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Law Enforcement and Remedial Roulette

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The Class Action as Sheriff: Private Law Enforcement and Remedial Roulette

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A. INTRODUCTION

In a recent conference paper,¹ Jeff Berryman expressed dismay about the “piecemeal” undermining of the compensation principle. The compensation principle requires that the plaintiff should as nearly as possible get the sum of money that will place him in the same position as if he had not suffered a wrong.² Berryman argues that the principle has occupied a central position in modern private law “as a justification for who (victim) is allowed to commence an action in court, and for what (compensation), and as a limiting mechanism on the limits of what courts may justifiably do. But its justificatory and limiting roles are becoming frayed.”³ He describes the demise of the principle as “death by a thousand cuts”. Some of the deepest cuts have been inflicted by the modern class action.

In this essay I will explore the effect of developments in class action law and practice upon remedial law, and investigate the state of health of the compensation principle. My focus will be upon class actions in Australia, Canada, and the US, in descending order. I will concentrate on compensatory, and to a lesser extent restitutionary remedies; leaving discussion of punitive, exemplary and treble damages for another occasion.

My overall hypothesis is that whilst the compensatory principle is being assailed by the calls for the class action to deter corporate misconduct, the principle still acts as a moral compass. Corrective justice has not entirely yielded to instrumentalism, but the current autonomous, individualistic, and substantive law model of corrective justice under private law needs to adjust to group procedural justice as practised in law firms and in the courts.

Although remedial law is underpinned by several objectives such as compensation, restitution, punishment, coercion, and urgent and declaratory relief,⁴ changes to facilitate class actions have overwhelmingly been justified on the basis of deterrence. Many argue that deterrence of corporate misconduct is now the single most important objective of the class action. Since the global village is predominantly inhabited by corporations, and the transactions undertaken by them cross national and continental boundaries, the class action operates like a privatized police officer targeting breaches of the law occurring in mass transactions. In this respect, the class action is often referred to as the private attorney general, to indicate that it operates by the permission of the national state rather than under its auspices. Class actions are

* The author wishes to thank Peter Cane and the anonymous referee for their helpful comments on an earlier draft as well as Jeff Berryman and Rick Bigwood for organizing the Remedies Symposium and providing editorial assistance.

¹ J. Berryman, *The Compensation Principle*, Conference Paper, Remedies Forum, Atlanta 2007, at 13.

² Lord Blackburn in *Livingstone v. Rawyards Coal Co* (1880) 5 App Cas. 25 at 39 (HL (Sc))

³ J. Berryman, *The Compensation Principle*, Conference Paper, Remedies Forum, Atlanta 2007, at 2.

⁴ M. Tilbury *Civil Remedies* (Sydney: Butterworths, 1990) Vol 1 at 17.

said to have a fusion of public and private roles⁵ in performing law enforcement tasks that would be unremedied by public officials.⁶

In this respect, the class action can be likened to a sheriff, or bounty-hunter. It operates to enforce the law, but like a Wild West sheriff it is likely to mete out rough justice, adopting a creed that accepts that the apprehension of crooks may justify some bending of the rules. It may appear like the Sheriff of Nottingham with its hands in the till and a corrupt band of racketeers, or it may have a shiny sheriff's badge like Deputy Dawg, ever at the ready to apprehend corporate miscreants. The importance of the simile is to portray the continuum of law enforcement activity undertaken by the class action, and to observe that there is a tendency to vigilantism that forms part of its *raison d'être*. The centrality of law enforcement reflects the overarching importance of deterrence. Cassels and Jones demonstrate this concern by the following quote which squarely juxtaposes the compensation principle to the deterrence function when discussing the judicial approval of class action settlements where a large portion of the recovery is paid to the lawyers:

Consider the case where proposed counsel fees would consume all or virtually all of the proposed recovery. Courts and commentators have expressed a visceral opposition to such a proposal, even where the claims at issue are so small as to be individually untenable. In such a case the reaction indicates that deterrence is being considerably undervalued and the role of the plaintiff's counsel in exercising the public rights ignored. As distressing as it may seem, such an arrangement may be the only way of pursuing the wrongdoer, and courts ought to be alive to this possibility.⁷

Their reference to the "visceral opposition" indicates that we may instinctively oppose deterrence for its own sake even if we agree that the class action is very good at securing it. This essay will explore the challenges that this vision of the class action presents to the law of remedies, in particular to the compensation principle. In Part B, the overall problem is identified - that the class action has wrested too many compromises from remedial law and there is a concern that the continued viability of the compensation principle is threatened by calls to promote the role of the class action in securing deterrence. In order to interrogate the problem I examine the propositions made by Cassels and Jones, that:

1. it is legitimate for the plaintiff lawyers to be paid the entire funds of a class action recovery in order to pursue wrongdoers;
2. courts and commentators are viscerally opposed to such a proposal;
3. this opposition persists even where claims are so low as to be individually untenable;
4. this opposition ignores the role of plaintiff's counsel in exercising public rights.

The issue will be exemplified by the remedial difficulties created by vitamin antitrust litigation conducted in the US, Canada, and Australia, where the members of the class suffering the loss were not present, and in the tobacco excise litigation in Australia, where the plaintiffs were middlemen who were securing a windfall at the expense of

⁵ O. Fiss, "The Political Theory of the Class Action" (1996) 53 *Washington and Lee L. Rev.* 21 at 21.

⁶ *Ibid.* at 22.

⁷ J. Cassels and C. Jones, *The Law of Large Scale Claims* (Toronto: Irwin Law, 2005) at 369 (footnotes omitted).

the missing end-point consumers. Proxy or ‘next best’ remedies such as in-kind settlements and cy-pres funds will also be discussed.

In Part C, I examine the dominant theoretical analyses of private law by corrective justice theorists, but find them wanting due to the assumption of private law autonomy and individualism. I will then map a middle ground by arguing that current theoretical models presuppose a hierarchy between substantive and procedural law. This hierarchy is irrational, and the relationship between the two bodies of law must be interpreted dialogically. In Part D, I apply the dialogical analysis to the problem of the missing end-point consumer in the antitrust litigation and the ‘middle-man windfall’ in the tobacco litigation, to show that the poles of substantive/procedural law and individual/collective rights operate dialogically to craft solutions to challenges presented. Most importantly, the vitamin trust and tobacco case studies demonstrate the continued vitality of the compensation principle, which operates expressly or in the sub-text of the judgments as a moral compass.

B. A STATEMENT OF THE PROBLEM

1) The Nature of the Class Action and the Role of the Plaintiff Lawyer

Both remedial and procedural law are based on the classic model, where litigation is characterized as a trial between two individuals (or two unitary interests) who are diametrically opposed, which is adjudicated on a ‘winner takes all’ basis.⁸ Similarly, relief is conceived as compensation for past wrongs, confined in its impact to the immediate parties.⁹ This conception has hampered both the development of group interests in procedural law, and innovation in the provision of remedies to group interests. The classic model also embodies understandings about the incentive structure of litigation and private law generally; expressed eloquently by Tilbury as follows:

Remedies is essentially a plaintiff-orientated subject. It is concerned with what matters most to the plaintiff in civil litigation, namely what he will get.¹⁰

The plaintiff in individual proceedings will generally perceive an injury or wrong and then seek out a lawyer who will advise him of available remedies. The decision whether or not to pursue individual litigation will often depend on whether the remedy is valued by the client. The incentive structure of a class action is vastly different. Commonly, lawyers perceive the injury or wrong, seek out eligible lead plaintiffs, and solicit members of the class.¹¹ The larger the membership of the class

⁸ A. Chayes, “The Role of the Judge in Public Law Litigation” (1976) 89 Harvard L. Rev. 1281 at 1282.

⁹ A. Chayes, “The Supreme Court – 1981 Term – Foreword: Public Law Litigation and the Burger Court” (1982) 96 Har. L. Rev. 4 at 8-9:

“The issue was whether the particular plaintiff was entitled to the (usually compensatory) relief demanded from the particular defendant, when both plaintiff and defendant were private persons. The question of the plaintiff’s standing to sue merged with the question of whether the plaintiff had stated a cause of action on the merits.”

¹⁰ M. Tilbury, *Civil Remedies*, *supra* note 4 at 17.

¹¹ The empirical study of class actions undertaken by the RAND Institute showed that class action attorneys played myriad roles. They stated ‘Some class actions arose after extensive individual litigation or efforts to resolve consumer complaints outside the courts; others were the first and only form of litigation resulting from a perceived problem. Sometimes class action attorneys uncovered an

and the smaller the injury suffered by each individual, the greater the degree of lawyer control. The structure of the class, the causes of action relied upon, and the remedies will be determined by strategy and expedience.

