Third Annual Conference on Global Class Actions
Sydney and Canberra, 11-12 December 2009

Following up on the 2007 Global Class Action conference co-sponsored by Stanford Law School and the Oxford Centre for Socio-Legal Studies and a smaller workshop held at Oxford in December 2008 that brought together some of those who participated in the 2007 conference, Profs. George Barker and Peta Spender,of Australian National University and Prof. Peter Cashman of Sydney University organized a conference at which speakers reviewed the status of class actions in their respective countries and discussed ongoing and proposed research. The Sydney/Canberra conference focused especially on third-party financing for class and group actions, an issue which has attracted increasing attention worldwide since the 2007 conference. The countries represented at the conference included Australia and New Zealand, England and the Netherlands, and Canada and the United States. No representatives from elsewhere in Asia or Europe or from Latin America were able to attend the Sydney/Canberra conference, but papers reporting new developments in those parts of the world have been posted on the Stanford Global Class Action website. Slides and other materials shared at the conference will be posted on the website as they become available. Discussions are underway about follow-up conferences in 2010 and 2011 and information will be posted on the website as it becomes available.

The Status of Class Actions and Related Research Projects

England

Prof Paul Fenn of Nottingham University and Prof Neil Rickman of Surrey University discussed the English Costs Review being undertaken by Lord Justice Jackson. Prof Fenn is one of Jackson's team of assessors. The Jackson Report will be published on 15 January and a launch conference is planned for then. Prof Fenn reported that Lord Woolf's Report of 1996 had included a matrix for fixed costs into which he had intended that figures would be put, and it might be anticipated that Jackson LJ will propose a similar matrix that includes figures for hourly rates, plus small percentage uplift elements so as to incentivise lawyers to carry out more work on 'larger' cases and hence provide an element of proportionality. The Jackson Report is likely to be highly influential within much of the English-influenced common law jurisdictions. A fixed recoverable cost tariff for lower value claims (possibly up to £250,000) would bring the English system closer to that of civil law systems such as Germany. Profs. Fenn and Rickman are collaborating with Profs. Barker, Spender and Eisenberg on a comparative study of class actions, which has only recently gotten underway. (Note: The Final Version of the Jackson report has now been published and is available at http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf)

Prof Ted Eisenberg of Cornell University presented the latest data from the ongoing research by him and Prof Geoff Miller of NYU from a large US electronic database on class actions, focusing primarily on federal class actions but including some data as well on state-based class actions. One finding is that courts' fee awards to class counsel are remarkably uniform, in percentage-of-recovery terms., and that the general pattern is that the percentage of recovery

awarded in fees diminishes as the total size of the recovery increases. From these and other data generated by this research project, Eisenberg argued that the system works very well and proportionately. (A link to a draft of Prof. Eisenberg's paper, co-authored with Prof. Geoffrey Miller can be found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1497224

Prof Deborah Hensler of Stanford University presented an overview of developments in US class action law. After the adoption of the modern class action rule (federal Rule 23) in1966, class actions expanded in scope and number. By the 1980s class actions appeared to have become an accepted part of the civil litigation landscape. But an increase in the number, scope and variety of federal and state class actions in the 1990s, led to legislative and judicial "pushback". This was reflected in the passage of the Private Securities Litigation Reform Act in 1995 (intended to curb securities class actions), the US Supreme Court 's decisions in *Amchem v. Windsor* (1997) and *Ortiz v. Fibreboard* (1999) (curtailing the use of class actions for mass tort cases) and a lengthy and contentious effort to amend Rule 23. The 2003 amendments to Rule 23 that emerged from this process increased judicial control over class counsel appointment, class counsel fees, and settlements and provided for appeal of class certification decisions but did not restrict the use of 23(b)(3) damage class actions. Notably, the amendment process left the opt-out provision for damage class actions in place. Since then Congress and the courts have picked up where the amendment process left off . The Class Action Fairness Act (2005) expanded federal jurisdiction for class actions, where corporate defendants hoped judges would look more skeptically at motions for class certification. Appellate courts applied heightened evidentiary standards to class certification and a series of US Supreme Court decisions tightened pleading standards for securities class actions (*Tellabs*), found no private right of action against second parties in securities class actions (*Stoneridge*), and more recently raised pleading standards for civil actions generally (*Twombly, Iqbal*). Efforts to represent non-US claimants in class actions in US Courts have also met with judicial resistance. And questions by the justices during recent oral argument in a class action case (*Shadygrove)* revealed considerable skepticism among US Supreme Court justices about the value of class actions. It is not known how these policy actions have affected class action litigation overall. Class action filings continue to be quite robust but filings only show part of the picture; available evidence suggests only a small fraction of cases filed as class actions result in classwide settlements. Moreover, efforts are underway in Congress to overturn many of the judicial decisions that favor the business community. The advent of third party funding could significantly change plaintoff and defendant strategies. (Deborah's Powerpoint slides for her talk are posted on this website under Articles & Commentary.)

