

MULTI-PARTY ACTIONS: A EUROPEAN APPROACH

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This Article gives an overview of the kaleidoscope of developing mechanisms for dispute resolution in European jurisdictions and explains why generally few multi-party actions exist in Europe. It summarizes the seminal 1993 European Commission survey of alternative mechanisms and the major trends and developments since then (Section I), and the current status of national litigation procedural rules on class actions and the extent of class action litigation (Section II). It then analyzes this current status (Sections III and IV). Section V notes important differences between the approaches in the United States and the European Union, and Section VI considers the need for a basic class mechanism in Europe.

I. OVERVIEW OF THE EUROPEAN APPROACH TO DISPUTE RESOLUTION

European jurisdictions approach the resolution of disputes, particularly those involving consumers, in a number of different ways. Until efforts within the past ten years or so by the European Community authorities to harmonize certain topics, the choice and development of mechanisms had been entirely an individual matter for each of the twenty or so governments of Western Europe. The inevitable patchwork of laws and mechanisms that has resulted does, however, contain a number of strong similarities of general approach, which reflect some important differences from the approach of other trading blocks, notably North America. In 1993, the European Commission surveyed the available mechanisms in EEC member states relating to access for consumer disputes.¹ Part III of that report analyzed these mechanisms under the following headings:

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1. See Green Paper Presented by the Commission: Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market, COM(93)576 final.

A. Protection of Individual Rights²

The Commission found that member states had attempted to facilitate the settlement of consumer disputes using three different mechanisms:

- by simplifying court procedures applicable to small disputes;
- by instituting out-of-court procedures specifically devoted to consumer disputes, either at the initiative of public authorities or, more frequently, industry; such procedures are either an alternative to going to court (arbitration of consumer disputes, as in Spain, Portugal, Netherlands) or complementary and/or pre-litigation procedures (like mediation or conciliation); and
- by creating a joint representation action, in which a consumer organization may take action on behalf of consumers who have suffered individual harm caused by the same entity and having a common origin.³

The Commission noted that the first mechanism, the simplification of court procedures, was instituted in member states by the following methods:

1. reform of the Code of Civil Procedure, designed not only to simplify the settlement of “small claims” but also to streamline procedures in general and eliminate the backlog of pending cases (Belgium 1992, Italy 1990 and 1991, Germany 1993);
2. creation of “simplified” procedures . . . for disputes of a civil character below a certain sum (France 1988, Netherlands 1991, Portugal 1991, United Kingdom 1988);
3. creation of a (simplified and) special procedure solely available to consumers for disputes whose value does not exceed a specific sum (Ireland 1991).⁴

The paper further noted that disputes below a certain value were governed by a specific method in all member states.⁵ The common features of this method were as follows:

1. simplified procedures for bringing an action (simplified referral—a registered letter, or a simple declaration recorded by the judge or a clerk of the court) and
2. the fact that a lawyer’s assistance is not required and

2. *Id.* at 54.

3. *See id.*

4. *Id.* at 54-55 (internal citations omitted).

5. *See id.* at 55.

3. a prior attempt to effect conciliation (which is mandatory in most countries) by the presiding judge.⁶

B. Protection of Collective Interests⁷

The Commission reported some member states had delegated the protection of collective interests to an autonomous or independent administrative authority (for example, the Director General of Fair Trading in the United Kingdom, the Consumer Ombudsman in Denmark, or the Director of Consumer Affairs in Ireland).⁸ In eight member states, consumer organizations were recognized as having *locus standi* to apply to the courts for an injunction or prohibition order regarding forbidden or unfair commercial practices.⁹ Germany created this mechanism through legislation enacted in 1909, 1965, and 1976; Greece and Spain, in 1991; France, in 1988 and 1992; Italy, in 1990 and 1992; Luxembourg, in 1983 and 1986; and Netherlands and Portugal, in 1981.¹⁰ A further method exists in Belgium where, since 1991, legal protection of collective interests may be undertaken by both consumer organizations and an administrative authority.¹¹

C. Aid for Legal Advice and Legal Aid¹²

The Commission had undertaken a number of pilot projects in member states, from which it concluded the following in its *Green Paper*:

the pilot projects prompted by the Commission (see in particular the ongoing projects in Ireland, Italy and Greece) show that a very large percentage of consumer disputes can be settled without going to court at all, provided a counselling service is made available to consumers (this service must be free of charge or at least its price must be “accessible” to the consumer).¹³

The Commission commented that in two member states (United Kingdom and France), public finance was provided for legal advice, as through Citizens Advice Bureaus.¹⁴ A later report by the Commission extensively examined legal aid, finding that legal aid for court

6. *Id.*

7. *Id.* at 64.

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *Id.* at 68.

13. *Id.*

14. *See id.*

proceedings is available in all member states but in widely differing forms, including any of the following:

[P]rovision of free or low-cost legal advice or court representation by a lawyer; partial or total exemption from other costs, such as court fees, that would normally be levied; [and] direct financial assistance to defray any of the costs associated with litigation, such as lawyers' costs, court fees, witness expenses, liability of a losing party to support winners' costs, etc.¹⁵

D. Community Developments

Since the 1993 snapshot outlined above, developments have taken place both in the context of member states' national reforms and in the context of the European Community's multi-state reforms.

Individual member states have continued to expand or innovate across the broad spectrum of national mechanisms. For example, Italy, Portugal, and Spain have joined France in permitting representative actions by consumer organizations.¹⁶ Further progress has been made with respect to consumer or small claims mechanisms, ombudsmen, industry codes of practice, and conciliation systems.¹⁷ A particularly significant development is the revolutionary reform of litigation procedure in England and Wales, where the Civil Procedure Rules of 1998 are based on principles of removing complexity, cost, and delay. In these 1998 Rules, emphasis is placed on judicial management of cases, a requirement for proportionality between costs and amounts in dispute, and the pre-action exchange of statements of case and evidence, so parties may settle disputes as early as possible.¹⁸ These factors have reduced the number of proceedings commenced, increased early mediation of claims, and limited the extent of legal work. This system is being considered carefully by other governments and is likely to spread.

15. Green Paper from the Commission, *Legal Aid in Civil Matters: The Problems Confronting the Cross-Border Litigant*, COM (2000) 51 final, Feb. 9, 2000, at 2; *see also* European Commission, *Guide to Legal Aid and Advice in the European Economic Area* (1996).

16. *See* the French case, *Cour de cassation 1st civ.*, 5 Oct. 1999, *Union Federal des Consommateurs (UFC 38) v. Emme*, *Juris Data* no 003376, as noted by Sandie Chillon, *CONSUMER L. J.* v.7(4), 529-530 (1999).

17. As one example from England and Wales, see the introduction of three "tracks" in a civil action under the Civil Procedure Rules, allocation to which is based primarily on the value of the case. This means that there is a separate small claims track for claims up to £5,000 and £15,000. Also, some U.K. courts offer mediation schemes, for example, Central London County Court.

18. *See* C. PRO. R., Rule 1.

Developments have also occurred at the European Community level. Pursuant to its remit to facilitate cross-border trade (and therefore also resolution of cross-border disputes) in order to create the Community's single internal market, the European Commission has taken various measures to reduce transnational barriers between member states and to promote harmonized approaches. The approach to some issues has to be made with care, but some progress is continuing to be made, especially in four main areas of reform.

First, given the observation noted above that many consumer disputes are small claims that can be settled quickly by simplified mechanisms, the European Commission has promulgated a standard Consumer Complaint Form, emphasized the need for member states to have simplified procedures with no or minimal cost or involvement of lawyers, and made steps to create a network of bodies responsible for the out-of-court settlement of consumer disputes and the standard consumer complaint form.¹⁹

Secondly, based on some national precedents, Directive 98/27/EC permits consumer organizations to apply to courts in fellow member states for an injunction against an infringement of any of a number of consumer trading Directives, covering areas such as misleading advertising, unfair contract terms, consumer credit, package holidays, and consumer guarantees, committed in the organization's own state by an entity in the fellow state.²⁰ This mechanism avoids the need for a class action device; but, although it may be appropriate on horizontal consumer trading issues, it involves enormous and seemingly insurmountable difficulties where any individual issues must be resolved.

