ICEL EPA Environmental Law Conference, 30th September 2016

Collective Redress for Mass Environmental Harm- incl. Multi-party Litigation©

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1. Collective Redress for Mass Environmental Harm

Environmental harm comes in various forms, ranging from environmental disasters causing pollution, to environmental nuisances.[2] Almost by definition environmental harm often affects many and may cause widespread damage. The routes to collective redress for such harm may take varying guises. The role of public law and regulation play a primary role in this, as do alternatives to litigation such as ADR and other techniques. As the environment is a diffuse interest, it does not fit naturally within the framework that is traditionally recognised by the law for the protection of individual rights. In Ireland, for example, in both law and practice, private individuals and NGOs are inclined to have a secondary role in the regulation of environmental matters, as compared to public authorities. There is considerable acknowledgement by the Irish legislature that individuals or groups can have an interest in the environment, despite the more prominent role played by the regulatory authorities in this area and adjustments have been made to deal with problems such as legal standing.[3]

Mass harm is an inevitable by-product of modern living in today's mass consumer society. Where mass harm results in litigation and where many people are affected by this harm, they ought to be able to achieve access to justice. Mass harm litigation poses many challenges to all those involved in such litigation: the victims of the harm, the defendants, judges and the court system. A key concern in achieving collective redress for environmental mass harm is access to justice for individuals and groups. Existing tools for citizen enforcement are still hampered by some practical impediments such as legal standing (*locus standi*), the prohibitive cost of litigation and the challenge of funding litigation. In Ireland, a longstanding lacuna in the area of access to justice is the lack of a procedural mechanism to enable multi-party actions (MPA) for mass harm.[4] Such a procedure could be used in cases involving multiple plaintiffs with similar claims against the same defendant or defendants.[5] Such actions

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[2] eg noise from wind turbines or airports.

[3] Examples of this can be seen in all aspects of planning law enforcement and in the civil liability provisions accompanying enforcement measures under some legislation, such as sections 57 and 58 of the Waste Management Act Waste Management Act 1996 (as amended). These civil liability provisions provide for enforcement provisions in a tort-type way as proceedings may be initiated by anybody and so effectively resemble regulation in their effect.

[4] Ireland is an example of a common law jurisdiction that, at present, has no formal statutory or court rules for MPAs, so neither multi-party nor specifically collective action is yet permitted, save for very limited representative actions.

[5] Irish Law Reform Commission, *Consultation Paper on Multi-Party Litigation* (LRC CP 25-2003) 1.

could be similar to group or collective action type lawsuits in a modified form so as to safeguard against abuse. The absence of such a procedural mechanism potentially impedes citizens' access to justice and collective redress for mass harm. Ireland does not need more litigation. Ideally, wherever possible, collective redress ought to be achieved through ADR and regulation. Litigation and MPAs are not a panacea or a silver bullet solution to the problem of mass harm. MPAs, however, can be a useful procedure for managing mass harm cases. MPAs are one of a suite of solutions to mass harm, alongside regulation and ADR. These are all tools that can help deliver collective redress and access to justice. Ireland has had many cases of mass harm and environmental mass harm: - the cases surrounding harm caused by Pyrite, Thalidomide, Vioxx, Army deafness, hepatitis C blood contamination, asbestos litigation, are examples of just a few. The way in which these cases have been resolved has been hugely inefficient- both in terms of cost, delay and duplication. Where there is a clear need for litigation, a procedural mechanism that would help to manage mass harm litigation is necessary. The case currently being taken against Volkswagen in Ireland in relation to its emissions scandal highlights the need for collective treatment of such cases.[6]

What tools for environmental enforcement currently exist?

Professor Macrory will speak about environmental regulation in England and Wales and how it involves many public regulation agencies. This paper will look particularly at private enforcement tools. There is a robust history of reliance on self- and co-regulation as well as increased trust in both private and public regulation. The public authorities have extensive formal enforcement powers under both criminal and civil law. The enforcement powers of most public authorities have been reformed in the past few years as the Government adopted all of the recommendations in the Hampton Report[7] and the Macrory Report[8]. The new regime on administrative sanctions has been enshrined in the Regulatory Enforcement and Sanctions Act 2008 (RESA). There is now a focus on achieving outcomes that deliver compliance, restoration of market balance and restitution to those harmed.[9] Increasingly, instead

[6] This case is currently in the news as a number of motorists are seeking compensation from Volkswagen due to its admission that it cheated on emissions tests. A class action taken in the US against the car manufacturer resulted in a settlement of $15 billion. As yet, in Europe however, there has been no collective action due to the lack of appropriate procedural mechanism.

[7] The Hampton Report, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (HM Treasury, 2005) considered how to reduce unnecessary administration for businesses, without compromising the UK's excellent regulatory regime.

[8] The Macrory Report, *Regulatory Justice: Sanctioning in a post-Hampton World*; *Regulatory Justice: Making Sanctions Effective* (HM Treasury, 2006).

[9] This is as a result of the English 'Better Regulation' Policy, which aims at making both public expenditure and business costs more efficient and effective; the Hampton Report (n 22); and the Macrory Penalty Principles contained in the Macrory Report (n 23). Professor Macrory elaborated 'Six Penalties Principles' in order to achieve this: 1. Aim to change the behaviour of the offender.
2. Aim to eliminate any financial gain from non-compliance.
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue.
4. Be proportionate to the nature of the offence and the harm caused.
5. Where appropriate, aim to restore the harm caused by regulatory non-compliance.
6. Aim to deter future non-compliance.

of requiring private parties to seek redress by initiating action in the courts for compensation or injunctions, public bodies can be highly effective in both facilitating and delivering redress.[10] Such techniques can be more effective and economical than traditional civil action or other tools of redress. In this way, regulators can form effective agents for addressing mass or collective redress issues without the cost, delay or abuse of private civil litigation.

Statutory liability regimes also play an important role in achieving environmental regulation as they use a kind of hybrid device of liability provisions, to provide for civil liability for remediation.[11] These remedies can even supplant tortious remedies in some circumstances.

Private law, in particular tort law, has developed incrementally through the common law to meet the new challenges of modern-day living, and phenomena such as environmental and toxic torts (a toxic tort is tort caused by contact with a toxic substance, eg pesticides, chemicals and pharmaceutical drugs.). Tort law, such as environmental mass harm litigation, can play a role that can assist to achieve regulation. It often results in compensation and deterrence. For example, in the US because tort law there provides for punitive damages, it also regulates. This position is reflected in English law, famously, in cases such as *Hunter v Canary Wharf*[12] and *Gillingham Borough Council v Medway*[13], in both of which it was held that tort law is not to be supplanted by statutory or regulatory measures.

There can obviously be tensions in the interaction between regulation and adjudication. The roles of public law and private law in dealing with environmental problems need to be defined as they each have a completely different focus. One issue, for example, is whether environmental disputes should be resolved on the case-by-case, fact-intensive basis of the common law. One of the advantages of this incremental approach of specific judgements in individuals is that it gives guidance to future cases. Public regulatory law sometimes looks at relatively abstract issues and tries to use prospective approaches to problem solving, such as cost-benefit analysis. Public regulatory law does of course often enforce specific breaches. Abstract public policy can, however, ignore real rights such as property rights.[14] Environmental regulation has been hugely beneficial to private law because it requires vast amounts of information to be supplied and made available to State agencies that collect and compile this information for purposes such as licensing and monitoring. This information is often invaluable evidence for would-be plaintiffs and defendants. Environmental legislation increasingly requires free access to information and has

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[10] C Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart Publishing, forthcoming). This section is informed by an extract from a chapter on The Enforcement Powers of Individual Agencies.

[11] Such statutory liability is commonly used in England and Ireland, for example sections 57 and 58 of the Irish Waste Management Act, 1996, as amended.

[12] [1997] UKHL 14.

[13] [1993] QB 343.

[14] Which would eg enable a landowner to seek tort damages against a polluter who has created a nuisance, despite the polluter having a licence, eg *Magnolia Coal Terminal v Philips Oil Co*, 576 So2d 475 (La 1991).

changed the culture in relation to access to information.[15]

2. Challenges created by the distinctive features of environmental mass harm litigation

While environmental mass harm litigation obviously entails the usual practical difficulties associated the issues of cost, funding etc, it has distinctive features that present particular difficulties for claimants seeking collective redress:

A. Toxic Torts

Environmental mass harm litigation is increasingly informed by, and centred on, toxic torts, ie hazardous substances and harms that were either uncommon or non-existent in the past, which often cause newly emerging injuries, for example injuries resulting from exposure to asbestos, dioxin and toxic waste disposal.[16] Victims of toxic torts wishing to litigate their claims face distinct challenges in bringing their cases, particularly in proving causation, often due to the scientific complexity of evidence. There is an obvious gap between legal and scientific culture. Evidence may require expert interpretation in order for it to be used in court. These problems can be exacerbated and amplified at mass level as judges, plaintiffs and defendants may struggle to deal with technical evidence, perhaps where different types of injury are caused by one incident. The law has had to evolve to deal with these emerging issues. It would appear that collective treatment of such harm can help to alleviate these difficulties, particularly, for example, where the courts must deal with technically complex and correspondingly expensive issues collectively. Looking at the US as an example because it is the forerunner in toxic tort litigation. Over the decades since toxic torts have become recognised there, tort law has evolved to meet the new challenges they have presented. Such challenges include difficulties presented by case management,[17] causation,[18] statute of limitations,[19] expert evidence,[20] novel injuries[21]

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[15] For example, this has been the case for the past 25 years under EU law and has put in place stringent and rigorous rules since 1990, as a result of the introduction of the original Directive on the freedom of access to information on the environment, Directive 1990/313Directive (EC) 90/313/EEC OJ 1990 L 158/56 provided for access to environmental information.

[16] Kanner, 'Toxic Tort Litigation in a Regulatory World' (n 13) 1.

[17] eg in *re Agent Orange Prod Liab Litig*, 597 F Supp 740 (DCNY 1984). Public law models have begun to impact on private law toxic tort cases, esp in civil procedure and evidence law. A greater variety of toxic tort claims are being handled as class actions and mass torts; eg *Petrovic v Amoco Oil Co*, 200 F 3d 1140 (8th Cir 1999) (affirming post-*Amchem* environmental and toxic tort class action settlement. Indeed, some remedies such as medical monitoring may be better suited to class action treatment. See *Ayers v Township of Jackson*, 525 A 2d 287 (NJ 1987) (class action by group of residents against township for nuisance arising from contamination of water by toxic pollutants leaching into aquifer from town's landfill – medical monitoring was granted).

[18] eg A Kanner, 'Ruminations on Trial by Jury: An Essay in Honor of Judge Robert S. Vance' (1990) 5 *Toxic L Rep* (BNA) No 12, pt I, 415.

[19] A Kanner and E Trevor, 'Federal Expansion of State Statute of Limitations in Hazardous Materials Cases' (1988) 29 *The Barrister* 34.

