

MULTI-PARTY PROCEEDINGS IN ENGLAND: REPRESENTATIVE AND GROUP ACTIONS

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I. INTRODUCTION

In July 2000 the Duke University School of Law and the Faculty of Law of the University of Geneva held an excellent conference in Geneva entitled “Debates Over Group Litigation in Comparative Perspectives.” The conference focused on comparing and contrasting class actions with multi-party proceedings. The present paper has been revised in light of that stimulating discussion.

This text begins by considering the relatively undeveloped system of English representative proceedings (Section II). That system is the English version of a class action. The development of representative proceedings has been retarded by the courts’ general inability, save in unusual situations, to award damages on behalf of a represented class of claimants. After a short mention of consolidated proceedings (Section III), discussion will turn to Group Litigation Orders (Section IV). In 2000, new provisions appeared which governed English group actions, i.e., civil proceedings to which large numbers of parties can accede in pursuing claims or defenses.¹ As we shall see, coordinated group actions are really intended to act as a surrogate for a mature system of class actions. Group actions are different from class actions because each group litigant is a member of a procedural class as a party, rather than as a represented non-party. Section V of the paper contains a series of comparisons between representative and group proceedings. Through these comparisons, I have attempted to distill the thoughts stirred by the discussion at the Geneva conference.

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1. See CIVIL PROCEDURE RULES [CIV. P. R.] 19.0.10–19.15 (U.K.).

II. REPRESENTATIVE PROCEEDINGS

A. Representative Proceedings in Outline

In England, a party representing others can sue to vindicate not only his personal interest but also the rights of those who are similarly affected by a defendant's breach of duty. This is the representative action, which has a long history.² A representative action can take three forms: an active form, when it is claimant-led; a passive form, when the represented group consists of various potential wrongdoers or debtors; or a combined active and passive form. Of these three forms, the most important is the active representative claim.

B. The Main Rule

Rule 19.6 of the 1998 Civil Procedure Rules adopts, with slight modification, the rule which appeared in the Rules of the Supreme Court and in the County Court Rules (both of these latter sets of rules have been phased out over the last year or more).³ The rule now provides the following:

- (1) Where more than one person has the same interest in a claim
 - a. the claim may be begun; or
 - b. the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.
- (2) The court may direct that a person may not act as a representative.
- (3) Any party may apply to the court for an order under paragraph (2).
- (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule
 - a. is binding on all persons represented in the claim; but
 - b. may only be enforced by or against a person who is not a party to the claim with the permission of the court.⁴

2. See generally STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

3. See CIV. P. R. 19.6 (repealing the former rules RSC O. 15, r. 12(1), CCR O.5, r. 5(1)).

4. *Id.*

C. Aspects of Representative Proceedings

1. *Need for a Common Interest.* A representative cannot use this procedure to make a claim if he does not have a cause of action in his own right.⁵ For example, the Court of Appeal recently declared that an action could not proceed in representative form because it was improperly constituted.⁶ The case concerned a trade association's complaint that the defendant had committed the tort of misrepresenting its product as Swiss chocolate.⁷ The court held that the association lacked capacity to sue on behalf of affected Swiss traders because its own interests had not been damaged by the wrong.⁸ Furthermore, Rule 19.6 clearly explains that the interest which underlies the representative's cause of action must be the same as that of the represented parties.⁹ In other words, they must all be common victims.

2. *No Need for Judicial Permission or Nomination.* Representative proceedings can begin without the court's permission. By contrast, such permission is required to make a group litigation order under the English rule.¹⁰ The court's permission is also necessary to continue a derivative action.¹¹ Such permission must be obtained once the derivative action has been formally commenced by issue of a claim form.¹² Also, the representative does not need to be appointed or elected by the relevant group.¹³ He can be a self-appointed general.

3. *The Position of the Represented Persons.* It is unnecessary for the represented persons to be informed of the intention to bring the representative action or of the action's progress. Furthermore, the representative claimant or defendant is *dominus litis* ("the one

5. *See id.*

6. *See Trade Association Cannot Sue Over Passing-Off*, THE TIMES, Mar. 15, 1999, (examining RSC O. 15, r. 12(1) (now CIV. P. R. 19.6(1)) and the Court of Appeal decision in *Chocosuisse Union des Fabricants Suisses de Chocolat v. Cadbury Ltd.* "[w]here more than one person has the same interest in a claim . . ."); *see discussion infra* Section II.D.2 (regarding payment by professional organizations of class action cost).

7. *See Trade Association Cannot Sue Over Passing-Off*, *supra* note 6.

8. *See id.*

9. *See* CIV. P. R. 19.6.

10. *See* CIV. P. R. 19.11; *discussion infra* Section IV.

11. *See id.* at 19.9.

