Multi-party litigation

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In this paper I will discuss the some of the arrangements that are currently in the litigation context. Some of the difficulties and obstacles at procedural level and in substantive terms are discussed in the papers by Colm MacEochaidh and Brian Kennelly.

In terms of approaching its recent report on multi-party litigation, it was very important for the Commission to consider - and obviously there is an enormous amount of literature on this - the underlying principles that ought to apply in this particular context. We can see some of these principles applicable in a wider context other than multi-party litigation.

I will look at the general approaches involved in the procedural aspects envisioned by the Commission and how might they differ from the current arrangements in terms of test cases. Obviously FLAC are very much involved in many of these incredibly significant test cases down through the years involving that boundary between private interest and public interest. Funding is discussed to some extent by the Commission, one particular proposal has found its way into the final report as well on the amendment in the Civil Legal Aid Act of 1995.

I will through each of these particular aspects of the report and give you an overview of how the Commission approached the issue.

First I will look at the idea of multi-party litigation in context. Other aspects overlap with litigation, such as campaigning and general consciousness-raising. Sometimes they come to fruition in terms of various legal responses to litigation or potential litigation, and of course we've seen – in a variety of contexts – various versions of the no-fault schemes, going back to the Stardust tragedy in 1981 and I suppose even before that, to Thalidomide in the 1960s. To some extent, there was a recognition that where people are involved in very significant personal difficulties and are unable to access justice through conventional litigation processes, at least there is some kind of recognition of the need to engage in alternative mechanisms to sort out the justice issue.

In the context of no-fault schemes, the Commission is also looking at a version by which you might have some resolution; not totally satisfactory, but at least something. We're living in a country now that is a regulated country; it may be difficult psychologically and culturally for Irish people to

be regulated, but this is the society that we're living in now. So whether we call it 'Big Brother' or the 'hand of government on our shoulder all the time' or whether we agree that random breath testing may be a good idea or that CC cameras are possibly fine in some contexts, we are living in this slightly more regulated context. In terms of campaigning, this does provide opportunities for raising issues. Without wanting to do any lawyers out of any business, we have to look at it from a justice point of view in terms of resolving disputes, whether it's through ADR or EDR or however it might be described.

One of the case studies that was mentioned in the report was the Alder Hey Organ Retention case, involving more than one thousand potential litigants who were dealt with by the Centre for Effective Dispute Resolution over a three-day mediation hearing. Those one thousand disputes not only dealt, in a sense, with what litigation might be able to do but of the course the other, human dimension, which included getting apologies for the way in which people were treated, entirely lacking in dignity. In addition, in involved very important symbolic things, like having a plaque erected, which was part of the mediation process also. Thus while the judiciary and the legal profession are innovative, it is hard to imagine judges saying, 'And by the way in addition to the costs, what about the plaque?' From that perspective, as well just in terms of trying to put it in context, the Commission is conscious of the need to look at the issue against a wide variety of backgrounds. You have to think about that wider context in which all kinds of public interest litigation might be occur.

The next aspect of the Commission's report was to look at the current state of play in relation to multi-party litigation. None of these will be of any particular surprise, but the Commission wanted to at least put on record some aspects. Some developments are happening or have already happened in relation to *amicus curiae* Clearly the Human Rights Commission does have standing given to them on a statutory basis. This is a development which obviously is coming from international instruments requiring the need to ensure that rules such as standing, which are incredibly entrenched as we know in private law litigation principles in Ireland, must not stand in the way of resolving disputes in appropriate circumstances. There is a lot of international pressure in the background, maybe not immediate pressure, but to some extent some of those pressures come into play here.

Referring to the PowerPoint, I just wanted to remind myself by putting the word 'statutory' in brackets after 'NGO' that, in a sense, across the wide variety of public interest litigation, there is a need to ensure that NGOs like the Consumers Association now have standing. There is an increasing acceptance that NGOs in the statutory context have a very important role in declaratory proceedings. In terms of the Irish Penal Reform Trust case, for example, the analysis and judicial approach there is very important. Judgment had just been delivered shortly before the Commission's report went to press so we didn't have the opportunity to really look at it in detail,

but it certainly seems to be along the lines of some of the English case law, particularly the Greenpeace case. This seemed to indicate that the judges both in England and Ireland are recognising the importance of having somebody like the IPRT involved, where individual litigants may not be able to fully represent the wider aspects of a case. From that perspective, obviously, these are very important issues - it's an evolving area.