[20] eg *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993).

and multiple defendants.[22] All of these problems have been dealt with both collectively and individually. The courts have responded by developing jurisprudence to deal with the unique traits of this type of litigation.[23]A number of key developments over several decades have changed the face of US toxic tort litigation.[24] First, the courts have developed an approach to deal specifically with the distinctive characteristics of toxic tort litigation. For example, they have permitted recovery for a broader range of injuries, addressed statute of limitations problems that can affect multiple and time-delayed harms and removed problems of product identification associated with mass marketing.[25] Secondly, on a statutory level, Superfund legislation has changed the landscape in which toxic tort law exists.[26] This legislation aimed to address the cleanup of hazardous waste disposal sites and the imposition of liability for the cost of remediation on those responsible.[27] There have, however, been some complaints by law reformers of the need for legislative or administrative solutions in the US.[28] A question that Europe ought to perhaps consider is whether the widening of US toxic tort law should be adopted in Europe, or perhaps this concept may be inconsistent with the ideas of balanced justice as between claimants and defendants. Looking in particular at the difficulties in relation to causation and

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[21] For more detail on new theories of compensable injuries, see J Weinstein, *Individual Justice in Mass Tort Litigation: The Effect of Class Action, Consolidations and Other Multi-Party Devices* (Northwestern University Press, 1995) 152.

[22] eg G LaMarca, 'Market Share Liability, Industry-Wide Liability, Alternative Liability and Concert of Action: Modern Legal Concepts Preserving Liability for Defective but Unidentifiable Products' (1981) 31 *Drake L Rev* 61 (various product identification theories); G Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law' (1985) 14 *J Legal Stud* 461, 462.

[23] eg R Baker and M. Markoff, 'By-Products Liability: Using Common Law Private Actions to Clean Up Hazardous Waste Sites' (1986) 10 *Harv Envt'l L Rev* 99, 100.

[24] A Kanner, 'Future Trends in Toxic Tort Litigation' (1989) 20 *Rutgers LJ* 667.

[25] A Kanner, 'Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation (1987) 18 *Rutgers LJ* 343.

[26] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601-75, as amended by Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub L No 99-400,100 Stat. CERCLA, commonly known as Superfund, was enacted by Congress on 11 December 1980. This law created a tax on the chemical and petroleum industries and provided broad federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. Over 5 years, $1.6bn was collected and the tax went to a trust fund for cleaning up abandoned or uncontrolled hazardous waste sites.

[27] Some commentators say that Superfund seems to have been an inefficient clean-up law. Opinion in the US has since turned full circle to support 'Brownfield Redevelopment' which is trying to release environmental clean-up from Superfund and redirect it to the private sector, which is economically incentivised to effective clean-up. See further A Kanner, 'Rebuilding America' (1995) 20 *Nat'l Ass'n Envt'l Prof'ls New*s 17; A Kanner, 'Rethinking Superfund' (1995) 20 *Nat'l Ass'n Envtl Prof'ls News* 19.

[28] See further W Ginsberg and L Weiss, 'Common Law Liability for Toxic Torts: A Phantom Remedy' 9 *Hofstra L Rev* 859 (1981); W Hurwitz, 'Environmental Health: An Analysis of Available and Proposed Remedies for Victims of Toxic Waste Contamination' (1981) 7 *Am J L & Med* 61; W Hurwitz, 'An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries' (1980) 12 *Rutgers L Rev* 117; M Sokolow, 'Hazardous Waste Liability and Compensation: Old Solutions, New Solutions, No Solutions' (1982) 14 *Conn L Rev* 307.

evidential complexity, latency and foreseeability in these types of cases:

B. Causation and Evidential Complexity

One of the distinguishing features of toxic tort cases is the difficulty a plaintiff may experience in establishing causation. A plaintiff must prove that the harm was caused by that defendant's activities. This can be extremely problematic under traditional causation rules due to the complex nature of scientific and technical evidence. This may be greatly exacerbated in cases of mass harm.[29] However, paradoxically, the collective treatment of environmental mass harm cases may alleviate some of the difficulties faced by individuals in these cases. Firstly, collective treatment gives plaintiffs cliched 'strength in numbers' and allowing them to 'pool their resources' in terms of dealing with issues such as costs. Secondly, like in other mass harm cases, the handling of multiple claims can give rise to common or related issues of fact or law. Where claimants have suffered similar injury, they may have issues such as causation dealt with collectively, obviating the need for them to prove this individually.[30] The clustering of such claims strengthens individual claims. Environmental cases can also commonly involve conflicting and often novel expert testimony, as well as scientific uncertainty. Treating environmental mass harm cases collectively may alleviate some of the difficulties in these cases.

While proving causation may be problematic now it may become less so because of legislative initiatives, such as the European REACH legislation and subsequent legislation in EU Member States, which could ease this difficulty.[31] This Regulation is crucial to toxic torts as it assesses the human and environmental impacts of chemicals and the information compiled by virtue of the accumulation of these assessments will form a vast database of scientific and technical data. This means that, with ease of access to such information, issues and difficulties of causation for future harms should be alleviated.

Proving causation is difficult in the English and Welsh courts and Irish courts. The Scottish case of *Graham & Graham v Rechem*[32] provides an extreme example of the

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[29] This difficulty has been alleviated in the US through judicial and legislative evolution of the law to deal specifically with toxic torts.

[30] This is exemplified by the contrast between the *Corby Group Litigation* and the *Buncefield Litigation*. In the former, claimants suffered similar injury whereas in the latter the incident resulted in wide-ranging forms of injury.

[31] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC., OJ L 396, 30.12.2006.

[32] *Graham & Graham v Rechem International Ltd* [1994] Env LR 158. This case involved an action in negligence and nuisance against the operator of a hazardous waste incinerator by local farmers for alleged damage to their cattle. The case involved a vast amount of cutting-edge scientific evidence. It lasted for 896 hours in court, spread over 198 days, and involved 80 lay witnesses and 21 expert witnesses on issues such as veterinary toxicology, agricultural accountancy, incinerator design, dioxin formation, pollution dispersion, analysis of trace organics and meteorology.[32] The Grahams submitted that the crucial issue on causation was whether the symptoms exhibited by their herd were indicative of contamination.[32] The lawyers had to have a detailed understanding of the scientific issues before legal

practical problems that can arise in trying to establish causation in toxic tort cases.[33] Similarly, in Ireland, while there has not yet been extensive litigation of toxic torts, an early example of one such case is that of *Hanrahan v Merck, Sharpe and Dohme*, which shows similar difficulties in proving causation.[34] The facts were similar to those in the *Rechem* case, with the plaintiffs failing to prove, at first instance, that the emissions from the neighbouring chemical plant had caused the illnesses being suffered by their livestock. They failed to rebut the vast array of technical and scientific evidence being propounded by the defence that raised questions over causation. Only on appeal to the Supreme Court did the plaintiffs finally succeed in their action, as they managed to convince the Court that there was no other possible cause for the illness other than the emissions from the pharmaceutical plant. Judge Henchy, in his Supreme Court decision, discussed at length the merits of reversing the burden of proof in toxic tort cases and placing it on the defendants instead, requiring them to prove that their activities did not cause the harm. [35]He ultimately declined to reverse the burden in proof in this case but the appellants succeeded nonetheless. This case shows that, hopefully, judges may be willing to be more creative when addressing issues of causation in toxic tort-type cases in the future.

There were indications of a change of attitude to the traditional causation stance in England and Wales in the case of *Fairchild v Glenhaven Funeral Services Ltd*, which has become a leading case on causation in English tort law.[36] It concerned malignant mesothelioma, a deadly disease caused by breathing asbestos fibres. The problem was that, because of long latency periods, it is impossible to know when the crucial moment of the harm occurring was, and consequently, which of the employers was responsible for his illness.[37] It was held that the appropriate test in this situation was whether the defendant had materially increased the risk of harm towards the plaintiff. The employers were held to be jointly and severally liable against the claimant.

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arguments could be made. Furthermore, the importance of particular issues changed during the trial as the lawyers' understanding of the science increased. Ultimately, the case failed on the issue of causation, as it was found that there were other possible explanations of the cattle's injuries.

[33] There is however an important exception to this – the *Fairchild* exception to the general common law rule on causation (the 'but for' test) on indivisible diseases – so courts have created a policy exception where the risk of causing could be equated with causation in indivisible diseases (they do not permit this in any other area); *Fairchild v Glenhaven Funeral Services* [2002] 3 WLR 89 (HL).

[34] [1988] ILRM 629.

[35] 'What the plaintiffs have to prove in support of their claim in nuisance is that they suffered some or all of the mischief complained of and that it was caused by emissions from the defendants' factory. To hold that it is for the defendants to disprove either or both of those matters would be contrary to authority and not be demanded by the requirements of justice. There are of course difficulties facing the plaintiffs in regard to proof of those matters, particularly as to the question of causation, but mere difficulty of proof does not call for a shifting of the onus of proof. Many claims in tort fail because the plaintiff has not access to full information as to the true nature of the defendant's conduct.' Henchy J. in *Hanrahan v Merck, Sharpe and Dohme* [1988] ILRM 629, [21].

[36] [2002] UKHL 22. Mr Fairchild had worked for a number of different employers, as a subcontractor for Leeds City Council; all of these employers had negligently exposed him to asbestos. He contracted pleural mesothelioma and died. His wife subsequently sued the employers on his behalf for negligence. A number of other claimants were in similar situations, and joined in the appeal.

[37] It takes 25 to 50 years before symptoms of disease become evident.

C. Latency and medical monitoring

The *Fairchild case* of asbestos exposure highlights another common challenge of toxic tort cases, which is latency. There is often a delay between the exposure to the toxin and subsequent development of any disease, injury or symptoms. This can cause difficulty for both plaintiffs and defendants, as it can be very difficult to assess harm in such situations. In the US, courts have created a so-called 'two-disease' rule in order to deal with this problem and have recognised the possibility of two types of disease: one acute and the other chronic, permitting a more orderly litigation process.[38] This is a very efficient managerial tool for toxic tort cases. For example, in cases of injury resulting from asbestos exposure, the right has been recognised to bring a second action for cancer after prior recovery for asbestosis caused by the same exposure to asbestos. This allows a victim to sue for later developing cancer even if she was previously aware of a separate injury caused by the exposure (such as asbestosis). This is instead of forcing one lawsuit for all the claims at an early stage, which would require suits for 'increased risk' of future harms under an inflexible statute of limitations.

The US courts have also introduced a remedy known as 'medical monitoring' to help specifically in cases of latent injury. This is the observation of a disease, condition or one or several medical parameters over time.[39] It is based on the idea that, as a victim of wrongful toxic exposure, a plaintiff is entitled to medical examinations and frequent testing to detect the development of any future illness that may be caused as a result, in order that such early detection may allow early medical treatment to minimise the severity of the injury. It is available as a remedy even if the risk being claimed may be speculative, whether or not the class members placed at risk were actually injured. The cost is borne by the wrongdoer. [40]

Ireland has experienced asbestos litigation in the decision of the Supreme Court in the case of *Fletcher v The Commissioners of Public Works.* This case arose out of what was admitted to be the failure of the defendants as employers to take proper precautions for the safety of the plaintiff, Mr. Fletcher, who had been employed for many years as a General Operative in government buildings. The trial judge found as a fact that he had inhaled very large quantities of asbestos dust over a number of years and was satisfied that the defendants were guilty of gross negligence. The medical evidence was that, although the plaintiff was exposed to the risk of developing asbestosis and mesothelioma, he had not contracted either disease and it was unlikely that he ever would. He was diagnosed as suffering from 'reactive anxiety neurosis'. The trial judge was satisfied that the plaintiff's psychiatric illness was the result of his exposure to asbestos dust. The defendants appealed the matter on the basis that the trial judge's determination that the plaintiff was entitled to recover damages in respect of psychiatric illness, when unaccompanied by any physical injury, was wrong in law. In the Supreme Court, the Chief Justice, Mr Ronan Keane, felt that important policy issues needed to be considered in deciding whether the plaintiff was entitled to

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[38] *Mauro v Raymark Indus Inc*, 561 A.2d 257 (NJ 1989).