12. *See id.*

13. *See* Neil Andrews, *Principles of Civil Procedure*, ¶ 7-026 (1994).

who calls the procedural shots”) which means the representative can compromise the claim or defense single-handedly. It might seem that the represented group is subject to the representative’s dominion. However, it is possible for members of the represented group to rebel, secede, and become co-defendants if they are discontent with the manner in which the representative is conducting the proceedings.¹⁴

4. *Settlement.* The court normally does not need to monitor or approve settlements reached through representative proceedings. The exception, which is consistent with general principles, concerns judicial approval of settlements affecting a represented party who is either suffering a mental disability or is a minor (i.e., under 18 years of age).¹⁵ The court’s inherent jurisdiction might be invoked in the future to deal with a situation where a representative proposes settling the case on terms which are regarded as disadvantageous, prejudicial, or unattractive to represented persons who have not been fully consulted.¹⁶

5. *Judicial Control at the Stage of Enforcement.* Another source of protection for the represented person’s interest develops if he is subject to a representative action brought against a representative defendant. In this situation, which concerns the passive form of representative actions, the represented person can seek fuller consideration of his particular position before the relevant judgment is enforced against him. Thus, the rule provides:

- (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule . . .
 - b. may only be enforced by or against a person who is not a party to the claim with the permission of the court.¹⁷

The same rule, it should be noted, entitles a party who is represented by a claimant to sue on the relevant judgment, but only with the court’s permission.¹⁸]

14. See ANDREWS, *supra* note 13, at 144-45, ¶ 7-011 (considering, notably, *John v. Rees*, 2 W.L.R. 1294 (Ch. 1970)).

15. See CIV. P. R. 21.10(1).

16. See ANDREWS, *supra* note 14, at ¶ 1-003 (commenting on inherent jurisdiction); see generally SIR JACK JACOB, *THE REFORM OF CIVIL PROCEDURAL LAW* (1982); M. S. Dockray, *The Inherent Jurisdiction to Regulate Civil Proceedings*, 113 L.Q.R. 120 (1997); M. S. Dockray, Note, *Restraint Orders*, 107 L.Q.R. 376 (1991) (criticizing this phenomenon’s amorphous nature); J.A. Jolowicz, *Practice Directions and the Civil Procedure Rules*, 59 CAMBRIDGE L.J. 53, 53 n.1 (2000) (citing additional discussions of inherent jurisdiction).

17. CIV. P. R. 19.6(4)(b).

D. The Question of Damages

1. *No Award of Damages at Large.* Damages cannot be awarded at large or globally without reference to the particular loss suffered by members of the relevant class of interested persons. This is the nub of the matter and the reason why the English representative action remains a procedural backwater rather than a flourishing style of multi-party litigation. The arithmetic of individual loss must be totted and tabulated painfully and precisely. English law recognizes no shortcut to this computation. Furthermore, a fundamental and general limitation of awarding damages in England is that punitive or non-compensatory damages are not available for a breach of contract or for the tort of negligence.¹⁹ This limitation constitutes a brake upon proliferation of damages claims in representative proceedings.

As for compensatory damages, slight progress occurred in 1981 when a Chancery judge held that the representative claimant can establish a common basis of liability, which can be adopted by others similarly harmed by the defendant.²⁰ This involves a two-stage procedure: first, the claimant must make a declaration of entitlement to relief within the main action; then, the represented persons must invoke this declaration in secondary proceedings when proving their personal loss and seeking damages. This development was acknowledged by Professor Jolowicz.

[T]he idea that there can be a representative action for a declaration that members of a class are entitled to damages, an idea which does not have the corollary that there may actually be a representative action for damages, is capable of helping to solve some of the problems that are raised by multitudinous small claims of similar character while avoiding the obnoxious features, and especially the “punitive” character, of the American massive class action. It opens the door to an economical procedure for dealing with questions of liability without at the same time involving the risk that the

18. *See id.*

19. *See generally* LAW COMMISSION REPORT NO. 247, AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES, HC 346 (1997) (U.K.).

20. *See* Prudential Assurance Co. v. Newman Indus. Ltd., 2 W.L.R. 339 (Ch. 1980), *appeal granted in part*, 2 W.L.R. 31 (C.A. 1982) (Eng.). The Court of Appeal did not disturb the prior judge’s analysis of the scope of representative proceedings. The appeal was allowed for other reasons.

defendant is ordered to pay damages to or for the account of those who do not seek them.²¹

However, the 1981 decision has not stimulated much new litigation. The explanation, it seems, is that the two-stage nature of this procedure requires represented persons to take the initiative by following up on the initial decision; damages are not awarded on a plate. Another factor, perhaps the main one, is that potential representative claimants have been wary of incurring costs when the outcome of the case is uncertain. Claimants fear that they might be fully liable for the other side's costs without the guarantee of financial contribution by the represented parties. The question of costs in representative proceedings is briefly discussed in Section II.F below. This topic has yet to be fully illuminated by the courts.