Thirdly, in 1999 the European Commission issued a Green Paper on cross-border legal aid as part of European policy on the creation of an area of freedom, security, and justice.²¹ Its focus on legal aid at this time is somewhat ironic, given considerable variation in the availability of legal aid across the member states (by the Paper's own definition,²² some states only have *de facto pro bono* systems with no public funding) and given the clear experience of the United King-

19. See Commission Recommendation 98/25, of Mar. 30, 1998, on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, 1998 O.J. (L 115) 0031-0034; Council Resolution of May 25, 2000, on a Community-Wide Network of National Bodies for the Extra-Judicial Settlement of Consumer Disputes, 2000 O.J. (C 155) 1.

²⁰ 1998 O.J. (L 166) 51.

²¹ Green Paper from the Commission: Legal Aid in Civil Matters: The Problems Confronting the Cross-Border Litigant, COM (00)51 final, Feb. 9, 2000.

²² See *id.*

dom and Sweden that legal aid does not work well and that legal services should be privately financed.²³ In 1997 Sweden provided that private legal expenses insurance (“LEI”) policies should be emphasized and given priority over state support.²⁴ LEI is widespread in Sweden and Germany, and it is possible that its existence discourages poor or speculative claims.

Fourthly, where litigation is appropriate, various international conventions exist on legal mechanisms, in the context either of the Community (former Article 220 of the EC Treaty²⁵) or of The Hague Conference on Private International Law.²⁶ The Commission is currently in the process of developing further the following items:

The Brussels Convention of September 27, 1968, on jurisdiction and the enforcement of judgments in civil and commercial matters;²⁷

- The Rome Convention of June 19, 1980, on the law applicable to contractual obligations;²⁸
- The Hague Convention of November 15, 1965, on the service abroad of judicial and extrajudicial documents in civil and commercial matters;²⁹
- The Hague Convention of March 10, 1970, on the taking of evidence abroad in civil or commercial matters;³⁰
- The Hague Convention of October 25, 1980, designed to facilitate international access to the courts,³¹ which has only been signed by a minority of the member states.

23. See generally THE TRANSFORMATION OF LEGAL AID (Francis Regan et al. eds., 1999).

24. See Francis Regan, *Retreat from Equal Justice? Assessing the Recent Swedish Legal Aid and Family Law Reforms*, 19 CIV. JUST. Q. 168 (2000).

25. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1, 1 C.M.L.R. 573 (1992).

26. See The Hague Conference on Private International Law, Oct. 9, 1951, 220 U.N.T.S. 121.

27. See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Oct. 30, 1978 O.J. (L 304/77) v.21. See now Council Regulation (EC) No 44/2001 of Dec. 22, 2000 on Jurisdiction and the Regulation and Enforcement of Judgments in Civil and Commercial Matters, O.J. (L 012) Jan. 16, 2001, pp.1-23.

28. See Convention on the Law Applicable to Contractual Obligations, Oct. 9, 1980 O.J. (L 266/1) v. 23.

29. See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 658 U.N.T.S. 162.

30. See 847 U.N.T.S. 231; U.K.T.S. 20(1977), Cmnd 6727; 23 U.S.T. 2555, T.I.A.S. 7444; J.O.F. 17 Apr 75; 1975 R.T.A.F. 22; 57 Vert A 748; 102 JDI 635; RCH p.152.

31. See Misc 14 (1981), Cmnd 8281; 19 ILM 1505; RCH p.284.

E. Comments on the European Approach

An innocent observer of the European scene could be forgiven for commenting that the current position on access to justice across the member states is confusing, with various different mechanisms existing contemporaneously. It is, however, possible to analyze this pluralistic approach, as the Commission did in its 1993 report, under broad headings, and then to conclude that a number of these mechanisms are—or have the potential to be—valid, useful, speedy, and cost-efficient dispute resolution methods that deserve further investigation, development, and promulgation.³² Within this developmental process, it may also be possible to bring about a convergence of those national systems that currently differ, whether systemically or in detail.

Many of the European access to justice and dispute resolution mechanisms represent an approach to economic and social policy that rejects an adversarial approach and excessive or unnecessary transactional costs but favors conciliation at proportionate costs. European policy emphasizes social cohesion rather than an approach stressing the individualistic vindication of personal rights.

II. THE CURRENT STATUS OF MULTIPLE CLAIMS IN EUROPE

A. Rules of Procedure

The first factual observation is that it is only recently that some European jurisdictions have introduced a rule of court procedure on the recognition or management of a multi-party action. For example, a Group Actions Act came into force in The Netherlands on May 1, 1994. Some class action provisions (with limitations) are contained in the Portuguese Law 83/95 of August 31, 1995. A rule of civil procedure on group litigation was introduced in England and Wales in May 2000.³³ The Civil Procedure Act 1/2000 of January 10, 2000, introduced a class action mechanism in January 2001 in Spain for entities entitled to defend the interests of their members. The Scottish Law Commission has considered³⁴ (but in 2000 rejected) a need to intro-

32. See Green Paper Presented by the Commission: Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market, *supra* note 1.

33. See C.J.S. HODGES, *MULTI-PARTY ACTIONS* (Oxford, 2001) (discussing C. PRO. R. 19.III).

34. See Scottish Law Commission, *Multi-Party Actions: Report by Working Party* (1993); Scottish Law Commission, *Multi-Party Actions: Court Proceedings and Funding* (1994).

duce a multi-party rule. Proposals have languished in Sweden³⁵ and Finland,³⁶ but the debate in the former might be revived. No specific multi-party rules, therefore, exist in a significant number of European states, notably Germany, France, Italy, Austria, Switzerland, and the Central European states.

B. Experience of Multi-Party Cases

The second factual observation is that the only European jurisdictions that have any significant experience with multi-party actions for compensatory damages are the common law countries: England and Wales have had a succession of major cases since the early 1980s, sometimes with the same litigation replicated in later years in Scotland and Ireland. The principal cases have typically involved hundreds and sometimes thousands of claimants. The subject matter of these cases has largely been pharmaceutical product liability claims; other product sectors have been noticeably absent and other types of claims (for example, financial or environmental cases) have been much rarer.

A summary of these major completed cases in England and Wales is given at Table 1. There are two other remarkable features of these cases: first, the claimants were funded almost entirely by legal aid, rather than by private or trade union funding or by legal expenses insurance, and second, the success rate of many of the cases was low. These aspects call for detailed examination, in Section III below, but it should be noted here that this experience shows that where multi-party claims predominantly involve individual issues (which the product liability cases almost always do, whereas other types of case may not), a court mechanism that seeks to resolve all the cases in a group by focusing mainly on actual or supposed common issues, at the expense of individual issues, will run into difficulties. Many of the English cases failed on their individual facts, but this was not apparent for some time, as the facts were not investigated until the group claims had proceeded some distance. These observations raise the issue of the suitability of certain types of cases, such as product liability, for group resolution.

35. See SOU 1994:151, However, 1994 proposals have been revived in 2000.

36. See Klaus Vittanen, Note, 7 CONSUMER L.J. 140 (1999).

III. ANALYSIS

A. What's Different About Some Jurisdictions?

The observation that multi-party litigation exists as a phenomenon in some jurisdictions but not others³⁷ prompts an analysis of the reasons that certain jurisdictions may attract or repel multi-party claims. Such an analysis³⁸ reveals the importance of a range of different factors, notably the following:

- the ability of lawyers to advertise (permitted in England since 1988 but prohibited in most other European jurisdictions);
- the extent of any funding requirement for the claimant, principally to pay his lawyers, experts, and court fees. There is none under a U.S. contingency fee system, nor is there such a requirement for some people under the pre-2000 English Legal Aid system.³⁹ From 2000 onwards, the reformed English system of a conditional fee agreement (described below) similarly requires no, or restricted, personal contribution.
- the extent of any financial risk for the claimant if he loses. European jurisdictions differ on the extent (and amount) to which a losing party will have to pay the winner's legal and expert costs. Such costs could amount to considerable sums where they are unregulated, whereas rules in Germany, for example, regulate and restrict the reimbursement of the winner's lawyers' fees for contentious work.⁴⁰ In England and Wales the normal rule has always been that the loser pays (most of) the winner's cost, but this rule was effectively set aside where the claimant was publicly aided, leaving the

37. Multi-party litigation is present in the United States, in Canada (to a much lesser extent), and in Australia; in Europe, however, it exists principally only in the Western common law jurisdictions, notably England and Wales.

