

Mass Justice

Challenges of representation and distribution

Jenny Steel and Willem H. van Boom (editors)
Edward Elgar (2011)

ISBN978-1-84980-506-3

**Book Review by Sally Ramage, Editor, *The Criminal Lawyer*,
Bloomsbury, UK**

Introduction

The contributors to this special law book *Mass Justice* include eminent legal scholars from around the globe and among these are Rob Markin, Law Professor, Southampton University; Robert Lei, Law Professor, Cardiff University and Geraint Howells, barrister-at-law at Gough Square Chambers, London.¹

The majority of the case law cited is English and American and the table of cases is extensive. However, it would have been useful if a table of Conventions (Aarhus Convention; European Convention on Human Rights; Rio Declaration, etc) were provided, together with a glossary, since *Mass Justice* is not an everyday legal topic.

The editor reveals that the motivation for *Mass Justice* is due to the fact that 'mass' civil justice '*throws up novel challenges for legal systems which have so far barely been addressed*'. Such challenges are:

- fair representation of all individual interests when settlements are reached;
- access;
- civil procedure; and
- compensation goals.

Such legal issues highlight the differences between individual and collective interests and between the public and private goals of civil law.

¹ Gough Square Chambers barristers act for banks and other financial institutions, supermarkets, manufacturers, distributors and high street retailers. We also act for government agencies such as the Office of Fair Trading, and local authorities' trading standards and environmental health departments and we act for individuals. See <http://www.goughsq.co.uk/areas-of-practice.php>.

Mass tort

The class action vehicle is used generally when a number of people have suffered the same or similar injuries. Often many of the individuals' injuries were relatively minor, such that they might not pursue legal redress on their own. Together, however, the value of the claims of the class add up, and suing as a class means consolidating the attorneys, defendant, evidence, witnesses, and most other aspects of the litigation. If the number of people affected by the product or conduct is high, it becomes impractical or even impossible for them to file individual lawsuits. When a class action is permitted, the group files the lawsuit with a representative plaintiff, called a 'named plaintiff' or 'lead plaintiff' at the forefront. There are many examples of class action lawsuits. A class may consist of a group of employees who were subjected to employment discrimination², a number of patients who were prescribed a drug with injurious side effects, a neighbourhood of residents whose homes or families were injured by a toxic spill, all the consumers who purchased a defective product that caused them injuries, or corporate investors who suffered fraud in the purchase or sale of shares and other securities. One type of class action lawsuit is the 'mass tort; action. 'Mass tort' litigation is a multi-party lawsuit based on a massive accident, such as an airplane crash, in which many people are injured or widespread personal injuries caused by a defective product, such as a medical device. One example of this is the recent United Kingdom 'miners' class action. A benefit of the class action format is its efficiency. The class action lawsuit brings together and disposes of thousands of claims at one time that are impractical to litigate individually. The judge decides the basic question of who wins with regard to the entire group. If the defendant wins, the class lawsuit is dismissed and the individuals in the group are prohibited from filing new or individual lawsuits over the same issue against the same defendant. If the class of plaintiffs wins, the court finds the defendant liable for the plaintiffs' injuries, and the amount of recovery is later divided among the plaintiffs. Because it aggregates small claims, the class action format lowers the high cost of litigation. Also, class actions are usually brought by attorneys who are particularly trained and experienced in litigating and managing complicated lawsuits. Also, class actions seek to ensure that all injured plaintiffs receive something. It may be the case that the defendant is bankrupt or for some other reason cannot afford to pay each individual the full amount necessary to cover his or her losses. When the class wins the lawsuit, each participant receives some

² In 1999, a miners' union, NACODS, took RJB Mining to court. They sought a ruling that its members should not have to work more than 48 hours a week. The pit deputies complained that RJB had asked them to sign away their right to refuse to work more than the maximum number of hours. NACODS claimed that its members feared victimisation if they refused, and many were working 'under protest'. Editor, 'Miners test working hours law', BBC, 23 Feb, 1999.

payment, even if it is not an amount to fully cover damages. Absent a class action, payment by the defendant would be on a first-come, first-served basis.

