Class Actions in the Scottish Courts

A new way for consumers to obtain redress?
Chairman's Preface

For the past 2 years and 7 months a group of dedicated lawyers has been quietly investigating a subject which even to the informed consumer in this country, or indeed to the lawyer, is something of a novelty: class actions (sometimes also described as group or public interest actions). Certainly it is a topic which I am sure is unknown to most Scots.

This is often the road to progress in the area of consumer rights—years of pernickety work by experts culminating in a proposal whose details might not be readily understandable by the general public but the effect of which is to provide simple, clear help. An excellent example of this approach is the Consumer Credit Act 1974 which is daunting in the 174 pages of its complexity but whose provisions furnish an intelligible basis for comparison of the costs of various forms of credit.

The subject of class actions also typifies this method. The aim is to provide the consumer with another way of enforcing his legal rights, rights which all too often go by default because individuals are reluctant to go to court. The means to this end are the planning and establishment of a new court procedure.

At present under Scots law where several people have the same grounds of complaint against a common defender, each individual may have to bring a separate action to be sure of securing his rights. Under a class action procedure only one action would be necessary, thus saving time and money and minimising the deterrence to legal action, particularly where, although there may be several complaints, the value of each claim is relatively small.

In 1979 the Scottish Consumer Council set up a Working Party:

1. to define what is meant by public interest and class actions and to ascertain whether and to what extent such remedies are available under Scots law.
2. to recommend what kinds of public interest or class action could or should be made available and to suggest how such actions could be administered in the present court structure.
3. to suggest how public interest and/or class actions could be financed.
4. to consider how the legal profession might be affected by the Working Party's proposals.
5. if necessary, to commission research on any aspect of the work of the Working Party.
6. to produce a report with recommendations to the Scottish Consumer Council.
This Report is the product of the Working Party’s deliberations. It examines the definition of a class action and the circumstances in which such an action would be useful. It looks at existing procedures and then goes on to produce a detailed blueprint for a class action procedure within the Scottish legal system. The last Chapter of the Report looks beyond the class action to assess its appropriateness and effectiveness in relation to other means of consumer redress.

The Scottish Consumer Council welcomes the Report which in our opinion sets out convincing arguments for the need for a class action procedure and provides a satisfactory explanation of how such a procedure might work. We hope that the Report will stimulate discussion not only in this jurisdiction but also furth of Scotland, and act as a catalyst for reform.

On behalf of the Scottish Consumer Council, it is a pleasure for me to thank Sheriff Ian Macphail and James Clyde, Esquire, Q.C., each of whom chaired the Working Party so admirably (from July 1979 to May 1980 and from June 1980 to February 1982 respectively) and contributed in a major way to this Report. A list of the members of the Working Party follows and to them all, I express our appreciation, particularly those who travelled considerable distances to the meetings. Many other busy people gave their time, knowledge and experience unstintingly and to them also we owe a debt of gratitude. Finally, I would like especially to mention Sheila Gilmore, who was the Scottish Consumer Council’s Legal Advisory Officer when the project began and who continued to act as a most efficient secretary to the Working Party even after leaving our employ and taking up a legal apprenticeship.

ESME WALKER,  
Chairman, SCC.  

May 1982
Class Actions Working Party

Chairmen:  Sheriff Ian MacPhail (July 1979 — May 1980)
           Mr. James Clyde, Q.C. (June 1980 — February 1982)

Members:  Mr. M. G. Clarke
          Mr. J. Gardner
          Mr. D. Johnston
          Mrs. J. Macintosh, C.B.E.
          Dr. R. McCreadie
          Dr. A. Paterson
          Mrs. A. Paton
          Mr. R. Tur
          Mr. D. Williamson
          Professor I. Willock
CHAPTER ONE

INTRODUCTION

1.1 This study is concerned with the means by which access to a judicial remedy may most easily be obtained where there are a number of individuals with similar complaints against a common defender. Occasion for such a course may arise in a wide variety of circumstances. Cases can occur, as for example at a football ground such as Ibrox, where a number of individuals may be injured in an accident. A large number of holidaymakers may suffer when the holidays fail to live up to the claims of the brochure. A large number of unconnected individuals may suffer through the purchase of a defective product, for example a defective machine, contaminated food or a harmful cosmetic. Tenants in a housing scheme may be aggrieved by a failure to remedy some defect common to many of the houses in the scheme. In the field of employment issues may arise, for example, on a matter of equal pay, which are common to large number of employees. All of the residents in one area may have some common grievance over a matter of pollution affecting the amenity of their environment or perhaps causing some actual harm to their property. In many of these kinds of cases the loss sustained by each individual may be quite small. The risk, trouble and expense involved in litigation by any single individual may be disproportionate to the amount of that individual’s loss.

1.2 This question is one which has received considerable attention in other jurisdictions at home and abroad. It has arisen principally because of a growing awareness of the inadequacy of existing procedure to deal sufficiently with situations of increasingly common occurrence where the grounds for legal action whether through accident or in the area of consumer affairs or in administration or elsewhere are common to a considerable number of people. This phenomenon can be observed in Scotland and it is solely with the means of resolving the problem in that jurisdiction that this study is concerned.

1.3 It will be useful at the outset to discuss terminology. In relation to the issue in question a variety of terms are used to describe relevant forms of action—such as group actions, class actions, public interest actions and so on. In analysing the different forms there is perhaps no completely satisfactory classification. One can endeavour to distinguish between actions of public interest and actions of private interest. But that distinction is not only imprecise but of doubtful value. There can well be an action of a private nature which can have an effect directly or indirectly on the public or on groups of the public. An
interdict by a private individual may directly benefit other individuals. Action by one person may lead more easily to the settlement of similar claims by others. Private actions can well be of public interest.

1.4 A distinction can be suggested between circumstances where a pursuer has a personal stake in the action in the sense that his person or property is directly affected by the matter in dispute and circumstances where he has no such personal stake but sues as a member of the public in respect of an alleged breach of a duty to the public. The latter case is known as an *actio popularis*. But in order to raise such an action the pursuer must still establish some kind of substantial interest. In a sense the pursuer in an *actio popularis* must still have some kind of a personal stake, although the stake may be identical to that which the other members of the public have in the issue.

1.5 That distinction between private and popular actions is not immediately relevant for the purposes of the present study. This study embraces both actions of a public character and those of an individual or private character. But it is almost solely concerned with procedure. It is not primarily concerned with title or interest to sue nor is it primarily concerned to review the kinds of remedies available at law. What it does seek to consider is the introduction of a new procedure whereby so far as possible in accordance with existing rights of action, entitlements to sue and present kinds of remedy, a plurality of persons may raise and prosecute legal proceedings.

As the Australian Law Reform Commission has observed in its Report on Class Actions (paragraph 14)

‘Class Actions are a legal procedure only; they do not themselves create new rights or establish new liabilities.’

1.6 One term has to be found to describe the form of action which is to be suggested. In this study the term ‘class action’ will be used. By that term is meant a procedure by which, in a situation where numerous people have a similar interest in the resolution of a particular question, one action can take the place of many.

1.7 The first step is to review the procedures which presently exist.
CHAPTER TWO

EXISTING PROCEDURES

2.1 Criminal Proceedings

The present study is concerned with rights and duties in the civil law and not with criminal prosecution. It should however be noticed that prosecution is an important means of securing or protecting the rights of members of the public. Examples may be found in prosecutions under the Trade Descriptions Act 1968, the Consumer Credit Act 1974 and the Consumer Safety Act 1978. In addition it is now possible following the Criminal Justice (Scotland) Act 1980, for the Court to award an individual compensation in criminal proceedings under, for example, the 1968, 1974 or 1978 Acts.

Private prosecution is very rare in Scotland. It requires the concurrence of the Lord Advocate, failing which the leave of the High Court (J. & P. Coats v Brown 1909 S.C. (J) 29) neither of which is granted except in exceptional circumstances. It appears that private prosecutions by members of the public are in principle more readily available in England (c.p. Lord Wilberforce in Gouriet v U.P.W. (1978) A.C. 435 at 477).

2.2 Individual Action affecting a group

2.2.1 In many cases where a group is aggrieved a remedy can in practice be effected by the action of one individual. Thus in actions of interdict the suppression of the act complained of can operate to the benefit of many more people than the individual who raised the action. One householder who interdicts the playing of cricket can enable the risk of damage to his neighbours' property to be avoided (Miller v Jackson (1977) Q.B. 966). The prevention of the discharge of sewage at one point benefits other users of the water in addition to the pursuer (Moncrieffe v Perth Police (1886) 13 R 921). A political group may be satisfied by the grant of interdict against the broadcasting of certain political programmes obtained by a few of their number (Wilson v IBA1979 SLT 279). In Gay v Malloch 1959 S.C.110 the defender was ordained to remove a fishing stance from the river, thereby benefiting all the riparian proprietors. An interdict by two "producers of Scotch Whisky" against the passing off of an alcoholic drink not produced in Scotland as having been so produced would probably have been of benefit to all producers of Scotch whisky (Lang Bros. v Goldwell 1977 S.C.74).

2.2.2 But the benefit which the members of the class who were not parties to the action may enjoy in such a case is indirect, casual and
may be partial. They cannot in any technical sense found on the
decision but merely point to it as a precedent. If the pursuer has sought
damages other members of the class will have no right to any award
unless they raise their own proceedings. If the defender chooses to
implement his obligation to the pursuer in terms of the decree and to
ignore the identical obligations which he has to others who have not
sued they have no recourse beyond further litigation.

2.3 Multiple Action

2.3.1 Where a number of individuals are aggrieved by the same or a
similar wrong the one certain procedural course is for each of them to
raise a separate action against the one defender. Each will have title
and interest to sue in respect of his particular right. Each can claim the
particular redress appropriate to his individual case.

2.3.2 For the individual, however, the time and effort involved,
particularly when the sum concerned is small, may be disproportionate
to the benefit to be gained. The individual will have to take time to
consult a lawyer, gather evidence and attend Court. If he has to take
time off work he will also incur greater financial costs. The preparation
of a separate process for each claim in such a case obviously involves a
considerable quantity of paperwork with considerable duplication and
considerable expense. As matters stand the best means of reducing
this is to nominate one of the actions the leading action and so sus-
pend the others pending its resolution.

2.3.3 If all the actions are taken to proof the Court will probably hear
the proof in all the actions together, even although the processes are
not formally conjoined. Although this avoids some unnecessary
duplication of proof, the preliminary procedural expense of consulting a
lawyer and pursuing the initial stages of an action must necessarily
have been incurred.

2.4 The Test Case

2.4.1 A test case is not a legal term but is commonly understood to
mean an action whose function is to determine the legal position of
numerous individuals who are not parties to one action. Only the actual
parties to the case are bound by the judgement – though if that judg-
ment is from a high enough Court the doctrine of precedent will ensure
that subsequent cases are decided along the same lines.

2.4.2 A test case is properly achieved where the parties to a dispute
involving several individual examples agree that a decision relating to
one of them will be binding on the other cases. By virtue of that
agreement only one action becomes necessary or if the agreement is
made after several actions have been raised it becomes unnecessary to
take the others to a conclusion. Often it may be difficult for the parties
to agree upon a candidate for the test case. A defender may prefer to settle particularly prejudicial cases before taking the issue to litigation (for example Simpson v Dundee District Council (Scotsman 19th July 1990) where the District Council in the course of a dispute about the sale of council houses indicated that Mr. Simpson’s case was the worst possible test case). Litigants in individual cases may agree to settlement without agreement even being reached on a test case or without a judicial decision being given which would be plainly applicable to other existing situations.

