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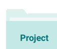
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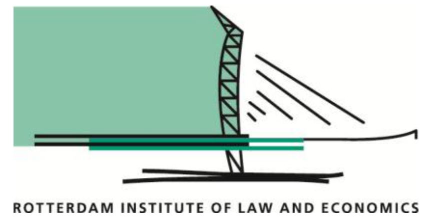

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Judges and Mass Litigation: Revisiting the Judicial Cathedral through Rational Choice Theory and Behavioural Economics

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Forthcoming in the journal 'Aansprakelijkheid, Verzekering & Schade [Liability, Insurance & Damage]' 2014(2)

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Abstract
In this paper, we study judicial attitudes and decision-making in mass litigation in the light of social sciences, namely rational choice theory and behavioural economics. These insights offer complementary views that are relevant in times where judges have been assigned increased responsibilities in our societies. We notably argue that even though recent discussions at the European level as well as in several Member-States have urged judges to play 'prominent' and 'leading' roles when monitoring mass proceedings, a key issue has however often been omitted: are these expectations ultimately realistic? Social sciences tend to nuance the great expectations nowadays shared by many policymakers.
We first discuss the different roles assigned to judges in the context of mass litigation. Then, we study judicial attitudes from the perspective of rational choice theory. A behavioural approach follows and addresses the effects associated with the magnitude of mass disputes on judicial decision-making. Finally, we apply these insights to a mass proceeding, namely the Dutch Collective Settlement of Mass Claim (WCAM).

Key words: judge, class action, mass litigation, WCAM, rational choice, behavioural economics

JEL Classification: K40,K41

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1. Introduction

The study of judicial behaviour and judicial decision-making has progressively pervaded social sciences and been embraced by economists and psychologists. This research sheds light on the way judges manage and decide cases beyond the 'mythology of legal decision-making' which posits that judges are neutral decision-makers applying law to facts.[1] Initially sceptical to these new approaches inherited from the North-American tradition[2] and viewed as attempts to desacralize the judicial institution,[3] legal scholars have progressively perceived the mutual benefits brought by these different perspectives which contribute to renew the role of the judiciary by discussing judges' strengths and weaknesses. These insights offer complementary views that are very relevant in times where judges have been assigned increased responsibilities in our society.

A manifestation of judges' growing importance regards their role in mass litigation, so cases that involve many claimants and large-scale damage. From a procedural point of view, tools to handle mass litigation are multiple. They encompass class action, representative action, group action and other collective devices. Cappelletti prophesied a few decades ago that the rise of 'big businesses' as by-product of ever-increasing consumption and production would sooner or later require the implementation of 'big judiciaries'.[4] Recent discussions at the European level as well as in several Member-States have urged judges to play 'prominent' and 'leading' roles when monitoring mass proceedings to avoid the costs and abuses usually associated with these tools (such as legal blackmail, opportunistic behaviour or frivolous lawsuit) outweighing their benefits (such as facilitating access to justice, enhancing deterrence or decreasing plaintiffs' rational apathy).[5] Great expectations have thus been placed on judges' shoulders. Throughout the discussions a key issue has however been omitted: are these expectations realistic? In this article

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[1] V.J. Konecni and E.B. Ebbesen, 'The Mythology of Legal Decision-Making', (7) *International Journal of Law and Psychiatry* 1984, p.5-18.
[2] More specifically from the US Legal Realism movement in the 1920s-1930s.
[3] H-B. Schäfer and C. Ott, *The Economic Analysis of Civil Law*, Edward Elgar Publishing 2004.
[4] M. Cappelletti, 'Vindicating the Public Interest Through the Courts: a Comparativist's Contribution', *Buffalo Law Review* 1975, p.643; M. Cappelletti, 'Le Pouvoir des Juges', *Economica* 1999, p.61.
[5] EU Commission, Public Consultation 'Towards a Coherent Approach To Collective Redress', SEC(2011),173 (answers compiled in Evaluation of Contributions to the Public Consultation and Hearings, study JUST/2010/JCIV/0027/A4); Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law, 2013/396/EU, 11 June 2013.

we argue that the beliefs of policymakers contrast with insights from social sciences. Discussing judicial strengths and weaknesses in this context is relevant for policymakers, but also for judges and society at large. Expecting too much from judges who might not be able to live up to these expectations could be detrimental for the judiciary's functioning and reputation.

The article is structured as follows: Section 2 discusses the roles assigned to judges by policymakers in mass litigation. Section 3 studies judicial behaviour from the perspective of rational choice theory, whereas Section 4 adopts a behavioural approach and discusses the effects associated with the magnitude of mass cases on judicial decision-making. Section 5 applies these insights to the WCAM. Even though this proceeding is not *per se* litigation but a judicially scrutinised settlement agreement, it nonetheless constitutes a way to deal with mass claims that is to some extent comparable to mass litigation as such. Section 6 briefly concludes.

2. A first view of the judicial cathedral: The role of judges in mass litigation as expected by policymakers

The admissibility of a mass claim, its management and its final resolution are the essential duties that judges must endorse when monitoring mass cases. A pastoral allegory featuring a watchdog, a cattle driver and a good shepherd is instructive to distinguish the different dimensions of judicial intervention. Like the watchdog protecting a herd against external threats, the judiciary is asked to behave as a filter ensuring the group's viability and scrutinizing the overall admissibility of the claim (2.1). Like the cattle driver who actively leads the herd to its final destination, judges should then ensure that cases make orderly progress and avoid the pitfalls associated with such complex and lengthy procedures (2.2). Finally, just as a good shepherd keeps track of his stray sheep, judges should take care of the parties' different interests and supervise a final outcome deemed fair and equitable to all participants, and specifically to those who are absent or represented throughout the proceeding (2.3). The brief presentation of these three roles ultimately shed some light on what kind of judge policymakers ideally expect to deal with mass litigation (2.4).

2.1 Watchdog

Endorsing the role of watchdog – or gatekeeper – is a function that judges are used to perform in individual litigation.[6] In the realm of mass litigation, judges are expected to behave as watchdogs first when verifying the admissibility of the mass claim and second when determining the shape and size of the claimant group.

