CIVIL JUSTICE SYSTEMS

A Comparative Examination of Multi-Party Actions

The Case of Environmental Mass Harm

Joanne Blennerhassett

Hart · CH Beck · Nomos

A COMPARATIVE EXAMINATION OF MULTI-PARTY ACTIONS

This monograph addresses the phenomenon of mass harm and how it may be resolved through collective redress. It examines particularly how such redress may be achieved through mechanisms such as multi-party actions (MPAs). In order to do this an analytical framework is created against which to evaluate various multi-party procedures. This is illustrated through the experience of a selection of common law jurisdictions in dealing with mass harm, namely that of England and Wales, Canada, Australia and the United States, as well as that of EU collective redress. It examines multi-party action laws benchmarked against the objectives identified in the analytical framework. The phenomenon of environmental mass harm in particular is explored as a case study, as it illustrates some of the difficulties that may arise in mass harm litigation. Also, this work explores where the best solutions for mass harm redress may lie in the future—perhaps in collective actions or through alternatives such as regulation and alternative dispute resolution or a combination of these. Finally, the experience of mass harm litigation in Ireland is examined, as currently this jurisdiction does not have an effective mechanism for dealing with mass harm.

Volume 4 in the series Civil Justice Systems

Civil Justice Systems

Series General Editor, Christopher Hodges, Director, Swiss Re/CMS Research Programme, Centre for Socio-Legal Studies, University of Oxford

This series covers new theoretical and empirical research on the mechanisms for resolution of civil disputes, including courts, tribunals, arbitration, compensation schemes, ombudsmen, codes of practice, complaint mechanisms, mediation, and various forms of Alternative Dispute Resolution. It examines frameworks for dispute resolution that comprise combinations of the above mechanisms, and the parameters and conditions for selecting certain types of techniques and procedures rather than others. It also evaluates individual techniques, against parameters such as cost, duration, accessibility, and delivery of desired outcomes, and illuminates how legal rights and obligations are operated in practice.

Volume 1: *The Costs and Funding of Civil Litigation: A Comparative Perspective* edited by Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka

Volume 2: *Consumer ADR in Europe* by Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda

Volume 3: *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* by Christopher Hodges

A Comparative Examination of Multi-Party Actions

The Case of Environmental Mass Harm

Joanne Blennerhassett

• HART •
PUBLISHING
OXFORD AND PORTLAND, OREGON
2016

Hart Publishing
An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

First published 2016

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-50990-529-4 (Hart Publishing)
HB: 978-3-406-703-62-1 (Verlag CH Beck)
ePDF: 978-1-50990-530-0
ePub: 978-1-50990-531-7

Library of Congress Cataloging-in-Publication Data

Names: Blennerhassett, Joanne, author.

Title: A comparative examination of multi-party actions : the case of environmental mass harm / Joanne Blennerhassett.

Description: Oxford ; Portland, Oregon : Hart Publishing, 2016. | Series: Civil justice systems ; volume 4 | Includes bibliographical references and index.

Identifiers: LCCN 2016019865 (print) | LCCN 2016020006 (ebook) | ISBN 9781509905294 (hardback : alk. paper) | ISBN 9781509905317 (Epub)

Subjects: LCSH: Class actions (Civil procedure) | Joinder of actions. | Liability for environmental damages.

Classification: LCC K2243 .B54 2016 (print) | LCC K2243 (ebook) | DDC 344.04/6—dc23

LC record available at https://lccn.loc.gov/2016019865

Series: Civil Justice Systems, volume 4

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon CR0 4YY

To my family, my Doctors of Love.

FOREWORD

The perennial question of how to deliver collective redress is complex and multifarious. It is one that continues to vex policymakers and lawyers. The reality of the way in which modern life operates has led to an increase in 'massification' on many levels, such as mass production and mass consumption. Unfortunately the occurrence of mass harm is also increasingly evident in our time.

We are familiar with the broad spectrum of types of harm that may occur, ranging from mass injuries caused by defective products or environmental exposure to toxic chemicals, to mass financial losses resulting, inter alia, from violations of consumer law or competition law. In almost every part of the world, unfortunately, such harm may occur and the need for redress becomes a key question. Where do the solutions to providing collective redress to mass harm lie? The answer may be found in an array of approaches such as through regulation or dispute resolution. The appropriate response varies and it is clear that there is no 'one size fits all' answer to the phenomenon of mass harm. The issue of access to justice for those who suffer mass harm is a concomitant question. In appropriate circumstances, where legal proceedings result, groups of victims may wish to aggregate their legal proceedings in order to try to surmount some of the obstacles that they may face in pursuing a legal action individually. One of the procedural mechanisms that has evolved as a response is that of the multi-party action (MPA).

The author, Dr Blennerhassett, as an expert in tort law and dispute resolution, examines the issues surrounding mass harm, collective redress and MPAs in a broad and practical way to address these questions. She has scrutinised the experience of a selection of common law jurisdictions and analyses how they have dealt with MPAs and alternative tools in the pursuit of collective redress. The US, as a forerunner in multi-party actions, teaches broad lessons and evidences many of the positives and perceived ills of mass litigation. England and Wales have adopted a much more conservative approach to such litigation. Dr Blennerhassett's expertise in EU law helps the reader to engage with EU policy and EU Member State experience in addressing the challenges of mass harm, as many Member States have faced similar difficulties in responding to such harm. She appraises whether and to what extent MPAs may improve access to justice and empower those harmed with a route to collective redress. Dr Blennerhassett has created an excellent analytical framework of MPA objectives and uses these as benchmarks to assess how and whether MPAs may assist in the pursuit of collective redress. This is a unique and valuable contribution to scholarship in the field of dispute resolution. As an environmental law specialist, Dr Blennerhassett invokes the phenomenon of environmental mass harm as a case study to illustrate some of the challenges and complexities that mass harm litigation can present.

