

Public Funding of Class Actions and the Experience with English Group Proceedings

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I. INTRODUCTION

Legal aid and multi-party actions can promote access to justice by making legal representation available to impecunious litigants. However, these systems also *create* costs: improved access to justice can mean that unmeritorious claims are brought, wasting public money and unfairly burdening defendants. Careful allocation of legal aid to multi-party claims is essential because of the enormity of the expense and the number of individuals whose rights are at stake be they claimants, taxpayers supporting public defendants, or shareholders supporting corporate defendants. The delicate balance needed in financing high-risk litigation is exacerbated by irresponsibly applied criteria for legal aid allocation and cost exaggeration by lawyers. Legally aided group action claimants have nothing to lose and defendants, most often pharmaceutical companies or health services, may have nothing to gain because defence costs can equal or exceed the cost of settling. Known as ‘legal aid blackmail’, a defendant who is unable to recover costs even if he wins is pressured to settle unmeritorious cases, or to agree to a settlement more favourable to the legally aided party than would normally be justified. Thus the benefit of expensive litigation as a mechanism to discourage vexatious claims is lost.

The fault lies not only with the claimants, but also with opportunistic lawyers who fail to control costs, and with legal aid institutions driven to maximize access to justice seemingly at any cost, thereby funding cases that cannot win. Such problems can also occur in single party litigation but are magnified by the greater expense and far-reaching effects of multi-party claims. The public is the real loser: legal aid expenditures in the millions of dollars add to costs borne by

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society generally for large-scale compensation sought in the judicial arena, such as increased insurance premiums and higher prices of goods to consumers.¹ Moreover, baseless large-scale litigation weakens public confidence in institutions like public health authorities, and negative publicity from a trial (even if successfully defended) can damage a company or its product's image. Perhaps most seriously, unfounded claims run on public money can undermine public support for the legal aid system itself, and in so doing jeopardize legitimate claims.

This article will focus on the negative experience in England, to argue that the proper balance in multi-party actions between access to justice and its associated costs necessitates better management and allocation of litigation risk. More effective screening of legal aid applications and non-public sources of funding for the investigation of claims, such as the Class Action Disbursement Fund in Ontario, could achieve this goal. This view will be demonstrated through a discussion of several recent English group actions which appear to involve the abuse of public funds. Reforms to civil procedure itself will not be discussed, rather the paper will focus on possible modifications to the existing English legal aid system. It must be emphasized from the outset that the lack of publicly available information on the English Legal Services Commission's decisions to fund specific cases has constrained this analysis, forcing reliance on secondary sources and conjecture in several instances. Indeed the opacity of the Legal Services Commission's decisions will emerge as a central deficiency in need of improvement. It is necessary to begin with a brief explanation of the group litigation order procedure, the mechanism through which several of these actions have been brought.

II. GROUP LITIGATION AND LEGAL AID IN ENGLAND

A. Group Litigation Orders

There was no special framework for multi-party proceedings in England until amendments to the *Civil Procedure Rules* in 2000 provided for a Group Litigation Order (GLO)², which permits the trial of multiple similar claims that give rise to common issues of fact or law in one proceeding administered by the same judge.³ If liability is established, the individual litigants must prove only that they suffered harm as a consequence, in addition to quantifying their

¹ Patrick Atiyah, *The Damages Lottery* (Oxford: Hart Publishing, 1997) at 21. [Atiyah]

² *The Civil Procedure Rules (Amendment No. 3) 2000*, S.I. 2000/221.

³ *Ibid.* at 19.10. For a detailed outline of the GLO procedure see Mark Mildred, "Group Actions" in G. Howells, ed., *The Law of Product Liability* (London: Butterworths, 2000) 375 at 409. [Mildred]

individual loss. The purpose of the GLO is to manage large complex claims more efficiently, saving court resources and improving access to justice by avoiding the re-litigation of similar facts and law for each individual claimant.⁴ Litigants are also able to bring or defend claims more readily by sharing the burden of enormous costs among members of the group. A GLO will contain directions concerning the establishment of a register of all the claims managed as a group, and judgment on a common issue is binding on all parties to all other claims on the register. Litigants must opt-in to the register, each group member must independently file a claim form to become a party to the action. This requirement has been viewed as an impediment to access to justice, unlike the opt-out American and Canadian class action systems where joining the class is costless.⁵ The fact that there is some process involved with becoming a group claimant is beneficial however, because each individual case is subject to legal evaluation on its merits by the solicitor launching the claim. As we shall see, this requirement is not without its problems. Costs are leveled against group litigants severally. Each claimant is liable for an equal proportion of the common costs unless the court orders otherwise, as well as the costs associated with his individual claim, if one has been brought.⁶ This is unlike the system in Ontario where the lead plaintiff bears the entire burden of costs, including that of an adverse cost award, as well as all fees and disbursements of the class lawyers. Other Canadian provinces do not apply the 'loser pay' principle to class actions except where there has been frivolous or vexatious conduct by one of the parties. Before GLOs were initiated in England, group actions, such as the *Benzodiazepine*⁷ case, were tried together in an *ad hoc* manner under civil procedure rules for joinder. This paper will consider both legally aided GLOs as well as other multi-party actions.

B. Legal Aid and Moral Hazard

Reforms to England's legal aid system were undertaken in 1999 which, *inter alia*, tightened the merits test and abolished coverage for personal injury, death, or damage to property claims, replacing them with conditional fees.⁸ Clinical

⁴ Rachael Mulheron, *The Class Action In Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004) at 52. [Mulheron]

⁵ Rachael Mulheron "Some Differences With Group Litigation Orders – And Why A Class Action is Superior" (2005) 24 Civil Justice Q. 40 at 50. [Mulheron]

⁶ *The Civil Procedure Rules 1998*, S.I. 1998/3132 at 48.6.

⁷ *A.B. and Others v. John Wyeth & Brother Limited*; *A.B. and Others v. Roche Products Ltd.* [1977] P.I.Q.R. 385 (C.A.) [*A.B. and Others*].

⁸ For a critique of the reforms before they took place see Michael Zander, "The Government's Plans on Legal Aid and Conditional Fees" (1998), 61 Mod. L. Rev. 538.

negligence claims may still receive legal aid. In addition, claims that have a wider public interest that would otherwise be excluded, such as claims against public authorities and some personal injury matters⁹, may also receive legal aid.¹⁰ In 2003/04, the Legal Services Commission ('the Commission') spent £811 million of its £2.1 billion budget on civil legal representation.¹¹ While the precise amount spent per year on multi-party claims is not known, nor are there public records on the number of multi-party actions which apply for funding, the Commission's predecessor, the Legal Aid Board, acknowledged that multi-party actions were the most expensive cases that it funded.¹² According to the Commission's Annual Report, four publicly funded multi-party actions were concluded in 2003–04. All of these actions are discussed below.¹³

Legal aid can be justified on grounds of equity: access to justice is a fundamental right that should not depend upon economic status. The requirement of legal aid as a component of access to justice is reflected in Article 6(1) of the European Convention on Human Rights ('ECHR'): the right to a fair trial. This right has been interpreted by the European Court of Human Rights to include legal assistance in certain civil matters, such as highly complex cases¹⁴—a category into which multi-party actions often fall.

While facilitating access to justice for impecunious litigants is a worthy goal, this objective can be exploited through 'rational' (self-serving or strategic) behaviour on the part of the applicants for legal aid and their solicitors. The first part of this dilemma is what economists identify as 'moral hazard' on behalf of the consumer, in our case the user of legal aid. As there are no costs to a legally aided claimant other than the minimal statutory charge from the Commission, the likelihood of a claimant engaging in litigation is elevated. At the same time, the incentive to settle before trial is diminished.¹⁵ The absence of risk in effect grants legally aided claimants access to justice available only to

⁹ Legal Services Commission (U.K.), *Funding Code Guidance*, s. 10 (December 2003), Release 11 [*Funding Code Guidance*].

¹⁰ *Access to Justice Act 1999* (U.K.), 1999, c. 22, Sch. 2 (1).

¹¹ Great Britain Legal Services Commission, *Legal Services Annual Report 2003/04*, (London: Treasury Office, 2004) at 4. This total spent on civil representation includes family matters.

