18. Class actions in context

Deborah R. Hensler

INTRODUCTION

Legal scholars who write about class actions, group litigation and other collective litigation focus on statutes and rules. Public policy-makers who debate adopting collective procedures focus on consequences. Neither scholars nor policy-makers typically pay much attention to the circumstances that give rise to the mass claims that the procedures address, the cultural values and institutions that shape beliefs about when people and businesses should be compensated for losses, the economic arrangements that facilitate or deter litigation and the politics that shape decisions about who will be responsible for paying compensation to whom and how much.

The case study research reported in this book highlights the importance of these contextual variables for understanding the functions collective litigation plays in different legal regimes and polities and the roles of parties, lawyers, judges, politicians and civil society in shaping litigation. By juxtaposing the stories of how collective litigation arose and evolved in different contexts, it is possible to discern both the common features of different jurisdictions' collective litigation processes and the importance of regime-specific characteristics in determining the outcomes of collective litigation. Close observation of class actions and non-representative group procedures reveals a more complicated picture of the challenges mass claims present than is typically suggested by the debates over the adoption of collective litigation procedures.

Qualitative studies of a small number of mass litigations leave many empirical questions unanswered. How many such lawsuits are there? What types of injuries are most (and least) likely to lead to mass litigation? How are the benefits and costs of various forms of collective litigation distributed? The answers to such questions await quantitative research. But the rich narratives about litigation in diverse legal, cultural, economic and political circumstances presented in this book offer lessons for policy-makers and suggest avenues for future scholarship. This

chapter discusses both, and ends with an epilogue about the process of conducting collaborative comparative research.

LESSONS FOR POLICYMAKERS

When it Comes to Efficiency, Collective Litigation Procedures are Not Created Equal

When the resolution of a common issue such as the application of the relevant liability rule has a dispositive effect on many claims that arose under the same factual circumstances, it seems sensible from an efficiency standpoint to resolve that issue once for all claims. However, it is possible to design a collective litigation procedure that introduces so much complexity into litigation that it outweighs savings due to aggregation. It is also possible to implement a collective litigation procedure in a way that preserves so much of the individualization that is traditional in ordinary litigation that the potential gains from aggregation are unrealized.

The Deutsche Telekom securities litigation (Chapter 13) illustrates this lesson. The 'model case' procedure (KapMuG) developed to speed the litigation specifies an appellate process that has resulted in multiple trips up and down the court ladder to resolve key issues. The result is that the case lingers on at the time of this writing, more than ten years after its inception. Moreover, although the procedure provided for decision-making on a single 'model case', judges were required to record the decision in the model case in the hundreds of individual case files that were registered as part of the proceeding, defeating some of the benefits of aggregation.

In contrast, the US multi-district litigation procedure (MDL), another form of group proceeding, is used efficiently in US federal courts, as illustrated by the Toyota unintended acceleration litigation and the litigation arising from the British Petroleum oil spill (Chapter 5). US judges assigned to oversee an MDL issue decisions on pleadings, discovery and summary judgment motions that apply by law to all the individual claims that have been consolidated for pretrial management. No individual record-keeping is required to implement the intent of the legislators who enacted the MDL statute. Only final decisions on the merits are reserved for individual judgment.

However, sometimes ad hoc processes may prove more efficient than special collective procedures. The English property damage litigation that arose as a result of the Buncefield explosion (Chapter 15) illustrates this

lesson. Over time some English judges and lawyers have decided that in some circumstances judicial case management is more efficient than the English group litigation procedure (GLO) that bears some resemblance to the German and American group proceedings.

In contrast to all these group litigation approaches, class action procedures create a single lawsuit. Absent class members' opt-in or opt-out, decisions typically must be made within a limited time period, minimizing uncertainty about who is bound by these decisions. However, as illustrated in the case study of the Royal Dutch Shell securities litigation (Chapter 8), class actions may require extensive—and expensive—notice campaigns that introduce an element into collective litigation that is not present in group litigation procedures or judicial case management. Not all class actions proceed swiftly. (However, none of the class actions described in this book took as long as the Deutsche Telekom proceeding.)