In subsequent discussion, Prof Eisenberg referred to a successful media campaign by industry against plaintiff lawyers. Prof Hensler accepted that there are some abuses amongst the good of the US system, and there is a need for regulation. Richard Murray, a former strategic adviser to Swiss Re, maintained that data held by reinsurers indicated that US tort costs had for some decades been rising at an unsustainable rate: liability costs growth exceeded US GNP growth 1950-2000 by 50% pa. But because these data are confidential, Mr. Murray was unable to provide public sources for this observation. In addition to policy shifts identified by Prof Hensler, Mr. Murray pointed to the reversal of the ‘fraud on the market’ theory and restraints on punitive damages and the demise of scheme liability theory. He noted that 23 bills are currently in Congress pending to reverse these and other business-friendly decisions, reflecting a more "populist" Congress and White House.

Dr Christopher Hodges of CSLS Oxford presented the new model for collective redress that appears to be emerging within the European Union. This involves a matrix of public and private enforcement techniques, within the public policy circumstances that the EU and Member States place most emphasis on public enforcement for securing observance of public norms and place limited emphasis on private enforcement save for compensation for damage to private rights (the current exception being in competition law). Accordingly, the new model prioritises direct negotiation, facilitated by private actors or by public oversight, and places less emphasis on judicial remedies such as class actions (whilst recognizing that judicial procedures still have a role to play). However, innovative approaches are occurring in various directions, that are difficult to summarise.

Dr Hodges noted new judicial collective mechanisms in Bulgaria, Italy, Russia, and proposals in Poland, Belgium, Brazil and UK (financial services), and at EU level for competition damages and possibly consumer collective redress.

Prof Ianika Tzankova of Tilburg University discussed the Dutch class action situation and major cases that have been successfully settled. CFAs are prohibited, third party funding is viable, legal expenses insurance exists (but before- not after-the-event), and some costs are shifted on a tariff basis. A 1994 law introduced a generic collective action, brought by an association, but not for damages – instead, claims may be brought for an injunction or for a declaration (and this is used as a first stage). There are no staistics on the number of filings but around 100 have been completed to date. The 2005 collective settlement law provides for court review of settlements in order to make them binding. Five such settlements have occurred so far. The DES case covered 34,000 claimants and only a hand full opted out. There were many opt-outs in the Dexia bank case, which has a very specific background and a recent decision of the Supreme Court rejected the argument that the settlement terms were approved as reasonable/ a bench mark also for those who opted out. In the Shell cases the court accepted jurisdiction for shareholders both inside and outside the Netherlands, as in the latest cases (Vie d'Or and Vedior). Proposed legislation aims at facilitating settlements further, by accelerating decisions on points of law to the Supreme Court, and in judicial assistance of settlement.

Prof Garry Watson of Osgoode Hall, Toronto explained the thriving Canadian class action situation. Reliance on specialist judges had been found essential. Ontario has cost shifting and the Bar has now realized that they have to indemnify the representative claimant, which gives lawyers a stake as third party funders. A significant number of cases have been funded by the Ontario Class Proceedings Fund. Two commercial Litigation Funders are now operating.

Profs Barry Allen and Kim Economides of Otago University presented the new Zealand position. There is an old fashioned UK-style representative claim mechanism only at present. A draft class action mechanism was produced a year ago, but no further action has occurred. NZ is a small country with only 3 million people. Perhaps the federal structure of other countries lends better to growth of class actions. The accident compensation scheme eliminates pressure for damage class actions, and there is a general lack of litigation funding. In NZ there is an emphasis on rule change through legislation; in addition the current judiciary is not favorably inclined towards class actions.

Litigation Funding (LF)

Moira Saville of Mallesons Stephen Jaques spoke on Australian developments, notably the *Brookfield Multiplex* decision of 20 October 2009 over LF as Managed Investment Schemes and need for regulatory approval. (Note: The issue of whether and how to regulate third-party litigation financing has now been referred to the Australian Securities and Investments Commission.)

Van Moulis of Slater & Gordon outlined various developments on LF, including the *Jameson* decision.

John Walker, MD of IMF Litigation Funding, based in Australia, outlined the business and operations of his company in LF. He said that they fund a wide range of cases, from an economic rationalist perspective. They were listed in 2001, and have expended into funding class actions, of which around 50% are shareholder cases, followed by financial services and other cases. The Australian Standing Committee of Attorneys General is holding an inquiry into possible regulation of LF. The High Court recently held in *Brookfield* that a funder (the Maurice Blackburn firm) should have been registered under the financial service provider regulatory scheme: pending decisions, temporary exemptions have been granted by the authority (ASIC) so as to allow current cases to continue. The matter has been passed from the desk of the Financial Services Minister to ASIC. IMF is in fact the only current funder to hold an ASIC licence. It covers capital adequacy, product disclosure statement requirements (practice is audited) and complaints handling systems. Current issues include:

1. an AG review on regulatory focus concerning cy pres distributions;
2. the exclusion of 'free riders' because the courts in Australia have permitted class actions that are in effect opt-in, with the class comprising those who enter into LF contracts with the funder of a case: this leaves those who have not opted in free to take action after the outcome of any favourable case;
3. whether there should be disclosure of *both* the existence of an LF contract by plaintiff to defendant and *also* insurance by defendant to plaintiff. Walker argues that the latter would prevent unnecessary litigation;
4. whether LFs should be able to provide a 'complete service' to a client: Walker argues that many clients wish to hand all decisions over to the LF, who is in a position to provide an expert service in handling a case, and capable of taking all decisions. Some argue that this may be a step too far from client autonomy and control over their own affairs.