2.5 Combination of Pursuers

2.5.1 It is competent in certain cases at present for several individuals to join together as pursuers in one process. This can be done when the persons are aggrieved by the same act of the defender. It can also be done where the pursuers have a joint interest in the subject matter of the action. But when the pursuers have individual claims the action must contain a separate conclusion for damages for each pursuer and each pursuer must have a separate issue where the action is to proceed to jury trial.

2.5.2 A combination of pursuers in one action is incompetent if there is no true community of interest among the pursuers. Thus a false representation made to several people at different times at different places cannot be made the subject of one action (Killin v Weir (1905) 7F 526). Where several pursuers claimed damages from a warehouse-keeper in respect of loss of whisky while in the defenders care, the action was dismissed because each pursuer had a separate contract with the defender (Fishof v Cheapside Bonding Co. 1972 SLT (N) 7). Moreover if the effect of the combination in the one action is to deprive the defenders of a right of relief against one of the pursuers the one action is incompetent (Buchanan and Others v Thomson 1974 SLT 124).

2.6 Claims for the Death of a Relative

2.6.1 Where claims for damages are brought by surviving relatives in respect of a death they must all join in the one action. This situation provides one existing example of a class action. The procedure is regulated by the Damages (Scotland) Act 1976. That legislation and experience of its effects is instructive in connection with the possible wider scope of class actions. The persons entitled to sue are the executor and the relatives defined in Schedule 1 of the Act.

The problem then arises of ensuring that all members of the class join in the action if they have the right and wish to do so.

2.6.2 Section 5(6) of the Act of 1976 requires that the pursuer serves notice of the action on every ‘connected person’ of whose existence and connection with the action the pursuer is aware or could with reasonable diligence have become aware. By “connected person” is
meant a person other than a party to the action who has title to sue the same defender in another such action based on the injuries from which the deceased died, or the death (section 5(1)).

2.6.3 Section 5(2) provides that any connected person is entitled to be added as a pursuer in the action. But it also states that every connected person is barred from suing the same defender in another such action based on the relevant injuries or the death unless in terms of subsection (5) he satisfies the court that by reason of lack of knowledge that the other action had been raised or for any other reasonable cause he was unable to make an application to be sisted in that action.

2.6.4 The provision for notification is made the more secure by a provision that if it appears to the Court that the pursuer has failed to implement the duty imposed by subsection (6) the Court may dismiss the action. The necessity for a connected person to act on receipt of the notification is stressed by a requirement that the notice must contain a statement that if he fails to make use of his right to be added to the action he risks being barred from other action (subsection (7)).

2.6.5 It should be observed that the operation of these provisions has met with considerable difficulty, complication and expense. In a number of cases a considerable amount of expensive research has had to be set in hand to discover the existence or identity of possible "relatives" and to provide intimation to them. Even although the standard of research is modified to one of reasonable diligence the cost and trouble of the investigation and intimation may well be thought to be unnecessary. The more that research is required, the less it is likely that the relative would be interested in joining the action and the more remote would be any risk of injustice in such a person being barred from suing.

2.7 Representative Actions

2.7.1 Scottish practice admits of the representation of an unincorporated association through the medium of its officials. As Lord Deas observed in *Cunningham v Edmiston* (1871) 9M 869. "There are of course many and great difficulties in the way of bringing 13,000 persons into the field. But a meeting of all those who are accessible might have been called, and if that meeting had authorised the action I do not say that would not have been enough". But representation in this context is only to overcome the difficulty of dealing with a body which is not recognised as a person in the eyes of the law, able to sue and be sued in its own right. Moreover, the representation will relate to the rights or obligations of the association not to the individual grievances of its members.

2.7.2 Except to the extent that some of the procedures already
noticed can be said to be representative there is no process of a strictly representative action in Scotland. In England such a procedure is permitted in accordance with Order 15 Rule 12 of the Rules of the Supreme Court. This provides *inter alia* . . . . "(i) where numerous persons have the same interest in any proceedings . . . . the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them representing all . . . . (2). A judgement or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue . . . . but shall not be enforced against any person not a party to the proceedings except with leave of the Court . . . ." An example can be found in *Duke of Bedford v Ellis* (1901) A.C.1 where a whole class of growers of fruit, flowers and vegetables claiming certain rights under statute were represented by several individual market gardeners. But where several shippers had individual contracts a representative action on behalf of all was not allowed (*Markt & Co. v Knight S.S. Co.*, (1910) 2 K.B.1021).

Essentially for the English action there must be common interest, common grievance and common remedy but the procedural rule which permits the representative action is not construed narrowly and the current trend appears to be towards an increased scope of this kind of action. In *Prudential Assurance v Newman Industries* (1979) 3 All E.R.507 a representative action was raised by a shareholder on behalf of himself and other shareholders where each had a separate cause of action against an alleged breach of duty by certain officers of the company, but the Court required to be satisfied that the relief claimed did not put the defendants in any worse position than they would have been in the case of individual action by any member of the class and accordingly it was stated that while a declaration might be given or an injunction granted the Court could not award damages. But more recently in *E.M.I. Records v Riley* 1 W.L.R.923 it was recognised that when nearly all the potential individual claimants were members of the one organisation (the British Phonographic Industry Ltd.) damages could be awarded to one member of that organisation who sued on its own behalf and on behalf of all the other members. Where however the ground of action lies in contract as opposed to tort it seems that a representative action is still incompetent.

2.8 Assignation

2.8.1 At least in theory it would be possible for a number of individual claimants to assign their claims to a single person who would prosecute the action himself. It should be possible to present claims based on contract as well as delictual claims economically in this way.

2.9 The Actio Popularis

2.9.1 This is understood to be an action brought by a pursuer in his
capacity as a member of the public to vindicate or defend a public right. It has its origin in Roman Law (e.g. Digest 47.23.1). Under Roman Law the informer who raised the action might in some cases keep the whole or part of the damages or fine which was awarded. In Scotland a similar type of proceeding can be traced in provisions for a reward to the discoverer of certain crimes or offences (Erskine Inst. 4.1.17). In Ewing v Glasgow Commissioners of Police (1839) McL & Rob. 847 it was apparently admitted that what is known under the denomination of a popular action forms no part of the law of Scotland (p. 860). The matter may be one of nomenclature but Scots law has recognised a form of popular action where the pursuer has a sufficient interest to raise proceedings (Ersk. Inst. 4.1.17; Maclaren on Court of Session Practice 225–6). Provided that such a sufficient interest exists in the pursuer then the action is competent. Moreover, unlike England, the consent of the Crown is not necessary. Thus one inhabitant of a burgh can competently seek to vindicate the rights of all the inhabitants (Grahame v Magistrates of Kirkcaldy (1882) 9 R (HL) 91). In Jenkins v Robertson (1869) 7M 739 several labourers were put forward to represent the public in an action for declarator of a public right of way. In Blackie v Magistrates of Edinburgh (1884) 11 R 783 several vegetable merchants sought a declaration of a right of market. In Potter v Hamilton (1870) 8 M 1064 three members of the public sought removal of obstructions from an alleged public road.

2.9.2 But the matters of so-called public right which may be prosecuted in an actio popularis are somewhat restricted and perhaps less relevant to modern times than they were to times past. For the most part such litigation is concerned with rights of way, of ferry, of harbour and moorings, of navigation, of fishing, of grazings, of use of common land, or market, and of bleaching. In MacCormick v L.A. 1953 S.C.396 two members of the public sought to raise a question of the constitutional legality of the title ‘Elizabeth 11’ but the action was dismissed. Lord President Cooper (p. 413) observed ‘It is true that we in Scotland recognise within certain limits the actio popularis in which any member of the public may be entitled as such to vindicate certain forms of public right but the device has never been extended to such a case as this’. Thus the use of the actio popularis as a form of collective action in the present day is at least problematic.

2.10 Actions by the Lord Advocate

2.10.1 By statute the Lord Advocate may raise proceedings in the public interest. Under section 211 of the Local Government (Scotland) Act 1973 when a complaint is made to the Secretary of State about a local authority and certain procedures including a public local enquiry have been carried through the Lord Advocate may raise an action on behalf of the Secretary of State. It is possible that at common law the Lord Advocate is entitled to bring a civil action in the public interest, perhaps in a case of persistent defiance of statutory regulation (Mag. of
Buckhaven & Methill v Wemyss Coal Co. 1932 SC.201. Lord Sands at p.214). But this is not a course which is adopted in practice.

2.11 Action by other officials or bodies

2.11.1 With the possible exception of the Lord Advocate already noticed there appear to be no common law provisions for action in matters of public interest or group interest by any official or body acting on behalf of or in the interest of, the public or the group. Some statutory instances however exist. Thus for example local authorities may institute legal proceedings when they are 'expedient for the promotion or protection of the interests of the inhabitants of their area' (section 189 of the Local Government (Scotland) Act 1973). Under section 146 of the Public Health (Scotland) Act 1897 a local authority may petition the sheriff for the removal of a nuisance. There are statutory powers for enforcement related to their respective areas of responsibility given for example to the Director-General of Fair Trading (Fair Trading Act 1973 section 35 et seq.) and the Pharmaceutical Society of Great Britain (Medicines Act 1988). The Equal Opportunities Commission (Sex Discrimination Act 1975 section 75) and the Commission for Racial Equality (Race Relations Act 1976 section 66) are empowered to advise and arrange for the advice from and representation by a solicitor or counsel. In the context of European Law the Commission acts in something of a representative capacity when a complaint is lodged. A similar approach is taken by the Commission of Human Rights.

2.11.2 There are distinct attractions in the bringing of grievances before the Court by a body acting on behalf of the aggrieved individual, or in some respects in a representative capacity. The whole financial burden may be taken over by the representative. The individual is not involved in any elaborate technicalities of procedure. But the decision to proceed and to persist in the proceedings may well be taken away from the individual so that he loses the direct control of the action.

2.11.3 Further consideration of this type of remedy is however, strictly speaking, outside the scope of the present study. This study is properly concerned with situations when the parties to the litigation have a title and interest to sue the action. It must however be noticed that action by a body not personally involved in a cause certainly deserves serious consideration as a means of resolving grievances without directly involving the persons directly affected which might with advantage be introduced into Scotland. In a number of foreign jurisdictions consumer associations or bodies of that kind may competently raise proceedings in the interest of the public or of certain members of the public of a declaratory or preventative character. This matter is raised again in Chapter 10 below.
CHAPTER THREE

THE NEED FOR ANOTHER PROCEDURE

3.1 It has been shown that there already exists in Scottish practice and procedure a variety of ways in which the Courts can entertain matters of group interest. But it is also evident that there are certain procedural restraints on the extent to which such remedies may be sought. Some of these have been noted in the preceding Chapter.

3.2 Particular note however may be made of the problems of the application of a single decision. In many instances a defender will be prepared to apply the decision reached in one case to other similar cases. He may indeed bind himself to do so as in some test cases. Even without such a formality, where there is a risk of further litigation the probability in practice will be that he will proceed to settle all similar claims. This is also likely to occur where there has been considerable publicity about the case or the event which gave rise to it. Events such as the Ibrox crowd disaster. (Doughan v Rangers F.C. 1974 SLT (Sh.Ct.) 34) and cases such as Congreve v Home Office (1976) 1 All E.R.697 concerning the fee for T.V. licences provide examples of the kind of situation where it would be expected that the defender would secure that the decision in the particular case was applied to all other interested persons.