Agency problems commonly arise in class actions, especially where the individual claims are small, and the members of the class have little or no incentive to monitor lawyers. This has led to concerns about lawyers furthering their own interests at the expense of the class, particularly in settlements.¹² Coffee has argued that high agency costs characterize class action litigation and permit opportunistic behaviour by lawyers. As a result, it is more accurate to describe the plaintiff's lawyer in a large class action as an independent entrepreneur than agent of the client.¹³

Skepticism about entrepreneurialism underpins the visceral opposition to the role of the plaintiff's counsel referred to by Cassels and Jones above. The description of lawyers as 'entrepreneurial' is derisory, at least in the US. However, in jurisdictions like Australia, which have cost shifting rules and ban contingency fees, class action litigation is inherently risky. Although class action activity in Australia is permeated by entrepreneurialism there is also a strong element of cause-lawyering which motivates plaintiff lawyers.

According to Sarat, cause-lawyering is a moral or political activity that encourages pursuit of the lawyer's vision of the right, or the good, or the just. It may also be described as ideological lawyering.¹⁴ It may be contrasted with conventional or client lawyering, which involves the deployment of a set of technical skills on behalf of ends determined by the client, not the lawyer. In this conception, the practice of law is neither a domain for moral or political advocacy, nor a place to express the lawyer's beliefs.¹⁵

In a globalized society the class action is a weapon of choice for the cause-lawyer in pursuit of multinational corporations. Those who espouse cause-lawyering emphasize the political economy of globalization with its concomitant dissemination of neo-liberal values. As stated by Scheingold and Sarat:

...globalisation should not be equated with the construction of an open apolitical and beneficent global village. Instead it is first and foremost a vast project in political economy that is restructuring the global order in ways that

allegedly illegal practice on their own; sometimes angry consumers (or their attorneys) contacted them. Sometimes the lawyers first found out about a potential case from regulators or the media. Sometimes they jumped onto a litigation bandwagon that had been constructed by other class action attorneys. When they came later to the process, class action attorneys sometimes brought resources and expertise that helped conclude the case successfully for the class, but sometimes they seemingly appeared simply to claim a share of the spoils'. See D. Hensler, B. Dombey-Moore, E. Giddens, J. Gross, E. Moller and N. Pace, *Class action dilemmas: Pursuing public goals for private gain*, Executive Summary (RAND ICJ, 1 January 1999) <http://www.rand.org/publications/MR/MR969.1/MR969.1.pdf> at 14, (last accessed 6/10/07).

¹² See generally the work of John Coffee, e.g. "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action" (1987) 54 U. of Chicago L. Rev. 882 and "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions" (1986) 86 Col. L. Rev. 669, and N. Scott, "Don't forget me! The client in a class action lawsuit" (2002) 15 Georgetown J. of Legal Ethics 561.

¹³ J. Coffee, *ibid.* at 882-883.

¹⁴ For an exploration of the role of ideological plaintiffs in class action see V. Morabito, "Ideological plaintiffs and class actions - an Australian perspective" (2001) 34 U.B.C.L.Rev. 459.

¹⁵ S. Scheingold and A Sarat, *Something to believe in: politics, professionalism, and cause lawyering* (Stanford: Stanford University Press, 2004) at 2.

maximise its compatibility with the values and interests of multinational enterprise.¹⁶

Moreover, the nation state loses some of its political steering capacity during the process of globalisation.¹⁷ The state's enforcement power is bound to its territory while the subjects of state regulation, especially business firms, have increasingly expanded their activities beyond national borders.¹⁸ New forms of governance operate above and beyond the nation state but the modes of enforcement at the international level are still weak. Like other business firms, plaintiff class action firms have themselves expanded their activities beyond national borders and increasingly co-ordinate international enforcement activity.¹⁹

Overall, the motives of the plaintiff lawyer will range from the self-interested entrepreneur to the idealist cause-lawyer, so the visceral opposition to Cassels and Jones' proposition cannot be based on revulsion of opportunism alone. Nevertheless, lawyers clearly control class actions and increasingly resort to class actions in a globalized environment, hence inadequate monitoring has the potential to cause inequities, as will be discussed below.

2) 'Pursuing Wrongdoers'

Traditionally, the goals of class actions have been access to justice, judicial economy and behaviour modification²⁰ However, increasingly, commentators assert that behaviour modification is the primary function and that compensation of class members is less important or irrelevant. Such commentators urge that the sole function of the class action is deterrence, and that concerns about compensation are at best distracting, or at worst, damaging to the effectiveness of the procedure.²¹ For example, Gilles and Friedman argue that the focus should be entirely upon whether defendants internalize the social cost of their wrongdoing, and there is generally no legitimate utilitarian reason to care whether class members with small claims get compensated at all. They refer to the influence of compensatory concerns as "compensationalist hegemony".²²

There is no doubt that the class action is a highly effective mechanism for deterring breaches of the law by large and otherwise unaccountable institutions such as corporations. Corporate law theorists regard class actions and a specialist plaintiff bar as vital to the development of creditor protection through tort law, and contend that tort law remains "undeveloped" in jurisdictions where they are not present.²³

¹⁶ *Ibid.* at 135.

¹⁷ A. Scherer and G. Palazzo, "Globalization and Corporate Social Responsibility", draft paper to be published in A. Crane, A. McWilliams, D. Matten, J. Moon, D. Siegel, eds., *The Oxford Handbook of Corporate Social Responsibility*, (2008) available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID989565_code721161.pdf?abstractid=989565&mirid=1 at 4 (last accessed 6/10/07).

¹⁸ *Ibid.*

¹⁹ See H. Watt, "US class action star targets UK" *The Sunday Times*, March 11, 2007, regarding the opening of the London office of the US plaintiff firm Cohen, Milstein, Hausfeld & Toll.

²⁰ V. Morabito, "Class Actions: The Right to Opt Out under Part IVA of the Federal Court of Australia Act 1976 (Cth)" (1994) 19 Mel.U.L.Rev. 615 at 627.

²¹ M. Gilles and G. Friedman, "Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers" (2006) 155 U. Penn. L. Rev. 103.

²² *Ibid.* at 107.

²³ G. Hertig and H. Kanda, 'Creditor Protection' in R. Kraakman et al, *The Anatomy of Corporate Law, A Comparative and Functional Approach* (Oxford: OUP, 2004) at 77.

Research undertaken by the RAND Institute presents the empirical evidence that class actions have a deterrent effect and restrain corporate misconduct. The report states:

... [t]he corporate representatives whom we interviewed said that the burst of new damage class action lawsuits has played a regulatory role by causing them to review their financial and employment practices. Likewise, some manufacturer representatives noted that heightened concerns about potential class action suits have had a positive influence on product design decisions.²⁴

But there is some danger in the relentless pursuit of deterrence since it can descend into vigilantism. Where class actions involve individually non-recoverable claims, a real issue arises as to whether the claim is pure deterrence without compensation, even though the conceptual structure of substantive law would demand the conferral of a remedy. Moreover, Cassels and Jones invite us to face the possibility that the remedy is vestigial and immaterial to the goals of law.

3) 'Where the claims at issue are so small as to be individually untenable'

This section will provide examples of the remedial difficulties presented by classes where the claim is so small as to be individually untenable.

a) The Stratospheric Class

Class actions operate at various levels of abstraction. Because an opt-out class action is defined by description, its members may be readily ascertainable and quantifiable, or the class may defy one's imagination with its vastness. For example, AWB Ltd, an Australian company, which allegedly paid bribes to the discredited Saddam Hussein regime to supply wheat in Iraq thereby breaching UN sanctions, has recently been named as defendant in four class actions on behalf of US farmers,²⁵ Australian farmers,²⁶ AWB shareholders,²⁷ and recently, by the victims of Hussein's regime, in actions brought under the *Alien Tort Claims Act (US)*. The class populated by AWB's shareholders is readily ascertainable. Similarly, 'Australian wheat farmers' may be ascertained with requisite inquiries. 'US farmers' are one step removed, but in the absence of the need to prove reliance, the group may be ascertained, damages calculated globally and settlement or judgment funds distributed accordingly.

What about the victims of Hussein's regime? Press reports asserted that lawyers for Iraqi citizens, Saadya Mastafa and Kafia Ismail, filed the class complaint on behalf of a group of people, "comprising victims of crimes perpetrated by the Saddam Hussein regime in Iraq from 1996 to 2003, or their surviving immediate family members."²⁸ The action alleges that the defendants contributed to the injuries

²⁴ D. Hensler, B. Dombey-Moore, E. Giddens, J. Gross, E. Moller and N. Pace, Class action dilemmas: *Pursuing public goals for private gain*, Executive Summary (RAND ICJ, 1 January 1999) <http://www.rand.org/publications/MR/MR969.1/MR969.1.pdf> at 9, (last accessed 6/10/07).

²⁵ "AWB faces third US class action" ABC News 19/6/2007 available at <http://www.abc.net.au/news/stories/2007/06/19/1955996.htm> (last accessed 12/10/07).

²⁶ "US farmers begin legal action against AWB" ABC News 17/4/2007 available at <http://www.abc.net.au/news/stories/2007/04/17/1899161.htm> (last accessed 12/10/07).