Efficient dispute resolution—whether within or outside the court—can come at the price of accuracy, as illustrated in the British Petroleum litigation (Chapter 5). The private Gulf Claims Facility paid over $6 billion to more than 169 000 claimants in less than two years. But the potential of 'easy money' attracted thousands of fraudulent claims as well as many honest claims that would likely not have survived formal legal tests had they been litigated, increasing the total compensation paid by the facility.

Designing aggregative procedures that achieve an optimal balance between efficiency and accuracy is hard. Optimal design may not be possible because of legal rules that require or prohibit certain procedural options. Moreover, an aggregative procedure that makes sense on paper may not achieve its desired goals in practice. Whether a procedure will achieve the balance its designers sought depends on how it is implemented by those charged with doing so and how those it is intended to serve respond to it. The responses of both groups are shaped not merely by formal legal rules but also by culture, economic incentives and politics.

Effective implementation of aggregative procedures depends critically on judges' perceptions of their role: where judges pro-actively manage cases—often termed 'case management'—the procedures are more likely to be implemented effectively. Adopting case management techniques may require a shift in judicial culture and specialized training.

Mass Media Set the Stage for Mass Claims

Law students are taught that substantive legal doctrine determines who has a claim against whom and for what, and procedural rules determine

how a justiciable claim will be litigated. But when mass losses or injuries occur, mass media often clamor for investigation and draw (sometimes hasty) judgments about causation and fault that encourage litigation and compensation, even when the claims do not satisfy exacting legal standards. Available evidence suggests that protracted media attention to mass injuries and losses and the oft-times dramatic responses to these spur litigation. The influence of a particular procedural mechanism on claiming behavior pales beside the effects of mass media.

The effects of media on mass claiming are not limited to certain types of jurisdiction or particular types of loss. In the trans-national Royal Dutch Shell securities litigation (Chapter 8) and the US Toyota unintended acceleration litigation (Chapter 5) persistent reporting may have contributed to quicker corporate responses to management failures and more vigorous regulatory investigations. In the Toyota case these in turn encouraged thousands of complaints to the regulatory agency. In the English Buncefield explosion, media coverage contributed to quick corporate acceptance of responsibility for losses (Chapter 15). National media coverage of contamination in the Gulf of Mexico following the BP oil spill increased public attention to the spill and likely contributed to President Obama's decision to press the company's CEO to set up a $20 billion compensation fund (Chapter 5). The Chilean La Polar case (Chapter 17) generated 2,000 newspaper articles and occupied the national political agenda for three weeks, ultimately moving the Minister of Interior to issue a call to compensate consumers. The involvement of a media celebrity in a public relations campaign to encourage ordinary German citizens to purchase Deutsche Telekom shares may have contributed to investors' perception that they were owed compensation when the share price collapsed (Chapter 13).

Notwithstanding the importance of crisis management and media relations to parties and lawyers engaged in mass litigation, no law school offers courses in this topic; nor has it attracted serious legal academic attention. But the role of media in shaping mass litigation has drawn the attention of large corporations that are most frequently the targets of such litigation, and the large law firms that usually represent them, many of which have created formal crisis-management practice groups. Smaller firms that represent plaintiffs exclusively in jurisdictions that have divided bars are unlikely to have the resources to deploy the full range of strategies that public relations firms and law firms offer corporate clients. But the most experienced plaintiff firms, especially in the United States (US), have a sophisticated understanding of how media coverage shapes government responses to mass injuries and losses, and they use this knowledge to shape the litigation environment.

Judges are the least comfortable with the media firestorms that frequently accompany mass litigation. Formally judges are presumed to be 'above the fray' and most strive to maintain their distance from media representatives. Whether and to what extent judicial decision-making is responsive to media portrayals of mass claims and mass litigation is unknown.

Mass Claims Incentivize Legal Adaptation

There is an extensive literature on societal responses to mass injury victims. Survivors of terrorist attacks and natural disasters tug on the public's sympathies, which often leads to an outpouring of relief aid from private and public sources. Key to arousing public sympathy is the perception that the survivors' injuries and losses were a result of bad luck or someone else's incompetence or malfeasance rather than the survivors' own behavior. When the circumstances surrounding the injury are ambiguous, survivors are less likely to be perceived as 'victims' and more likely to be seen as unworthy to receive aid and left to fend for themselves. When mass injuries lead to protracted and disputatious compensation processes, those who were at first viewed as worthy victims may come to be seen as greedy supplicants or perhaps fraudsters (Barrett, 2005; Dauber, 2003–2004; Tugend, 2013).