There are other typical types of actions that are represented as a test case and in which FLAC has been very much involved in the past, notably the *Airey* case and the Social Welfare Equality case. The Commission looked at these, in particular the Social Welfare Equality case, especially as potential case studies for how people actually manage to see an issue from the multi-party perspective despite obstacles. The Social Welfare case was a multi-party case, trying to persuade and put a bit of pressure on the Department of Social Welfare to review its case law. Ultimately it did in terms of the litigation involved.

Although test cases may in themselves be quite narrow in terms of the formal application of the ruling to the individual litigant or series of litigants, where again some accounts are probably about repetitive strain injuries, signing the statements of claim and how is the statement of claim penned, there is a particular issue here about the indirect impact which a test case ruling may have, even though in formal terms it doesn't have a particular impact. Even looking at the way in which social welfare claims trundle fairly quickly through the courts, through the High Court, Supreme Court, Court of Justice and back again into the High Court and Supreme Court, there is a clear absence of basics like fairness and transparency in the way in which they are being handled.

In that respect the Commission then went on to look at the underlying principles in analysing what reforms ought to be put in place. There is enormous emphasis in the report on procedure and procedural fairness and efficiency. The Commission did consider fairness to defendants, particularly in multi-party litigation, and in the Irish context traditionally we don't have a huge amount of litigation, on the multi-party front anyway, involving consumer protection or even in a sense private litigation, but the State or its agencies have been defendants in many of the famous multi-party actions including the Social Welfare cases and the army deafness claims. So from that perspective the Commission is conscious of the need to look at this from a procedural perspective and in terms of fairness both for complainants, or plaintiffs, and for defendants. But equally, then, the Commission is very conscious of both the literature and the practical aspect of the principal of applying access to justice.

This had an overwhelming impact on analysis in various law reform bodies in common law jurisdictions that have looked at how to maximise the potential for people to gain access in the context of litigation, where a number of common areas of interest are identified. In the context of applying those

principles, the ultimate solution that the Commission is recommending would not be described as radical in the context of existing procedural mechanisms for achieving justice in multi-party litigation terms. It is an alternative to, not a replacement for existing arrangements like test cases and representative actions.

The other aspect of the recommendations is what form they might take - the Commission generally recommended that most of these procedural reforms could take the form of a means of court??? and a draft means of court was included in the report. Further, the Commission recommended an amendment to the Civil Legal Aid Act 1995 that made it clear that multi-party actions would not be excluded from the theoretical scope of the act. However, real world issues of whether the Legal Aid Board actually has the resources to fund any of these things are outside the control of the Commission.

In terms of the particular details of the Commission's proposals on multi-party actions, one basic points evolved between the consultation paper and the report. In the consultation paper the Commission had provisionally recommended there should be an opt-out process or opt-out principle at the head of any reforms in this area; that would steer it slightly in the direction of the US model. However, in the end the report of the Commission tends towards the opt-in principle. In other words, it is really based on the traditional sense of individual litigation; it is based on the individual litigation model, where somebody is only bound by a court order if they actually choose to become bound by opting in, by issuing proceedings. There are some elements which might have a slightly opt-out or lock-in version to them and that some elements of that have been incorporated into the proposals of the Commission. By and large, however, the Commission's proposals are quite similar to the group litigation order (GLO) arrangements in England and Wales. Obviously the Commission would be conscious that there have been a number of criticisms of the GLO procedure in England and Wales, perhaps both on a principle basis and on a practical basis, in terms of the way that they may not produce finality, whereas an opt-out system produces finality for all sides in litigation. The Commission took the view that at this particular instance it would be too radical a step to move towards an opt-out system. The conclusion was that on balance it would be based on the existing principles of civil litigation which are primarily opt-in.

Now there are some elements of opt-out or lock-in; for example, it was recommended by the Commission that at a certain point, if a piece of litigation is recognised and certified as multi-party litigation, the court – whether it is the High Court or Circuit Court – has jurisdiction to order that individual litigant must join the multi-party action. From that point of view there is a certain element of mandatory consolidation of proceedings in the Commission's recommendations.