3.3 But there is no guarantee or certainty that the single decision will be applied universally and where the matter is not notorious or if there is no other pressure on the defender to generalise its application those who have not taken proceedings may become involved in unnecessary trouble or expense or even lose out altogether. In Electrolux Ltd. v Hutchinson & Others 1977 I.C.R.252 the claims by 6 women for equal pay were upheld by the Employment Appeal Tribunal. A further 122 women in the same grade had lodged claims and more were likely. But the company did not immediately apply the decision to any of these other cases and but for the intervention of the Equal Opportunities Commission further legal action might have been necessary.

3.4 Problems can of course arise in the application of the one case where possible points of distinction can be found in the others which it is claimed to govern and the defenders' difficulty in such a situation has to be recognised. In the area of consumer affairs however, such distinctions are less likely to occur. An example may be found in the cases where holidays have failed to live up to the claims of the brochure and damages have been awarded to disappointed holiday makers, (e.g. Jarvis v Swans Tours (1973) 1QB 233). In such cases there are likely to
be many people who suffered and while the defender might, perhaps because of the publicity or in the interest of his own commercial goodwill voluntarily, compensate all his customers whether or not they have complained there is at the very lowest no guarantee that compensation will be given unless a claim is made or even litigation commenced. It is rarely that an aggrieved consumer can sit back in confidence that he will receive redress without litigation and not find that his claim has become time-barred and unenforceable.

3.5 In addition to shortcomings in procedure there are certain other factors which at present may inhibit a ready access to the Courts in cases where group interests are involved.

3.6 One evident deterrent from litigation is the cost of it or the fear of the potential cost. This is of particular significance where the cost involved is disproportionate to the size of the claim. Thus the damage suffered in individual cases may be relatively small, for example where contaminated food either purchased at a shop and consumed at home or served in a restaurant only causes a mild stomach upset. Or again the matter may involve a costly technical investigation although the damage suffered is small. Examples could be found in cases of mild damage suffered through suspected pollution from a factory or other source, or in the case of tenants complaining of dampness the solution to which may or may not be the responsibility of the landlord. Legal Aid endeavours to overcome the barrier of expense which might deter an impoverished litigant but does not provide a complete solution to the problem.

3.7 Another difficulty may be found in the possibility that the members of the group may well be relatively inarticulate and shy of attempting to express their grievance. They may well have a fear of the machinery and procedure of the law and would prefer to accept injustice rather than become involved in processes which may seem incomprehensible to them. Furthermore, where there are many people sharing a common or similar grievance, even if there is one of them who is prepared to organise or lead a united effort with a view to seeking some remedy, his attempts to find support and assistance from the others of the group may meet with reluctance or apathy so that he loses his enthusiasm and through lack of support adopts the acquiescence of the others. There are not many people who are prepared to embark on what may seem like a crusade with little or nothing in the way of active support. Moreover in some cases there may even be a fear of victimisation, that if a complaint is pressed, job or promotion prospects may be prejudiced. A procedure by way of class action may provide a sense of solidarity and confidence which would enable justice to be effected where at present timidity or fear deter action. Equality in litigation may be restored.
3.8 Another factor which relates to the present failure to pursue judicial remedies is an ignorance of the rights which an aggrieved person may have. The maxim "Ignorance of the law is no excuse" rings more and more harshly in the ears of a society overflowing with statutory orders and enactments. Law Centres, Advice Bureaux and the practising profession do much to advise and encourage the pursuit of justified claims for redress but they cannot hope to deal with the cases where the individual does not even appreciate that it would be worthwhile seeking such advice or is unwilling to do so. As the Royal Commission on Legal Services in Scotland has recently stated: "There is widespread ignorance about the individual's rights and duties under the law and about the range of legal services available, and of the ways in which these services can help the individual to find solutions to his problems" (Report, Cmdn. 7846, para. 6 (1)). A class action will not by itself overcome this ignorance, but members of the class who are ignorant of their rights and are accordingly not involved in the initiation of the action will nevertheless be able to have the benefit of it.

3.9 Where for reasons such as those just noticed no action is taken it is probable that actions which are wrongful or even unlawful may continue unchecked. For example, defective goods will continue to be supplied; or a landlord will continue to charge for repairs which are properly his responsibility. Unsafe practices may continue where it is found cheaper to buy off the few who complain than change an industrial process. A manufacturer may prefer to allow his customers to remain in ignorance of a defect in his goods because the cost of recall for repair and the loss of commercial reputation is believed to be too high. A company may prefer to risk individual claims than to recall certain defective articles for repair. The introduction of class actions might encourage the use of safer working practices, better quality control and increased research before marketing of new products.
CHAPTER FOUR

OTHER JURISDICTIONS

4.1 It is with a view to meeting the difficulties mentioned in the preceding Chapter or at least to go some way to mitigate them that a form of class action is suggested. What is meant by this expression was explained in Chapter 1. Before discussing the scope of what might be involved in Scotland by such an innovation it may be useful to comment briefly on the developments achieved or discussed in certain other jurisdictions.

4.2 England

There is at present no class action procedure as such in England but significant use is made of the representative action which has already been noted (para 2.7.2 supra). From what has been said there it can be noticed that the development appears to be towards extending the scope of the representative action, although the development so far has only been in the field of tort not in breach of contract. Nevertheless such further steps as may be required to achieve a class action procedure may more readily be achieved than in Scotland where the idea involves a greater novelty. A study is presently underway in England into the possible introduction of class actions there.

4.3 The United States of America

4.3.1 The class action is most fully established in the United States where it has been much praised as a means of asserting the rights of the ordinary person against the powerful (the business corporation or big government), and on the other hand much criticised as being cumbersome, expensive and ruinous for many defendants. It is also alleged that threats of class actions lead defendants to settle actions where the claims in fact had little substance.

4.3.2 The class action appears to have become increasingly important in the United States after 1966 when a system of ‘opting-in’ to the action, even after judgement, was replaced by the present system of ‘opting-out’. Procedure is governed by Rule 23 of the Federal Rules of Civil Procedure. It should be noted that several States have their own class action procedure which differs from that in the Federal Rules. A consideration of the differences is inappropriate here.

4.3.3 A preliminary hearing is held to decide whether or not the
action should be certified as a class action. The following must be shown:

1. that the class is so numerous that joinder of all members is impracticable
2. that there are questions of law and fact common to the class
3. that the claims or defences of the representatives are typical of the claims or defences of the class
4. that the representative parties will fairly and adequately protect the interests of the class.

In addition the court must hold that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

These conditions have given rise to a considerable amount of procedural wrangling at this preliminary stage of the case. Supporters of class actions say that in some cases judges who do not like the class action have failed to prevent the delaying tactics of defendants. It is clear that it is important that preliminary procedures are clear and straightforward.

4.3.4 When the action has been certified as a class action, the court rules on how class members are to be given notice. Class members have an opportunity to opt out of the action, which is then not binding upon them. Notice has given rise to particular problems in the United States because it has been held that the constitutional requirement of due process means that all class members must be given an opportunity to be heard. In the case of Eisen v Carlisle and Jacquelin individual notice to all class members was ordered, with the cost to be borne by the individual plaintiff. The cost of this far exceeded the individual plaintiff’s claim.

Despite the publicity given to the problem cases, such as Eisen, the class action has been successfully used in the United States. Notice has been given in many cases by public advertisement, in newspapers and on television, for instance.

4.3.5 Problems have arisen in cases where legislation, partly to encourage individuals to take legal action, has laid down a minimum amount to be paid as damages to a successful plaintiff. For instance the Truth in Lending Act (similar to our Consumer Credit Act) guaranteed individuals suing under the Act a minimum sum of $100 if their claim was successful. Where class actions were brought, the multiplication of these $100 sums could add up to a significant amount when the breach of the Act had been technical.

However, in 1974 the Act was amended so that the $100 minimum did
not apply in class actions, and in addition a maximum sum was set for damages in such actions under this Act.

4.3.6 Some commentators now argue that many of the "teething" problems of the class action have been overcome. Some are a result of constitutional requirements in the United States which would not apply elsewhere. Others are related to the problems of financing class actions in a country without legal aid, and where it is usual for each side to pay its own legal costs, regardless of who wins. It is fairly common for lawyers to undertake cases on the basis of receiving a proportion of the damages if successful, and nothing if the case fails. This practice is not allowed in Britain.

It does appear that the court itself is required to play a more active role in the management of the case than is usual in legal actions either in the U.S. or in Scotland. The court must be satisfied as to the preliminary conditions, and may well be involved both in the giving of notice, and in the distribution of damages after the action.

4.3.7 Suggestions have been made in the United States that the class action procedure should be altered. In 1979 a Bill was introduced to Congress, which would create two types of action —

(1) a "public action". This would be available where at least 200 people had been injured by a breach of the law, and where the individual claims were for $300 or less. This action could be started either by an individual claimant, or by the Government. The claim would be taken as a single one, and no question of individual notice or opting out would arise. Once breach of the law had been proved, the court would assess the total amount of damages due. This sum would be paid into the Administrative Office of the U.S. Courts, which would make arrangements for distributing it to claimants.

(2) a "class compensatory action", which would be available where at least 40 people have claims of more than $300. This would be the existing "class action" with some modifications of the procedure. Instead of having to prove that the common question "predominate" it would be necessary only to show that questions of law and fact were "substantially" common. In addition to the certification process a preliminary hearing would be held on the merits of the claim.

This Bill has not yet become law in the United States.

4.4 Canada

4.4.1 In Canada the English "representative action" is in use. As in England the representative action has been held not to be available when separate damages are being claimed by members of the class nor where the claims of class members arise out of separate contracts with the defendant.
However, despite these restrictions, it has been possible to use the representative action to obtain redress for groups. In *Chastain v British Columbian Hydro and Power Authority* (1973) 32 DLR (3d) 443 a representative action was brought on behalf of those customers of the Hydro Board who had been charged security deposits. As in Britain the fuel board charged such deposits to customers thought to be poor credit risks. The power to charge deposits was contained in regulations, and the representative plaintiffs were claiming that the regulations were invalid. The claim was upheld by the court, and the Board was ordered to refund all deposits.

In *Shaw v Real Estate Board of Greater Vancouver* (1973) 36 DLR (3d) 250, a group of real estate salesmen brought a representative action against a real estate board, which, it was claimed, had illegally taken part of their commission. The salesmen won their case and obtained repayment of the commission.

4.4.2 Thus in its present form the Canadian representative action is available for use by groups affected by illegal action by statutory bodies. Financial compensation can be obtained. However, many consumer disputes involve separate contracts. In Canada an action was brought by a group of consumers against General Motors, where the restrictions on the action were got round by each plaintiff claiming $1000 from the company. This sum represented each car's loss in market value.

4.4.3 Legislation has been proposed in Canada to introduce a class action as part of the Government's Competition Policy. Where a firm committed a criminal offence under the Competition Policy Law, or failed to obey an order of the Competition Board, it could be sued by any person who suffered loss or damage as a result. Either an individual consumer, or a 'class' of consumers would be able to bring an action, even where each member of the class had a separate contract.

Under the proposed legislation, class actions would be limited to cases of misleading advertising or price-fixing (which are covered by the Canadian Competition Act). Class actions would not be possible where, for instance, products were defective. The class action could only be brought after the Government had taken its own action against the firm.

4.4.4 The suggested procedure was that there would be a preliminary hearing to decide whether a 'class' existed, whether the questions common to all class members predominate over questions affecting individuals and whether the class action was manageable. Finally the court would have to be satisfied that the class action was the best means of settling the dispute and that the plaintiff could represent fairly and adequately the interests of the class. Class members could opt out,
and not be bound by the decision, and the court would decide whether and how notice should be given.

