



**British Institute of
International and
Comparative Law**

COLLECTIVE REDRESS IRELAND



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**British Institute of
International and
Comparative Law**

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The British Institute of International and Comparative Law exists to advance the understanding of international and comparative law, and to promote the rule of law in international affairs.

Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

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I. General Collective Redress Mechanism

1. Scope

Ireland does not currently have a structured collective redress mechanism in force. It follows that no framework exists which currently provides or regulates the use of a general collective redress mechanism in Ireland. The following sub-chapters will, therefore, describe those mechanisms which are used as a replacement to deal with multi-party litigations.

a. The Representative Action

Rule 9 of the Rules of the Superior Courts 1986 states:

“Where there are numerous persons having the same interest or matter, one or more such persons may sue or be sued, or may be authorized by the court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested.”

Although this Rule provides that a person can initiate proceedings on behalf of a big number of people, it should be noted at the outset, that the application of this Rule is, in practice, very limited. The reason for this is the limitations associated with its application.

First, the representative must show that he or she is authorized by the member of the class to act on their behalf. This is however, not a rigid requirement because the authorization does not have to be in writing, and so an implied authorization could also suffice under certain circumstances. Nevertheless, the application of this limitation by the courts impacts the number and the type of the group members.

Secondly, Rule 9 provides that the members of the group on which behalf the representative action is conducted must have "same interest". This requirement was applied by the courts in a restrictive way, namely the interest of the different members must be identical, as opposed to other class action mechanism (and as opposed to the recommendation of the Law Reform) where it is suffice to show that the members of the class share a common legal or factual question. Again, this requirement means that the representative action can only be invoked in limited scenarios.

Thirdly, a representative action also has limited scope of remedies which the representative can seek on behalf of those he or she represent. Only an injunction or a declaratory remedy are available. No damages are allowed. This is, of course, a major restriction on the ability to use this mechanism to conduct multi-party litigations.

Fourthly, a judgment (or a settlement agreement approved by the court) in the commonly known class action binds all the member of the class as defined by the court. Although the members are sometimes allowed to ask to be excluded from the judgment (or the settlement agreement) the default is that they are bound by it, and so an appeal to the court is required if they indeed wish to be excluded. This is an advantage from the defendant's point of view, given that the defendant knows that anyone falling within the definition of the group is bound by the judgment, even absent of an active consent to be part of the group. A representative action is different. Here the judgment would bind only those represented by the representative, namely only those who authorized the representative to conduct the litigation on their behalf. Anyone else is not part of the litigation and hence not bound by its outcome. The result is that future litigations may be initiated against the defendant by litigants who has similar claims to those which were already litigated. Therefore, a judgment (or a settlement agreement) does not "immune" the defendant from the cost involved in similar proceedings if those are brought by litigants who were not represented in the representative action.

Lastly, it should also be noted that Rule 9 does not provide detailed procedural rules, which are usually required in order to be able to manage complex proceedings such as a multi-party action.

b. Test Cases

The test case is mentioned in this report as means to conduct multi-party litigations although in fact it is not quite so given that it is not a structured tool for multi-party cases. Nevertheless, in the absence of a structured legal class action mechanism this tool is used in some instances to solve multi-party disputes and is, in practice, even more favorable and more commonly used than the above-mentioned Representative Action.

The test case is used when numerous proceedings are initiated by different individuals and those proceedings share common (or they arise out of the same) circumstances. If such is the case then one or few cases can be

tried while the others remain pending. The outcome of the leading case would then serve as a benchmark for the other pending cases. In other words, the court's finding in the test case can use as an indication by other litigants who can learn from the judgment what the court's view is in the points they share with the test case.

Several points should be emphasized. Firstly, it is important to note that each one of the proceedings -both the test case and those which were stayed in anticipation of the judgment in the said test case - are separate and independent. That means that the judgment in the test case does not bind the others. It is true that, as mentioned above, in light of the common issue/s they share with the test case, the pending proceedings can get a clue on how the court is likely to role in their own case. This is particularly true in light of the common-law doctrine of precedents, according to which courts usually follow previous rulings with the same circumstances.

It is also important to note, that the ability of the test case to influence subsequent proceedings also depends on the issue of the case. If the case results in a legislation or administrative act being declared unconstitutional, then any subsequent litigant whose case is grounded on a similar argument is likely to easily be able to rely on the judgment in the test case. Things are, however, a bit more complicated when the case involves damages, given that there is a need to assess those damages individually per case.

Despite those two reservations the general rule is that the test case and the pending cases are separate and the said separation means that the judgment in the test case (or in any other similar case) does not bind the rest¹. That is, of course not the case in the "traditional" class-action, where the entire group members are usually bound by the judgment in the case of the representing claimant.

