Some Comparative Observations on *Res Judicata* for Canada's Newest Class Actions Regime

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I. INTRODUCTION

In January 1999, the Manitoba Law Reform Commission produced a detailed and instructive report entitled "Class Proceedings",[1] in which that Commission recommended that Manitoba should adopt a statutory class action regime.[2] That suggestion, and the proposed legislation which the Commission drafted to facilitate its various recommendations, recently became a reality when the *Class Proceedings Act* came into force.[3] Additionally, class action reform is clearly gaining momentum elsewhere in Canada, with the introduction in 2002 of two new provincial class action regimes,[4] and the release in 2000 of a detailed discussion paper by the Federal Court Rules Committee concerning the possible introduction of class proceedings for that court.[5] Of course, three provinces—

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1 The report was co-authored by Professor Karen Busby of the Faculty of Law at the University of Manitoba, and by Mr Jonathan G. Penner, an independent researcher.

2 *Class Proceedings* (Report No 100, January 1999) at 36 and recommendation 1.

3 *Class Proceedings Act 2002*, SM 2002, c 14, and see earlier: Third Session, Thirty-seventh Legislature 2001/2002, available at http://www.gov.mb.ca/leg-asmb/misc/billstatus.html (Bill No 16). The Act was assented to on July 25, 2002, and was proclaimed in force January 1, 2003.

4 Newfoundland and Labrador's *Class Actions Act 2001*, SNL 2001, c C-18.1 (commenced operation on 1 April 2002), and Saskatchewan's *Class Actions Act 2001*, SS 2001, c C-12.01 (commenced operation on 1 January 2002).

5 *Class Proceedings in the Federal Court of Canada* (Discussion Paper, 9 June 2000).

Quebec,[6] Ontario,[7] and British Columbia[8]—introduced expanded class action statutes much earlier, and despite fears of a flood of litigation and "legalized blackmail", the available evidence indicates "that expanded class proceedings in those provinces has not spawned litigation that is excessively burdensome either in terms of the number of suits that have been brought or of their demand on court resources."[9]

Despite such reassurances, the purpose of this comparative article is to consider one small and, thus far, rarely-litigated area of jurisprudence that has the potential to increase the burdens of class litigation upon both courts and defendants. This jurisprudence concerns the application of the extended principle of *res judicata* to class proceedings. To date, the issue has arisen squarely for consideration in one notable decision under the Ontario regime, *Allan* v. *CIBC Trust Corp*.[10] Coincidentally, the issue has also arisen in group litigation in England, in the case of *Barrow* v. *Bankside Members Agency Ltd*.[11] While both decisions arrived at the same result, the reasoning which led to their conclusions differed markedly. Their ramifications are perhaps yet to be fully demonstrated, but the potential for repetitive litigation as a result of the decisions is intriguing. The reasoning applied in both cases would be potentially applicable if any similar conundrum were to arise in class litigation in Manitoba, following the enactment of the *Class Proceedings Act*. This is particularly so, given that the key legislative provision relied upon in *Allan* has been closely reproduced in Manitoba's *Class Proceedings Act* as sub-section 26(1).

For the purposes of the comparative analysis in this article, Part II will sketch both the respective multi-party litigation schemata under which the decisions arose, and will outline the precise question at issue. The application of both the extended principle of *res judicata* and the potential for abuse of the court's process in respect of multi-party litigation will then be examined in Part III, primarily by reference to the two aforementioned decisions. Part IV will critically examine the two decisions, while Part V will canvass their ramifications, especially their adverse consequences for judicial efficiency and for the

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6 *An Act Respecting the Class Action*, SQ 1978, c 8 (which commenced operation on 19 January 1979).

7 *Class Proceedings Act, 1992*, SO 1992, c 6 (which commenced operation on 1 January 1993) (hereafter, "*CPA 1992*").

8 *Class Proceedings Act, 1995*, SBC 1995, c 50, which commenced operation on 1 August 1995.

9 Federal Court of Canada Rules Committee, *Class Proceedings in the Federal Court of Canada* (Discussion Paper, 9 June 2000) at 15.

10 (1998), 39 OR (3d) 675 (Gen Div).

11 [1996] 1 WLR 257 (CA).

defendant. Finally, the author will suggest in Part VI that the issue warrants reconsideration, and that multi-party litigation is an unexceptional instance in which the extended principle of *res judicata* and abuse of process should indeed play significant roles in preventing multiple litigation.

II. THE ISSUE AND THE MULTI-PARTY SCHEMAS

Before turning to the main issue, it is useful to provide a thumbnail sketch of the differing multi-party environments from which *Barrow* v. *Bankside Members Agency Ltd* and *Allan* v. *CIBC Trust Corp* emanated.

When *Barrow* was delivered, there was no class action regime operative in England, apart from the little-used and much-maligned representative rule.[12] As a result, group litigation was handled on an *ad hoc* basis. The methods of handling the grouping of a plethora of similar claims evolved on an individual basis as a matter of necessity because there was a complete absence of court rules or legislation. Much of the development occurred simply by agreement between the parties and the judge,[13] and the Lloyd's litigation (of which *Barrow* was part) was no exception.[14] Particular management techniques were used in the circumstances of a particular case, with no expectation that they would work for another; and it was accepted that an understanding of the various techniques was developing as time progressed.[15] As Harlow and Rawlings described in 1992, "in the pragmatic spirit of the common law, here taken to extremes, the actors make up the rules as they go along. On a case-by-case basis, or more accurately on the basis of preliminary or interlocutory hearings and practice notes, the new procedure is built up, virtually from nothing."[16]

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[12] *Rules of the Supreme Court*, Ord 15, r 12 ("Where numerous persons have the same interest in any proceedings ... the proceedings may be begun, and, unless the Court otherwise orders, continued by or against any one or more of them as representing all or as representing all except one or more of them"). Various common law jurisdictions around the world adopted that rule with minimal variance, including Manitoba: *Queen's Bench Rules*, Man Reg 553/88, as amended, R 12.01. For further discussion, see Manitoba Law Reform Commission, *Class Proceedings*, *supra* note 2, 6–9.

[13] M. Mildred and R. Pannone, "Class Actions" in M Powers and N Harris (eds) *Medical Negligence* (London: Butterworths, 1990) at 236.

[14] For a description by Saville L.J. of the "without prejudice" conferences and management plans at the first stages of the litigation, see [1996] 1 W.L.R. 257, 267. His Honour was the judge in charge of the Commercial Court in 1993, and was the original architect of the rules governing the management of the Lloyd's litigation.

[15] See C. Hodges, *Multi-Party Actions* (Oxford: Oxford University Press, 2001) at para. 1.07. This book contains excellent and informative discussion and case studies of the judicial *ad hoc* management of numerous important group actions in England.

[16] C. Harlow and R. Rawlings, *Pressure Through Law* (London: Routledge, 1992) at 129.