2. *Damages at the Representative Stage When Total Liability Can Be Calculated.* In some unusual cases the two-stage procedure just mentioned is unnecessary and representative claims for damages require only a single-stage or concentrated procedure. These rare situations occur when a defendant's total liability can be calculated readily and damages divided precisely among class members. One example is the representative claim by cargo-owners against a tortfeasor, which was upheld by the House of Lords in 1947; the court awarded a global sum in favor of the representative party, which the party would then distribute among the members of the represented class.²² There the defendant negligently collided with a ship carrying cargo, and cargo owners sued using a representative claim, claiming entitlement to reimbursement of their "general average contribution," which they had made to their shipper.²³ Their position was not complicated by special terms or defenses in the contracts of carriage. Each cargo-owner had suffered loss equal to the amount of the general average contribution, and the representative party calculated the damages for the total amount of loss and entered a schedule of these amounts.²⁴ Therefore, the court could choose to enter a judgment re-

21. J. A. Jolowicz, Comment, *Representative Actions, Class Actions and Damages—A Compromise Solution*, 39 CAMBRIDGE L.J. 237, 239 (1980).

22. See *Morrison Steamship Co. v. Owners of Cargo Lately Laden on S.S. Greystoke Castle*, 1 All E.R. 696 (H.L. 1947) (Eng.).

23. See *Owners of Cargo on the Greystoke Castle v. Owners of the Cheldale*, 1 All E.R. 177, 179 (C.A. 1945) (Eng.), cited with approval in *Smith v. Cardiff Corp.*, 2 All E.R. 1373 (1954) (Eng.). The judgment of Evershed M. R. in *Smith* is an example of how damages can be awarded in a representative claim.

24. See *Owners of Cargo on the Greystoke Castle*, 1 All E.R. at 179.

flecting these individual interests, or a global amount of contribution could be awarded as damages, which the representative would be obliged, as trustee of a fund, to distribute among the class members (the cargo-owners).²⁵

A 1981 decision presents another permutation.²⁶ This claim concerned a breach of copyright in musical recordings.²⁷ The defendant was selling goods retail in London markets, and was caught dealing in items (records, tapes, etc.) which infringed upon a host of interested parties' rights.²⁸ Because an award of individual damages would have required inquiry by a Master, subsequent to the main judgment assessing the precise amount of the loss, damages were awarded on a representative basis.²⁹ The relevant class of interested musicians and recording companies had agreed that their damages should be paid to their professional watch-body to meet the costs of similar actions.³⁰

3. *Pecuniary Relief Against Sets of Wrongdoers or Debtors.* The Court of Appeal in 1991 upheld a representative claim brought against a large consortium of insurers who had agreed to bear a risk under separate contracts of insurance.³¹ They had contracted among themselves that they would be represented by a named underwriter for the purpose of settling any claim relating to this insurance arrangement.³² At least seven factors justified procedural representation in this case: (1) the amount of the insurers' liability could be calculated in advance; (2) it was unlikely that any represented party might wish to challenge the amount of any award; (3) the consortium had agreed to be led by a named underwriter; (4) representation would not be prejudicial to that consortium; (5) individual defendants would receive notice of the proceedings; (6) a represented party could apply to be excluded from the class and so become a co-defendant if he wished to dissociate himself from this representation; (7) the court

25. *See id.*

26. *See* E.M.I. Records Ltd. v. Riley, 1 W.L.R. 923 (Ch. 1981) (Eng.).

27. *See id.*

28. *See id.*

29. *See id.* at 926.

30. *See id.*

31. *See* Irish Shipping Ltd. v. Commercial Union Assurance Co., 3 All E.R. 853 (1991) (Eng.); *see also* R. M. Merkin, Comment, *Multi-Party Insurances and the Conflict of Laws*, 1989 L.M.C.L.Q. 389; Neil Andrews, Comment, *Representative Actions Against Numerous Defendants*, 49 CAMBRIDGE L.J. 230 (1990).

32. In *Bank of America National Trust and Savings Ass'n v. John Joseph Taylor*, Waller J thought that passive representative proceedings for debt recovery or damages could be ordered even in the absence of such an agreement: vol 1 Lloyd's Rep. 484, 495 (Q.B. 1992) (Eng.).

would need to give permission before the judgment could be enforced against the represented persons.³³

A 1992 decision focuses upon the third factor.³⁴ In *Bank of America National Trust and Savings Association v. John Joseph Taylor*, the court held that a monetary claim can be brought against a defendant who is sued in a representative capacity even if there is no agreement between the class members (wrongdoers or debtors) authorizing the defendant to litigate or settle claims on their behalf.³⁵

