind that we set up a working party in 1979 comprised of a number of distinguished lawyers to look at other methods of enabling consumers to enforce their legal rights. This resulted in the publication in 1982 of our report Class Actions in the Scottish Courts (the Class Actions Report), which advocated the introduction of a class actions procedure in the Scottish courts\(^1\). It was much referred to by the Scottish Law Commission in their discussion paper and later report on Multi-party Actions and has been cited widely by others interested in this area.

\(^1\) Class Actions in the Scottish Courts: a new way for consumers to obtain redress?; Scottish Consumer Council, May 1982.
Official interest in the problems raised by multi-party litigation was demonstrated by a reference in 1988 inviting the Scottish Law Commission to consider the feasibility of introducing a procedure into Scottish civil courts to cope with such cases. Later that year there were two disasters in Scotland which gave rise to multi-party litigation, the Piper Alpha oil platform disaster in July and the destruction of Pan Am Flight 103 over Lockerbie in December. The Commission reported to the Lord Advocate in July 1996 but while it was considering its conclusions other work which contributed to them was published. A Commission discussion paper and the report of a working party which it set up were published in 1994. In addition, the Central Research Unit of the Scottish Office published a report by researchers at the University of Dundee’s Department of Law.

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While the SCC’s Class Actions report has been influential in the debate on class actions both in Scotland and the rest of the UK, the fact is that Scotland still does not have a class actions procedure. In England and Wales the Civil Procedure Rules have, since 2000, provided a mechanism for dealing with litigation involving large numbers of claimants or defendants known as a Group Litigation Order. There are class action procedures in several Commonwealth jurisdictions as there have been for many years in the United States. This report revisits the issue and examines the policy arguments for the introduction of such a procedure in Scotland. As the debate in this area has moved on considerably since 1982, other aspects of what might be called group actions are also considered.

* Civil Procedure Rules, Part 19
A class action is a court procedure which enables a number of individuals with similar complaints against the same defender to seek a judicial remedy in one action instead of each raising separate actions. It is important to note that it is a legal procedure only: it does not give claimants any new substantive rights.

There are many situations where such a procedure might be appropriate:

a) In the so-called mass disaster cases where many people are killed or injured as a result of, for example, a rail accident, at least some of the legal issues could be dealt with by such a procedure.

b) It might also be of use in creeping disasters of which claims for damages in respect of allegedly defective drugs such as tranquillisers are examples. In these cases there is no connection between the victims except that they have all suffered from the same drug though at different times and, possibly, in different ways.

c) Claims falling within these two categories will often arise in consumer situations, but it is also usual to refer to a third category more specifically as consumer claims. These are cases where a large number of consumers of goods or services claim relatively small amounts of money which, individually, it might not be economic to recover through litigation. Examples could be found in cases where a number of holidaymakers are misled by the same error in a package holiday brochure or many people purchase the same shoddy product.
The class action is a subset of the group or multi-party action. The other kind of group action may be termed the public interest action. The public interest action is one where a public official takes action for the benefit of the public at large or a section of it; or one brought by an organisation such as a consumer protection or environmental organisation on behalf of its members and the public.

Our Class Actions Report, in addition to advocating the introduction of a class actions procedure, envisaged further reforms which would develop group actions. Ironically, while no progress has yet been made on class actions, considerable progress has been made in relation to the other type of group action. For that reason, while this report will rehearse the arguments for the introduction of class actions, it will also draw attention to the other forms of group action.
The overriding reason for advocating the introduction of class actions is that it is essential in the interests of upholding the rule of law. It is unacceptable that consumers or others should be given rights which they cannot effectively enjoy. Such a situation is a reproach to a legal system. The importance of a remedy has been recognised in the introduction of small claims procedures and other methods of improving access to justice. The class action is another important way of doing so. It enables litigation to be conducted more efficiently and makes a remedy a practical possibility, particularly where large numbers of people have each lost small amounts which it would not be economic to litigate about individually.