This scenario of case management in the absence of concrete rules at the time when *Barrow* was decided stood in stark contrast to the detailed class action regime that has been operative under Ontario's *Class Proceedings Act* since 1993, and pursuant to which *Allan* arose. This statute, many aspects of which are reflected in the Manitoba class action regime, details various certification criteria[17] and outlines the procedures and judicial powers relevant to an expanded class action proceeding. In particular, it provides that a judgment on the common issues determined in the class action will "set out the common issues",[18] and further, "binds every class member who has not opted out of the class proceeding".[19] Interestingly, there is still no equivalent of the CPA *1992* operative in England. In 2000, a more light-handed schema of group litigation orders ("GLOs") was introduced in the English *Civil Procedure Rules*[20] by which to manage a group of claims that raise common issues of fact or law, but this schema differs in some fundamental respects from regimes that operate (with some variation) in Canadian provinces, including Manitoba.[21]

Despite the different multi-party environments which confronted the Ontario General Division and the English Court of Appeal in *Allan* and *Barrow* respectively, the difficult conundrum giving rise to those decisions was very similar. The particular question can be framed as follows: where a common issue is determined in a multi-party setting (which we shall term "class action #1") adversely to the plaintiff class, to what extent is a subsequent proceeding (whether individual action/s by class member/s or class-wide litigation) against the same defendant (which we shall call "action #2") permitted so as to determine another issue which *could* have been raised by the class members in class action #1, but was not? In other words, the problem is whether, if an issue could reasonably have been put before the court in class action #1 but was not, the class member/s will be precluded from seeking the determination of that is-

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17 These are contained in s 5(1) of the CPA *1992*, and require that there is a cause of action, there is an identifiable class, that the claims of the class members raise common issues, that a class proceeding would be the preferable procedure for the resolution of the common issues, and that the representative plaintiff/s meet the criteria in s 5(1)(e).

18 Section 27(1)(a).

19 Section 27(3), which section shall be considered in further detail later in the article.

20 Part 19.III of the *Civil Procedure Rules* (hereafter "the CPR"). The schema was inserted in the CPR by the *Civil Procedure (Amendment) Rules 2000*, SI 2000/221, r 9, sch 2.

21 For example, the GLO schema is an opt-in rather than the opt-out regime; the parties in the GLO group are all represented *parties* who have filed originating process, rather than non-parties who are represented by a representative plaintiff; and the GLO schema provides that common issues may be determined by selecting a test or lead case, or by other management techniques which appear to the court to be the most suitable for the cluster of claims at hand.

sue in action #2. If the answer to this is in the affirmative, then the failure of the class members to raise the issue in class action #1 will render the commencement of action #2 inappropriate.

Where action #2 is sought to be instituted in these circumstances, it immediately attracts two principles of potential application. The first of these is the rule in *Henderson* v. *Henderson*,[22] and the second argument is the possibility of an abuse of the court's process in litigating that which should have been litigated previously. Indeed, both arguments were raised by both defendants in *Barrow* and *Allan*.

The rule in *Henderson* v. *Henderson* enjoys a varied nomenclature—a form of cause of action estoppel, non-issue estoppel, *res judicata* in the wider sense,[23] and the broad scope of *res judicata*.[24] According to the rule, as stated by Sir James Wigram V-C, the court:

> requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. ... It is plain that litigation would be interminable if such a rule did not prevail.[25]

As the majority of the Supreme Court of Canada confirmed in *Town of Grandview* v. *Doering*,[26] the broad principle cited in *Henderson* applies "to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." The rule is one of public policy, as Sir Thomas Bingham M.R. noted in *Barrow* v. *Bankside Members Agency Ltd*:

> The rule is not based on the doctrine of *res judicata* in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that

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22 (1843) 3 Hare 100; 67 ER 313.

23 All these terms were used in *Barrow*, *supra* note 11 at 266 (Saville LJ).

24 This is the term which was used by Keenan J. in *Allan* v. *CIBC Trust Corp* (1998), 39 OR (3d) 675 (Gen Div) 681, and also by the Ontario Law Reform Commission, *Report on Class Actions* (1982) at 754.

25 *Supra* note 22 at 115–16; 67 ER 313, 319–20.

26 [1976] 2 SCR 621, 634, citing *Henderson*, supra note 22 at115.

> litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do.[27]

As this statement indicates, and notwithstanding that defendants usually present these arguments in the alternative (as occurred in both *Allan* and *Barrow*), the *Henderson* rule is closely associated with the doctrine of abuse of process. If a plea by the defendant—that the rule in *Henderson* applies so as preclude action #2—is successful, it means that action #2 covers issues or facts which were so clearly part of the subject matter of the litigation in action #1 and so clearly could and should have been raised, that it would be an abuse of process to allow the new proceedings. That link between the two doctrines has been judicially[28] and academically[29] acknowledged.

It was explained in *Hall v. Hall*[30] that the narrow concept of *res judicata* concerns judicially *determined* subject matter, the facts and issues actually decided in action #1. There was no question of this narrow concept arising in either *Allan* or *Barrow*. The respective courts were never asked to decide in the multi-party litigation in action #1 the issues which the defendants then complained should not have been raised in action #2. It was the extended principle of *res judicata*, the wider ambit of the *Henderson* rule, which fell for consideration.

Thus, the conundrum is whether, to adopt the colourful phraseology of others, the plaintiffs in action #2 have to put forward their whole case in class action #1, or whether they can "stir the dust which has received such honourable sepulture"[31] in class action #1, or start "hoarding parts of [their case] against a rainy day."[32] As will be evident in the next section, the latter of these views has received affirmation in both *Allan* and *Barrow*, but for different reasons.

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27 *Supra* note 11 at 260.

28 *Greenhalgh* v. *Mallard* [1947] 2 All ER 255 (CA) 257; *Brisbane City Council* v. *Attorney-General (Qld)* [1979] AC 411 (PC) 425; *Talbot* v. *Berkshire County Council* [1994] QB 290, 296, 301.

29 P.R. Barnett, *Res Judicata, Estoppel and Foreign Judgments* (Oxford: Oxford University Press, 2001) at 192–95, and see the discussion by the Ontario Law Reform Commission, *Report on Class Actions* (1982) at 754.

30 (1958), 15 DLR (2d) 638 (Alta CA), cited in *Allan*, *supra* note 10 at 680.

31 K.A. Turner and G. Spencer Bower, *The Doctrine of Res Judicata* 2nd ed (London: Butterworths, 1969) [4].

32 *Supra* note 11.

III. EXTENDED PRINCIPLE OF *RES JUDICATA* IN CLASS ACTIONS

A. The Position in Ontario

In *Allan* v. *CIBC Trust Corporation*,[33] it was held that action #2 (described as two nearly identical actions brought by groups of plaintiffs) could be maintained in the face of vehement argument by the defendant that either the extended principle of *res judicata* or an abuse of process should have barred its commencement. Keenan J. described the case as raising "unusual and novel issues".[34]

The plaintiffs invested funds in mortgages used to raise money for a development company, Mater's Management Ltd ("Mater's"). Mater's was engaged in the development and sale of land and shopping centres in Ontario, and there were approximately 4000 investors across Canada who participated in mortgages over the Mater's properties. The defendant CIBC Trust Corporation's predecessor, Morgan Trust, acted as trustee. It received and distributed the mortgage funds on behalf of the investors. Unfortunately, a substantial amount of the investors' funds were lost. Allegedly, monies were used for improper purposes, mortgaged properties were overvalued, and as a result of the worsening financial position, the trustee applied to the court for the appointment of a receiver to Mater's. A receiver was duly ordered.[35] The investors then considered the possibility of instituting proceedings as a class against the trustee.