38. See C.J.S. Hodges, *Factors Influencing the Incidence of Multiple Claims*, J. OF PERSONAL INJURY LITIG. 289 (1999); see generally ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *PRODUCT LIABILITY RULES IN OECD COUNTRIES* (1995) (providing a comparative discussion of product liability systems in OECD member states and the factors contributing to their differences).

39. Legal aid was available only to those with disposable income and capital below certain limits; the poorest of these would make no personal contribution, but a sliding scale of personal contributions applied at the upper end.

40. The losing party must reimburse the winning party's lawyer's fees calculated in accordance with BRAGO (German Attorney's Fees Schedule) which calculates fees on the basis of the amount in dispute. This is the case even if the winner has agreed to a higher fee with his lawyer (for example, a fee charged on an hourly basis).

claimant with no risk, as in almost all U.S. states. Under the new English conditional fee system, the claimant's risk is covered by insurance.

- the predictability of the court's decision. The U.S. jury system introduces a level of instability by lowering the level of intellectual and scientific understanding of which the court is capable. While judges may similarly vary, some have very high capacity.
- the level of damages that might be awarded. The general level in the United States is high compared with European jurisdictions, even though principles and amounts vary within Europe.⁴¹ No European jurisdiction generally permits punitive damages; their existence in the United States, even though relatively infrequently awarded or confirmed on appeal, contributes to higher settlements.

Certain other factors, while relevant in other contexts, appear irrelevant in the current situation. For example, in the product liability context, there are no significant differences in the substantive liability law of jurisdictions in the first world block (all have advanced concepts of negligence, strict liability, and breach of contract), and no significant general differences in the level of safety of products marketed in the different trading blocks. It is implausible, for example, that the level of safety of pharmaceuticals is lower in England and Wales than in other European jurisdictions. Indeed, it is often the case that the same products (with the same design, manufacturing controls, and standardized labelling) are marketed across the world and are subject to similar extensive regulatory controls, which are identical throughout Europe.

The information that exists on the level of safety of products marketed in Europe indicates that quality and safety are high and that few product liability claims are to be expected.⁴² Therefore, the only plausible explanation of the U.K. phenomenon of the past fifteen years of a succession of large multi-party actions involving pharmaceuticals is the concern over the safety of medicines, originated in individuals who may have suffered side effects (and some who claimed did not) and turned by media attention into a matter of

41. See DAVID MACINTOSH & MARJORIE HOLMES, *PERSONAL INJURY AWARDS IN EU AND EFTA COUNTRIES* (2d ed. 1994).

42. See the many responses by industry to the European Commission's 1999 Green Paper on Directive 85/374/EEC on product liability published at <http://www.europa.eu.int/comm/internal_market/en/goods/liability/replies.htm>.

incompletely informed public concern. Given the hype, some pressure groups and a very small number of lawyers were able to attempt to channel the issues into a quasi-enquiry through the courts. While generalized demands could be made by claimants for “justice” and “compensation,” their lawyers were able to derive sometimes enormous financial benefit from payments made to them by the legal aid fund, without regard to whether they won or lost. Almost all of the individual claims were struck out or withdrawn in the interlocutory stages. There should be no surprise at the general failure of these claims; it is generally recognized that medicinal products can cause side effects, but the safety of medicines, including their labelling, is heavily regulated by governmental agencies.

B. Alternative Mechanisms

A further observation that can be made is that many European civil law jurisdictions have included for years a procedure whereby one or more individuals can join as a *partie civile* to an on-going criminal investigation or prosecution, such that if the court declares the defendant to have criminal liability, it may also order compensation to be paid to the *partie civile*. This mechanism has the obvious advantage of allowing a consumer simply to lodge a complaint with the relevant regulator or investigating judge,⁴³ who then takes the burden and cost of investigation, and if a successful criminal complaint ensues⁴⁴ the consumer obtains an award of compensation, albeit perhaps from a different court. It was this mechanism, rather than a direct compensation suit, that was invoked, for example, by the claimants in the leading Spanish case involving adulterated grape seed oil.⁴⁵ The mechanism is well established in Germany, France, Italy, and other states. It also exists in England.⁴⁶

The existence of this procedure, which is rarely reported, challenges the common lawyer’s traditional separation of criminal and civil cases into distinct procedural streams and provides an alternative mechanism to private multiple compensation claims. This model also suggests a different balance between control of behavior by

43. See, e.g., C. PÉN. (Fr.), Art. 121-3, C. COM. [Fr.], Art. L. 221-1 through L. 223-3, L. 223-1, L. 223-2, and R. 223-1 and 223-2.

44. See, e.g., C. COM. (Fr.), Art. L. 215-10.

45. Tribunal Supremo, Sentencia de 23-4-1992, Sala de lo Penal (Ponente: D. Enrique Bagigalup Zapater), Recurso num. 3654/1990. Tribunal Supremo, Sentencia de 26-9-1997, num. 895/1997, Sala de lo Penal, (Ponente: D. Gregario Garcai Ancos), Recurso num. 2569/1996.

46. See Powers of Criminal Courts Act, 1973, §35 (Eng.).

regulation and compensatory liability than has developed in, notably, the United States, a point that will be discussed further below.

IV. LESSONS TO BE LEARNED FROM THE CASES IN ENGLAND AND WALES

The above history illustrates the problems that can occur when a litigation funding system has structural weaknesses. Various important lessons need to be learned from the failure of the English legal aid system in relation to the expense of multiple cases, supplier-induced demand on a public funding system, and the need for proper scrutiny of claims.

A. Expense

Prior to reform in 1999, the United Kingdom had a legal aid system introduced in 1949 as part of consistent “welfare state” reforms enacted after the war. The legal aid system was based on public funding of payments to private sector lawyers for advice and representation given to citizens whose disposable income and capital fell below certain thresholds. Initially, the scheme covered eighty percent of the population.⁴⁷

However, the scheme became ever more expensive. The legal aid budget was the only major national expenditure program that was not subject to a budget or a cap. It was difficult to control rises in costs of private suppliers of legal services, despite successive attempts made during the 1990s through mechanisms such as franchising. There were also issues of variable and inferior quality of the legal services provided by private suppliers, although attempts were made to control quality by requiring certain suppliers to be members of particular specialist panels and to operate quality systems. However, the gross and net costs of the system increased enormously, particularly from the mid-1980s to the mid-1990s, and, as a result, successive governments reduced the financial thresholds for eligibility, so that fewer people qualified for legal aid even if they made a contribution to the cost.⁴⁸ The system was finally largely scrapped and replaced by

47. See Arabella Thorp and Patsy Richards, *The Access to Justice Bill: Legal aid*, Research Paper 99/33, 22 March 1999, House of Commons Library at 7.

48. The costs order would be made but subject to the restriction that it should not be enforced without leave of the court, which would only be granted where the defendant showed that he would otherwise suffer severe financial hardship. See Legal Aid Act, §18(4) (1988) (Eng.). The Board contributed to the costs of only 158 successful unassisted defendants in 1994-95

private funding (conditional fee agreements) supported by limited public funding (under a more flexible, prioritized, and capped *Funding Code*).⁴⁹ The new approach is explained in the Appendix to this Article.

It is possible to see the attraction of lawyers to legal aid from the 1980s as a reaction to other structural changes affecting the legal market. The percentage of legal aid cases involving tort claims tripled (from 13% to 29%) between 1980-91 and 1993-94.⁵⁰ Meanwhile, during the 1980s, solicitors had lost their monopoly in conveyancing (real estate)⁵¹ but had in return been given the right to advertise.⁵² The property market crashed in 1989, leading to a significant fall in the number of property transactions, a fall in the number of solicitors engaged in conveyancing (from 22,000 in 1989 to 15,000 in 1997⁵³), and a fall in earnings from conveyancing (for firms with fewer than twenty-five partners and gross fee income more than £15,000, income from conveyancing fell from 22% to 16%, and income from commercial property fell from 20 to 11%⁵⁴). Faced with these difficulties, diversification into what by the early 1990s seemed a promising new area of multi-party actions with guaranteed legal aid income offered enormous appeal.⁵⁵

In the five years from 1985 to 1990, the number of civil legal aid certificates for non-matrimonial cases increased by 22%, gross expenditure rose by 120% to £153 million and net expenditure by 145% to £76 million.⁵⁶ Over the same period, the average legal aid bill rose by 60%, from £950 to £1,526.⁵⁷ In 1990, thirty-six million people, or 66% of the population, were eligible on income grounds for non-

and 186 in 1993-94. See House of Commons Hansard Debates, Written Answers to Questions, col. 876, July 2, 1996.

