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New Zealand's Response to the Need for Class Actions

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PART I

INTRODUCTION

> "In the modern world the mass production and distribution of goods and services has become an inescapable reality. While it brings benefits to many, it also increases the possibility that wrongful injury, loss or damage will be caused on a mass scale. It is time for the legal system to face these realities and to free itself from the individual approach to the granting of legal remedies in cases where mass wrongs occur."[1]

This paper sets out to explore some of the provisions made in the New Zealand legal system for giving access to legal remedies to the victims of "mass wrongs".[2]

It is prompted in large part by the recent publication of a report entitled "Grouped Proceedings in the Federal Court", prepared by the Australian Law Reform Commission.[3] This report proposes the introduction of a procedure whereby individual proceedings concerning the same mass wrong may be "grouped" with that of an original principal applicant. The procedure is a type

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[1] Australian Law Reform Commission Grouped Proceedings in the Federal Court (Referred to hereafter as ALRC Report) Report No 46, (Canberra 1988), para 13.

[2] This expression describes a situation in which a single defendant has caused (or threatened to cause) loss, damage or injury to a number of people in circumstances where monetary, injunctive, declaratory or other relief is available. ALRC Report, above n 1, para 13

[3] ALRC Report, above n 1. This report represents the second stage of a study originally begun in 1977 relating to the access of citizens to the Federal Courts. The first part resulted in the publication of Standing in Public Interest Litigation Report No 27, (Canberra, 1985)

of class action.[4] The draft Bill contained in the report sets out the details of how the "grouped proceedings" should be conducted, and allows changes to the normal rules relating to costs. The scheme has been devised to supplement existing litigative procedures which are seen as inadequate to deal with the growing need for group actions in private law, as indicated in the quote above.

Is New Zealand's legal system similarly deficient? We have a number of forms of group action. Some are general procedural options, contained in the High Court Rules. Others are provided as a means of enforcing substantive rights created in specific legislation. Is there also a need for one uniform procedure to deal with all actions taken on behalf of groups of wronged individuals? The overall conclusion of this paper is that we probably do not, so long as we continue to build provisions for bringing group actions into specific legislation.

My studies indicate that the only significant procedural difficulties in bringing group actions arise where financial relief is sought. The liberal approach to standing adopted in public or administrative law proceedings is likely to be applied where the equitable non-money remedies of injunction and declaration are sought in private law matters by individuals acting in a representative

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[4] The term "class action" is usually associated with the procedure available in the United states at both the Federal level (Federal Court Rule 23) and as provided in most States. Quebec in Canada also has such a rule. The other Common Law jurisdictions have "representative action" procedures. As pointed out by K Uff in "Class, Representative and Shareholders' Derivative Actions in English Law" [1986] 5 Civil Justice Quarterly 50, class actions differ more in degree than kind from representative actions, being more comprehensive and usually giving less emphasis to the need for commonality among group members.

capacity. The focus in this paper, as in the Australian Law Reform Commission's report, is therefore on ways of dealing with group claims for money.

I should make clear that my reasons for encouraging the development of procedures for facilitating group claims are radically different from those of the Australian Law Reform Commission.[5] The Commission specifically states that their proposals are not intended to provide a mechanism for the punishment or deterrence of wrongdoing. They are simply to "enable identified persons who establish their loss to secure the legal remedy the law provides".[6] The acknowledged consequences of making the law more enforceable and of ensuring consistency of outcome definitely take second place to the individual benefits envisaged by their proposals.[7]

This is surely a quite unreal position. One cannot treat the inevitable consequences of a proposal as "unintended" and therefore virtually ignorable. Those very matters which the Commission finds of secondary - or even no -

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[5] This is not altogether surprising, given that the ALRC saw their grouped proceedings proposal as complementary but separate to their earlier Report (above, n 3) on facilitating public interest litigation by liberalising the rules of standing. But it is the rigid correlation of public interest litigation with public benefit, and private interest litigation with solely private benefit, that has produced the bizarre statements referred to below.

[6] ALRC Report, above n 1, para 323.

[7] ALRC Report, above n 1, Chapter 2

importance constitute the true justification for enhancing the access of groups to money remedies.[8]

There are a number of significant public benefits which would result from such provisions. Two distinct scenarios illustrate these.[9] The first is where each victim has a claim for an amount which makes it economically rational that she should bring an action individually. The potential size of the award justifies the risk and cost involved in bringing the action. The value of grouping a number of similar such actions is judicial economy, in that it reduces the overall amount of litigation. The costs to all parties - including the Justice Department - can be reduced by disposing of many cases simultaneously. This is a simple economic public benefit.

The second situation - which is the more interesting from the point of view of this paper - is where the claims are too small to be individually worth bringing. The main purpose of facilitating such incipient actions is to encourage litigation, which thereby confirms the law and its efficacy, and deprives the defendant of

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[8] This approach owes much to R H Tur - see "Litigation and the Consumer Interest; the Class Action and Beyond" (1982) 2 Legal Studies 135, in which he discusses the "public" aspect of apparently purely "private" litigation in the context of consumer remedies.

[9] These two scenarios are drawn from the tripartite analysis adopted by the ALRC, which in turn was borrowed from the Ontario Law Reform Commission's Report on Class Actions (Ontario, 1982, 3 Vols), (referred to hereafter as the Ontario Report), and which itself had adopted the classification from "Developments in the Law - Class Actions" (1976) 89 Harv Law Rev, 1318. This divides claims into "individually recoverable", "non-individually recoverable", and "non-viable". My discussion is clearly only of the first two; the third category describes claims so insignificant that they are termed by the ALRC (above n 1, para 61) as "trivial".

the profits of her wrongdoing. In any legal system, the law in general, and specific laws in particular, must be seen to be enforceable. Those who do wrong must not be seen to be outside the law merely because they have the wit to spread their harm thinly over many people rather than concentrating it over a few.

The fact that providing procedures enabling litigation to be taken against such wily wrongdoers may also put money in the pockets of the victims is almost incidental. As isolated victims these people could not obtain relief, as the cost of the action would make it economically unjustifiable. Anything they receive as a result of an action taken on their behalf is a bonus. But the advantage of enforcing the law through civil actions is that the sanction accurately reflects the damage caused by the wrong. In the end, it is the benefit to the public of having laws which are seen to work, rather then the private benefits obtainable by individuals, which justifies the search for a way to facilitate group actions.

The major difficulties posed by group actions on behalf of unnamed persons arise out of two doctrines which are central to our legal system. The doctrine of res judicata means that once a matter has been judicially decided it cannot be reopened between the same parties or their privies. In order to be bound by the judgment, it is necessary to be a party to the proceeding. But mass victims forming the membership of the group represented in a group action are not "parties" in the usual sense of being named or participating in the proceedings. For instance, they cannot have discovery ordered against them. They form a distinct category of litigants who are encompassed by the doctrine of res

judicata because they are bound by the judgment, without being parties proper. The expression "group member" in this paper describes that special category.

The difficulty in group actions is that res judicata cuts both ways. While in some situations group membership is a free ride to a vindication of legal rights and a route to legal remedies, in others it becomes a most objectionable variety of judicial legislation. It can conclusively determine the legal rights of those who may not even know about the proceedings, without giving them an opportunity to have their own point heard.[10]

The other doctrine of central importance to a discussion of group actions is stare decisis. Once a court has laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle, applying it as precedent to future cases. What this means is that whose who are neither parties nor group members - in other words, the public at large - though not bound by a decision, are affected by the statement of law emerging from the case.[11] It is for this reason that litigation arising from events producing multiple victims with potential financial legal remedies are fought so vigorously by defendants. A lone litigant whose isolated claim may be quite modest will have a formidable battle if seeking a judgment which could implicate the defendant in massive

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[10] H Patrick Glenn strongly condemns group actions on the basis of their objectionable legislative effect. See "Class Actions and the Theory of Tort and Delict" [1984] University of Toronto LJ 287, and "The Dilemma of Class Action Reform" (1986) 6 Oxford Journal of Legal Studies 262.

[11] This doctrine underlies the purposive use for the public benefit of apparently private litigation. See J A Jolowicz, "Diffuse, Fragmentary and Collective Interests in Civil Litigation: English Law" (1983) 42 Camb LJ 222.

liability through subsequent litigation. Yet the doctrine of stare decisis makes it imperative that a plaintiff in that situation should have sufficient resources to make the fight an equal one, as an unfavourable decision will discourage further litigation by other victims.