E. Declaratory Relief in a Representative Action

In 2000, the House of Lords heard an appeal in a representative action brought by a policy-holder representing 90,000 other policy-holders.³⁶ The representative sought relief in the form of a declaration that the defendant life insurance company had been acting unlawfully by denying to one category of policy holders the same rights as those enjoyed by another category.³⁷ The proceedings were in fact paid for by the defendant, who showed a clear interest in achieving a final declaration of the legal position, which would bind all interested parties.³⁸ The House and the courts below were content for this litigation to proceed in representative form. The case is a vivid example of a defendant gaining the benefit of “closure” by responding to a single representative action in which a multiplicity of interested parties’ claims can be conveniently considered.³⁹ It is no wonder, therefore, that the defendant was content to fund this efficient form of proceedings.⁴⁰ Of course, declaratory relief is especially amenable to representative proceedings because there is no pecuniary or other positive order made after judgment, and because the decision is self-executing.

F. Costs and Representative Proceedings

It is probable that the English courts will be able to apply the costs rules to achieve an equitable distribution of the cost burden involved in representative proceedings. This will require the beneficiary of an ac-

33. The now-applicable rule, CIV. P. R. 19.6(4), makes explicit this last proposition.

34. See *Bank of America*, 1 Lloyd’s Rep. at 493-94; see also David Kell, Comment, *Evolution of Representative Actions*, 1993 L.M.C.L.Q. 306, 306-309.

35. See 1 Lloyd’s Rep. at 493-94.

36. See *Equitable Life Assurance Soc’y v. Hyman*, 3 W.L.R. 529 (H.L. 2000) (Eng.).

37. See *id.*

38. See *id.*

39. See *id.*

40. See *id.*

tive claim to be liable for a proportionate contribution to costs incurred by the representative.⁴¹ The courts have yet to provide guidance regarding how they will exercise their discretion in making such costs awards in this context. As suggested above, that cloudiness is a strong disincentive against bringing representative proceedings.

III. CONSOLIDATION

An additional form of multi-party procedure combines related claims or defenses in the interests of efficiency.⁴² The rules boldly declare that, in principle, “[a]ny number of claimants or defendants may be joined as parties to a claim.”⁴³ Conversely, the court can split up claims which cannot be conveniently managed within a single case.⁴⁴ The court may “stay the whole or part of any proceedings . . . either generally or until a specified date or event.”⁴⁵

The process of joinder of actions can generate actions involving thousands of claimants. For example, the House of Lords in 2000 allowed an English action to proceed in which over 3,000 claimants sought damages because they suffered personal injury or were the dependants of victims who had died.⁴⁶ The House’s decision preliminarily concerned an interesting issue of *forum non conveniens* (the appropriateness of England as the seat of this litigation). The claims were made by a host of individuals residing in South Africa who alleged breach of duty by an asbestos mining company operated in South Africa by a parent company registered in London.⁴⁷ The case illustrates the transnational nature, the scale, and the complexity of such mass tort claims. The action is clearly suitable for treatment under the new 2000 system of Group Litigation Orders, which will be examined next.

41. See ANDREWS, *supra* note 14, at ¶ 7-009 (noting especially Judge Waller’s opinion in *Bank of America*).

42. See CIV. P. R. 3.1(2)(g) (“[T]he court may . . . consolidate proceedings . . .”).

43. CIV. P. R. 19.1.

44. See CIV. P. R. 19.2(3) (“The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings.”).

45. CIV. P. R. 3.1(2)(f).

46. See *Lubbe v. Cape PLC*, 1 W.L.R. 1545 (H.L. 2000) (Eng.).

47. See *id.*

IV. GROUP ACTIONS

A. Introduction

England now accommodates most multi-party litigation within the group action procedural category. This category is governed by a new code of rules contained in Section III of the Civil Procedure Rules.⁴⁸ Although this set of rules has been substantially revised over time, the process of group litigation has been recognized in England for many years.⁴⁹ The essence of a group action includes a set of parties (normally claimants, but they might be defendants) shepherded into a single flock, travelling the long road to settlement without the separate consideration of a multiplicity of identical or similar issues. It is a compact form of macro-justice because it allows common issues to be decided efficiently, consistently, with finality, with an equitable allocation of responsibility for costs, and with due speed.

B. Group Litigation Orders: The 2000 Procedure

Amendments to the 1998 Civil Procedure Rules were made in 2000, implementing the reform of group actions.⁵⁰ The new rules are contained in Civil Procedure Rules Part 19, Section III,⁵¹ and in a Practice Direction entitled Group Litigation.⁵² The essence of the 2000 procedure is that the court delineates a cluster of claims as appropriate for a group litigation order. Such an order provides for “the case management of claims which give rise to common or related issues of fact or law (the ‘GLO issues’).”⁵³

The procedures require a solicitor acting for a proposed party to a group litigation case to “consult the Law Society’s Multi-Party Action Information Service” and obtain information about other cases which might give rise to a proposed group action.⁵⁴ Interested solicitors are

48. See CIV. P. R. 19.0.10–19.15.

49. See ANDREWS, *supra* note 14, at ¶¶ 7-017–7-018 (referring to the multi-party litigation system up until the mid-1990s).