The other aspect that shows similarities to the English and Welsh GLO system is that it concerns judicial certification of individual proceedings. In other words, the starting point would be individual litigation for somebody who brought their own case and who must actually initiate those proceedings. You then have a collection of these initial individual proceedings, which are subsequently joined together and brought before a judge, who certifies that they are suitable and appropriate to be put together and dealt with as a registered single claim. All parties involved then would be placed on this multi-party action register. This is largely similar to the England and Wales GLO process. There are some elements that differ from the English GLO process, such as discretion around cut-off dates for entry on the register. The proposal states that there may be a time, for example, a certain point in the proceedings from which people will either not be allowed to join or not be allowed to leave the register. There are particular issues around whether this is a move away from traditional litigation the Commission is conscious of the need to respect the individual's rights and entitlements, on the one hand, and the integrity of the multiple / class element of the litigation on the other; i.e., whether you look at it purely in terms of the individual entitlements of one litigant, or consider the concerns of the group as a whole. The balance which the Commission was trying to strike was one in which the analysis is really based on the legal litigation and the entitlement of people only to be bound by decisions of which they are aware and, on the other hand, the need to recognise that there is little point in having some new process that really just looks like the old process used by people in the past. Thus there is an element of trying to lock people into the litigation to some extent, once they have voluntarily joined it in the first instance.

The last area that the Commission looked at was funding and the various obstacles that it might raise on the access to justice front. The Commission looked at a number of different connected areas, including costs and funding generally. Firstly, the Commission was very conscious of the need to make sure that while it didn't have a role in recommending a budget for the Legal Aid Board, at the very least the statutory bar on the Board even considering multi-party actions for legal aid should be removed, as it had outlined in the consultation paper. It is one thing for the Commission to propose that civil legal aid be amended but it is another for the government and Oireachtas to act on this proposal and a third step for them to actually give funding to the Legal Aid Board in this area. In terms of formal changes, therefore, there are a lot of steps still to go there and a lot of campaigning still to be done.

In terms of basic rules about costs, the Commission took the view that, in general, costs would be shared amongst all registered members. This is quite different from transactions where the party might actually go forward as the representative case or the class action test case within the class, as in some of the class action processes which involve an opt-out system, the lead test case would be at risk in terms of costs. The Commission held that this should be shared among all the parties on the multi-party action register. However,

reflecting the fact that there are no rules in the context of costs, the Commission suggested there ought to be a discretion for the court to decide that costs would not be shared among registered members, as it might be appropriate in some instances and in keeping with the traditions and history of costs.

In the UK the conditional fee arrangement was introduced in a time of general changes made to civil procedure rules arising from the Woolfe Reports of the mid-1990s and as part of the general review of civil justice. This is not the case in Ireland and in reviewing the existing situation, the Commission decided it would not be appropriate in the context of multi-party actions to make fundamental changes regarding fees. It was also conscious of the fact that there was a legal costs working group which hadn't yet reported at the time on legal costs. It has since come up with some proposals in a report published earlier this year. This legal costs working group report recommended that practitioners should only be paid for work actually done, which is a fundamental change in terms of dealing with legal costs. This may mean that costs come down or that practitioners undervalue their legal fees. In any event there are some quite significant proposals which no doubt will result in legislative changes over the next few years.

With regard to insurance, it is possible to limit liability to some extent, as for example, most people will, believe it or not, probably have various insurance policies which include what are called 'before the event legal expense coverage' or 'BTE' insurance, such as in the case of house insurance policies. This affords high-quality legal representation without costing a fortune. Such provisions have become quite common in the fairly basic insurance policies that we all take out. While this may be the case, the Commission spent a lot of time investigating the Irish market in this area. There is a relatively uneven approach to 'before the event' insurance coverage in Ireland and there are even insurance companies willing to provide such cover if the client considered themselves potentially at risk in terms of litigation.

There is then the other kind of insurance which applies when you know that you're into litigation, 'after the event legal expense coverage', which is a more expensive as then the insurer is aware of the risk involved. Apparently there was some after the event insurance cover available in England, but not a huge amount, as the insurers are rather apprehensive about it. From what the Commission found, there was not really any kind of real 'after the event' coverage in Ireland, so it is not really applicable to litigation except where there are standard forms in some personal insurance policies. The Commission accordingly did not make any proposals in the context of insurance.

To finish, the approach of the Commission is to look at the issue of multi-party litigation from the perspective of applying in whatever way it could the principles of appropriateness, fairness and efficiency. It is an alternative route that the Commission is recommending from the point of view of

procedural fairness. It serves to remind us that litigation itself is one part out of all of the other pieces of possible armoury in the context of reform, substantive and procedural, any area of activity.

Copies of the Law Reform Commission's report on Multi-Party Litigation are available by contacting :

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