[39] For further reading on medical monitoring please see A Kanner, 'Medical Monitoring: State and Federal Perspectives' (1989) 2 *Tul Envt'l LJ* 1.

[40] The US courts have begun to allow current actions for medical monitoring if these would mitigate possible future harm, *Ayers v Township of Jackson* (n 45).

recover damages for the impairment of his mental condition that had resulted from his exposure to the risk of contracting mesothelioma. He stated that the courts had to adopt a more circumspect approach to cases of psychiatric illness because it is less susceptible to precise diagnosis. More importantly, the Chief Justice referred to:

> The undesirability of awarding damages to plaintiffs who have suffered no physical injury and whose psychiatric condition is solely due to an unfounded fear of contracting a particular disease … should not be awarded damages by the law of tort.[41]

Despite the fact that Mr. Fletcher could not recover compensation from his grossly negligent employer, it would make sense that he (1) would be entitled to financial assistance in defraying the costs of medical check-ups; and also (2) that such cost would be payable by the employer, for the purposes of deterrence. Medical monitoring, by regularly observing the condition of the plaintiff's health, if it had been available as a remedy, would have achieved both. It remains to be seen how strictly this decision will be interpreted in subsequent cases, as the Supreme Court has already distinguished its earlier decision.[42]

D. Legal Costs

There are a number of factors to be taken into account when accounting for costs in mass environmental harm litigation. In order to ensure fairness, costs ought to be proportionately and reasonably incurred. They should also be proportionate and reasonable in amount to the value of the claim and to the importance of the matter to all parties. Depending on the system of determining legal costs, matters such as the skill, effort and specialised knowledge of those involved may be taken into account. Another factor is obviously the amount of time spent working on the case by lawyers and other advisers. In England and Wales and Ireland, toxic tort litigation is generally extremely expensive as seen in *Graham & Graham v Rechem*. The defendant's costs were estimated at £4.5 million and the cost to the Legal Aid Board at £1.5 million. Also, the potential costs to industry could be immense, as exemplified in the *Fairchild*

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41 The Chief Justice was also mindful of the implications for the health care field of a more relaxed rule in respect of recovery for psychiatric illness. He was accordingly satisfied that the law in that jurisdiction should not be extended by the courts to allow the recovery by plaintiffs of damages for psychiatric injury resulting from an irrational fear of contracting a disease because of their negligent exposure to health risks by their employers, where the risk is characterised by their medical advisers as very remote. Mr Fletcher was found to be at risk of possibly contracting mesothelioma at some stage in the future, following exposure to asbestos, but it was impossible to know when and if this would occur. Had the plaintiff exhibited any physical symptoms as a result of the asbestos exposure, however, the Court would certainly have allowed his claim 'That specific policy considerations that disputed the imposition of liability in 'fear of disease' cases included the undesirability of awarding damages to plaintiffs who had suffered no physical injury and whose psychiatric condition was solely due to an unfounded fear of contracting a particular disease and the implications for the health care field of a more relaxed rule as to recovery for psychiatric illness (threats of numerous large monetary awards coupled with the added cost of insuring against such liability)', Ibid.

42 In the case of *Swaine v The Commissioners of Public Works* [2003] IESC 30 (2003). The facts in this case were similar to those in *Fletcher*, where the plaintiff had been exposed to the risk of fatal injury from breathing asbestos in the workplace over an extended period. In the High Court, O'Neill J had held the defendant guilty of 'negligence of the grossest kind', awarding him €45,000 plus €15,000 aggravated damages. The defendant appealed quantum but did not contest liability. The Supreme Court overturned the award of €15,000.

ruling.[43] In England and Wales, fees may be on a 'no win, no fee basis'. However, previously, there was a success fee payable by the defendant that was not covered by the claimant's damages (this fee was effectively half of the amount of potential recovery in cases). Costs for the litigation of individual cases are often in line with damages. New legislation that came into effect in April 2013 means that the success fee is no longer payable by the defendant.[44] Also, the proportionality rule has been tightened up and will be applied strictly.[45] Insurance in England and Wales is 'after-the-event' and this means that the loser pays the winner's costs. Such costs can be very high. The loser pays the insurance premium and the cost of this can also be very high. In cases that involve injury, one-way cost shifting applies. This means that when the defendant loses, he pays the claimant's costs; when the claimant loses, each side bears its own costs. This is a factor in environmental cases, as costs will not apply if there is no proven injury. Therefore, if claimants are going to litigate environmental cases, they have to do so without insurance.

E. Corporate Veil

In some cases is may be argued that a parent company is not liable because the corporate veil needed to be lifted in order to confer liability. This has happened in a number of environmental cases in Ireland in recent years. Often this is a question of whether a parent company is in control of the subsidiary. A similar issue has arisen in Ireland in relation to tort-type statutory liability under the *Waste Management Act.*[46] A landmark judgment was that of *Wicklow County Council v Fenton,*[47] in which Court lifted the 'corporate veil' of a domestic company in order to give effect to the polluter pays principle.[48]The Court held that it was necessary to lift the 'corporate veil' and impose personal liability on directors of a limited liability company for any shortfall in the remediation costs which the company might not be able to meet by way of so-called 'fall-back orders'. The Court found that it was appropriate to do so, even where the directors were not directly involved in the relevant activities, to ensure that an innocent party, the community or State would not

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[43] [1994] Env LR 158. This case is believed to have been the longest civil trial in English history. . In that case, Lord Justice Brooke in the Court of Appeal said that around 1,550 people a year are diagnosed with mesothelioma in the UK, of which about o1.500 cases are due to exposure to asbestos. Owing to the large number of potential claims, it has been estimated that this single ruling will lead to insurance claims of £6–8 billion over the next 20 years

[44] The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 introduces a wide range of reforms to the justice system as well as delivering structural reforms to the administration of legal aid. Pt 2 makes changes to the funding and costs of civil cases.

[45] This is as a result of the Rome II Regulation, (EC) No 864/2007. This is an EU Regulation regarding the conflict of laws on the law applicable to non-contractual obligations. From 11 January 2009, the Regulation created a harmonised set of rules within the EU to govern choice of law in civil and commercial matters (subject to certain exclusions) concerning non-contractual obligations, including specific rules for tort and specific categories of tort.

[46] 1996 (as amended).

[47] [2002] 4 IR 44.

[48] This principle of EU law is found in the Waste Framework Directive. The Waste Management Acts subsequently transposed this Directive. The Court interpreted sections 57 and 58 of the Waste Management Acts in a purposive way, to give full effect to the Directive and to the polluter pays principle.

be required to step in to pay the remediation costs.

In a subsequent case however, *Environmental Protection Agency v Nephin Trading Limited & Ors*,[49] the High Court refused to disregard the company's limited liability protection to impose clean-up costs on directors personally under section 57 of the Waste Management Act. In this case, regarding a landfill site polluting the surrounding area, the EPA sought 'fall-back orders', that is to impose personal liability on directors for the costs of environmental clean-up, where the company did not have adequate funds to pay. The Court upheld the separate entity division between the company and its directors.

In contrast to this, in the case of *John Ronan and Sons v Clean Build Limited (in liquidation) and Others*,[50] Judge Clarke held five former directors and shareholders of a liquidated company personally liable for the costs of remediating a site on which significant quantities of construction waste had been allowed to accumulate. This decision confirms that directors and shareholders of companies may be held personally and independently liable for environmental pollution. The Court avoided the need to decide whether it preferred the reasoning of Mr Justice O'Sullivan in the *Fenton* case, or Mr Justice Edwards in the *Neiphin* case and so the conflict over whether the High Court has the inherent power to make a fall-back order against a director or shareholder remains unresolved. The Court did, however, confirm that a director or shareholder might be held personally liable where it is found to be *independently liable* under the Waste Management Acts for the environmental pollution in question, and that the polluter pays principle is a relevant consideration in the context of civil environmental enforcement. The case is also significant because it would appear to be the first occasion that a person other than a local authority or the EPA has taken direct civil enforcement action under sections 57 and 58 of the Waste Management Acts.

3. Novel Remedies for Environmental Mass Harm

The difficulties created by the features of environmental mass harm and are encountered in such litigation highlight the need for some novel remedies. Several of these have been mentioned already but there are a number others.

A. Interim Measures – such as *quia timet* injunctions and Medical Monitoring
While tort law is mainly concerned with remedying actual harm and is rarely successfully used to prevent harm or increased risk, tortious remedies may include *quia timet* injunctions .[51] For example, where a community may fear potential adverse effects from the construction of a new development, a court may give declaratory relief by way of a *quia timet* injunction to prevent such harm arising. Where there has been environmental harm and a victim has suffered actual injury,

[49] [2011] IEHC 67 (High Court, Edwards J, 3 March 2011).

[50] [2011] IEHC 300.

[51] See Kanner, 'Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation' (n 57).

they have a greater likelihood of success in a private tort action than where they are merely at increased risk of harm.[52]

There are, however, cases where interim measures, such as medical monitoring, have been granted to victims at higher risk of injury in the future.[53] For example, cases involving alleged long-term injury or diseases, such as those resulting from exposure to asbestos, or to deal with public health problems caused by issues including hazardous waste. These require victims to be assessed periodically over an extended period as they can result in a range of indeterminate health risks as well as other harms. Medical monitoring may also be awarded even in circumstances where there has not yet been any evidence of physical injury once there are sufficient grounds to believe that the victim's claim is genuine.[54] Victims may still bring a claim later even if they have been engaged in prior litigation based on the same tortious behaviour.[55] Three elements are required for medical monitoring, according to the case of *Merry v Westinghouse Elec Corp*:[56] (1) exposure to hazardous substances; (2) potential for injury; and (3) the need for early detection and treatment.[57] In recent decades, the UK and Ireland has experienced an increase in toxic tort litigation and a growing body of case law shows how the law is evolving in response to this, for example in the field of asbestos.[58]

B. Acute versus Chronic Environmental Harm and Novel Remedies

It is important to distinguish the type of harm in question in environmental mass harm cases and to tailor the remedy sought to it. This is because the range of damage can vary greatly; for example, the type of harm emanating from an old waste disposal site versus an incident with a nuclear reactor. While the usual tort law remedies such as damages and or an injunction are likely to be pursued by the environmental mass harm victims, there are some remedies that are quite specific in relation to this harm, for example the remedy of medical monitoring. Together with traditional tort law remedies, more creative innovations may be required in granting alternative relief that may be more suited to environmental mass harm.

C. Equitable Relief and Problems with Legal Restitution

Often courts use a legal restitution approach when awarding damages for harm to property. However, it could be argued that this approach is inadequate on its own, for

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[52] Ibid.