Where the court ruled that the class action would be unmanageable, the proposed legislation made provision for a 'suitable class action' to be launched by a public official, the Competition Policy Advocate. In this case, the money recovered would go to the government, not to class members.

4.4.5 One Canadian province, British Columbia, specifically authorises class actions. Under their Trade Practices Act, the Director of Trade Practices or any consumer, may bring an action on his own behalf or on behalf of a designated class of consumers in the province. The court may declare an act or practice deceptive or 'unconscionable' and may grant an injunction to stop it. Any money or property unlawfully acquired may be restored by court order. It is not possible, however, to claim damages.

It should be noted that class actions are not possible in Quebec, which is a civil law jurisdiction.

4.5 Australia

4.5.1 The Representative Action already exists in Australian law, but it appears not to have been used for group actions against public authorities in the way it has been in Canada.

4.5.2 In 1977 the Law Reform Committee of South Australia issued a report recommending legislation to introduce a class action procedure. This suggested that a preliminary hearing would be held to certify the action as a class action once the court was satisfied that:
(1) common questions of law or fact predominated over questions affecting individuals.
(2) the action would be manageable.
and (3) the action appeared to have merit.

The court would decide whether or not notice should be given to class members, and if so how it should be given. Members of the class would be able to opt out of the action, and would not then be bound by the result. If a successful class action involved a money payment by the defendant, the total sum would be paid into court and efforts made to pay out to individual class members. However, any surplus would be paid into a special fund to be used to pay the legal expenses of those trying to bring class actions.

4.5.3 In June 1979 the Law Reform Commission (looking at federal law) published a discussion paper on class actions. This suggested that a class action should be allowed when:
(1) the class is numerous
(2) common questions of law or fact predominate over questions affecting individuals
(3) the representative will fairly and adequately represent the class
(4) the action is manageable.

The Commission left open the issue of whether class members should be expected to opt-in or opt-out, but considered that the question of notice could be left to the discretion of the court. Where damages were to be claimed, individual assessment of each claim would normally be required. The Commission suggested that where there was a large, or unidentified class damages might be assessed for the class as a whole, or a ‘fluid recovery’ technique used. The Commission foresaw problems if the normal costs rules applied, that is that the loser pays the legal costs of the winner. It therefore suggested that in class actions for damages each side should pay its own costs, and that in addition plaintiffs ‘in need’ should be able to apply for financial assistance to a Class Actions Fund. This fund would be made up from any surpluses arising in cases where the defendant had been ordered to pay a fixed amount into court, but less than the full amount had been claimed by individual class members.

4.5.4 These two reports have apparently aroused considerable controversy in Australia. The Law Reform Commission plans a final report for the end of 1981. However, it seems clear from an article published by Bruce Debelle, a member of the Commission, in August 1980 (Australian Law Journal p. 508) that what the Commission now has in mind is a fairly modest reform. This would in effect be an extension and modification of the representative action to allow actions for damages and to cover the situation where there are separate contracts. In the article Debelle suggests that matters both of notice and opting-in or opting-out should be left up to the discretion of the court. The financing of these actions is seen as an important issue. The Commission now appears to be considering alteration of the normal costs rule only where —
(1) at a preliminary hearing the court is satisfied that the action is being brought in good faith, and the claim appears to have merit.
or
(2) the court is satisfied that matters of public interest were involved.

4.5.5 As a result of the response to the discussion paper, the Commission appears to be against ‘fluid recovery’ techniques, and to favour individual compensation whenever possible. However, class-wide assessment of damages would be acceptable ‘where individual loss can be worked out arithmetically’.

Debelle suggests that cases where individual amounts of damages would be very small, or where individual claims cannot be proved, or where the class is unidentified or where class members would be
unlikely to claim, are not suitable for the class action. Instead he puts forward the idea that criminal enforcement could be encouraged in such circumstances, with fines being increased to take account of the unjustified enrichment which can arise from unlawful dealing.

It should be noted that with these proposals on damages, the scope for a Class Actions Fund would be fairly small.

4.6 Japan

4.6.1 Japanese law was developed from German law, but has also come under the influence of American law since World War II. There is no class action procedure at present, but the possibility has been discussed by Government agencies and political parties.

4.6.2 There is provision in civil procedure for one member of a group to act as plaintiff for the whole group, but all members of the group must be identified and all must give consent to the representation.

4.6.3 Actions involving damage claims by a large number of people have been brought in Japan (e.g. the ‘Minimata Disease’ cases where chemical pollution caused death and disability) but have had to take the form of several multi-party suits.

4.7 Europe

4.7.1 Continental jurisdictions have in the main rejected class actions and sought to stimulate litigation by relaxing the rules of standing both as to access to administrative courts and by way of statutory authorisation for some specified groups to facilitate action in defence of the collective interests fostered by these groups.

4.7.2 France

French law provides two actions for breach of the criminal law, a public action by the state and a private action by the victim for damages. The private action is available to anyone who personally suffers damage directly from such violation. It may be brought separately in the civil court or jointly with the public action in the criminal court. Indeed the injured party may initiate action in the criminal courts even where the prosecuting authorities have not acted. The advantages to the victim of taking action in the criminal courts are a reduced risk of paying the defendant’s costs and the more rigorous investigative techniques at the court’s disposal.

Groups are, it seems, viewed with some disfavour by the courts when they seek to attach themselves to the criminal process by way of the action civile. Because the relevant provision of the code contemplates direct and personal injury there has been considerable doubt as to whether an association can pursue an action civile where such injury as
has occurred is to its members rather than to itself. The Civil Chamber of the Court of Cassation is less unsympathetic than the Criminal Chamber which has been opposed to granting standing in such circumstances. Following a landmark decision of the combined Chambers of the Court of Cassation that a trade union had standing to protect the collective interest of the trade represented, Art. 411-1 of the Labour Code granted all rights reserved to the partie civile in relation to acts which directly or indirectly prejudiced the interest of the trade represented. French courts have interpreted this to exclude actions either wholly in the public interest or wholly in the interest of an individual member.

4.7.3 Whereas the courts have been uneasy with the standing of groups, the legislature has pressed ahead to grant it in particular cases, including such authorisations in various regulatory laws, presumably in the belief that such groups contribute to law enforcement. Not only trade unions, but groups opposing racialism or prostitution, groups seeking to preserve the environment or to protect consumers and, speaking rather broadly, the French equivalents of Alcoholics Anonymous and the R.S.P.C.A., have been granted standing. The standard legislative techniques are either to define the type of group or to permit action where the harm to the general objectives of the group is not remote from the action complained of. Thus any group having charter objectives seeking to prevent prostitution may take action in the event of any violation of the penal code relating to 'white slave traffic' which 'have prejudiced directly or indirectly the mission which it fulfills'. Courts have frequently granted such groups damages where the violation complained of threatens their collective interest.

4.7.4 The Loi Royer states that groups whose explicit charter objective is to defend the interests of consumers may, if approved for that purpose (an administrative process), bring action with respect to acts causing harm, directly or indirectly to the collective interest of consumers. The criteria for approval are, first, existence for more than one year; secondly, representativeness which, so far as nationwide groups are concerned, involves having at least 10,000 members and, thirdly, the nature of their activities which should include the production and distribution of consumer information, giving advice and holding meetings. Approximately ten national and fifty local groups have been approved. The Loi Royer overturned previous court decisions denying consumer groups the action civile in cases of improper pricing and sales practices, as being solely a matter of public interest for public prosecution by the state and not merely a matter of the collective interests of the groups. A cluster of laws in 1975, 1976 and 1979 concerning waste disposal, the protection of nature and the reform of the Urban Code granted similar status to environmentalist groups, though, in sharp contrast to the Loi Royer, the standing granted is expressly limited to violations specified in these laws.
4.7.5 In civil actions there appear to be no limits on joining many claims arising out of one wrongful act in one action. However, French law applies the rule 'no suit by attorney' rigorously thus excluding a representative action on the English model. Thus while an association may sue for a wrongful act which injures all its members it cannot normally sue where only some members are injured. The Civil Chamber of the Court of Cassation is willing in some such cases to detect injury to the collective interest of the associations in such circumstances, thereby allowing an action to proceed.

4.7.6 In France the administrative courts are quite separate and independent. At first instance there are tribunaux administratifs and the ultimate court of appeal is the Conseil d'Etat. In recent times the Conseil d'Etat has liberalised the rules of standing, moving away from a requirement of a direct and personal interest. But liberal as the rules have become the Conseil d'Etat has stopped short of permitting an unrestricted actio popularis. Yet the requirement is extremely flexible. The position with groups is similar; if there is some connection between the collective interest of the group and the illegality complained of, standing will normally be recognised. Thus an association of property owners and ratepayers had standing to litigate a municipal authority's failure to order a streetcar company to resume a service it had discontinued.

4.7.7 Overall, developments in France facilitate defence of the collective interest of groups and associations and grant groups devoted to fostering diffuse or fragmented interests a particular status. On the other hand, the procedures do not appear to allow an individual to take the initiative in bringing a group's resources into the litigation. The group must, generally speaking, already be in existence, and must be administratively approved. Further, it appears that the groups are not entitled to recover damages suffered by their members in their own right without a formal assignment.

4.7.8 Germany

In Germany, a person injured by violations of the criminal law may intervene in a number of ways. Some of these authorise private prosecution without reference to the public prosecutor. As in England, the right of private prosecution is not much used and the courts appear to discourage it. It relates, in any event, to quite minor crimes. A claim for compensation is available to the victim of any crime under a procedure known as Adhäsionprozess whereby he may become involved in the criminal process. This contemplates only material interests, operates only in the event of a conviction and the court may refuse to decide the claim if this would significantly delay disposition of the criminal action. This is indeed likely to be so. There is also a requirement that the victim be notified. This can be quite onerous where many individuals have suffered from one violation. It appears that the process is little used.
4.7.9 Like France, Germany has adopted the technique of statutory authorisation, granting standing to certain groups to sue for injunctive relief in the civil courts where individual litigation insufficiently protects the public against violations of the law. The Law Against Unfair Competition, 1965 granted consumer groups standing to seek injunctions restraining unfair business practices. This experiment is thought to have had a beneficial effect. There are already many reported decisions under this law and standard terms have been widely revised.

4.7.10 Since only injunctive relief is involved, consumer groups in Germany cannot sue for damages on behalf of individual consumers injured by violations of the law. However, proposals, reaching at least the stage of a Bill drafted by the Federal Ministry of Justice, seek to unite these liberal rules as to standing with a power to sue for damages. Under the scheme the purchasers relying on untrue statements by the seller would have an action for damages. Such claims would be assigned to a consumer group which could enforce an aggregate claim against the seller.

Where the action succeeds, the proceeds would be disbursed to the assignors, not all of whom need be members of the consumer group. The radical union of the merits of the class action and the Verbandsklagen (as the statutorily authorised group action is known) has occasioned much controversy and resistance. Nonetheless the proposals imply an awareness of the limitations of the current German procedures and of the merits of the class action.