With that background in mind, I now turn to discuss some existing and proposed group action procedures in New Zealand. The paper is in five Parts. The following Part considers the scope of the "representative procedure" embodied in our High Court Rule 78. On its face it appears to have the potential to provide individual financial remedies through an action brought by a representative of the affected persons. Although the ambit of the Rule has recently been clarified and (arguably) extended, its future use will still depend very much on further judicial interpretation. I have discussed the procedure in some detail, because it provides a model for other group actions. When devising statutory provisions for group actions it is important to understand the limitations of that model.

New Zealand already has a number of statute-specific group action provisions. The major ones are contained in the Fair Trading Act 1986 and the Human Rights Commission Act 1977.[12] These are discussed in Part III. Unlike the

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[12] There may be other examples of group actions in other legislation. For instance, the Commerce Act 1986 s86(4) contains provision for the Court to order restitution to non-parties who have suffered as a result of a breach of s55 (pricing in contravention of controls set by Order in Council). This provision is of limited scope, and it is unclear who could seek such an award or how it would be made. It may also be possible under the reparation provisions of the Criminal Justice Act 1985 for money to be awarded to multiple victims of crime.

representative procedure, which can be used in bringing any cause of action, these can only be used when bringing the statutory causes of action created in the relevant legislation. Experience to date suggests that the group action provisions of the Fair Trading Act are ineffective, while the Human Rights Commission Act procedures are probably workable and appropriate.

Two other areas of substantive law in which multiple victims are a potential feature are company law and environmental law.[13] Both are under review at present. The new Draft Company Act proposed by the Law Commission includes a specific provision for a representative action.[14] This is discussed as a good example of a statute-specific provision for group actions. The Resource Management Law Reform proposals on environmental law are still vague, but I shall briefly discuss some of the elements which should be included in legislation to take account of the needs of group litigants in this field.

In the conclusion, some of the broader considerations raised by a discussion of group actions are referred to. The notion of suing in court for the vindication of other people's legal rights is something of an incongruity in our essentially

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[13] The Ontario Report (above n 9, Chapter 5) lists and discusses the major substantive law areas in which class actions are brought in the United States. For the year 1980, in descending order of frequency, they are: civil rights, securities, shareholder actions, anti-trust, consumer and trade practices, mass accidents and environmental law. We do not have the substantive rights which could give rise to anti-trust group actions, and litigation over mass accidents is precluded by s27 of the Accident Compensation Act 1982. The Report also notes that the vast majority of cases are founded on statutory rather than common law causes of action.

[14] Law Commission Report No 9 Company Law: Reform and Restatement (Wellington, June 1989), clause 133

individualistic, adversarial, judicial dispute-resolution system. However, such actions appear to be needed, and inevitable; and must therefore be provided for. New Zealand's legal system is reasonably "group action conscious", but I hope in this paper to encourage awareness of the continuing need for appropriate provisions, and to inform the debate which may be beginning about the desirability or otherwise of introducing a class action procedure.[15]

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[15] Evidence of an emerging debate lies in the fact that the Commerce Commission, Justice Department and Treasury have each had work done on class actions in the last few years. (The only recent published paper in New Zealand on this topic is "Class Actions" by Justin Emerson [1989] 19 VUWLR 183, which discuses the design features of a class action, on the assumption that one is needed.) I gather also that at a recent meeting of the Australasian Standing Committee of Consumer Affairs Ministers (Hobart, June 1989) the proposed "Grouped Procedure" was mentioned, and our Minister required briefing on the topic. The need for group action procedures is impinging, however slightly, on the consciousness of our legislators.

PART II

The Representative Procedure - High Court Rule 78

High Court Rule 78 is one of several rules designed to enable the court to deal with groups of litigants. The major related rules are Rule 73, which permits joinder, and Rule 382 which allows for the consolidation of proceedings which have already commenced.[16] Both these operate only in situations where the parties are identified and have consented to be involved in the proceedings. Rule 78 on the other hand allows the court to authorise group membership in the sense described above. That is, people who are neither named nor participating in the proceeding, but who fall within the description of the class represented, will be bound by the judgment. The class or group therefore becomes, for the purpose of this action, a "litigative entity".[17] The Rule reads:

> **78. Persons having the same interest** - Where 2 or more persons have the same interest in the subject-matter of a proceeding, one or more of them may, with the consent of the other or others, or by direction of the Court on the application of any party or intending party to the proceeding, sue or be sued in such proceeding on behalf of or for the benefit of all persons so interested. (My emphasis)

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[16] High Court Rule 81 has the potential to be a group action procedure, but as there are no relevant authorities which illustrate its use, there is little that can be said about it as yet.

[17] Stephen C Yeazell From Medieval Group Litigation to the Modern Class Action (Yale University Press, New Haven and London, 1987) (Referred to hereafter as Yeazell). The concept of how, when and why certain groups become "litigative entities" is central to Yeazell's discussion. This book also provides much of the historical background to this paper. It is usefully reviewed by J A Jolowicz in (1988) 47 Camb LJ 486, but less favourably treated in (1988) 102 Harv Law Rev 522.

The ability to commence and conduct an action on behalf of a group without having obtained each member's individual consent is a tremendous advantage in mass victim cases. The action can be begun promptly with a minimum of expensive co-ordination among members. Wrongdoing can quickly be brought to account.

However, judicial interpretation of the scope of the Rule means that the court will only allow a representative proceeding in an action for damages to continue where group members are identified and have consented. The case law shows that the courts are not saying that the first part of the rule must be satisfied before a damages claim is permitted in this form, but rather that in exercising its discretion under the second part it will insist on consent being obtained from group members. To understand how and why this situation has developed, it is necessary to look briefly at the history of the representative proceeding.

1) Group Actions - 12th to 19th Century

To the courts of medieval England, group actions were in no way unusual or problematic.[18] In a society based on a "communal and collective concept of groups",[19] actions brought on behalf of groups of villagers or sections of a town's population were unremarkable occurrences. In such cases the litigation

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[18] Yeazell, above n 17, traces the history of the representative procedure in England from the 12th century to the late 19th century, citing many examples of typical group actions. He then crosses the Atlantic to recount its transformation into the class action of the United States (Federal Court Rule 23).

[19] Yeazell, above n 17, 157.

was not the link between the group members; on the contrary, the groups were well established and the membership recognised through common knowledge and custom. There was no difficulty in treating such groups, represented by one or more members, as litigative entities.

The court's approach to groups changed through the 15th to 18th centuries with the decline of the sorts of communities which had generated group actions and the rise of incorporations. One of the most fundamental marks of incorporation was the right to sue and be sued. How then could unincorporated groups also claim this right? On the basis that they had in the past recognised them, courts continued to allow such groups to be represented in litigation, though they came to be dealt with solely by Chancery, the domain of oddities. As a consequence, the only remedies available to those affected by a group action were equitable.

This recognition of group litigation however clashed with the developing Chancery rule of "compulsory joinder". This rule was that, in order to avoid a multiplicity of proceedings and to obtain a final decree which would bind all involved, all those interested in the subject matter of the case before the court had to be made parties to it. The way to explain reports of actions in which unnamed group members had been bound by decisions obtained on their behalf was to describe this form of action as an exception to the general rule, permitted in limited circumstances, as a concession to judicial economy.

In 1873, after six centuries of dealing with group actions, the practice was codified when the courts of Law and Equity were united. Section 10 of the

Supreme Court of Judicature Act 1873, which formed the prototype for all subsequent representative procedures, read:[20]

> Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf of or for the benefit of all parties so interested.

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[20] This basic form has persisted in England into RSC Ord 15 R12, though it has been added to. The representative procedures of the English speaking Canadian Provinces (Quebec has adopted a US-style class action procedure), the Federal Court in Australia and most of the Australian States are still closely based on this. Victoria enacted a new representative procedure in 1986, which requires the prior consent of members before the action can be commenced. South Australia produced a unique form of representative procedure in 1987 which permits actions to be commenced without the consent of members, requires court authorization in order to continue but specifically says authorization shall not be refused on the ground that damages are sought which must be individually assessed. There are as yet no reported cases in which either procedure has been used.