Whether claiming is seen as righteous or exploitative is culturally determined. Today, even in capitalist societies, there seems to be a tendency to favor redress for ordinary people—'mom and pop' investors, pensioners, middle- and lower-income consumers and small-business owners—who have suffered losses in their dealings with large corporations, even when the terms of the transactions between such citizens and corporations arguably do not justify legal redress. However, sympathy for individuals who may not have understood the terms of a contract they entered into does not necessarily extend to providing collective redress to a class of similarly situated individuals. In part as a result, the litigation described in this book did not always—or even often—lead to formal legal victories. However, the litigation sometimes encouraged doctrinal changes and procedural innovations that tilted the legal regime towards the claimants. Moreover, as lawyers became more familiar with mass litigation, some began to change the way they practice law. In some instances, these changes may have shifted the course of subsequent litigation.

The Vie d'Or litigation (Chapter 6) offers a vivid example of the potential of sympathetic claimants to shift legal norms. The 11,000 Dutch consumers who lost their investments and life insurance policies when

Vie d'Or was declared insolvent were relatively affluent. But because they were mainly independent contractors and small business owners, they lacked the safety net afforded to government and corporate employees. As the insolvency litigation ground on, their plight attracted media and ultimately political attention. The Public Prosecutor was permitted to file a request for an inquiry into Vie d'Or's affairs with the Enterprise Chamber of the Amsterdam Court of Appeal, even though normally only company shareholders can file such requests. The public Insurance Regulator established and funded a special purpose foundation to represent the Vie d'Or claimants' interest in the litigation, the first time in the Netherlands that a public agency took such a step. Although the Dutch State contested its liability for the lax regulation that contributed to the fall of Vie d'Or all the way up to the Supreme Court and formally resisted public pressure to contribute to a settlement fund, behind the scenes the government eventually helped facilitate a collective settlement of the claims. Out of concern for its public image, the industry trade association contributed to the settlement fund, even though it was not a party to the litigation.

Germany's group litigation procedure (KapMuG) was adopted specifically to expedite the resolution of claims for financial loss filed by thousands of ordinary citizens who had been encouraged to buy shares in the newly privatized Deutsche Telekom company in an era when it is was uncommon for middle class Germans to invest on the stock exchange (Chapter 13). When the shareholders turned to their legal expenses insurance policies to cover their litigation costs, their insurers argued that the policies' language excluded their claims. Rejecting the insurers' argument, the Court ruled that the exclusive contract language the insurers relied on did not apply when the claims at issue alleged prospectus liability in the context of retirement savings—which fit precisely the circumstances of the Deutsche Telekom shareholders. Although the KapMuG was primarily intended to assist the courts in dealing with the flood of claims that followed the ruling on legal expenses insurance, over the longer term the new procedure came to be seen as helping to assure access to court for investors. To guarantee that all of the claimants whose cases were registered in the model case proceeding were accorded their constitutional right to participate in the trial of their claims, the Deutsche Telekom court created a password-protected on-line database—a first for German courts—that allowed all claimants to access court documents, a procedure that was subsequently incorporated in the KapMuG when it was revised and extended in 2012.

The $20 billion settlement fund established by BP to compensate property owners and commercial fisherman for loss of income due to

contamination from the Gulf oil spill (Chapter 5) was less a consequence of legal doctrine than a result of political pressure on behalf of those who suffered losses, most of whom were small business owners and independent operators. Although BP was liable for damages under the Oil Pollution Act, the statutory cap on damages was a mere $75 million. Although BP might have chosen to establish a compensation fund as an alternative to litigation under other circumstances, it is unlikely that the company would have moved so swiftly and so generously—or that President Obama would have pressed them to do so—were it not for the characteristics of those who had suffered losses. The special claim to compensation that Gulf residents (arguably) had was invoked in an eloquent White House address by President Obama.

Lawyers also change their practices in response to mass litigation. Until recently, firms specializing in representing plaintiffs were uncommon in civil law jurisdictions. Now that has begun to change. A Dutch lawyer who represented the special purpose foundation established to consummate the trans-border settlement negotiated by Royal Dutch Shell and US plaintiff lawyers left his former law firm to establish a new firm modeled along the lines of a US plaintiff law firm. Firms specializing in mass litigation played a prominent role in the Belgian L&H securities litigation (Chapter 14) and the German Deutsche Telekom litigation (Chapter 13). In Chile an entrepreneurial lawyer came forward to prosecute the consumer class action against La Polar (Chapter 17).