4.7.11 As regards challenges to administrative procedures the German position appears to be that an individual has standing where a legally protected interest has been infringed. Despite much argument in favour of a liberalisation of the rules, particularly with a view to permitting associations to challenge administrative decisions relating to the environment, wild-life, licensing of drugs and preservation of buildings of architectural or historical interest, little progress has been made. In many such areas the interest is diffuse and fragmented. Few are the individuals who have standing to challenge; and fewer still are ready to undertake the expense and risks of litigation. Traditional rules of standing which appear still to hold sway in Germany support individual economic or proprietary interests but prove unsuitable for the protection of interests which concern environmentalists, nature-lovers and other such associations. Academic comment in Germany supports the extension of the Verbandsklagen process to equip associations to defend such interests, subject to some qualification of the groups concerned such as that established in France relating to the period of existence of the group, its representativeness and the nature of its activities.
CHAPTER FIVE

DANGERS AND DISADVANTAGES

5.1 No discussion of class actions would be complete without a recognition of the possible dangers and disadvantages of the introduction of such a procedure. Some of these may now be noted and considered.

5.2 One danger is plainly that of abuse. Some fear that if such a form of action was introduced manufacturers and suppliers would be faced with enormous claims of no substance and that time and expense would be wasted in dealing with frivolous and worthless litigation. Clearly the risk of abuse is something that would require to be obviated. One solution is to require an authority from the Court before an action can acquire the status of a class action. Such a step would enable the potential defender to object to such authorisation and for the Court to determine that at least prima facie the action is of substance and not frivolous.

5.3 Another objection is that class actions are or would be unmanageable. This is very largely a procedural problem. Much would depend upon the definition of the class in question. Much also depends upon the nature of the remedy which is being sought. If the matter is one where at least initially only a declarator or an interdict is sought then there should be no significant problem of management. It is perhaps rather in relation to awards of damages or individual remedies that the problems may occur.

Consideration of this matter will be taken up later in this paper and a solution suggested.

5.4 It may also be suggested that class actions would only be effective in countries where lawyers are permitted to have a financial stake in the litigation, for example by way of contingency fees in the U.S.A., but would be ineffective in Scotland where no such financial stake is allowed. How the expenses should be met is a question which deserves special consideration and is discussed in a separate chapter below. It appears that class actions are receiving serious consideration in jurisdictions where fees are not regularly charged on a contingency basis and there is no good reason why they should necessarily be linked to that system of expenses.

5.5 Another fear is that it would lead to suppliers or manufacturers of goods increasing their prices to offset anticipated claims against them.
It is however open to question how real this fear truly is. Presumably it would only be likely to occur where the situation was one where it was seriously considered that a liability would be established. But if such cases do in fact exist then it would seem that those who oppose class actions on this ground would prefer to see the continuation of a situation where suppliers and manufacturers are acting in breach of their duties and obligations.
CHAPTER SIX
THE PARTIES AND
THE SUBJECT MATTER

6.1 The Parties

6.1.1 The procedure of a class action is designed to ease the problem of access to justice in cases where a number of individuals are aggrieved by wrongful acts which spring from a common origin and have to some extent affected them all. On a strict analysis there may be one wrongful act whereby all have suffered or as many wrongful acts as there are individuals who have suffered. The class action seeks to cover both of such extremes. The procedure should thus be competent in situations where joint action is not at present recognised. Where many people who have bought a particular mass-produced article which is defective have a claim against the manufacturer their rights of action may be in law separate, being based on the distinct contracts in which each of them was involved. But such a case should be open to a class action procedure just as much as the case of the group who have suffered injury through the one negligent act of a common defender.

6.1.2 It is also envisaged that a class could be sued by a procedure developed along lines similar to that suggested for actions brought on behalf of a class. This possibility is not pursued in further depth in this paper but it is recognised as a matter deserving further study.

6.2 Subject Matter of the Action

The subject matter of the class action will include the whole range of rights and duties which are the subject matter of litigation by individuals where the issue arises in a context affecting a plurality of individuals. The class action does not involve the creation of new rights and liabilities or matters of substantive law. Essentially the area of the present study is one of procedure.

6.3 Definition of the Class

6.3.1 The action would be raised by one or more members of the class. Title and interest will be determined by the ordinary rules. The first step in the action would be to have its status as a class action affirmed and at the same time the class defined. Its status as a class action could be significant in connection with the matter of expenses, considered in a later chapter, and also for the effect of any judgement pronounced in the action. The definition of the class is also obviously of relevance and importance in connection with the identification of the persons who could be affected by the action. In general the intention
would be that all members of the class would be bound by the decision in the class action. How far individuals might be excepted from this rule is considered later in this chapter. Identification of the members of the class is also of relevance in connection with awards to be made to them in the event of success.

6.3.2 If individual awards of damages are contemplated, the class should not be so large as to be unmanageable. An example of what has to be avoided can be found in the attempt made in the American case of Heart Disease Research Foundation v General Motors Corporation (1872 3ERC 1760) to claim damages on behalf of 125 million residents of metropolitan areas of the United States. There would have been enormous difficulties in processing so many claims for damages had the attempt succeeded.

6.3.3 On the other hand it is undesirable to permit only part of a class with a common interest to constitute a class for the purposes of an action. All those who have a like interest should be included with a view to the avoidance of further litigation.

6.3.4 There will be some cases in which the Court at one and the same time may make a decision on liability and redress but there will be others in which the Court will require to draw a distinction between the finding of liability and the award of redress in whatever form it might take. In the latter case it will be desirable to split the procedure between a consideration of the merits of the case and the giving of the remedy. Such a course has long been provided for in Scotland in the Court of Session in Rule of Court 108 but seldom if ever adopted. That Rule permits the Court in any action with pecuniary conclusions to separate the proof on the merits from proof on the question of the amount for which decree should be pronounced. This kind of separation can be seen in England in the representative action with a recent example in Prudential Assurance Co. v Newman Industries (1978) 3 All E.R.507.

6.3.5 If such a split procedure were involved then initially the class action may be presented without such detailed investigation of the precise scope or identification of the class which further redress would require. Procedurally as a distinct stage thereafter, an application could be permitted whereby appropriate redress could be obtained. Further intimation would at that stage then become desirable and this matter is discussed in the next chapter.

6.3.6 For the purposes then of raising a class action it is not necessary that the precise number or identity of the individuals comprising the class should be ascertained. The essential is that they should each have a similar interest in the subject matter of the action. The interest need not be identical. In cases of defective goods manufactured and supplied to the public the individual consumers will in each case have a
distinct contractual relationship with the supplier and there will be no absolute common interest. But they will each have a similar interest in having it established that the defect was negligent. The class in such a case would be all persons who had purchased the article in question new. The class in such a case would be extensive. On the other hand a relatively small class could occur in a case where a number of individuals have suffered physical injury by the same accident, such as the collapse of a building or a collision with a bus. At the greatest extreme the class could consist of all members of the public where what is in issue is a matter which affects all members of the public as such—for example the existence of a public right of way or the legality of some proceeding which affects the public.

6.3.7 One combination which would be included is the class of persons entitled to sue for the death of a relative. Procedure already exists for this in the Damages (Scotland) Act 1976 but this has not proved satisfactory (see Chapter 2.6 above). Treated as a Class Action the problem may be open to a more satisfactory solution because the matter of intimation would be for the discretion of the Court.

6.3.8 In one major respect Class Actions cut across one of the basic traditions of present Court procedures. One essential feature of any case at present is that it is between identified and ascertained individuals. Such was the old rule of the Chancery Court in England until, for the sake of convenience, it was relaxed to permit the representative suit (see Lord Macnaughten in Duke of Bedford v Ellis (1901) A.C. at p. 81). There are some circumstances in Scotland where the Court will act so as to bind persons unascertained or unidentified—for example in applications under Section 1(1) of the Trust (Scotland) Act 1961 a binding approval to a variation of trust can be given on behalf of persons yet to be born. But the whole tradition of Scottish litigation is that it is between specific persons who are involved in the process.

6.3.9 In sharp contrast a Class Action does not necessarily require all the persons interested and affected by it to be identified and ascertained individuals. Where the matter with which it is concerned gives rise to individual claims then at least at some stage in the course of the action, if not from its commencement, elements of the traditional practice may occur. But in its essence it is a procedure for resolving before the Court an issue of legal right or legal duty or obligation which relates to a plurality of individuals without necessarily involving all the individuals interested in the matter. The competency of such a procedure depends on the nature of the case and the circumstances rather than on questions of right or title to sue.

6.3.10 Careful consideration of the definition of the class for the purposes of the action is clearly essential. In principle it is suggested
that a wide approach to the problem should be adopted. The community of interest should not be determined by too precise or fine a rule if the procedure is to become a realistic and useful vehicle in litigation. The ‘common interest’ which was long ago recognised in England as sufficient for the competency of the representative action there (c.f. Duke of Bedford v Ellis (1901) A.C. 1) points the way towards the kind of definition which would be appropriate for a class action. But to limit the competence of class actions in the field of contract to cases where there is a common contract, as is the rule for the English representative action (Markt v Knight (1910) 2 K.B. 1021) would be unduly restrictive. Cases where the contract is made by one person for the group would survive such a rule such as the case where one individual books a meal in a restaurant for a group and all suffer food poisoning, or one individual books a coach whose failure to arrive causes loss to the whole group (c.f. Woodar v Wimpey (1980) 1 All E.R.571, 576) but contracts for the supply of goods or services to individual customers are normally made separately by each customer. It would be desirable to enable such individuals to sue together even although technically their contractual relationships with the defender are distinct.

6.3.11 The common interest may fall to be determined in terms of the entitlement to redress. In Naken v General Motors of Canada Ltd. (1979), 21 Ontario Reports 780 the plaintiffs sued on behalf of themselves and all other persons who had purchased new motor vehicles of a certain make and model manufactured and marketed by the defendants. They claimed a sum of damages for each member of the class in respect of the depreciation in resale value of each vehicle by virtue of it not being ‘durable, tough, and reliable’ as was expressly warranted in the defendants’ printed advertisements. The claim was struck out because the alleged class lacked the element of commonality. It included purchasers who had not seen the advertisements as well as those who had. So the description of the class was amended to refer only to those purchasers who saw the advertisement of the defendants and as a result had purchased a new car from a dealer.

6.3.12 The test of commonality must remain a matter of circumstances. Where the contractual relationships are separate some care will be required to ensure that there is a sufficiency of similarity between the contracts to make it right to determine the issue in one process. When standard forms of contract are in use such an exercise may not be very difficult. The Court can call on the assistance of both sides in determining the proper limits of the class in any given case and it is thought that the resolution of the problem can safely be left there as a matter which essentially has to be considered in the circumstances of each case. Assistance in relation to the relevant guidelines could perhaps be found from the practice of other jurisdictions (see Chapter 4) but a prescription of formal guidelines could run the risk of being unduly restrictive.
6.4 Procedure

6.4.1 From what has been said it is clear that some form of preliminary application is required whereby the matter can be raised before the Court and the matters of status of the action and definition of the class determined. The simplest course is probably for the action to be served and a motion then enrolled for its certification as a class action. The defender will then have an opportunity of appearing at the outset to oppose the certification if he wishes; and if the Court decides to certify there can also be room for discussion with the representatives of both parties upon the problem of definition of and intimation to the class. It would be useful to have the opportunity for obtaining the guidance of an appeal court on questions relating to the granting or refusal of certification so that the original decision by the Court should be open to appeal. The danger might arise of the use of an appeal procedure as a delaying tactic but if an appeal was only competent with leave of the Court the risk of abuse should be avoided. It is accordingly suggested that an appeal with leave should be provided.

6.4.2 If the action is certified as a class action by the Court and the class has been defined then procedurally it could continue substantially as an ordinary action under present practice. Consideration however might be given to expediting the process of adjustment so that the course of the action is not unacceptably slow.