2) Developments to 1986

While group actions appear to have been able to be accommodated by Chancery,[21] the procedure produced difficulties when applied to common law actions, particularly those for damages. This did not become apparent for some time however. The first full discussion of the codified rule occurred in 1901 in the case of Duke of Bedford v Ellis and Others[22] but its facts did not really challenge the applicability of the rule to common law actions. However, it illustrates some useful points about the representative procedure.

The action was brought by six growers on behalf of themselves and all other growers who were entitled under the Covent Garden Market Act 1828 to certain preferential treatment in their use of the market. The plaintiffs alleged that the owner of the market, the Duke of Bedford, was disregarding their rights and they sought a declaration as to those rights, an injunction to stop further infringement, and an accounting of sums over-charged to the six representative plaintiffs in the past six years. Note that these are all equitable remedies, and the money claim - accounting - was sought individually, not on behalf of unnamed group members. The Duke sought to have the proceedings stayed.

Lord Macnaghten delivered the leading judgment. In allowing the action to proceed he made a statement which later judges repeatedly used as setting out

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21 A useful discussion of Chancery's "liberal and flexible attitude" towards the procedure is found in J A Kazanjian's "Class Actions in Canada" (1973) 11 Osgoode Hall LJ 397.

22 [1901] AC 1

the criteria necessary for bringing an action in a representative form. He said, referring to the history of such proceedings:[23]

> "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

The three key requirements then are a common interest, a common grievance, and relief which is in its nature beneficial to all.

There are a number of other useful points illustrated by this case. First, argument on the procedure is an interlocutory matter in which the facts as pleaded by the plaintiffs are treated as true. Their Lordships asserted that they were unwilling to prejudge the merits of the case by striking it out at this stage.[24] To this extent, there is a bias in favour of bringing a proceeding as a representative action.

Second, as the rights of the growers were arguably inimical to those of the general public, it was not a case in which the Attorney-General could represent the growers.[25] The procedure's function was clearly the ascertainment and protection of private, not public, interests.

Third, Lord Macnaghten was unconcerned that the group was a fluctuating one, for he said that although it might be difficult to compile a catalogue of

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[23] Above n 22, 8

[24] Above n 22, 11

[25] Above n 22, 11-12

growers, yet it would be possible to say of any person whether or not he or she belonged to the class.[26] Neither was it necessary that group members have a proprietary interest in the matter, as had been asserted in an earlier case.[27]

And fourth, the only part of this claim which was made in a representative capacity was that seeking injunctive and declaratory relief arising from a determination of the rights of the class as a whole. The outcome would, in fact, have affected group members equally whether the action had been brought on behalf of them all, or by an individual. Beside the fact that the six growers were also seeking individual money claims, it would seem that the reason for attempting to bring the action through a number of plaintiffs in a representative capacity was some sense of "safety in numbers". One can sympathise; it is a classic example of "little" people trying to assert their rights against an extremely powerful one. This "social balancing" aspect of representative proceedings is as relevant today as it was then.

The liberal Duke of Bedford approach appeared to continue the long practice of allowing, or at least not interfering with, a group proceeding when that was the best way to get to the justice of the case. In 1910 however, a stricter approach was adopted, in the case of Markt & Co Ltd v Knight Steamship Co.[28] There Fletcher Moulton LJ, after referring to the history of the rule, said:[29]

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[26] Above n 22, 11

[27] Temperton v Russell [1893] 1 QB 435, 438

[28] [1910] 2 KB 1021 (CA)

[29] Above n 28, 1038

> "It is the language of the rule that must govern us now, and even if it could be shewn that before the Judicature Act the Court of Chancery would have applied the procedure in cases not within the language of the rule, that would not affect the present practice in any branch of the Supreme Court".

The facts of that case were that in 1904 the ship "The Knight Commander", while on a voyage from New York to Japan, was stopped by the Russians, searched, and her crew and passengers removed. She was then shot and sunk. The justification was that the ship was carrying contraband of war. The 45 or so shippers who thereby lost cargo claimed against the Russian government. But that claim was still not settled by the time the limitation period for bringing an action in England was about to expire. So two of the shippers each issued separate writs, seeking damages, on behalf of themselves and the other shippers against the Steamship company for breach of contract and duty in the carriage of goods by sea.

Fletcher Moulton LJ described these writs as "hopelessly bad".[30] He and Vaughan Williams LJ were adamant that the writs could not stand. Their major objections were that a claim in contract could not be brought in a representative action because there could be no "common interest" in such a case (as demanded by Lord Macnaghten's description of a representative action). This notion that actions on individual contracts cannot fulfil the "common interest" requirement has dogged representative actions ever since.[31]

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[30] Above n 28, 1034

[31] See below, n 34

The second major restriction arose from the assertion that as damages were a personal remedy, a representative action was absolutely inapplicable when that remedy alone was sought.[32]

In contrast to the views of Fletcher Moulton LJ and Vaughan Williams LJ, Buckley LJ was prepared to see a common interest in the shippers' concern with the ship and her voyage. The question of individual damages would have to be dealt with in separate proceedings, a difficulty which he acknowledged would always occur in every representative action.[33]

But this was the minority opinion. The views of the other two judges prevailed, and served to effectively stifle representative actions based on contract, or which sought damages, for the next 70 years. Markt is cited again and again as establishing a barrier to using a representative action based on contract, or in cases where damages are sought.[34]

A good example of the judgment's powerful effect is the New Zealand case of Take Kerekere v Cameron.[35] In an action for damages for trespass brought by two Maori tenants in common, on behalf of all the owners, Chapman J said,

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[32] Above, n 28, 1040-1041

[33] Above, no 28, at 1048

[34] For instance, see ALRC Report (above n 1) para 5; Ontario Report (above n 9) Chapter 2; see also Jennifer K Bankier "Class Actions for Monetary Relief in Canada: Formalism or Function" [1984] Windsor Yearbook of Access to Justice 229, for a discussion of the impact of the judgment on a generation of formalist judges in Canada.

[35] [1920] NZLR 302

dismissing the case, "[A] representative action is moreover inappropriate for the settlement of numerous claims for damages" and then simply cited Markt, without further comment.[36]

The nature of the group possessing the land was in all probability quite unlike the Markt group, whose members were linked solely by their common interest in an event giving rise to similar legal rights. This was a group a Maori tenants in common of land evidently traditionally long used or occupied by them or their forbears.[37] The group therefore had much in common with the medieval type of group described by Yeazell and accepted in their time as litigative entities. By treating Markt as a blanket prohibition against claiming damages, without enquiring into the nature of the group or the legitimacy of the representation, the practical advantages of the representative procedure were denied to the litigants.

It is impossible to know how extensively the representative procedure has been used in the eighty or so years since Markt. There are very few English and

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[36] The first reason however on which the case was dismissed was that the "claim for damages was based on the assumption that 2 tenants in common claiming to sue as representing themselves and others could recover damages in respect of the rights of the other tenants in common, which is manifestly impossible" (p303). Such a statement illustrates the inability of the English legal system to accommodate Maori approaches to land law. Even the enterprising attempt to use the representative procedure to overcome European individualism in the law failed, for what must have appeared an incomprehensible and arbitrary reason.

[37] The damages claim was for the destruction of an eel fishery resulting from the trespass.

New Zealand reported cases in which its use is an issue,[38] though one comes across cases, particularly in administrative law, in which it is used, apparently without comment.[39] In view of what was said in the cases about to be discussed, it appears though that it was not used in claims for damages, or in actions based on contract.[40]

The beginning of the break from the restrictive Markt approach did not begin in earnest until 1979,[41] with the case of Prudential Assurance Co Ltd v Newman Industries Ltd.[42]

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[38] This paper mentions most of the reported New Zealand and English cases. There have been more cases - and generally more debate - in Canada; these are well concisely described in the Ontario Report, above n 9.

[39] For example, Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149, where a declaration was brought by the plaintiff on behalf of himself and 50 other students. A similar New Zealand example would be CIR v Lemmington Holdings Ltd [1982] 2 NZLR 517.