Judges must go through a kind of certification process where they will verify the number of involved claimants, the existence of common issues, the representativeness of representative bodies and/or lead counsels, the adequacy of the proceeding given the needs and particularities of the case at stake. In some cases, they may also be required to conduct a preliminary assessment of the merits of the claim. These different steps exist in every mass proceeding regardless of their

[6] R. Marcus, 'Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits of Class Certification', (79) *George Washington Law Review* 2011, p.324-373.

procedural design. A difference however consists in the way judges will formally fulfil their duties. Their intervention may go from a strict control over established criteria as the one conducted by American judges when certifying class actions who, depending on cases, must among other review the numerosity, commonality, adequacy or superiority criteria enshrined in FRCP Rule 23, to a more flexible and relaxed approach as for instance the one adopted by English judges when reviewing the admissibility of Group Litigation Orders (GLO).[7]

In every mass proceeding judges must also scrutinize the size and the shape of the group and ensure a level of homogeneity within the claimant group. From a legal point of view, defining the group of plaintiffs is aimed at determining and circumscribing plaintiffs who will be bound by the final judgment and entitled to compensation. From an economic point of view, homogeneity within the claimant group has important effects: it facilitates economies of scale, reduces the risks of opportunistic behaviour such as free-riding, enhances the group's bargaining power by reducing the risk of adverse selection and facilitates the use of cost-effective case management techniques such as test cases, samples or statistics which have progressively been employed by judges when facing scattered data and numerous parties.[8] Furthermore, judges may define subgroups to take into account related claims brought by claimants with different interests or status or to ensure the adequate manageability of the case. Judges must also ensure that the case is adequately publicised in the media to allow potential claimants to step in (in case of opt in) or to step back (in case of opt out).[9] By channelling information, judges consequently ensure that plaintiffs have a chance to be heard and to present objections. In doing so, judges should also remain highly precautionary given the important reputation costs borne by companies and businesses on such occasions.[10]

2.2 Cattle driver

The case management philosophy is known in continental systems where judges must already take active steps for the resolution of civil disputes.[11] A similar tendency is noticeable in common law systems even though judges are there portrayed as traditionally more passive.[12] Managerial judging is importantly reinforced and reaches its comprehensive meaning in the realm of mass litigation.[13] Dealing with numerous plaintiffs sometimes located in several countries, exchanging with different counsels or handling a vast array of scattered data requires judges to develop

[7] C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems – A New Framework for Collective Redress in Europe,* Hart Publishing, Oxford 2008.

[8] A. Lahav,'Bellwether Trials', (76) *George Washington Law Review* 2008, p.576; D.M. Duzinsky, 'Tobacco Litigation: Statistics Permitted for Proof of Causation and Damages in Class Action', (31) *Journal of Law, Medicine and Ethics* 2003, p.161-163.

[9] K.R. Feinberg, 'Democratization of Mass Litigation: Empowering the Beneficiaries', (45) *Columbia Journal of Law and Social Problems* 2012, p.481-497.

[10] P.S. Koku, 'An Analysis and the Effects of Class-Action Lawsuits',(59) *Journal of Business Research* 2006, p.508-515.

[11] A.S. Zuckerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, Oxford University Press, 1999; C.H. Van Rhee (ed.), *Judicial Case Management and Efficiency in Civil Litigation*, Antwerpen/Oxford: Intersentia, 2007.

[12] J. Resnik, 'Managerial Judges', (96) *Harvard Law Review* 1982.

[13] P.H. Shuck, 'Mass Torts: An Institutional Evolutionist Perspective', (80) *Cornell Law Review* 1995, p.941-989.

important managing skills. They may thus organise case management conferences, organise data gathering or ask for the opinions of experts and external help.

2.3 Good shepherd

The compensation and distribution stages have been sources of multiple concerns. Literature has notably pointed out the risks of seeing claimants' interests ultimately diluted into the group and the risk of neglecting the interests of represented and absent claimants. Additionally, concerns have been expressed about possible under-compensation amounts that would undermine the overall deterrent effect of the proceeding (known as 'coupons settlements' in the United States) or alternatively about over-compensation amounts that would be detrimental for business and companies. Furthermore, warnings have been made concerning the risks of seeing compensation amounts ultimately kept by opportunistic intermediaries pursuing their own interests to the detriment of the group.[14] Judges must therefore exert a high degree of care for absent and represented parties. As Posner pointed out in *Reynolds v. Beneficial National Bank* 'we and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries'.[15]

2.4 What kind of judges do policymakers expect to handle mass litigation?

Stadler has raised an important question: what type of judges do we ultimately need to deal with mass litigation?[16] Based on the three roles distinguished above, it appears that ideally judges should be active managers able to behave as a guide, support and arbiter; they should preferably be connected decision-makers at ease with communication tools such as the internet which allow them to communicate with all parties involved;[17] they should behave as pragmatic decision-makers fully aware of the practical and immediate consequences of their decision; they should avoid being numbed by the number of parties involved; they should be innovative and prone to develop new management techniques to cope with numerous claimants and help the case proceed; they should preferably be familiar to economic thinking and statistic reasoning to be able to define an optimal size for the claimant group;[18] they should finally be sensitive to mass case's different geometry by knowing how and when to balance group considerations with plaintiffs' individual rights.

[14] C. Guthrie, 'Risk-Preference Asymmetries in Class Action Litigation', (119) *Harvard Law Review* 2005, p.587-608; J.G. Backhaus, A. Cassone and G.B. Ramello (eds.), *The Law and Economics of Class Actions in Europe: Lessons from America*, New Horizons in Law and Economics, Edward Elgar Publishing, 2012.

[15] *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 279-80 - 7th Cir. 2002.

[16] A. Stadler, 'Collective Redress Litigation – A New Challenge for Courts in Europe', in A. Bruns et al. (eds.), *Liber Amicorum Rolf Stürner*, Tübingen 2013; M. Faure, 'CADR and Settlement of Claims – a Few Economic Observations', in C. Hodges and A. Stadler, *Resolving Mass Disputes – ADR and Settlements of Mass Claims*, Edward Elgar Publishing 2013, p.38-60.

[17] J.B. Weinstein, 'The Democratization of Mass Actions in the Internet Age', (45) *Columbia Journal of Law and Social Problems* 2012, p.451-471.