²⁷ "AWB shareholders launch legal action" ABC News 13/4/2007 available at <http://www.abc.net.au/news/stories/2007/04/13/1897021.htm> (last accessed 12/10/07).

²⁸ "AWB faces new class action in the US", Farm Online, 17 September 2007 available at http://fairfield.yourguide.com.au/detail.asp?class=national%20news&subclass=general&story_id=1054848&category=general (last accessed 4/10/07).

and damages sustained by the plaintiffs by giving substantial assistance to the Saddam regime, contrary to the “law of nations” and the *Alien Tort Claims Act (US)*.²⁹ Although there may be a nexus between AWB’s conduct and the victims of crimes perpetrated by Hussein in Iraq, there seems to be little chance that avenging AWB’s behaviour in the courts will lead to these victims receiving fair compensation.

Other examples abound. In February 2007, the Ninth Circuit affirmed class certification in *Dukes v Wal-Mart*.³⁰ In this case Betty Dukes is suing Wal-Mart alleging gender discrimination under the *Civil Rights Act (US)*. The class which Dukes represents is said to contain approximately 1.5 million women who worked for Wal-Mart from 1998. Dukes claims the women, like her, lost promotions and pay because of their gender. The suit claimed substantial punitive damages.³¹ So, should the damages be distributed somehow to 1.5 million women, or should we be satisfied that wrongdoers are being pursued?

b) The Disappearing Consumer

A related development has been the proliferation of class actions where the end-point consumers are not represented in the litigation even though they are the group that has suffered loss. A pertinent example is the litigation which followed an international price fixing and market sharing cartel for vitamins, which was uncovered in the late 1990s. Connor describes it as follows:

Twenty-one chemical manufacturers fixed the prices of 16 vitamin products in nearly every country of the world for up to 16 years. The cartels’ global sales during the conspiracies amounted to grand total of \$34 billion. Illicit profits made by the cartels totaled \$10 billion.³²

Prosecutions commenced in the US in 1997, Canada in 1998, Australia in 2000,³³ and the European Commission in 2001.³⁴ In the pecuniary penalty proceedings brought by the ACCC in Australia, several of the defendants admitted contravening Australia’s antitrust laws.³⁵ The Federal Court imposed pecuniary penalties amounting to A\$26 million.³⁶

Class actions were commenced in US, Canada, and Australia. In the US, a multitude of class actions were filed in federal courts, but these were consolidated into one principal action that was argued in the U.S. District Court for the District of Columbia between 1999 and 2003.³⁷ This consolidated suit had approximately 4,000

²⁹ “AWB faces new class action in the US”, Farm Online, 17 September 2007 available at http://fairfield.yourguide.com.au/detail.asp?class=national%20news&subclass=general&story_id=1054848&category=general (last accessed 4/10/07).

³⁰ *Dukes v. Wal-Mart Inc.*, 474 F.3d 1214 (9th Cir. 2007).

³¹ M. Moller, “The Anti-Constitutional Culture of Class Action Law” (2007) Regulation, Vol. 30 (2) 50 at 50.

³² J. Connor, *Global Price Fixing*, (2007) at 360.

³³ *Australian Competition Consumer Commission v Roche Vitamins Australia Pty Ltd*, [2001] FCA 150 (28 February 2001).

³⁴ J. Connor, *supra* note 32 at 360.

³⁵ Section 45, *Trade Practices Act, 1974 (Cth)*.

³⁶ *Australian Competition Consumer Commission v Roche Vitamins Australia Pty Ltd*, *supra* note 33 at [27].

³⁷ *In re Vitamins Antitrust Litigation* 1999-2 Trade Cas. (CCH) P72,626 (7 June 1999).

plaintiffs, being firms that had purchased bulk vitamins in the United States directly from the major manufacturers. There were no end-point consumers in the class.

According to Connor, the most successful private suits were launched in Canada where courts began authorizing substantial recoveries in the late 1990s. The litigation was settled in the Supreme Court of British Columbia in April 2005 (for BC residents only) and in Ontario Superior Court (for the rest of Canada) in March 2005. There were 20 corporate defendants.³⁸ Unlike the United States, the courts considered three groups of plaintiffs simultaneously: direct purchasers of vitamins during the relevant period, intermediate purchasers, and ultimate consumers. In the Ontario proceedings, the plaintiffs pursued the litigation using a two-stage model:

1. On behalf of all purchasers of vitamins, they sought to hold the alleged conspirators accountable for the aggregate overcharge on all sales of vitamins in Canada by recovering aggregate damages.
2. Class counsel developed a distribution model for the aggregate damages to be paid to or for the benefit of direct purchasers, intermediate purchasers, and consumers.³⁹

The matter settled for a total damage assessment of approximately \$140 million. Motions were brought before Cumming J. in the Superior Court of Justice, Ontario, for simultaneous certification of the class proceedings and approval of the settlement. In a settlement which is said to be the largest private antitrust suit in Canadian legal history, approximately 75% of the funds were distributed to direct purchasers and 17% to indirect purchasers; the latter was handled through a cy-pres process⁴⁰ by giving the funds to selected consumer and trade associations.⁴¹ As at the date of settlement, the proposed class definition for each of the Ontario actions was:

All persons in Canada who purchased the relevant Class Vitamin(s) in Canada in the relevant Purchase Period(s) except the Excluded Persons and persons who are included in the corresponding British Columbia and Quebec Actions.⁴²

Cumming J. commented that:

The proposed class definitions embody all levels of purchasers, including those who purchased vitamins in raw form and those who purchased a product of which vitamins were a component part. ... [T]he class necessarily has to include all levels of plaintiffs, from direct purchasers to intermediate purchasers to ultimate consumers. All groups of class members must be present to ensure that the wrongdoers do not retain any of the fruits of their wrongdoing and to protect the rights of the class members to make a claim against a common fund to address their losses.⁴³

Cumming J. found that the Court had power to make a cy-pres order,⁴⁴ which was appropriate in this case because the class consisted of tens of thousands of

³⁸ J. Connor, *supra* note 32 at 407.

³⁹ *Ford et al v. Hoffmann-La Roche Ltd. et al.* (2005) 74 OR (3d) 758.

⁴⁰ This term will be defined and discussed under the next sub-heading.

⁴¹ J. Connor, *supra* note 32 at 407.

⁴² *Ford v. Hoffmann-La Roche Ltd. et al.*, *supra* note 39 at [22].

⁴³ *Ibid.* at [22].

⁴⁴ Pursuant to sections 24 and 26 of the *Class Proceedings Act, 1992*, (Ont).

intermediate purchasers and millions of consumers, and the complexity and administrative costs associated with direct distribution to members of these subgroups would have been prohibitive.⁴⁵ The cy-pres order was delivered in tranches, according to protocols which regulated the distribution to organizations which were closely aligned to the livelihood of the members of the sub-group. Thus, for intermediate purchasers, many of whom were primary producers who used the vitamins for animals, the funds went to organizations like the Canadian Pork Council, Canadian Goat Society, and the Canadian Broiler Hatching Egg Marketing Agency.⁴⁶ Similarly, the funds belonging to the ultimate consumer sub-group went to broadly based community organizations such as Canadian Feed the Children and the Food Safety Network.⁴⁷

In Australia, a class action was filed in 1999 against the three largest vitamin makers on behalf of buyers of vitamins.⁴⁸ In the original claims, the group members were defined as:

... persons who between 5 March 1992 and 5 July 1999 purchased in Australia all or some of vitamins A, B1, B2, B5 ... , B6, B9 ... , B12, C, E, either directly or indirectly by way of the purchase of foods, beverages, vitamin pills or capsules or other products which contained one or more class vitamins supplied by one or more of the respondents ...⁴⁹

However, by the time that settlement of the proceedings was judicially approved, the description of the class had become, ‘businesses [which] had, over the relevant period, spent \$2000 or more upon vitamins or products containing vitamins’. By this stage the class did not include any end-point consumers.⁵⁰

The description of the class was amended in December 2003 to remove the end-point consumers of the vitamins who were arguably the only group who had suffered loss that could not be passed on further in the supply chain. Because the lead plaintiff was a human-use consumer of the vitamins, it was necessary to seek the leave of the court to remove her as lead plaintiff⁵¹ as it amounted to a discontinuance of some of the claims.⁵² The reasons given by the plaintiff lawyers were, *inter alia*:

- there is a serious risk of the applicant losing on some of the claims, particularly in relation to human-use vitamins;
- a reformulation of the case so as to minimise the risk of losing on some claims, and potentially having to pay costs in relation to those claims, [was] reasonable and appropriate;
- the United States experience in respect of claims by individual consumers, which suggested the total “loss” suffered by an individual consumer was likely to be small, made it reasonable to excise the claims of any consumers from the proceeding ...;⁵³

⁴⁵ *Ford v. Hoffmann-La Roche Ltd. et al.*, *supra* note 39 at [79] – [80].

⁴⁶ *Ibid.* at [91].

⁴⁷ *Ibid.* at [99].

⁴⁸ *Bray v F Hoffman-La Roche* (2003) 200 ALR 607 at [7].