¹² Legal Aid Board "When the Price is High: Consultation Paper on Draft MPA Contract and Tendering Documents" (1999) at para 7.12, as cited in *Hodges*, *infra* note 31 at 187.

¹³ *Supra* note 11 at 83.

¹⁴ *Airey v. Ireland* (1979) 32 Eur. Ct. H.R. (Ser.A) 4, 2 E.E.H.R. 305 at para. 26. See also *Steel and Morris v. United Kingdom* (2005), 41 E.H.H.R. 22, 403 in which the denial of legal aid in a defence against defamation was held to violate the right to a fair trial under Art. 6(1) of the ECHR.

¹⁵ Alastair Gray "The Reform of Legal Aid" (1994) 10 Oxf. Rev. Econ. Policy 54. [Gray]

the truly affluent for whom money is no object.¹⁶ Thus the potential for frivolous lawsuits increases, necessitating careful scrutiny of legal aid applications.

Applicants cannot apply for civil legal aid directly; it must be done through a solicitor. Applications for group action coverage require that a case plan outlining general strategy be submitted with the completed form.¹⁷ The claimant's solicitors must provide detailed information to the Commission on the likely success and costs of the claim.¹⁸ This leads to the second part of the legal aid dilemma: moral hazard on behalf of the solicitor. The solicitor's opinion will not be independent because the solicitor has a financial interest in advancing the case. Consequently he or she might offer overly optimistic assessments of the merits—a clear conflict of interest.¹⁹ This can be particularly hazardous in group actions where the lead solicitor's interests are larger than any one claimant. Funded by legal aid win or lose, the solicitor has no incentive to present an accurate picture of the likely costs and merits of a claim, either to the claimants or to the Commission. This is exacerbated by an asymmetry of information between the consumer and the Commission, neither of whom are in as strong a position to assess the legal merits of their case.²⁰ In an attempt to constrain such exploitation and thus improve the objectivity of the Commission's decision-making, the opposing party is now informed of an application made on behalf of potential litigants so that he or she might make submissions outlining why funding should not be extended. Any person, not just a party to the action, is entitled to make representations regarding an application for funding.²¹ It is hoped that such representations will assist in achieving objectivity in the allocation of legal aid in the future.

In addition to embellishing a case's merits, legally aided solicitors are motivated by self-interest to inflate costs. Whether billing by the hour or in proportion to the complexity of a matter, solicitors have no incentive to

¹⁶ Adrian A.S. Zuckerman, "A Reform to Civil Procedure - Rationing Procedure rather than Access to Justice" (1995) 22 J.L. and Soc'y 155 at 164. [Zuckerman]

¹⁷ United Kingdom, Community Legal Services, *Application for CLS funding certificate* (CLS APP1), found at 2005 <<http://www.legalservices.gov.uk/civil/forms/applications.asp>>.

¹⁸ If the solicitor indicates that the claim's chance of success is borderline or poor, reasons must be given, which may include overwhelming interest to the client or public interest: see *Application for CLS funding certificate, ibid.*

¹⁹ Anthony Barton, "Medical Litigation: Who Benefits?" (2001) 322 B. M. J. 1189 and Zuckerman, *Supra* note 16 at 175.

²⁰ Gray, *Supra* note 15 at 53–54.

²¹ Legal Services Commission (U.K.), *The Funding Code Part 2—Procedures*, Part C, s.11, C41 (April 2003).

economize and will drive up costs, either deliberately or sub-consciously, in order to maximize their own gains.²² Standard fees have been suggested as a solution to this dilemma. Reimbursement would depend on the stage reached in the process of a matter, such as discovery, trial, or appeal. However, methods of payment merely alter the moral hazard as solicitors would want to reach 'trigger points' where the value of a case would jump to another level, even if this was not the best legal course of action.²³ Such problems can be aggravated in multi-party actions because of greater uncertainty cultivated by longer trials and greater quantities of more complex evidence.

It is important to recognize that moral hazard on behalf of the consumers and providers is partially cultivated by the lack of incentives on the part of the Commission to control costs. The Commission's employees' choices to extend funding are not regulated through punishment or reward. Therefore, the employees are guided only by the desire to assist impecunious litigants in achieving access to the courts, and whatever personal satisfaction that might engender. Indeed this aim is consistent with the self-serving motivation of solicitors and applicants, all of which contribute to the runaway costs of legal aid. The Commission's behaviour is not indicative of moral hazard, however, as it not rational (self-serving), but normative and, as we shall see, misguided.

C. Criteria for Legal Aid Allocation

In order to better illustrate where legal aid allocation in multi-party actions has gone wrong, we must first examine how funding allocation decisions should be made according to the Commission's own guidelines. Public funding for multi-party actions is allocated through the Commission's Multi-Party Action Unit ('the Unit'), which assesses cases based upon guidelines contained in the Funding Code.²⁴ Legal aid may be granted for common issues, known as 'generic work', or for one or all individual claims.²⁵ In deciding whether to grant representation in any civil matter, the Commission engages in a cost-benefit analysis in which it evaluates the probable number of claimants involved, the merit of their claims and the estimated cost of trial. In all cases funding will be denied if

²² Zuckerman, *Supra* note 16 at 163.

²³ Gray, *Supra* note 15 at 64.

²⁴ Established under s. 8 of the *Access to Justice Act 1999* (U.K.), 1999, c. 22; Legal Services Commission (U.K.), *The Funding Code*. Online: Legal Services Commission *Funding Code* <http://www.legalservices.gov.uk/civil/guidance/funding_code.asp> The Funding Code was established following a consultation process between practitioners and government that concluded in October 2004 [*The Funding Code*].

²⁵ Legal Services Commission (U.K.), *Funding Code Procedures, Part D, s.1, A1* [*Funding Code Procedures*].

the matter is suitable for a conditional fee arrangement,²⁶ a requirement that prevents redundant government assistance. In cases without a significant public interest element with quantifiable damages, the test is:

- i) [I]f the prospects of success are very good (80% or more), likely damages must exceed likely costs;
- ii) if the prospects of success are good (60-80%), likely damages must exceed likely costs by a ratio of 2:1;
- iii) if prospects of success are moderate (50-60%), likely damages must exceed likely costs by a ratio of 4:1.²⁷

This calculation has also been referred to as the ‘reasonable private client test’: would a reasonable private client contribute funds to such a case?²⁸ The cost-benefit analysis in clinical negligence claims is easier to satisfy, reflecting the perceived seriousness of such matters. Generic claims with a chance of success as low as fifty percent must show likely total damages only twice as large as likely costs.²⁹ This may be one reason why, shockingly, only twenty-seven percent of clinical negligence claims funded by legal aid in 2002/03 were successful (in that judgment for substantive damages was awarded to claimants at trial or other final hearing).³⁰

In cases indicated by the applicant’s solicitor as having widespread public interest, legal representation will be denied unless the likely benefits of the proceedings justify the likely costs, having regard to the prospects of success on the common issues and all other circumstances. The determination of public interest is made by the Public Interest Advisory Panel, a body meant to provide consistency and independence in the evaluation of this concept.³¹ Public interest is taken to mean a *real benefit* to a larger segment of society, and not just to the individual claimant.³² Health and safety are key public interest concerns, as

²⁶ Legal Services Commission (U.K.), *Funding Code Criteria*, ss.5.6.1, 5.7.1 [*Funding Code Criteria*].

²⁷ *Ibid.*, s. 5.7.3.

²⁸ *Funding Code Guidance*, *Supra* note 9, s. 4.8.

²⁹ *Funding Code Criteria*, *Supra* note 26, s. 9.3.2.

³⁰ U.K., Department of Health, *Making amends: A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS* (Report of the Chief Medical Officer) by Sir Liam Donaldson (London: Crown Copyright, 2003) at 68. The success rate for cases proceeding beyond the investigation stage was 60%. Note that ‘success’ does not involve a comparison between costs expended relative to rewards obtained.