[18] D. Betson and J. Tidmarsh, 'Optimal Class Size, Opt-Out Rights, and "Invisible" Remedies', (79) *George Washington Law Review* 2011, p.542-576 (suggesting that courts 'should make optimal class size a relevant consideration' when certifying, at p.568).

3. A second view of the judicial cathedral: mass litigation judges as perceived by rational choice theory

When fulfilling all the tasks previously presented, policymakers have in mind a depersonalised image of the judiciary. They expect them to behave as robust and neutral umpires while performing under considerable burden. However, research suggests that judges cannot be perceived as mere 'disinterested administrators of justice' but should rather be viewed as 'deeply interested participants'.[19] Furthermore, judges monitoring class action lawsuits tend to leave their role of external manager to behave as full 'players'.[20] These remarks therefore invite us to question what it is that judges want when monitoring mass claim. Law and Economics scholars dealing with judicial behaviour consider that judges have preferences and, like other people, respond to incentives (3.1). From this starting point, it is possible to identify the preferences of judges when resolving mass cases (3.2). The flexibility associated with standards that usually regulate judicial behaviour on these occasions allows them to express their choices (3.3). This ultimately allows predicting how rational maximizing judges may behave when managing mass claims (3.4).

3.1 Judges have preferences and respond to incentives

Approaches based on rational choice theory are aimed at clarifying judges' incentives and at exploring what judges want and how judges think.[21] The starting hypothesis posits that judges, like all human beings, act as rational and interested individuals. They respond to incentives and have a utility function which includes a set of preferences (referred to as 'arguments') that they seek to maximize under constraints. In the aftermath of Cooter and Posner,[22] Law and Economics scholars have posited that judges principally seek non-monetary payoffs in their work, such as reputation, prestige, powers or decrease in workload.[23] Financial incentives may also play a role, albeit to a lesser extent. Empirical research conducted in common law and civil law countries has extensively supported these findings and for example substantiated judges' concerns for career advancement,[24] or their willingness to decrease their workload.[25] Other studies have also stressed the role played by judges' reputation within judiciaries.[26]

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[19] M. Selvin and M.A. Peterson, 'Mass Justice: The Limited and Unlimited Powers of Courts', (54) *Law & Contemporary Problems* 1991, p.227-247.
[20] F. McGovern, 'An Analysis of Mass Tort for Judges', (73) *Texas Law Review* 1995, p.1821-1845.
[21] R.A. Posner, *How Judges Think*, Harvard University Press, 2009.
[22] R.A. Posner, 'What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)', (3) *Supreme Court Economic Review* 1993, p.1-41; R. Cooter, 'The Objectives of Private and Public Judges', (41) *Public Choice* 1983, p.107-132.
[23] K. Zajcz and M. Kovac, 'What Do the European Judge Strive For – An Empirical Assessment', *International Journal for Court Administration*, April 2011.
[24] M.A. Cohen, 'The Motives of Judges: Empirical Evidence from Antitrust Sentencing', (12) *International Review of Law & Economics* 1992, p.13-30; M.R. Schneider, 'Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal, (20) *European Journal of Law & Economics* 2005, p.127-144.
[25] M. Beenstock and Y. Haitovski, 'Does the Appointment of Judges Increase the Output of the Judiciary', (24) *International Review of Law & Economics* 2004, p.351-369.
[26] N. Garoupa and T. Ginsburg, 'Reputation, Information and the Organization of the Judiciary', (4) *Journal of Comparative Law* 2010, p. 226-254.

3.2 What do mass litigation judges strive for?

The judicial preferences previously identified are particularly relevant in the field of mass litigation. Research regarding individual litigation argues that decisions taken by insulated judges can often be regarded as 'low-cost decisions': while having an effect on litigants, they induce neither direct nor personal costs on insulated judges.[27] Transplanted to the field of mass litigation, this assumption becomes questionable: choices that judges make have direct and long-lasting consequences on their well-being. Choices to define a group broadly, to control the adequate and effective communication between the class representative and the group, to convey information to parties or to spend time scrutinizing every individual claim forming the group rather than to focus on the group as a whole drastically increases their workload, their administrative burden or their public exposure. In other words, when managing mass disputes, judges can be seen as agents dealing with competing costly alternatives.[28] Assuming that they behave as rational actors maximizing their individual utility, they ultimately choose between the options that yield them the highest personal reward at the lowest cost. The number of parties, the administrative burden associated with the administration of mass cases, the high costs of notification, aversion to the enhanced public exposure that is inevitably associated with high-profile cases are among the costs that judges may want to avoid. Alternatively, a taste for power, a quest for prestige and fame, public attention within the legal audience, or search for career advancement can be viewed as benefits that judges may seek to achieve.

3.3 How do mass litigation judges express their preferences?

Policymakers usually refer to standards, as opposed to strict rules, to regulate and guide the judicial monitoring of mass claims. Law and Economics scholars have extensively debated the conditions under which the use of standards or of rules – in other word the degree of precision that should be associated with the law - is more desirable to monitor behaviour.[29] When compared to rules, standards avoid the costs of ex ante particularizing situations and make it easier for judges to ex post adapt their behaviour to the peculiarities of the case that they have to manage. Standards have thus been advocated as means facilitating judicial flexibility necessary for the treatment of mass claim. How and how many test cases should be ordered, how and how many subgroups should be defined, on which criteria should the group be defined, how should the case be advertised in the media, how should the merits of individual claim be assessed or to what extent should individual issues prevail are – among many others – questions that will extensively depend on the nature of the dispute at stake. Furthermore, standards appear also useful in situations where policymakers have only a limited knowledge of how judges should adequately handle cases. In mass litigation, it is not certain that policymakers have clear ideas about the way judges should handle cases. They thus tend to rely on judges' expertise and competences. Standards however induce several costs. They notably delegate a large extent of the

[27] G. Kirchgässner, *Homo Oeconomicus: The Economic Model of Behaviour and Its Applications in Economics and Other Social Sciences*, Springer 2008, p.141.
[28] R.N.M. Graham, 'What Judges Want: Judicial Self-Interest and Statutory Interpretation', (30) *Statute Law Review* 2009, p. 38-72 (for a similar approach concerning statutory interpretation).
[29] L. Kaplow, 'Rules Versus Standards: an Economic Analysis', (42) *Duke Law Journal 1992,* p.557-627; H.-B. Schäfer, 'Legal Rules and Standards', in: C. Rowley and F. Schneider (Eds.), *The Encyclopedia of Public Choice*, Springer 2003, p. 671-674.