There is also the deterrent argument in favour of the class action. As the Australian judge, Mr Justice Kirby, then chairman of the Australian Law Reform Commission, put it:

‘Why should a defendant secure benefits by unlawful conduct, relying on the inadequacy of the legal system and the timidity and lack of organisation of those wronged?’

Not infrequently, there are situations where many individuals lose small amounts as the result of unlawful actions by traders but few find it worthwhile to take action. The result is that the wrongdoer makes a windfall profit. An example of this kind of situation was the Hoover flights saga in the early 1990s when the company failed to honour an offer in a marketing promotion to provide free flights. Many thousands of consumers appear to have been disappointed but few seem to have resorted to the small claims courts.

Class Actions: A Panacea or Disaster? 1978 The Australian Director 25, at 33.
That few of those disappointed in the Hoover case took their cases to court is not surprising. The amounts were not large and many may not have thought it worthwhile to do so. One may also speculate that fear and ignorance of the workings of the legal system may also have played a part. Research on small claims both in Scotland and England demonstrates that many potential litigants are reluctant to embark even on the simplified procedures offered by the small claims courts. Recent research found that people in Scotland generally have negative perceptions of the courts and to a greater degree than people in England and Wales.

Where larger sums are at stake, as there will usually be in the mass disaster and creeping disaster cases, there are other factors to be taken into account. Such cases often present particular difficulties. In many product liability cases, especially those involving drugs, the evidence required is of a very specialised scientific nature. Much research is required and expert evidence will be needed to assess the viability of the claims.

These claims can also involve considerable legal complexity and areas of law with which few lawyers are familiar. For cases to be litigated separately is inefficient where similar issues arise in many aspects of the case. It makes much more sense for claimants to band together. Common issues can be explored on behalf of a group of potential claimants and the cost of doing so can be spread over the whole group. In this way the unequal struggle between the individual victim and the well-resourced corporation can be made fairer.

Dealing with similar disputes against the same defender in one litigation also prevents inconsistency. If individual cases are dealt with in different courts there is the possibility that different judges will arrive at different conclusions.

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*Paths to Justice Scotland: what people in Scotland do and think about going to law, Hazel Genn and Alan Paterson, Oxford University Press, 2001, Ch. 7.*
It is not just victims who benefit from the more efficient handling of litigation by means of group procedures. Defenders can benefit also through fighting only one action rather than a series of actions. Not only may there be a saving in litigation costs for companies in such situations but also other savings in less loss of management time to the unproductive business of dealing with litigation.

The courts too may benefit. The Ontario Law Reform Commission’s Report on Class Actions noted that one benefit that is commonly attributed to class actions is judicial economy, in that they may benefit both the parties and the courts by diminishing the total amount of litigation and thus reduce the total cost of settling disputes arising from mass wrongs. As the report put it:

“There is no real disagreement that class actions can achieve judicial economy where all class members have individually recoverable claims. If a class action procedure were not available, most of these claims would be litigated individually, leading to duplicative and costly hearings, at least in situations where there are too many plaintiffs for joinder to be feasible. Class actions aggregating individually recoverable claims are beneficial not only to plaintiffs, but also to defendants, since such actions reduce defence costs by eliminating the need to assert common defences in each individual suit.’

The Dundee research into multi-party actions\(^9\) gives an insight into the benefits of treating claims together. Approximately 70 investors made claims against an insurance broker alleging that their money had been misappropriated. It proved possible to use conjunction which is one of the existing techniques for dealing with cases which raise similar issues. The 70 different cases were grouped together and dealt with as one case. Had this not been done and the cases had gone to trial individually, it is reckoned that they would have taken up the whole of a term in the Court of Session.