50. See generally LORD CHANCELLOR’S DEPARTMENT, ACCESS TO JUSTICE: MULTI-PARTY SITUATIONS: PROPOSED NEW PROCEDURES (1997); LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT 223-48 (June 1996); SCOTTISH LAW COMMISSION REPORT NO. 154, FINAL REPORT ON MULTI-PARTY ACTIONS, 1996, Cmnd. 3291.

51. See CIV. P. R. 19.0.10–19.15.

52. See CIVIL PROCEDURE RULES PRACTICE DIRECTION [P. D.] 19 (U.K.).

53. CIV. P. R. 19.10.

54. P. D. 19BPD-003.

expected to form a Solicitors' Group. The group chooses one solicitor to run both the application process and the eventual case.⁵⁵

C. Consideration of the Application

An application for a group litigation order, or official permission to conduct such proceedings, will be considered by a judge.⁵⁶ This will be the more common form of commencement. The court itself can also create a group litigation order of its own motion.⁵⁷ But, whether the initiative for such an order comes from a party or from the court, no such order will become definitive without the consent of the Lord Chief Justice, in the case of proceedings in the Chancery Division, or without the consent of the Vice-Chancellor in a county court.⁵⁸

D. Constituting the Group Claim

The court's first task is to identify the so-called group litigation order issues, i.e., the questions of fact or law which are related.⁵⁹ The order will specify a management court that will run the case.⁶⁰ Claims already pending that fall within the scope of the group action shall be transferred to the control of the management court and may be entered on the group register.⁶¹ The order will also prescribe related future claims which will join the same group action.⁶² To facilitate this, the order will contain directions for publicizing the relevant order.⁶³

E. Case Management in Group Litigation

Different judges can be responsible for managing various facets of the litigation.⁶⁴ Thus, substantive issues will always be handled by the managing judge, but he might need assistance. The rules provide for the additional appointment of a Master or District Judge to consider procedural matters, and for the appointment of a specialist costs judge.⁶⁵ The

55. *See id.* at 19BPD-005.

56. *See id.* at 19 3.5-3.6.

57. *See id.* at 19BPD-016.

58. *See id.* at 19BPD-011(3.3).

59. *See* CIV. P. R. 19.10, 19.11(1) & 19.11(2)(b).

60. *See* CIV. P. R. 19.11(2)(c).

61. *See* CIV. P. R. 19.11(3)(a).

62. *See id.* at 19.11(3)(b).

63. *See id.* at 19.11(3)(c). In addition to publication under 19.11(3)(c), a copy of a group litigation order must be sent to the Law Society and to the Senior Master. *See* P. D. 19B-029.

64. *See* P. D. 19BPD-023.

65. *See id.*

need to contemplate a judicial team reflects the complexity of large group actions. The early involvement of a costs judge is an enlightened and beneficial innovation. When the costs stakes are high, sometimes astronomical, much time, expense, and anxiety can be saved by a cost judge's intervention *ab initio*. The management court can then issue various directions. For example, the court may specify the details to be included in a statement of the case, and these specifications will serve as criteria for entering claims on the group register.⁶⁶ The court can also nominate one or more claims on the group register to proceed as test claims.⁶⁷

F. The Group Register

Those wishing to join and take advantage of group litigation under the 2000 rules must either affirmatively register as parties to the relevant claim,⁶⁸ or at least have their particular claims adjoined by judicial consolidation to the group action.⁶⁹ Therefore, group actions involve positive opting-in, or at least a positive decision to litigate. This contrasts with representative proceedings where no such positive decision is necessary.⁷⁰ Representative proceedings can effectively take place behind the backs of class members without their knowledge, participation, or control. The management court will also specify a date after which no claim may be added to the group register.⁷¹

G. Binding Effect of Orders and Judgments

A decision made with respect to a Group Litigation Order issue provisionally binds all parties on the group register at the time the decision is given, unless the court orders otherwise;⁷² late-comers are also bound.⁷³ A party who is adversely affected by a judgment or order can seek permission to appeal.⁷⁴

66. See CIV. P. R. 19.13(d).

67. See *id.* at 19.13(b).

68. See *id.* at 19.11(2)(a), (3)(b), 19.12(1)(3), 19.14.

69. See *id.* at 19.11(3)(a)(i)&(iii), 19.11(3)(b), 19.13(f).

70. See discussion *supra* Section II.C.3.

71. See P. D. 19BPD-034.

72. See CIV. P. R. 19.12(1)(a).

73. In the case of claims subsequently entered on the register, “[t]he court may give directions as to the extent to which that judgment or order is binding.” CIV. P. R. 19.12(1)(b). An aggrieved late claimant cannot appeal against the relevant judgment or order, but must instead “apply to the court for an order that the judgment or order is not binding on him.” *Id.* at 19.12(3).

