SIMON GOLDRING

CLASS ACTIONS

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CLASS ACTIONS

Introduction

The prevalence of class actions is presently much greater in the US than in England. 3,092 class actions were filed in the US federal courts last year (a 30% increase from the previous year) and many more are filed in State courts (because of their willingness to confer class certification). By contrast, only 26 Group Litigation Orders have been made in England and Wales since May 2000.

Could Class Actions become widespread in England?

Group actions in this country have received a substantial amount of media attention recently, largely due to the high profile nature of the actions being heard. Examples include:

- The group action against various airlines (to be heard in October 2002) in which it is alleged that passengers on long haul flights suffered deep vein thrombosis (DVT);
- group actions arising out of defective products, particularly against the pharmaceutical sector (including MMR, Hepatitis C and third generation contraceptive pills);
- group actions arising from spontaneous disasters, such as the Potters Bar rail crash (in which, Railtrack has recently made a settlement offer of £12m);
- group actions against employers for equal working conditions, most recently, where 900 employees of the Big Food Group have challenged the closure of the final pension scheme;
- group actions against public bodies, ranging from housing repair, sexual abuse in care homes to the wrongful retention of body parts;
- threatened group actions arising from financial collapses, such as Equitable Life, Claims Direct, Independent Insurance Company and Split Capital Trusts/ Zeros.

Some commentators have predicted that the recent amendment to the Civil Procedure Rules, specifically catering for class actions together with the expansion in availability of conditional fees could create an environment in which class actions flourish.

It should be borne in mind, however, that certain unique factors exist in US which allow a class action culture to flourish. The absence of these factors in the UK means that the class action culture is unlikely to be replicated here to the same extent.

The US – a different culture

It is often said that US Government has a "light touch", with US business not facing the same degree of regulation compared with their European counterparts. For example, in the US, it is the courts that effectively impose standards on business, which means that class actions are used to as a method of developing standards. The cultural differences can be illustrated by looking at how the lead plaintiff is seen as the champion of the consumer/worker in the US, whereas in England, the first demand is for a public enquiry, rather than a claim form.

Class actions are part of the US culture, they feature widely in popular films and novels, whereas in England, they are viewed with either scepticism or ridicule (we delight in stories of obese Americans suing McDonalds). Such is our reluctance to embrace class actions that we cannot even agree on a consistent name - Lord Woolf and the Legal Services Commission call them "multi-party actions", the Lord Chancellor calls them "multi-party situations" and the Civil Procedure Rules describes them as "group litigation".

Quite simply, the film "Erin Brockovich" in which an ill-educated single mother takes on the might of corporate America – and wins – could never have been a British film.

US Contingency Fees – an incubator for class actions

Plaintiffs in America fund their actions by contingency fees. This means that they are not liable for either their own lawyers' or their opponents' costs. US Plaintiffs therefore have little to lose by issuing proceedings. In addition, juries are responsible for making awards, one reason why they can be astronomical (and can include punitive damages). In contrast, corporate defendants have everything to lose in this hostile environment – the only certainty is that they know from the outset that their costs will never be recoverable. In practice, this means that many class actions are settled, which in itself fuels the litigious culture.

US class actions are typically lawyer led, and indeed US lawyers have much more of an incentive to initiate actions as they can expect to receive a percentage of the damages. This can lead to potentially enormous rewards[1], as illustrated in a preliminary enquiry in July 2002 into the costs of the lawyers acting for New York State against the tobacco industry found that the agreed costs (US$625 million) equated to US$13,000 per hour! The lucrative nature of class actions has led to the creation of the plaintiffs' bar, which actively seeks out claims and typically issues proceedings within days (sometimes hours) of a loss.

[1] In 2001, there were 18 jury awards exceeding US$100 million or more, which was down from a record 27 in the year before. Whilst there was a decline in the highest jury awards in 2001, there were still nearly 100 verdicts of US$20 million or more and nearly 200 verdicts of US$ 10 million or above.