³¹ For a discussion of attempts to define “public interest”, see e.g. Christopher Hodges *Multi-Party Actions* (Oxford: Oxford University Press, 2001) at 191. [*Hodges*]

³² *Funding Code Criteria*, *Supra* note 26, s. 5.7.5.

is the potential financial boon derived from claims against manufacturers for product liability.³³ In addition to assisting a wider segment of society, cases may also fall within the public interest if they could establish a new legal precedent.³⁴ The Commission has stated that such 'test cases' may be funded even if the prospects of success are fifty percent or 'borderline'.³⁵ The justification for the preference for public interest matters is clear: claimants should not be required to shoulder the expense of proving a claim for which the indirect benefits are felt by society at large. In effect, public interest claimants are providing a service to the public. It is important to recognize the implied emphasis on the forward-looking aspect of public interest upon which this justification rests. Tangible benefits to society and new legal precedents suggest a preventative concern for undefined future victims, rather than merely correcting past injustices suffered by identifiable individuals. Accordingly we might conclude that an action against a doctor still in practice, or an action regarding a drug still being sold would involve public interest whereas a lawsuit against a professional who had retired, or one involving a drug no longer on the market, would not.

Public funding may be withdrawn when the criteria under which funding was originally granted are no longer satisfied.³⁶ An English court has ruled that there is no violation of Article 6 of the ECHR in the withdrawal of legal aid to group claimants because judicial review of the decision to withdraw is available as recourse.³⁷ Withdrawal and any other decisions of the Commission, including the original denial of legal aid, may be judicially reviewed. Indeed this is done regularly, often at public expense.³⁸ Decisions may be appealed first to the Regional Director of the Commission and then to the Funding Review Committee ('the FRC').³⁹ A court may intervene only in certain circumstances: if the Commission or the FRC have taken into account irrelevant considerations, have failed to take into account considerations which are clearly relevant, or if the decision was based on a misunderstanding or was one which no tribunal

³³ *Funding Code Guidance*, *Supra* note 9, s. 5.2.2. There is expansive discussion of public interest in *The Funding Code*.

³⁴ *Ibid.*, s. 5.2.3.

³⁵ *Ibid.*, s. 4.3.

³⁶ *Funding Code Criteria*, *Supra* note 26, s. 14.2.

³⁷ *A.B. and Others*, *Supra* note 7 at 400.

³⁸ Mariel Irvine, "Class Actions: Vibration White Finger, Deafness, Smoking Litigation and Railway Disasters" (1998) 6:8 *Int'l Ins. L. Rev.* 257 at 258. See, e.g. *Paul Sayers and Others v. Smithkline Beecham Plc, Smith Kline & French Laboratories Ltd., Merck & Co. Inc., Aventis Pasteur MSD Ltd.* (2004) E.W.H.C. 1899 (Q.B.) [MMR/MR case]

³⁹ *Funding Code Procedures*, *Supra* note 25, Part C, s. 5; criteria 19–22.

properly directed could have reached.⁴⁰ The initial refusal of legal aid for group applicants does deny access to the courts. However, it is a justified allocation of exiguous resources to claims that not only have the greatest chance of success, but that are also the most serious, such as criminal cases involving a deprivation of liberty. This concern is reflected in the Funding Code's preference for civil claims that have a wider public interest and consequently will affect the lives of more people in a more serious way.

The Commission established a contracting system in 1999 wherein firms would tender for the opportunity to represent legally aided multi-party actions. This was, in part, to ensure that only experienced, well-equipped solicitors would undertake representation of group claimants.⁴¹ This system was an extension of a franchising procedure begun in 1994 to ensure quality control in the provision of civil legal aid generally. Firms are now granted multi-party contracts by the Unit based on the submission of a detailed case plan for managing the litigation and binding cost limitations on various stages. The Unit balances ability and economy by comparing hourly rates from various firms through a costed case plan. It is hoped that such competition will offset solicitors' opportunistic behaviour and engender efficiency. Disbursements for counsel and experts are restricted: their rates will be no more than those of the contracting solicitors, fulfilling the contracting system's principle of risk-sharing. Hourly rates are lower than commercial market rates, but solicitors are guaranteed payment even if they lose.⁴² Still, the current hourly rate for group action fees is £70, which represents a substantial loss to firms on the claim unless they are successful.⁴³ The Unit may terminate contracts on various grounds including solicitors' failure to control the conduct and progress of the action and excessive claims for payments.⁴⁴ The transfer of the matter to another solicitor in mid-trial might lead to more problems than it would prevent. A good deal of billed hours would be needed for a new solicitor merely to become familiar with the case such that service would be duplicated before any progress was made. This is why the evaluation of solicitors for franchising must be conducted carefully from the outset.

The above restrictions on legal aid allocation have led to several multi-party actions being denied certificates in recent years, such as the lawsuit against the

⁴⁰ Paul Balen, "Multi-Party Actions and the Legal Aid Board" (1996) J.P.I.L. 231 at 246.

⁴¹ *Legal Aid (Prescribed Panels) Regulations*, 1999, S.I. 1999/166. See also *Mildred*, *Supra* note 3 at 457–458.

⁴² *Funding Code Guidance*, *Supra* note 9, s. 15.13.3

⁴³ Martin Day & John Kelleher, "Lessons from MMR and the Future of Group Litigation Funding" (2005) 1 J.P.I.L. 98 at 102. [Day & Kelleher]

⁴⁴ *Mildred*, *Supra* note 3 at 457.

anti-depressant Seroxat and the claim brought by families of victims in the mass-accident Potters Bar train crash.⁴⁵ Despite these comprehensive guidelines and procedures, legal aid waste in group actions has persisted. A discussion of six English cases will illustrate the root of this problem: the Commission's overarching desire to promote access to justice with little regard for expense, and the exploitation of this aim by solicitors and their clients. We will begin with the notorious *Benzodiazepine* case. This case occurred before the reforms were in place, but is provided as background.

III. PUBLICLY FUNDED MULTI-PARTY CASES IN ENGLAND

A. Benzodiazepine

The case of *A.B. and Others v. John Wyeth & Brother Limited; A.B. and Others v. Roche Products Limited*⁴⁶ began in 1990 before reforms to legal aid and before the existence of the Group Litigation Order. This was a multi-party action against several pharmaceutical companies for alleged harmful side effects associated with the chemical *Benzodiazepine*, used in the prescription anti-anxiety drugs Valium and Ativan. Over 5000 claimants represented by 3000 law firms issued proceedings. This uncritical granting of applications reflected the Legal Aid Board's zeal for maximizing access to justice. The Board feared that early cut off dates—after which new claimants would not be permitted to join the action—would exclude many claimants from entry into the group.⁴⁷ Almost all of the claimants were granted some legal aid, most of which was spent on individual claims.⁴⁸ The trial was particularly complex because it involved multiple claims with slightly different interests and varied injuries were allegedly caused by different products at different times. While claimants intended a generic attack on the drugs, the court allowed the defendants access to information on individual claims. This revealed unsupported allegations when tested against medical evidence. The crucial defect was the inability of the claimants to present a unified case on the negative effects of the medication, as evidenced by an overly broad and unworkable statement of claim. Causation could not be established because of weak scientific evidence. Many medical reports did not actually attribute other alleged symptoms to the drugs and some of the symptoms claimed were identical to those for which the drugs were initially prescribed, namely, anxiety. Worse, some claimants had apparently never been prescribed the product of

⁴⁵ Jon Robins, "Law: Why Have They Let Us Down?" *The Independent* (23 September 2003).

⁴⁶ *A.B. and Others*, *Supra* note 7.

⁴⁷ *Mildred*, *Supra* note 3 at 405.

⁴⁸ *Hodges*, *Supra* note 31 at 16.

which they complained.⁴⁹ After hearing submissions from the defendant's solicitors that the case was futile—a novel procedure at this time—the then Legal Aid Board conducted an audit of the pleaded cases in 1993, doubtful that the medical evidence that had been supplied showed any actionable injury. The Board subsequently decided to withdraw funding for most of the Valium claimants. Ativan claimants were required by the Board to show cause for their legal aid certificates not to be withdrawn. Shortly thereafter support was withdrawn for many of the remaining claimants. An appeal against the withdrawal was dismissed by the Area Committee of the Board in 1994. The defendant Roche then successfully applied to court to have an important remaining claim struck out as an abuse of process. With insufficient funding, there was no longer a realistic prospect that the remaining litigation could be concluded. The court conducted a cost-benefit analysis, weighing the extent and likelihood of damages recoverable against the quantity of defendant's legitimately incurred costs. The remaining cases against Wyeth and Roche were subsequently struck out in 1995 and 1996 as an abuse of process.⁵⁰

In its enthusiasm for inclusionary justice, the Legal Aid Board was blind to the lack of merit of the individual cases because of the ostensible merit of the generic case. With each claimant's solicitor focused on his own client's case (and the billings available therein), a massive expenditure ensued before the true weaknesses of the cases were exposed. Facing no risk themselves, claimants were complicit in the obfuscation, joining the class without properly assessing their own usage of the drugs relative to their injuries. While the outcome of the *Benzodiazepine* litigation may not have been substantially different under the GLO procedure (Kennedy J. used a number of case management techniques to conduct the trial as efficiently as possible)⁵¹, stricter legal aid assessments post-1999 might have prevented the trial from labouring for as long as it did. By the time the trial collapsed, the *Benzodiazepine* debacle cost the taxpayers an estimated £40 million, the most expensive publicly-funded action in English history.