work to the judiciary. In doing so, they increase agency costs and make it more difficult to control judicial behaviour.[30] They also drastically increase discretionary decisions which in the Law and Economics literature are usually envisioned as a leeway for the expressions of personal preferences and biases.[31]

3.4 Predicting behaviour of rational utility maximizing judges: gurus and/or followers

Judges have preferences and find in standards that loosely regulate their behaviour a venue to express their own views. It remains however to predict how rational utility maximizing judges might behave. In this view, a key issue consists of determining whether judges will consider mass claims as an *opportunity* and thus be willing to *maximize the benefits* previously identified, or alternatively as a *misfortune* and thus be willing to principally *minimize the costs* previously set forth. For matters of clarity, one can first distinguish the attitude of judges behaving as *gurus* from the attitude of judges acting as *followers*. Both types of attitudes have been substantiated in practice and show long-lasting implications on the management and resolution of mass claims.

The term 'guru' is borrowed from by McGovern who noticed that 'the incentives of judges to be viewed as gurus of mass torts have become strong'.[32] A judge-guru is more likely to maximize arguments of his utility function such as reputation, prestige, power, career concerns and his taste for public service. Conversely, his desire to decrease his workload or to maximize leisure will be secondary. He will therefore be highly active in developing a comprehensive case management approach so as to control all the facets of the case at stake. Yet, even though the active attitude of the judge-guru appears particularly well-fitted for the conduct of mass litigation, this behaviour can turn out to be costly for parties and society. First, the judge-guru may be tempted to impose his own views on the litigation, or to dictate his own solution to the case even though his perceptions may not be perfectly aligned with the expectations of parties. He may leave his role of *active* judge to endorse the more problematic role of *activist* judge that could jeopardize his impartiality and independence. An example can be found in the behaviour of judge Weinstein when monitoring the Agent Orange class action lawsuit brought by Vietnam War Veterans who had been exposed to a harmful herbicide. His extensively discussed intervention was welcomed as 'a virtuoso performance of judicial management'.[33] However, observers also pointed out that the judge used his powers in 'an aggressive way' and took decisions that a majority of plaintiffs was not eager to adopt.[34] He also 'made highly questionable decisions while working for a settlement that would render them invulnerable to appeal'.[35] Such a situation ultimately questions the legitimacy of judge-gurus – who in Europe are not elected - to take such important decisions

[30] R.A. Posner, *Economic Analysis of Law*, 5th ed, Aspen Law & Business 1998 (specifically at 20.3: 'Statutory Production, Rules versus Standards).
[31] N. Gennaioli, 'Judicial Fact Discretion', in A. Schleifer (ed.), *The Failure of Judges and the Rise of Regulators*, Walras-Pareto Lecture 2012, p.23-52.
[32] F. McGovern, *supra* note 20.
[33] L.B. Novey, 'Collective Judicial Management of Mass Toxic Tort Controversies: Lessons and Issues From the Agent Orange Litigation', (27) *Social Science & Medicine* 1988, p.1071-1084.
[34] K. O'Neill, 'Agent Orange on Trial: Mass Toxic Disasters in The Courts', (15) *Review of Law and Social Change* 1986-1987, p. 415-428, reviewing P.H. Schuck, *Agent Orange on Trial – Mass Toxic Disasters in the Courts*, Belknap Press Harvard University 1986).
[35] P.H. Schuck, *supra* note 34, p. 249.

that influence the welfare of many citizens. Going a step further (already introducing an insight from behavioural economics, an approach to which we will return in Section 4), the judge-guru may also be particularly prone to the egocentric bias which refers to the tendency of individuals to view themselves as being above-average, immunized against the mistakes usually made by their fellow human beings. Rachlinski, Guthrie and Wistrich found that judges were likely to be influenced by this bias.[36] As Weinstein highlighted, 'one danger that every judge must guard against is ego [since] the sense of power and prestige in supervising mass tort or public interest case are heady'.[37]

Alternatively, judges will behave as followers when they primarily rely on parties to frame and manage issues. They rationally adopt an attitude that could be qualified as being more passive**.** The monitoring of mass cases indeed induces great costs that they may seek to avoid or to minimize. Albeit still present in his utility function, a judge-follower is therefore less influenced by prestige, reputation or career concerns and, in turn, is more trying to decrease his workload. As anecdotal evidence, a lawyer depicted the attitude of Justice Pratt who was first in charge of the Agent Orange Class Action as the one of an 'absentee landlord'.[38] The course of action of the judge-follower may be twofold. First, assuming that he is not eager to exert a high level of effort, he may essentially refer to focal points to drive the behaviours of parties toward a given outcome at lesser costs to himself. Second, following the assumptions formulated by Macey,[39] a judge-follower is also more likely to spend time overviewing the procedural fairness of the litigation where he can use his general skills, rather than to spend time scrutinizing in-depth the substance of the case for which more technical and specific skills are required. In an attempt to decrease workload and reduce dockets, some scholars have argued that judges may be tempted to clear settlements by simply agreeing without contestation with the work performed by parties.[40] Behaving differently would represent burdensome alternatives which could impair judicial resources. Empirical research on judicial review of attorney fees in class action lawsuits tends to substantiate this idea.[41] The attitude of the judge-follower is however problematic. First, parties principally lead the case and as judge Weinstein has noticed from his own practice, 'in mass tort cases, the judge often cannot rely on the litigants to frame the issues appropriately'.[42] Assuming that he is more likely to scrutinize the procedural fairness of a settlement than to focus in depth on its substance, he may be misled by stakeholders' strategies which would give only an 'appearance of fairness' to the final outcome.[43] Second, low-effort judges who tend to favour

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[36] C. Guthrie, J. Rachlinski and A. Wistrich, 'Inside the Judicial Mind', (86) *Cornell Law Review* 2001; C. Guthrie, J. Rachlinski and A. Wistrich, 'Blinking On the Bench: How Judges Decide Cases', (93) *Cornell Law Review* 2007, p. 1-43.

[37] J. Weinstein, *Individual Justice in Mass Tort Litigation – The Effect of Class Actions, Consolidation and Other Multiparty Devices*, Northwestern University Press 1995, p.93.