[53] eg *Ayers v Township of Jackson* (n 45); Kanner, 'Medical Monitoring: State and Federal Perspectives' (n 125).

[54] eg *Hagerty v L & L Marine Servs, Inc,* 788 F 2d 315 (5th Cir 1986).

[55] *Mauro v Raymark Indus Inc*, 561 A.2d 257 (NJ 1989).[19].

[56] 684 F Supp 847, 850 (MD Pa 1988) (citing *Habitats Against Landfill Toxicants v City of York*).

[57] The main legislation providing for medical monitoring is CERCLA, specifically section 107 of CERCLA, which recognises medical and environmental surveillance as compensable response costs in a lawsuit. These 'response costs' are preventative. They are not the same as traditional damages, which are compensatory.

[58] eg the English case of *Fairchild v Glenhaven Funeral Services* (n 71).

several reasons.[59] First, it does not provide deterrence. This is because, with environmental damage, often the cost to restore the land to its previous condition is greater than the diminution in its value. Instead, therefore, courts have commonly made polluters pay what was the fair market value for the land before the damage. This is often ineffective as a deterrent as it may be cheaper to pollute and to pay this than to properly dispose of waste. By doing so, the polluter may be unjustly enriched by the cost saving of paying compensation to the victim rather than the cost of treating the pollution. Secondly, this approach fails to account for market costs versus social value because it is impossible to put a true cost on environmental damage when the value of land is placed in the context of an entire ecosystem. Thirdly, this approach creates economic incentives for polluters to locate their polluting activities on low-value land. Overall, the legal restitution model creates incentives for industry both to pollute and to concentrate pollution in certain areas.[60] This legal restitution model also clearly delivers an outcome that conflicts with the polluter pays principle. Such problems are exacerbated in cases of mass harm as a greater number of victims are affected. Perhaps an approach based on the equitable doctrine of unjust enrichment could be a preferable solution instead.[61] This would require that a polluter should pay at least the amount saved by polluting if that amount is greater than the diminished value of the land.[62] These theories of restitution and unjust enrichment are factors that ought to be taken into account when trying to provide remedies for mass harm. They influence the behaviour of potential polluters and wrongdoers and the punishment that they may face for such harm.

4.Solutions that MPAs may offer for Environmental Mass Harm.

MPAs[63] are one form of collective redress procedure that may lead to a remedy or

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[59] A Kanner, 'Equity in Toxic Tort Litigation: Unjust Enrichment and the Poor' (2004) 26 *Law and Policy* 209–30.

[60] Osofsky, 'Learning from Environmental Justice (n 109).

[61] Kanner, 'Equity in Toxic Tort Litigation' (n 135) 222.

[62] There are three remedies for unjust enrichment: the use of a constructive trust, the equitable lien and subrogation. It is at the discretion of a judge to use whichever remedy he or she feels is most appropriate in each case and, for environmental pollution an equitable trust is usually the most appropriate solution. For example, a portion of the profits made by a polluting company could be held on trust for members of the community to compensate them for the diminution in value in the value of their land. The unjust enrichment model, in general, has the advantage of removing the incentive to target pollution at lower-valued lands. Another factor is that deterrence should be the primary aim of environmental protection because, as previously stated, the value of land is inestimable and, if it is contaminated, the long-term damage is likely to be grave and unquantifiable, probably affecting more victims.

[63] Under the UK Funding Code a multi-party action is defined as 'Any action or actions in which a number of clients have causes of action which involve common issues of fact or law arising out of the same cause or event'. It states that MPAs cover a wide variety of different circumstances, but most can be divided into either:

1. Instant disasters – ie where a large number of people have been affected, usually suffering from personal injury, by a sudden event such as a major transport disaster;

broaden access to a remedy for mass harm.[64] They are court-based mechanisms for cases involving multiple plaintiffs[65] with similar claims against the same defendant or defendants.[66] In this paper the term MPA is used in the wide sense to mean any form of actual or potential litigation involving multiple parties.[67]

This paper has discussed some of the challenges experienced in mass environmental harm litigation. Dealing with these collectively through MPAs may alleviate some of the difficulties. For example, the handling of multiple claims can give rise to common or related issues of fact or law. These may be suited to collective treatment. The clustering of such claims strengthens individual claims. Difficulties that may otherwise confound plantiffs if they were acting individually may be surmounted as a group. It may also help them to overcome some of the psycholigical barriers faced in mass litigation. For both defendants and plaintiffs collective treatment can deliver many efficiencies as MPAs help to deliver economies of scale in terms of sharing costs, saving time by resolving disputes collectively and avoiding duplication. Overall, it might be beneficial, in terms of access to justice and procedural justice to join these actions together in an environmental MPA. Two English cases of environmental mass harm *Corby*[68] and *Buncefield*[69] show that claimants in mass

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2. Creeping disasters – ie where a large number of people have been harmed by a common cause such as an allegedly harmful product or form of treatment.

See further detail at: www.legalservices.gov.uk/.../Funding_Code_-_Chapter_15_-_Multi_Party_Actions_-_April_2010.pdf.

64 For further detail, see C Hodges, *Multi-Party Actions* (Oxford University Press, 2001) 3.

65 Although the terms are sometimes used interchangeably, there are technical differences between them when applied in the context of a specific jurisdiction. For example, a US class action is a particular phenomenon and is different from a Canadian class action. In some cases these mechanisms are actions in which a representative of one or more members of a group sues on behalf of the entire group[65] but without all the members of the class being identified in court. In the US, class action use is relatively common due to the American system of legal enforcement. Also 'US style' class action is different from the collective action procedure being espoused by the European Commission in its 2013 collective redress policy.

66 Irish Law Reform Commission, *Consultation Paper on Multi-Party Litigation* (LRC CP 25-2003) 1.

67 It is noteworthy that defendant class actions are possible for cases involving multiple defendants. These are far more infrequent than plaintiff actions and usually less complex. This research will focus on class actions brought on behalf of multiple plaintiffs as these are more numerous and relevant to MPAs and mass harm.

68 The Corby toxic waste case was a court case decided by The Hon. Mr. Justice Akenhead at the High Court of Justice, London, on 29 July 2009 in the case of *Corby Group Litigation v. Corby Borough Council* [2009] EWHC 1944 (TCC). The case was resolved using a GLO. The judge found Corby Borough Council liable in negligence, public nuisance and a breach of statutory duty for its reclamation of a Corby Steelworks in the town of Corby, Northamptonshire, between 1985 and 1997.[1] The landmark decision was historically significant as the first in the world to establish a link between atmospheric toxic waste and birth defects - all previous cases have involved water pollution - and held implications for other council reclamation programs and the methods of conducting reclamation in England and Wales

69 This resulted from an explosion at the Buncefield Oil Storage Depot at Hemel Hempstead, Hertfordshire, which took place on 11 December 2005. This was the biggest explosion in Europe since the Second World War, which measured 2.4 on the Richter Scale and could be heard 200km away. Around 4,000 local businesses, local residents and other oil companies with facilities at Buncefield sought to recover damages for the losses they suffered as a result of the explosion. The aggregate

environmental harm cases can benefit from efficient case management. *Corby*, for example, demonstrated how the obstacles of mass harm litigation that may confound individuals could sometimes be overcome as part of a group action.

Also, for judges trying to manage complex environmental mass harm litigation, MPAs can be a helpful managerial device. They can act as mechanisms to provide procedural justice and to enhance the overall management of such litigation. This may be through the use of Group Litigation Orders in England and Wales or creative case management, particularly for fact management.[70]

What examples of environmental collective actions can be seen in Europe? The class action law in Portugal expressly provides for its use to preserve environmental heritage and other matters. In Sweden, the class action procedure has been used to sue for environmental harm, such as noise pollution caused by airports that irritated inhabitants of surrounding neighbourhoods. In Spain, there are some tools for collective action, for example an environmental class action was taken when the ship *Prestige* spilled oil off the coast of Galicia and the Spanish Government brought a criminal action and distributed compensation to fisherman.

A crucial factor in relation to MPAs is the issue of funding. For example, claims cannot be brought in the US without contingency fees and there is no cost shifting. This is also the case in Canada were it not for contingency fees, consortia of funders, costs only being enforceable against representative claimants, and the use of the device of 'men of straw' to defeat cost shifting. In Australia, the difficulties of funding have largely been alleviated by the introduction of third-party funding, with representative plaintiffs being 'men of straw'. Historically, funding has been a very large stumbling block in England and Wales and an ongoing problem in Ireland due to the lack of legal aid. Overall, funding of MPAs is absolutely critical and is closely affected by the prevailing costs regime. Ultimately, private funding in a loser pays system that has no or limited legal aid can only be through lawyers (through contingency fees) or through other funding intermediaries (such as insurers or investors).

Many lessons can be learned about the use of MPA mechanisms and case management as a route to achieving collective redress for environmental mass harm from the experience of other common law jurisdictions, particularly on the US and England and Wales. However, in jurisdictions such as Canada, there has been limited class action activity in the area of environmental law as they are unlikely to be

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amount of the claims was in excess of £750 million. The Competent Authority, *Buncefield: Why Did it Happen? The Underlying Causes of the Explosion and Fire at the Buncefield Oil Storage Depot, Hemel Hempstead, Hertfordshire on 11 December 2005* (2011) available at: www.hse.gov.uk/comah/buncefield/buncefield-report.pdf. Extraordinarily, the civil compensation litigation made swift progress and was resolved before the regulatory process. No GLO was used in this case, despite it seeming suited to such treatment.

[70] Fact management in group actions is one complexity, as is the assessment of quantum for loss of amenity. In cases such as these there can be hundreds of individual cases which all raise the same issues. Fact management is therefore complex but crucial. The challenge is to ensure that the claims are assessed efficiently, economically and proportionately; J Thornton, 'Group Actions for Private Nuisance: Fact Management and Assessing Quantum for Loss of Amenity' e-law November 2012, available at: www.lexology.com/library/detail.aspx?g=c022102a-ac8d-4b25-9f5c-32cafd1d2f1a.

certified there.[71] Therefore, it seems that even though some environmental cases may be well suited to an MPA format, there is no guarantee that such cases will be certified as suitable for this.[72] The reality is that there is not a huge likelihood that environmental claims will be brought as collective actions, largely because, as identified at the outset of this paper, first, the environment does not fit naturally within the framework that is traditionally recognised for the protection of private rights. Secondly, predominantly public authorities play a primary role. Thirdly, as we have seen, there are lots of difficulties with private enforcement (such as complex and conflicting expert evidence, scientific uncertainty, vast amounts of information, hence inherent uncertainty of outcomes, and huge costs and cost risks). Also, we have seen that, following Superfund, academic commentators concluded almost unanimously that tort law was not equipped to address the problems of modern pollution and torts. This seems to undermine the potential role for MPAs in the environmental mass harm sector.