B. MMR/MR vaccine

*Paul Sayers & Others v. Smithkline Beecham Plc*⁵² was a GLO brought under the Consumer Protection Act⁵³ for injuries allegedly sustained by more than 1000 claimants from the measles, mumps and rubella ('MMR/MR') vaccine. The

⁴⁹ Gary Hickinbottom, "Benzodiazepine Litigation", as cited in Hodges, *Supra* note 31 at 385.

⁵⁰ *Ibid.* at 377.

⁵¹ *Ibid.* at 369.

⁵² *Supra* note 38.

⁵³ Consumer Protection Act 1987 (U.K.), 1987, c. 43.

vaccine had been introduced in 1988 and was administered to an estimated one million individuals annually. Concluded after the legal aid reforms came into force, the MMR/MR claim involved the second largest legal aid expenditure in English history. Sixteen hundred legal aid certificates were issued to children, most of whose parents joined the group action as litigation guardians. In September 2003 the Commission withdrew the certificate granted by its predecessor, the Legal Aid Board, supporting generic legal work for the eight lead claimants who alleged injuries of autism with or without bowel disorder⁵⁴, due to the lack of scientific credibility in the claim that the vaccine was linked to autism. Approximately sixty medical reports had been exchanged indicating that the link to autism was weak. A British medical journal, *The Lancet*, claimed that questionable research that had originally established causation should not have been published.⁵⁵ Key tissue samples examined by a pathologist (at a cost to legal aid of £800,000) may have been contaminated during analysis and the results were wrongly reported.⁵⁶ By the time the Commission withdrew the certificate, £15 million of public money had been spent on the generic and individual work. The Commission's decision to withdraw funding was reviewed by the Funding Review Committee, who upheld the discharge for all but eleven cases. Children suffering from encephalitis, epilepsy and deafness—but not autism—retained legal aid coverage. An application for judicial review of the Committee's decision was dismissed with leave to appeal also refused. This prompted the Commission to discharge the certificates of all remaining non-lead claimants.⁵⁷ In late 2004, the Commission reinstated legal aid for more than one hundred of the families for alleged MMR/MR-related injuries including arthritis, epilepsy and encephalitis, although not for autism.⁵⁸

⁵⁴ The withdrawal of funds was done under s. 15(2) of Regulation 77 of the *Legal Aid Act* (U.K.), 1988 c. 34. Note that the claims were not funded under the Access to Justice Act's Funding Code.

⁵⁵ "MMR Case' Parents Lose Latest Bid for Legal Aid" (27 February 2004) online: AutismConnect <<http://www.autismconnect.org/news.asp?itemtype=news§ion=000100010001&page=5&id=5165>>.

⁵⁶ Brian Deer, "Fresh doubts cast on MMR study data" *Sunday Times* (25 April 2004).

⁵⁷ This decision was likely an 'issue of principle' in which the Commission decides on one significant issue affecting a large number of claims—often one of causation - that cannot be challenged individually. See *Funding Code Guidance*, *Supra* note 9, s.15.12(2).

⁵⁸ This decision was believed to be the result of legal developments in Japan, where a number of children were awarded compensation for neurological disorders resulting from the MMR/MR vaccine: Jamie Doward, "MMR Parents Gain Legal Victory" *The Observer* (26 December 2004).

The Commission later revealed that the Legal Aid Board had been funding extensive research into the effects of the vaccine on autism. This was the first time that the Board had done so. Medical professionals decried this exercise, as it was known by the medical community for years that no link existed between the vaccine and the disease.⁵⁹ Group action practitioners agree that funding scientific research is a misuse of limited legal aid funds. This is especially so since the Commission is not suited to supervise research adequately and it engenders a perception of bias of which the courts will inevitably be suspicious.⁶⁰ Clearly, courts should not be used as a forum for the proof of scientific claims and research should be managed by a professional medical research organization, not a legal aid board whose role is to investigate legal liability once the factual basis for it is at least probable if not certain. The losses incurred in the MMR/MR case were not merely the financial burdens borne by the government and the pharmaceutical defendants. Fear generated by the negative publicity of the MMR/MR case has been blamed for the drop in vaccination rates among children, raising concern of a measles epidemic.⁶¹

C. Nationwide Organ Group Litigation

The case of *A.B. v. Leeds Teaching Hospital NHS Trust*⁶² ('NOGL') was a GLO brought in 2004 by relatives of deceased patients against several hospitals for the retention of patient organ samples allegedly without authorization. At the time of the trial, 2100 potential claimants had been notified and 369 had joined the register. The four lead claims included allegations of negligent failure to counsel bereaved relatives, breach of statutory duty, negligent failure to provide information, wrongful interference with a corpse and deceit. Damages were also sought for emotional stress and nervous shock. A separate GLO brought against the Royal Liverpool Children's Hospital, where doctors had contravened express instructions forbidding organ retention, settled for £5 million with an average recovery of £5000 per child.⁶³

A cost-capping order was imposed by Gage J. after the claimants' costs on generic issues had risen to £1.45 million and additional significant costs were anticipated under the Commission's case plan. Gage J. regarded costs of this size

⁵⁹ Michael Fitzpatrick 'Medicine On Trial' *Spiked Health* (15 December 2003). Online: Spiked Health <<http://www.spiked-online.com/Articles/00000006E019.htm>>.

⁶⁰ *Supra* note 43 at 100.

⁶¹ *Supra* note 58.

⁶² (2003), E.W.H.C. 1034 (Q.B.) [NOGL].

⁶³ "Alder Hey parents accept out-of-court settlement" *Society Guardian* (27 February 2003). Online: Society Guardian <<http://society.guardian.co.uk/alderhey/story/0,7999,904168,00.html>>.

as disproportionate to the complexity of the issues at trial and the amounts at stake. The defendants had argued that damages should be no more than £3 million. Gage J. preferred the claimants' estimate of total damages at £15 million, however, with 2100 total claimants the individual recovery per claimant would be only £7000.⁶⁴ Gage J. also determined that the claimants' estimate of solicitors' hours spent on preparation for the trial was substantially excessive.⁶⁵ Moreover, the Commission's case plan erroneously double-counted certain items, such as meetings with expert witnesses, casting serious doubt on the credibility of the case plan itself.⁶⁶ In carefully estimating reasonable hours spent on various tasks and hourly rates for solicitors and disbursements, a cost cap of £506,500 was set for the remainder of the trial.⁶⁷ The claimants' solicitors had estimated future costs at nearly twice that amount, at £957,000.⁶⁸

A common-sense knowledge of legal practice supports Gage J.'s assertion that the hours allegedly required for tasks like preparing for meetings with clients were well beyond that which was actually needed. This is a stark example of how the absence of solicitors' incentives to economize can lead to the distortion of litigation costs. Publicly funded case plans need not be flawless, but they should be prepared and implemented carefully with an eye to cost minimization regardless of the perceived importance of the issues to the claimants and the likely quantifiable recovery. Nevertheless, Gage J.'s decision to limit costs in this case has been criticized for failing to account for the uncertainty of the ultimate size of the group register, thereby potentially underestimating the possible award relative to anticipated costs per claimant. This judgment raised concern that an overly restrictive pre-emptive cost order might violate the principle of equality of arms, limiting the legally aided group's costs to a level that would disadvantage it relative to the opponent.⁶⁹

Despite the legitimate apprehension over the difficulty in accurately assessing future costs, equality of arms does not require absolute parity in resources between the legally aided party and its opponent. Equality can be attained provided that each party has a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage.⁷⁰ Therefore cost caps that are moderately proportionate to the amount at stake and the com-

⁶⁴ NOGL, *Supra* note 62 at para. 6.