74. See *id.* at 19.12(2).

H. Test Claims

When a claim is singled out to form a test claim, decisions in that case are binding on all similar claims on the group register. The result of the test claim can also bind subsequent claims added to the register, if the court so directs.⁷⁵

I. Costs

A new costs rule was issued in June 2000 to complement the group action system.⁷⁶ The rule distinguishes between common costs and individual costs. Where an application or hearing deals with both common issues relating to the group and individual issues affecting only particular parties, the court will declare the proportions of the costs attributable to common costs and to individual costs.⁷⁷

The essence of the new costs rule is that group litigants will normally be subject to an “order for common costs” which will impose “on each group litigant several liability for an equal proportion of those common costs.”⁷⁸ It should be noted that the basic English costs rule, which permeates all forms of civil litigation, is that the “loser pays.” The 1998 Civil Procedure Rules reaffirm that “the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party,” and this rule applies to all forms of civil proceedings, not just multi-party litigation.⁷⁹ In England, the cost-shifting rule is said to be not only an aspect of elementary fairness between litigants but consistent with public policy, because it deters ill-considered or malevolent claims and defenses and encourages settlement.⁸⁰ It has this effect by applying obvious and considerable pressure to both parties to avoid the double risk of becoming liable for the other side’s costs in the event of the latter’s victory, as well as bearing their own legal costs.

Consistent with the basic costs rule, members of a group claim will incur liability for the opponent’s costs if the group loses the action. Group members’ costs liability to the victorious opponent might be

75. See CIV. P. R. 19.12(1).

76. See *id.* at 48.6A.

77. See *id.* at 48.6A(5).

78. CIV. P. R. 48.6A(3).

79. *Id.* at 44.3(2)(a).

80. See *Condliffe v. Hislop*, 1 W.L.R. 753, 762 (C.A. 1996) (Eng.); *AEI Rediffusion Music Ltd. v. Phonographic Performance Ltd.*, 1 W.L.R. 1507, 1516 (C.A. 1999) (Eng.) (citing *Roache v. News Group Newspapers Ltd.*, 1998 E.M.L.R. 161 (C.A. 1992) (Eng.)); see also *R v. Lord Chancellor ex parte Child Poverty Action Group*, 1 W.L.R. 347, 356 (Q.B. 1999) (Eng.).

comprised of two elements.⁸¹ First, a group litigant's liability with respect to other members of the group will be "an equal proportion, together with all the other group litigants, of the common costs."⁸² For example, suppose a thousand group litigants bring a claim against the defendant, judgment is awarded for the defendant, and the case concludes. Each of the thousand group litigants will be liable to the defendant for an equal part of the total common costs owed to the defendant by the group. The second and additional element of costs payable by an individual group litigant is the amount of individual costs incurred by the defendant in meeting that particular litigant's claim.⁸³ This could include expenses incurred by the defendant when demonstrating that a particular claimant had not suffered the loss alleged.

V. APPRAISAL OF ENGLISH STYLES OF MULTI-PARTY LITIGATION

The enactment in 2000 of the Civil Procedure Rules, Part 19 Section III, makes plain that the architects and custodians of English civil justice prefer that multi-party litigations should proceed as group actions rather than as representative proceedings.⁸⁴ Furthermore, most multi-party traffic already takes the group action route because the representative action does not generally allow damages to be awarded at large in favor of a class. As discussed in Section II.D.2, the court can award damages in a representative action only where (i) the class members' loss can be readily ascertained at the time of judgment; or (ii) the class members have waived their rights to individual receipt of damages and instead wish their compensation to be paid to a body enjoying care of their interests.⁸⁵ Note that even in this last situation, however, the damages must be worked out.⁸⁶

A contingency of non-English commentators at the conference suggested that the English preference for group litigation orders, rather than class actions on the representative model, diminishes the chances of victims of mass wrongs to gain effective access to justice. Some critics went further and suggested that the English system is pusillanimous for failing to commit itself to recovery of damages in class actions. In response to these comments, I will address the fundamental question, a

81. See CIV. P. R. at 48.6A(4).

82. *Id.* at 48.6(A)(4)(b).

83. See *id.* at 48.6A(4)(a).

84. See CIV. P. R. 19.0.10–19.15; discussion *supra* Section IV.

85. See *supra* notes 26-30 and accompanying text.

86. See *id.*

delicate issue of policy and fairness: whether in English multi-party actions it is right to prefer as the primary style of procedure a case-managed group litigation rather than representative style actions (known elsewhere as class actions). Ultimately, this question involves a political judgment that requires a choice between imponderable merits and demerits. The following factors need to be weighed in the balance of this inquiry. Many of these factors were addressed in the course of the spirited discussion at the Geneva conference in 2000.