Class actions, however, *are* complicated. Sometimes they are controversial. This has manifested in two particular respects: by a strongly held opinion for and against their introduction, and by frequent appellate review.[73] The is criticism of US class actions, its side-effects of conflicts of interests and the resultant alleged widespread abuses.[74] There is also, however, a strong counter-argument that such 'abuse' criticism is unwarranted.[75] Some commentators credit class actions with a mission to provide 'ready, meaningful justice for the relatively disempowered in contemporary "massified" societies'.[76] In the US, MPA mechanisms are used as a necessary form of 'private attorney general'. In Europe, enforcement is predominantly provided by public agencies and compensation may be pursued in some circumstances by way of a private action through some form of MPA. There is no easy answer to this debate. It is important to note that it can be increasingly difficult to get certification in the US and Canada and also that in the consumer field there has been a major shift towards arbitration and class arbitration. Notwithstanding this, the US experience of collective redress teaches invaluable lessons about the use of MPA and their effects. This paper is not advocating the US style approach that envcourages litigation as MPAs are not a panacea for dealing with mass harm. They do, however, potentially play an important role in situations where there is a clear need in suitable cases. There does appear to be a strong argument that they can be an important managerial procedural tool that may assist with the management of mass harm MPAs ought to be considered as part of a suite of solutions, alongside ADR and regulation, for delivering collective redress.

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[71] This is largely due to the difficulties encountered in the certification of such cases.

[72] eg pollution claims usually require extensive and expensive expert evidence of cause and effect. Further, potentially large groups of persons might be adversely affected by a contaminating event, such as the release of a noxious gas cloud from an industrial facility or the pollution of a river with toxic effluents.

[73] Ibid.

[74] eg defendants being blackmailed into settling weak cases and lawyers sometimes receiving comparatively more compensation than their clients.

[75] D Hensler, 'Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?' (2014) 63 *De Paul L Rev* 1101.

[76] F Valdes, 'Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective' (2008) 24 *Ga St UL Rev* 627, 648.

5. Collective redress in Ireland

Ireland is a common law jurisdiction that does not yet have an effective mechanism for multi-party litigation. This is despite recommendations by the Irish Law Reform Commission (LRC), Ireland's principal public body for the investigation of law reform, for the introduction of a new litigation procedure in the form of a multi-party action.[77] Instead, occasionally the courts use a confusing array of alternative methods in cases where an MPA mechanism would have had an obvious role. The implications of this approach for access to justice in Ireland are evaluated and discussed in light of the LRC Report recommendations and I this paper will illustrate some of the practical aspects of this procedural lacuna.

As explained previously, MPAs, by enabling victims of mass harm to combine their legal actions, can be a key tool in achieving access to justice. They can enable litigants to overcome many of the impediments facing citizens who take legal actions individually.[78] Ireland is still somewhat at sea procedurally between the class action mechanisms seen in the US and the emerging group litigation approach in England and Wales. This is because Ireland, at present, has no formal statutory or court rules for MPAs, so neither multi-party nor specifically collective action is yet permitted, save for very limited representative actions. These possibilities are rarely invoked because they are of such restricted use. This fact distinguishes Ireland from other common law jurisdictions with MPA mechanisms and appears to be a gap in the Irish legal framework. Under the existing statutory framework MPAs seem to be actively discouraged. In recent years there have been a number of cases of mass harm, including contaminated blood products, army deafness and asbestos-related ill health. Such cases usually draw widespread public interest due to the nature of their claims, the scale of the potential class or the prospect of State liability. Normally, however, owing to the lack of an appropriate mechanism, those with cases potentially suited to an MPA must pursue them in another way. Great injustices and inefficiencies have resulted from these improvisations.

The LRC has recognised the procedural gap that results from the absence of MPAs. In a major study in 2005, it explored the prospects for MPAs in Ireland and has

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[77] The Law Reform Commission was established by the Law Reform Commission Act 1975 as an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It has published over 100 documents containing proposals for law reform which are available online at www.lawreform.ie. The LRC usually publishes in 2 stages: first, a Consultation Paper and then a Report. This occurred with the Multi-Party Litigation recommendations. The Consultation Paper is intended to form the basis for discussion and its recommendations, conclusions and suggestions are therefore provisional. The LRC *Consultation Paper on Multi-Party Litigation* was published in 2003 and its *Report on Multi-Party Litigation* was published in 2005.

[78] eg problems associated with funding and standing. See for further detail, A Ryall, 'Delivering the Rule of Environmental Law in Ireland: Where Do we Go from here?' in S Kingston (ed), *European Perspectives on Environmental Law and Governance* (Routledge, 2013). That publication also explores international conventions such as Aarhus (The United Nation Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) and highlights the need for access to justice as a key facet of the aim of improving environmental governance in Europe.

recommended their introduction.[79] Despite the LRC recommendations, there have not yet been any such legislative proposals for change in Ireland. This raises a number of questions. It is possible to speculate that there are policy reasons for the lack of MPAs. It seems that there is almost a de facto prohibition on such mechanisms, because of the lack of a procedure providing for them and because of the presence of rules that effectively prohibit them, including for example the prohibition on damages awards for representative actions.[80] Despite the LRC's recommendations for MPAs in mass tort and personal injury litigation – an area where the State has been and is likely to be a regular defendant – the State has been very slow to introduce a MPA system.[81] Irish policymakers may be exercising caution for fear of opening apocryphal litigation floodgates by having a full-blown collective action procedure, bringing with it the risks that some have alleged this mechanism can unleash where such procedure is abused and is not accompanied by adequate controls.[82] Perhaps there is a concern regarding competitiveness or attractiveness as a location for foreign investors wishing to set up business in Ireland. However, the MPA procedure, as recommended by the LRC, is designed to minimise such risks.

Irish Supreme Court Judge Denham, when launching the LRC Report in 2005, commented that:

> It is probable that the less well off, those disadvantaged in our society, would be the main beneficiaries of a new procedure enabling multi-party action … It is no easy task- the challenge is to find a just balance in multi-party litigation between procedural efficiency and fairness. The Law Reform Commission has met this challenge successfully. Implementation of this Report would bring us a step closer to succeeding in this task.[83]

In these words, Mrs Justice Denham identified the raisons d'être of the MPA. She highlighted three of the key benefits that they are designed to achieve: access to justice; procedural efficiency; and fairness.

A. Overview of Current Irish Mechanisms for Dealing with Mass Harm

i. Public Actions

This denotes a category of actions whereby certain public officials are empowered to institute litigation on behalf of a wide group of affected individuals. For example, regulatory bodies (or a given regulator) and the Director of Public Prosecutions (DPP)

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[79] Irish Law Reform Commission, *Report on Multi-party Litigation* (LRC 76-2005).

[80] There is no explicit reason for this prohibition; it is likely to discourage the taking of such actions to achieve a monetary award. Remedies are limited to injunctive or declaratory relief. The bar on the bringing of representative actions in tort currently exists in ord 6, r 10 of the Circuit Court Rules 2001.

[81] L Broderick, 'Class Actions – Opting In or Out of the Bandwagon' (Accountancy Ireland Archive, 2005).

[82] A Miller, 'Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem"' (1979) 92 *Harv L Rev* 664 (outlining these problems while defending class actions and asserting that the problems are overstated).

[83] Ibid.

may institute public actions for the prosecution of regulatory offences, such as those in the financial sector.[84] Another example is that the Attorney General may sue on behalf of the public and bodies such as NGOs using section 6 of the Ministers and Secretaries Act 1924 for the assertion of public rights.[85] In the environmental context, one might include prosecutions or other enforcement action taken by the Environmental Protection Agency within this category.

ii. Organisation Actions

It may be possible for certain organisations to institute proceedings that could otherwise be taken by a number of individuals. Such organisations are often public interest groups or pressure groups that are deemed to have a sufficient interest in the case to qualify for standing. In this way an action by an appropriate organisation could effectively dispose of multiple potential individual cases.[86] However, the issue of *locus standi* could operate as an obstacle and also the possibility of damages does not exist, as only declaratory or injunctive relief may be given. This may be a deterrent to such actions being used in environment-related cases (although, in the case of actions to enforce the environmental impact assessment (EIA) Directive or the integrated pollution prevention and control (IPPC Directive) the fact that environmental NGOs enjoy automatic standing avoids some of these difficulties).[87]

iii. Litigation Avoidance

Occasionally it may be best to deal with a group of individual actions together in a way that avoids litigation and to facilitate a remedy in a more sensitive and efficient way, particularly where a question of public interest is involved. An obvious example of this is the special mechanisms such as statutory no-fault compensation schemes that deal with mass cases of personal injury (for example, injuries arising from infected blood products supplied by State bodies,[88] and injuries suffered by those who had been in residential institutional care).[89] In situations of serious injury or widespread mismanagement, usually for which there is some State accountability, there have been cases in which a public inquiry is necessitated, for example the recently established State inquiry into banking malpractice. The aim of a public inquiry is to determine facts relating to a particular incident or series of incidents of public interest and to ascertain whether a wrong has been committed against society

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[84] See also the jurisdictions of the Competition Authority and the Director of Consumer Affairs to institute proceedings on behalf of consumers.

[85] eg the case of *Attorney General (SPUC) v Open Door Counselling Ltd* [1988] IR 593 (this case was taken by the Attorney General on behalf of the Society for the Protection of the Unborn Child to challenge the distribution in Ireland by Open Door Counselling of information on abortion services abroad).

[86] An example of this is the case of *Irish Penal Reform Trust v Minister for Justice, Equality and Law Reform* [2005] IEHC 305.

[87] Council Directive 85/337/EEC on the assessment of effects of certain public and private projects on the environment, (EIA Directive) OJ L 175 1985 or Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (the IPPC Directive), OJ L 24, 2008. See Directive (EC) 2003/35 OJ 2002 L 156/17, amending the EIA Directive to implement the Aarhus Convention.

[88] See Hepatitis C Compensation Tribunal Act 1997 (No 34/1997).

[89] See Residential Institutions Redress Act 2002 (No 13/2002).

or the public interest. Its aim is *not* to deliver judgment on legal rights. Depending on the results of such inquiry this may lead to claims for compensation by victims or their relatives, such as occurred with the Hepatitis C Tribunal and the Institutional Redress Board under the no-fault compensation schemes discussed above.

Other methods of litigation avoidance, which have been used particularly in consumer actions, include the use of ADR. In the US, ADR has recently been endorsed in the US Supreme Court's decision in *AT&T Mobility LLC v Concepcion*.[90] In this case, the Court invalidated a Californian law that attempted to limit contract arbitration clauses considered unfair to consumers. The Court held that if there is an arbitration clause in a contract, parties must be held to that. If this approach is followed in other courts and jurisdictions, this will strengthen the use of ADR as an alternative to class action litigation. This decision would appear to indicate that in the consumer field there has been a major shift to arbitration and class arbitration.

This paper has also explored how prevention through regulation may be another method of potentially avoiding litigation. While the function of regulation in the domain of multi-party litigation may not be immediately obvious, the influence of effective regulatory mechanisms will often function to prevent the wrong arising in the first place and therefore preclude the need for any type of multi-party litigation.[91] Regulation often relates to areas in which there is great potential for multiple parties, for example consumer regulation and the safety of pharmaceutical products. In such circumstances, regulation plays an essential role in multi-party litigation. There is an important background role played by certain Irish regulatory and standards agencies in this area: the Office of the Director of Consumer Affairs and the Irish Medicines Board, for example, are particularly active and effective. Also, the State Claims Agency is charged with the function of identifying risks that could lead to future claims against public bodies. It is empowered to liaise with these bodies to ensure that these foreseeable risks are managed and controlled appropriately. In this way it carries out an important preventative role. This Agency was established as a direct result of the State's largest litigation experience, the army deafness claims (discussed below).[92] In the environmental context, the Department of the Environment, Community and Local Government carries out this regulatory role in conjunction with the Environmental Protection Agency (EPA) and local authorities.

iv. EU Initiatives

Several EU instruments, for example those provided for consumer protection, permit a nominated competent authority (in Ireland's case, the Director of Consumer Affairs) to initiate proceedings on behalf of consumers.[93]

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[90] *AT&T Mobility v Concepcion*, 563 US Reports, 27 April 2011.