⁶⁵ *Ibid.* at para. 47.

⁶⁶ *Ibid.* at para. 47(3).

⁶⁷ *Ibid.* at para 62.

⁶⁸ *Ibid.* at para. 47(6).

⁶⁹ Mark Mildred, "Case Commentary: *AB v. Leeds Teaching Hospitals*" (2003) J.P.I.L. 155.

⁷⁰ *De Haes and Gijssels v. Belgium* (1998), 25 E.H.H.R. 1 at para. 53.

plexity of the issues and that are based upon an informed and objective assessment of the expenses legitimately incurred should be applauded. Furthermore, equality of arms is an implied right under Article 6 of the ECHR and may consequently be subject to limitations provided that they are imposed in the furtherance of public interest or other legitimate aims.⁷¹ One such aim may be the prevention of excessive costs used as a means of applying undue pressure on an opponent, forcing it to discontinue its action, so-called 'legal aid blackmail.'⁷² Gage J.'s order in the *NOGL* and pre-emptive cost-capping orders generally have accordingly been praised for preserving equality of arms by ensuring that a party's access to court is practical and effective, while removing the threat of costs being used as a way to intimidate opponents into abandoning their position., which can be the case in group actions financed by unrestricted legal aid.⁷³

In the judgment on the substantive issues,⁷⁴ Gage J. ruled that the removal and retention of the organs by doctors without parents' permission did warrant compensation. However, the removal of organs by coroners was a standard practice in post-mortem examinations and the coroners had no legal duty to ask for consent for retention once consent had been given for a post-mortem, as outlined in the *Human Tissue Act*.⁷⁵ The claimants had no right of burial or possession of organs lawfully removed by coroners at post-mortem and retained.

The Commission's willingness to expend vast resources on the *NOGL* demonstrates its, and to a large extent the public's, hypersensitivity to the concept of 'injury', extending the human right of bodily integrity to tissue samples (not 'body parts' as the media sensationally described them, implying that children's bodies had been dismembered).⁷⁶ This irrationality resulted not only in a waste of public funds, in both legal aid and in the hospitals' defences, but also in damage to medical research and patient treatment such as increased waiting lists for

⁷¹ *Brown v. Stott (Procurator Fiscal, Dunfermline) and another* [2001] 2 All E.R. 97 at 119 (P.C.).

⁷² This issue was raised in the recent *King v. Telegraph Group Ltd.* [2004] E.W.C.A. Civ. 613 (C.A.(Civ. Div.)), where the defendants had no prospect of recovering their costs, even if successful, against the impecunious claimant (who was represented under a conditional fee arrangement).

⁷³ Saima Hanif, "A User's Guide to Pre-Emptive Cost Orders" (2004) 154 *New Law Journal* 1862.

⁷⁴ *A. v. Leeds Teaching Hospital NHS Trust*, [2004] EWHC 644 (Q.B.D.).

⁷⁵ 1961 (U.K.), c. 54, s. 1-2.

⁷⁶ See, e.g. Vicky Shaw, "How Could They" *Yorkshire Evening Post* (27 March 2004).

organs and a shortage of paediatric pathologists⁷⁷ This was a clear indication that it is often against public policy to finance certain lawsuits. The Commission's decision to pursue this group action may have rested on the lead solicitor's strategic presentation of the litigation as a 'test case' breaking new legal ground with wide ranging implications, namely property rights in body parts In reality, the case involved a narrow issue of hospital procedure. Most importantly the NOGL illustrates the Commission's and the legally aided solicitors' acute failure to control the costs of a case by allowing funds spent (or allegedly spent) to grossly exceed reasonable amounts.

D. Oral Contraceptives, Post Traumatic Stress and Sexual Abuse Cases

Three additional publicly funded multi-party actions should be mentioned. In *X.Y.Z. and others v. Schering Health Care Ltd*,⁷⁸ seven lead publicly funded claims were tried against three drug companies for alleged cardio-vascular injuries, including stroke and thrombosis, resulting from combined oral contraception pills. Total damages requested by all claimants were £10 million. The claim was dismissed midway through the trial, MacKay J. ruled that although the drugs caused increased cardiovascular risk by a factor of 1.7, this was insufficient for a finding of cause and effect between the drugs and the injuries (the threshold for which was established at the outset as a risk factor of 2).⁷⁹ The decision was based primarily on the preference for the defendant's expert evidence.⁸⁰ Even had the claimants' evidence been preferred, which generally indicated a risk factor of between 1.5 and 2, liability would have been possible only at the very upper end of danger in the evidence presented.⁸¹ Consequently the claimants were defeated, in part, by their own hand.

The second case, *Various Claimants v. The Ministry of Defence*⁸² had the Commission supporting an unsuccessful claim on behalf of military servicemen against the Ministry of Defence for failing to prevent and treat post-traumatic stress disorder ('PTSD') following the Falklands War, the Gulf War and conflict in Northern Ireland. In addition to ruling that the Ministry owed no duty of

⁷⁷ Dick Taverne, *The March of Unreason: Science Democracy and the New Fundamentalism* (Oxford University Press Oxford 2005) at 55-56.

⁷⁸ [2002] E.W.H.C. 1420 (Q.B.D.) [*Oral contraceptives case*].

⁷⁹ *Ibid.* at 2 and 344.

⁸⁰ *Ibid.* at 329.

⁸¹ *Ibid.* at 342. One minor study presented by the claimants showed a risk factor of 2.2 which was offset by a study showing 1.7.

⁸² [2003] E.W.H.C. 1134 (Q.B.D.) [*PTSD case*].

care to maintain safe working conditions for its personnel, the court held that the Ministry was clearly statutorily immune from liability from the events which occurred before 1987. This accounted for approximately half of the claims. Costs of this group action are unknown but it involved 2000 claimants, all of whom were publicly funded, as were the defendants. It is difficult to see how these two actions survived the Funding Code's analysis. There is no record of the Commission's reasoning, therefore one can only hypothesize. Given the patent flaws, the low risk factor presented in the oral contraceptives case and the statutory immunity in the PTSD case, it is unlikely that the Commission simply failed to appreciate the legal merit of the claimants' claims. A more plausible explanation is that the Commission recognized that the claims were not strong but chose to proceed anyway. This was perhaps because of perceived process values such as the catharsis engendered by a citizen exercising their right to freedom of expression, a concern that may well have informed the funding of the NOGL. This justification is particularly problematic in group claims because of the number of litigants who may need or wish to give evidence. In addition, the Commission may have gauged that negative publicity generated by the litigation alone would compel these defendants to raise the safety standards of their products and working conditions regardless of whether liability was established. These hypothetical gains have costs: the pharmaceutical company will externalize the expense of defending the claim, and possibly of raising its safety standards higher to avoid future claims, by increasing the price of its contraceptives. Litigation expenses and costs for any resultant improvement in personnel care incurred by the Ministry of Defence would probably manifest themselves in higher taxes or diminished government services in other areas. Consequently it is vital that the Commission resist seeking intangible or illusory benefits, and adhere strictly to the merits assessment in the Funding Code.

The third case is *Various Ledward Claimants v. Kent and Medway Health Authority and another*⁸³ in which 59 claimants brought an action in negligence against a regional health authority for the alleged sexual abuse of patients by a gynaecologist who had since died. Six of the eight lead claimants were financed by legal aid. The lead solicitor, Janet Loveday, had advertised the case in a local newspaper. The Commission withdrew funding after evidence showed that Ms. Loveday had altered witness statements and that some of the claimants were not even patients of the gynaecologist during the time when the alleged assaults occurred, facts which had been revealed by an earlier internal NHS hearing. The group action was subsequently dismissed because the claimants could no longer fund their case.⁸⁴ The cost to the public of the failed litigation was esti-

⁸³ [2003] EWHC 2551 (Q.B.D.) [*Ledward*].