[38] P.H. Schuck, *supra* note 34*,* p.117.

[39] J.R Macey, 'Judicial Preferences, Public Choice, and the Rules of Procedure', (23) *Journal of Legal Studies* 1994, p. 627.

[40] S. Koniak and G. Cohen, 'Under Cloak Settlement', (82) *Virginia Law Review* 1996, p.1051-1280; A. Garapon and I. Papadopoulos, *Juger en Amérique et en France – Culture Juridique Française et Common Law*, Paris : Odile Jacob 2003, p.248.

[41] E. Helland and J. Klick, 'The Effect of Judicial Expense on Attorney Fees in Class Actions', (36) *Journal of Legal Studies* 2007, p. 171-187.

[42] J.B. Weinstein, *supra* note 37, p.92.

[43] J.R. Macey, *supra* note 39.

settlements at unequal terms may ultimately lead defendants to overinvest in prevention.[44] Third, and on a broader scale, the attitude of the judge-follower can be viewed as a 'serious abdication of judicial responsibility' misunderstood by the legal profession and the public.[45] As Marcus expresses it, '(…) judges' substantive preferences in mass tort litigation may tempt them to be less rigorous at the very time when they should be most demanding'.[46]

Undoubtedly, judges dealing with mass cases will be more eager to behave as gurus or followers depending on the developments of the case at stake. These two expected attitudes however do not seem to fit the expectations expressed by policymakers.

4. A third view of the judicial cathedral: mass litigation judges as perceived by behavioural economics

Departing from rational choice theory, behavioural law and economics has incorporated insights from psychology and cognitive sciences as a way to propose a more realistic image of human behaviour.[47] Theoretically, judicial decision-making should not be altered by the magnitude of mass claim or by the fact that many parties are involved. In a recent interview, albeit conducted in a different context, the President of the German Constitutional Court was for instance asked whether a lawsuit filed by 37,000 individuals weighs more than a lawsuit filed by a single plaintiff. His reply was blatantly negative: 'we do not count but we ask ourselves whether the claim is meritless or not'.[48] Behavioural research tends however to portray judges as boundedly rational, biased and sensitive decision-makers (4.1). The magnitude of mass litigation may therefore have an impact on their decision-making (4.2). These insights suggest that judge can also be numbed by the magnitude of mass litigation (4.3).

4.1 Judges as boundedly rational, biased and sensitive decision-makers

Following the seminal work of the Nobel Prize Laureate Simon, behavioural research considers that judges, like all human beings are boundedly rational. [49] As Simon explained, rationality is bounded 'when it falls short of omniscience'.[50] Individuals have limited computational skills and capacities and therefore a limit exists to the number of options that the human brain can effectively entertain. Furthermore, contexts and environments in which individuals evolve are

[44] L. Kockesen and M. Usman, 'Litigation and Settlement under Judicial Agency', (32) *International Review of Law & Economics* 2012, p. 300-308.
[45] J. Weinstein, *supra* note 37, p.111.
[46] R.L. Marcus, 'They Can't Do That, Can They? Tort Reform Via Rule 23', (80) *Cornell Law Review* 1995, p. 901.
[47] C. Jolls, C.R. Sunstein and R. Thaler, 'A Behavioural Approach to Law & Economics', (50) *Stanford Law Review* 1998, p.1471-1550.
[48] *Le Monde*, 'L'Europe à l'épreuve des tribunaux', interview with A.Vosskuhle, 1 October 2012(translation from the authors).
[49] H.A. Simon,'A Behavioural Model of Rational Choice', (69) *The Quarterly Journal of Economics* 1955, p.99-118; H.A. Simon, 'Rational Choice and the Structure of the Environment', in *Models of Man: Social and Rational – Mathematical Essays on Rational Human Behaviour on a Social Setting*, New York: John Wiley & Sons 1957, p. 241-257.
[50] H.A. Simon, 'Rational Decision-Making in Business Organizations', *Nobel Memorial Lecture*, 8 December 1978.

highly uncertain and unpredictable. Judges therefore do not behave as optimizers but rather as *satisficers*, seeking a solution that is merely good enough or sufficient.[51]

Recent research has also shown that judges are receptive to cognitive errors and illusions such as the *hindsight bias* (the tendency to overstate the likelihood of past events, knowing in hindsight that they have actually occurred), *anchoring* (the propensity to base a decision on external information - relevant or irrelevant to the decision at hand - which modifies the standard of reference) or *framing* (processing information differently depending on the manner the issue is worded, for example as loss or as profit). Extensive empirical research conducted with judges tends to support these findings.[52]

Finally, judges are portrayed as not only cognitively boundedly rational but also as emotionally boundedly rational decision-makers. Although for long denied,[53] the role of judge's emotions has experienced renewed impetus and is nowadays perceived as a 'field whose time has to come'.[54]

4.2 The mass litigation context and its effect on decision-making

Decision-making is influenced by the idiosyncrasies of the decision-maker, by the characteristics of the tasks he performs, and also importantly by contexts. [55] The context of mass litigation therefore matters and has an effect on judicial decision-making. Even though mass cases are brought to courts by representative associations or leading lawyers, judges take their decisions *in the shadow* of numerous represented and absent parties. Furthermore, mass cases are likely to be emotionally charged since they often deal with controversial societal issues such as large-scale accidents, diseases or defective products. They represent a psychological burden not only for parties, but also for judges.[56] Behavioural research has shown that people do not perceive individuals as they perceive groups [57]and that also professionals may take different decisions when facing a single person rather than a group.[58]

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[51] A. Tsaoussi and E. Zervogianni, 'Judges as Satisficers : a Law and Economics Perspective on Judicial Liability', (29) *European Journal of Law & Economics* 2010, p.333-357; G.M. Gulati and S.M. Bainbridge, 'How Do Judges Maximize? (The Same Way Everybody Else Does – Boundedly): Rules of Thumb in Securities Fraud Opinions', (51) *Emory Law Journal* 2002, p.83-151.

[52] C. Guthrie, J. Rachlinski and A. Wistrich 2001 and 2007, *supra* note 36; J. Rachlinski, 'A Positive Psychological Theory of Judging in Hindsight', (65) *University of Chicago Law Review* 1998, p.571-625.