Having a background and training as a practitioner, Dr Blennerhassett recognises the need to explore the very real challenges facing those dealing with mass harm and she was strongly motivated by the practical law reform aspect of this research. The results of this

work are both informative and compelling. It is clear from her research that jurisdictions without some form of procedural mechanism are impeding access to justice for those who have suffered mass harm.

Dr Blennerhassett concludes that MPAs are not the panacea to mass harm litigation. Instead, they only form part of a suite of solutions that may enable access to justice and collective redress. She advocates a holisitic approach to such redress, highlighting the use of regulatory solutions and alternative dispute resolution techniques as complementary tools in this range of solutions. It is clear that MPAs have a crucial role as management mechanisms for dealing with cases of mass harm. While MPA methods may vary from jurisdiction to jurisdiction, their objective does not. The methods invoked reflect the realities of the different legal systems. The question of which MPA mechanism may best suit each jurisdiction is a policy decision based on these realities. All of the jurisdictions examined are endeavouring to achieve the same output of managing collective redress, the overriding need being that of procedural justice. This conclusion is supported by the author's analytical framework which clarifies that the fundamental reason for the need for MPAs is to enable the efficient management of mass harm litigation so as to maximise just outcomes; that they are an invaluable procedural tool to assist in 'managing the unmanageable'.

Ireland is an example of a jurisdiction that has clearly experienced many large instances of mass harm, often resulting in costly, unmanageable, inefficient litigation or compensation tribunals. A few examples include: the army deafness cases against the State; the blood contamination caused by Hepatitis C; the pyrite construction damage that resulted in the longest-running case in the history of the High Court. Despite a clear procedural need for managing mass harm redress, Ireland still does not have an effective MPA procedure. Moreover, MPAs appear to be actively discouraged. Instead, the courts invoke a confusing array of alternative methods where MPAs might have played a more obvious role. In 2005, the Irish Law Reform Commission (LRC) recommended the introduction of an MPA procedure as an additional procedural mechanism to assist with mass harm litigation for use in cases where there is a clear need. Despite this recommendation, more than 10 years later there has still been no change. Dr Blennerhassett raises a number of critical questions in this work that need to be urgently addressed and resolved. These questions include: why a jurisdiction such as Ireland, despite having experienced many cases of mass harm and litigation, remains reluctant to introduce MPAs? Why has it not yet taken steps to adopt a procedural mechanism that will enhance access to justice for those who need it? More than 10 years after the Law Reform Commission recommendations, why have these questions not been resolved?

One may speculate that there are policy reasons behind this stagnation as there seems to be an almost de facto prohibition on such a mechanism. Perhaps it is because the State is likely to be a regular defendant in cases of mass tort and personal injury litigation. It is also likely that a fear exists of opening the cliched floodgates of litigation if such a procedure were to be introduced without adequate controls. The LRC, however, recommended the introduction of a procedure designed to minimize such risk. Due the lack of appropriate mechanism, those with cases that would be suited to MPA must pursue them in another way. It is evident that great injustices and inefficiencies would result from these improvisations. Claims that the introduction of an MPA procedure would encourage a 'compensation culture' are erroneous, because, in suitable cases, MPAs can assist the efficient management of such cases. While MPAs are not a metaphorical silver bullet that will resolve all the

challenges of delivering effective collective redress, they are a necessary procedural mechanism that ought to be in the legal armoury of any jurisdiction in order to assist in providing access to procedural justice. Dr Blennerhassett offers a keen insight into the nature and necessity of MPAs as a response to the modern phenomenon of mass harm. She explores why Ireland, in particular, not only requires but also deserves this legal mechanism in order to protect its people from those who have caused mass harm. This book will provide invaluable guidance to judges, lawyers, academics and policymakers who inevitably face the modern challenge of managing mass harm litigation.

Peter Sutherland SC

CONTENTS

ACKNOWLEDGEMENTS

With heartfelt thanks to Dr Owen McIntyre, Professor Christopher Hodges, Professor Steve Hedley, Peter Sutherland SC, Erin Brockovich, Professor Colin Scott, Professor Joe McMahon, Professor Imelda Maher, Professor Deborah Hensler, Professor Vince Morabito, Professor Stefaan Voet, Professor Allan Kanner, Professor Itzchak Kornfeld, Professor Jasminka Kalajdzic, Mark Tynan, Caroline Fine, Dr David McFadden, Veronica Calnan, Pat Rice, Sinead Moloney, Mel Hamill, Robert Crossley, Tom Adams, Emma Platt and all at Hart Publishing. Special thanks to Rowland, Veronica, Rowley and Geoff Blennerhassett for giving me solace and safe haven. Also to all my dear friends for their kindness. Lastly, to Sully, Chloe and Jamie, without whom I would never have managed to do this—thank you for all your love and for keeping me going—it's been an emotional odyssey.

AUTHOR BIOGRAPHY

Dr Joanne Blennerhassett is a graduate of Trinity College Dublin, Université Paris 2 Panthéon-Assas, University College Dublin, the Law Society of Ireland and University College Cork. She is a College Lecturer in the Sutherland School of Law, University College Dublin, where she has lectured since 2003, specialising in Environmental Law, Tort Law, and Dispute Resolution. She has a background as a practitioner having practiced as a solicitor. She is also a qualified mediator and arbitrator. She was recently awarded a PhD in collective redress which formed the background research for this monograph.