A. Some Advantages of Representative Claims

1. *Efficiency.* English representative proceedings can efficiently render all class members subject to the court's relief without being identified and notified, and without making a positive election to join the litigation.⁸⁷ Procedural costs are therefore reduced.

2. *Access to Justice.* Three points are of importance with this advantage. First, representative actions can promote better access to justice than group litigation because the latter requires positive steps to be taken by the alleged victim of a legal wrong.⁸⁸ Secondly, representative proceedings enable rights to be vindicated that cannot readily be enforced by individual action. Thirdly, the class action is a means of redressing procedural inequality between small claimants and large defendants.

3. *Equality of Treatment.* Representative actions embrace a whole class of interested persons and so ensure a fair and equal allocation of rights or burdens.⁸⁹

4. *Finality or Closure.* The representative action achieves finality of outcome or closure. Defendants prize closure because it enables them to draw a line under a particular tragedy, series of mishaps, or a set of related consumer grievances.⁹⁰

5. *Effectiveness in Vindicating Civil Rights.* The representative action can be more potent than other forms of multi-party litigation. It can increase the effectiveness of the civil law's vindication of rights and interests, especially when combined with generous costs provisions, such as conditional fee schemes⁹¹ or even the discretionary sus-

87. See discussion *supra* Section. II.C (contrasting representative proceedings with Group Litigation where positive opting-in is necessary); see also *supra* Section IV.F.

88. See *supra* notes 68-70.

pension of the ordinary costs rule that the loser pays the other side's costs.⁹²

B. Disadvantages of Representative Proceedings

1. *Failure to Particularize Relevant Distinctions.* This concerns the danger of superficial adjudication. Representative proceedings can cause injustice if the action steamrolls over relevant differences between individual claims or defenses. To avoid this, the court must be alert to ensure that salient differences are teased out during the litigation.

2. *Counterproductive Speed.* There is a related danger of misplaced procedural haste. Representative proceedings might not conclude the entire matter but merely scratch the surface of a myriad of detailed disputes. It may prove necessary to pursue secondary litigation to achieve precision in individual cases. This can cause avoidable delay and expense. In some situations, it is better for there to be a measure of procedural discipline and for each claim to be carefully pleaded and registered as part of a group action. This allows the court to consider both common issues and individual divergences from that common ground within the same action.

89. See ANDREWS, *supra* note 13, ¶¶ 7-023–7-024.

90. See *supra* note 36 and accompanying text (discussing when a representative action on behalf of 90,000 was funded by defendant life insurance company).

91. See Neil H. Andrews, Comment, *Conditional Fee Agreements: The Courts and Parliament in Union*, 57 CAMBRIDGE L.J. 469 (1998); Neil H. Andrews, Comment, *Common Law Invalidity of Conditional Fee Agreements for Litigation: "U Turn" in the Court of Appeal*, 59 CAMBRIDGE L.J. 265 (2000) (describing the "no win, no fee" system, with or without an additional bonus for the lawyer to reward success in the litigation). The statutory provisions prescribing valid fee agreements are "§58 and §58A of the Courts and Legal Services Act 1990 (substituted by section 27 of the Access to Justice Act 1999 and effective from April 1, 2000)," the Conditional Fee Agreements Regulations 2000, (S.I. 2000, No. 692) (revoking the 1995 regulations (S.I. 1995, No. 1675)), and the Conditional Fee Agreements Order 1998 (S.I. 1998, No. 1860). *Id.* at 265.

92. See *R v. Lord Chancellor*, 1 W.L.R. 347 (C.A. 1999) (Eng.) (affirming jurisdiction to make an order prior to trial to protect applicant against liability for costs); *McDonald v. Horn*, 1 All E.R. 961 (C.A. 1995) (Eng.) (noting that courts are reluctant to make such pre-trial cost orders except in favor of trustees and related officers such as executors, receivers, liquidators, and minority shareholders); see also *Wilkinson v. Neary*, 1 W.L.R. 1220 (Ch. 1995) (Eng.); *Re Biddencare Ltd.*, 2 B.C.L.C. 160 (Ch. 1994) (Eng.).

3. *Problems of Due Process.* Representative proceedings notoriously can violate people's legitimate interests in receiving due process, namely in receiving due notice of the claim, having their dispute properly articulated, and enjoying an opportunity to state their case.

4. *The Danger of Collective Bullying.* One objection to representative or class actions is that they have a tendency in extreme cases to coerce even large companies into settling rather than fighting a case on the merits.⁹³ Wearing his hat as captain of a tribe, it becomes easier for David to smite Goliath. But in principle, group litigation can raise the same problem of intimidation, except that the group members stand shoulder to shoulder on the battlefield. Perhaps the difference between group litigation and class actions is that there is a lesser chance of the former being used as an errant form of coercing a settlement whether or not the case is meritorious. This result occurs because group litigants must register and individually plead their claims and because they are severally liable for common costs.⁹⁴ By contrast, class members in representative proceedings can be spectral and the merits of their claims wholly speculative.