[53] T.A. Maroney, 'The Persistent Cultural Script of Judicial Dispassion', (99) *California Law Review* 2011, p.629-682; T.A. Maroney, 'Emotional Regulation and Judicial Behaviour', (99) *California Law Review* 2011, p.1485-1555.

[54] B.H. Bornstein and R.L. Wiener, 'Emotion and the Law : A Field whose Time Has to Come', in *Emotion and the Law*, Nebraska Symposium on Motivation, 2010.

[55] E. Fantino and S. Stolarz-Fantino, 'Decision-Making: Context Matters', (69) *Behavioural Processes* 2005, p.165-171.

[56] J.B. Weinstein, *supra* note 37, p. 41.

[57] D.L. Hamilton and S.J. Sherman, 'Perceiving Persons & Groups', (103) *Psychological Review* 1996, p. 336-355; J. Susskind et al., 'Perceiving Individuals and Groups: Expectancies, Dispositional Inferences, and Causal Attributions', (76) *Journal of Personality and Social Psychology* 1999, p.181-191.

[58] A. Tversky and R.A. Redelmeier, 'Discrepancy Between Medical Decisions For Individuals Patients and For Groups', (322) *The New England Journal of Medicine* 1990, p. 1162-1165 (about physicians); contra: M.L. Dekay et al., 'Further Explorations of Medical Decisions for Individuals and For Groups', (20) *Medical Decision-Making* 2000, p.39-44.

4.3 Judges numbed by numbers? Two examples: The identifiable victim and the outlier effects

In the mass litigation context, judicial decision-making may be subject to numbing. Two effects are here of particular interest, namely the identifiable victim effect and the outlier effect.

One could theoretically expect that extra attention and extra precaution will be dedicated to decisions that can impact on the welfare of a large number of people, no matter if the targets are clearly identified or not.[59] This issue is cornerstone in the realm of mass litigation. Claimants are indeed largely depersonalised and tend to be merely considered *en masse*.[60] Others have suggested that the 'tragic aspect of mass torts is that individual harm becomes routinized'.[61] As said previously, judges are expected to behave as fiduciaries. In others words, they should be highly careful *vis-a-vis* absent or represented parties. In the aftermath of Schelling, behavioural research has however extensively described a so-called identifiable victim effect to refer to a decrease in sensitivity *vis-à-vis* unidentified victims.[62] Abundant empirical evidence has shown that people are more willing to exert a higher degree of attention and effort when their actions or decisions are directed toward identified targets.[63] Also, harms affecting a larger number of people are ultimately perceived with less severity than harms affecting a smaller number of individuals. Analysis of awards granted by juries in 136 recent American toxic tort cases shows that juries have compensated each victim less in tort cases when there are more victims.[64]

The second cognitive illusion is known as the outlier effect. Group members turn out not to be assigned a same weight within the group and decision-makers are often blinded by the presence of stronger claimants. In an experiment conducted with mock jurors, evidence was found that jurors facing complex cases and high information-load are less and less able to distinguish between plaintiffs.[65] Information about a group member that stands above the average is thus more likely to be easily recalled. The outlier effect can influence the way the group is perceived in several ways. On the one hand, the presence of an outlier may lead to the assimilation of all pending cases – even the weakest ones – to the situation of the outlier.[66] Also juries seem to use the judgement of the outlier 'as a threshold test [:] if they decided that the company was indeed liable for the outlier's injuries then all plaintiffs benefitted. If not, then all suffered.'[67] The

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[59] S. Sah and G. Loewenstein, 'More Affected = More Neglected: Amplification Bias in Advice to the Unidentified and Many', (3) *Social Psychological and Personality Science* 2012, p.365-372.

[60] E.J. Cabraser, 'The Essentials of Democratic Mass Litigation', (45) *Columbia Journal of Law & Society* 2012, p.499-523.

[61] A.D. Lahav, 'The Law and Large Numbers: Preserving Adjudication in Complex Litigation', (59) *Florida Law Review* 2007, p.384.

[62] T.C. Schelling, 'The Life You Save May Be Your Own', in S.B.Chase (Ed.), *Problems in Public Expenditure Analysis*, Washington D.C.: Brooking Institution 1968, p.127-176.

[63] D.A. Small and G. Loewenstein, 'Helping a Victim or Helping the Victim: Altruism and Identifiability', (26) *Journal of Risk and Uncertainty* 2003, p.5-16 ; T. Kogut and I. Ritov, 'The Identified Victim Effect: An Identified Group or Just a Single Individual?', (18) *Journal of Behavioural Decision-Making* 2005, p.157-167.

[64] L.F. Nordgren and M.-H. McDonnell, 'The Scope-Severity Paradox: Why Doing More Harm is Judged to Be Less Harmful', (2) *Social Psychological and Personality Science* 2011, p.97-102.

[65]. I.A. Horowitz, I. Brolly and L. Forster Lee, 'Effects of Trial Complexity on Decision-Making', (81) *Journal of Applied Psychology* 1996, p. 757-768.

[66] M. Leon, G.C. Oden and N.H. Anderson, 'Functional Measurement of Social Values', (27) *Journal of Personality and Social Psychology* 1973, p. 301-310.

[67] I.A. Horowitz and K.S. Bordens, 'The Effects of Outlier Presence, Plaintiff Population Size, & Aggregation of Plaintiffs on Simulated Civil Jury Decisions', (12) *Law & Human Behaviour* 1988, p.209-229.

presence of outliers is therefore likely to have important implications on verdicts about liability or on the assessment of damages. The asbestos class action lawsuit *Cimino v. Raymark Industries Inc*. is illustrative.[68] In his report, the Special Master appointed in this case first recommended to exclude from the claimant group mesothelioma plaintiffs on the basis that this subgroup represented only a small percentage of the total claims, but their disease was far more severe than other pleural or asbestosis plaintiffs who were also taking part to the dispute. It was thus feared that 'the jury may be unduly influenced by dramatic illness which make up a small percentage of the plaintiffs' class'.[69] Alternatively, the presence of outliers can exacerbate contrast effects. An experiment conducted with American judges found that judges are likely to be receptive to this bias.[70] By contrast, weaker arguments make other arguments appear stronger. Stronger claims that are mixed with weaker aggregated plaintiffs would thus appear stronger than they actually are. And the other way around, weaker aggregated plaintiffs may in turn suffer from the presence of outliers. When compared to the claims of stronger claimants, their own claims might be perceived as being weaker than they truly are. There is thus a chance that weaker aggregated plaintiffs receive less than if their cases were brought individually and separately.[71]

5. The insights applied to Dutch judges handling WCAM cases

Introduced into the Dutch legal system as a practical and emergency solution to the DES case deadlock, the WCAM has contrary to initial expectations progressively been employed to deal with different fields of substantive law and shown long-standing cross-border implications.[72] Judges have been assigned a cornerstone role for the monitoring of the WCAM (5.1). Yet the proceeding heavily depends on judges' attitudes and may be subject to their biases (5.2). One may however wonder whether the fact judges presiding WCAMs sit in panel has an effect on their attitudes and decision-making (5.3).