⁴⁹ *Bray v F Hoffman-La Roche Ltd* (2002) 190 ALR 1 at [2].

⁵⁰ *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322 at [26]

⁵¹ Pursuant to s.33V, *Federal Court Act, 1976* (Cth).

⁵² *Bray v Hoffman-La Roche Ltd* [2003] FCA 1505.

⁵³ *Ibid.* at [33].

The court approved the substitution of group members who were substantial purchasers of animal vitamins as lead plaintiffs.⁵⁴ In July 2006, Jessup J., in the Federal Court of Australia, approved a settlement of A\$30.5 million plus legal fees of \$10.5 million.⁵⁵ Although his Honour noted that end-point consumers did not share in the settlement,⁵⁶ it was nevertheless approved. As far as the author is aware, no arrangements were made for distributions to end-point consumers, and a cy-pres scheme on the Canadian model was not available under Australian law.

The vitamin class actions have been lauded as an important complementary measure to the public prosecution of the corporations involved. Connor's analysis of the litigation indicates that the typical criminal fine imposed was one-fifth to one-half of the estimate of the actual overcharges, 'so the need for supplemental civil punishment would appear to still be strong'.⁵⁷ 'Coattail'⁵⁸ class actions are often commenced after a public prosecution, and are said to provide reparation to the harmed, supply supplemental civil punishment, and boost the likelihood of deterrence of illegal conduct.⁵⁹ Is it important that those who have suffered the injury are absent?

This issue is not confined to the vitamins litigation. In *Campbells Cash and Carry Pty Ltd v Fostif*⁶⁰ the plaintiffs were retailers and the defendants wholesalers of tobacco. They held, respectively, a retailer's and a wholesaler's licence under state legislation until, on 5 August 1997, the High Court of Australia struck down the licence provisions.⁶¹ Whilst the licensing scheme was in force, the defendants paid to the State of New South Wales licence fees referable to the value of tobacco sold by it from month to month. The plaintiffs passed that fee on to consumers, as part of the purchase price of tobacco products. The plaintiffs paid the licence fees for August 1997, but the decision in *Ha* meant that the defendants were not liable to pay. The plaintiffs sued in restitution to recover that part of the price paid by it to the defendants for tobacco that was referable to those unpaid licence fees.⁶² The defendants refused to return the money paid for the licence fees and so the plaintiffs brought a representative action in the NSW Supreme Court. The class represented were tobacco retailers, not tobacco consumers.

The *Fostif* litigation raises a further element of windfalls. Where the end-point consumers are not present, and distributions are made to participants further up supply chains that have already passed on the cost, they will be double-dipping. It is exacerbated in this case because the restitution remedy focuses upon the gain to the defendant rather than loss to the claimant as required by a damages claim.

⁵⁴ *Ibid.* at [40].

⁵⁵ *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)*, *supra* note 50.

⁵⁶ *Ibid.* at [26].

⁵⁷ J. Connor, *supra* note 32 at 394.

⁵⁸ M. Redish, "Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals" (2003) U. of Chicago Legal Forum 71 at 88-89.

⁵⁹ There will inevitably be debate about whether class actions do, in fact, sufficiently punish corporate misconduct and secondly if they deter future misconduct. Connor has estimated that the vitamins class actions returned 100% of the money that was stolen but was repaid 10 years after the overcharging, which amounts to a net loss for the claimants because not only does money depreciate over time but it also has an opportunity cost as financial capital. See J. Connor, *supra* note 32 at 411.

⁶⁰ (2006) 229 CLR 386.

⁶¹ *Ha v State of New South Wales* (1997) 189 CLR 465.

⁶² See discussion in *Campbells Cash and Carry Pty Ltd v Fostif* (2006) 229 CLR 386 at [24].

c) In-Kind Settlements and the Cy-Pres Remedies

The US courts have developed an elaborate framework of in-kind remedies⁶³ in class action settlements. In-kind payments are “non-cash compensation from the defendant to the plaintiff class, usually in the form of a coupon or scrip that class members can apply toward the purchase of the defendant’s products in the future”.⁶⁴ In the US, they have been used for many commodities such as foodstuffs, groceries, home sites, legal texts, and services such as air travel and brokerage fees.⁶⁵ The valuation of in-kind payments is extremely difficult,⁶⁶ the redemption rates of coupons low,⁶⁷ and it foists the defendant’s products onto a class that may otherwise be unwilling to purchase them.⁶⁸ Most importantly, there is trenchant concern that excessive attorney fees are often negotiated as part of the settlements.⁶⁹ Consequently, there is doubt that in-kind remedies provide either meaningful compensation or have deterrent value. Coupon settlements in interstate class proceedings are now regulated by the US *Class Action Fairness Act, 2005*.⁷⁰ There appears to be little interest in emulating the US experiment in Australia⁷¹ or Canada.

Another option is the cy-pres remedy. Cy-pres doctrine is the vehicle by which the intentions of a donor may be given effect ‘as nearly as possible’ in circumstances where literal compliance cannot be effectuated.⁷² Originally derived from trusts, it has been developed extensively as a remedial device for class actions. For example, a price-rollback cy-pres is a distribution of damages to individuals by way of a lowering of the purchase price of the defendant’s product for a set time period.⁷³ Whereas, in an organisational-distribution cy-pres, unclaimed class action fund monies are ‘given to a designated entity and used to fund a project, institution or study which will be likely to indirectly assist the class members as a group’.⁷⁴ This method of damages distribution has received much favourable support, particularly to create consumer trust funds,⁷⁵ although some concern has been expressed about strangers to the litigation receiving a windfall benefit on a price-rollback.⁷⁶

⁶³ G. Miller, L. Singer, “Nonpecuniary Class Action Settlements” (1997) 60(4) *Law and Contemporary Problems* 97.

⁶⁴ Note: “In-Kind Class Action Settlements” (1996) 109 *Har. L. Rev.* 810 at 810.

⁶⁵ *Ibid.* at 810.

⁶⁶ G. Miler, L. Singer, *supra* note 63 at 108.

⁶⁷ Gramlich’s study of antitrust class actions settled by coupon distributions to the class, found an average redemption rate of 26.3%. See F. Gramlich, “Scrip Damages in Antitrust Cases” (1986) 31 *Antitrust Bulletin* 261 at 274.

⁶⁸ C. Leslie, “The Need to Study Coupon Settlements in Class Action Litigation” (2005) 18 *Georgetown J. of Legal Ethics* 1395 at 1397.

⁶⁹ See the discussion of the ‘vitriolic attacks’ upon coupon-based settlements made by Senate Judiciary Committee’s Report which preceded the Class Action Fairness Act in E. Hosp, “Settlements Under the Class Action Fairness Act of 2005” (2006) 67 *The Alabama Lawyer* 124, text accompanying fns 4-5.

⁷⁰ In the Australian context, see V. Morabito, “An Australian Perspective on Class Action Settlements” (2006) 69 *M.L.R.* 347.

⁷¹ *Ibid.* at 364.

⁷² R. Mulheron, *The Modern Cy-pres Doctrine: Applications & Implications* (London: UCL Press, 2006) at 1.

⁷³ *Ibid.* at 218-222.

⁷⁴ *Ibid.* at 222.

⁷⁵ *Ibid.* at 223.

⁷⁶ *Ibid.* at 221.

Legislation in Canada makes statutory provision for class action cy-pres distributions,⁷⁷ and the doctrine in the US has developed through ‘creative judicial decision-making’.⁷⁸ Australia has not endorsed a class action cy-pres remedy pursuant to either statute or case law. The Australian Law Reform Commission (ALRC) report,⁷⁹ which formed the basis of the Federal Court’s class action powers under Part IVA Federal Court Act,⁸⁰ expressly disclaimed the wider cy-pres model in favour of a model which allowed only for the unclaimed residue of judgment or settlement fund set aside by the defendant for distribution to the class of plaintiffs to be returned to the defendant.

It is worth considering why the ALRC chose the narrow model. Mulheron has stated that the ALRC’s rejection of cy-pres distributions was ‘comprehensive’ and summed up the ALRC’s reasoning as follows:

First ... a class action procedure was intended to *compensate* class members. It was not intended to penalise defendants or to deter to any greater extent than provided for under the existing law, and a cy-pres award was inconsistent with that primary compensatory function.

Secondly, any damages award payable by the defendant ought to be matched as closely as possible to the class members’ entitlement (thus only victims who came forward with valid claims should represent the defendant’s liability to that class). That precluded organisational-distribution payments to some third party entity, or price-rollback reductions for future purchasers who were not repeat purchasers and who were not plaintiffs themselves.

Thirdly ... a cy-pres distribution could result in a windfall to non-class members, by obtaining damages in return for no loss or injury caused by the defendant.