The problem was that the class was somewhat divided as to the appropriate basis of complaint that ought to be alleged. Eventually, class action #1 was instituted against Morgan Trust's successor for breach of contract, breach of fiduciary duty, taking action against Mater's without authority, and taking proceedings (applying for the appointment of a receiver) which could cause severe permanent damage to the assets of the investors and Mater's.[36] It was contended that Mater's was a safe investment vehicle whose activities should not have been stopped by the appointment of a receiver. This was the prevailing view advocated by one group of investors who, it is stated in the report,[37] were backed by the principals of Mater's.

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33 *Supra* note 10.

34 *Ibid* at 687.

35 Montgomery J., 20 January 1990.

36 *Supra* note 10 at 678.

37 *Ibid* at 678, called the New Investor Committee, or "NIC Group".

The remaining investors[38] supported the alternative view that the Mater's mortgages were very defective and unsafe forms of investment, that the trustee had a duty to warn the investors of the risks associated with the development company, and had breached that duty by failing to monitor and assess the safety and performance of the investments. Though alternative claims are permissible in a class action,[39] this alternative theory of liability was not raised in class action #1. As Keenan J. noted, obviously that type of claim would have been inimical to Mater's interests, and therefore unacceptable to some of the investors.[40] Instead, the only common issues for determination in class action #1 were whether the trustee ought to have made application for appointment of the receiver, and whether the trustee was liable in damages to the class members for having sought and obtained the receiver's appointment.

That class action was certified as complying with the requirements of the *CPA 1992*,[41] but was dismissed on the defendant's motion for summary judgment.[42] Ground J. considered that there were reasonable and probable grounds for the trustee to bring the application for the appointment of a receiver, and that the trustee acted in what it believed to be the best interests of the investors by attempting to protect trust property. Therefore, his Honour addressed and disposed of the question of any liability on the part of the trustee for having applied for and obtained an order appointing the receiver. There were no other common issues, and no other findings, in class action #1.

In light of that dismissal of the class action, another attack was launched against the defendant trustee by some of the same class members, but based upon the second of the abovementioned theories of wrongdoing (*i.e.* that the investment and its supervision were defective). The defendant promptly challenged the legality of action #2, as both a breach of the extended principle of *res judicata* and as an abuse of the process of the court. It argued that the plaintiffs were "lying in the weeds" with their alternative claim, and should properly have put the alternative theory of negligence before the court in class action #1. On the other hand, the plaintiffs argued that their claims were not advanced as any part of the former class action, and were not any part of the common issues in that claim (the only common issues there being whether the

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38 Called, in the report, the "IAC Committee".

39 See, for example: *Campbell* v. *Flexwatt Corp* (1997), 44 BCLR (3d) 343 (CA).

40 Supra note 10 at 678.

41 The formal order for certification was made on 19 April 1996; the two common issues are set out at 681.

42 Ground J. gave judgment on 7 November 1996, by virtue of which the class action was dismissed, reported at: (1997), 7 CPC (4th) 260, upheld on appeal: 69 ACWS (3d) 1102 (Ont CA), leave to appeal to SCC denied.

trustee was liable for having applied for and having obtained an order appointing the receiver).

The plaintiffs' arguments prevailed on both counts. The principal reason for the Court's conclusion was that the second claims, while arising out of the same incident, fell outside the scope of the common issues in class action #1. That was crucially important, for sub-section 27(3) of the *Class Proceedings Act, 1992* provides:[43]

> A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,
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> (a) are set out in the certification order;
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> (b) relate to claims or defences described in the certification order; and
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> (c) relate to relief sought by or from the class or subclass as stated in the certification order.

In this regard, any question of an unsafe investment vehicle and negligence arising therefrom was prior to and unrelated to the trustee's application for the appointment of the receiver.[44] The former composed no part of the common issues in class action #1, they were not set out in the certification order, and sub-section 27(3) thus permitted their litigation in action #2. Only common issues set out in the certification order and upon which there had been judgment could not be re-litigated. Further, Keenan J. noted that sub-section 27(3) had its genesis in the much earlier report of the Ontario Law Reform Commission,[45] in which the Commission had argued:

> Shortly stated, we are of the opinion that, in a class action context, the substantive law of *res judicata* should be amended to preclude the application of the rule against splitting. ... It will be noted that our recommendation forges a link between the certification order and the *res judicata* effect of a judgment on the common questions. ... It is our intention to restrict the *res judicata* effect of a judgment on the common questions: the judgment should determine those issues, and only those issues, that have been raised specifically by the representative plaintiff.[46]

It followed from this that the extended principle of *res judicata*, otherwise termed the rule in *Henderson* v. *Henderson*, did not apply so as to preclude ac-

[43] That sub-section is repeated almost verbatim as sub-section 26(1) in the *Class Proceedings Act* recently enacted by the Manitoba Parliament.

[44] *Supra* note 10 at 683.

[45] OLRC, *Report on Class Actions* (1982).

[46] *Ibid* at 767–68.

tion #2. The principle was abrogated by sub-section 27(3) and by the definition of the "common issues" contained in the original certification order.

Additionally, Keenan J. considered that the allegations raised in action #2 and class action #1 were "not the same cause of action".[47] Citing appellate Canadian authority,[48] his Honour referred to the principle in *Henderson*:

> That broad scope of *res judicata* is not so broad, however, as to extend to every dispute that may exist between the parties. It will only extend to those matters which arise out of the same cause of action and should have been put before the court at the time the action was heard.[49]

The defendant also argued that the commencement of action #2 constituted an abuse of the court's process. Again, it failed in this submission. In Keenan J.'s view, it was true that the alternative theory could have been included as common issues in class action #1 (and other representative plaintiffs chosen who did not have a Mater's affiliation).[50] There was nothing in the *Class Proceedings Act, 1992* or in the general law that prohibited the present plaintiffs from being members of a class in which they disagreed with the theory of liability which it was espousing, or from going forward with other claims if the class action did not succeed.[51] Nor was there any rule that prohibited them from advancing further litigation that was based on issues that were not disposed of in the class action.[52] It followed that there was no obligation upon class representatives to put all issues before the court in action #1. Although the defendants argued that the burden upon them of re-litigating the issues in the class action should not be tolerated, the court pointed out that, in actual fact, no issues were being re-litigated. That the receiver and manager was appointed properly and in compliance with the trustee's duties was binding upon the plaintiffs and the defendant—but that was not at issue in action #2. [53] Clearly, Keenan J. considered that, while there was no impediment to making an alternative claim in a class action, there was no requirement to do so either.