⁸⁴ David Sapsted and Richard Savil "Women In Doomed Abuse Case Sue Lawyer" *The [London] Daily Telegraph* 26 June 2004. [*Sapsted & Savil*]

mated at £2 million, £400,000 of which was spent in fees to Ms. Loveday. Defence costs were an additional £700,000.⁸⁵ Although Ms. Loveday was an approved member of the Law Society's panel of experts on clinical negligence at the time of the trial, she had been rejected the year prior. Ms. Loveday ran the group action from her home office, where she specialized in personal injury law and had little office support.⁸⁶ It is unclear how the Unit could have agreed to grant Ms. Loveday a contract for this action under these circumstances. This raises concerns about the strictness of the contracting procedure. Moreover, there was little public interest in pursuing a claim against a deceased defendant because there was no danger of a future injury to a larger segment of society (and consequently no benefit to anyone beyond the claimant group).

The failure of the *Ledward* case suggests not so much the Commission's failure as it illustrates the problems that can ensue from solicitor-led litigation. Solicitors' ability to advertise for multi-party actions has been unregulated such that even highly speculative cases can be made attractive to claimants, often because of a flawed public perception that liability has already been established.⁸⁷ Media reports from claimants who had been approached by Ms. Loveday suggest that she preyed upon claimants' psychological vulnerability and misled them regarding the strengths and costs of their claims.⁸⁸ Such problems have been fuelled by the portrayal of lawyers in the media as champions of people's rights against wealthy opponents.⁸⁹

IV. POSSIBLE SOLUTIONS TO LEGAL AID WASTE IN MULTI-PARTY ACTIONS

Methods of rectifying the multi-party action legal aid abuse that we have seen in England will now be considered briefly. Non-judicial forms of compensation which could reduce reliance on litigation, such as a more advanced regulatory regime, have been the subject of other works⁹⁰ and will not be discussed here.

⁸⁵ Clare Dyer, "Sex Case Women Lose Legal Bill Plea" *The [London] Guardian* 22 June 2004.

⁸⁶ *Sapsted & Savil*, *Supra* note 84.

⁸⁷ *Hodges*, *Supra* note 31 at 310 and 312.

⁸⁸ *Sapstead & Savil*, *Supra* note 84. Some of the claimants were not on full legal aid.

⁸⁹ *Hodges*, *Supra* note 31 at 311.

⁹⁰ See, e.g. Atiyah, *Supra* note 1 at 185–193.

A. Alternatives to Legal Aid

One possible way to avoid future abuses of legal aid in multi-party actions would be to abolish legal aid for any actions eligible to proceed as a GLO so that scarce public funds could be saved for individual litigants who do not have the advantage of pooling resources to bring or defend claims. This would be more effective were the GLO an opt-out rather than an opt-in regime, as group claimants could then join a class without the need to file a statement of claim. Therefore, there would be no need for initial legal representation, at least until the determination of individual entitlement following the establishment of liability. Another option could be to abolish legal aid for certain categories of expensive cases, such as clinical negligence.⁹¹ This could have eliminated some of the wasteful multi-party actions discussed above. This seems somewhat arbitrary however, as medical negligence cases can be extremely important to their litigants and sometimes in the public interest.

With legal aid removed for some or all categories of multi-party claims, impecunious claimants could seek legal representation on a conditional fee basis. This would transfer the financial risk from the public purse and on to solicitors, and would help to eliminate vexatious claims by countering self-interested behaviour on the part of solicitors. Solicitors would only take on cases they believed were sound on their own cost-benefit assessment, although this might not be any more accurate than the 'artificial' analysis conducted by the Commission. Solicitors might still be tempted to overcharge clients by exaggerating risks when negotiating "uplifts".⁹² Competition among solicitors for the lowest uplift percentage could prevent this. Conditional fees are also problematic in multi-party actions because multi-party practitioners may handle only one file over several years. Consequently they do not have the luxury of taking the risk that they will win more cases than they lose each year.⁹³ Solicitors will only take cases if the rewards of success at least balance expense of failure, and this is hindered by the fact that success fees cannot exceed one hundred percent of the costs recoverable. Any discontinuing claimants, the number of which would be uncertain, would also remove their share of costs recovery thereby depleting the available return for solicitors.⁹⁴ These factors would inhibit smaller law firms that may not have the cash flow necessary to operate on conditional fees over the long term.

⁹¹ This has been considered for some time: see, e.g. "Med Neg Legal Aid To Go?" *Solicitors Journal* 6 Sept 2002, 769.

⁹² Zander, *Supra* note 8 at 548.

⁹³ Day & Kelleher, *Supra* note 43 at 103.

⁹⁴ Mildred, *Supra* note 3 at 451.

Solicitors' concern that they will not be paid unless they win might be alleviated by impecunious citizens taking out litigation expense insurance before the event to cover potential future litigation costs. They could then pay solicitors whether they win or lose, possibly with an uplift for victory as an added incentive.⁹⁵ A problem here is that indemnity levels available under most litigation expense policies are insufficient to cover costs in large, complex cases.⁹⁶ Moreover, premiums could be prohibitively expensive, particularly if a policy holder's potential risks are exaggerated by opportunistic insurance companies. This might be resolved by government subsidization to assure affordability.⁹⁷ Although this might not be any less costly than the existing legal aid system, it would spread the risk of unsuccessful litigation among insurance companies and the government rather than placing it squarely on the government, as under the current regime.

Another source of funding for impecunious group claimants might be third parties and investors, a full discussion of which is beyond the scope of this paper and has been examined by others.⁹⁸ Organizations such as environmental groups may commit funds to assist with group litigation for the sake of the public good, and corporations might contribute in order to profit from a share in the judgment. This is much like the operation of contingency fees in Ontario, where lawyers' fees are calculated as a percentage of the damages awarded rather than as a portion of the costs. Such an incentive would be less attractive in England, where damages are much smaller relative to costs and may run afoul of the common law's prohibition on champerty and maintenance. A contributing third party might not identify meritorious claims any better than the Commission does, but this is its prerogative as a private entity; as long as public money is not spent it should be free to choose its own investments. We might have reason to suspect that a private investor would select meritorious claims more efficiently than a government agency because there would be a financial incentive to assist stronger cases. The individuals assessing applications will personally gain from choosing winners by recovering their investment at a profit. Creating similar financial incentives for the Commission could improve the scrutiny of claims by more closely approximating the commercial cost-benefit analysis that a private investor would undertake. Part of the existing problem with the Commission's decision-making process is that the government assumes

⁹⁵ Legal expense insurance has been suggested by several authors including Gray, *Supra*, note 12 at 65; Atiyah, *Supra* note 1 at 189-192; and Hodges, *Supra* note 28 at 136-137.

⁹⁶ Hodges, *Supra* note 31 at 136-137.

⁹⁷ Gray, *Supra* note 15 at 65.

⁹⁸ This has been discussed by Poonam Puri, "Financing of Litigation by Third Party Investors: A Share of Justice" (1998) 36 *Osgoode Hall L. J.* 515; and Mulheron, *Supra* note 3 at 459.

all risk of mistakes and, more importantly, Commission representatives have no incentive to be more discerning in their assessment of applications. Ironically, rational self-serving behaviour, which can lead to abuse when exhibited by solicitors and legal aid users, may be the very mindset which the Commission itself must be compelled to adopt. Were Commission employees to receive salary bonuses or paid leave commensurate with the success of the cases the Commission supports (perhaps tied to the ratio of favourable judgments or settlements relative to costs incurred) we might expect fewer failures such as those we have seen. The drawback with these scenarios is that with cost and profit as the bottom line, more risky claims with a public interest element would inevitably be neglected.