C. Assessment

Ultimately, it is uncertain whether group actions are less likely to involve procedural bullying. The remaining three disadvantages to representative claims are more solid and exhibit why group litigation is a more beneficial style of litigation. What emerges from these lists of merits and demerits is that it is no easy matter to decide whether one style of multi-party procedure is superior to another. The English preference for group litigation orders is not transparently wrong, nor is it self-evidently right.

VI. CONCLUSION

The English legal system is more circumspect than many other systems in recognizing new legal techniques and concepts. More recently there have been signs of a greater willingness among the senior judges to innovate and to take slightly bolder steps when developing the law.⁹⁵ For several decades judicial innovation seemed to be monopolized by

93. This was an observation made by several defense attorneys at the conference in July 2000.

94. *See supra* Section IV.I.

95. *See Kleinwort Benson Ltd. v. Lincoln City Council*, 3 W.L.R. 1095 (H.L. 1998) (Eng.) (abolishing in a bold decision the 200-year mistake of law ban upon restitutionary claims for the recovery of mistaken payments).

Lord Denning, whose judgments in the Court of Appeal often came crashing to the ground on further appeal to the House of Lords.⁹⁶ A more positive way of making this point is to say that the English legal system is famous for its pragmatic approach to change.⁹⁷

Lord Steyn, a Lord of Appeal in Ordinary who is a conspicuously innovative judge, but also a shrewd pragmatist, kindly chaired the common law section of the Geneva conference (English, Canadian, and Australian reporters) and made some interesting observations. He suggested that English senior judges are opposed to a litigious society, that is, an over-excited tendency for citizens and businessmen to “blame and claim” by bringing actions in the ordinary courts rather than pursuing grievance procedures through political systems of democratic accountability, pressure groups, ombudsmen, arbitration, conciliation, etc.⁹⁸ Nor, he suggested, were these judges guilty of applying an oligarchic brake in the litigation process.⁹⁹ Instead, he said this view reflected a sense, which is widely shared within the community, of the place of civil law and of its relationship to the other organs of political and social life.¹⁰⁰

Against this background, it is perhaps not complacent to say that the newly refined 2000 model of group litigation orders must be allowed time to prove itself. If, in five years, the 2000 system turns out to be an inadequate vehicle for delivering damages to those who deserve compensation, English law reformers will need to consider the experience of other legal systems. Many of these legal systems have embraced the class action and allowed cohorts of potential claimants to receive justice without participating positively in the action or in the settlement negotiations.

The Author’s main anxiety is that the custodians of English civil justice have not formally created a mechanism for assessing the success of group litigation. Furthermore, one senses that England will do well to debate actively whether the group litigation procedure is a flexible and efficient response to the problem of multi-party litigation. Perhaps the clamoring voices of potential claimants (or class members) and their

96. *See* *Photo Prod. Ltd. v. Securicor Transp. Ltd.*, 2 W.L.R. 283 (H.L. 1980) (Eng.); *Woodar Inv. Dev. Ltd. v. Wimpey Constr. U. K. Ltd.*, 1 W.L.R. 277 (H.L. 1980) (Eng.). The court decided these cases on February 14, 1980, a St. Valentine’s Day massacre at Westminster.

97. *See generally* P. S. ATIYAH, *PRAGMATISM AND THEORY IN ENGLISH LAW* (1987).

98. Lord Steyn, Address at the Conference on Debates Over Group Litigation in Comparative Perspectives (July 21-22, 2000).

99. *See id.*

100. *See id.*

lawyers have not been stilled by the recent provisions for group litigation, nor might the 2000 rules cause the bitter waters of civil contention to subside.¹⁰¹

In February 2001, the Lord Chancellor's Department issued a consultation paper, entitled "Representative Claims: Proposed New Procedures."¹⁰² The document is the fruit of a committee's lengthy deliberations. But the text is tentative and merely sets out a series of options for possible reform of the law. It is too early to say whether this consultation paper will proceed further or, if it does progress, what shape eventual changes in the law might take. All that can be said now is that this latest official paper demonstrates that the English governmental authorities and some parts of the English legal profession see the need for further legal development of multi-party procedure. The system of group litigation introduced in 2000, and which has been described in this paper, might not be the last word on this topic in England.

101. These images echo Lord Simon of Glaisdale's words in another context, in the *Amphill Peerage Case*. See *Amphill Peerage Case*, 2 W.L.R. 777, 805-06 (H.L. 1977) (Eng.).

102. Lord Chancellor's Dept. (London, 2001).