6.5 Opting-In and Opting-Out

6.5.1 One question remains to be considered in connection with the matter of definition of the parties to the action and that is the one of opting-in and opting-out. This question relates principally to the matter of res judicata and the problem of how far individuals are or are not bound by the decision in a class action. At the one extreme it may be thought that no one should be bound by the action unless they are a conscious and willing party to it. On that approach (opting-in) only those who give a positive indication of their wish to be party to the action are bound by it and indeed benefit by it. At the other extreme it may be thought that all members of the class should be bound by the action unless they take a positive step to disassociate themselves from it (opting-out).

6.5.2 Those who favour a requirement for opting-in will point to the unfairness of imposing on people without their consent a litigation and a decision which affects them and may, if the action fails, involve them in the loss of a possible claim. A problem also arises in connection with liability for expenses in the event of failure. On the other hand if opting-in is made a pre-requisite for the class action then the whole procedure becomes of little more worth than a means of obtaining advertisement for potential litigants. If the class action is only available to people who choose to sue together very much of its purpose is lost. If, as has
already been stated, the class may at least at the outset be composed of a number of people as yet unascertained then opting-in cannot be a requirement. As regards expenses it would not only be unreasonable but probably impractical to make all members of the class in an unsuccessful class action liable for the expenses. If that possibility is removed (as we argue it should be) then there is less argument for a requirement of opting-in. Expenses are considered in Chapter Eight.

6.5.3 On the other hand it does not appear to be fair to compel people to be involved in litigation against their wishes or to be bound by a judgement when they have not had and could not reasonably have had knowledge of the action. In practice perhaps few will wish to opt out of an action. Nevertheless it is thought that the procedure should allow for that possibility.

6.5.4 If opting-out then is to be permitted the stage or stages at which it could be achieved require to be considered. In so far as it is concerned with *res judicata* it is of course obvious that no one can be bound by a decision until the decision has been pronounced. Different considerations may arise before judgement from those arising after judgement. Before the case is decided the effect of anyone opting out is to have themselves excluded from the class and so no longer represented by the pursuers. If they are no longer a party then they are not bound by a decision. It is thought that any member of the class should have the right to have himself excluded from the class before any decree is pronounced on the merits of the case. No reason need be stated because this should in our view, be a matter of right.

6.5.5 After decree has been pronounced however the decree will apply to and bind every member of the class as defined. It will stand as *res judicata* barring any member from litigating against the same defender on the same subject matter. But to allow for the possible case of unfairness, where for example by some excuseable ignorance one who is a member of the class but has known nothing of the action wishes to sue separately, then it is thought that by an exercise of discretion by the Court he should be allowed to do so. This would not be a matter of right but of discretion in the circumstances of the case. The matter would probably arise after a class action had failed but it could possibly arise even after success where a particular individual did not wish to or was too late to join in the particular award which the Court had made. Comparison may be made with the provisions of the Damages (Scotland) Act 1976 mentioned in Chapter 2.6.3 above. Doubtless the occasions for opting-out at any stage would be few indeed but it appears reasonable to make provision for it along the lines suggested.

6.6 Jurisdiction

6.6.1 Finally something should be said on jurisdiction. The
suggestions which have been canvassed are substantially of a procedural character so that ordinary jurisdictional rules will apply. But the question arises as to the Court or Courts in which such a procedure should be permitted. There seems no doubt that such procedure, if it is introduced, should be permitted in the Court of Session but the question is whether such jurisdiction should be exclusive. The argument in favour of the Sheriff Court also having the competence to deal with class actions is that many disputes may be of a localised nature or of relatively small value and the remoteness and additional expense of proceeding in the Court of Session should not be allowed to discourage potential litigants. The arguments in favour of exclusive Court of Session jurisdictions are:

(1) that questions of importance to the public at large may be involved
(2) even if the public at large are not involved the 'class' may comprehend numerous persons many of whom may reside outwith and at some distance from the particular Sheriffsdom whose jurisdiction is invoked
(3) proceedings in a single Court would ensure greater uniformity in decisions as to which actions should be certified as class actions, a matter which would be particularly important in the early years before a coherent practice is established
(4) the binding nature of the doctrine of 'res judicata' makes it preferable that the decision be one of a superior Court.

6.6.2 The working party has come to no collective view but suggests that if the Sheriff Court were to be given jurisdiction the Sheriff should be given power at the stage of certification either at his own behest (ex proprio motu) or on the application of any party to consider the foregoing criteria. If the Sheriff were of the view that the action was more appropriately one for the Court of Session then, instead of granting or refusing certification, he could remit the application to the Court of Session which would then determine the issue of certification and order either that the action then continue in the Court of Session or be remitted back to the Sheriff Court to proceed there. If there were to be such procedure, however, it is clearly desirable that the machinery be straightforward and expeditious.
CHAPTER SEVEN

REMEDIES

7.1 Introduction

In the simplest kind of case (such as a uniform overcharge affecting a large number of people) where the Court can make a simple decision on liability and redress the Court may order the defender to make a lump sum payment and to advertise the award to permit claimants to come forward. However, as has already been suggested class actions procedurally may have to be split into two parts. The first dealing with the question of principle which is common to all members of the class, such as the liability of the defender to make reparation and the second dealing with the remedy to be given in the event of the pursuers succeeding in the first branch of the case (see above 6.3.4). The first branch would end in a finding by the Court on the issue of principle. If this is adverse to the pursuers then the action would be concluded at that stage. If it was in favour of the pursuers then the case would require to continue in order that an appropriate remedy might be given. It is with this second stage that this chapter is concerned. Depending on the form of remedy decided upon a further hearing or hearings may be necessary.

7.2 Bases for Redress

7.2.1 The variety of civil remedies which are available to a pursuer under existing procedure should also be available in class action procedure. In many cases the remedy may well be one of damages but the action should not be limited to that form of remedy. It should be possible to obtain orders of interdict or of performance where such courses are appropriate.

7.2.2 Where an order for payment is sought this could be on a variety of different bases. Payments might be sought or ordered on a basis of repayment of money wrongly demanded. For example the action might be raised against an unlawful requirement to pay a deposit for some particular service provided by a statutory body, or against an overcharge in rent or rates by a local authority, or against an overcharge by a supplier of goods or services. In all such cases the remedy sought will be a recovery of the sums wrongly paid by the individual members of the class.

7.2.3 Alternatively the remedy sought in other cases may be a remedy in damages and where damages are claimed or awarded that might be on the basis of fault or on a basis of breach of contract. The wide variety of possible remedies requires a procedure which is of some flexibility.
7.3 **Intimation**

7.3.1 Where the first part of the action has ended favourably for the pursuer and the possibility arises of the defender being ordered to make a money payment to members of the class in question some steps may have to be taken at that stage to identify the members of the class more fully than has been necessary before that stage. If individual payments are to be made then the individuals entitled to such payments must be ascertained and identified so their entitlement can be confirmed and the payment made. In such cases the first step in the second stage of the action should be some procedure for intimation. The making of a fairly thorough intimation at this stage is the more necessary if the initial intimation of the raising of the action has not attempted to explore the identities of the whole members of the class. Moreover there may be cases where it would be proper to enable such views as individual members might have on the appropriate remedy to be canvassed at the start of this stage of the action.

7.3.2 As regards the method of intimation it is probably inappropriate to prescribe any particular necessary course. The circumstances of different cases may differ so materially that the course to be adopted should best be left to the discretion of the Court in each particular case. Where the claim relates to a group of customers of a particular distributor, or purchasers of a particular commodity it might be possible to obtain a list of the individuals concerned and achieve a reasonably complete and effective intimation by sending a circular to each of these people. In other cases there will be no discoverable list of the identities and some form of public advertisement will be required. It should be possible for the Court to devise the method most suited in the circumstances to discovering the persons who are the members of the class in question and so interested in any remedy to which they might be entitled.

7.3.3 The intimation or advertisement which is proposed as the first step of the second stage of the action would invite the members of the class to come forward and to identify themselves. The response which would be called for should be a written one and the request might be that all members of the class should write to the pursuers' law agent notifying him of their name and address. If an indication has already been given by the Court of the particular form of remedy which might be awarded that could also be included in the advertisement and an opportunity then given to the individual members of the class to make representations about it.

7.4 **Orders Positive and Prohibitive**

Where the action has been one for interdict or order for performance and the Court accedes to such a course then little if any problem will arise so far as the members of the class are concerned. No action or
participation will be required so far as they are concerned. Indeed their individual identities are not critical in such a case and the justification for the step of intimation to them would only be to allow for representations from them on the matter of remedy. Such representation could be done by a Minute in the action and this could enable the particular point raised to be ventilated and discussed.

If the pursuers were able to agree to the point then the form of decree sought to be pronounced by the Court would be submitted by the pursuers and the Minuter together. On the other hand if the pursuer did not agree with the submission by the Minuter the Minuter can then seek to be excluded from the action so as to preserve his own position.

7.5 Awards of Money

7.5.1 When the action seeks payment from the defender of individually assessed damages the step of intimation is critical in order to ascertain the recipients. Two questions arise in connection with such a form of remedy, firstly that of establishing the entitlement of particular individuals to receive the payment and secondly that of quantifying the sum to be awarded.

7.5.2 As regards the first of these questions a procedure plainly has to be established for proving the title of each and all of the persons who claim to be entitled to an award. This is in other words a procedure for proving that particular individuals are members of the class in question. Doubtless in many cases there will be no occasion for challenge or dispute. But in some cases the defender may well wish to be assured that he is not paying persons who, whether innocently or not, are not truly members of the class.

7.5.3 The problem which arises at this stage is connected with the precise way in which the definition of the class has been drawn. If for example the situation was one of an alleged misrepresentation or misleading advertisement and a remedy was sought for those who had been thereby induced to enter some particular transaction there could be some individuals who had suffered a loss as a result of the transaction but who had not entered the transaction through having been induced to do so by the representation or the advertisement. The class in such a case should be limited to those who had been induced. Then at the stage of the action now being considered the question would be whether all the claimants were or were not members of the class. The question is one of title and qualification.

7.5.4 But beyond that, there could be occasions where although the claimant is a member of the class there is some particular disqualification which attaches to him. Since the class action is essentially a matter of procedural not substantive law it would be inappropriate to confer on a claimant a right which he would not have in an ordinary action and
equally inappropriate to deprive a defender of a line of defence which would be available to him in an ordinary action. If then there is a particular defence to which a particular member of the class is subject that plea must be preserved and an opportunity given in the procedure for it to be presented and if necessary disputed and resolved. The way in which the class is defined may in many cases exclude such examples but an opportunity must still be given to permit the consideration of individual defences.

7.5.5 One such case could be that of contributory negligence in the case where the loss has been partly caused by the defender but also partly caused by fault on the part of the individual. In such a case the claimant would be a member of the class but the defender should be able to require a modification of any award in respect of the sharing of the fault.

7.5.6 The procedure for checking and testing the entitlement of individuals to claim as members of the class must also enable the canvassing of any particular problem relating to those who do qualify as members but yet may be subject to some particular defence. Initially the onus must be on the individual to establish if necessary that he or she qualifies as a member of the class. Doubtless in many cases this can be readily and informally done by reference to a date of purchase or some other detail of the individual’s involvement in the affair. These details could be given directly by the pursuer’s law agent to the defender’s agent. In any case of dispute a resolution could be achieved in a summary way before the Court by Minute and Answers or by reference to a man of skill.