As will be discussed in Part IV, sympathy can certainly be expressed for the defendant's arguments in this case, particularly the effect that "litigation in stages" has upon both judicial resources and finality of the dispute for the parties.

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47 *Supra* note 10 at 683.

48 *Hall* v. *Hall and Hall's Feed & Grain Ltd* (1958), 15 DLR (2d) 638 (Alta SC, App Div).

49 Allan, supra note 10 at 681.

50 *Ibid* at 685.

51 *Ibid.*

52 *Ibid* at 684. The defendant referred to this as "litigation by instalments": at 684.

53 *Ibid* at 685.

B. The Position in England

As noted previously, the decision in *Barrow* v. *Bankside Members Agency Ltd*[54] arose, not under any statutory or regulatory schema, but by virtue of the case management of group litigation which preceded the implementation of the GLO regime. The decision arose from the Lloyd's litigation, the description given to the mass of claims (involving names, members' agents, managing agents, underwriters, brokers and the Society of Lloyd's) which resulted from losses suffered in the Lloyd's insurance market in the 1990s. Just as Keenan J. did three years later, Sir Thomas Bingham M.R. described the interrelationship between the principle in *Henderson* v. *Henderson* and group litigation as "novel".[55]

A group of litigants comprising 3000 names (the Gooda Walker action group) issued proceedings against certain defendants alleging breach of contract and negligence in the conduct of underwriting, that is, failure to conduct the underwriting business of the relevant insurance syndicates with reasonable care and skill. This was an issue which could be determined on a global basis, without reference to the individual circumstances of each group member. The claim was eventually decided in favour of the group, although the names which composed the group were held to be not entitled to recover *all* the damages they had claimed against the defendants in that action.[56] Possibly with the hope of recovering the balance of his damages,[57] the plaintiff Mr Barrow issued fresh proceedings, action #2, against the same defendant (and one other), claiming damages for negligence in selecting his portfolio. Again, as in *Allan*, a different theory of liability was advanced—negligent portfolio selection rather than negligent underwriting of the syndicates. Although action #2 was a unitary proceeding, the Court of Appeal noted that there might be other group members minded to do the same.[58]

The second theory was one that required consideration of the individual circumstances of the group members' cases, as to whether there had been an inappropriate selection of syndicates for individual names. This obviously would differ, depending upon whether the name was of ample means and adventurous temperament, to whom a syndicate with a greater risk might be attractive, or a name of more modest means and of cautious disposition for whom the prospect

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54 *Supra* note 11, delivered 7 November 1995. A petition by the defendant for leave to appeal was dismissed by the Appeal Committee of the House of Lords on 31 January 1996.

55 *Ibid* at 260.

56 *Deeney* v. *Gooda Walker Ltd* (QB, 4 October 1994, Phillips J.).

57 Mr Barrow only recovered in the group litigation about 60% of the damages that he had claimed.

58 *Supra* note 10 at 264.

of smaller but more dependable profits and the avoidance of loss might be appropriate. It was to achieve judicial economies and to prevent the action from becoming bogged down in a morass of detailed enquiry into the personal circumstances of thousands of names that the original group action proceeded only on the basis of alleged underwriting deficiencies.

The defendant applied to strike out action #2 on the grounds that it offended the rule in *Henderson* v. *Henderson*, or alternatively, that the fresh action was an abuse of the court's process. The defendant "unreservedly accept[ed]" that Mr Barrow's portfolio selection claim, even if made in the group litigation action, would rightly not have been determined in the course of that trial (keen as the court was to deal with global instead of individual issues). The defendant argued, however, that the claim should have been made (*i.e.* raised), and for the plaintiff to remain inactive until after action #1 was decided and to bring a new claim against the same defendant not even intimated before was precisely the sort of mischief proscribed by *Henderson* v. *Henderson*: an abuse of the court's procedure, working injustice to a defendant called upon to resist multiple suits.[59]

Unfortunately for the defendant, these arguments were unsuccessful, both at first instance[60] and on appeal. The same result occurred as in *Allan*: action #2 was permitted. In the absence of any equivalent statutory provision to that of sub-section 27(3) of the *Class Proceedings Act, 1992*, the extended principle of *res judicata* was held to be inapplicable for a different reason. The Court of Appeal agreed with the plaintiff's contention that the rule in *Henderson* had no application where it was common ground that part of a plaintiff's claim, whether brought forward or not, would not be ruled upon until later.[61] Indeed, Saville LJ stated that the principle in *Henderson* is not concerned with what should have been *raised* in earlier proceedings, but what should have been *dealt with* in those proceedings.[62] In that regard, the purpose of the first group action was to decide one common issue, namely, whether the business of underwriting was conducted with reasonable skill and care, and whether judicial efficiency in the Gooda Walker action could only be achieved if individual claims that names might have against their members' agents were not included in that action.[63]

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59 *Ibid* at 262.

60 QBD (Comm Ct), 21 March 1995.

61 *Supra* note 11 at 262, citing *Henderson*, supra note 22 at 115 indicating that the rule applies where the matter becomes "the subject of litigation in, and of adjudication by" a court; and *Yat Tung Investment Co Ltd* v. *Dao Heng Bank Ltd* [1975] AC 581 (PC) 590 ("matters which could and therefore should have been litigated in earlier proceedings").

62 *Ibid* at 268.

63 *Ibid* at 264 (Sir Thomas Bingham MR); 268 (Saville L.J.).

Hence, the Court of Appeal held that if the second claim could not have been raised and decided in the first action for reasons of judicial management of complex litigation, that amounted to a "special circumstance"[64] to which Sir James Wigram V-C referred in the passage in *Henderson* reproduced earlier in the article. Judges have since held "special circumstances" to mean: "in case justice should be found to require the non-application of the rule."[65] Whatever the phraseology, the group litigation scenario in which common issues were determined in the first proceedings had, for reasons of judicial economy, precluded the application of the *Henderson* rule. It excused the plaintiff group members from having to bring forward their whole case (their alternative theory of liability) at the outset.

Nor did the Court of Appeal consider Mr Barrow's action #2 to constitute the abuse of process contended by the defendant:

> Since his portfolio selection claim would not have been decided before now anyway, he is not causing there to be two trials where there would have been one. He is not exposing the defendant to an unnecessary series of trials. The defendant is not, in truth, any worse off as matters now stand than if Mr. Barrow had made and pleaded this new claim at the outset. One can, of course, understand the defendant's dismay at the emergence of this new claim, and Mr Barrow's may not be the only claim of its kind; but the claim would not have been [welcome] whenever presented.[66]

Moreover, just as in the *Allan* litigation, in which the first theory of liability pleaded that the mortgage investments were safe whereas the second theory pleaded that they were not, the English Court of Appeal noted that hearing alternative claims that are inconsistent is perfectly permissible in group litigation. For example, the argument of the names in the Lloyd's group litigation followed the lines that the "syndicates involved no unusual risk of loss and I suffered loss because your underwriting was negligent", whereas the latter portfolio selection claim was necessarily based upon the contention that "participation in these syndicates did involve an unusual risk of loss and I should not have been asked to participate and I suffered loss as a result, even if your underwriting was not negligent." There was no abuse of process in such inconsistent arguments, whether maintained in one action or two.[67]

C. Summary of the different decisions

Thus, *Allan* and *Barrow* articulate separate reasons for the non-application of the rule in *Henderson* v. *Henderson* where, in the multi-party context, action #2

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64 *Ibid* at 263 (Sir Thomas Bingham MR, Peter Gibson and Saville L.JJ. concurring).