\(^9\)Vol 1 1982 Toronto, Canada

It may be argued that there are existing methods of dealing with cases where large numbers of claimants are involved and that these are sufficient. There are indeed procedures which may enable claims involving large numbers of people to be dealt with together. In some cases an interdict obtained by one litigant may benefit many others. A classic example is the case of Webster v Lord Advocate where Ms. Webster, who had a flat close to Edinburgh Castle, obtained an interdict to prevent being disturbed by preparations for the Edinburgh Tattoo. Everyone else living in the vicinity benefited from her action.

The actio popularis is ‘an action brought by a pursuer in his capacity as a member of the public to vindicate or defend a “public right”’.\(^{11}\) It has sometimes been used to defend public rights such as rights of way, rights to certain uses of the seashore, and rights to use land for recreation. The cases in which it has been used show that no special interest is required of a member of the public who seeks to prosecute such an action. However, the modern view seems to be, as Lord Clyde put it, that the ‘action is somewhat special and limited.’\(^{12}\)

Under the Local Government (Scotland) Act 1973, the Lord Advocate may raise an action in the public interest\(^{13}\) but in practice this procedure is not used. Section 146 of the Public Health (Scotland) Act 1897 might also be described as a sort of class action. It provides a procedure which may be used by ten or more council taxpayers where their council has failed to remedy a nuisance. It has been used to deal with dampness cases arising in local authority rented housing but has proved difficult to operate. Another limited form of class action is provided by the Damages (Scotland) Act 1976. Where claims are brought by surviving relatives in respect of a death they must all join in one action.

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\(^{11}\) Scottish Law Commission, Multi-Party Actions: Court Proceedings and Funding, Discussion Paper No. 98, November 1994, para. 2.20.


\(^{13}\) Section 211.
Normally, where a number of people are harmed by the same or a similar wrong they must individually raise separate actions against the one defender. While, with the exceptions mentioned above, the Scottish legal system has no purpose-built procedure for dealing with such cases, there are techniques for mitigating the difficulties that this can cause. In some situations a test case may be brought. This is not a legal term and there is no provision for it in court rules. For it to work properly, the parties to a dispute involving several individuals need to agree that a decision relating to one of them will be binding on the others. Otherwise, unless the decision is from a high enough court, only the parties to the case will be bound by the decision.

There is the possibility of what is known technically as contingency, which permits the parties to ensure that cases involving similar issues are dealt with by the same judge. One of the recent multi-party actions in Scotland demonstrated the limitations of this process. The same photocopier company raised many actions in various sheriff courts against customers who defended the actions on the basis that they had been misled by the sales persons of the pursuer. It might have been thought that it would have been sensible to have assigned these cases to the same sheriff, but the pursuer preferred not to permit this and the courts have no power to compel such action.

In some situations it is possible to take a further step in relation to contingent cases and to make them ‘conjoined’. This means that they are treated for procedural purposes as one case and, for example, decisions on procedural matters apply to all the conjoined cases. The commentators note that the modern tendency is to avoid formal conjunction and rely on the parties to make informal working arrangements to avoid duplication and its attendant expense.¹⁴

That such informal working arrangements can work has been demonstrated by some of the recent mass disaster litigation. In the years since the publication of our Class Actions Report there have been several such disasters in Scotland, of which Lockerbie and Piper Alpha are the most notorious. Despite the absence of a class action procedure the legal profession acted with great skill in coping with these unusual and complex situations. In many of the disaster cases the response has been to set up solicitors’ groups to co-ordinate the work of solicitors in formulating claims, carrying out negotiations for a possible settlement, and, if it proves necessary, litigating. The Dundee Multi-Party Actions Report concluded that these methods had worked well.

Despite the success of Scots lawyers in overcoming the difficulties posed by the lack of a class actions procedure, we still maintain that the conclusions of our original Class Actions Report are valid and that it would be of benefit to the legal system to provide for one. We are confirmed in that belief by the fact that the Scottish Law Commission in their Multi-Party Actions report, published after a number of high profile mass disasters had been dealt with and with the benefit of the Dundee research, also concluded that the facility should be provided.