5.1 The WCAM judges as watchdogs, cattle drivers and good shepherds

As Van Boom has observed, 'the position of the Amsterdam Court is unmistakably crucial for the credibility of the WCAM as an instrument for the efficient and fair settlement of mass claims'.[73] The proceeding indeed heavily relies on judicial performance.

Following the classification previously established, WCAM judges will act as watchdogs when verifying the adequate representativeness of the associations or foundations and their ability to

[68] *Cimino v. Raymark Industries Inc*., 751 f. 649 (1990).
[69] J. Ratliff, 'Special Master's Report in Cimino v. Raymark Industries Inc.', (10) *The Review of Litigation* 1991, p.521-546 (emphasis added).
[70] J..Rachlinski, C.Guthrie and A.Wistrich, 'Context Effects in Judicial Decision Making', Paper presented at the annual meeting of the American Psychology-Law Society, 2010.
[71] I.A.Horowitz and K.S.Bordens, *supra* note 67.
[72] I. Tzankova and D. Hensler, 'Collective Settlements in the Netherlands: Some Empirical Observations', in C. Hodges and A. Stadler (eds.), *supra* note 16, p.91-105.
[73] W.H. Van Boom, 'Collective Settlement of Mass Claims in the Netherlands', in M. Casper, A. Janssen, P. Pohlmann and R. Schulze (eds.), *Auf dem Weg zu einer Europäischen Sammelkage?,* Munich: Sellier 2009, p. 171-192.

sufficiently represent the interests of represented parties. They will also channel and monitor information so as to ensure that all potential claimants can ultimately opt out the proceeding or present objections to the agreement.[74] Furthermore, the legislative amendment of July 2013 renewing the WCAM framework has intensified the role of WCAM judges as cattle drivers.[75] By scheduling a preliminary appearance (*preprocessuele comparitie*), which may be requested by the representative body, by the alleged defendant or by joint application, judges may become particularly active for the monitoring of the case.[76] In such an appearance the parties can discuss the way in which they will try to reach a settlement, or discuss other ways to end the dispute (e.g. by mediation). The judge plays a 'facilitating and guiding role' here, without actually taking decisions.[77] He can assist the parties in formulating the most important points of conflict and stimulate them to reach agreement. Interference of a judge may also induce unwilling parties to consider a settlement. As evidenced by the DSB WCAM currently under judicial review, judges may also organise hearings (*regiezitting*) to discuss case management issues.[78] Finally, WCAM judges will act as good shepherds when reviewing the fairness of the proposed settlement. On this occasion, they will endorse the role of '*negotiorum gestor*' for the absent and represented parties.[79] They may also review lawyers' fees when these amounts are taken out of the settlement fund.[80] This judicial intrusion within the content of a transaction freely agreed by parties could at first sight be seen as contrary to the traditional rule of contractual freedom. Mass settlements however are not private settlements: they do not solely address the private interests at stake but have also 'quasi-public components' since they involve a large number of people and deal with highly mediatised social issues.[81]

Los, vice-president of the Amsterdam Court of Appeals and involved in several WCAM rulings, recently focussed attention on the role of the judge in the WCAM. One of the issues he discussed was whether the WCAM judge should execute a *full* evaluation of the settlement agreement (which requires, among others, information on the relevant circumstances of the case, of which it is not clear how the judge should acquire this information), or 'merely' a *marginal* evaluation (assessing if there are reasons to reject the settlement).[82] In Los' view the WCAM evaluation in practise tends towards a marginal evaluation, which is strongly based on what the parties present. This in his view is understandable, given that the WCAM is in essence an individual procedure where the parties determine the boundaries within which the judge has to operate. According to

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[74] X. Kramer, 'Enforcing Mass Settlements in the European Judicial Area: EU Policy and the Strange Case of Dutch Collective Settlements (WCAM)', in: C. Hodges and A. Stadler (eds.), *supra* note 16*,* p. 63-90; F. Weber and W.H. van Boom, 'Dutch Treat: the Dutch Collective Settlement of Mass Damage Act (WCAM 2005)', *Contratto e Impresa – Europa*, vol.1, 2011.

[75] Wet van 26 juni 2013,*Stb.* 2013, 255.

[76] Also other courts than the Amsterdam Court of Appeal are competent in this respect.

[77] C.J.M. Klaassen, 'De rol van de (gewijzigde) WCAM bij de collectieve afwikkeling van massaschade 'en nog wat van die dingen', *Ars Aequi* 2013, p. 635.

[78] For an example of a hearing in the DSB WCAM, see *www.dsbcompensatie.nl/media/17175/proces-verbaal_regiezitting_wcam_dsb_bank.pdf* (visited February 2014).

[79] W.H. Van Boom, supra note 73.

[80] *Stichting Converium Securities Compensation v Liechtensteinsche Landesbank*, 2012, LJN BV1026.

[81] E.C. Burch, 'Procedural Justice in Non-class Aggregation', (36) *Wake Forest Law Review* 2009; J.T. Grabill, 'Judicial Review of Private Mass Tort Settlements', (42) *Seton Hall Law Review* 2012, p.123-183.

[82] W.J.J. Los, 'Toepassing Van De WCAM – Bespiegelingen over de rol en taak van de rechter', in W.J.J. Los (ed), *Collectieve acties in het algemeen en de WCAM in het bijzonder*, Nederlandse Vereniging voor Procesrecht n°28, Den Haag: BJu 2013, p. 25-29.