[91] LRC Report (n 79).

[92] Ibid for further detail.

[93] See eg Council Directive (EC) 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ 1993 L 95/29.

v. Private Actions

This is the main focus of this paper and refers to procedures that enable a group of individuals to institute proceedings to deal with that group collectively. Unlike the public action or organisation action, in private litigation the decision to pursue an action rests solely with the group of individuals. As mentioned at the outset, Ireland has a confusing array of mechanisms that have occasionally been used for cases of mass harm. These are rarely invoked and are private multi-party procedures that currently fall short of MPAs. They comprise the following four mechanisms.

First, there are *representative actions*. Irish courts have taken a very restrictive attitude towards these: they are permitted in very limited circumstances in which parties have the same interest and where certain prerequisites are met.[94] They cannot be used for tort claims[95] and it is not possible to get damages. It is not possible to get legal aid for these cases. This type of representative action is a long way from the US class action procedure.

Secondly, there is the tool of *joinder*. This is a process whereby the court can simply join additional litigants to an action where it is necessary in the interests of justice and in this way it can hear related cases together. The joinder system is used regularly to combine actions involving two or more parties and can, on occasion, broaden to actions involving many parties.[96]

Thirdly, there is the tool of *consolidation*. This is an alternative to a joinder. It occurs where the court rules that disputes must be tried or consolidated together by a plaintiff uniting several causes of action in the same proceedings.[97] This rule further provides that where such causes of action cannot be tried together conveniently, the court may order separate trials or make such other order as may be necessary or expedient to dispose of the matters.[98] Where a plaintiff does not take steps to unite several causes of action in the same proceedings, matters pending in the High Court may be consolidated by order of the court on the application of any party and regardless of whether or not all the parties consent to the order.[99] Aside from the provisions in the Rules, the court has an inherent jurisdiction to order that cases be heard

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[94] This 'same interest' has been examined in representative proceedings in other common law jurisdictions, such as those in England and Wales.

[95] Ord 6, r 10 of the Circuit Court Rules 2001 expressly excludes representative actions founded on tort. No further explanation can be found of why this is so but this was also stated by the Supreme Court in *Moore v Attorney General (No 2*) [1930] IR 471.

[96] See eg *Abrahamson v Law Society* [1996] 1 IR 403 (Law students challenged the Law Society's decision to deny them exemption from the entrance examination to the Law Society. Their individual actions were combined in a single action before the High Court as the plaintiffs were a defined group with identical claims for declaratory and injunctive relief, represented by one legal team.)

[97] Ord18, r 1 of the Irish Rules of the Superior Courts (RSC) provides that a plaintiff may unite several causes of action together in the same proceedings.

[98] RSC, Ord 18, r 1 provides that where it appears to the court that causes of action are such that they cannot all be conveniently disposed of together, the court may order any of such causes of action to be excluded and consequential amendments to be made to such order as to costs may be just.

[99] RSC, Ord 4, r 6; *Duffy v News Group Newspapers Ltd* [1992] 2 IR 369.

simultaneously.[100] The difference between joinder and consolidation is that consolidation does *not* involve making all the claimants parties to a single set of proceedings. Instead, the plaintiff litigates the consolidated claims on the premise that he represents the other litigants. Any judgment is deemed to be binding on the other litigants (the plaintiffs in the parallel proceedings, with which his claim has been consolidated). In this way consolidation resembles the representative action and is a less flexible system for managing large class claims.

Fourthly, *test cases* are a commonly used mechanism. These are currently used in Ireland as the favoured means of dealing with mass harm litigation. Quite often a plaintiff proceeds on an individual basis. The test case establishes a benchmark and, while subsequent actions by other litigants are not bound by the result, the test case outcome gives an indicator of the outcome of future litigation both in terms of formal precedent and the similarity of subsequent proceedings.[101] This is uncomplicated where the test case pronounces an administrative or legislative action unconstitutional,[102] but is less straightforward where an individual assessment of damages is necessary. Test cases were used to deal with the many army deafness claims taken against the State and also in private actions.[103] These are unduly costly and result in procedural inefficiencies as well as unnecessary duplication, as illustrated in the examples discussed further below.

vi. Other Discrete Areas

Certain specific provisions under Irish law provide for representative proceedings to be brought under the law relating to trusts and estates and derivative actions on behalf of shareholders in company law and in relation to fatality claims.

B. Cases Exemplifying the Problems of Mass Harm Litigation in Ireland

The following cases are a clear illustration of what occurs when some of the above private action procedures are used and there is no appropriate multi-party procedure. They support the contention that by proceeding on the basis of such fragmented and piecemeal procedures, access to justice is impeded, and gross procedural inefficiencies and procedural unfairness result.

i. Social Welfare Equality Cases

An early example is the two cases of *Cotter and McDermott v Minister for Social Welfare and Attorney General.*[104] These resulted from the failure by Ireland to implement the 1978 Directive on Equal Treatment in Social Welfare.[105]

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[100] *O'Neill v Ryanair Ltd* [1992] 1 IR 160.

[101] G Whyte, *Social Inclusion and the Legal System* (Institute of Public Administration, 2002) 104.

[102] See G Hogan and G Whyte, *Kelly: Irish Constitution* (4th edn, Butterworths, 2003) 487–97 (such a declaration nullifies the impugned act or legislation in all situations including those where litigation is pending).

[103] See eg *Gough v Neary* [2003] 3 IR 92, [2003] IESC 39 (successful negligence claim against an obstetrician for an unnecessary hysterectomy during childbirth, in advance of a further 65 similar cases pending against him).

[104] Case 286/85 *Cotter and McDermott v Minister for Social Welfare (No 1)* [1987] ECR 1453 and Case 377/89 *Cotter and McDermott v Minister for Social Welfare (No 2*) [1991] 1 ECR 1155. These

ii. Army Deafness Claims

The army deafness litigation is the best example of multiple, similar claims over a period of 13 years, resulting from hundreds of individual army deafness cases. Claims of hearing loss were brought by serving and former members of the Defence Forces. It was found that the Defence Forces, and consequently the State, were liable for negligence in failure to prevent noise-induced hearing loss of serving and former members of the Defence Forces. The State's alleged negligence resulted in approximately 14,650 soldiers claiming partial or total loss of hearing.

iii. Pyrite Construction Dispute

In 2011, the Irish High Court finished hearing a case that had been running for over two years against the Irish construction industry with claims of more than €100 million. These claims were brought by 550 homeowners who had purchased houses that developed structural faults, due to the use of pyrite infill during construction. This was the longest running case in the history of the Commercial Court and one of the most expensive court cases in the history of the State. The plaintiffs took separate actions and the same lawyers did not represent them all. The action was settled when a €25.5 million repair fund was agreed. This case typifies the problems inherent in the current procedure whereby plaintiffs must initiate separate and individual claims seeking damages particular to his or her situation. The cost, delay and wasteful inefficiencies of this system are self-evident and work only to the advantage of lawyers, whose fees are mounting as long as the litigation continues.

While these examples are not necessarily environment-related, they suggest that it is in the interests of the State, in the interests of litigants, and in the interests of justice to embrace some form of MPA procedure to avoid the anomalous situations illustrated above. Cases where environmental harm is suffered by numerous victims and caused by an identifiable defendant or group of defendants are an obvious further example of

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cases arose from the fact that until 1986 Ireland's social welfare policy had discriminated against married women. Married men were the automatic recipients of child benefit and received higher rates of welfare payment based on a presumption that their wives were dependent on them. For married women to receive these payments, they had to prove that their spouses were incapable of supporting themselves. In 1984, a Directive obliged Ireland to remove these practices of sex discrimination, but it did not do so until 1986. The Free Legal Advice Centre (FLAC) (a pro bono NGO) took a case arguing the entitlement of married women to back-payments during the 2-year period when Ireland's discriminatory policy was in breach of EU law. Their victory had far-reaching consequences, making it possible for 69,000 women to claim their entitlement.

[105] Council Directive (EC) 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ 1979 L 6/24. The two cases were test cases for 11,200 married women who instituted proceedings, out of a total 69,000 who had been disadvantaged by this failure. The State settled these two cases along with another 2,700 without admission of liability. However, this ignored approximately 8,500 claims initiated as well as the remaining 58,000 married women who had not yet initiated proceedings. This was followed by the case of *Tate v Minister for Social Welfare* involving 70 of these women, in which Miss Justice Carroll ruled in the High Court that they too were entitled to relief. So far the total cost of the litigation for final claims amount to a cost of €278m, of which €184.5m comprises awards or settlements and €94m was paid by the State in legal costs. The overall cost borne by the Irish taxpayer has been €300m.This decision resulted in the Government announcing that the required payments would be made to the entire group of 69,000 women, with this amount totalling £265 million including interest.

where an MPA procedure would be of great assistance. Such a procedure would enhance access to justice and help surmount prohibitive obstacles such as the high litigation costs faced by individuals. These constitute gaps in Ireland's current litigation system, which arguably falls short in this respect of that of other EU Member States, particularly when viewed in light of the requirements of the Aarhus Convention.

C. Particular Difficulties with Multi- Party Litigation in Ireland

Ireland does not have a very high level of private civil litigation because legal costs can be prohibitive. The issue of lawyers' fees is controversial in Ireland. There have been recent recommendations for reform in this area from Ireland's Competition Authority and further reform was envisaged in the Legal Services Regulation Act 2015 by formalising an obligation for lawyers to outline costs to clients in advance.[106] Funding cases is a crucial area, and one with which litigants often have difficulty dealing. Owing to the failure of the Irish authorities to invest public resources in facilitating private civil litigation, the question of funding is a factor not only in relation to the issue of access to justice but also to considerations of fairness and the efficiency of the civil court system. Recognising that funding is so central, it is useful to look at key elements related to this issue.

i. Legal Aid

Ireland does not have a comprehensive and effective system for civil legal aid as it is limited to means-tested parties in family law and some limited civil litigation matters.[107] In theory, it is possible, under the guidelines for civil legal aid, to get funding for personal injury litigation where the criteria for assistance are met.[108] However, the means testing level set under the financial eligibility requirement test that applies to the funding available to the Legal Aid Board has meant that any such application would almost certainly fail. As a result, a body of so-called Middle Income Not Eligible for Legal Aid (MINELA) has developed in Ireland, and even those fulfilling the financial criteria for civil legal aid are very unlikely to succeed in securing it unless their case falls within a limited number of categories, notably family law and asylum law.[109] Environmental law areas fall outside these categories, although, arguably, it is an area that requires civil legal aid as parties who wish to bring actions are often acting in the public interest and not just on their own behalf. As such, the tradition of civil legal aid is significantly less generous and efficient than might be presumed. The Irish civil legal aid scheme specifically excludes test cases and MPAs of any sort, so it is not available for representative actions.[110]

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[106] No 65/2015.