65 *Yat Tung Investment Co Ltd* v. *Dao Heng Bank Ltd* [1975] AC 581 (PC) 590.

66 *Supra* note 11 at 263.

67 *Ibid* at 264.

seeks to raise issues that arise out of the same series of circumstances and transactions, against the same defendant, and in respect of the same loss, which could have been raised in action #1. In *Allan*, the statutory abrogation of the rule by sub-section 27(3) of the *CPA 1992* meant that anything which was not a "common issue" in the certification order could be re-litigated subsequently. On the other hand, in *Barrow*, if the common issue to be determined in action #1 was framed to enhance judicial manageability of the group members' claims, then the inability to obtain a determination on another issue in that action meant that, by "special circumstance", the rule did not apply to bar the commencement of action #2.

IV. Critical Analysis of the Decisions

In this section, certain queries and difficulties with the principal reasoning of *Allan* and *Barrow* will be canvassed. First, it will be contended that sub-section 27(3) of the *Class Proceedings Act, 1992* arguably does not have the effect that the Court in *Allan* bestowed upon it. Secondly, it will be suggested that in any scenario similar to *Allan*, permitting action #2 may call into question the efficacy of the certification of class action #1. Thirdly, it will be argued that the Court of Appeal in *Barrow* interpreted the rule in *Henderson* v. *Henderson* far more generously than have other authorities before or since. Finally, it will be submitted that there are arguable grounds upon which a prejudice to the defendants as a result of action #2 could (despite the findings in *Allan* and *Barrow*) constitute an abuse of process in multi-party litigation. Each of these four issues will be considered in turn.

A. Relationship Between the Certification Order and *Res Judicata*

The reasoning in *Allan* v. *CIBC Trust Corp* is unconvincing in one crucial respect. In the passage of the Report of the Ontario Law Reform Commission[68] to which the Court refers[69] to support the splitting of the class members' case between two separate actions, the Commission seemingly recommended that the rule against splitting should be modified in a different context than that which arose in *Allan*.

The Commission raised the conundrum of a representative plaintiff who successfully sued in negligence and obtained judgment for property damage. Could class members who had also incurred personal injuries as a result of the defendant's negligence seek relief for that different type of damage by instituting

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68 *Report on Class Actions* (1982), 767–68.

69 Supra note 10 at 683.

separate and subsequent individual actions?[70] To permit the class members to do this could, it was said, offend against the "rule against splitting" of one's case.[71] However, the Commission considered that, if class members were not permitted to do so, the result would be unsatisfactory.[72] Instead, the Commission held that the class members could split their cases if there was a provision in the statute which provided that the judgment in action #1 was binding to the extent that it determines "the claim described and the relief specified in the order".[73] The Commission stated that this proposal:

> [had] the effect of precluding the application of the rule against splitting by restricting the binding effect of the class action judgment to only what was actually sought and determined in the class action. Therefore, if a representative plaintiff restricts the class claim to monetary relief for property damage, a class member would appear to be bound only by the judgment rendered in that regard and to remain free to initiate a separate action seeking monetary relief for personal injuries.[74]

It was this concern which provided the basis for the eventual provision which became sub-section 27(3).[75] Specifically, it was in this context that the Commission suggested that "the substantive law of *res judicata* should be amended to preclude the application of the rule against splitting".[76]

However, it seems that the Commission was not discussing a situation where the class members were subsequently seeking to allege a different theory of liability to recover precisely the *same* damages as in the previous claim. In both *Allan* and *Barrow*, there was no question of the plaintiffs recovering their

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70 OLRC, *supra* note 68, 760; the example is repeated again on 767, and is derived from the case of *Cahoon* v. *Franks* [1967] SCR 455, 63 DLR (2d) 274.

71 This rule was defined (at 755) to "prohibit a litigant from bringing separate actions by splitting an underlying factual situation or cause of action that properly should have been the subject of only one lawsuit". It followed that, if a plaintiff suffered different types of damage, "he would not be able to institute a separate action in relation to each type of damage, but rather he would be required to seek complete recovery in one action" (at 756).

72 *Ibid* at 767.

73 *Ibid* at 763, in which the Commission referred to this wording that had been proposed previously by the Law Reform Commission of South Australia in *Thirty-sixth Report Relating to Class Actions* (1977), especially the Draft Bill, s 7, and also that suggested by Professor Williams as s 7 of "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada—Some Proposals for Reform" (1975) 13 Osgoode Hall LJ 1 at 65.

74 *Ibid* at 764 (citation omitted).

75 Section 34(2) of the Draft Bill. This was eventually reproduced with slight modification as s. 27(3).

76 *Report on Class Actions* (1982) at 767.

damages twice under their first and subsequent claims,[77] action #2 was another attempt to recover the same damages but upon a different allegation. In contrast, the Commission was addressing a situation (postulated by its own example) in which the class members were seeking relief in action #2 for a different injury and for a different loss. In that situation, the individual class member would not be estopped from having the subsequently raised issue determined in action #2, provided that the issue did not fall within the ambit of the common issues litigated by the representative plaintiff and upon which there had been judgment in class action #1. Thus, reliance upon sub-section 27(3) to abrogate the effect of the rule in *Henderson* v. *Henderson* is not entirely justified by reference to the OLRC Report, which appeared to advocate that particular provision for a different reason.

B. The Certification of Class Action #1

Further, permitting the commencement of action #2 poses some interesting questions about the original certification of class action #1. In *Allan*, and notwithstanding a subsequent judicial suggestion to the contrary,[78] it is apparent from the report and from academic commentary[79] that the class of investors in class action #1 did comprise both those who supported and those who had reservations about the theory of liability which espoused that the appointment of receiver and manager was the reason for the investors' financial disaster. Indeed, Keenan J. notes of action #2 that "[a]ll but two of the present plaintiffs were members of the class and plaintiffs in the [first] class action".[80] What this raises is a potential conflict within the class in class action #1, and the question of whether the class representatives chosen were adequate representatives of the class.

Keenan J. expressly noted that an alternative claim in class action #1 would have been inimical to Mater's interest and therefore unacceptable to one por-

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77 As much was stated by Sir Thomas Bingham M.R. in *Barrow* at [1996] 1 WLR 257 (CA) 264.