Anti-trust

In the US, EU and in many other jurisdictions, it is illegal for companies to conspire to control markets or take action to keep other companies from entering a market. Such antitrust leaves one with fewer options, meaning that higher prices must be paid.³ An antitrust class action lawsuit can begin when one consumer, joined by others, takes legal action through an experienced law firm with sufficient financial resources. Such a consumer class action lawsuit sends an important message. Similarly, when companies collude and decide on a price for their products, consumers end up paying higher prices. Instead of the market determining prices, prices are determined by companies' conspiracy.

A company may find ways to block other companies from the marketplace. No competition means higher prices and such anti-competitive measures can also mean lower quality, because there are no other options in the marketplace. On the other hand, a manufacturer might bring such an action against consumers who breach its copyrights.⁴ One experienced United States class action law firm with partner Michael Hausfeld has opened offices in the United Kingdom.⁵ Companies which change the rules for franchisees can destroy the individual franchise operation. In such a case, one consumer can be the voice of many other consumers in a class action lawsuit. A class action lawsuit is one in which a group of people with the same or similar injuries or death⁶ caused by the same product or action sue the defendant as a group. People seek justice in class action lawsuits when their injuries have been caused by, among other things, defective products, including pharmaceutical drugs, motor vehicles and other consumer products, and medical devices. Other types of conduct over which people have sued as a class include consumer fraud, corporate misconduct, securities fraud, and employment practices and anti-trust. Filing and fighting a lawsuit can cost a great deal of money and for the average person, that can place justice out of their reach unless that person becomes a part of a class (a group of similarly situated people), if the class can find a lawyer willing to finance and litigate a lawsuit, then all members of the class have a chance to right a

³ It is to be noted that before the UK Enterprise Act 2002, such action was not illegal. See *Mogul Steamship Co Ltd v McGregor, Gow & Co* [1892] AC 25.

⁴ *EMI Records v Riley* [1981] 2 All ER 838. Copyright action for damages. Award of damages in.: Plaintiff-representative of class.

⁵ Editor, 'US class action star targets UK', *Sunday Times*, 11 March 2007.

⁶ See *Duncan v Cammell Laird* [1942] 1 All ER 567. A submarine disaster where proceedings for damages were brought by the relatives of deceased victims against the builders.

wrong. A class action lawsuit is therefore a lawsuit brought on behalf of many similarly situated people who have been harmed in the same way by the same entity. Usually class action litigation will have only a few named plaintiffs (one or two), but those plaintiffs often represent many other people - hundreds, thousands, sometimes millions of people. Usually the person who got the ball rolling will be chosen as the 'lead plaintiff,' 'named plaintiff,' or 'class representative' in the class action.⁷ Although anyone can offer to be the lead plaintiff, the role must be officially sanctioned by the court.⁸ The harm done to one person may amount to a relatively small amount of money, for instance it may be just an extra £20 fee when you buy a product or service. But if that £20 is multiplied by all the people who had to pay, the amount could be a profit of hundreds of thousands or millions of pounds to the company that charged the bogus fee.

Consumer class actions

When one consumer has faced an issue with a business, other consumers have probably had the same experience. One consumer's voice can be multiplied many times over in a class action lawsuit. Consumer class actions can be cases brought against manufacturers who fix prices on products or who sell a household product that fails in normal usage. Therefore by joining with others in a class action, a message is sent to manufacturers that their wrongdoing has a price. A successful class action lawsuit can force the company to pay back all the members of the class plus a penalty. Not many law firms have the resources to invest in class action lawsuits and even if they do, many law firms do not wish to tie up their in difficult litigation. It takes a significant financial investment to investigate the wrong-doing, use the legal discovery process to obtain evidence, consult with expert witnesses, obtain class action certification, and fight the case in court and a class action law firm has to do all this against the formidable resources of a large corporation.