Secondly, usually in class actions the main plaintiff has the duty to conduct the proceedings in a way which is to the best interests of the group members. Here, the plaintiff has no such obligation. The cases are separate and so the plaintiff in the test case bear no obligations towards the pending cases or other potential cases which share the same circumstances.

Thirdly, the fact that the cases are separated also means that a potential plaintiff eligibility (whether his or her action was filed or yet to be so) for relief cannot be automatically derived from the judgment in the test case. Such potential claimant would usually need to initiate separate proceedings in order to get relief. When the defendant is the state, then the state might take a voluntary approach according to which those who can show that they have a similar case to the test case (and hence entitled to the same remedy) could claim it without the need to initiate legal action². However, when the defendant is a private party, then that is not likely (or at least that is less likely) to happen.

Lastly, although the test case and the pending/future cases are separate, the court may be aware that its ruling in the test case has an effect on, potentially, many other cases. Because the test case is separate the judgment might not address those considerations although they were part of the decision making process albeit only in the back of the judge's mind. That is of course an unwanted situation.

2. Available Remedies

Ireland does not currently have a structured collective redress mechanism, and so it follows that there are no provisions discussing the potential remedies available to the group in such proceedings. However, the remedies available in a Representative Action, discussed above, are restricted to injunctions and declaratory relief only. No damages can be awarded. It follows that a representative Action is not an appropriate mechanism to conduct cases when the cause of action on which it relies is tortious.

3. Costs

Ireland does not currently have a structured collective redress mechanism, and so it follows that there are no provisions discussing the allocation of costs in such scenario. The general rules applicable to allocation of costs are set out in Court Order 99 of the Rules of the Superior Courts 1986. According to those rules, and similarly to other common law jurisdictions, the unsuccessful party usually bears the costs of the successful party.

¹ In practice the test case will usually serve as a benchmark which will help the rest of the cases to be settled out of court.

² For example, if the court rules that a certain tax collection was illegal, then the state can (and maybe even likely) to declare that any individual from which the said tax was collected is entitled to restitution without the need to take legal action.

4. Funding

Third party funding of litigation is prohibited in Ireland. This view was reaffirmed recently by the Irish Supreme Court, in a judgment rendered in May 2017 it held that "third party funding to support a plaintiff (where none of the exceptions apply) is unlawful by reason of the rules on champerty"³.

Further, with regard to the Representative Action the relevant legal source is the Civil Legal Aid Act 1995. S9(a) provides that:

Subject to any order made under subsection (10) and to the other provisions of this subsection, legal aid shall not be granted by the Board in respect of any of the following matters:

...

(ix) any other matter 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 interest in the proceedings concerned.

It follows that in Representatives Actions no legal funding is available. To conclude, the Irish system is not very favorable in terms of third party funding in general and public funding of Representative Actions in particular. Because multi-party litigations usually entail heavy financial burden the lack of possibility to fund it would usually prevent initiation of such proceedings.

³ Persona Digital Telephony v Minister for Public Enterprise [2015] IEHC 457.

II. Sectoral Collective Redress Mechanism

Ireland does not currently have a structured collective redress mechanism, and so it follows that there are no provisions specifically intended to regulate sectoral collective redress actions.

Certain EU initiatives allow defined statutory bodies and Consumer Organizations to initiate proceedings the aim of which is to protect consumer rights. However, those proceedings are not to be considered as the "classic" class action because they cannot be initiated by private individuals.

Test cases, which we discussed above can be initiated by private individuals, but this mechanism entails other problems which differ it from the "classic" class-action. Nevertheless, in some sectoral area this tool was proved to be successful.

For example, when Ireland failed to implement the 1978 Directive on Equal Treatment in Social Welfare, legal proceedings were brought against the State arguing breach of social welfare rights, and illegal discrimination. Several test cases were tried before the Irish courts. Eventually, and after the court had ruled in favor of the claimants, the State was willing to pay to 69,000 women who were subject to the same discrimination. In this case the test case tool was successfully used to protect social welfare rights.

A further example are proceedings brought against the State arguing negligence and liability on the part of the State for hearing loss suffered by members of the defense forces during military service. As a result of those proceeding it was found that the State was indeed negligent, and that it did not take measures to protect the hearing of members of the Defense Forces. Consequently this helped establish the liability of the State for other similar cases.

Another example of what can be seen is as a use of the test case mechanism in a niche area of the law is a test case brought against an obstetrician for an unnecessary hysterectomy during childbirth. This is an example to a test case which was brought in the private sphere (as opposed to the cases discussed above which were against the State) and which when was upheld was relied upon by more than 60 other similar pending cases.

III. Impact of the EU Recommendation

The Law Commission Consultation Paper was published back in 2013 and the Report was published two years later in 2015 – long time before the Recommendations of the EU commission. Although both Reports recommended that Ireland make changes to allow multi-party litigations no changes were made.

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