Fourthly, the mechanism of damages distribution had nothing to do with enhancing access to the courts, the primary goal of a class actions regime.⁸¹

The ALRC made the following comments at paragraph 239:

Any money ordered to be paid by the respondent should be matched, so far as possible, to an individual who has a right to receive it. If this cannot be done, there is no basis for confiscating the residue to benefit group members indirectly ... simply because the procedure used was the grouping procedure. It would be a significant extension of present principles of compensation to require the respondent to meet an assessed liability in full even if there is no person to receive the compensation. Any such change would be in the nature of a penalty, and would go beyond procedural reform. It has nothing to do with enhancing access to the courts.

⁷⁷ For example, section 26 *Class Proceedings Act, 1992* (Ont), which gives the court power to direct any means of distribution of amounts awarded by way of damages.

⁷⁸ R. Mulheron, *supra* note 72 at 236.

⁷⁹ Australian Law Reform Commission *Grouped Proceedings in the Federal Court*, Report no 46 (1992).

⁸⁰ Upon which, in turn, the Victorian provisions are based.

⁸¹ R. Mulheron, *supra* note 72 at 230-231.

The ALRC report places considerable importance upon compensation as the bedrock of the inquiry. This is an example of the compensation principle's role as a moral compass in class action jurisprudence.

A recent discussion paper issued by the Victorian Law Reform Commission ('VLRC') Civil Justice Enquiry has raised the option of a cy-pres fund which can be used to create a Justice Fund to finance access to justice initiatives.⁸² The VLRC First Exposure Draft states that:

It is proposed that the court should have power to order cy-pres type remedies where: (a) there has been a proven contravention of the law, (b) a financial or other pecuniary advantage ('unjust enrichment') has accrued to the person or entity contravening the law as a result of such contravention (c) a loss suffered by others is able to be quantified and (d) it is not possible, practicable or cost effective to identify and compensate some or all of those who have suffered the loss.⁸³

This recommendation contemplates a wider cy-pres remedy than that recommended by the ALRC - the trigger for the court's power to set up the fund is the defendant's unjust enrichment rather than an unclaimed residue. The unjust enrichment model is also wider than a comparable provision in Ontario, which gives the court power to direct any means of distribution of amounts awarded by way of damages.⁸⁴

This proposal could enhance access to the courts by subsequent litigants thereby satisfying the ALRC's fourth criterion because it is proposed that the cy-pres fund be used for litigation funding. However the proposal bypasses the 'next best option' policy which underpins the cy-pres alternative to the distribution of damages. There is no attempt to confer even an indirect benefit on members of the class (unless it could be argued that later public interest litigation indirectly benefits members of the class); hence it clearly challenges aspects of the compensation principle. It also potentially raises constitutional questions about the ambit of judicial power.⁸⁵

The test proposed by the VLRC is based on gain to the defendant as compared to the ALRC's focus upon compensation. The VLRC proposal is intended in part to alleviate the problems associated with windfall gains, which arose in the *Fostif* and *Roxburgh* cases. There may be some questions as to whether the 'unjust enrichment' inquiry is substantive or procedural and this introduces significant uncertainty. Nevertheless, a cy-pres distribution provides flexibility in class actions and can be remarkably effective when used judiciously. However, a preliminary inquiry must be made concerning the ALRC's contention that, the cy-pres fund is in the nature of a penalty because the absence of anyone to receive compensation takes the issue 'beyond procedural reform.' This point demonstrates the boundaries of the proper role of the class action as a procedural device for enforcing private law.

⁸² Victorian Law Reform Commission Civil Justice Enquiry, Summary of draft civil justice reform proposals as at 28 June 2007, Exposure Draft available at <http://www.lawreform.vic.gov.au/> (last accessed 9/10/07).

⁸³ *Ibid.* at 43.

⁸⁴ Section 26, *Class Proceedings Act, 1992* (Ont).

⁸⁵ For example, the doctrine in *Kable v DPP* (1996) 189 CLR 51 might be considered which prevents state parliaments from making laws that adversely affect the integrity of state courts. Arguably, if the courts are called upon to make independent decisions about the distribution of remedies e.g. by cy-pres funds, it could be said that they were exercising non-judicial functions which potentially embed the court in the political process. See F Wheeler, "The *Kable* Doctrine and State Legislative Power over State Courts" (2005) 20 *Australasian Parliamentary Review* 15 at 16.

4) 'The role of the plaintiff's counsel in exercising public rights is ignored'

In this part of the quote above, Cassels and Jones are referring to the so-called regulatory or 'public law' role of the class action. They urge Canadian courts to recognize this role through an increasing emphasis on deterrence.⁸⁶ Although many commentators regard the class action as playing a critical role in law enforcement as the 'private attorney general',⁸⁷ it is important to recognise the appropriate ambit of public and private enforcement of the law so as to discourage vigilantism. Class actions perform law enforcement tasks that would be unremedied by public enforcement due to poor resources.⁸⁸

Dagan describes this approach to law enforcement as 'blunt instrumentalism', which portrays private law as merely one form of regulation. On this view, private law is indistinguishable from legislation, and "nothing prevents private law from pursuing such aims as condemning anti-social behavior or promoting the interests of parties other than the plaintiff and the defendant." Blunt instrumentalism perceives civil suits as one "mechanism whereby the state authorizes private parties to enforce the law."⁸⁹

Redish argues that the Cassels and Jones' portrayal of class action lawyers exercising public rights is spurious and anti-democratic. He claims, that under private law, the plaintiff may choose whether or not to enforce his private rights, but in class actions, bounty hunter lawyers bring suit through the creation of faux classes comprised of passive right holders who do not receive 'real' compensation, despite the intention of the substantive law. He states:

...no plaintiff is ever required to enforce his private compensatory right. To the contrary, the substantive law vests that choice exclusively in the individual victim. Thus, in such situations, any incidental benefit to the public interest is wholly contingent upon the private victim's decision to seek to judicially enforce her substantively created remedy.⁹⁰

There is an element of voluntarism which is critical to private law. The excessive focus upon deterrence raises the question of the standing of litigants where a class is entirely passive. I will investigate this further by theoretical and conceptual analyses.

C. THEORETICAL AND CONCEPTUAL APPROACHES

Class actions generally enforce statutory or private laws which set up a bilateral relationship between the person who breaches the law and a person who suffers an injury as a result. Although the individual's injury may be so minor as to be either unperceived or not worth remedying, the nominal injury still forms part of the framework of the law which allows for access to courts and a principled assessment of

⁸⁶ J. Cassels and C. Jones, *supra* note 7 at 362.

⁸⁷ See generally, P. Spender, "Securities Class Actions: A View from the Land of the Great White Shareholder" (2002) 31 *Common L. World Rev.* 123.

⁸⁸ O. Fiss, "The Political Theory of the Class Action", (1996) 53 *Washington and Lee L. Rev.* 21 at 22.

⁸⁹ H. Dagan, *The Limited Autonomy of Private Law*, 9 August 2007, at 4 available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1005807_code142750.pdf?abstractid=1005807&mid=1 (last accessed 9/10/07), quoting E. Rubin, "Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law" (1998) *Wisconsin L. Rev.* 131 at 154.

⁹⁰ M. Redish, *supra* note 58 at 76.

the defendant's obligation to make recompense. Therefore, the injury provides standing to the plaintiff to pursue private enforcement even in an aggregated claim, and the injury remains the touchstone of the moral balance between the plaintiff and the defendant.

Corrective justice theorists refer to this moral balance as 'correlativity,'⁹¹ described by Zipursky as "a neat pairing: a defendant who must pay to the plaintiff not just any amount, but precisely the amount of the plaintiff's injury; and a plaintiff who is entitled to receive precisely the amount of her injury, and is entitled to receive it not simpliciter, but entitled to receive it from the defendant".⁹² The concept of corrective justice itself "is based on a simple and elegant idea: when one person has been wrongfully injured by another, the injurer must make the injured party whole."⁹³ As applied to damages, the:

...stated goal of the damages remedy is compensation of the plaintiff for legally recognised losses. This means that the plaintiff should be fully indemnified for his loss, but that he should not recover any windfall. Stated in this way, damages is an instrument of corrective justice, an effort to put the plaintiff in his or her rightful position.⁹⁴

Dagan describes the corrective justice theorists as 'private law autonomists' since private law in this view, "is a realm with its own inner intelligibility, isolated from the social, economic, cultural, and political realms. This isolation derives from the bilateral logic of private law adjudication."⁹⁵ The autonomist analysis explains the justificatory role of private law very well because correlativity justifies to defendants "both the identity of the beneficiary of any liability imposed on them and the exact type and degree (or magnitude) of that liability." But the analysis obscures "the rich social fabric that serves as the inevitable context for the parties' relationship."⁹⁶

Although the message of the corrective justice theorists is elegant, it is based on an individualistic, autonomous, static view of the substantive law. In order to effectively theorise the issue it is necessary to develop a collectivist, contextualised, dynamic, and procedural account of the role of the class action and its relationship to remedial law. It is therefore necessary to seek the middle ground between instrumentalism and autonomism, and along the way delve into the murky realm of law in action. To quote Cane:

⁹¹ E. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995), J. Coleman, *Risks and Wrongs* (Oxford: OUP, 1992), Jules Coleman, "The Practice of Corrective Justice" (1995), 37 *Arizona L. Rev.* 15.