Notice to Potential Class Members

Every person who would be affected by the court's decision in the class action is entitled to notice that the action has started. Although it usually is not possible to give every such individual personal notice, all persons

⁷ In the United States, the Private Securities Litigation Reform Act provides that the best lead plaintiff is the person with the largest financial interest-the amount lost or the percentage of net worth lost-of the damages sought by the class. Also, depending on the circumstances, several individuals may be appointed to serve together as lead plaintiffs. The named plaintiff also must meet specific criteria under the facts of the particular case. His or her injuries must be representative of those of the entire class, and the judge must believe that the lead plaintiff will adequately represent the interests of the class. For example, if the case involves a toxic environmental spill, the lead plaintiff must be someone whose property is alleged to have been damaged by the spill. A person with no such connection to the subject of the lawsuit cannot be the class representative.

⁸ Who is qualified to be the class representative or lead plaintiff is governed in the US, by the Federal Rules of Civil Procedure or a state's specific procedural rules. In some areas of the law, there are specific rules governing how the court determines the class representative.

who might be affected are entitled to the best notice possible. The court will order that the class representative, through his or her attorneys, make reasonable attempts to notify any unknown class members by general media such as television, an advertisement in a magazine or newspaper, or a posted flyer. The court will tailor the type of notice required to the particular facts of the case. Those people who are notified then have the opportunity to join in the action-called 'opting in' or to decide not participate as a member of the class-that is, to 'opt out'. In some cases, individuals don't have the opportunity to opt out. For example, if a class action has been filed over particular injuries caused by a particular defendant, all people who are similarly situated are automatically in the class and must live with the outcome. A recent English class action which involved the National Union of Mineworkers (NUM) against the collieries was a sad indictment of lack of professional ethics which resulted in the miners receiving a pitiful amount of compensation because the NUM, in providing law firms with thousands of clients seeking damages from the miners' compensation scheme, made agreements with the law firms for money to be deducted from miners' damages payments to be given to the NUM.



Class Action Judgments: A plan of distribution

In a class action, the court's decision applies to every participant who has opted into the class. All individuals who fit within the court's original definition of a class member are bound by the final court decision, even if they never actually go to court or otherwise participate in the lawsuit. Payment to the participants in the class action usually follows a 'plan of distribution.' With the help of the parties and their lawyers, the judge develops the plan to distribute the amount that the plaintiff class won in the lawsuit (less the legal fees and litigation costs). Each member of the class may receive certain percentage of the total amount fund,⁹ or may receive a certain figure.¹⁰ In some cases, the lawyers seek and obtain permission for an individualised, in-depth review of each participant's claim, so as to tailor the amount awarded to each class member to the 'value' of his or her claim. This method is rarely used in large class actions. When the parties in a class action lawsuit decide to settle, the presiding judge must approve the settlement, making sure it is fair to all parties.



⁹ See *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1982] Chancery Div. (Equal treatment for all in class- insolvency case).

¹⁰ In the US, after obtaining the court's permission to go forward with the lawsuit as a class action, the lawyers and the lead plaintiff work with the court to determine who will be considered a class member. As the case progresses, the lead plaintiff also has control, with the attorneys, over the direction the litigation will take. The lead plaintiff works with the lawyers and attends pre-trial conferences in court. The lead plaintiff undertakes to give substantial service to the class when he or she agrees to serve as the class representative. If the suit has been successful, the court often approves an 'incentive award' to be given to the lead plaintiff - a payment to reward him or her for stepping forward and representing the class.

Distribution after bankruptcy

Bankruptcy laws protect troubled businesses and provide for orderly distributions to business creditors through reorganization or liquidation.¹¹ Bankruptcy laws help people who can no longer pay their creditors get a fresh start – by liquidating assets to pay their debts or by creating a repayment plan. Bankruptcy laws also protect troubled businesses and provide for orderly distributions to business creditors through reorganization or liquidation.