49. The Funding Code: In Accordance with the Access to Justice Act (1999). (See also § 8 of the Act.) Controller of HM Stationery Office (Norwich 2000).

50. See Mike Hope, *Expenditure on Legal Services*, p.30, table 3 (Government Economic Service Working Paper 132, 1997).

51. See Administration of Justice Act, 1985 (Eng.). See in particular, § 6, which amended § 22 Solicitors Act 1974 (restricting an unqualified person not to prepare certain documents).

52. See Solicitors Practice Rules 1936/72, amended Oct. 1, 1984; see now the Solicitors Publicity Code.

53. See Bill Cole, *Solicitors in Private Practice, Their Work and Expectations* (The Law Society Research Study No.26, 1997).

54. See Mike Hope, *Expenditure on Legal Services* (Government Economic Service Working Paper No.132, 1997).

55. Tim Weekes, *Class Acts*, L. SOC'Y GAZETTE no. 94/47, at 20 (Dec. 10, 1997).

56. See *Review of Financial Conditions for Legal Aid: A Consultation Paper* (Lord Chancellor's Department, June 1991).

57. See *id.*

matrimonial civil legal aid.⁵⁸ For personal injury claims, thirty-eight million people, or 69% of the population, were eligible.⁵⁹ There was then a sharp increase in legal aid in 1990-91. In the four years from 1990-91 to 1993-94, there was no change in GDP and total government expenditure increased by 12%, but total legal aid expenditure increased by 55%, of which 74% was accounted for by civil legal aid.⁶⁰ For civil legal aid within this period, total real spending increased by 91% and unit cost by 51% but volume by only 27%.⁶¹ In 1993-94 expenditure on legal aid was *five times* the level in 1979-80 (in real terms as deflated by the Treasury GDP deflator).⁶² In contrast, total government expenditure had increased over that period by 29% and GDP by 24%.⁶³ From 1990 to 1997, the cost of civil and family legal aid tripled to £671 million, and, most significantly, the average cost of a case increased by 53% above inflation, while the number of people helped fell by almost 30%.⁶⁴

B. Supplier-Induced Demand

A structural fault of the legal aid system was that suppliers determined the type, quality, and cost of the legal services that were provided. Accordingly, there was extensive criticism that demand for legal aid was supplier-led.⁶⁵ Indeed, there has been strong criticism,

58. See House of Commons Hansard Debates, Written Answers to Questions, col. 490-491, May 22, 1991.

59. See *id.*

60. See Gwyn Bevan, *Has There Been Supplier-Induced Demand for Legal Aid?*, 15 CIV. JUST. Q. 98, 106, 108 (1996).

61. See *id.* at 109.

62. See *id.* at 106.

63. See *id.*

64. See House of Commons Hansard Debates, col. 1060, Mar. 4, 1998; Gwyn Bevan, *Explanatory Notes: Access to Justice Act 1999*, reprinted in *A READER ON RESOURCING CIVIL JUSTICE* (Alan Paterson & Tamara Goriely eds., 1996).

65. See LORD WOOLF, *ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES* (1995); GWYN BEVAN ET AL., *ORGANIZING COST-EFFECTIVE ACCESS TO JUSTICE* (1994); CAROL HARLOW & RICHARD RAWLINGS, *PRESSURE THROUGH LAW* 296 (1992); Richard Abel, *The Paradoxes of Legal Aid*, in *PUBLIC INTEREST LAW* 379 (Jeremy Cooper & Rajeev Dhavan eds., 1986); Bevan, *supra* note 60; Erhard Blankenburg, *The Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid*, in *THE TRANSFORMATION OF LEGAL AID*, *supra* note 23, at 113; Mel Cousins, *The Politics of Legal Aid - A Solution in Search of a Problem?*, 13 CIV. JUST. Q. 111, 121-125 (1994); *Overtuning the Trough*, *THE ECONOMIST*, June 22, 1996, at 34 ("The nub of the problem is that, aside from plaintiffs or defendants themselves, the people who benefit from legal aid are the same as those who largely determine whether it should be granted: lawyers. The result is supplier-induced demand."); Philip Stephens, *The Injustice of Rationing*, *FIN. TIMES*, July 23, 1996, at 16 ("The lawyers have not helped. Some have treated legal aid as a blank cheque.

notably from the judiciary, that advertising by some lawyers has generated claims that have often been claims of poor quality.⁶⁶ Although the professional and self-regulatory association has recognized this problem,⁶⁷ it has not acted to control it (as it could, for example, by amending the Solicitors' Practice Rules).

The new Rule of Court on Group Litigation specifies under the heading "Publicizing the GLO" that a copy of a Group Litigation Order shall be given to the Law Society and the Senior Master of the Queen's Bench Division.⁶⁸ The management court does, however, have power to control publicity. Experience of the major cases shows that failure to use this power will lead to difficulties by generating poor claims and by inflating public expectations of success which inevitably will not be realized, leading to a lack of confidence in the system.⁶⁹

C. No Costs Risk to the Unsuccessful Plaintiff

The normal rule in the United Kingdom, Ireland, and, to some extent, a number of other European jurisdictions, is that whoever loses a case (or makes a payment in settlement) should pay the majority of the opponent's legal costs; this usually amounts to a significant sum, often equal to or exceeding the value of small claims. This cost allocation rule is supported on economic principles.⁷⁰ It aims to discourage weak cases, to encourage early settlements that reflect the strength of each party's case, and to enable the winner to have the remedy, if plaintiff, or to fend off the claim, if defendant, without

Fees have risen sharply and cases have been brought before the courts for no other reason than to enrich the legal profession."'). *But see* Alan Patterson & Tamara Goriely, *Rushcliffe Fifty Years On: The Changing Role of Civil Legal Aid Within the Welfare State*, in *A READER ON RESOURCING CIVIL JUSTICE* 213 (Alan Paterson & Tamara Goriely eds., 1996) (advancing a contrary view).

66. *See AB and Others v John Wyeth & Brother Ltd.*, 7 MED. L. REP. 267, 278 (1996) (quoting the May 6, 1992 judgement of J. Ian Kennedy); *AB and Others v John Wyeth & Brother Ltd.*, 8 MED. L. REP. 57, 73 (1997) (per L.J. Brooke); Legal Aid Board, *Issues arising for the Legal Aid Board and the Lord Chancellor's Department from multi-party actions* ¶¶ 2.9, 2.21(1994).

67. *See Group Actions Made Easier*, THE L. SOC'Y ¶ 2.2.2 (1995).

68. *See* C. PRO. R. PRACTICE DIRECTION 19B (supplementing § III of Part 19 of the Civil Rules of Procedure).

69. *See* HODGES, *supra* note 33, at ch.17 *et seq.*

70. *See* Neil Rickman, *The Economics of Cost-Shifting Rules*, in *REFORM OF CIVIL PROCEDURE* 327 (A.A.S. Zuckerman & Ross Cranston eds., 1995).

having to meet the costs generated by the losing party opposing or pressing the claim unsuccessfully.⁷¹

However, a claimant's position was enormously assisted by the fact that the normal cost allocation rule did not apply where the claimant was in receipt of legal aid. This suspension of the normal rule was based on the policy that the claimant would, by definition, be poor, having few if any resources to satisfy an award of costs, and should therefore not be intimidated against enforcing genuine legal rights by embarrassment over an absence of funds. Moreover, the policy protected the state against the risk of depletion of state resources by cost orders against it.

The effect of this suspension of the normal rule, however, was the widely recognized phenomenon of plaintiffs' "legal aid blackmail" of defendants, forcing defendants to settle claims that were of lesser intrinsic merit than would normally be the case.⁷²

This phenomenon has now been reversed, since the normal "loser pays" rule applies where the claimant operates on a conditional fee basis. As explained in the Appendix, some public funding remains available to support the investigation of claims or the cost of very expensive claims that are otherwise run on a conditional fee basis, from specific capped central budgets earmarked for "Very Expensive" or "Multi-Party" cases. Still, the claimant remains liable for opponents' costs if he loses; it is intended that this risk be covered by private insurance, as is the position for all conditional fee arrangements. While some may argue that it will be rare that insurers will underwrite this risk, in actuality, there is no reason why insurers would not underwrite a good risk (like a multi-party claim with good chances of success), as they were prepared to do for claims by service personnel with "Gulf War Syndrome."⁷³

D. Absence of a Scrutiny Mechanism

The essential problem with the legal aid system rested with an absence of non-partisan *scrutiny of the merits* of a claim. The appli-

71. See *Regulatory impact assessment: Improvement in the availability and use of conditional fees* (Lord Chancellor's Department, 1998).