[107] For detail please see the section on Civil Legal Aid on the website for the Legal Aid Board at www.legalaidboard.ie

[108] The Civil Legal Aid Act 1995 (No 32/1995) does not expressly exclude personal injury litigation.

[109] MINELA is a term coined under the civil legal aid system in England and Wales.

[110] The Civil Legal Aid Act 1995, s 28(9)(a)(ix) specifically excludes legal aid for 'matters as respects which the application for legal aid is made by or on behalf of a person who is a member and acting on behalf of a group of persons having the same interests in the proceedings concerned'.

In order to avoid the risk of ruinously expensive legal costs, litigants commonly proceed by using the device of 'men of straw'[111] for challenges under the Planning Acts and in common law and nuisance. There is a very limited additional funding scheme for those not eligible for civil or criminal legal aid called the Attorney General's Scheme, but this is not applicable to most civil legal cases.[112] Perhaps the Civil Legal Aid Act 1995 should be amended to allow funding of some of the improvised mechanisms of MPAs, for example representative actions, even if only on grounds of efficiency. The LRC recommended in its 2005 *Report on Multi-party Litigation* that this Act be amended to make provision for the funding of an otherwise eligible group member for his proportion of an eventual costs order. As for other litigants who are not eligible for civil legal aid, it seems that in order to avoid costs their best option remains to await a similar case, to be used as a test case, where litigants are willing to proceed despite lack of legal aid funding.

ii. Insurance

Litigation insurance is not generally available in Ireland. 'Before-the-event' (BTE) insurance is very uncommon in jurisdictions where, as a rule, costs follow the event and it is unheard of that anybody would take on 'after-the-event' insurance. If BTE legal expense insurance were to become widespread in this jurisdiction, this could act as a potential means of financing MPA litigation.

iii. Costs Follow the Event

Finally, but crucially, costs generally follow the event, which means that the award will be made in favour of the successful party. Accordingly, the loser of a case usually has to pay the entire amount of the costs, which is a double financial burden, having to meet both sets of costs in the action. However, this is at the discretion of the presiding judge and is not a statutory requirement. The main problem with this serious litigation risk is that of having to meet the other side's costs as well as one's own. If MPAs were to be introduced there would have to be changes to how costs are currently decided. Furthermore, it should be noted that the standard rule that costs follow the event does not apply for certain environmental cases.[113]

iv. Conditional Fee Arrangements (CFAs)

In Ireland it is illegal for barristers and solicitors to charge contingency fees based on a percentage or proportion of any award or settlement for a case, despite this being a common practice in other common law jurisdictions.[114] However there are occasions

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[111] Those with extremely limited financial means, hence, no assets to risk losing if costs are awarded against them. It is possible to speculate that the more relaxed approach of the Irish courts to the proprietary interest requirement for *locus standi* in nuisance actions is a tacit recognition of the 'man of straw' plaintiff.

[112] For details of this please see the section on the Attorney General's Scheme at www.attorneygeneral.ie/ This Scheme provides payment for legal representation in certain types of legal cases not covered by the civil legal aid or criminal legal aid schemes. It is an *ex gratia* scheme set up with funds available from the Oireachtas. The Chief State Solicitor's Office administers application the Scheme. It generally covers: certain types of judicial review (relating to criminal matters); bail applications; extraditions including European Arrest Warrant applications; and habeas corpus.

[113] As discussed more fully by Ryall, 'Delivering the Rule of Environmental Law in Ireland' (n 78).

[114] Code of Conduct of the Bar of Ireland, s 12.1(e): 'Barristers may not accept instructions on condition that payment will be subsequently fixed as a percentage or other proportion of the amount awarded'.

on which lawyers agree to represent clients on the basis of CFAs, which is permitted and is a common method of deferred payment for legal services, including in environmental cases.[115]

v. Advertising and the Irish Legal Profession

In relation to advertising, solicitors are allowed to advertise but there are severe restrictions, for instance advertising in respect of personal injury claims.[116] This would appear to suggest that such restrictions on advertising could certainly impact on solicitors running MPAs. However, notification of potential litigants does not pose too difficult a challenge in Ireland, owing to the small size of the jurisdiction.

D. Irish Law Reform Commission Report

As discussed above, this report followed on from the publication by the Commission in 2003 of a Consultation Paper on multi-party litigation.[117] A comparative review of selected multi-party procedures from a variety of jurisdictions as well as current Irish arrangements for multi-party litigation was undertaken to inform this report. The LRC stated that its proposals for multi-party litigation are not to be considered as replacements for existing procedures, particularly the test case, but rather as providing an alternative procedure where this is more appropriate. Despite this recommendation, MPAs have yet to be introduced by the legislature.

The Irish Law Reform Commission (LRC) Report highlighted the need for procedural fairness as a core element in any multi-party litigation and cited Hodges' call for a 'managerial mechanism to move forward resolution of all the individual claims'.[118] There was strong emphasis in the LRC's approach on judicial case management of litigation, as recommended by the Committee on Court Practice and Procedure in 2003. The LRC recommended that any reform in this area should be based on principles of procedural fairness, efficiency and access to justice In particular, the LRC recommended that there should be active case management by the courts, which is in keeping with the general trend in the reform of civil procedure such as those in the Woolf reform recommendations. This report was welcomed by the Free Legal

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[115] This label though is potentially misleading and must be explained further. Where costs follow the event, this term suggests that where the client is unsuccessful in the action, the solicitor will absorb the fees and if no damages are awarded then there is no fee. However, in fact, these agreements do not insulate the client from costs in the event that their case is unsuccessful. Instead, they merely defer the payment of these costs until the close of the action. This means that the client does not have to pay for representation at the beginning of the litigation, but the solicitor can later pursue the client for these costs as they remain as a debt due between the client and solicitor, although the solicitor may decide against the pursuit of these costs, which is often the case.

[116] The Solicitors Advertising Regulations 2002, SI 518/2002, were introduced pursuant to s 4 of the Solicitors (Amendment) Act 2002 (No 19/2002), which preserves the right of a solicitor to advertise, but severely restricts personal injuries advertising.

[117] Irish Law Reform Commission, *Consultation Paper on Multi-Party Litigation* (LRC CP 25-2003)14.

[118] C Hodges, *Multi-Party Actions* (Oxford University Press, 2001) 68 ch 5 [11].

Advice Centre, an Irish pro bono legal service, as well as by several senior members of the judiciary.[119] The LRC Report recommended, inter alia:

- the introduction of a completely new procedure to be called a Multi-Party Action (MPA). The MPA would operate as a flexible tool to deal collectively with cases that are sufficiently similar, to be introduced by way of the Irish Rules of Court, where common issues among the individual actions are involved;
- the MPA procedure should operate on the basis of an opt-in system whereby individual litigants will be included in the group only where they decide to join the group action. This is very different, for instance, from the Canadian class action procedure in which individuals are deemed to be part of the class unless they opt out;
- MPAs would require certification by a court before they could become established;
- the court would certify the MPA only where it was considered to offer a fair and efficient means of resolving the common issues involved;
- the court would establish an MPA Register containing a list of the cases in the MPA;
- the court would, where appropriate, select lead cases to go forward as representative of those in the group;
- the court would set a general cut-off date for entry into the MPA;
- a single legal representative would be agreed by the MPA members or nominated by the court to deal with the common issues arising in the MPA;
- the cost associated with the MPA would be spread among its members in equal measure; and
- where an individual member of the MPA would have been eligible as an individual litigant for civil legal aid, they should continue to be eligible for aid to the extent of their share of the costs under an MPA and they will receive funding for this from the Irish Legal Aid Board.[120]

The LRC drafted an amendment to the Irish Rules of the Superior Courts to provide for the introduction of MPAs and also drafted an amendment bill to provide for civil legal aid for MPAs for those eligible for legal aid funding. The report's recommendations include the distinction between general issues in common and subsidiary issues (that individuals may wish to pursue otherwise) and also how to include small claims.[121] The LRC recommended that costs should be shared equally among a group so, in this way, it did not find a solution to the general problem of funding. It did, however, address the civil legal aid aspect of this barrier, by providing eligibility requirements for this aid for those who would otherwise qualify for civil legal aid and drafting amendments to provide for this in the Rules of Court. The

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[119] See www.flac.ie/download/pdf/dec04_lrc_class_actions.pdf. FLAC enthusiastically welcomed the Commission's recommendation to introduce MPAs, on the basis that to do so can only strengthen public interest litigation and increase access to justice. In particular, it notes the necessity of amending the Civil Legal Aid Act 1995 to allow for legal aid in representative actions. It emphasises that the objective of increasing access to justice should underpin all decisions taken in relation to the specifics of the procedure, including those relating to costs.

[120] See further details at: www.legalaidboard.ie/lab/publishing.nsf/Content/Civil_Legal_Aid.

[121] Note Ireland already has a small claims court for disputes up to a value of €2,000, such as those involving consumers, which parties can take without the need to engage a lawyer.

Government has yet to adopt these recommendations by legislation. To date, no changes have been made to the Rules of Court. As mentioned earlier, it was predicted that, in circumstances where the State has been and is likely to be a regular defendant, it is likely that the State will be slow to introduce a MPA system.

In the opinion of Justice McGuinness, former President of the LRC, the Irish methods of dealing with multiple cases have led to some 'appalling situations because of the lack of multi-party actions' such as the army deafness litigation.[122] Ireland has had its access to justice record condemned previously in several landmark cases in the European Court of Human Rights. Probably the most significant example of this is the historic judgment in *Airey v Ireland*[123] where the court declared that the right of access to justice must not be 'theoretical and illusory' but 'practical and effective'.[124] Such issues have also arisen in the ECJ.[125] Notably, the English Supreme Court made an order for reference in *R (Edwards and Pallikaropoulos) v Environment Agency and DEFRA*, the first case in which that court has had to consider the relationship between Article 9 of the Aarhus Convention, which requires that environmental litigation not be 'prohibitively expensive', and the normal rule under English (and Irish) civil procedure that an unsuccessful judicial review claimant should pay the respondent's costs.[126] The appellant argued in that case that for her to pay the respondents' costs would render the litigation prohibitively expensive.[127]

E. What may lie ahead?

i. Developments in England and Wales

Perhaps pressure is building in Ireland because its closest neighbour, England and Wales, has introduced a mechanism to aid multi-party access to justice. Developments there are likely to be watched very closely in Ireland, particularly those surrounding the Group Litigation Order (GLO) and the 2013 introduction of collective actions for competition law infringements. Recent policy in England and Wales has been that a sectoral approach should be adopted, and the only sector in which a collective action has been introduced is that of competition law, where it forms only one part of a 'three pillar' policy. It is notable that many commentators focus only on the competition collective action element of this and omit the point that it is (almost certainly) a 'last resort' pathway, and that the new regulator's power is intended to be the first path. Unusually, the competition sector has no specific structure for ADR

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[122] Hon Catherine McGuinness, former President of the Irish Law Reform Commission (Address to the 'Globalisation of Class Actions' Conference, Oxford University, December 2007).