⁹² B. Zipursky, "Civil Recourse, not Corrective Justice" (2003) 91 *Georgetown L. J.* 695 at 701-

⁹³ *Ibid.* at 695, citing J. Coleman, *Risks and Wrongs*, *supra* note 91; A. Ripstein, 'Equality, Responsibility and the Law' (1998); E. Weinrib, *The Idea of Private Law*, *supra* note 91; R Epstein, "A Theory of Strict Liability", (1973); 2 *J. of Legal Studies* 151, George P. Fletcher, "Fairness and Utility in Tort Theory, (1972) 85 *Harvard L. Rev.* 537; Stephen R. Perry, "The Moral Foundations of Tort Law" (1992) 77 *Iowa L. Rev.* 449.

⁹⁴ D. Dobbs, *The Law of Remedies* 2nd ed. (St. Paul: West Group, 1993) §3.1, quoted by J. Berryman, *supra* note 1 at 2.

⁹⁵ H. Dagan, *supra* note 89.

⁹⁶ *Ibid.* at 5.

[p]rivate law is not only a system of norms but also a set of institutional arrangements for creating and sustaining norms, and a set of social practices around those norms and institutions.⁹⁷

1) Mapping the Middle Ground

The analysis has proceeded so far on the basis that there is a clash between the instrumental goals of class actions as a species of procedural law, which promote access to justice, judicial economy, and behaviour modification,⁹⁸ and the justificatory and limiting roles of the compensation principle as a species of remedial law. The particular concern is that the class action bullies the compensation principle into submission and the justificatory and limiting objectives have been unnecessarily sacrificed to the exigencies of class action litigation.

This reasoning is based on an understanding that procedural law is subordinate to substantive law. I will issue a challenge to revisit this hierarchy and to more accurately explain the relationship between these two bodies of law. Brudner's analysis of the common law will be invoked to portray substantive and procedural law as two poles in a dialogic community. Whilst the two poles appear to be in conflict, in fact they track one another and each requires the other for its own coherence so as not to displace or subvert the value it tracks.⁹⁹ In other words, "the relentless pursuit of a single value destroys that value".¹⁰⁰

Jacob considered that there is a vital and essential dichotomy between the substantive law - the function of which is to define, create, confer or impose legal rights and duties - and procedural law - the function of which is to provide the machinery, the manner or the means by which legal rights and duties may be enforced.¹⁰¹

Remedial law falls within the substantive category as explained by Tilbury:

The law of remedies is that branch of substantive law which deals with the types of redress available in response to the imposition of liability on a party in civil litigation.¹⁰²

Substantive and procedural laws have different functions, though classifying a law as one or the other is often problematic.¹⁰³ Such categorization might not be important if the function of the relevant body of law is clear, but, historically, jurists have fostered the categorization in order to subordinate procedural law. This view may be traced to the work of Bentham, who first described procedural law as 'adjectival' and

⁹⁷ P. Cane, "The Anatomy of Private Law Theory: A 25th Anniversary Essay" (2005) 25 Oxford J. of Legal Studies 203 at 217.

⁹⁸ V. Morabito, "Class Actions: The Right to Opt Out under Part IVA of the Federal Court of Australia Act 1976 (Cth)" (1994) 19 Mel.U.L.Rev. 615 at 627.

⁹⁹ W Lucy, "The Common Law According to Hegel" (1997) 17 Oxford J. of Legal Studies 685 at 699-700 p 690-691.

¹⁰⁰ *Ibid.* at 695.

¹⁰¹ J. Jacob, *The Fabric of English Civil Justice*, (London: Stevens, 1987) at 55.

¹⁰² M. Tilbury, *supra* note 4 at 4.

¹⁰³ As Justice McHugh stated, "...in discussing procedural rights, I may occasionally be referring to what others describe as substantive rights". See, "Does Chapter III of the Constitution protect substantive as well as procedural rights?" (2001) 21 Aust. Bar Rev. 235 at 237. See also M. Tilbury, M. Noone and B. Kercher, *Remedies: Commentary and Materials* (Sydney: LBC, 2004) at 3, "... many matters which, functionally facilitate the enforcement of other rights are significant rights in themselves. An example is an asset preservation (or Mareva) order".

considered that “the only defensible object ... of the adjective branch of law ... is the maximisation of the execution and effect given to the substantive branch of the law”.¹⁰⁴ I have argued elsewhere that judges use the terms ‘substantive’ and ‘procedural’ normatively, to signify a hierarchy in which ‘substantive’ rights should not be displaced, rather than functionally to signify the operation of the doctrine in question.¹⁰⁵ Consequently, doctrines such as legal professional privilege and limitation laws are ‘recruited’ into the substantive category so as to preserve aspects of their operation from intrusion or to serve other instrumental goals.

This hierarchy has become an article of faith, but upon revisiting the issue it is difficult to justify. Firstly, each body of law protects fundamental social values – substantive law protects values such as property, family and citizenship, whereas procedure protects values such as dignity,¹⁰⁶ participation,¹⁰⁷ and truth, or perhaps less ambitiously, accuracy.¹⁰⁸ The values are different but neither set of values is more important than the other. Secondly, there are indications that procedure and process values are becoming more influential. Two developments are at play. The first concerns the proliferation of procedural contexts in which substantive laws are asserted, e.g. tribunals, arbitration, mediation, and industry ombudsmen. In this sense, procedure is said to be trans-substantive.¹⁰⁹ In each forum due process concerns will operate to negotiate the best procedure for that context. The second development is the work by social psychologists, which indicates that citizens’ perception of fairness in legal settings is linked to process rather than outcomes.¹¹⁰ The third reason to dispute the substantive-procedural hierarchy is that procedural law will often curtail or nullify deliberation about, or adjudication of, substantive issues, e.g. by summary judgment. Ineffective procedure will not only fail to effectively resolve disputes but will also stymie the development of substantive law.

Overall, the importance of the operation of procedural law is demonstrated by Zipursky in relation to tort:

We cannot grasp the phenomenon of a tortfeasor's liability to a plaintiff unless we place it within a more accurate procedural context. The state does not impose liability on its own initiative. It does so in response to a plaintiff's suit demanding that the defendant be so required. ... In permitting and empowering plaintiffs to act against those who have wronged them, the state is

¹⁰⁴ J. Bentham, *The Principles of Judicial Procedure, Works of Jeremy Bentham Vol 2, J.* Bowring ed. (New York: Russell & Russell, 1962) at 6.

¹⁰⁵ P. Spender, “A Handmaid’s Tale? Process Values and the Relationship Between Substantive and Procedural Law” (forthcoming).

¹⁰⁶ “The ‘dignitary theory of due process’ attempts to develop an analysis that focuses upon the degree to which decisional processes preserve and enhance human dignity and self-respect”, J. Mashaw, “Administrative Due Process: The Quest for a Dignitary Theory” (1981) 61 *Buffalo L. Rev.* 885 at 886.

¹⁰⁷ R. Summers, “Evaluating and Improving Legal Process – A Plea for “Process Values”” (1974) 60 *Cornell L. Rev.* 1 at 20-27. Summers presents a catalogue of process values for use in evaluating legal processes. For further analysis see P. Spender, “A Handmaid’s Tale? Process Values and the Relationship Between Substantive and Procedural Law” (forthcoming).

¹⁰⁸ L. Solum, “Procedural Justice” (2004) 78 *Southern California L. Rev.* 181.

¹⁰⁹ R. M. Cover, “For James Wm Moore: Some Reflections on a Reading of the Rules” (1975) 84 *Yale L. J.* 718.

¹¹⁰ J. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, N.J.: Lawrence Erlbaum, 1975), T. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990) republished 2006, and K. Tornblom and R. Vermunt, *Distributive and Procedural Justice: Research and Social Applications* (London: Ashgate Publishing, 2007).

not relying upon the idea that a defendant has a pre-existing duty of repair. Instead, it is relying on the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor who wronged them. Civil recourse, not corrective justice, explains the concepts and principles embedded in our tort law and displayed in its plaintiff-defendant structure.¹¹¹

Coming back to the effect of class actions upon remedial law, much of the analysis of remedial law “assumes [that] the requirements of procedural law have been satisfied.”¹¹² This assumption is important to keep in mind when providing prescriptive accounts of the interaction. By stating that the compensation principle occupies a central position in substantive law and warning about the encroachment of procedure, Berryman relies on this assumption and upon the substantive-procedural hierarchy.