72. See *Manley v. Law Soc'y* 1 All E.R. 401, 411 (C.A. 1981); House of Commons Hansard Debates, col. 875, July 2, 1996; *Legal Aid: Targeting Need* Lord Chancellor's Department Cm. 2854 (1995); R. S. Jandoo & W. Arthur Harland, *Legal Aid Blackmail*, 134 NEW L.J. 402 (1984).

73. See *Indemnity for Gulf War Group Action*, L. SOC'Y GAZETTE 1 (Sept. 3, 1997); *Conditional Fee Insurance Offer to Gulf War Veterans*, 141 SOLICITORS J. 807 (1997); *Gulf War Conditional Fee Insurance Firm Named*, 141 SOLICITORS J. 833 (1997).

cant's lawyer's function under the legal aid system was both partisan, as an advocate on behalf of his client's case to the Board, and also independent, as advisor to the Legal Aid Board on the merits. This gave rise to an inherent conflict of interest for the lawyer. Moreover, it was in the plaintiffs' lawyers' personal financial interests to recommend that cases always be pursued, since they would be paid by the Board regardless of the outcome of the case.⁷⁴

The Board was hampered in its objective analysis of an application by a number of factors. First, it is essentially dependent for its legal analysis on the partisan opinions of the applicant's lawyer(s).⁷⁵ In some circumstances, scrutiny of an application might be undertaken by a lawyer at the Board, particularly for more expensive claims, but that individual might not be expert in the subject matter involved.

74. See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 38, at 45 (noting that “[a]ttorney compensation is a critical determinant of consumer access [to justice and compensation]”); George Pulman, *Funding for Multi-Party Actions*, in SHAPING THE FUTURE: NEW DIRECTIONS FOR LEGAL SERVICES 196 (Roger Smith ed., 1995) (asserting that the benzodiazepine litigation was “run for the benefit of lawyers . . . The Legal Aid Board spent about £2,000-£3,000 per plaintiff to prove that there was no case”); Robin C. White & Rachel Atkinson, *Personal Injury Litigation, Conditional Fees, and After-the-Event Insurance*, 19 CIV. JUST. Q. 188, 127 (2000) (“under legal aid there were cases where solicitors ran up significant fees on investigative costs and then ‘turned down’ the case”); *In the News: Legal Aid “Fantasies” Attacked*, 145 NEW L.J. 914, (1995) (quoting the deputy Vice-President of the Law Society as saying “[t]o some people who read only the tabloid press, legal aid must look like a racket—promising support for those of moderate means, but in practice providing it only to the poorest of the poor—and to some wealthy exploiters of the system”); *The Legal-Aid Budget: Out of Control*, THE ECONOMIST, Sept. 16, 1995, at 20, 66 (“It is true that lawyers are assiduously milking the system . . . Too many weak cases are backed”).

75. The expertise of Legal Aid Board staff is legal and administrative, rather than medical or technical. See House of Commons Hansard Debates, Written Answers, col. 845, Feb. 17, 1995. The Legal Aid Board pointed out its frustration in the efficiency of the screening process where it had to rely on lawyers who have a financial interest in the outcome. See Legal Aid Board, *Issues for the Legal Aid Board and the Lord Chancellor's Department in Multi-Party Actions* (May 1994). In July 1997, Chancery Division judges wrote to the Lord Chancellor expressing concern at a significant number of wasteful and undeserving cases funded by legal aid “that no-one in their right minds would pursue if they were paying for them themselves” granted on the advice of lawyers who are then paid to run them. Frances Gibb, *Judges Protest at “Far-Fetched” Legal Aid Cases*, THE TIMES, July 28, 1997, at 10. Again in January 1999, Chancery Division judges complained to the Lord Chancellor about the legal aid system's inability to weed out weak cases. See Clare Dyer, *Judges Condemn Legal Aid “Waste”*; *Secret Report Attacks Funding of Hopeless Cases*, THE GUARDIAN, Jan. 29, 1999, at 11. The judges proposed that lawyers who advise on legal aid should not then act in the case, and that opponents should have the right to ask the Board to seek a second opinion on the merits of the case. See *id.* This issue motivated the Board's introduction of quality controls and assurances in the later 1990s. See BRIAN MAIN & ALAN PEACOCK, WHAT PRICE CIVIL JUSTICE? (2000).

The Board was also hampered by a system, as it applied at the time and before the introduction of the Civil Procedure Rules, in which a decision on funding was based almost entirely, and often solely, on the evidence available to the claimant, rather than being based on a complete picture of the case, taking into account the assertions and evidence of the proposed defendant. As explained, this procedure has been changed under the new system, in which claimants and defendants have to exchange their positions before commencing proceedings so that an informed risk assessment on a claim can be undertaken based on all the available evidence at that stage.

By contrast, under the new conditional fee system, the claimant's lawyer is no longer in a partisan role, since it is he who has to undertake a risk assessment for his own purposes in deciding whether he is personally prepared to invest in taking the case. Furthermore, the general need under this system for insurance against the risk of liability for opponents' costs means that insurers will play a crucial quality control role in decisions regarding initiation and continuation of cases. To undertake effective quality control requires the objective assessment of comprehensive and reliable information; insurers should rightly require more prior investigation of multi-party claims than took place under the legal aid system, and reforms in Civil Procedure Rules (see Appendix) should assist this insurer activity.

The conclusion under the previous system was that the English legal aid system funded, at enormous public expense,⁷⁶ a sequence of cases in which public concern over potential safety issues was generated by lawyers and media publicity. Nearly all of these cases had low intrinsic merits and subsequently failed, almost all of them in advance of a trial on the merits (many were struck-out for technical deficiencies or withdrawn on subsequent legal advice).⁷⁷

Various adverse consequences have been identified as flowing from these cases. First, there is the significant amount of wasted public expenditure. Secondly, there is the problem of the encouragement of public belief in the lack of safety of the products concerned. This is of particular significance given the fact that many of the cases involved medicinal products. Failure to take or continue

76. Public expenditure on the Benzodiazapine tranquilizer litigation alone was stated by the Legal Aid Board to be £40,000,000. See *The Funding Code: a new approach to funding civil cases*, Legal Aid Board, Jan. 1999.

77. See Hodges, *supra* note 38, at 289.

with medicinal therapy may result in adverse health consequences.⁷⁸ Thirdly, similar “roller-coaster” emotions of claimants themselves may lead to disenchantment with the defendants and the legal system, but rarely with their own lawyers.⁷⁹ Fourthly, various authors have referred to the development of a “compensation culture”⁸⁰ which encourages people to make claims for real or supposed misfortunes, irrespective of causation or liability.⁸¹

V. CULTURAL DIFFERENCES

A. European Compensation Mechanisms

There is a danger that those who study and practice tort law may tend to overemphasize the importance of tort law as a socio-legal mechanism, particularly because of an absence of familiarity with the mechanisms of regulation, healthcare, and social security. This point resonates with serious criticism of the cost, inefficiency, and rarity of the tort system’s concentration on the principle of full compensation.⁸² In summarizing the relative importance in Europe of tort law and social security systems on the topic of compensation for injury, the following was recently noted:

It is important to recognise that social security systems—not tort law or the [product liability] Directive—are the principal mechanisms of providing security and finance for injured citizens in Europe. This contrasts with USA where tort law has a much higher social and Constitutional importance, the basic mechanism for healthcare provision is by private insurance and perhaps 23% of the

78. Examples include fears of the safety of vaccines prompting discontinuation of immunization programs and increased incidence of death and morbidity of children and the discontinuance of oral contraceptives causing increased pregnancy.

79. See *AB and Others v. John Wyeth & Brother Ltd.*, 8 MED. L. REP. 57, 73-74 (1997) (per L.J. Brooke); J Millington, *Breast Cancer Radiation Claims*, MEDICAL LITIGATION 7 (September 1999).

80. See FRANK FUREDI, *COURTING MISTRUST: THE HIDDEN GROWTH OF A CULTURE OF LITIGATION IN BRITAIN* (1999). See also Martyn Day, *The Americanisers*, J. OF BRIT. INS. L. ASS’N page 5 (May 1997). But see J.R.A. Wylde, Letter to the Editor, J. OF BRIT. INS. L. ASS’N 5 (1997) (responding to Day’s article, criticizing U.S. plaintiffs’ lawyers for thriving on contingency fees ‘by ramping-up the expectations of frequently unmeritorious parties’).