The work of the Scottish Law Commission is of particular importance because of its thorough discussion of the issues. The Commission’s report followed the report of a working party\(^{15}\) and a discussion paper.\(^{16}\) It also included a draft Act of Sederunt containing court rules for class actions which could be used as a model.


\(^{16}\) See note 3.
Having recommended that class actions should be included in the Scottish legal system, the Class Actions Report concluded with a perceptive chapter looking further ahead. Three further steps were envisaged, though it was not thought appropriate to recommend these steps at the time because they went well beyond procedural reform and required reform of substantive law. Ironically, two of the steps envisaged have since been adopted by government, one with conspicuous success, and it is to these ideas that we now turn.

The first step beyond class actions was labelled the ‘external pursuer class action’ or ‘public interest class action’. The class action recommended by the report is sometimes referred to as an ‘internal pursuer class action’ because one or more people take action on behalf of themselves and others who have suffered harm. In the external pursuer action a group or association would be granted standing to sue on behalf of consumers for damages suffered by them.

A tentative step in this direction has recently been taken with an interesting change to the Competition Act 1998 made by the Enterprise Act 2002. This permits bodies approved by the Secretary of State to bring claims for damages before the Competition Appeal Tribunal on behalf of consumers of goods and services. How successful this will be remains to be seen.

These claims will be particularly difficult and expensive and there is little incentive for organisations to become involved, particularly as the normal legal expenses rules will apply and will probably leave them out of pocket even if the action is successful. To make this kind of action more attractive probably needs some financial incentive such as the treble damages actions available in American anti-trust law or, at least, some enhancement of the legal expenses normally awarded to a successful party.
The second recommended step beyond the traditional class action was to allow consumer groups to seek remedies by way of interdict or declarator. It was argued that this was a particularly appropriate method as consumers face suppliers on unequal terms. The report noted that the powers of the Director General of Fair Trading to take action under Part III of the Fair Trading Act 1973 against traders who persistently treat consumers unfairly provided a model. This suggestion has proved to be extraordinarily prescient. The Part III model has not proved as effective as had once been hoped but it has very recently been replaced by the Enforcement Order procedure under Part 8 of the Enterprise Act 2002.

This permits the Office of Fair Trading (OFT)\(^{17}\) and various ‘designated bodies’ to take action on behalf of consumers against infringements of a wide range of laws. The designated bodies are mainly various statutory regulators but there is a procedure for designating other organisations and it is expected that private organisations such as the Consumers’ Association will be given these powers.

The Enforcement Order procedure is similar to other more specific procedures under the Control of Misleading Advertisements Regulations 1984 and the Unfair Terms in Consumer Contracts Regulations 1999. The latter is an excellent example of the value of the public interest class action. The regulations supplement the traditional means of redress through individual litigation by giving the OFT and a number of other organisations, including the Consumers’ Association, power to require traders to remove unfair terms from their contracts. This has the great benefit not only of making the new legislation effective but also of operating on the principle that prevention is better than cure.

\(^{17}\) Note: from 1 April 2003, the functions of the Director General of Fair Trading have been transferred to a new corporate body, the Office of Fair Trading, by virtue of the Enterprise Act 2002
These regulations have been very successful in dealing with almost 7,000 cases, with one exception, without having to take court action. Two spectacular examples of the benefits of the regulations are contained in a recent report by the Comptroller and Auditor General, which shows the agreement of a mortgage company to remove unfair penalties from their loan agreements has saved consumers £65.2 million, while amendments to mobile telephone contracts are estimated to be saving consumers between £60 and £80 million each year.18

The third step beyond the basic class action proposed by the Class Actions Report was that:

‘... the concept of ‘consumer interest’ might receive express statutory recognition such that it would be clear that public bodies conducting themselves in a manner detrimental to the interests of or unfair to consumers would be acting ultra vires. Consumer groups should then be entitled, by way of judicial review, to seek redress against such unfair conduct.’