[40] The Markt proscription did not operated to frustrate representative actions which merely included a claim for damages on behalf of class members. In Jones v Cory Bros & Co Ltd (1921) 56 LJ 302, some miners had sought, on behalf of themselves and other miners affected, a declaration that the inadequacy of equipment supplied by their employers had frustrated their attempts to work, thereby causing them to lose wages. At the same time, they sought damages both individually and for those whom they represented. They were granted all except an award of damages for group members. And in Moon v Atherton [1972] 2 QB 435, Lord Denning remarked, obiter, that the original (though now abandoned) representative action was perfectly well conceived, even though it had been a claim in tort for specified individual damages.

[41] Though in John v Rees [1976] Ch 345 there had been dicta encouraging a more flexible and pragmatic approach to the procedure.

[42] [1979] 3 All ER 507; [1981] Ch 229 (References hereafter are to the Chancery report)

The Prudential case involved a claim in tort. The plaintiff was a shareholder of a company which had, through its chairman, issued a circular concerning the proposed purchase of the assets of another company. At a later meeting the transaction was approved by resolution, despite the plaintiff's opposition. The plaintiff subsequently commenced a derivative action on behalf of the company against some of its officers, alleging that the circular was tricky, misleading and contained statements which the defendants could not honestly have believed. Later on the plaintiff sought to amend its claim to include a personal claim for damages on behalf of itself and all other shareholders as at the date of the meeting, on the common law ground of conspiracy.

Vinelott J allowed the claim to proceed in representative form. In so doing he removed much of the effect of the perceived Markt proscription against using a representative action to seek damages. After reviewing the authorities, he listed three propositions defining when a representative action was appropriate.[43]

1) A representative action could not be maintained in circumstances which might confer a right of action on a member of the class represented who would not otherwise have been able to assert such a right in separate proceedings, or bar a defence which might otherwise have been available to the defendant in such a separate action.
2) There must be an "interest" shared by all the members of the class, which in the case of a tort claim meant that there must be a common ingredient in the cause of action of each member of the class.

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[43] Above n 42, 229

3) The court must be satisfied that is for the benefit of the class that the plaintiff be permitted to sue in a representative capacity.[44]

The procedure envisaged was clearly a two-step process. First the plaintiff in a representative capacity would seek an order on the issues common to the class, which would be res judicata for all class members. It would then be up to each member to bring separate proceedings to establish individual damage. This appears to be the sort of procedure which Buckley LJ had in mind in Markt, which he implied was based on the established practice in that sort of group claim.

A further freeing up of the restriction on using a representative action in damages claims occurred two years later in EMI Records Ltd v Riley[45]. The plaintiff in that case was a member of the British Phonographic Industry (BPI), and was suing on behalf of itself and all other members of BPI. Those members between them produced and distributed virtually all the sound recordings in England. The action was against a defendant who admitted to selling (but not to making) "pirate" cassettes, thereby infringing the BPI members' copyright in those recordings. The plaintiff sought an injunction restraining the defendant, and at the same time an inquiry into damages suffered by BPI members. The plaintiff was, in other words, not looking for a two-step procedure such was approved in Prudential, but a one-step one.

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[44] This specific requirement arises from the case of Smith v Cardiff Corporation [1954] 1 QB 210, which is discussed later.

[45] [1981] 2 All ER 838

The plaintiff was granted both the injunction and the order for inquiry into damages. But the circumstances were said to be very special in this case to warrant this extension of the use of the representative proceeding in a claim for damages. The BPI members covered virtually all those to whom the wrongful action related; it would be nearly impossible to quantify individual claims; and all members had agreed that any damages paid would be distributed not individually but as a generic award paid to an organisation (BPI) whose activities would benefit them all. The motivation behind the action appears to be not to recover individual losses, but to display the seriousness of BPI members in acting against "pirates", to ensure the defendant did not keep the profits of her wrong, and at the same time capture some funds for the general benefit of the group members.

These two cases, Prudential and EMI Records, indicated a new willingness on the part of English judges to rehabilitate the representative procedure. They have been seen as preparing the ground for further development.[46] As yet however, neither England nor Australia has embraced their possibilities with the gusto New Zealand displayed in the case discussed next.[47]

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[46] Keith Uff, in "Recent Developments in Representative Actions" [1987] 6 Civil Justice Quarterly 15 describes the on-off reaction of the English judiciary to these cases, as well as the growing sense that something must be done to facilitate group actions.

[47] The Canadian courts are developing a more expansive approach to their representative procedures, as discussed later.

3) Post 1986 - Flowers v Burns

A new set of High Court rules was adopted in New Zealand in January 1986. They include the version of the representative procedure given at the beginning of this section.[48]

In December of that year, two applications under the new rule were heard together in an action before McGechan J. They provided an opportunity for a comprehensive review of the authorities and a statement of how the new version of the rule should be used in New Zealand.[49]

The judgment is reported as R J Flowers v Burns.[50] The report of the case gives a slightly misleading impression about how the application for direction under Rule 78 came about. The background was as follows (both applications covered virtually identical facts, so I shall treat them as one).

In 1983 a number of kiwifruit growers had, through their agents Turners & Growers Ltd, stored kiwifruit in Mr Burns' cold store. For some reason, the

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[48] The old rule was Rule 78, which read "Where there are numerous persons having the same interest in an action, one or more of them may sue or be sued, or may be authorised by the Court of a Judge to defend in such action on behalf of or for the benefit of all person so interested".

[49] There has been no academic comment on this enunciation of the law apart from that contained in Emerson's article (above n 49). The implications of the case are of course included in McGechan on Procedure (Brooker & Friend, Wellington, 1985,) and Sim and Cain's Procedure and Practice (12th ed, Butterworths, Wellington).

[50] [1987] 1 NZLR 260

temperature in the store dropped to a level which caused the fruit to be damaged. The action was brought by one named grower on behalf of others who had similarly suffered damage, the claim being based on both contract and bailment.

What the report omits to make clear is that the action was brought as a subrogation proceeding by the insurer of many of the growers.[51] When the fruit was found to be damaged, a major salvage operation had been undertaken, during which the fruit of different growers got mixed up, and that which could be saved was sold off. Many of the growers were insured with NZI, who compensated them for their loss. The insurance company then wanted to commence subrogation proceeding against Mr Burns. By this time however, it was impossible for them to bring these individually, as they had no way of identifying the quantum of loss for any particular grower, because the proceeds of the sale of undamaged fruit had been applied to NZI generally. As all the insurance company needed was a global award, the proceeding were begun in a representative form, following the EMI model. The situation was not, as the report suggests, one in which a number of aggrieved persons had sensibly joined to fight in court to their mutual advantage.

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[51] It is this background which explains why we have heard no more of this action. Despite winning on the procedural point, the case has not yet come to a substantive hearing because the class members are unwilling litigants; they are neighbours (and even relations) of Mr Burns, and see no value in assisting the insurance company pursue its claim against him.

The plaintiff in Flowers v Burns applied to the court under Rule 78 for directions that it could bring a representative action against Burns. In the course of his judgment, McGechan J set out the requirements which must be fulfilled in order for an application under Rule 78 to proceed. Besides the ones set out below, he also specifically stated that the approach to the rule's application should be liberal.[52] The sources of the requirements should be evident from the discussion of the cases above, though it is arguable that in the course of re-stating the position, he effected subtle changes in their meaning.[53]

1) Members of the class to be represented must have a common interest in the proceeding. They must all be able to claim as plaintiffs in separate actions in respect of the event concerned. No defences should be available to some only of the class.

2) The representative action must be beneficial to all of the class.

3) A representative action for damages is possible if both the above requirements are met, and in addition (a) the action covers the whole or virtually the whole of the class of potential plaintiffs, and (b) all represented members have consented to the payment of global damages to the representative plaintiff.

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[52] Above n 50, 271

[53] Above n 50, 270-271

At this interlocutory stage, McGechan J was not prepared to find conclusively that any of those requirements had not been fulfilled, and therefore would not rule out the representative claims. The burden, it appears, was on the defendant to show why the representative procedure should not continue. The judge did admit the possibility that at a later stage the action might need to be 'unpacked'. He gave directions as to the further management of the case, which involved obtaining details of the separate contracts and bailments alleged; ordering discovery by all class members and by the defendants; and obtaining affidavits from all class members that the plaintiff would be entitled to hold any damages obtained on trust for the members according to their respective rights and interests.