78 *Green* v. *35 Walmer Road Construction Co* (1998), 42 OR (3d) 301 (Gen Div) (in *Allan*, "[a] class action brought by one group of investors was dismissed. Other investors *who were not part of the class* were permitted to proceed on grounds different from those advanced in the class action.": at [32]) (emphasis added).

79 See G.D. Watson and M. McGowan, *Ontario Civil Practice 2002* (Scarborough: Carswell Thomson Professional Publishing, 2001) R 12.05 (in *Allan*, "class members were permitted to sue separately to advance an alternative theory of liability"), and also R 21.03 ("The court permitted class members from an unsuccessful class action to commence new actions ..."). Also see Ground J in *Nash* v. *CIBC Trust Corp* (1996), 7 CPC (4th) 263 ("The class will be all persons who were investors in Maters Management Ltd as of January 19, 1990 in which Morgan Trust act as their trustee").

80 Supra note 10 at 680.

tion of the class (who were keen to deflect any suggestion that the company was unsafe and risky as an investment vehicle).[81] His Honour further pointed out that when the first class action was advanced, some of the group of investors "were uneasy"[82] about the theory being put forward in the suit (that the appointment of the receivers was wrongful), but that they made no attempt to assert the alternative claim at that time. His Honour continued:

> When the certification motion was before Ground J in February 1996, there was no mention of the alternative theory of liability of CIBC Trust and no mention of the conflict among the investors. CIBC Trust was not then aware of the alternative theory and the possibility of an alternative claim. They were not in a position to know of the conflict between the NIC Group and the IAC Committee. Therefore, they were not in a position to argue the conflict of interest among the investors. Although they argued against certification, Ground J was not made aware of that conflict and was therefore unable to consider the effect that it would have on the suitability of the proposed representative plaintiffs.[83]

These factors, while raised by his Honour, were not discussed in any detail, yet they appear to have been worthy of fuller consideration. A certification decision for class action #1, in the absence of any knowledge by that court of an alternative theory of liability which would be litigated if the class action failed, seems somewhat unsatisfactory. This is especially so if, subsequently, later issues raised by the class or by some class members demonstrate some conflict in the class of which the court should have been aware in class action #1, in order to determine adequacy of representation, whether sub-classes should have been formed at the outset to resolve any conflicts, and whether suitable common issues either across the class or within sub-classes were possible. The court was deprived of the opportunity to consider these issues as part of the certification order because of the failure of the class to put forward their whole case at the outset.

C. The *Henderson* Rule: What Could or Should Have Been Raised

In the context of multi-party litigation, it becomes apparent that there is a fundamental issue as to when the rule in *Henderson* v. *Henderson* applies so as to preclude issues being raised in action #2. Does the rule come into operation (to the class members' detriment) where those issues could have been *raised* in class action #1 so as to provide warning to the defendants of the ambit of the issues to be ultimately adjudicated, whether in the group litigation or subsequently? Or does the rule only operate in circumstances where the issues could have been *dealt with* in class action #1? In this latter instance, if judicial opinion is

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81 *Ibid* at 678.

82 *Ibid* at 684.

83 *Ibid.*

that they would not have been determined and resolved in action #1, then the class or class members can properly litigate them in action #2. Essentially, what did Sir James Vigram V-C intend by a case being "brought forward" in *Henderson*[84]—did that term mean that the issue could have been "raised" or that it could have been "raised and determined" in the original proceedings?

It will be recalled that, in *Barrow*, counsel for the defendants did not argue that Mr Barrow's new portfolio selection claim would and should have been determined in the course of the earlier trial, but he did contend that it ought to have been advanced.[85] However, both the Master of the Rolls[86] and Saville L.J.[87] strongly indicated that it must have been definite that the issues would have been *decided* in group action #1 if a plea based upon *Henderson* to preclude action #2 was to be successful. If they would not have been decided, the *Henderson* rule did not apply, and it was not an abuse of process not to have raised them in action #1.

This conclusion is perhaps not without some controversy. As Barnett notes,[88] that approach to the *Henderson* rule is more generous than the decision in *Talbot* v. *Berkshire County Council*,[89] another decision of the English Court of Appeal, would suggest. In the latter, Stuart-Smith L.J. explained that the purpose of the rule is that "it enables the defendant to know the extent of his potential liability in respect of any one event".[90] His Lordship continued that "[i]n *Yat Tung Investment Co Ltd* ... the cause of action in the second action was different from the plaintiff's claim in the first action; but *it could have been raised* by way of defence and counterclaim to the bank's counterclaim in the first action. It was accordingly not maintainable."[91]

Moreover, since the decision in *Barrow*, the tension between whether the issues in action #2 could have been "raised" or "decided" in action #1 has arisen again, indicating that the scope of the *Henderson* rule is still under chal-

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84 *Supra* note 22 at 115–16; 67 ER 313, 316 (in fact, in the passage extracted earlier in this article, the requirement that the whole case be "brought forward" is mentioned no less than four times).

85 *Supra* note 11 at 262.

86 *Ibid* at 263 ("Since his portfolio selection claim would not have been decided before now anyway ...").

87 *Ibid* at 268 (the rule "is not ... concerned with what should have been raised in earlier proceedings, but what should have been dealt with in those proceedings").

88 See Barnett, *supra* note 29, 207.

89 [1994] QB 290 (C.A.).

90 *Ibid* at 297.

91 *Ibid* (emphasis added).

lenge. In *Fennoscandia Ltd* v. *Clarke*,[92] the plaintiff argued (along the lines of *Barrow*) that the rule in *Henderson* v. *Henderson* only applies where it is definite that the subject-matter would have been decided, had it been raised in action #1. In this case, Mr Clarke did not raise the issues in action #1 which he then sought to litigate in subsequent English proceedings, but it was far from definite that, had he done so, the issues would have been decided in action #1. The first court (a District Court in the state of Delaware) had some discretion as to what claims it would decide under the principle of pendant jurisdiction.[93] Counsel for Mr Clarke argued that action #1 was an expedited trial on a limited number of defined issues, and if these other issues had been added, that would have significantly lengthened the trial process, and so it may well have been disallowed for hearing by the District Court if they had been raised.[94]

However, that argument was rejected by a differently constituted Court of Appeal than that which heard the *Barrow* decision.[95] Instead, it was held that it was still an abuse of process to commence action #2 because, by failing to raise the subject matter in action #1, the plaintiff deprived the first court of the opportunity to decide it—even if it could not be said that the first court would definitely have decided it, had it been raised.[96] The decision in *Barrow* was referred to in only brief terms, in which Kennedy L.J. stated that "*Barrow's* case was unusual because the Lloyd's litigation with its initial group action was itself unusual. In contrast to the present case the defendant's counsel readily conceded that the issue raised in the later action would not have been dealt with at the earlier trial".[97]

While the fact scenario in *Fennoscandia Ltd* v. *Clarke* was by no means identical to *Barrow's*, the conclusion is nevertheless interesting. The cases demonstrate a very fine distinction. There is arguably no abuse of process to commence action #2 if the subject matter would not have been decided in action #1, even if it had been raised; but there *is* an abuse of process to commence action #2 if the subject matter may not have been decided in action #1. Whether this is the direction in which the *Henderson* rule and abuse of process

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92 [1999] 1 All ER (Comm) 365 (CA).