Robert Johnson, a banker, voiced the concern that LF may encourage collusion, if cases are filed and disappear if the defendant pays the funder or law firm. Walker responded that the LF provides the instructions to the lawyer but the client/lawyer can override them. Where a class has different views, IMF has poled the class to ascertain what they think (this can be done efficiently and speedily by email). IMF's experience is that most people do not have a view and are content for IMF to suggest decisions. To provide some oversight, IMF has invited institutional clients to form a committee of overseers on a case. At other times, the funding

agreement specifies that decisions on settlement may be taken by Senior Counsel. As an economic rationalist, IMF seeks to pick cases for which the chances of success exceed 60% of the value of the claim, so the interests of the members are less. Prof Hensler noted that a possible solution to class conflicts involves sub-classes, each with their own representative plaintiffs and counsel, but this may become unwieldy. Van Moulis of Slater & Gordon noted that the judge scrutinises costs and the different methodologies of lawyer and funder.

John Walker said that LFs should have a duty to the court. They undertake long and careful due diligence processes before accepting cases. They look at the value of a case by its future discounted cashflow settlement value. Lawyers look at the merits of a case (because of the existence in Australia of the loser pays risk), and then the prospects of recovery (availability of assets, and aggregation).

The outcome of recent case law in Australia has been to convert a formerly opt-out class regime into a consensual opt-in regime, in view of the need for plaintiffs to enter contracts with a LF. Opt-in class actions solve the issue of free riding but may present other problems. Australian funding agreements typically provide that clients will not be liable for adverse costs, which risk is covered by the funder. Prof Cashman noted that if a representative plaintiff turns out to have a bad case and has to drop out, the lawyers assume liability for costs and are prevented from proceeding with other good cases in the class; it would be preferable for the lawyers to have no liability for costs and not get into funding cases.

The Ontario Class Proceedings Fund takes a premium of 10% of recoveries, and is widely used. The Canadian law firm Siskinds funds cases and the court has recently held that a 6% premium was reasonable for a recovery of C$10m but not if it were C$3m. Representative plaintiffs are subject to the cost shifting rule, but Canadian lawyers are now giving indemnities to their clients to cover this risk, so as to avoid the need for clients to take independent legal advice on the costs risk, which would threaten the viability of actions.

Dr Hodges noted that Prof John Peysner and he are undertaking a study of LF in England & Wales, and that the outcome of decisions on what constitute appropriate ethical arrangements might differ as between England, Australia and USA.

Law Reform

Prof Peter Cashman of Sydney University presented an overview of Australian law reform initiatives and identified key reports and commentary outlining reform proposals, including

- ALRC Class Actions Report 1988, and unimplemented issues on fees and funding
- ALRC ‘Managing Justice’ Report 2000
- Murphy & Cameron article 2006
- VLRC ‘Civil Justice‘ Report 2008

    - Key recommendations
        - Contrary to *Nixon v Philip Morris*, all members should have a claim against one (not all) class defendants;
        - Limited opt-in classes should be permissible;
        - Cy-pres should be available on conditions for the residue of an undistributed fund;
        - A new funding mechanism is needed, with the Ontario funding scheme a promising option
- Clark & Harris MelbLR 2008 article
- Commonwealth 'Access to Justice' Task Force 2009-12-17
- Morabito UNSWLJ 2009 article.

Prof Cashman said that the VLRC had proposed that *all* cases should satisfy a merits requirement.

Research

Prof. Vincent Morabito has received a large research grant from the Australian Law Reform Commission and from several other sources to conduct an empirical comparative study of Australia's class action regimes. Prof. Morabito was unfortunately unable to attend the conference. His first report on study findings was published in December 2009 and can now be downloaded from this website; check the tab labeled "Empirical Data."

Profs. Barker, Spender, Rickman, Fenn and Eisenberg are collaborating on a comparative class action project, focusing on costs, also funded by the Australian Law Reform Commission. The Rand Institute for Civil Justice (ICJ) in collaboration with UCLA Law School and Prof. Rickman (as representative of Rand's European office) have announced a project on third-party litigation financing. The Federal Judicial Center (FJC), the research arm of the US federal judiciary, is continuing research on class actions, focusing on the effects of CAFA. Details about Rand ICJ and FJC are available on their respective websites (www.rand.org and www.fjc.gov). The Oxford CSLS has a number of research projects on general civil justice mechanisms, large cases, and non-court alternatives in UK, which will extend to EU. Research by individual academicians in the US, Canada, and elsewhere continues; because of resource constraints, much of this work relies on available court data, which often omit significant information about the nature and outcomes of cases. Participants agreed to continue discussing the potential for collaborative research, including more qualitative case studies on the development, progress and outcomes of selected class and non-class group actions.