4) The Scope of the Representative Procedure

The implications of McGechan J's formulation of the conditions for bringing a representative action need to be examined. The judge clearly intended clarifying the law in this area. Whether he did so in a way which will encourage the use of the Rule, or in a manner which limits it unnecessarily, remains to be seen.

(i) Where consent has not been obtained

If a plaintiff comes to court to bring an action under Rule 78 having obtained the prior consent of all group members, the court apparently has no initial screening role.

The defendant may however apply to have the action struck out or stayed under High Court Rule 477. This rule is a codification of part of the court's inherent jurisdiction to strike out actions in which no reasonable cause of action is disclosed, or the proceeding is frivolous, vexatious or an abuse of process. It is used sparingly, and only in very clear cases.

It is not clear whether the defendant would be able to apply to have the proceedings struck out merely because they do not comply with the Flowers requirements. Rule 78 is worded in the alternative - the representative plaintiff must either have the consent of the others or seek direction of the court. The only ground of attack might be if the defendant could show that the plaintiff and the group members did not have the "same interest" in the proceedings. What this may mean is discussed below.

(ii) Where consent has not been obtained

If group members have not expressly consented, or if the plaintiff seeks the direction of the court anyway, guidance for how the court should exercise its

discretion will inevitably be drawn from the Flowers decision. Its major requirements are discussed below.

1.(a) A common interest in the proceeding

In Flowers this phrase is treated as synonymous with the actual words of the rule which refer to "the same interest in the subject matter of the proceeding". Whatever the words used, some guidelines for what appears to be required can be drawn from recent cases. A right of action arising out of a single incident or event (Prudential, Flowers, Jones v Cory[54]) or an on-going situation (EMI, Duke of Bedford) can provide a sufficient common interest. Membership of a common group is obviously sufficient (John v Rees[55]).

Individual contracts no longer appear to constitute non-common or separate interests, as the majority in Markt thought. The view expressed in that case by Buckley LJ would now appear to be accepted, as illustrated by Flowers itself, where despite separate contracts the common interest in the accident in the store provided adequate commonality for the purpose of founding a representative action.

As far as actions based on tort are concerned, Vinelott J in Prudential seemed to set a low threshold for finding a common interest. He said that their must simply be "a common ingredient in the cause of action of each member of the

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[54] (1921) 56 LJ 302

[55] [1970] 1 Ch 345

class"[56]. It could hardly be that the existence of a common defendant would be a sufficient "common ingredient", but there is no indications of how significant that ingredient must be.

In general, the barrier created by the need to find a common interest appears far less challenging than in the past. Implicit in Flowers was an acceptance that all that was required was some degree of interest in the subject matter of the proceeding, with no need to show any other nexus such as a common contract or undertaking. This amounts to a major liberalisation of the Markt approach.

2.(b) **All class members must be able to claim separately**

In his judgment, McGechan J recognised that there were allegations by the defendant which, if true, would show that some of the class members would have no right to sue at all - for instance, it was alleged that some did not even have fruit in the store at the time of the accident. Yet the judge said:[57]

> "...at this early interlocutory stage I am in no position to make a factual finding on that point....Unless I am to elevate the mere expression of contest by a defendant into an automatic barrier to a representative action, I cannot regard these contentions as decisive."

The defendant would need to produce very clear evidence that some of the class were not entitled to claim at all, in which case, those individuals would be struck out of the class, presumably leaving the rest of the class intact. The

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[56] Above n 42, 255

[57] Above n 50, 272

definition of the class should be carefully framed to exclude any who might obviously not be able to sue, such as those who were statute barred, or who could not be brought squarely within the cause of action.[58]

1.(c) **No defences available applicable to some only of the class**

The defendants in Flowers raised a number of defences to the claim - lack of contract, imputed knowledge of the store's deficiencies, lack of title in the fruit held. But McGechan J evidently did not view these defences as being applicable "to some only of the class". His focus is clearly on issues which could be applicable to some of the class but not others. He said:[59]

> "At this stage it appears the question of contract or non-contract will raise issues similar in the case of each member grower....[T]hese [defences] raise no obviously distinctive issues as between the member growers themselves."

This is quite a different emphasis to that taken in New South Wales (which relies on substantially the same precedents that we do, and whose rule is very similar). In Dillon & Ors v Charter Travel Co Ltd,[60] the defendant had sought orders to stay proceedings brought by a plaintiff on behalf of herself and a number of others. All had been passengers on the ill-fated ship "Mikhail Lermontov", and were suing for damages for loss of personal effects, personal

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[58] In Naken v General Motors of Canada Ltd (1979) 21 Ontario Reports, 780, a representative procedure was sought to be brought on behalf of purchasers of Firenza motor cars and suffered loss because the vehicle was not as it had been advertised to be. The Court allowed the action, but on the basis that the class must be redefined to include only those who had seen and relied on the advertisements.

[59] Above n 50, 272

[60] (1988) ATPR 40-872

injuries, loss of the holiday cruise, and restitution of the fare price. Many of the class members had in fact accepted payments from the Charterers and signed releases indemnifying them. Yeldham J, in refusing to allow the action to continue in representative form, said:[61]

> "...it is essential that the plaintiffs sue individually and separately because of the replies which will be pleaded to the anticipated defence of the defendants, and which will raise substantially different issues on behalf of each of the plaintiffs concerning the releases which they executed."

Compare this with Flowers. It is possible that the existence or otherwise of contracts between the various class members and the defendant could similarly have raised substantially different issues (some were oral, some claimed to be through Turners & Growers), yet for McGechan J this was not bar.

McGechan J might have found a bar if there had been within the class two distinct, readily ascertainable groups, one of which would definitely face a particular defence, while the other group would not - as was the case in Dillon. It is possible that this was the sort of situation in which the "no defences available applicable to some" requirement might not be met. The point then would be that the class lacked the necessary commonality, and should be split into two. If that is so, the requirement is far less daunting than the words at face value would appear to make it; it comes down again to defining the class carefully. For instance, where the cause of an action is based on misrepresentation one might think that was a situation which would fall squarely within the category of providing defences which would be different for

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[61] Above n 60, 49-435

each member of the group, as the misrepresentation must be shown to have acted on each person individually. Yet this looks like the sort of situation in which McGechan J would say it raises "no obviously distinct issues as between the member[s]".

2. **The representative action must be beneficial to all the class**

A claim for money will always be treated as a claim to a benefit, as money is the very measure of wealth.[62] Non-money claims could be more difficult; but the problem can be dealt with by defining the class in terms of the requirement of benefit gained or detriment avoided - "An action brought on behalf of all those who have been adversely affected by ..." Lord Macnaghten's statements in Duke of Bedford about it not being necessary to be able to compile a catalogue of members so long as one could tell whether any particular person belonged or not, is helpfully broad dicta in this context.

One thing that will stymie the class on this ground is if the judges take a limited - or mistaken - view of the benefit sought by the class. One case in which failure to comply with this requirement of representative proceedings caused the action to fail was Smith v Cardiff Corporation.[63] The plaintiffs, suing on behalf of themselves and 13,000 other council tenants, sought a declaration that a proposed scheme by their landlord to raise their rents was ultra vires. The scheme involved raising rents according to the tenant's means.

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[62] P Birks An Introduction to the Law of Restitution (Clarendon Press, Oxford, 1985) 109

[63] [1954] 1 QB 210

This naturally involved an enquiry by the Council into each tenant's income. It was that which was the real objection to the scheme. The Court of Appeal however said a representative procedure was not appropriate because the action, if successful, could not in its nature be beneficial to all, for under the scheme some of the class members would not have had to pay any increase at all, while others would. But to see a lack of unity within the class on that basis was to ignore the fact that that was not what their action was concerned with. The tenants were united in their objection to the procedure proposed, not to the level of rent increases which might result.

The above covers all the requirements which must be met when seeking a non-monetary award. The main remedies likely to be sought are injunctions and declarations, though the representative procedure could also be used in such actions as seeking to have a contract set aside, or a guarantee discharged. In an application for an injunction or declaration, the distinction between a "public" action commenced, for instance, by a responsible public interest group,[64] and a "private" action commenced by a representative using the representative procedure,[65] becomes blurred. In "public interest" litigation New Zealand courts generally do not permit issues of standing to delay their perusal of the merits of the case.[66] It would be surprising, given that judicial tendency, if the court permitted technical objections based on the nature of the

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[64] For example, EDS v South Pacific Aluminium [1981] 1 NZLR 216, 220

[65] For example, Mundy v Cunningham [1973] 1 NZLR 555

[66] As evidenced by the acceptance in Finnegan v NZ Rugby Football Union [1985] 2 NZLR 159 of the English approach to standing adopted in Reg v IRC ex parte Fed of Self Employed [1982] AC 617

representative plaintiff in an action brought under Rule 78 to divert it from dealing with the matter, at least in non-money claims. Even in money claims, this was certainly the overall approach in Flowers.