81. See Gerard Hanlon, *A Profession in Transition?—Lawyers, The Market, and Significant Others*, 60 MOD. L. REV. 798, 813-815 (1997) (noting that most members of the public are not skilled buyers of legal services, lacking both knowledge and economic power); Abel, *supra* note 65, at 386 (“Legal aid is a social reform that begins with a solution—lawyers—and then looks for a problem it might solve, rather than beginning with the problem—poverty, or oppression, or discrimination, or capitalism—and exploring solutions.”).

82. See generally P.S. ATIYAH, *THE DAMAGES LOTTERY* (1997); PETER CANE, *ATIYAH’S ACCIDENTS, COMPENSATION AND THE LAW* (6th ed. 1999).

population have no cover. Furthermore, the level of social security provision in Europe is generally high—very high (and very expensive) in Scandinavian states. The Scandinavian schemes for drug injury compensation pre-dated the Directive and were designed for the particular circumstance of the particular country, notably the high level of existing social security . . . It is important to remember that a claimant under any compensation scheme or tort system still has to establish causation, which can be difficult in relation to healthcare products but must be faced as a matter of fairness as between claimants, particularly if some are inevitably to be held not to qualify since their injuries cannot be proved to have been caused by the product.⁸³

B. Behavior Control: Regulation or Liability?

It is sometimes argued by apologists for the U.S. class action that the mechanism of liability for payment of compensatory damages through the civil courts is necessary, at least as a threat, to control and modify behavior, particularly of large corporations. In order to establish the validity of this assertion, the following should logically be shown:

- existing behavior patterns disregard relevant and justifiable concerns;
- alternative mechanisms to control behavior either do not exist or do not function adequately;
- the liability mechanism can and does in fact operate effectively to bring about modification in behavior which can be accepted as beneficial;
- the costs and benefits of the liability mechanism are proportionate: the incremental increase in protection is justified by the increased cost.

There is no general call in Europe for regulation through litigation. There also seems to have been no empirical research in Europe to establish any of the points listed above. There is evidence that, for example, the general standard of safety for products marketed in Europe is high and the level of safety defects is very low.⁸⁴ It is a policy requirement that governs EC regulatory Directives that measures concerning health, safety, environmental protection, and con-

83. European Federation of Pharmaceutical Industries and Associations, *Response to Product Liability Green Paper* (1999), published at <http://www.europa.eu.int/comm/internal_market/en/goods/liability/replies.htm>.

84. *See id.*

sumer protection must take as a base a *high level* of protection.⁸⁵ The U.K. Department of Trade and Industry has published research concluding that “human behaviour seems to be the most common immediate cause of home accidents, with faulty products and poor design having an ever decreasing influence.”⁸⁶ It has also been estimated that the number of dangerous unrecalled products in use is very low compared with the billions of products in use and that probably at least seventy-five percent of home accidents that involve products involve products that have been used for many years, with the accident resulting from wear and tear and lack of due care and maintenance.⁸⁷ Enforcement officials consider that unrecalled unsafe products in Europe principally comprise cheap electrical products or toys that are imported into the EU by small or medium sized companies, typically from the Far East.⁸⁸ This would point to a need for increased border control and market surveillance rather than an unenforceable liability mechanism.

If one were to accept for the sake of argument that a class action mechanism can have a deterrent effect, its primary force would be where cases are brought which are meritorious in revealing sub-standard practice. Two observations can be made on this in the European context. First, the multi-party cases that have been brought to date in the United Kingdom have had overwhelmingly poor merits. Given the enormous costs of these actions to the public purse and defendants, the argument that regulation should be undertaken through deterrence is significantly undermined.

Secondly, most of the U.K. cases have involved industries that are already heavily regulated.⁸⁹ There is no evidence in those cases that regulation was inappropriate or ineffective or that the corporations would have acted any differently at the relevant times. If that is so, the argument for indirect regulation by threat of litigation, as a complementary mechanism to direct regulation by governmental agencies, looks weak, unnecessarily duplicative, and wasteful of resources. If litigation does produce change, it seems to be a very costly way of doing so.

85. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Oct. 2, 1997, O.J. (C 340) 1, art. 95 (1997).

86. Department of Trade and Industry, *Research on the Pattern and Trends in Home Accidents* (1999), at 98.

87. See Department of Trade and Industry, *Product Recall Research* (2000).

88. See *id.*

89. See generally C.J.S. HODGES, *MULTI-PARTY ACTIONS* (Oxford, 2001).

The essential tools of behavior modification of corporations or executive agencies in Europe are consumer and media pressure, self-regulatory codes of conduct, official regulation and scrutiny, and court injunctions in urgent cases. The European Community has, over the past forty and particularly fifteen years, constructed complex and sophisticated regulatory mechanisms to control commercial behavior. The scale of European regulation is awesome, wide-ranging, and continuing. The areas covered include business organization, product safety, environmental activities risking harm to the environment, and consumer trading protection. Taking the example of product liability again, many product sectors (medicines, medical devices, machinery, electrical products, cosmetics, motor vehicles) now have specific regulatory control mechanisms covering the design, production, labeling, and post-marketing surveillance stages. Authorities are designated to regulate and enforce the legislation. Whilst work is constantly continuing on potential improvement of these systems, there is no suggestion that the regulatory mechanisms are systematically or institutionally inappropriate or ineffective. It would require a revolutionary change in European policy if these regulatory mechanisms were to be declared ineffective and for there to be a need for even supplemental regulation through compensation.

The point is sometimes made that regulation through litigation incurs the risk of inconsistency among the many decisions that are made constantly by regulatory agencies and the few and probably ill-informed decisions made by civil courts. This point has considerable force in Europe, where the policy of the common market and economic area, as laid down in the EC Treaty, is based precisely on the harmonization and consistency of commercial activity between member states in trade, economic behavior, regulatory action, and consumer and environmental protection. Achieving harmonized, consistent standards is a fundamental policy of the EC legislation, which is endemically organized to achieve this. The institutionalization of potential for the establishment of multiple standards of behavior being set on the one hand by regulators, who operate within systems designed to achieve consistency, and on the other hand by civil courts, which have no knowledge of the regulatory framework or standards, would be contrary to European policy and adversely affect the Treaty's requirements on free movement of goods.

C. The U.S. Class Action “Threat”

Given its existing mechanisms, Europe has no need for U.S.-style class action litigation. A prevailing view amongst European experts is that the U.S. class action can simply be used to leverage large sums of money from a corporation to claimant attorneys through contingency fees “earned” in return for settling a large number of claims sometimes of speculative value, as illustrated by the bendectin, silicone, and dietary drug settlements.⁹⁰ Such a settlement may be in the corporation’s commercial interests in the U.S. context as it achieves closure on the potential for multiple individual claims arising over many states for an uncertain period, each with a cost and drain on resources and the risk of maverick jury awards.

The conclusion from these considerations is that the root causes of the problem lie in the legal system’s unpredictable potential for arbitrary variation in liability decisions, in the potential for very large (again unpredictable and arbitrary) damages awards, and in the disproportionate size of the commercial incentive to the plaintiffs’ lawyers. Europe is very keen to avoiding these aspects.⁹¹ As a matter of public policy, the Judicial Committee of the House of Lords, the U.K.’s supreme court, has held in a sequence of decisions⁹² that, as Lord Steyn stated at the Duke/Geneva conference, “we do not want a litigation-driven society,” and therefore placed a limit on the tort system.⁹³

One of the most important balancing controls is a rule that whomever loses should pay most (but not all) of the winner’s legal costs. This is lacking from some EU jurisdictions (albeit ones which do not have a high level of litigation in any event, so the rule may not be a necessity)⁹⁴ and its absence in the United States has contributed

90. *See* Debates over Group Litigation in Comparative Perspective: What Can We Learn from Each Other?, organized by the Duke University School of Law and the University of Geneva Faculty of Law at Geneva, Switzerland, July 21-22, 2000 (in which this view was expressed by speakers from various European jurisdictions: Neil Andrews, Harald Koch, Judge Nordh, and others).