In the UK, the Chancery Court in London has the bankruptcy function.¹²



The primary purposes of bankruptcy law are to repay creditors in an orderly manner to the extent that the debtor has property available for payment. Some bankruptcy cases are filed to allow a debtor to reorganize and establish a plan to repay creditors, while other cases involve liquidation of the debtor's property. A bankruptcy case normally begins by the debtor filing a petition with the bankruptcy court. A petition may be filed by an individual, by a husband and wife together, or by a corporation or other entity. The debtor is also required to file statements listing assets, income, liabilities, and the names and addresses of all creditors and how much they are owed. The filing of the petition automatically prevents or ‘stays’ debt collection actions against the

¹¹ In the US, each of the 94 federal judicial districts handles bankruptcy matters, and in almost all districts, bankruptcy cases are filed in the bankruptcy court. US bankruptcy cases cannot be filed in State court. ¹¹Bankruptcy laws help people who can no longer pay their creditors get a fresh start by liquidating their assets to pay their debts, or by creating a repayment plan.

¹² In the US, Federal courts have exclusive jurisdiction over bankruptcy cases. This means that a bankruptcy case cannot be filed in a state court.

debtor and the debtor's property. As long as the stay remains in effect, creditors cannot bring or continue lawsuits, make wage garnishments, or even make telephone calls demanding payment. Creditors receive notice from the clerk of court that the debtor has filed a bankruptcy petition. Some bankruptcy cases are filed to allow a debtor to reorganize and establish a plan to repay creditors, while other cases involve liquidation of the debtor's property. In many bankruptcy cases involving liquidation of the property of individual consumers, there is little or no money available from the debtor's estate to pay creditors. As a result, in these cases there are few issues or disputes, and the debtor is normally granted a 'discharge' of most debts without objection. This means that the debtor will no longer be personally liable for repaying the debts. In cases disputes may give rise to litigation in a bankruptcy case as to who owns certain property, what the property is worth, how much is owed on a debt, whether the debtor should be discharged from certain debts, or how much money should be paid to lawyers, accountants, auctioneers, or other professionals. Litigation in the bankruptcy court is conducted in much the same way that civil cases are handled in the district court. There may be discovery, pretrial proceedings, settlement efforts, and a trial.

Conclusion

Mass Justice is an interesting volume which Edward Elgar saw the wisdom of publishing since, in the United Kingdom, there is not much legal activity as regards class actions, unlike in the United States, and so, quite correctly, the editors define 'mass justice' as the involvement of a range of thematic issues which have exercised policy-makers, courts and legal advisors throughout the world, but which have only recently begun to be seriously debated. Such class actions include environmental and consumer litigation; personal injury claims resulting from industrial diseases; distributive issues arising from corporate insolvency for unsecured creditors; and distribution of liabilities between insurers (as will become evident when insurance claims pour in after the recent UK riots, arson and looting as reported in *Google News*, the *BBC*, the *Guardian*, the *Times* and other newspapers and television and radio outlets.¹³ The English riots in August 2011 caused hundreds of millions of pounds of destruction of property, businesses, stock, chattels, flood damage, fire damage and destruction, looting, and losses of livelihoods.

¹³ See *Irish Shipping Ltd V Commercial Union sub nom Commercial Union Assurance Co Plc v Irish Shipping Ltd* [1991] 2 QB 206.



Implicitly, *Mass Justice* is concerned with mass resolution of mass torts emphasising procedural issues; issues of enforcement and access to court; availability and distribution to funds; insolvency as a distributional mechanism of mass justice; insurance and funds and collective bargaining. Nevertheless, class actions remain a highly effective and efficient form of civil litigation, when they finally come to court and eventually are settled. (See Nico Coburn, 'Lawsuit from 2002 flooding still awaiting trial. Mediation sessions have failed twice', *Ottawa Citizen Newspaper*, 26 July 2011.¹⁴



¹⁴ Derek Nicholson, a lawyer representing 77 plaintiffs who suffered property damage when sanitary and storm sewers in Glen Cairn overflowed during a storm on June 27, 2002, said a settlement in the case has not been reached despite two mediation sessions. The lawsuit was certified by a judge as a class-action on March 21, 2005. Nicholson said he offered in October 2009 to settle out of court for \$1.7 million, which he said represented 80 per cent of the residents' actual losses. The offer remains on the table.