A final important point in relation to non-money claims concerns funding. Yeazell argues that the difficulties in funding a claim from which no financial benefit may be derived may act as a mechanism for ensuring that, despite lack of explicit consent, only proceeding which do in fact have the support of those represented are brought.[67] He asserts that in the US the practical result is that most non-money class claims are taken by voluntary groups which can command a sufficiently high level of support to fund the action. In this way the practicalities of funding an action ensures that representation is in fact representation by consent.[68]

In claims for damages (or presumably any money claim) the following conditions must be met in addition to those already discussed.

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[67] Above n 17, 279

[68] On the question of funding representative actions, s31 of the Legal Aid Act 1969 is clearly intended to provide legal aid for representative proceedings - the wording of the section is taken directly from the old Rule 78. However, it can be refused if the refusal would not "seriously prejudice" the applicant and if the group members could pay. It seems unlikely that the provision could be of much real assistance, given the difficulty of ascertaining the means of group members. The Justice Department unfortunately does not collect statistics in a form which indicate whether this provision has ever been used. The other legal aid provision for groups is contained in s31A, which was introduced by the Treaty of Waitangi (State Owned Enterprises) Act 1988. This provides that legal aid may be granted to applicants before the Waitangi Tribunal who are acting on behalf of the group. The restrictions on this section however are even more unrealistic than under s31, and I understand from the Waitangi Tribunal office that although people have applied under this provision, legal aid under it has never yet been granted.

3. **The action covers all or virtually all potential class members and their consent has been gained to an award of a global sum**

These last requirements reveal most clearly the practical limitations of Rule 78. They impose obligations far beyond those apparent on the face of the rule. Because of them, the costly and time-consuming task of contacting all group members must be undertaken before judgment (though not apparently before commencement of proceedings). The action is then a kind of bulk joinder.[69] But the necessity for "virtually all" group members to be involved makes it less flexible than joinder. What is more, in situations where the size of the class in unknown, it will be impossible to know when this requirement is fulfilled.

Where individual proof of loss is necessary to determine the level of damages, the representative action can only be taken as the first part of a two-step procedure, as in Prudential. Although the action might at that stage be characterised as an action for damages (what is being sought is a determination of the defendant's liability for damages to those falling within the definition of the class), this third set of Flowers conditions appears to be superfluous, as the award is not going to be "global".

The requirement for consent to a grant of a global sum presumes that the award will be made by reference to something other than individual loss. But if

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[69] In Morgan v Taranaki Farmers Meat Co Ltd [1925] NZLR 513, the joinder of all 112 group members was in fact preferred to the use of a representative procedure.

group members are not required to prove individual loss, why is their consent necessary before money can be awarded for their benefit?

The consent requirement is understandable where it is envisaged that the award will go not to individual group members but to some third party - such as BPI in the EMI case. But what when there is no third party recipient? The requirement cannot reasonably be defended on the basis that consent should be sought just in case some members object to the action. Group members are not required to prove their non-objection to a claim for non-financial relief, so why should they have to do so when money is sought on their behalf?

Yeazell identifies one persuasive justification for the consent requirement.[70] He finds that the purpose of the demand for individual consent is to prevent abuse of the procedure. It discourages the initiation of "blackmail" suits by representative plaintiffs (and their lawyers) on behalf of unascertainable classes. This may not be such a real danger in New Zealand, where we do not have provision for the contingency fee agreements which are available in the US and which may make such suits good business propositions. But seeing the consent requirement as being essentially about protecting defendants should make it easier to recognise when that requirement can sensibly be dispensed with.

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[70] Above n 17 . The class action procedure set out in Federal Court Rule 23 to which Yeazell is referring makes this same distinction between non-money claims, which can be brought without the consent of class members, and money claims, which do require individual consent.

The particular situation I have in mind is typified by two Canadian cases, Swift Canadian Co Ltd v Alberta Pork Producers' Marketing Board,[71] and Ranjoy Sales & Leasing v Deloitte, Haskins & Sells.[72] These came after the apparently restrictive Supreme Court decision in General Motors of Canada v Naken[73] in which it was said that the representative procedure was too skeletal a Rule to found the procedurally complex action which was being sought.[74] In Swift Canadian and Ranjoy the actions, commenced on behalf of classes of nearly 5000 and 1000 members respectively, were permitted to proceed in representative form. Unlike in Naken, the identities of the group members and the quantum of their individual loss could be discovered by reference to documents in the defendant's possession. It is not clear from the reports whether consent had been obtained from each group member, but there is no mention that this was needed before the damages actions could proceed. Both were claims in which neither of the two reasons identified above for requiring individual consent applied.

The question is, if similar situations arose in New Zealand, would Flowers be distinguished, in order to avoid these unnecessary restrictions? Or would it be treated as the last word on representative actions for damages and therefore require strict compliance with the conditions it laid down? Until we know whether the action will be used liberally, or in a restrictive way, I suggest we

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71 [1984] 9 DLR (4th) 71 (Alberta Court of Appeal)

72 [1984] 16 DLR (4th) 218 (Manitoba Court of Appeal)

73 (1983) 144 DLR (3rd) 385; [1983] 1 SCR 72

74 For an attack on this judgment, see Jennifer Bankier's article, above n 34.

should leave the Rule as it is. If, as I advocate, provisions for group actions are built into legislation establishing the kinds of causes of action likely to be litigated on a group basis, Rule 78 should rarely be needed anyway.[75] Peculiar and uncertain though it is, it still has as much potential to be liberally used as illiberally. At present at least the judicial climate would appear to promote the former.[76] Rule 78 is a group action procedure which simply needs to be used more, to discover the depths of its potential.

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[75] See above n 13, where the Ontario Report cites the American experience that non-statutory actions are rarely brought as class actions.

[76] Besides the evidence of judicial impatience with technical restrictions on form discussed earlier (above n @), High Court Rule 4 enjoins judges to construe the rules so as to secure the "just, speedy, and inexpensive determination of any proceeding". In some situations adhering to the Flowers requirements will certainly inhibit that.

PART III

Statute-Specific Group Action Procedures

Examples of statute-specific group action procedures are contained in the Fair Trading Act 1986 and the Human Rights Commission Act 1977. These statutes create new, or simplify existing, causes of action relating the protection of consumer rights and freedom from discrimination. In addition they established public officials who may act as representative plaintiffs on behalf of wronged persons. The funding of state officials for this purpose constitutes a recognition of the public value of facilitating access to remedies through civil suits. The breach, the victim and the remedy are integrated into the enforcement process through the involvement of a publicly funded third party.

In this Part I shall first look at the extent to which each of these statutes make provision for victims of mass wrongs to obtain financial relief, and how these provisions have been used. I then discuss if and how they could be improved.

1) Fair Trading Act

Section 43 of the Fair Trading Act appears to make it possible for the Commerce Commission (or any person) to seek damages and other relief on behalf of people who are not party to the proceedings. The section reads:

> **Other orders** - (1) Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that a person,

> whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss or damage by conduct of any other person that constitutes or would constitute -
>
> (a) A contravention of any of the provision of Parts I to IV of this Act;....
>
> the Court may .... make all or any of the orders referred to in subsection (2) of this section. (My emphasis)

The orders which can be made include declaring a contract void, or varying it; ordering a refund of money or return of property; paying for any loss or damage (ie making reparation); repairing goods supplied; or providing services.