91. The European Commission is to publish a Working Paper on the recovery of legal expenses and lawyers fees in 2000.

92. *See, e.g.,* McFarlane and Another v. Tayside Health Board, 2 App. Cas. 59 (2000) (appeal taken from Scot.) (referring to distributive justice).

93. *See* Debates over Group Litigation in Comparative Perspective: What Can We Learn from Each Other?, organized by Duke University School of Law and the University of Geneva Faculty of Law at Geneva, Switzerland, July 21-22, 2000 (in which this view was expressed by speakers from various European jurisdictions).

94. *E.g.,* Luxembourg and Portugal. *See* CHRISTOPHER HODGES, PRODUCT LIABILITY: EUROPEAN LAWS AND PRACTICE 176-77 (1993). Also, in a number of jurisdictions it is usual

significantly to what many Europeans view as a grossly over-heated litigation market. Economic research noted above supports such a rule, which encourages early settlement of litigation.

A central problem lies with the propensity of a system to generate poor claims and then its ability—or inability—to weed them out. It is not difficult to support an aim of the efficient, timely, and proportionate resolution of genuine cases. History, however, reveals a serious problem when access to justice is uncontrolled and the litigation economic system involves a level of transactional costs which is too high.

VI. SHOULD THERE BE A CLASS MECHANISM IN EUROPE AND, IF SO, OF WHAT SORT?

The question remains, however, whether there should be a mechanism for processing multiple claims in an efficient way, if multiple similar or identical claims arise. It should first be asked whether there is an actual or theoretical need. It is striking that so very few multiple claims, particularly genuine claims, have arisen in Europe and that judges have not made loud calls that their existing procedural powers to manage multiple claims are inadequate.

One type of multiple claim which can arise is a transport disaster.⁹⁵ Yet it can be quite possible to manage all of the claims individually without creating a complex class mechanism. All of the various major airplane, railway, or oilrig incidents in the United Kingdom during the past fifteen years settled before trial.⁹⁶ Liability was usually admitted (or a single test case resolved it), and the issues which took time to resolve related to individual issues such as quantum or verification of the claimant's genuine facts.

A. The English Group Litigation Approach

The rule of civil procedure introduced in England and Wales in May 2000, with its associated practice direction, is very brief. It builds on the experience of management issues which arose in the succession of multi-party cases that occurred in the previous fifteen years, but it is also influenced by the revolutionary philosophy towards management of civil procedure generally, introduced by the

practice that the losing party does not end up paying a significant amount or all of the winning party's legal fees—for example, Belgium, Greece, Ireland, and Spain. *See id.*

95. For example, the Piper Alpha oil platform disaster on July 6, 1998 (no citation possible for this case as it settled before trial).

96. *See HMSO, Lord Cullen, The Public Enquiry Into Piper Alpha Disaster* (1990).

Civil Procedure Rules 1998 (“CPR”).⁹⁷ The new approach taken in the CPR is that it is the court, not the parties, who control the speed, complexity, and cost of litigation. This approach derived from the review undertaken by Lord Woolf in the mid-1990s which concluded that litigation was too slow, complex, and costly.⁹⁸ The new approach introduced radical exchanges in culture, with pre-action disclosure by parties of the nature of their allegations and supporting evidence, in accordance with official pre-action protocols, encouragement of early settlement of disputes with institutionalized opportunities for mediation, extensive case management by the courts, including simplified and accelerated procedures, and power for the courts to restrict evidence or issues on the ground of disproportionality of costs.

Against this background, Rule 19.III facilitates the court to manage particular multi-party litigation with maximum flexibility. This Rule is more significant for what it omits than for the little it includes. The Rule is triggered where there is an unspecified number of individual cases that give rise to common or related issues of fact or law, which the court must define as Group Issues.⁹⁹ The procedure is for opt-in of claimants rather than opt-out. This trigger is deliberately wide. There is no need for formal consideration of U.S. Federal Rule 23 issues such as predominance, since it is not institutionally inevitable under the English rule that all cases within the Group Litigation will be decided in the same way. The constitution of a Group is merely for managerial convenience and does not predict the way in which the cases in the Group, or any sub-groups that may be created, will be managed procedurally, still less decided. It may be that a test case or cases may be taken forward (but it may not), in which case the Rule provides that a decision on one of the Group Issues is binding on the other cases within the Group (but not in relation to other matters). It is recognized that even if some issues may be resolved by test cases, this cannot resolve any other individual issues of any other cases in the group.

97. See C. PROC. R. 1998.

98. See generally LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995); LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996).

99. This mechanism should be distinguished from a historical rule (reproduced at CPR, Rule 19.II) that one claimant may represent others where each has *the same* interest. Rule 19.II has consistently been interpreted as requiring identical interest between those represented and, accordingly, has not been used in modern multi-party litigation.

The primary virtue of this approach is, therefore, its flexibility. The Rule enables all similar cases to be transferred to a single management court and to be managed in a consistent, though not necessarily identical, fashion. The Rule is an enabling mechanism and leaves extensive discretion to the managing judge. It may be, for example, that individual cases are not resolved together, or that the result in a small number of test cases does in fact bind all the others. The English Rule adopts a minimalist procedural approach—this is all, it is suggested, that is necessary. Successful management of multi-party claims will continue as before to depend on intelligent application of discretion, assisted by knowledge of previous experience.¹⁰⁰

The English Rule is, therefore, primarily about achieving efficient administrative management of similar cases. It does not, unlike U.S. Federal Rule 23, require that all of the cases are substantively the same and raise the same issues of substantive law. The U.S. requirement for substantive congruence requires a decision at the start that the facts of all cases are predominantly identical and that common issues predominate. In contrast, the English approach is more flexible and only requires that some common or related issues arise.¹⁰¹ The former tends to an opt-out mechanism whereas the latter favors opt-in, which has consequences in relation to the number of claimants that might be involved.

VII. CONCLUSIONS

A case of practical need for a multi-party rule of procedure in Europe remains to be made out. The only European jurisdictions that have experienced significant multi-party litigation are England and Wales, whose cases have overflowed somewhat to Scotland and Ireland. The English litigation can be seen as insubstantial, in that it was largely an artifact of funding and other factors, albeit the cases presented some procedural challenges before most of them collapsed or were settled usually before trial. An enabling and generalized rule of procedure has recently been introduced, influenced by previous experience in these cases and by the new general philosophy towards litigation procedure. This is all that is required. Europe neither needs nor wishes to import U.S.-style class action litigation, representing huge, avoidable, and unnecessary cost which distorts the

100. See generally C.J.S. HODGES, *MULTI-PARTY ACTIONS* (Oxford, 2001) (attempting to collect such experience).

101. See C. PRO. R., Rule 19.III.

economy by siphoning transactional costs towards service suppliers who are enabled significantly to influence demand for their services.

TABLE 1
ENGLISH GROUP CLAIMS

Product Liability Cases

Product	Alleged Defect	Total Number of Claimants	Outcome
DTP(whooping cough) vaccine	Brain damage	200	Cases collapsed in 1988 after a preliminary court ruling in a test case that the product was not capable of causing the damage
Benoxaprofen (Opren)	Hepatic damage and other adverse effects	2,000	1,200 cases settled with total payment reported to be £2,275,000 and £4m costs in 1987: most of further 587 cases ruled barred for limitation in 1992
Blood products	Transmission of HIV virus	1,200	Settled by the Department of Health in 1990 with the establishment of a £42m fund
Contrast media (Myodil)	Arachnoiditis	4,000	Settled in 1995 with £7m divided amongst the 426 then continuing plaintiffs
Benzodiazepine tranquilizers	Dependency	17,000	Case collapsed in 1994 when the Legal Aid Board withdrew funding after spending £40m in legal and expert costs: defendants made no payments to any plaintiffs
Intra-uterine device (Gravigard)	Infection and infertility	100	Cases were successively discontinued or withdrawn until legal aid was withdrawn from the remaining 17 cases in 1996 after some 8 years' funding. Defendants made no payments.

Norplant	Difficult extraction	324	All cases discontinued in 1999 against the manufacturer after legal aid was withdrawn from the claimants just before trial on the advice of their counsel.
Human growth hormone	Viral contamination	98+	As at end of 1999, 32 cases compensated.
Tobacco	Lung cancer	50	All claims discontinued in 1999 after 9 cases failed on a preliminary issue on limitation.