Litigation funding in UK – an impediment to class actions

By contrast, English lawyers do not have the same financial incentive to initiate class actions. Claimant lawyers in England can charge on a conditional fee basis but this can be no more than 100% of their usual fees. Although conditional fees can be lucrative for personal injury litigation, where matters are quickly resolved, they are not suitable for class actions, particularly if there are novel liability or causation arguments. The alternative to conditional fees for most claimants is funding from the Legal Services Commission (legal aid), but the number of cases that will qualify in future is set to decline because from 3rd December 2001, funding will be limited to class actions that have a significant wider public interest.

The lower financial incentive for lawyers to bring class actions means that there is no equivalent of the plaintiffs' bar in England. The closest we have is "Class Law", a four-partner firm in the west-end. Whilst it has a high profile (it is currently investigating 7 group actions), Class Law has not yet issued any proceedings under the Group Litigation Order, which came into force in May 2000.

In addition, claimants in England are liable for the costs of successful defendants, a powerful disincentive to bringing proceedings, particularly if the claims are weak or complex.

Therefore, in contrast to the US, the system of funding in England is not an incubator for class actions.

Martin Day, involved in the tobacco litigation in the UK, offers an illustrative tale. When he landed in Boston for a tobacco litigation conference he saw ten private jets lined up on the runway, belonging to his US counterparts. Their success in earlier class actions had earned them enormous fees, allowing them to amass a "war-chest" to take on "Big Tobacco" – there was no equivalent for the English lawyers, and it was essentially the lack of funding that snuffed out the English tobacco litigation (discussed below).

Procedure for Group Litigation - UK

In May 2000, the Civil Procedural Rules ("CPR") were amended to incorporate specific provisions for class actions – the Group Litigation Order.

A Group Litigation Order will be made to provide the case management of individual claims that "give rise to common or related issues of fact or law", a more flexible test than the US equivalent, which could mean that more claims are capable of "certification" than in the US.

A Group Litigation Order is usually made following an application by the claimants. It will set out the criteria to judge whether claims fall within the group, provide directions about the group register and possibly directions concerning publicity - unlike the US, claimants have to opt in to group litigation, which depending on the circumstances may require publicity for them to do so.

GLO's differ from ordinary proceedings, where case management occurs after filing a defence, instead, the court will actively manage group litigation from the very outset in an attempt to overcome some of the problems associated with class actions. Case management should (in theory):

- § achieve a balance between the right to pursue and defend cases individually and the need for them to be dealt with efficiently and economically;
- § control costs by (for example) selecting lead cases or preliminary issues;
- § protect the differing interests of the claimants (for example, costs orders for discontinuing claimants - discussed below)

The court can also, at any time, give directions:

- § varying the generic issues;
- § appointing lead solicitors;
- § regarding the management of the register
- § specifying a "cut off date" for claimants to opt into the GLO
- § specifying that any settlement must be approved by the court;
- § concerning the statements of case (pleadings)

The first Group Litigation Order was made less than two years ago, however, it is too early to assess the impact of this new procedural regime, although there have been recent decisions relating to the costs of Group Litigation Orders (discussed below), which could be significant going forward.

Cost Orders in Group Litigation

The costs of generic issues in group litigation can be very high.

The general rule is that when a party discontinues, he will be liable for both his own and the successful defendant's costs. Where a claimant discontinues he would generally be liable to pay his share of the defendant's common costs, but this could give the defendant a windfall if the remainder of the group succeed - the defendant would be entitled to recover some costs, even though it lost the overall action.

The Court of Appeal in December 2001 (reversing the first instance decisions) found that this general rule should not apply to group litigation. The court should retain discretion with regard to the costs of discontinuers, which, instead, should be determined at the end of the case. This means that the defendant could be liable to pay a discontinuing claimant's common costs, depending on the outcome of the overall litigation.

Forum shopping:- Lubbe -v- Cape Plc.

More than 3,000 South African miners issued proceedings in England against Cape Plc for compensation for their ill health caused by their exposure to asbestos dust in South Africa.

Cape argued that South Africa was the more appropriate forum. The High Court and Court of Appeal agreed, with the effect that the action in England was stayed.