7.5.7 The second matter of quantification involves considerations of practicability, reasonableness and fairness. Where the case is one of repayment the sums will presumably be ascertained and orders can be readily pronounced as may be appropriate or necessary for the repayment of particular sums. If a case arises where the amount paid is disputed then that dispute can be resolved by a process of Minute and Answer in the action related to the particular claimant. But in many cases the sum to be awarded to individual members of the class may vary. This potentially will be the situation in any award of damages, whether contractual or delictual. If the class is an extensive one a major problem could arise in the quantification of individual claims which might, if pursued with exactness, detract substantially from the economic advantage of a class action procedure. On the other hand a system of justice which totally ignored in every case real points of difference between claimants would be unacceptably rough.

7.5.8 It is suggested that the solution here lies in giving to the Court a wide discretion in the method to be adopted in any particular case. Where the class is large and the loss and damage suffered by the
members of the class is approximately the same it should be open to the Court to award the same single fixed sum in each case. Only in exceptional cases where a claimant could show that his particular loss was quite outwith the level of sum generally awarded would the Court consider the quantification of a particular loss. Where on the other hand, no general pattern or level can be ascertained individual quantification would require to be undertaken.

7.6 Further Forms of Redress

7.6.1 There could well be advantages in giving the Court a wide power in the method and procedure to be adopted in any given case. In some instances it could be simplest for the Court to order payment by the defender to the identified claimants of particular sums of money, on the pattern of existing practice. But in some cases it may be preferable to order the defender to pay over one single sum to be held by a neutral person, such as the Accountant of Court, and to be available for distribution among the claimants. In such a case a period would require to be prescribed in which claims would require to be made. It might be thought that an appropriate period would be six months within which all claims would require to be made. Any unexhausted balance could be remitted to the class actions fund mentioned in the following chapter. If the fund was found to be inadequate to meet the claims a further payment could be ordered from the defender.

7.6.2 It is for consideration whether the Court’s powers in any class action should not be of the very greatest width so as to enable a just remedy to be provided in every kind of case. In many instances an award of damages or an order along traditional lines may well be the just conclusion but there could be some cases where an exceptional course would be appropriate or where a special procedure for providing a traditional remedy may be useful. It may be noted that exceptionally in the United States devices known as ‘fluid recovery’ and ‘cy-près’ schemes have been adopted. In the Yellow Cab Company case (Dear v Yellow Cab Co. 63 Ca.R.724 (1967)) illegal overcharges of taxi fares had been made. Because of the difficulty of identifying all the individuals who had suffered and of quantifying all the losses, which in many cases would be of small amounts, the Court calculated the total amount of the overcharge and that amount was in effect returned to the class by the operation of a scheme whereby for a stated number of years the cab fares were reduced below the authorised minimum. Such fluid recovery and cy près schemes may only be devised in exceptional cases but the idea of permitting such flexibility in the giving of an appropriate remedy seems to deserve serious consideration.

7.6.3 When the first stage of the action has been concluded in the pursuers’ favour it is suggested that the Court should have a wide discretion in the form of remedy to be provided. The pursuer should
state what remedy or remedies he seeks and where he seeks damages he should specifically claim these in his initiating writ or summons, without being required to quantify the sum sued for (as is the present practice). But it should be open to the Court to determine in special circumstances that individual awards of damages would not be appropriate (for example, where the amount of the award is disproportionate to the cost of distributing it or where the individual members of the class are not ascertainable) and that the situation can be adequately met simply by an interdict or order on the defender short of a financial provision or by some financial provision other than awards of individual damages.

If some form of financial redress is called for then there should be a discretion in the decision to award an average compensation or fluid damages or particular damages to meet each individual loss. The method and procedure by which these courses are to be achieved would be left to the Court to determine.
CHAPTER EIGHT

FINANCE

8.1 Introduction

8.1.1 The financing of class actions is a matter of critical importance. As was observed earlier one of the intended advantages of a class action procedure is to mitigate the deterrence to litigation which presently exists in the cost of it. The expense of litigation can readily constitute a major obstacle in access to the courts. A procedure which necessarily involves a large number of people even although it is aimed at a generally more economical solution to a problem is potentially an expensive exercise. If the procedure is to become a practical proposition then a means of financing it without imposing an unacceptable burden upon the interested parties is essential. If the ordinary rules on litigation expenses were applied and the financial risk had to be carried personally by the member of the class involved in the action or affected by it it would be improbable that any procedure for class actions would ever be adopted in practice. A justification for making a special rule for this kind of action exists in the consideration that the subject matter of the action will often be one of importance to the public directly or indirectly.

8.1.2 There are a variety of possible methods of financing class actions other than relying solely on the personal resources of the members of the class. Some of these are now considered and discussed.

8.2 Expenses

8.2.1 One course is to provide for an alteration in the ordinary rule whereby expenses follow success. It is said that the viability of class actions in the United States depends on the fact that, except in certain Federal cases, each side is expected to meet its own costs. This argument was accepted by the Australian Law Commission who proposed that in class actions for damages, but not for declaration and injunction, each party should bear its own costs (see their paper of 1979 on class actions p.39).

The Law Reform Committee of South Australia proposed (their paper of 1977 p.8) that no costs be awarded to the defendant in a class action where the order permitting the action to proceed as a class action had been obtained without fraud or perjury but that costs could be awarded:

(a) where the plaintiff failed in his application for the order to proceed as a class action.

(b) where an interlocutory application is required because of some unreasonable act or omission by the plaintiff, and
(c) in relation to the determination of the claims of the individual class members after the common questions have been decided.

8.2.2 If any provision were to be made whereby pursuers in a class action were not to be liable for the defender’s expenses in the event of the defender’s success in the action it would be proper to make some exception to such a provision in order to cover such cases of neglect or unreasonable behaviour or other circumstances where it would be unfair for the defender not to recover some or all of his expenses. It would be a matter for consideration whether the grounds for such exception were to be formally spelled out and specified or whether it was simply provided that there would be no liability for expenses unless, or to the extent that, the Court ordered otherwise in special circumstances, it being left to the Court to develop the substance of such cases. One particular case which requires consideration is that of the defender who suffers grave financial hardship. In such a case it seems unreasonable that, if successful, he should not be able to recover some of his expenses at least. It would probably be wiser to make specific provision for the excepted cases.

8.2.3 However it may be that a provision along these lines could go some way to reduce the deterrent which the present risk of liability in expenses constitutes. The situation should not give rise to any greater hardship than exists at present in legally aided cases when a successful defender may not be able to recover his expenses from the pursuer. However some potential deterrent still remains in the risk of liability for one’s own expenses and this suggests that while this solution deserves serious consideration it does not appear by itself to provide the desired solution. Some external source of finance appears desirable.

8.3 Contingency Fees

8.3.1 Another possibility would be to permit a system of contingency fees. This is at present forbidden in Scotland, England and Australia. The system does exist in the United States and it may be that it contributes to some extent to the viability of class actions in that country. Its introduction to the United Kingdom would probably not be acceptable and no sufficiently strong arguments appear to be available to make this course worth serious consideration. Both the Benson Report and the Hughes Report advise against its introduction. Moreover, it would only be relevant to an action for damages and it is thought that a class action procedure should not necessarily be limited to such a kind of action.

8.3.2 It is of course competent for an action to be raised in Scotland on a speculative basis. But this course would be an uncertain and unattractive one so far as class actions are concerned and would certainly not promote their viability. Some more satisfactory solution requires to be found.
8.4 Legal Aid

8.4.1 Legal Aid is the most obvious external source of funds to consider. At present Legal Aid is not available to a body of persons but only to individuals. The provisions of section 20(1) of the Legal Aid (Scotland) Act 1967 are such as to make Legal Aid unavailable to the pursuers in a class action as a group. It is also to be noted that Regulation 6(1) of the Legal Aid (Scotland) (General) Regulations 1960 relating to situations where an applicant 'is jointly concerned with or has the same interest in the matter' as some other person might in some circumstances justify the refusal of Legal Aid even if an application was made by one member of the class in connection with a class action. On the other hand there are cases at present where Legal Aid is granted to a pursuer who is taking proceedings in the kind of circumstances where a class action could be appropriate.

8.4.2 Even if the statutory provisions permitted Legal Aid for group actions a formidable difficulty arises in relation to the assessment of the means of the pursuers. One course is to assess simply the means of those individuals who are presenting the action on behalf of the class. But this attracts the obvious criticism that individuals who would not be eligible for Legal Aid will obtain the benefit by the device of not being selected as the promoters of the class action. On the other hand such a course can be adopted under present circumstances in situations where a multiplicity of claims are to be pursued and all but one or a few are sisted. The test cases in such a situation may well be all legally aided but those claimants who would not be entitled to Legal Aid whose actions are sisted will have the benefit of the legally aided actions.

8.4.3 If Legal Aid is to be the source of finance for class actions then it is thought that the proper course would be for Legal Aid to be granted automatically once the action has been judicially certified as a class action. One justification for this can be found in the consideration that the actions will usually raise matters of public importance in which it is not unreasonable that the expense should be borne by the state. This is in line with the suggestion noted in the Benson report and (less enthusiastically) in the Hughes report that on certification by the Attorney General or the Lord Advocate or the court, litigants who fight an action which involves a point of law of public importance should have their expenses paid for by the state. Similar proposals were put forward by the Evershead Committee (1953), the Law Society of England and Wales (1963) and Justice (1969).

8.5 Legal Expenses Insurance

8.5.1 Legal Expenses insurance is another possibility to be mentioned. This is at present more common on the continent than in the United Kingdom but it may well grow in popularity. It certainly has many more
attractions for the individual and may well provide a more sure and satisfactory solution for many people than a state legal aid system.

8.5.2 But it is a matter essentially for individuals and it is at least doubtful whether insurance could be made available to meet the situation of pursuers in a class action. Even if policies were drawn to cover the situation of a class pursuer, problems would still arise where only some members of the class were insured and others were not. It does not seem that insurance, important as it may be for the future in the case of individuals, is an apt solution for meeting all the financial problems of class actions. It may however be of relevance to the position of the defender if he is obliged to bear his own expenses even if successful.

8.6 Class Action Fund

8.6.1 One final possibility to be considered is that of a Class Actions Fund, that is a fund administered by an independent body and capable of providing the necessary resources for class actions. Assistance from the Fund would be provided to all class actions certified as such by the court. No assessment of means would be involved.

8.6.2 This solution bears some similarity to the proposals of the Senate of the Inns of Court and the Bar (1975) and of Justice (1978) for the introduction of a Contingency Legal Aid Fund, inasmuch as the Class Actions Fund would operate on a contingency basis. Successful litigants funded by the scheme would be required to pay a percentage of any damages recovered, to the fund.

Cases might also occur where not all members of the class entitled to claim compensation have claimed their award and in order to avoid an unjust enrichment of the defender it would be appropriate for the residue of the sum paid by the defender to be paid over to the Fund. In such cases this solution would have advantage over one based on Legal Aid since it would produce a net gain for the Fund. In cases where the class action failed or where the remedy sought was other than damages this solution would be identical to the proposal that Legal Aid should be available on certification to groups where the question raised is one of public importance.

8.6.3 In order to meet the initial costs of setting up and financing the Fund, assistance would be required from the Government—backing which would probably have to continue for the first five years or so. Thereafter it is hoped that the Fund would be self supporting, although it might be necessary to supplement the contributions of successful litigants by a system of non-returnable registration fees (see the Justice proposals, 1978 at p. 11).

8.6.4 The visibility of such a Fund would be increased if its introduc-
tion was combined with the adoption of a general rule that a successful
defender would not be entitled to his expenses from the pursuers in a
class action except in cases of severe financial hardship.