The report argued that ‘Access to judicial review is a crucial element in any comprehensive strategy to foster the consumer interest’. This is because many services are supplied by public bodies and it should be possible to challenge them in the consumer interest. Since the report was written the range of services provided by the public sector has decreased. This proposal, however, raises wider issues in relation to judicial review and given that our report was somewhat optimistic in its view of the liberality of the Scottish courts in relation to permitting such actions we recommend that this matter should be looked at by the Scottish Law Commission.

An important issue in relation to group actions is the question of how they are paid for. Our Class Actions Report recommended the creation of a class actions fund to finance the basic form of class action which was advocated. This did not find favour with the Scottish Law Commission, which argued that funding should be dealt with by the Scottish Legal Aid Board. More recently, the Justice 1 committee of the Scottish Parliament recommended that the Scottish Executive should examine how access to legal aid could be made available to support collective action, organisations and representative bodies.\(^{19}\)

While legal aid is one option to be considered, this cannot provide the only answer, as it is probable that in most cases, not all of those involved in a class action will qualify for legal aid. There are various possible funding options which require further consideration. We still consider that there is merit in the proposal for a Class Actions Fund, although insurance-based funding may, for example, be one possible avenue for those on middle incomes.

The form of class action initiated by organisations raises different issues. One of the advantages of this procedure is that in many cases the pursuers are publicly funded. It is important that funding of such bodies takes adequate account of their powers to initiate group actions.

Some of the organisations empowered to bring such actions are private. As they are protecting the public interest, there is a case for making funds available from the public purse. Should an action by such a body be unsuccessful there should be a discretion for the judge to make such an order. There is a precedent in England where, in some circumstances, criminal courts can order that costs can be paid out of what are referred to as ‘central funds’, which simply means money provided by Parliament. Another possibility might be to look at how legal aid might be made available for actions by organisations and representative bodies, as recommended by Justice 1 committee.

There are also concerns about other aspects of the resources necessary to take forward such cases, particularly in relation to local authorities, which have such powers under Part 8 of the Enterprise Act 2002 and the Unfair Contract Terms Regulations. They need to have access to legal advice, and it must be noted that at present the legal departments to which they will turn have no experience of consumer protection issues in Scotland. This is exacerbated by the fact that there are several very small authorities who will find it difficult to provide the necessary resources, not only legal, but in terms of enforcement staff.
One objection often raised in relation to proposals for class actions is that they encourage litigation unnecessarily. While we reject this argument, we would also stress that in advocating the extension of group actions, we do not ignore the importance of seeking other forms of settling disputes. One consequence of proper group action procedures would be to encourage the settlement of disputes as they would bring home to defenders the fact that those they had injured had a realistic legal avenue of redress.

We have a longstanding interest in ensuring that consumers who become involved in disputes have access to an appropriate, affordable, means of resolving them. We are particularly interested in the potential benefits to consumers of alternative (or appropriate) dispute resolution (ADR), especially mediation. We believe that the increased availability of mediation as an option for resolving disputes of all kinds would be an important step towards achieving better access to justice for consumers in Scotland. In 2001, we published our report Consensus Without Court, which looked at how the use of mediation might be encouraged in Scotland as a means of resolving non-family civil disputes.

We would therefore envisage that in appropriate cases alternative forms of dispute resolution would be used, preferably without resorting to the courts at all. If litigation is embarked upon it should be within the powers of the judge to encourage the parties to consider some form of ADR.
recommendations

We recommend that:

• A class actions procedure should be introduced into the Scottish legal system immediately.

• The importance of ADR as a means of resolving disputes which might be litigated as class actions should be kept in mind.

• The Scottish Executive should undertake a full assessment of the various funding options, particularly legal aid.

• Attention should be paid to the financing of the other forms of group action.

• The possibility of using actions of judicial review to protect the consumer interest should be referred to the Scottish Law Commission.
a class of their own