Even though South Africa remained the more appropriate forum, the House of Lords nevertheless unanimously reversed this decision in July 2000 on the basis that the claimants would not get substantive justice unless their claims were heard in England, for two reasons. First, because there is no legal aid in South Africa, so there was no reasonable likelihood that the South African lawyers would pursue the claims, even though contingency fees are available. Secondly, the South African courts do not have procedures relating to group actions.

These factors, relevant to the availability of justice would apply equally to many jurisdictions throughout the world, as few have established class action procedures or legal aid. This raises the possibility of claimants "forum shopping" to issue class actions in the most favourable jurisdictions, which could include the UK with its new and as yet untested regime including the UK.

TOBACCO LITIGATION

Tobacco Litigation - US

The majority of individual states have compromised their actions against the tobacco industry, obtaining compensation for healthcare expenditure associated with smoking. For example, Florida settled for $14.5 billion over 25 years. The aggregate payment to the participating states will be US$246 billion over 25 years, so that each state has an ongoing financial interest in the solvency of the tobacco companies.

Between 1954 and 2000, there were approximately 1,800 actions filed by individuals or classes against tobacco companies and out of those approximately 50 reached court. US juries have made some spectacular awards – for example, $3bn to Mr Boeken in California in 2001 (this award was reduced to $100m on appeal, and is subject to further appeals, relating to the immunity granted by California to tobacco companies between 1988-1998).

However, until very recently, all the claimant successes in the lower courts have been overturned on appeal - very few individuals have ultimately succeeded in their claims, contrary to the impression given by the press.

The tobacco companies have also been successful in combating class actions. The overwhelming trend in tobacco litigation in the US has been the refusal to certify class actions. Usually courts find that the representative plaintiff cannot be typical of the unnamed class members or that he cannot adequately represent the class, because the facts relevant to liability (awareness of risk etc) and causation (exposure to other risks) are unique to each individual, and would require individual trials. Every Federal Court has denied class certification of tobacco actions and the majority of State courts have followed suit - the certification of the two state-wide class actions in the US (Engle in Florida and Scott in Louisiana) are both under appeal.

Historically the tobacco industry has obtained successful outcomes in both individual and class actions – particularly on appeal. Recently however, this trend is showing signs of a partial reverse and tobacco litigation seems set to continue in the coming years.

Tobacco Litigation - England

In marked contrast, there has been only one action in England against the tobacco industry and there are none on the horizon.

Leigh Day & Co commenced a class action in 1992 against a British tobacco company involving 52 claimants suffering from various diseases. The class action was initially funded by legal aid, but the certificate was eventually withdrawn and the action proceeded under a conditional fee arrangement. This meant that if the claimants lost, they would be liable for the tobacco company's costs.

At a preliminary hearing, in 1999, Mr Justice Wright found that two thirds of the claimants had issued proceedings outside of the limitation period of three years from diagnosis and he was not prepared to exercise discretion to extend this period which meant that the claims were struck out.

The tobacco companies were therefore entitled to pursue their costs, amounting to £15m, against the unsuccessful claimants. In order to protect their interests, their lawyers signed personal undertakings not to pursue any future claims against the tobacco industry for up to ten years, in return for the tobacco companies bearing their own costs of the litigation.

Therefore the issue of funding effectively ended tobacco litigation in England under the procedural regime in existence at that time.

As an example of the cultural differences between England and the US, Mr Justice Wright was critical of the way in which the class was assembled, and in particular, Leigh Day & Co's advertisements for claimants who suffered from smoking related illnesses (i.e. "ambulance chasing", which is more prevalent in the US).

Could England become hooked on tobacco litigation in future?

In March 2002, the Victoria Supreme Court in Australia gave judgment to Ms McCabe in her claim arising from lung cancer, although this was ostensibly on the basis of British American Tobacco's destruction of key documents, which meant that she could not get a fair trial. There are claims in 17 other countries, including Argentina, Brazil (where the burden of proof is reversed), Canada, the Netherlands and the Irish Republic – where there are 300.