8.7 Conclusion

8.7.1 In conclusion it would appear that the financing of class actions
would be assisted by the adoption of a general rule that a successful
defender would not be entitled to his expenses. But that solution may
not by itself be sufficient. Some external finance is probably desirable.
The two candidates appearing to deserve the most serious considera-
tion are Legal Aid and a Class Action Fund.

8.7.2 Of these automatic Legal Aid has perhaps the greater initial
attraction, using as it does the existing machinery and merely adding a
special provision for its use. But while that source could well be
preferred it may be unrealistic to look to it as a serious possibility. The
class action procedure would not easily lend itself to enabling any
contribution to be made to the Legal Aid fund. Moreover it can well be
doubted whether present economic conditions would make the use of
the Legal Aid resource acceptable. And while in some cases the
argument of public interest in the litigation would justify the use of
public funds it has to be recognised that in some class actions the
subject matter of the litigation will be principally of private and not
public interest. Legal Aid might still be available for the preliminary
stage of the procedure, the raising of the action and the application for
certification as a class action and any related appeal; but there that
source would probably require to stop.

8.7.3 In these circumstances the creation of a Class Action Fund
contains the best hope of seeing the practical realisation of class
actions in Scotland and their viability.

CHAPTER NINE

SUMMARY OF PROPOSALS AND RECOMMENDATIONS

9.1 This report is concerned with recommending the consideration of the introduction of class actions in Scotland. For the purposes of the report, a class action is defined as a procedure whereby one court action can take the place of many where numerous persons have a similar interest in the resolution of a particular question (see para. 1.6).

9.2 The procedure would be available to claimants in respect of the whole range of rights and duties which presently may be the subject matter of litigation by individuals where the issue arises in a context affecting a plurality of individuals (see para. 6.2).

9.3 For the purposes of raising a class action, it should not always be necessary that the precise number or identity of the individuals comprising the class should be ascertained at the outset. The essential matter would be that they each have a similar interest in the subject matter of the action though the interest need not be identical (see para. 6.3.6).

9.4 If individual damages are to be awarded, the class should not be so large as to be unmanageable (see para. 6.3.2).

9.5 The definition of the class should be a matter for a Court to determine in the circumstances of each case (see para. 6.3.12).

9.6 It is recognised that in certain cases, the Court will require to split its procedure between a consideration of the merits of the case and the giving of the remedy. Such a split procedure would allow the class action to be presented initially without such detailed investigation of the precise scope or identification of the class which further redress would require (see paras 6.3.4 and 6.3.5).

9.7 The procedure would require: (a) a preliminary application to the Court for certification of the action as a class action, which application might be opposed, (b) a decision on certification would be appealable but only with leave of the Court, (c) once certification of the class action was granted, and appropriate intimation considered, and if necessary carried out, the action would proceed substantially along the lines of existing procedures (see para. 6.4.1).

9.8 It is suggested that the procedure should include a provision for members of the class to disassociate themselves from the action or 'opt
out'. Any member of the class should have the right to have themselves excluded from the class before any decree is pronounced on the merits of the case (see para. 6.5.4).

9.9 After decree has been pronounced, that decree would apply to every member of the class preventing any member of the class proceeding against the same defender on the same subject matter. The Court however should as a matter of discretion in appropriate cases be able to permit individual members of the class to raise subsequent individual actions if, for example, they can show excusable ignorance of the fact that a class action had been raised (see para. 6.5.5).

9.10 There are arguments for providing that class actions should be part of the exclusive jurisdiction of the Court of Session (see para. 6.6). No positive recommendation is made about this but it is suggested that if the Sheriff Court were to be given jurisdiction in such actions, the Sheriff should be given power at his own behest or on an application by either party to remit the application for certification of the proceedings as a class action to the Court of Session.

9.11 The whole variety of civil remedies presently available to a pursuer under existing procedures should also be available in class actions, e.g. damages, payment, interdict and performance (see para. 7.2). Where the split procedure was to operate and the possibility of payments being made arose after disposal of the first stage of the proceedings, steps would require to be taken at that subsequent stage to identify the members of the class in a more definite way. This would require a process of intimation (see para. 7.3.1). The mode of intimation in any particular case should be left largely as a matter of discretion to the Court depending on the circumstances of that case (see para. 7.3.2). The response to intimation required for qualification to obtain the redress sought should be in writing and possibly also involve intimation to the original pursuer's law agent of names and addresses of individuals so claiming. Intimation should also provide for individual members of the class to make representations about the form of remedy (see para. 7.3.3). The defender at this stage of proceedings would be entitled to challenge the title and qualification of any individual to obtain a remedy against him and to establish any particular defence against a particular member of the class, such as contributory negligence (see para. 7.5.4).

9.12 In some cases where money awards should fall to be made, the sum payable would be the same for all individual members of the class. In other cases, differences between individual claims would require individual quantification. The precise method of quantification should be a matter for the discretion of the Court (see paras 7.5.7 and 7.5.8). Generally a wide discretion should be given to the Court to provide what is considered to be the appropriate remedy in a particular case (see para. 7.6.3).
9.13 It is recommended that a general rule be adopted that a successful defender would not be entitled to his expenses, subject to the Courts discretion to award expenses in special circumstances (see para. 8.2.2).

9.14 It is recommended that the bringing of a class action should be funded by a Class Action Fund administered by an independent body. Successful litigants would be required to pay a percentage of any monies recovered to the Fund. In that way, although the initial costs of establishing the Fund would require to be financed by government, it is considered that the Fund could be self-supporting in due course (see para. 8.6.1).
there is no reason in principle why consumers should be denied such a right.

10.7 Statutory standing for consumer groups would be a major reform in consumer law. Yet the idea may deserve consideration. French and German experience speaks loudly on its behalf. It places the power to initiate legal action where it properly lies, that is in the hands of consumers, through their associations. It overcomes the problem of title to sue. It would probably benefit the hard-pressed Office of Fair Trading itself by relieving pressure of business and it would be democratically appropriate to distribute the task of ensuring conformity to legal rules and policies. It would relieve consumers of any fear, whether well or ill founded, that the Director-General of Fair Trading might be insufficiently solicitous of their interests precisely at the point where he is best equipped to vindicate them, namely by the assertion of right through the judicial process. It would contribute to the Office of Fair Trading’s concentration on conciliation, education and the dissemination of information and it would legitimate the Director-General’s justifiable reluctance to invoke judicial proceedings otherwise than as a very long long-stop without thereby creating the impression amongst those who deal in business that invocation of the court’s power is a remote possibility with which they need not be concerned.

10.8 Further, once the first step beyond class actions is taken and an external plaintiff class action is established whereby consumer groups could take action in order to recover damages on behalf of individual consumers, it would be illogical to deny such groups the power to seek injunctive or declarative relief on the good and sufficient ground that prevention of abuse is better than cure. And so the second step beyond the class action is the statutory granting of standing to take legal action to foster and protect the consumer interest even where no identifiable individual consumers have actually suffered an identifiable or quantifiable loss.

10.9 One final area of relevance is administrative remedies. This is partly because the shape of modern societies means that many services are supplied by public bodies. The citizen is no less a consumer when he receives such services as health, education, gas, electricity, telecommunications or transport. It is also partly because the decisions of public bodies may impinge upon the general consumer interest.

10.10 Access to judicial review is a crucial element in any comprehensive strategy to foster the consumer interest. As has been observed:

"Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good
case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law and that is contrary to the public interest. Litigants are unlikely to expend their time and money unless they have some real interest at stake. In the rare cases where they wish to sue merely out of public spirit, why should they be discouraged?” (Schwartz & Wade, Legal Control of Government, 291 (1972).

A common answer to this question is that such public bodies are answerable to Parliament and not to the courts and that therefore issues of standing are insignificant. The mistake implicit in this response has been refuted often enough, most recently by Lord Diplock,

“It is not a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.’ (I.R.C. v Federation of Self-Employed (1981) 2 All E.R. 93, 107).

This suggests the encouragement of a policy aimed at increasing the opportunities for judicial review.

It is difficult to find a better example of such policy than the Michigan Environmental Protection Act, 1970 which gives any person the right to take legal proceedings against any other person, for the protection of the air, water and natural resources and the public interest therein from pollution, impairment and destruction. With 9,000,000 population, extensive mining and manufacturing complexes, four of the five Great Lakes and Detroit, one of America’s largest cities, opportunities for actions would appear unlimited. Yet in the early years, actions ran at only about 25 per annum. This is strong evidence against the ‘floodgates’ argument deployed by those opposed to liberalised rules of standing. An American commentator observes,

“when the ‘flood-gates of litigation’ are opened to some new class of controversy by a decision it is notable how rarely one can discern the flood that the dissenters feared . . . (indeed) the idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom” (Scott, 86 Harvard L. Rev. 654, 673-4 (1973).

10.11 Groups are generally better placed in Britain where the interests they foster are violated or threatened by public bodies rather than by private persons, insofar as the rules relating to ‘sufficient interest’ in England are increasingly widely construed and despite the actual deci-
sion of the House of Lords in *I.R.C. v Federation of Self-Employed*, there is much to be drawn from Lord Diplock’s dictum that

“it would . . . be a grave lacuna in our system of public law if a pressure group like the Federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the courts to vindicate the rule of law and get the unlawful conduct stopped” (*1981* 2 All E.R.93, 107).

In Scotland, the rules relating to access to the courts to challenge the actions or decisions of public bodies have long been more liberal than their English counterparts, not least because of the absence of the relator action. Further, where a group lacks standing, injunctive or declarative relief obtained by an individual who has standing will achieve a like, generalised effect. However, the type of interests fostered by groups in general and consumer groups in particular are diffuse and fragmented and may not readily be recognised by courts accustomed to individual economic or proprietary interests as a basis for a challenge to the actions or decisions of a public body.

10.12 It therefore follows that if one were to take the second step beyond the class action one should take a third, namely the step of ensuring, again by statute, that interest groups in general and consumer groups in particular have standing to challenge the actions and decisions of public bodies on the sole ground of detriment or unfairness to the diffuse and fragmented interest fostered by the group.

Perhaps the extent of this suggestion ought to be qualified by the rider that it would be open to Parliament in enacting legislation to specify whether or not the statutory powers of particular public bodies were to be immune from challenge on this ground, that is to say, there should be a general statutory rule that all public powers be exercised with due regard to the consumer interest and fairness to consumers, although some exceptions might be required. Further, it remains implicit that there would be no general right of groups to exercise the powers proposed in any or all of the three steps beyond the class action. Only authorised groups would have any or all such powers. Authorisation could be an administrative process whereby groups satisfying defined criteria of longevity, representativeness and function receive approval upon application. Alternatively, Parliament could simply specify which groups or associations should be empowered to seek such remedies.

10.13 In brief, the three steps beyond the class action canvassed in this chapter are as follows:—

First, on the assumption that a class action procedure were to be implemented, provision might be made for ‘external plaintiff class actions’ whereby consumer groups, either specifically named in the enabling statute or generically defined by reference to such criteria as longevity, representativeness and function could initiate and conduct
actions on behalf of consumers injured in their private rights, notwithstanding the absence of an identifiable and distinct group interest;

Secondly, and most radically, consumer groups, either specifically named in the enabling statute, or generically defined, might be statutorily empowered to seek relief by way of interdict or declaration where someone acts or threatens to act in a manner contrary to the interests of or unfair to consumers notwithstanding that there is no identifiable and distinct interference with the legal rights of, or injury to, any identifiable consumer;

And, thirdly, 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 detrimental or unfair conduct.
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