Other Personal Injury Cases

British Coal	Respiratory disease	75,000	Following judgment for the plaintiffs on generic issues in 1998, a scheme was agreed for settlement of individual claims.
British Coal	Vibration White Finger	50,000+	Following judgments for the plaintiffs in lead cases on breach of duty and causation, a settlement scheme was established in 1999 involving total payments estimated at £500 million.

Financial Cases

Case	Issue	Total Number of Claimants	Outcome
Lockton	Misrepresentation in prospectuses	[200]	Settled before trial
Lloyd's	Non-disclosure, misrepresentation, etc	12,300	£3.2 billion settlement scheme agreed 1996

Environmental Cases

Case	Issue	Total Number of Claimants	Outcome
X Co	Atmospheric release/carcinoma/nuisance	39	Settled before trial
Sellafield	Leukaemia in children	2+40	Two test cases failed to prove generic causation at trial

APPENDIX: THE UNITED KINGDOM'S REFORMS

Effective from 1999-2000, a totally new system of funding litigation claims was introduced for England and Wales. The system is based on a client entering into a conditional fee agreement (CFA) with his lawyer, under which the lawyer would usually receive nothing if the case were lost, but would receive a basic fee plus a success fee if the case were won or settled with a payment to the client.

The CFA differs from the U.S. contingency fee system in that the latter is based on the lawyer receiving a percentage of the damages/settlement (which can often be a significant percentage and significant sum, particularly given the high level of damages which prevail in the United States), whereas the English CFA involves a basic fee which is based on the lawyer's hours worked at an agreed hourly rate and the success fee is a percentage increase of the basic fee. Economic analysis indicates that a system where lawyers' fees are based on a controlled percentage of timed work is preferable to one based on a percentage of the total damage award in order not to encourage claims with low probability of success.¹⁰²

The percentage increase under the CFA is agreed with the client in writing in advance, and should reflect the degree of risk in the case. Accordingly, if the case has a high chance of success (such as damages caused in a road traffic accident), only a low percentage increase would be appropriate. The Court has power to review and reduce agreed percentages on the objection of the client or the opposing party who is ordered to pay them. The success fee may never be more than 100% of the basic fee.¹⁰³ The CFA must also satisfy certain formal requirements.¹⁰⁴

A CFA is almost invariably only entered into if it can be accompanied by an insurance policy which covers the client's risk of exposure to being ordered to pay the opponent's legal costs if the client loses the case. The client may have pre-existing legal expenses insurance (although perhaps only 17% of the U.K. adult population has such cover, unlike very much more of the population in Germany, Sweden, and France).¹⁰⁵ Since CFAs were introduced in England and

102. See generally Donald N. Dewees et al., *An Economic Analysis of Cost and Fee Rules for Class Actions*, 10 J. LEGAL STUD. 155 (1981).

103. See THE CONDITIONAL FEE AGREEMENTS ORDER 2000, S.I. 2000, No. 823.

104. See THE CONDITIONAL FEE AGREEMENTS ORDER 2000, S.I. 2000 No. 692.

105. See *Policy Report: Legal Expenses; Insurance: Realising its Potential*, CONSUMER'S ASS'N (1998).

Wales in 1995, the insurance industry has produced a variety of tailor-made after-the-event policies designed to be used with CFAs, some of which offer variations on payments of legal costs, disbursements on experts' fees and/or summary reimbursement for the losing lawyer who would not otherwise be paid under the CFA.¹⁰⁶

The end result is that the client should have no financial risk in the litigation, but the lawyer usually runs the risk of not being paid if he accepts a poor case. Some public funding has been retained for individuals with minimal resources, on the basis of the criteria set out in *The Funding Code*.¹⁰⁷ The public funds which are made available through this successor mechanism to the legal aid scheme are subject to finite budgets and are to be prioritized to cases concerning the welfare of children, domestic violence, serious wrong-doing or breaches of human rights by public bodies, and "social welfare" cases, including housing proceedings and advice about employment rights, social security entitlements, and debt. Public funding is generally not available for death or personal injury negligence claims, subject to certain exceptions.¹⁰⁸ Some funding from a specific, capped budget is available for cases which fall within categories of "very expensive,"¹⁰⁹ those involving a "wider public interest,"¹¹⁰ or (and this is the point of particular relevance to this topic) multi-party actions.¹¹¹

Furthermore, public funding may also be available to investigate cases which are of uncertain merit up to the stage at which it can be decided that the case is either sufficiently strong, in which case it should be taken privately on a CFA without further public funding, or is sufficiently weak to be dropped.¹¹²

A. The Advantages of a CFA Scheme

Overall, the effect of the reforms has been to restrict the availability of public funding, but to extend access to justice to the vast majority of the population, which was previously denied it. The advantage over the previous legal aid system is that CFAs for money

106. See the overview of products available on pages 10-14 of LITIGATION FUNDING (May 1999)—for instance Abbey Legal Protection runs Accident Line Protect (ALP) for the Law Society.

107. See HMSO, *The Funding Code: Access to Justice Act 1999 (2000)* (a code offers a more flexible and more speedily amended mechanism than the previous subsidiary legislation).

108. See *Access to Justice Act, 1999*, ch. 22, sched. 2 (Eng.).

109. *The Funding Code*, Part I, § 6.

110. *The Funding Code*, Part I, § 7.5.2.

111. See *The Funding Code*, Part 3.

112. See *The Funding Code*, Part I, § 5.8.

claims may now be entered into by those who previously did not qualify for legal aid but equally did not have sufficient resources to bear the financial risk of entering into litigation, given its potentially high costs and the risk of an order to pay opponents' costs.

The measures which have by far the greatest impact on increasing access to justice of both consumers and commercial entities, and reducing the transactional costs of litigation, would be to

- (a) harmonize and simplify the national rules of civil procedure, and
- (b) put in place national arrangements for funding civil litigation.

The combined effect of these measures would be to require parties (both claimants and defendants) to investigate their cases before commencing proceedings, exchange clear written statements of each side's case and supporting evidence before institution of litigation, and engage in mediation with an attempt to settle their disputes before being permitted to commence litigation (so that when litigation is commenced, it can be directed efficiently at the points still in dispute, and the litigation process will be as efficient and swift as possible). The litigation process should also involve some proportionality between its transactional costs and the sums in dispute.

B. Related Reform of Civil Procedure Rules

Many of these aspects have recently been introduced in the United Kingdom through the Civil Procedure Rules (introduced from 1999)¹¹³ and the Access to Justice Act 1999.¹¹⁴ The simultaneous

113. *See generally* LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995); LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996); LORD CHANCELLOR'S DEPARTMENT, ACCESS TO JUSTICE: THE WAY FORWARD (1996); LORD CHANCELLOR'S DEPARTMENT, ACCESS TO JUSTICE: JUDICIAL CASE MANAGEMENT: THE FAST TRACK AND MULTI TRACK: A WORKING PAPER (1997); LORD CHANCELLOR'S DEPARTMENT, ACCESS TO JUSTICE: CIVIL PROCEDURE RULES ABOUT COSTS: CONSULTATION PAPER (1997); *see also* LORD CHANCELLOR'S DEPARTMENT, CIVIL JUSTICE REVIEW: GENERAL ISSUES, recommendation 16 (1987) (a single procedural code for civil business, covering all courts, had been proposed in Lord Chancellor's Department); LORD CHANCELLOR'S DEPARTMENT, RIGHTS OF AUDIENCE AND RIGHTS TO CONDUCT LITIGATION IN ENGLAND AND WALES: THE WAY AHEAD (1998).

114. *See* The Legal Aid (Notification of Very High Cost Cases) Regulations 2000, S.I. 2000, No. 1801; The Civil Legal Aid (General) (Amendment) Regulations 2000, S.I. 2000, No. 451; The Legal Aid in Civil Proceedings (Renumeration) (Amendment) Regulations 1999, S.I. 1999, No. 3098; The Access to Justice (Membership Organisations) Regulations 2000, S.I. 2000, No. 693.

and coherent reform of *both* civil procedure and funding has produced in England and Wales an integrated system that has much to commend it. A principal change is that prospective litigants are required to disclose the nature of their cases and relevant evidence under Pre-Action Protocols so as to facilitate settlement, although these might not be applied where the court makes a Group Litigation Order.¹¹⁵

115. Under C. PRO. R. 1998 there are Pre-Action Protocols on Clinical Negligence, Construction and Engineering Disputes, Defamation and Personal Injury. (Other pre-action protocols may subsequently be added). See CIVIL PROCEDURE (The White Book) (2000).