[123] (1979) 2 EHRR 305.

[124] Ibid 314.

[125] As discussed by Ryall (n 78).

[126] *R (Edwards and Pallikaropoulos) v Environment Agency and DEFRA* [2010] UK SC 57. The Supreme Court had rejected Mrs Pallikaropoulos' application for a Protective Costs Order in advance of her appeal on the basis that, inter alia, insufficient information had been provided as to her financial means to conclude that the proceedings would be 'prohibitively expensive' for her. She nonetheless proceeded with her appeal. When it was dismissed, the Supreme Court ordered that she pay the respondents' costs (totalling around £88,000).

[127] [2010] UK SC 57.

representation, but ADR is still encouraged, and practice is likely to evolve. Representative actions, group litigation and creative case management have helped in some way to fill this procedural void but the use of the GLO has not been invoked as much as might have been expected. In terms of the usage of the GLO, the outcome for claimants' success has been mixed, as often the legal costs far outweigh the damages and it seems that GLOs are not being used frequently in practice. In practice, it would appear that case management has been used more often as an alternative. We can perceive from this that perhaps MPAs are not being used as much as was expected and that the alternative routes to collective redress are taking their place so that litigation is becoming an option of last resort. Instead of litigation mechanisms, alternative routes of enforcement have been pursued with success, indicating that collective redress can be achieved in ways other than through the use of aggregate litigation. It does appear that in some circumstances, mass harm cases present logistical difficulties and that there is a need for managerial mechanisms to help surmount these challenges. The *Corby* and *Buncefield* case studies illustrate the advantages that can be conferred by the use of management mechanisms such as MPAs or case management techniques. Also, some recent English collective redress cases demonstrate the courts there taking an innovative approach to such cases and not necessarily relying on the GLO. More recently however, few group actions, let alone toxic tort claims, have been successfully initiated in the UK[128] given the complexity of evidence and the consequent costs of funding the action.[129] It should be noted that the LRC's report is in line with the Woolf reforms, so there is a broad consensus regarding the requirements of justice in civil litigation. Ireland may be belatedly following in the footsteps of the English legal system if it does proceed with (some of) the LRC's recommendations, taking the advice of the Woolf Report's primary recommendation for introduction of case management and also new provisions for multi-party litigation. However, as stated previously, it is quite possible that the State may find itself the defendant in such multi-party litigation and so it may remain averse to its introduction.

ii. Aarhus and Human Rights

The Irish legal landscape may well be forced to change as Ireland formally incorporated the European Convention on Human Rights into its legal system in 2003.[130] As noted above, Article 6 of the Convention provides for the right to a fair trial. Current legal mechanisms for mass harm arguably do not provide this. Furthermore, as Ireland was the last EU Member State to ratify the Aarhus Convention, questions of access to justice may well be raised by this lack of legal mechanism. In examining the Aarhus Convention's implications, it is notable that the Aarhus Convention Compliance Committee (the ACCC) has handed down findings

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[128] See R Mulheron, 'Reform of Collective Redress in England and Wales: A Perspective of Need' (2008) Research Paper prepared for the Civil Justice Council of England and Wales.

[129] Since the introduction of the GLOs in 2000, although it has been possible for numerous claimants to pursue a group litigation action when there are common or closely related issues of fact and law, there are just 69 such actions listed on Her Majesty's Court Service website for 2010 – about 7 each year – across all types of claim. According to Mulheron, the second highest category of these actions was environmental claims at 15%; Mulheron, 'Reform of Collective Redress in England and Wales' (n 66).

[130] European Convention of Human Rights Act 2003 (No 20/2003).

that the UK Government is making it too expensive for environmental campaigners to take cases through the English courts.[131] This statement could open the door to new rules in relation to legal costs and community groups wishing to take cases to the English and Welsh courts. Under the Convention, which was ratified by the UK in 2005, the UK Government is obliged to give rights and to remove financial barriers for citizens who wish to mount legal challenges. The ACCC found that the UK was failing to ensure court proceedings were not prohibitively expensive and that measures were required to overcome the financial barriers to accessing justice in environmental matters. These issues have also arisen in the ECJ, such as in the recent referral from the UK Supreme Court in the *Edwards* case.[132] While Aarhus relates to environmental matters specifically, the culture of procedural rights stemming from its requirements might well inform developments in terms of general litigation. The environmental arena is often been a trailblazer for the emergence of such procedural rights. Ireland provides an example of where the introduction of rules on freedom of access to environmental information, introduced to transpose a 1990 Directive on access to environmental information, preceded the introduction of a more general Freedom of Information Act,[133] which did not come into effect until 1997.[134] This example of a culture relating to procedural rights could inform the development of rules for general civil litigation.

The availability of MPAs is crucial in the context of the overall EU environmental governance debate in terms of increasing access to justice more broadly for citizens. This state of flux is not particular to Ireland. Irish commentators will watch with great interest changes that are emerging in the US, England and Wales and at EU level.

[131] ACCC/C/2008/33.

[132] *R (Edwards and Pallikarapoulos) v Environment Agency and DEFRA* (n 62).

[133] Freedom of Information Act (No 13/1997).

[134] Directive (EC) 90/313/EEC OJ 1990 L 158/56 provided for access to environmental information. This Directive had been implemented in Ireland by means of various statutory instruments made in 1993, 1996 and 1998.

iii. EU Initiatives

The European Commission has worked for several years on developing standards of collective redress in the field of consumer and competition law. In 2011, the Commission carried out a broad public consultation to assess whether and how a European approach to collective redress could help European citizens and businesses.[135] It also took into account the European Parliament's Resolution 'Towards a Coherent European Approach to Collective Redress' asking for a horizontal framework for collective redress.[136] In June 2013, the European Commission made a Recommendation that set out a series of non-binding principles for collective redress mechanisms in Member States so that citizens and companies can enforce their EU law rights where these have been infringed.[137] It aims to ensure a coherent horizontal approach to collective redress in the European Union without harmonising Member States' legal systems and advocates that national redress mechanisms should be available in different areas where EU law grants rights to citizens and companies, notably in consumer protection, competition, environmental protection and financial services. By recommending to Member States that they put in place national collective redress mechanisms, the Commission aims to improve access to justice, while ensuring appropriate procedural guarantees to avoid abusive litigation. Also in June 2013, as previously mentioned, the Commission adopted a proposal for a Directive on competition damages actions under national law for breaches of EU competition law.[138] The Recommendation complements this proposed Directive. While the Recommendation calls on Member States to put in place collective redress mechanisms, the Directive leaves it up to Member States to decide whether or not to introduce collective redress mechanisms in the context of private enforcement of competition law.

There is ongoing debate in the EU about the introduction of collective procedures for monetary damages due to concerns about controls on excess and abuse. It seems that although the US model might allow such claims for consumers and investors, there are huge problems such as the cost, conflicts of interest between representatives, lawyers and claimants and unjust settlements.[139] A solution may be to refine the US model by adding controls against abuse into the procedure or instead to introduce alternative means of dealing with the fundamental issues. The EU collective redress proposals for collective action endeavour to achieve this as they contain many safeguards to avoid the perceived problems resulting from the excesses of US style class action. Many jurisdictions have introduced anti-abuse controls in their

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135 http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/cr_consultation_paper_en.pdf.

136 www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-21.

137 Commission (EC) Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

138 Commission (EC), 'Proposal for a Directive on Anti-trust Damages Actions' (n 69).

139 G Miller, 'Group Litigation in the Enforcement of Tort Law' in Arden (ed), *Research Handbook on the Economics of Torts* (n 15) 267.

legislation.[140] It is unclear, as yet, whether these controls work. Ultimately, Ireland may have no choice but to be persuaded by these EU developments that may help finally make up its mind on MPAs. With such decisive moves at European level at this point Ireland may not have the luxury of waiting any longer and may be forced to row in with the EU approach.

6. Conclusions

As demonstrated by the Irish experience of mass harm redress, it is evident that there are cases of mass harm occurring and multi-plaintiff personal injury litigation occurring. The asbestos litigation and pyrite litigation are early examples of environmental-type mass harm being litigated in Ireland, but it is only a matter of time before other such mass environmental harm matters will need to be litigated on a large-scale level. It would appear that there is a need for an efficient procedural mechanism to manage this reality. The Irish experience indicates that owing to the lack of such mechanism, other methods have to be used by way of improvisation in order to actuate this. The appalling delay, cost and injustice evidenced by the experience of victims of Thalidomide, for example, shows that this current practice is causing much difficulty. There are likely to be underlying policy reasons on the part of the legislature for Ireland's reticence in relation to adopting MPAs, despite the recommendations by the LRC that they should be introduced. One reason is likely to be the aim of discouraging large-scale litigation. Another reason is possibly to avoid the State being defendant in such action. The Swedish experience indicates that more claims are taken against governments as well as private parties if there are MPAs, so this is not an improbable risk.[141] The MPA experience from other jurisdictions illustrates that MPA procedural mechanisms can enhance procedural justice, in appropriate cases. This experience may inform the metaphysical question of whether Ireland ought to adopt an MPA mechanism to remedy the current procedural lacuna.

The role of judges is to clarify the law and to deliver justice. If mass claims occur in the legal system, it is clear that in some cases they need assistance from managerial mechanisms to help them to deal with multiple cases effectively. Collective actions or some managerial form of MPA certainly have their place within this role and therefore, where MPAs are required, they should be possible in appropriate cases. It would appear that recommendation by the Irish Law Reform Commission of the introduction of a multi-party action procedure was partly to encourage Irish civil procedure towards case management. It may be unwise to adopt a collective action procedure without having case management and one or more very experienced judges who could conduct and control such litigation effectively.

It would appear that collective actions alone are an outdated approach for dealing with the problem of mass harm and they are clearly not the most efficient route to justice. The courts are obviously not the only forum in which to resolve legal disputes. The

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[140] The US system controls include the requirements of adequacy of representation, numerosity, superiority and predominance. Other jurisdictions have controls such as the 'loser pays costs' rule and provisions on representation and settlement.

[141] C Hodges, 'Collective Redress: A Breakthrough or Damp Squibb? (2014) 37 *J Consum Policy* 86.

optimum way of achieving collective redress requires a modern holisitic approach. This requires an integrated model comprising a combination of tools from a range of solutions including regulation, ADR, courts, ombudsmen, among other through a modern. In summary, it seems that MPA litigation is necessary as a remedy of last resort to deal with mass harm where other techniques fail to deliver collective redress and where there is therefore no alternative to the courts.

As for mass environmental harm in particular, it would appear that the best solution is to have the widest range of possible legal remedies in order to deter pollution, to compensate harm and to protect the environment. If an MPA mechanism is to be in the form of a collective action it will require inbuilt safeguards to protect against abuse. [142] While mass litigation is not necessarily the best solution to environmental mass harm claims, it would appear that it could benefit from the managerial advantages that MPAs can confer. It seems without doubt that the time has come for Ireland to finally get in on the multi-party action, as without it there is a severe lacuna in the mechanisms for environmental mass harm redress.

[142] In terms of safeguards that should be adopted, we can learn from other common law jurisdictions and their experience of the need for prerequisites such as superiority, commonality and adequacy of representation.