93 This rule applies where a United States federal court trying an action under federal law has or may have jurisdiction to try also a related claim arising under state law, where the state and federal claims derive from a common nucleus of operative fact: see Sir Iain Glidewell at [1999] 1 All ER (Comm) 365 (CA) 374.

94 *Ibid* at 371.

95 The court was comprised of Kennedy and Schiemann L.JJ. and Sir Iain Glidewell.

96 See Kennedy LJ at 371–73 (with whom Schiemann L.J. concurred), and Sir Iain Glidewell at 374–75.

97 *Ibid* at 373.

should head in multi-party litigation is perhaps questionable. It involves the court in a degree of speculation as to what would have happened in the inevitably complex and case-managed litigation which class action #1 involves, had all issues been raised then. Moreover, if the rule in *Henderson* v. *Henderson* is to be predicated upon what would have been decided, and not upon what should have been raised, it certainly deprives the defendant of knowing at the outset the full ambit and extent of complaints that may be levelled against it and out of which the class litigation arises.

D. Identification of "Special Circumstances" in Multi-Party Litigation

Finally, the "special circumstances" exception to the rule in *Henderson* v. *Henderson*, which precluded the rule from applying in *Barrow* and which therefore allowed Mr Barrow's action #2, is far from clear. No attempt was made in *Barrow* to define what is meant by the term.[98] Previous decisions indicate that the plaintiffs may be excused from the failure to bring forward their whole case under this exception where the plaintiffs did not know of the claim at the time of action #1;[99] where the result in action #1 was impeachable[100] or was a default judgment;[101] where there may have been some agreement between the parties that the claim should be held in abeyance to abide the outcome of the first proceedings;[102] or if some representation was made to the plaintiffs upon which they relied so that the claim was not brought in action #1.[103] The decision in *Barrow* was certainly the first case in England to indicate that group litigation is a setting that falls within the "special circumstances" exception. Conversely, the exception will not be made out in circumstances where it would merely be unjust not to allow the plaintiffs to advance the claim in action #2;[104] or where the issue was not raised in action #1 due to "negligence, inadvertence or even

98 See, for similar comment: M. Oats, "Lloyd's Litigation: Abuse of Process" [1996] 2 International Insurance Law Review G–27.

99 *Lawlor* v. *Gray* [1984] 3 All ER 345 (QB) (the plaintiff did not know of the existence of the second claim at the time of action #1 because the Revenue had not communicated it).

100 *E.g.*, on the grounds of fraud or collusion.

101 Example cited in *Arnold* v. *National Westminster Bank plc* [1991] 2 AC 93 (HL).

102 Example cited in *Talbot*, *supra* note 39.

103 *Ibid* at 299.

104 *Ibid* at 299 ("since otherwise the rule [in *Henderson* v. *Henderson*] would never have any application").

accident",[105] even where the result of the rule will preclude the plaintiffs from seeking recovery of a large damages sum.[106]

Although, according to *Barrow*, the rule in *Henderson* v. *Henderson* did not apply to group litigation because of the case-managed narrowing of the issues determined in group action #1, both Sir Thomas Bingham M.R.[107] and Saville L.J.[108] indicated that any prejudice that the defendant could point to as a result of action #2 (which it would not have suffered anyway) would probably cause the court to find an abuse of process. Both considered that the only prejudice in the case at hand was that the defendant would have to now face another trial—but that litigation would not have been prevented, even had the portfolio selection claim been raised in group action #1.

However, in the context of a class action regime, there is one particular prejudice, peculiar to this type of litigation, which a defendant can suffer when a plaintiff class fails to bring forward at the outset all issues capable of being disposed of in class action #1. The defendant articulated it in *Allan*: that the outcome of the certification hearing in class action #1 could have been materially affected by the disclosure of the alternative theory of liability.[109] The possible conflicts and inadequate representation in class action #1 have already been mentioned. If the certification criteria would not have been satisfied, had the full case been disclosed at the outset, the defendant would never then have had the task of defending complex and burdensome class action litigation. As noted in the previous section, while Keenan J. acknowledged that Ground J. (the certification judge) was not aware of the alternative theories of liability at the certification hearing, that was not considered a prejudice that would have invoked an abuse of court.

In addition to this circumstance, litigation in stages can compromise the preparation of evidence on the defendant's behalf. For example, as the defendant pointed out in *Barrow*, there was a danger that issue estoppels might arise in circumstances where additional evidence would have been filed by the defendant in the group action specifically to meet points raised in the second ac-

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105 *Supra* note 22 at 115; 67 ER 313, 319.

106 Illustrated in *Republic of India* v. *India Steamship Co Ltd; The Indian Endurance and The Indian Grace* [1996] 2 Lloyd's Rep 12 (CA), in which it was held that incompetence was the simple reason why the claim had not been brought in action #1, and if the result of the rule in *Henderson* was injustice because there was a large sum at stake, that did not constitute "special circumstances" that would disapply the rule: at 24 (Staughton L.J.).

107 *Supra* note 11 at 263.

108 *Ibid* at 268.

109 *Supra* note 10 at 679, point 3.

tion;[110] and additionally, the lack of timely and one-off justice can prejudice the defendant in gathering or retaining documentary or oral evidence for action #2. Moreover, by holding back part of the case, the class members obtain the advantage of an early trial rather than a likely deferred trial where both sides would be required to prepare their entire cases.[111]

Although the defendants could not successfully point to any of these prejudices in *Barrow* or *Allan*, one can envisage where they might arise in an appropriate fact scenario in class litigation in the future. Unfortunately, neither case offers any guidance as to the circumstances in which the prejudice caused to the defendant by the failure of the plaintiffs to raise some matter in the first litigation could be said to be so serious that it would amount to an abuse of process to start another proceeding raising that matter.

V. RAMIFICATIONS OF THE DECISIONS

The principal decisions considered in this article ultimately have two important consequences for the conduct and finality of class litigation.

First, there is a consequent competing tension about how widely to frame the common issues for determination in the litigation, as Hodgson and Tough point out:

> On the one hand, the defendant does not want to broaden the allegations or claims against it. On the other hand, failure to include specific claims or allegations in the definition of common issues may result in the defendant facing those issues in subsequent litigation. Careful consideration has to be given to the description of the common issues and to what if any allegations may not be encompassed in those common issues.[112]

The definition of the common issues is crucial to both the class and the defendant.[113] However, the framing of the common issues is a role that the plaintiffs inevitably perform (occasionally with the court's assistance), for after all, the class is instituting the action. In practice, it is unrealistic to expect the defendant to deliberately widen the ambit of the common issues so as to prevent the risk of multiple litigation on multiple theories of liability—although, as the authors above indicate, that is the course which may be desirable for a prudent

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[110] *Supra* note 11 at 259.