If smokers increasingly win their claims in the US and other jurisdictions then future claims in England should not be ruled out altogether, particularly because the previous actions were struck out for procedural as opposed to substantive grounds.

However, it remains to be seen whether the issue of funding will continue to stub out such litigation in this country.

FOOD LITIGATION

The United Kingdom has an unenviable food safety record. We witnessed the world's worst food poisoning episode in 1995 when 20 people died in an outbreak of E Coli, traced to a Scottish butcher's shop. Recent food scares include the link between BSE and new variant Creutzfeldt Jakob Disease (nvCJD), genetically modified crops and chemical pollutants.

Some commentators describe food as being the "new tobacco", but a discussion of the novel risks associated with food and its potential impact on liability insurers is outside the scope of a talk on the "compensation culture" – these novel risks have not yet given rise to any civil claims in England.

The majority of litigated claims concerning food production involve product contamination or food poisoning. These are typically resolved according to general principles of contract and tort, and do not generally raise any specific legal issues.

That said, the litigation against McDonalds arising out of scalding injuries caused by coffee both in the US and England raises some interesting issues.

McDonalds Coffee Litigation - US

The "McDonalds Coffee Case" in the US led to a lot of publicity concerning their litigious culture – the claim was characterised as being frivolous and the award of $2.7m as outlandish. However, this characterisation is perhaps unfair.

In the decade before Ms Liebeck's injury, McDonalds had settled 700 similar claims and so they were aware of the risk of injury. Ms Liebeck suffered full thickness burns to her inner thighs, groin and genital areas, necessitating skin grafts during her eight- day hospitalisation. Finally, on appeal her award was reduced to $640,000, of which the majority was punitive damages to reflect the jury's finding that McDonalds' conduct was reckless, callous and wilful.

McDonalds Coffee Litigation - UK

On 25 March 2002, Mr Justice Field gave judgment in the class action, Bogle v McDonalds - there were 36 claimants in the group, of which 16 were aged 9 or under at the time the injury was sustained.

This case is of interest because it was one of the first Group Litigation Orders to proceed to trial and it the first reported food case decided on the Consumer Protection Act 1986.

McDonalds coffee is held at temperatures up to 90°C (the lay evidence of temperatures up to 97.9°C was rejected), and it was accepted that this would cause full thickness burns within one second if spilt onto skin.

His lordship concluded that:

- If McDonalds was to avoid the risk of injury it would have to serve its coffee at temperatures that would be unacceptably low to its customers - whilst McDonalds owes a duty of care, that duty was not such that it should have refrained from serving hot drinks at all.
- On the evidence, the cups and lids were adequately designed and manufactured and McDonalds had taken reasonable steps to reduce the risk of injury
- It could reasonably be assumed that those customers who purchased hot drinks were aware of the risk of injury in the event of a spillage and so there was no duty to warn of this "obvious" danger
- McDonalds were not strictly liable under the Consumer Protection Act because the safety of its hot drinks met the legitimate expectations of the general public

Most commentators have welcomed this decision – nobody wants to buy lukewarm coffee or encourage the development of a "compensation culture".

However, the decision was partly based upon perceived inadequacies in the expert evidence served by the claimants. For example,

1. His Lordship characterised Mr Ives (a mechanical engineer) as being an unimpressive expert and that the matters upon which he gave expert evidence were in the main outside his field of expertise.

2. His Lordship was able to conclude that the risk of injury would not have been avoided or reduced if the serving temperature had been 70°C rather than 90°C (as suggested by the claimants) because the claimants' expert was silent on this issue in his report. This was crucial to the finding on negligence and product safety, and arguably was made because of the deficiencies in the claimants' expert evidence.

Furthermore, the decision has been criticised on the basis that the court took into account irrelevant factors in determining whether the safety of the coffee met the legitimate expectations of the wider public.

The court's assessment that the safety of the coffee accorded with the legitimate expectations of the public was determined by the fact that McDonalds gave comprehensive training to its staff. However, it is difficult to see how this training could be relevant to the public's expectations of the coffee's safety.