B. Focus on Generic Cases and Improved Transparency

Legal aid waste could be alleviated by focusing scarce funds on the support of generic cases rather than on the investigation of a large number of individual claims involving a multitude of complex fact scenarios. This is, after all, the essence of the cost advantage in pursuing claims as a group. The Commission has already expressed its preference for funding the investigation of generic rather than individual claims⁹⁹ although there is little indication that it has actually done so. This practice could be problematic in cases like *Benzodiazepine*, where individual cases were the source of much of the difficulty. Liability in many individual cases was initially assumed by the Commission without sufficient verification.¹⁰⁰ Critics have also observed a conflict between the emphasis on generic claims and GLO pre-action protocols that require full investigation into individual claims before proceedings can be commenced.¹⁰¹ Still, there is little utility in apportioning funds on the advancing of individual cases when the generic case on which the group action is based remains uncertain. While it is true that the MMR/MR case's exploration into the generic autism link was fruitless, an important lesson from the *NOGL*, oral contraceptives, and PTSD cases is that core legal weaknesses in generic cases should be exposed before individual claims are advanced or even evaluated by the Commission. A more effective way of vetting individual claims from the outset is therefore warranted. In addition to fulfilling legal aid's guidelines for coverage, it would be helpful to have each applicant interviewed by a legal aid representative at the outset of litigation. This would serve to ensure that the claimant understands the stresses involved with testifying and undergoing medical or other examinations, possibly over a period of months or years, that liability has not yet been proven and that

⁹⁹ *Hodges, Supra* note 31 at 188. Hodges cites: "Legal Aid Board, A New Approach to Funding Civil Cases" (1999) [12.16].

¹⁰⁰ *Hodges, Supra* note 31 at 314.

¹⁰¹ *Mulheron, Supra* note 4 at 104.

there is a danger that legal aid support could be terminated before resolution. Realizing that there are non-financial costs associated with litigation and that rewards are uncertain might control a claimant's moral hazard, thereby reducing the number of claims.

Although the Funding Code outlines in detail how decisions should be made, there is a startling lack of publicly available information regarding the Commission's actual reasons for funding specific cases. Increased transparency in the Commission's decision-making processes at every stage from the initial application through trial, to judgment or settlement is thus essential. While this may conflict with solicitor-client privilege, accountability must be maintained because of the magnitude of public resources involved. Publicly available records of decisions, at least in those instances in which applications are challenged by opponents,¹⁰² edited where necessary to protect privacy interests, would improve the monitoring of expenditures both within the Commission and the Department of Constitutional Affairs which sponsors it. This would in turn maintain consistency in decision-making and adherence to the Funding Code as well as provide solicitors with a better understanding of which claims will be successful. This would allow them to screen unworthy cases, which would facilitate the challenging of applications by opponents. In addition to greater transparency in decisions, accountability might be improved by restructuring funding for the Commission itself. Rather than receiving risk-free grants underwritten by the government, the Commission should consider seeking funding from private loans. Commission resources would then be contingent upon the ability to repay such loans and therefore on the Commission's performance over time. This would build in a safeguard that decisions on applications for legal aid be taken with the utmost care. A similar system involving private, self-generating investigatory assistance to legal aid for multi-party actions will now be considered.

C. Self-Funded Investigation and the Ontario Class Proceedings Fund

The lack of funding alternatives for public interest cases and the need for initial claim investigation emerge as persistent problems for multi-party claims. Both may be addressed by a regime such as that in operation in Ontario where disbursement funding is available to class action plaintiffs. The Fund becomes liable to pay the defendant's costs if the defendant succeeds and obtains a cost order against the plaintiff. Fees are available on a contingency basis with lawyers paid a percentage of the damages awarded if the action is successful.¹⁰³The

¹⁰² This is done in Ontario, see below.

¹⁰³ In Ontario, legal aid for full representation funding (lawyer's fees) for multi-party actions is allocated by the Group and Test Case Committee of the provincial Legal Aid Board. *Legal*

Ontario Class Proceedings Fund ('the Fund') is administered by the Board of the Law Foundation and was created as a regulation under the *Law Society Amendment Act* in 1992.¹⁰⁴ Similar funds exist in Quebec¹⁰⁵ and in Hong Kong.¹⁰⁶ Under Ontario's cost-shifting system, the losing representative plaintiff alone is liable for the defendant's costs, as well as for his own lawyer's costs and disbursements. If the representative plaintiff receives assistance from the Fund then he will no longer be exposed to the risk of having to pay the defendant's costs in the event that the action is unsuccessful. The defendant may recover costs as well as disbursements from the Fund instead.¹⁰⁷ The Fund does not consist of public money: it is financed by interest generated from clients' money held in trust in one account for more than one client¹⁰⁸ as well as from judgments granted in favour of class action litigants who used the Fund. Ten percent of all awards, judgments or settlements received by applicants must be returned to the Fund.¹⁰⁹ Grants are administered from the Fund by the Class Proceedings Committee ('the Committee') and an application to the

Aid Services Act, S.O. 1998 c. 26 s. 13(1). Class Actions are governed by the Ontario *Class Proceedings Act*, S.O. 1992, c. 6.

¹⁰⁴ S.O. c. 7. See: *Law Society Act*, R.S.O. 1990, c. L-8; *Class Proceeding Regulation*, O. Reg. 771/92 amended to O. Reg. 535/95.

¹⁰⁵ The Fonds de recours collectif created *An Act Respecting the Class Action*, R.S.Q. c. R-2.1. The Fonds does not automatically relieve an unsuccessful representative plaintiff of liability for the defendants costs. However, under s. 29(c), the Fonds may assume liability for costs and disbursements which the plaintiff is ordered to pay a defendant if the agreement entered into between the Fonds and plaintiff so specifies.

¹⁰⁶ The Consumer Legal Action Fund was established in 1994 to finance complaints by consumers against manufacturers.
Online: <<http://www2.consumer.org.hk/yearbook/19992000/claf.pdf>>.

¹⁰⁷ *Law Society Act*, *Supra* note 105, s. 59.4(3).

¹⁰⁸ *Ibid.* at s. 57(1) which reads:

57(1) Every member who holds money in trust for or on account of more than one client in one fund shall hold the money in an account at a bank ... bearing interest at a rate approved by the trustees.

(2) The interest accruing on money held in an account referred to in subsection (1) shall be deemed to be held in trust for the Foundation.

¹⁰⁹ Cf. to conventional legal aid repayment requirements: recipients of legal aid may be required to reimburse the Legal Aid Commission for some of the funds, depending on their financial situation and conduct, *Access to Justice Act* (U.K.) s 10. See also the Ontario *Legal Aid Services Act*, 1998 S.O. 1998 c. 26 s. 40 wherein an applicant may be required to contribute towards legal aid costs.

Committee must include the submission of a written legal opinion regarding the merits of the case.¹¹⁰

The Ontario funding regime is illuminating because it appears to afford a narrower scope of discretion than that available to the Legal Services Commission in England. The *Law Society Act*¹¹¹ and its regulations¹¹² outline in detail how the Committee should assess applications to the Fund. These guidelines were evaluated in *Edwards v. Law Society of Upper Canada*¹¹³, the only decision on allocation from the Fund which has been reported. This case involved the challenge of a funding application by the claimant's opponent and held that the 'merits of the case' is the most important factor to be considered.¹¹⁴ In addition to avoiding redundant funding, the Committee favours applications that raise issues of broad public importance, or which are directed towards improving the situation of people who have been historically disadvantaged in society.¹¹⁵ The latter consideration is missing from the Funding Code. The Committee's focus seems to be more on the rectifying of systemic wrongs than it is on compensating for a particular harm done or on the specific legal issue at trial. Public interest is also linked with likelihood of success, with cases falling below a fifty percent chance of success being unlikely to receive funding.¹¹⁶ The Committee evaluates applications in reference to other applications. It grants funds such that the average case has a fifty percent chance of success and that the average levy, ten percent of the judgment, will be greater than the average defence costs in the event of failure. In theory this will result in a larger number of cases being funded, thereby spreading the risk of the Fund's depletion.¹¹⁷ In addition to taking into consideration the burden placed upon defendants in challenging weak claims, the Committee's goal of maximizing access to justice for the impecunious is checked because funds are finite. A positive decision on one applicant may require a refusal to another, such that only the most meritorious cases will be brought. Thus although there is no explicit cost-benefit test under the Committee's guidelines, the discretionary element in funding allocation is restricted. This might be one reason why Ontario has not suffered from costly

¹¹⁰ O. Reg. 535/95, s. 3(1).

¹¹¹ *Supra* note 105, s. 59.3(4).

¹¹² *Supra* note 105, s. 5.

¹¹³ (1994), 36 C.P.C. (3d) 116 (Ont. Class Proceedings Committee).

¹¹⁴ *Ibid.* at 130.

¹¹⁵ *Ibid.* at 127.

¹¹⁶ *Ibid.* at 135.