[111] This advantage to the group members at the expense of the defendant was also alluded to by defendant's counsel in *Barrow*, *ibid* at 259.

[112] J.A. Hodgson and B.A. Tough, "Practical Strategies in Class Actions" (1999) Advocates' Society (Ontario) "Back to Basics" Series, February 19–20, 1999 at para. 14.

[113] See also J.A. Prestage and S.G. McKee, "Class Actions in the Common Law Provinces in Canada" in Hodges, *supra* note 15, at para 14.17.

defendant who seeks to achieve some finality of litigation. Otherwise, a defendant "could face several actions alleging different theories of negligence."[114]

Secondly, there are substantial policy objectives that support the application of the rule in *Henderson* v. *Henderson* and decree that its application to multiparty litigation is unsuitable. The irony is that both sides of this coin seek to promote judicial efficiency: the application of the rule is directed towards ensuring that "litigation should not drag on forever",[115] while the non-application of the rule has been justified because the ambit of the issues in action #1 should be limited (at least in the main trial) to only certain issues, the determination of which will advance the litigation for all class members.

The desire to promote judicial efficiency in civil procedure and allocate resources more evenly is manifest in both Canadian and English jurisdictions. Under Ontario's *Class Proceedings Act, 1992*, for example, it has been repeatedly stated[116] that one of the triumvirate of goals of that statute[117] is judicial economy. The prospect of two court proceedings in order to have all claims of class members adjudicated compromises that objective.[118] While that has usually been considered from the point of view of preventing unitary actions by several class members, the case law in this article indicates that the goal may well be tested by entirely new actions *subsequent to* a class action which arise out of the same circumstances.

Similarly, the goal of judicial economy is vitally important in English civil procedure, especially since the advent in that jurisdiction of the *Civil Procedure Rules*.[119] The overriding objective of the CPR specifically requires the court to deal with cases proportionately,[120] and allot to them only an appropriate share

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114 *Supra* note 112 at para. 13.

115 *Barrow*, supra note 11 at 260 (Sir Thomas Bingham M.R.).

116 For the very first statement of this under the class action regime in Ontario, see: *Abdool* v. *Anaheim Management Ltd* (1993), 15 OR (3d) 39 (Gen Div) 45, aff'd: (1995), 121 DLR (4th) 496 (Div Ct) 503 (O'Brien J., Flinn J. concurring) 514 (Moldaver J.). Also, eg: *Macrae* v. *Mutual of Omaha Insurance Coy* (SCJ, 14 July 2000) 3; *Hollick* v. *City of Toronto* (1998), 18 CPC (4th) 394 (Gen Div) 400, reiterated: 2001 SCC 68, [15], [33]; *Millgate Financial Corporation Ltd* v. *BF Realty Holdings Ltd* (1998), 28 CPC (4th) 72 (Gen Div) 79.

117 The others are the provision of access to justice and the attainment of behaviour modification.

118 *Carom* v. *Bre-X Minerals Ltd* (1999), 44 OR (3d) 173 (SCJ) 243 (Winkler J).

119 They came into force on 26 April 1999, and as their architect, Lord Woolf, states, "involve a complete change of culture": Foreword, I. Grainger and M. Fealy, *The Civil Procedure Rules in Action* (London: Cavendish Publishing Ltd, 1999).

120 CPR 1.1(2)(c).

of the court's resources.[121] The English Court of Appeal has had the opportunity to express some robust views about abuse of process and relitigation under the *CPR* in the context of unitary litigation.[122] Chadwick L.J. referred to a "change of culture",[123] and stated:

> The reason, as it seems to me, is that, when considering whether to allow the fresh proceedings to continue, the court must address the question whether that is an appropriate use of the court's resources having regard (i) to the fact that the claimant has already had a share of those resources in the first action and (ii) that his claim to a further share must be balanced against the demands of other litigants. ... The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind—and must consider whether the claimant's wish to have 'a second bite at the cherry' outweighs the need to allot its own limited resources to other cases.[124]

In both *Allan*[125] and *Barrow*,[126] the courts accepted that the plaintiffs deliberately waited until they knew the results of the multi-party actions before starting the fresh proceedings, rather than bringing their entire cases forward at the outset. Whether this sort of litigious behaviour should be condoned in the present environment of stretched judicial and litigant resources is questionable. There is no doubt that one of the outcomes of both decisions is to encourage "wait and see" tactics, and hence duplicative litigation.

VI. CONCLUSION

The application of the extended principle of *res judicata* and abuse of process to multi-party litigation has rarely been considered. *Allan* v. *CIBC Trust Corp* still remains the only relevant decision under Ontario's *Class Proceedings Act, 1992*,[127] and the decision in *Barrow* v. *Bankside Members Agency Ltd* has also not been the subject of ratio consideration in the multi-party context in England since it was handed down. However, while the issue may have been described as "novel" in both leading cases considered in this article, class actions themselves

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[121] *CPR* 1.1(2)(e).

[122] *Securum Finance Ltd* v. *Ashton* [2001] Ch 291 (CA), leave to appeal refused: [2001] 1 WLR 538 (HL). The first action was struck out for delay, and the claimant purported to institute a second action.

[123] *Ibid* at 309.

[124] *Ibid* at 308–9.

[125] See *supra* note 11 at 684.

[126] Acknowledged by Saville L.J. *ibid.* at 266.

[127] See also the comment by Professor G.D. Watson, "Class Actions: The Canadian Experience" (2001) 11 Duke Journal of Comparative and International Law 269, fn 86.

are not. The enactment of a class action statute in Manitoba is tangible evidence that such litigation is being supported and conducted for the numerous benefits that the device provides to courts and to litigants. Hence, it is likely that class members seeking various tactical advantages or who are in the state of disagreement evident in *Allan* may, by their course of conduct, invoke further consideration of the issue.

Undoubtedly, the interrelationship between the *Henderson* rule, abuse of the court's process, and multi-party litigation, is a difficult and contentious issue. However, in light of the criticisms that may be levelled against the decisions in *Allan* and *Barrow*, it is suggested that the reasoning underpinning them may warrant reconsideration in the future, were a similar scenario to arise in the Manitoba province under its new class action legislation. A Manitoba court may well choose to interpret the equivalent of sub-section 27(3) of Ontario's *Class Proceedings Act, 1992* (closely reproduced as sub-section 26(1) of Manitoba's *Class Proceedings Act*) differently than did the court in *Allan* v. *CIBC Trust Corp*. Moreover, the application of the rule in *Henderson* v. *Henderson*, the interpretation to be accorded to the exception of 'special circumstances' under that rule, and proof of prejudice necessary to found an abuse of court process, may not be decided in the manner in which each was determined in the cases considered in this article, given the adverse consequences that those determinations have for repetitive litigation and judicial inefficiencies. Defendants of multi-party litigation are likely to seek to prevent the prospect of the multiple suits which the decisions entail by either distinguishing them on their facts or by further twin-pillared attacks based upon *res judicata* or abuse of process. These decisions are not, one suspects, the last word upon this intriguing topic.