It would be tempting to conclude that the combination of the McDonalds coffee and tobacco litigation - in marked contrast with equivalent actions in the US - demonstrates that group actions are bound to fail in England. Whilst it is true that of the few group actions that have taken place in England, few have been successful, there have been several examples of successful actions — although often these do not attract the same level of publicity these are discussed below.

PREDICTING THE FUTURE

Representative Actions

The Lord Chancellor's Department recently published the responses to its consultation paper on representative actions. It proposed that representative bodies should be able to bring claims on behalf of their constituents. An example would be the Consumers Association suing car manufacturers for alleged price fixing. The distinguishing feature of representative actions compared to class actions is that the claimant (e.g. the Consumers' Association) need not have suffered a loss, and the class could be unnamed. Representative actions would increase access to justice because the representative organisations could bring claims, which may not be economically viable for the public to bring on a class action basis.

Many of the responses argued that representative actions could prove oppressive for business and public bodies by opening the floodgates for US-style class actions and that measures would have to be put in place to prevent unmeritorious and vexatious claims.

The Lord Chancellor's Department has evidently taken on board these comments and as a consequence will not introduce generic representative actions. Instead, it anticipates that the proposals will be taken forward in a "targeted fashion" through the implementation of future EU directives. So, for example, it is thought likely that the EU will legislate to enable recognised consumer associations to bring representative actions in the UK. This is already the position in Belgium, France, Germany, the Netherlands and Spain.

Legislation

We can expect the introduction of further legislation and regulation, with the intention of increasing consumer and employee protection. The widening of statutory duties, many being strict in nature, will inevitably create new opportunities for litigation and perhaps, class actions.

However, class actions will not be as prevalent in England as they are in the US. Whilst our culture is changing, with increased emphasis of rights over responsibilities, our system of litigation funding effectively

limits the scope for class actions – a change to introduce contingency fees would require legislation, but there seems little pressure to do so, because the absence of widespread class actions in England is seen as a virtue rather than a vice.

Representative actions could plug the gap by facilitating claims that would not be economically viable, either on an individual or class basis. Legislation would be required to introduce representative actions, but this will now only be introduced in a piecemeal fashion to implement EU directives. It is likely that in the medium term, English law will be brought in to line with continental Europe, enabling for example approved consumer associations to bring claims.

Judicial Trends

Historically, very few class actions have succeeded in England, but there have been two recent exceptions.

First, the House of Lords overturned the Court of Appeal in July 2000, to allow 3000 claimants to pursue their personal injuries claims in England, even though South Africa remained the most appropriate forum. This led to a substantial class settlement earlier this year.

Secondly, the High Court gave judgment in March 2001 to 117 claimants who had contracted Hepatitis C from blood transfusions - notwithstanding that the Hepatitis C virus had not been identified at the time some of the claimants were infected and that no screening test for the virus was available for the most of the relevant period, which meant that infection for those claimants was unavoidable. The National Blood Authority was found strictly liable under the Consumer Protection Act 1987 (this was the first major judgment under this Act) on the grounds that the wider public had an expectation, determined by the judge, that the blood should be 100% free from any infection.

However, these cases do not mark a sea-change of judicial attitudes to class actions – when viewed against two recent class actions that have been unsuccessful.

First, as we have seen, in March 2002, McDonalds was not found liable to 36 customers who had suffered serious burns, even though these injuries were foreseeable. Whilst this is not inconsistent with the National Blood Authority case, the fact that the court determines whether a product accords with the public's legitimate expectations of safety will inevitably introduce an element of uncertainty in these cases.

Secondly, and most recently, a claim by over 100 women against a pharmaceutical company concerning the third generation contraceptive pill was struck out on the grounds that they were unable to prove causation.

Summary

We have seen a recent increase in publicity concerning potential group actions ranging from "economy class syndrome" to "split capital trusts".

It remains to be seen whether these develop into class actions – if they do, the new Group Litigation Order should facilitate their effective resolution.

In any case, class actions are unlikely to be as common in England as they are in the US, for a variety of reasons. An obese Englishman is more likely to blame under-active thyroid glands than he is to sue McDonalds.