¹¹⁷ *Ibid.* at 139.

failures of multi-party actions as England has. The Committee will also consider arrangements made by the group's lawyers to manage the case as it progresses. This will involve an assessment of the lawyer's expertise, commitment and overall strategy and planning in the case¹¹⁸ which should assist in cost control, much as the Commission's franchising system does. Unfortunately, there remains no disincentive against lawyers using the Fund for the investigation of a speculative claim. Consumer moral hazard also remains: applicants to the Fund are not discouraged from litigating because, as under conventional legal aid, they bear no risk.

The Fund initially met with praise because it facilitated public interest litigation in a jurisdiction where unsuccessful parties could be exposed to liability for costs.¹¹⁹ More recently, negative light has been cast on the Fund because it has failed to sponsor many claims, largely because of inadequate funding.¹²⁰ The Fund began operations with \$500,000, considered far too little to cover disbursements in a complex action.¹²¹ It was also feared that a single adverse costs award could deplete it entirely.¹²² These concerns were assuaged in part by the recent judgment in *Gilbert v. Canadian Imperial Bank of Commerce*¹²³, where \$1.65 million was recovered by the Fund in a class action regarding excessive interest rates charged on credit cards. Similarly, the Fund's disbursement-only coverage has been assailed for failing to redress barriers to litigation because of the magnitude of fees relative to disbursements.¹²⁴ Fees can be very high in class actions, particularly in specialized cases such as medical negligence or environmental claims. If lawyers are unwilling to take cases on a contingency basis, representation could be beyond the means of most litigants. However, in class actions disbursements in the form of expert witness fees and document

¹¹⁸ *Ibid.* at 128.

¹¹⁹ Roger Smith, "Managing the Down Cycle" (1996) *Legal Action* at 6; Lara Friedlander, "Costs and the Public Interest Litigant" (1995) 40 *McGill L. J.* 55. [Smith]

¹²⁰ Garry Watson, "Class Actions: The Canadian Experience" (2001) 11 *Duke J. of Comp. & Int'l L.* 269, at 275-276.

¹²¹ *Smith*, *Supra* note 119 at 7.

¹²² A court expressly ruled that concerns on the negative societal effect of a cost award depleting the Class Proceedings Fund are beyond the court's purview: *Edwards v. Law Society of Upper Canada* (2000), 188 DLR 4th 613 at 637 (Ont. C.A.), following *Garland v. Consumer Gas Co* (1995), 22 O.R. (3d) 767 (Gen. Div).

¹²³ (2004), 3 C.P.C. (6th) 35 (Ont. S.C.J.).

¹²⁴ *Puri*, *Supra* note 98 at 15.

review can make up a large portion of costs.¹²⁵ The rationale for granting disbursement-only coverage is clear: it finances the initial investigation into the merits of a claim, such that public or privately paid lawyers can make more informed decisions regarding full representation. If successful, the lawyers' fees are drawn from the common fund. Disbursement funding can also be limited to the filing fee for the statement of claim, but this still activates the cost guarantee, fulfilling the Fund's primary purpose of protecting the representative plaintiff from costs liability. Of course this is not to say that large-scale disbursement funding should be used as a tool to engage in a prolonged research project like the MMR/MR autism link, however, *prima facie* merits should be identified before further resources are committed from either public or private sources. That the funds available for disbursements have a built-in limit helps force lawyers to regulate their expenses without the requirement of a judicial cost assessment.

Initially the ten percent deduction from plaintiff's recovery did not adequately maintain the Fund's capitalization, largely because the cases with the largest damages rewards did not apply for funding. There had been an expectation that all class action plaintiffs in Ontario would apply for funding, however very few did.¹²⁶ Only 11 new applications were made to the Fund in 2003, three of which were successful and three of which were denied. The other five were either withdrawn or are pending. Only \$123,000 was paid from the Fund in 2003. Disuse of the Fund might be explained by adverse selection: litigants with the strongest cases will not use it as lawyers will be more likely to take their cases and pay disbursements on a contingency fee basis, and weaker cases are denied applications. Still, the Fund remains a useful model for self-funded initial investigation of claims. The disbursements themselves should be viewed primarily as the 'hook' which is used to make the Fund liable for all of the costs if the class action fails. The Fund is also an important means of funding group claims that seek non-monetary compensation, where a victory will not generate funds from which the plaintiffs' lawyers can recover their fees and disbursements.¹²⁷ The Ontario Fund has already been recommended by practitioners in England as a more efficient example of funding disbursements in group litigation.¹²⁸ Perhaps it could be financed from solicitors' membership and other fees paid to the

¹²⁵ A growing sub-profession has emerged in Canada: 'Project Lawyers'. These are highly-qualified lawyers retained at high cost by firms often on a long term contract basis to meet documentary discovery requirements.

¹²⁶ O. Reg. 535/95, s. 10(3)(b) and Watson, *Supra* note 120 at 276.

¹²⁷ Mulheron, *Supra* note 4 at 455.

¹²⁸ John Peysner, "The Future of Funding Litigation" (2004) 101 (17) *The L. Soc'y Gaz.*, 22.

Law Society¹²⁹, or via an initial large grant from the legal aid budget followed by a three percent 'tax' on all group action recoveries, whether or not the claimants apply to the fund.

V. CONCLUSION

Funding group litigation is an exercise in risk assessment—deciding which claims should be funded at public expense, and risk management—proportioning this risk among funding sources. As lawyers are reluctant to invest resources in high risk cases, legal aid will often take on riskier claims for the sake of the public good. Recent English group action cases have demonstrated how moral hazard on the part of claimants and solicitors, as well as the Commission's willingness to fund weak cases due to a desire to maximize access to justice can result in a waste of public resources. Defendants, who are often publicly funded themselves, have been left in the invidious position of fighting expensive battles that should never have been fought.

It should be emphasized that not all publicly funded group actions have resulted in failure. The NOGL was at least partially successful, although as yet uncertain compensation levels may be less than ultimate costs, and the MMR/MR vaccine case could yet result in damages awards for at least some of the claimants. A fourth multi-party action funded by the Commission in 2003/04 involved the successful defence of former employees of an insolvent bank.¹³⁰ Legal aid costs for this defence are unknown, but a subsequent legally aided counter-suit by the former employees was eventually settled. As the amount of the settlement was not disclosed, we cannot know if it justified the cost of the litigation, which was estimated to total in excess of £1 million for both parties,¹³¹ nor do we know if the liquidator in bankruptcy was compelled to abandon a strong defence for fear that the cost of litigating to a successful conclusion would exceed the amount of the settlement.

More mindful of the numerous failures we have seen, this article has considered several possible modifications to legal aid and the most effective solutions are these. The Legal Services Commission must implement its multi-

¹²⁹ Initial capitalization of such a fund in England could not be derived from the same source as in Ontario because of strict rules on repaying interest on client's accounts back to clients: see The Law Society of England and Wales, *Solicitor's Accounts Rules 1998*, Rule 24. For Ontario regulations concerning trust account interest: *Supra* note 104.

¹³⁰ *Bank of Credit International S.A. (In Liquidation) v. Ali*, [2002] 1 A.C. 251 (H.L.). The employees had been sued by the bank's liquidator in bankruptcy for the recovery of loans granted to the employees by the bank prior to its collapse.

¹³¹ *Bank of Credit International S.A. (In Liquidation) v. Ali (No. 2)*, [2003] E.W.C.A. Civ. 639 at para. 4.

party action guidelines more rigorously, particularly in the determination of costs relative to benefits and in the understanding of public interest. In order to do so, the Commission must carefully and objectively evaluate the strength of the legal claims that they are supporting, particularly the generic claims, rather than pursuing a cause simply because the ill-informed public desires it. Furthermore, the Commission must control solicitors' expenditures, as outlined in the contracting procedure, by insisting on binding cost estimates and the diligent implementation of case plans. Transparency and accountability in the Commission's decision-making process must be improved, possibly through performance-related incentives. As these recommendations may decrease the number of successful applications and may discourage solicitors from representing claims, some of the risks borne by private solicitors should be alleviated so that they will take on less profitable cases in the public interest. One way to achieve this is through self-funded disbursements at the investigative stage, as seen in the Ontario Class Proceedings Fund. These modifications should facilitate the balancing of multi-party litigants' access to justice against its associated costs such that the expensive failures we have seen will become a thing of the past.