This section has been used only once so far, in the case of Commerce Commission v Kelly Gall.[77] The Commission had already obtained an interim injunction preventing Mr Gall continuing to misleadingly advertise his photographic services, and the defendant was apparently not going to raise any objection to a final injunction being granted. In this action, the Commission was prosecuting Mr Gall over two alleged breaches of the Act. The first was for false and misleading representations with respect to price (section 13(g)) affecting a Mrs Crone, and the second was for accepting payment from a Mr Walker for services which the defendant did not have reasonable grounds to believe he could supply within the stated period (section 21(c)). At the same time, the Commission sought orders under section 43 in respect not only of Mrs Crone and Mr Walker, but also for a large number of others whose names were

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[77] Unreported, 18 May 1988, District Court Christchurch, CRN 8009006195.

listed on a schedule provided by the Commission, along with the sum claimed by each. This amounted to $3,800.

Fraser DJ found Mr Gall guilty only of the offence against Mrs Crone. However, in the course of discussing the influence which a reparation order for those listed would have on the level of fine to be imposed upon Mr Gall, the judge made the following comments.[78]

> "...before the Court can make a finding it must be satisfied by admissible evidence that there has been loss or damage suffered. It may well be that such evidence can be brought before the Court but it is certainly not before it at the moment....Because of the absence of any evidence which would enable the Court to make a specific finding of fact about individual complainants, I decline to make an order in respect of the complainants in the schedule other than Mrs Crone...and Mr Walker..."

He then added that under section 43 it was of course open to any person who had suffered damage to apply separately to the Court for a reparation order, and perhaps the Commission would be able to co-ordinate these applications.

This conclusion appears to take a restrictive, yet not strict, view of the court's powers under section 43. In granting reparation to Mr Walker, the judge had simply said that because at the hearing there had been evidence from Mr Walker as to his loss, he (the judge) could take that evidence into account. This was so even though it presumably related to conduct which he had just found did not amount to a breach of the Act, as the alleged offence against Mr Walker had not been proved.

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78 Above n 77, 3

One wonders what evidence the court must have before it before granting reparation to others. Must the victims be present at the hearing? Would sworn individual affidavits suffice? Would affidavits by the Commission that they were satisfied of a victim's loss be sufficient? And how closely should individual loss relate to the specific breach of which the defendant is convicted, or against which the injunction has been sought?

It is easy to see why the Fraser DJ felt constrained not to grant reparation merely upon presentation of a list of names with figures beside it. But a requirement for anything much more must deny the individual remedies apparently available to victims of mass wrongs through representation by the Commission. The presentation of evidence showing loss must involve, in the minimum, the identification, consent and participation of other wronged persons prior to the hearing. If victims are prepared to do that, there are already a number of other channels by which they could consolidate their proceedings,[79] and the promise of section 43 is illusory.

Kelly Gall has exposed the fact that the wording of section 43 means its ability to provide a means of giving financial (and other individual) remedies to non-parties is extremely limited. The problem lies in the requirement for the court to "find" that a person - who may not be a party - has suffered damage. If this were changed to a requirement merely for the court to be satisfied that

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[79] For instance by joinder or consolidation of actions in the District Court. Easier still would be to go to the Disputes Tribunal. This now has jurisdiction to hear individual claims of up to $3,000, and is also able to hear two or more claims together where that is convenient (Disputes Tribunals Act 1988 s39(2)).

non-parties had suffered, the way would be open for the Commission to seek a global or aggregate award of a sum representing an assessment of the likely extent of total loss suffered.[80] This would be awarded to the Commission to be held on trust and with the obligation for distributing it to those who have in fact suffered.

This approach would neatly deal with two other important practical constraints on the Commission's present ability to gain reparation for group members and which therefore undermines the Commission's enforcement function. A major difficulty - apparent in the Kelly Gall case for instance - is often the state of the defendant's records, certainly by the time of the hearing, if not before. This makes a finding on quantum of individual loss difficult to achieve. In distributing an aggregate fund, the Commission's concern would be to achieve an equitable distribution between all the claimants and so the defendant's records may be quite irrelevant.

The second problem is that in practice the defendant frequently has no money to pay the order.[81] An aggregate order can be made before the Commission has spent time and money contacting victims. Only if and when the money is

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[80] In these sorts of cases it would be prudent to allow the action to be brought only by the Commission (or some other responsible public body). It is highly unlikely that an individual would want to get involved in this managerially difficult proceeding, and denying them the opportunity means that special provisions for dealing with that situation need not be devised.

[81] The Commerce Commission recognises its vulnerability here. In its 1987 Annual Report, it requested an amendment to the Act which would enable the Court to order that traders retain assets in New Zealand until proceedings commenced against them had been completed.

produced need it commence the process of ascertaining individual loss and distributing the fund.

The question of course arises, however justifiable it may be to deprive defendants of the profit of their wrongdoing, is it worth the Commission's while spending time co-ordinating a distribution of perhaps very small sums? Why not just impose a fine? The answer depends on whether the distribution - which may sometimes be more a symbolic gesture than a provision of significant financial relief[82] - is seen as valuable in enhancing the effectiveness of the law and the faith of the population in its worth. Consumer laws which do not actually assist consumers at the point of hurt - the pocket - may never gain the respect of citizens, and therefore not feed through to affect supplier behaviour. I suggest that provision for individual reparation for consumers deserves to be more effectively provided for than it is at present, and that this would not be difficult to achieve. There is a potential public benefit in assisting individuals to obtain remedies which warrants the effort.

2) Human Rights Commission Act

The Human Rights Commission Act, like the Fair Trading Act, appears to provide a means for mass victims who are not party to the court proceedings to obtain remedies for wrongs through the intervention of a public official. Unlike the Fair Trading Act however, the provisions in this legislation are probably adequate to their purpose. Although individual damages can only be awarded

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[82] In Kelly Gall it appears that the claims were in the order of $100 each. At this level, the potential individual relief was probably more than merely symbolic.

to those who participate in a proceedings, there are provisions in the Act which enable the public official to obtain a generic award for the benefit of the whole class represented. In the context of anti-discrimination legislation, this remedy seems highly appropriate.

Under the Human Rights Commission Act 1977 and the Race Relation Act 1971, discrimination in certain matters on the basis of colour, race, ethnic or national origins , sex, marital status and religious or ethnic belief is made unlawful. Civil proceedings before the Equal Opportunities Tribunal may be bought by the Proceedings Commissioner (a member of the Human Rights Commission) where a complaint has not been able to be resolved by investigation. The proceedings may be brought on behalf of an individual, or, by section 38(2), on behalf of a class. Section 38(2) reads:

> The Proceedings Commissioner may, under subsection (1) of this section, bring proceedings on behalf of a class of persons, and may seek on behalf of persons who belong to the class any of the remedies described in subsection (6) of this section, where it considers that the person referred to in section 37(2) of this Act is carrying on a discriminatory practice which affects that class and which is in breach of Part II of this Act. (My emphasis)

The provision has rightly been referred to as providing a representative proceeding. It has not yet been used.

The recent case involving the Air New Zealand air hostesses appeared to be an ideal situation in which to make use of the provision. A large but identifiable group of women had all been subject to the same regime which was alleged to be discriminatory. However, instead of bringing the action on behalf of air hostesses as a class, the Commissioner brought the proceedings on behalf of 17 individually named women. The reason was that some potential members of the group had publicly asserted that they, personally, did not feel discriminated against. Their presence in the class would obviously have been damaging to the case the Commissioner was trying to make out, and anyway the Commissioner would not wish to bring an action on behalf of patently unwilling complainants.[83]

As it happened, the Tribunal found that there had been unlawful discrimination against the 17 air hostesses. An order was made to remedy the position of the complainants within the organisation and this has been complied with; negotiations for financial compensation to cover past losses are under way. Because of the size of the claim, if this cannot be agreed upon it will go to the High Court.

The position of those who could have been, but were not, included amongst the plaintiffs is interesting. The doctrine of res judicata means the finding of discrimination does not directly relate to them. If they want damages they will need to bring their own action. Yet the doctrine of stare decisis means that in

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[83] The background details and up-to-date information on the progress of this action were kindly supplied to me orally by Frances Joychild of the Auckland office of the Human Rights Commission.

fact the outcome of the case is pretty well pre-determined; so the defendants will seek to settle. But the hostesses cannot rely on this in their negotiations for settlement; if the employers drive a hard bargain they will have no option but to go to court. If they had been named members of the a group on whose behalf the original proceedings had been brought, the employers would have no such negotiating "stick" to wave, and would instead be negotiating as the result of a binding court order.