An alternative analysis to the substantive-procedural hierarchy is Brudner’s conception of dialogic community, which is derived from Hegel’s *Geist* concept.¹¹³ Following on from Hegel’s interest in resolving “the apparently fixed dichotomies of everyday thinking into a whole of which the formerly independent extremes are constituent parts”,¹¹⁴ Brudner argues that the common law’s unity involves a similar synthesis of several interrelated dichotomies.¹¹⁵ For example, substantive and procedural doctrines compete with each other for supremacy. However, they are in a dialogic community, therefore, the excesses of both are mitigated by the other. As stated by Lucy, “[d]ialogic community is the unity of subunities within the common law, the realization that alleged doctrinal opposites are in fact connected”.¹¹⁶ The main interest in a dialogical community is not that it provides us with reasons for action,¹¹⁷ but, rather, that it reshapes the inquiry as between substantive and procedural law. Procedural law is not subordinated and substantive and procedural doctrines interact on a level playing field.

Brudner’s analysis operates on a number of levels – doctrinal, instrumental, methodological and normative. In my view, the common law is subject to perpetual dialogic movement between many tensions that are discussed in this essay, i.e. public/private, substantive/procedural, entrepreneurial/cause-focussed, corrective/distributive, and individualistic/communitarian.

Brudner’s vision also affirms the poles of individualism and communitarian political philosophy.

On the normative level, the overarching truth of dialogic community is that we are both formally free, self-interested rights-bearers and agents whose identities are constituted by our membership in communities, groups and traditions.¹¹⁸

¹¹¹ B. Zipursky, *supra* note 92 at 698-699.

¹¹² M. Tilbury, M. Noone, and B. Kercher, *Remedies: Commentary and Materials*, *supra* note 103 at 3.

¹¹³ A. Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley Ca.: University of California Press, 1995) at 17.

¹¹⁴ *Ibid.* at 7.

¹¹⁵ *Ibid.* at 7-8.

¹¹⁶ W Lucy, *supra* note 99 at 699-700.

¹¹⁷ *Ibid.* at 699-700.

¹¹⁸ *Ibid.* at 699-700, discussing A. Brudner, *supra* note 113, *inter alia* at 8.

Practically speaking this analysis has two consequences. Firstly, it suggests that where class action and remedial doctrines clash, there should be an attempt to reconcile the demands of both bodies of law, e.g. it is appropriate to assess damages globally but that a global assessment of damages should nevertheless proceed on a principled, adapted corrective justice model (loss to the plaintiffs), rather than a distributive justice model (gain to the defendant). Secondly, the subject of remedial law is generally the individual and this conception needs to be adapted to group interests and mass transactions. Therefore, there should be recognition that distribution of loss to large classes will often render the litigation futile due to cost, but that distribution in kind through a cy-pres fund recognises the superior value of the class action as one of the few enforcement devices that genuinely disciplines multinational corporations, particularly in a globalised context.

D. FINDING THE LOST CONSUMER

Here, I apply the dialogic model discussed above to the problem of the disappearing consumer, previously discussed. I will start with the premise that antitrust class action litigation does have a deterrent effect, but that group actions should mirror the correlativity in the corrective justice model, therefore, we should retain the compensation principle as a ‘moral compass’. Bipolarity needs to be adapted to a group context, and substantive and procedural law should interact dialogically in order to maintain the values of procedural law (viability of the proceedings and participation by end-users) and substantive law (protecting competitive markets and the compensation principle).

I believe that correlativity operates across the substantive and procedural axes and that the compensation principle operates in the sub-text, both in its limiting and justificatory roles. The two juridical concerns which flow through the case study are, firstly, that the true victim of unlawful conduct is compensated, and secondly, that an intermediary who has passed on a loss should not obtain a windfall. The difficulty that the courts have faced is reconciling the mass nature of the transactions with the individualized nature of correlativity. Even if we assume the compensation principle applies, and damages may be measured globally, further questions arise, particularly in relation to proof. Should each consumer be required to prove that the act of the defendant caused a loss to them? If so, how might group proceedings be realistically conducted without unraveling in a mass of detail? If not, how do we determine how compensation should be distributed? Is it necessary that the consumers receive something or can we use proxies for compensation, e.g. by distribution to charities through cy-pres remedies? The following will provide a range of answers to these questions by the courts in the US, Canada, and Australia. Many of the answers are unsatisfying, but overall they do demonstrate both the dialogic nature of the exercise and the continuing resonance of the compensation principle as a ‘moral compass’.

1) The Cases – End-point Consumers of Vitamins

The 1968 case of *Hanover Shoe Inc v United Shoe Machinery Corp*¹¹⁹ is a useful starting point. The plaintiffs alleged that the defendants had monopolized the shoe machinery industry in violation of the Sherman Act, resulting in an overcharge. The defendants argued that the plaintiff class had passed on some or the entire overcharge,

¹¹⁹ 392 U.S. 481 (1968).

and, therefore, was not entitled to recover damages. The US Supreme Court rejected this defence, holding that the passing-on defence was not available to the defendants. The court held that if the passing-on defence was allowed, the alleged co-conspirators “would retain the fruits of their illegality”¹²⁰ because indirect purchasers, having only modest claims, would be unlikely to sue.

Subsequently, *Illinois Brick Co. v. Illinois*,¹²¹ decided by the U.S. Supreme Court in 1977, determined that only those who had directly purchased goods or services from conspirators to a price-fixing scheme were entitled to recover damages. Awarding damages to downstream purchasers, e.g. consumers who had bought the price-fixed product from a retailer, who in turn bought it from the manufacturer, were denied recovery because of the difficulty of determining how much or how little of the conspiracy-induced price increase middlemen had passed on to ultimate consumers, and because letting both middlemen and consumers sue for damages would unduly complicate class action litigation.¹²²

The Supreme Court concluded that any attempt to apportion an overcharge between direct and indirect purchasers would “add whole new dimensions of complexity to ... damages suits and seriously undermine their effectiveness.”¹²³ Additionally, the Court held that allowing indirect purchasers to sue for damages “would create a serious risk of multiple liability for defendants” if, at the same time, defendants were prohibited from asserting a passing-on defence against claims by direct purchasers.¹²⁴

An expert economist commented upon this decision as follows:

... although the amount of pass-on depends upon the structure of the intermediate market, the degree of product differentiation, and other variables, it is highly probable that most of the burden of a price-fixing conspiracy falls upon ultimate consumers rather than the middlemen who are immediate purchasers from the conspirators. Thus, justice is denied to the consumers.¹²⁵

The *Illinois Brick* decision has been described as “the reciprocal of the rule established by the Supreme Court in *Hanover Shoe*”, and was instrumental in excluding end-point consumers from the US vitamins cartel class actions during the 1990s – 2000s. *Illinois Brick* was the centerpiece of submissions made by the vitamin manufacturers in summary judgment applications to exclude end-point consumers from the classes. For example, in 2001, six members of a class action were the subject of a motion for summary judgment by the defendants. They had purchased vitamin pre-mix products from non-defendant manufacturers during the relevant period.

Hogan C.J. found that the six plaintiffs purchased pre-mix products from non-defendant suppliers, who in turn had obtained the vitamins to make the pre-mix from defendants – “that fact alone” rendered “the six plaintiffs indirect purchasers of the

¹²⁰ *Ibid.* at 494.

¹²¹ 431 U.S. 720 (1977).

¹²² F. M. Scherer, *Class Actions in the U.S. Experience: An Economist's Perception*, Faculty Research Working Papers Series, John F. Kennedy School of Government, Harvard University June 2007, available at

http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID976544_code385205.pdf?abstractid=976544&mirid=1 at 10, (last accessed 6/10/07).

¹²³ *Supra* note 121 at 737.

¹²⁴ *Ibid.* at 730.

¹²⁵ F. M. Scherer, *supra* note 122 at 10.

defendants”. Accordingly, the Court found that plaintiffs' damage claims were barred by *Illinois Brick*.¹²⁶ The plaintiffs argued that an ‘umbrella theory’ of liability should apply to preserve their claim, but this was rejected following the case of *FTC v. Mylan Laboratories Inc*,¹²⁷ which found that, “the addition of indirect purchasers to the litany of possible antitrust plaintiffs threatened to mire courts in unduly complicated and speculative damages proceedings”.¹²⁸ Hogan C.J. found that “the causal connection between plaintiffs' injury and the alleged conspiracy is necessarily attenuated by significant intervening factors, such as independent pricing decisions of the non-conspiring suppliers of pre-mix.”¹²⁹

The problem has been partially rectified at the state level in the US where about 20 states have enacted legislation to provide antitrust damages without the *Illinois Brick* passing-on barrier. However, state claims may be affected by the passage of the federal *Class Action Fairness Act, 2005*, which seeks to reduce the amount of state level litigation.¹³⁰ The only recourse in federal courts for indirect buyers injured by price-fixing was to lobby the attorney general to bring a *parens patriae* suit for them.¹³¹

In 1999 a group of US state attorney-generals began negotiations with the six largest vitamin manufacturers seeking damages for indirect purchasers of bulk vitamins who were overcharged by cartelization. In 2000, a settlement between the vitamin makers and 24 attorney-generals was reached whereby the companies agreed to pay these 24 states \$305 million. Commercial indirect buyers who conducted business in those states were entitled to file a compensation claim and receive shares of a pool of \$198 million. Households were ‘indirectly compensated’ by ‘appropriate state programs’.¹³² For example, “New York State announced that it would use the consumer portion for grants to nonprofit organizations and local governments for programs related to prenatal care, child nutrition, and alleviation of hunger”.¹³³

Although commentators have argued that the US settlement significantly under-compensated US consumers,¹³⁴ at least there was some attempt to distribute to end-point consumers. This was achieved in the Canadian litigation by a cy-pres remedy¹³⁵ as an exercise of judicial power, whereas the intervention of the attorney-generals in the US was an exercise in executive power. Overall, the issue raises questions about the capacity of the courts to structure compensation in class actions to end-point consumers, and demonstrates a sequencing of paired attempts to achieve this - judicial/executive, public/private, substantive/procedural - but within a compensatory framework.