Klaassen however, the *goal* of the WCAM in principle would justify and require a more independent research of the judge.[83] Klaassen states in this respect that 'the (desirable) task of the judge regarding the WCAM-procedure is not fully clear and can be debated'.[84] The choice between both types of evaluation clearly affects what exactly is expected from the judge, but in either case the judge is assigned a fundamental role in the procedure.

5.2 The WCAM is dependent on judicial attitudes and biases

Los points out that, even though the WCAM is in principle an individual procedure where the parties set the stage, the fact that *third parties* are affected by the ruling as well could justify that judges take a more active role in which they do not restrict themselves to the mere information brought by parties, but rather ensure that third parties have a possibility to take part in the debates since their own interests are in play.[85] Contrary to this idea, the literature presented suggests that judges may notably be incentivized to remain passive. Indeed, they intervene after the agreement between parties has been reached. It is therefore less costly for judges to strongly rely on the work performed by parties, or to simply overlook the procedural aspects of the agreement without further in debt-analysis. Since many commentators have drawn parallels between the WCAM and US class action settlements it is interesting to notice that such attitude has been substantiated in the practice of American judges.[86] On a broader scale, such insights therefore tend to question whether policymakers can realistically strongly rely on the performance of judges.[87]

5.3 WCAM judges sit in panels. Does this mitigate their attitudes and possible biases?

WCAM judges usually sit in panels. An important observation consist therefore of saying that the interested attitudes and biases previously identified are ultimately mitigated by the simple fact that judges discuss and exchange with their colleagues. The judge-guru may for instance be more prone to discussions and the judge-follower facing the watchful eyes of his peers may be incentivized to be more active. In the same vein, their biases would also be mitigated by the mere confrontations of judicial point of views. This idea is consequently straightforward and indeed appealing: several judges may do it better.

The effects of panels on judicial decision-making have however revealed to be ambiguous. Indeed, panels can create contexts allowing judges to share their knowledge, competences and skills and thus decrease the likelihood of cognitive biases or systemic errors that are usually

[83] C.J.M. Klaassen 2013, *supra* note 77, p. 633. Los agrees on this, see W.J.J. Los 2013, *supra* note 82, p. 25.
[84] *Idem*, p. 634 (translation from the authors).
[85] W.J.J. Los, *supra* note 82, p. 26.
[86] See *supra* note 40 and 41.
[87] I.Tzankova and H.Van Lith, 'Class Actions and Class Settlements Going Global: The Netherlands', in D,Fairgrieve and E.Lein (Eds.), *Extraterritoriality and Collective Redress*, 2012, Oxford University Press, p. 67-91 (highlighting about the funding of mass litigation that 'on a more general level the question remains whether an explicit statutory provision with regard to the oversight of funding issues in mass disputes can be omitted and whether a legal system can afford to be entirely dependent on the competence and discretionary powers of individual judges deciding on a case whether or not pay attention to funding dynamics in mass claim disputes').

committed by single judges.[88] Research found evidence highlighting that groups tend to perform better than the best individuals to complex intellective problems.[89] Scholars have also pointed out a possible 'group polarization' likely to occur in panels which can lead judges to make more extreme, controversial or unpopular decisions than a decision-maker would have done alone.[90]And the other way around, decisions rendered by panels can also be suboptimal. Information is processed differently and part of it can be omitted or neglected. Judges may be driven by personal incentives such as showing off their personal competences in front of their colleagues. The behaviour and decisions of high-status, charismatic or senior judges may for instance influence the other members of the panel.[91] Finally, time pressure may amplify the use of simple heuristics and facilitate erroneous assumptions.[92] Far from being alleviated or suppressed, interested attitudes, biases and cognitive errors may therefore be aggravated. It is therefore far from obvious that the mere fact for WCAMs judges of sitting in panels is a sufficient barrier to mitigate the effects associated with interested attitudes and biases.

6. Conclusion

Policymakers have a view of the relationship between judges and mass claim that is mostly one-sided: judges have a key role to play for the management and resolution of mass claims. The insights from social disciplines which we have discussed in this contribution have shown that this relationship is actually double-sided: judges do not only have an important role in mass litigation, but mass claims also may have a great impact on judicial attitudes and decision-making. The personality of judges therefore contributes to shaping the outcomes of mass disputes. The WCAM example shows that also in that procedure the way in which judges will ultimately understand and perform their roles importantly matters.

These insights ultimately suggest that judges are not mere neutral and robust decision makers and that the great expectations that have been placed on their shoulders might not always be realistic. In our view, in evaluating and adapting existing forms of mass litigation as well as in designing new forms, it remains essential to keep such perspectives in mind in order to avoid placing too much emphasis on judges' discretionary powers and attitudes.

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[88] R. Perrot, 'Le juge unique en droit français', (29) *Revue international de droit comparé* 1977, p.662; B.L. Bartels, 'Top-Down and Bottom-Up Models of Judicial Reasoning', in: D. Klein and G. Mitchell (eds.), *The Psychology of Judicial Decision-Making*, American Psychology-Law Series, Oxford University Press 2010, at p.45.

[89] P.R. Laughlin and H.R. Carey, 'Groups Perform Better Than The Best Individuals on Letters-to-Numbers Problems: Effects of Induced Strategies', (15) *Group Processes & Intergroup Relations* 2012, p. 231-242; P.R. Laughlin, E.C. Hatch, J.S. Silver and L. Boh, 'Groups Perform Better than the Best Individuals on Letters-to-Numbers Problems: Effects of Group Size', (90) *Journal of Personality and Social Psychology* 2006, p.644-651.

[90] C.R. Sunstein, 'The Law of Group Polarization', (10) *The Journal of Political Philosophy* 2002, p.175-195.

[91] T.Eisenberg, T.Fisher and I.Rosen-Zvi. ‚Group Decision Making on Appellate Panels: Presiding Justice and Opinion Justice Influence in the Israel Supreme Court', (19) *Psychology, Public Policy and Law*, 2013,n.3, p.282-296.

[92] F.S. ten Velden and C.K.W. de Dreu, 'Groups As Motivated Information Processors', *in* R.W.M. Giard (ed.), *Judicial Decision Making in Civil Law – Determinants, Dynamics and Delusions*, Eleven International Publishing 2012.

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