If a representative action was taken by the Commission, the damages awards which could be made would necessarily be personal. This is because damages are awarded under section 38(6)(c), which says they must be given in accordance with section 40. This section confines the damages awardable to:

1) pecuniary loss
2) loss of a benefit, monetary or otherwise, which the aggrieved person might have obtained but for the breach
3) humiliation, loss of dignity and injury to feelings.

An assessment of these matters obviously requires individual examination. Damages can therefore not be awarded to unidentified or non-participating class members.

Can any financial remedies be obtained for class members?[84] Under section 38(6)(g), the Tribunal may award "such other relief as it sees fit". This clearly could not allow the Tribunal to award damages other than in accordance with section 40. However, it might allow an award of some generic financial compensation. This sort of award is already seen as one appropriate remedy in discrimination cases. Settlements negotiated through the conciliation process have included this sort of provision. For instance, an employer brought before the Commission for sexual harassment might agree to make a donation towards a womens' aid project such as Rape Crisis. Individual women who have suffered by his action may not benefit directly, but the overall class of people who suffer from the wrongful discrimination - women - is helped.

Section 38(6)(g) of the Human Rights Commission Act provides an opportunity for such a generic award, which is not possible either under the representative action provided by Rule 78,[85] or under the Fair Trading Act. The field of discrimination is a reasonable area in which to make such awards, and provision for it is properly located in the Act, rather than in some general procedural rule such as a class action procedure.

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[84] Senator Gareth Evans asserts, in "Discrimination Legislation" [1984] NZLJ 214, 217, that damages should not be awardable in a class action based on discrimination. He does not explain why, but one intuits that his reasons are to do with the difficulty of giving a financial value to individual responses to discrimination. However a generic order to pay money to a worthy relevant cause does not produce the same unease.

[85] Although it might be within the court's inherent power to make such an order, I suggest that it would be a controversial and unlikely remedy to award in most civil proceedings for a money remedy.

PART IV

Prospective Legislative Provisions

Two other important areas in which mass victims might be concerned to have a procedure whereby they can gain financial remedy without the necessity of personal involvement in the proceedings are company law and environmental law.[86] As mentioned in the Introduction, both these areas are currently under review.

1) Company Law

Shareholders in companies form a special types of groups - ones particularly susceptible to becoming groupings of mass victims. Yet shareholders have limited personal rights and are thus rarely able to sue to obtain personal remedies, either individually or on behalf of a class of shareholders. Their rights have been tied to those of the company, so shareholders taking action, for instance against directors, have had to sue on behalf of the company using the "derivative action", which in notoriously difficult to bring. Any remedy obtained accrues only indirectly to shareholders as a result of an award made to the company itself.

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[86] See above n 13.

The Law Commission's recently released a report on Company Law addresses this problem.[87] It proposes the recognition of a number of personal rights for shareholders which are then personally enforceable. Most significant to this paper is the provision for bringing representative actions in respect of these rights.[88] Broadly, its provisions are that:

- where a shareholder brings an action against the company or a director,
- and other shareholders have "the same or substantially the same interest in relation to the subject-matter of the action",
- then the court may appoint the first shareholder as representative of the others
- and may make "such orders as it thinks fit", including ones covering the control and cost of the action and the distribution of any award.

The basic wording - the emphasis on "same interest in the subject-matter" - is clearly drawn from Rule 78. No mention is made of the need or desirability for consent. Representation based on the shared interest assumed to exist between shareholders is sufficient; express consent legitimising representation is therefore unnecessary.

Supporting the inference that prior consent is not required is the wording of the clause, which refers to the distribution of any amounts "adjudged payable by a defendant". This suggests that what is contemplated is an aggregate award

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87 Law Commission Report No 9 Company Law: Reform and Restatement (Wellington, June 1989)

88 Above n 87, Draft Bill, clause 133

followed by distribution, rather than proof of individual loss in order to discover the total amount due. In the company context this is a sensible approach, for the shareholder group members are identifiable and their individual losses should be able to be calculated mathematically.

It is beyond the scope of this paper to thoroughly assess the usefulness of this provision in the light of the whole new company regime proposed by the Law Commission. It might be found, for instance, that without provisions similar to those relating to the funding of derivative actions, the representative procedure is in practice unusable.

The point I want to make is that this provision demonstrates an understanding of the need to provide for the temporary creation of litigative entities in cases of mass wrong. It is precisely the sort of provision which needs to be built into legislation creating causes of action which are likely to accrue to mass victims.

2) Environmental Law

The Resource Management Law Reform project is currently undertaking a major review of environmental law. It evidently recognises of the value of encouraging individuals to enforce the law, rather than leaving that entirely to regulatory or enforcement agencies.[89] It also proposes that there should be a

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[89] People, Environment, and Decision Making: The Government's Proposals for Resource Management Law Reform (Wellington, December 1988), 61

means of providing compensation to those who have suffered as a result of an environmental wrong. A suggestion is that this could be achieved perhaps through a combination of criminal prosecutions and civil remedies combined in "an integrated system that includes both penalty and restitution".[90]

The enforcement of environmental law is a very difficult area. Having looked at other statutory provisions for bringing representative actions, I suggest that the new legislation should incorporate similar provisions, but tailored to deal with the particular problems involved in environmental cases. These include: the inevitable vagueness of the boundaries of the class affected, and the need for "opt out" provisions; the difficulties of involving state agencies in matters which frequently have strong political implications; the acute cost problems arising from the need to call expert witnesses; and the recognition of the varying degrees, and frequently subjective nature, of the impact on individual class members of the wrong concerned.

More specifically, there should be provision for the court to order a generic financial award, to be used for some appropriate purpose. Where a large number of people are affected by an environmental wrong, proof of individual loss could be totally impractical, and small individual distributions a completely inadequate compensation. To encourage individuals to enforce the law through private litigation, there must be the possibility of a significant benefit accruing to the class as a whole as a result of a successful action. A sizeable generic award might provide the incentive.

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[90] Above n 89.

The establishment of an effective means of deterring and punishing breaches of environmental law would be of enormous public benefit. A procedure facilitating groups of individuals to sue on their private rights could have a significant impact on the enforceability of the law. For that reason, public funding should be made available to support such actions. But because of their controversial nature, the involvement of a state-funded official to represent groups may not be appropriate.

It is not clear just what the RMLR project have in mind. One can only hope they are as alert to the benefits of group actions as the Law Commission appears to be, and are developing a workable procedure for bringing environmental litigation.

PART V

Conclusion

The exploration of provisions for dealing with multiple victims has highlighted many interesting facets of our legal and social system. It has illustrated the tension between the public and the private value of litigation. It reminds us of the fact that disputes are frequently not one-to-one, and invariably have "ripple" effects. It exposes the dangers of allowing the threshold at which legal actions are worth pursuing get too high. It prompts a consideration of the web of groups we are now all part of.

Where in medieval England, and pre-European New Zealand, groups were composed of individuals whose whole lives were intimately linked, now individuals belong to a multitude of groups, but at different times, to different degrees, and in different capacities. I belong to the group called women, to the group that buys petrol, to the group which owns shares in a particular company, to the group that lives in a particular suburb, sharing a particular environment. On occasions I may want those groups to be recognised as litigative entities; this paper has been about how to ensure that need can be accommodated.

Without doubt our legal system should respond to the changes in our society which have produced this range of group allegiances. This study has revealed that New Zealand law-makers - both legislators and judges - have in fact recognised the need and are making provision for multiple victims to use the courts to gain remedies. However, the lack of writing or comment, and the

variable quality of the provisions, suggests that this is occurring almost instinctively rather than as a result of awareness and conscious decision to promote its development.

If we do continue to develop appropriate provisions for dealing with multiple victims of wrong by building the opportunities into new legislation, I do not see any advantage in introducing a sweeping new procedure which attempts to provide for the full range of situations. The character of the substantive matter at issue determines the nature of the group, and the nature of the group should determine the procedure adopted. General procedures, such as those contained in Rule 78 or class action legislation, are vulnerable to judicial interpretations which may impose restrictions which, though appropriate to the situation immediately before the court, are quite unnecessary in others. More robust but specialist provisions are needed if this is to be avoided.

While some jurisdictions are struggling to devise a single procedure to facilitate group actions, New Zealand is developing a different and more subtle approach. We should acknowledge what we are doing, and undertake the task with open eyes and full understanding.