As far as the author is aware, no attempt was made to distribute to end-point consumers in the Australian litigation after the original end-point consumer was

¹²⁶ *In re: Vitamins Antitrust Litigation* 2001 WL 855463 (D.D.C.)(2 July, 2001).

¹²⁷ 62 F.Supp.2d 25 (1999).

¹²⁸ *Ibid.* at 41.

¹²⁹ *In re: Vitamins Antitrust Litigation*, *supra* note 126 at fn. 6-7.

¹³⁰ F. M. Scherer, *supra* note 122 at 10.

¹³¹ J. Connor, *supra* note 32 at 409.

¹³² *Ibid.* at 409.

¹³³ *Ibid.* at 410.

¹³⁴ Connor estimates that the settlement of \$305 million was about one third of the indirect overcharges, *ibid.* at 410.

¹³⁵ Note however that the Ontario Court of Appeal relied upon *Illinois Brick* in 2003 when refusing certification for a class which included the indirect purchasers of iron oxide pigments used to colour concrete bricks. The indirect purchasers had purchased new homes during the relevant period and concrete coloured bricks had been used in the construction. See *Chadha v. Bayer Inc* [2003] O.J. No. 27.

removed as lead plaintiff. The *Illinois Brick* case was not cited in the Australian cases, but the summary of the plaintiff lawyers' reasons for changing the description of the class in the 2003 application seems to point to difficulties of proof.¹³⁶

2) The Cases – End-point Consumers of Tobacco

In Australia, the issue of the lost end-point consumer arose after the High Court struck down state taxes on tobacco as an unconstitutional excise in 1997.¹³⁷ When wholesalers refused to refund the unconstitutional licence fees, several coattail class actions were commenced by retailers claiming the sums as money had and received. Both the Full Federal Court¹³⁸ and the High Court in *Roxborough's* case,¹³⁹ wrestled with an application by a class of middlemen retailers who admittedly had passed on the cost of the licence fees to consumers. Although the Federal Court attempted to block the claim upon substantive law grounds, the High Court rejected this analysis. In the subsequent *Fostif* proceedings, between two 'equally undeserving'¹⁴⁰ groups of litigants, the High Court provided an extremely narrow test of standing so as to curtail the actions on procedural grounds.

The language of the judgments, and the commentary, demonstrates the continuing vitality of both the limiting and justificatory roles of the compensation principle as the courts attempted to reconcile the claim before them with one that was not, i.e. the end-point consumers who had suffered the loss. Note the comments of Bryan and Ellinghaus regarding the Full Federal Court decision:

The overall impression gained from a reading of the majority judgment is one of straining to find reasons for refusing restitution. The policy informing this attitude is not hard to find. Emphasis was placed at several points in the judgment on the fact that the retailers had recouped the amount they had paid in respect of tax from cigarette purchasers. ... The moral force of the 'windfall' aspect of the case pervades the majority judgment, supplying the pretext for the application of a particularly restrictive and inappropriate test for implying terms and for reading down the criteria for the award of restitution. ... It is hard to dispel the notion that *Roxborough* was ultimately decided on the basis of the majority's aversion to conferring a perceived windfall on the retailers by judicial decision.¹⁴¹

It was found by the High Court that the fact that the appellants passed on the invalid licence fee to consumers in the form of higher retail prices was not by itself a general

¹³⁶ Early securities class actions were hampered by the need to prove reliance upon misrepresentations by individual members of the class because defendants would argue that differences in individual reliance by members of the plaintiff class meant that any proposed class would not satisfy the commonality requirement necessary for class certification. However, the case law evolved to recognise the fraud on the market theory which allowed plaintiffs to argue that they relied upon the integrity of the market rather than the challenged disclosure. By interpreting the requirement in this manner, lack of familiarity with the challenged disclosure becomes irrelevant. This is a demonstration of the evolution of proof under substantive law to accommodate class actions. See P Spender, *supra* note 87 at text accompanying fn 56.

¹³⁷ *Ha v. State of New South Wales* (1997) 189 CLR 465.

¹³⁸ *Roxborough v Rothmans of Pall Mall Australia Ltd* (1999) 167 ALR 326.

¹³⁹ *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

¹⁴⁰ *Ibid.* at [115] per Kirby J.

¹⁴¹ M. Bryan and M. Ellinghaus, "Fault Lines in the Law of Obligations: *Roxborough v. Rothmans of Pall Mall Australia Ltd*" (2000) 22 Sydney L. Rev. 636 at 667.

defence upon which the respondent could rely against a claim in restitution. Kirby J. cited the *Illinois Brick* case in support of this proposition,¹⁴² commenting that determining the damage which had been passed on may only be ascertained after a “highly sophisticated theoretical and factual inquiry”.¹⁴³

Although the result was clear under the law of restitution, it is unsatisfactory and Kirby J. invited legislative intervention.¹⁴⁴ There is more work to be done here, especially on developing strategies for the participation of end-point consumers personally, or by proxy, e.g. through a cy-pres remedy. On the last occasion that the High Court dealt with the issue, it tightened up class action standing rather than attempting to redistribute gain. In the result, the middlemen did not receive a windfall but those who suffered loss were still not represented.¹⁴⁵

E. CONCLUSION

[W]e may be better off in this country with more cops and fewer vigilantes.¹⁴⁶

In the end, the key question is whether class action litigation is socially beneficial.¹⁴⁷ Although we may decry the remedial distortions and compromises that lay in the wake of class actions, our opposition must be linked to sub-optimal outcomes. Sub-optimal outcomes might be seen in poor allocations which result in exploitation of passive right holders, or windfall gains to middlemen, or unprincipled remedial doctrine. However, in my view, an autonomous theoretical view of private law cannot resolve the issue. Rather, the answer lies in the middle ground, which is reached in the dialogic interplay of substantive and procedural law.

The case study reveals that far from suffering mortal wounds the compensation principle operates as a moral compass to guide judicial decision-making. This is manifested expressly and positively, e.g. in the *Hanover Shoe* case, or negatively and implicitly by the Full Federal Court of Australia in the *Roxborough* case where the court was prepared to bend the substantive law of restitution to avoid an outcome that ran contrary to the spirit of the compensation principle. It is also present in the sub-text of in-kind arrangements such as cy-pres remedies and the settlements negotiated by the US state attorney-generals in the vitamins litigation. These arrangements recognise that compensation is always a best guess, and, consequently, adopt a substitutive and symbolic strategy to put the class members in the same position as if they had not sustained the wrong. Yet the operation of procedural law at various points requires that the compensation principle shifts, or adapts, to the exigencies of the action. At these points, effective procedural law demands an alternative if strict adherence to the compensation principle would defeat the claim due to cost, e.g. where claims are small and thinly spread (Cumming J.’s

¹⁴² *Supra* note 139 at [130] per Kirby J.

¹⁴³ Quoting the US Supreme Court in *McKesson Corp v Division of Alcoholic Beverages and Tobacco*, *Dept of Business Regulation of Florida* 496 US 18 (1990) at 47.

¹⁴⁴ *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [174].

¹⁴⁵ *Campbells Cash and Carry v Fostif* (2006) 229 CLR 386.

¹⁴⁶ FTC Workshop -- Protecting Consumer Interests in Class Actions, September 13-14, 2004: Workshop Transcript: Panel 6: Empirical Analysis of Class Action Trends: Current Knowledge and Future Research Agendas, (2005) 18 *Georgetown J. of Legal Ethics* 1289 at 1309 per Mr Wootten.

¹⁴⁷ D. Hensler, B. Dombey-Moore, E. Giddens, J. Gross, E. Moller and N. Pace, *Class action dilemmas: Pursuing public goals for private gain*, Executive Summary (RAND ICJ, 1 January 1999) <http://www.rand.org/publications/MR/MR969.1/MR969.1.pdf> at 9 (last accessed 6/10/07).

judgment in *Ford v Hoffman-La Roche*), or where individual issues threaten to overpower the collective benefit, e.g. the *Illinois Brick* doctrine.

The compensation principle remains a moral compass by providing a 'True North' against which the court may navigate the substantive and procedural, the entrepreneurial and ideological, and the individual and collective poles in order to negotiate a just outcome. Far from being dead it remains a vital navigational tool assisting class actions to enforce the law.