Agency Problems are Inherent in All Forms of Collective Litigation—and More Complicated than Generally Recognized

All litigation involving represented parties carries with it the potential for 'principal-agent' problems: the possibility of conflicts of interest between a lawyer and her client stemming from the fact that the lawyer's incentives are not perfectly aligned with the client's (Hay, 1997; Mnookin, 1993). Class actions have traditionally been viewed as presenting a higher risk of such problems (Coffee, 2000), indeed such a high risk that some believe class actions should be prohibited altogether. Some who support class actions in principle favor assigning the class representative role to specially-selected associations thought to be better at protecting the class' interests, or prohibiting certain types of class actions that are thought to be particularly prone to principal-agent problems, such as cases where each class member's monetary claim is very small.

Some critics of class actions prefer group litigation procedures in which each claimant is individually represented for resolving mass

claims, believing that these procedures mitigate agency problems. However, the case studies illustrate that agency problems exist in all forms of collective litigation, not just class actions, and that the nature of these problems is more complicated than generally recognized.

At first glance, the Israeli securities class action *Shemesh v. Reichart* (Chapter 10) illustrates the paradigmatic principal-agent problem: a lawyer who pursues his own goal to the detriment of his class-member clients. In that long-running case, the class counsel refused to drop an appeal of a trial court ruling in favor of two defendants, notwithstanding the fact that the appellate litigation prevented class members from collecting compensation that had been extended to them in prior settlements with other defendants. But the principal-agent story in *Shemesh* had an unusual twist: by continuing to litigate, the lawyer not only delayed the payment of settlement funds to the class members for many years, he also delayed payment of his own fees and expenses. The class obtained a bit more in total compensation as a result of the protracted litigation but the class counsel himself arguably would have been better off financially if he had dropped his appeal. Asked by the researcher why he persevered with the case for such a long time, the lawyer asserted that he saw it as a duty to vindicate the class's claims against the non-settling defendants.

The Royal Dutch Shell case study (Chapter 8) illustrates one of the dangers of principal-agent problems in class actions: defendants may be able to play off entrepreneurial class action lawyers against each other in ways that may benefit the defendant more than the class members. The Royal Dutch Shell case was initially litigated in US federal court, even though the putative class comprised investors from all over the world. As required by the Securities Litigation Reform Act, the trial court judge appointed two pension funds as representative plaintiffs that together had the largest financial stakes in the litigation, and these funds' lawyers became class counsel. The effect of the appointment was to exclude law firms hired by other class members from becoming class counsel—and potentially earning very handsome fees. Objecting on principle to the notion of resolving the claims of non-US investors in a US court and seeking to limit the total amount required to resolve all claims, Shell's general counsel and its outside defense counsel negotiated a settlement of the non-US claims with one of the law firms that had been shut out of the class counsel role, and used the Netherlands settlement class procedure to resolve all of the non-US claims in the Amsterdam Court of Appeal. The result was to sharply reduce the value of the class action that was proceeding in the US court and hence the expected value of the class counsel's fees. The non-US investors were represented in the Amsterdam

court by a special purpose foundation, whose lawyer was paid on an hourly basis. However, the US firm with which Shell negotiated the Dutch foreign investors' settlement received fees according to what they would have received for representing a US class in US courts. Because of uncertainty at the time as to whether the US court would retain jurisdiction over the non-US claims, it is not clear whether the foreign investors were better or worse off as a result of Shell striking this deal, but it clearly benefited the US law firm that lost the competition to be class counsel in the US class action

The Dutch Vie d'Or case (Chapter 6) and the Chilean La Polar case (Chapter 17) demonstrate that agency problems are not eliminated by laws favoring social associations or public agencies as class representatives. Perhaps because of concerns about the resources that would have been required to play a role in the litigation, the Dutch national consumer association did not come forward to represent the purchasers of Vie d'Or life insurance policies after the insurer became insolvent. Instead it fell to the public Insurance Regulator to appoint a special purpose foundation to represent the policy-holders and to fund the foundation. Concerned that their relationship with the Regulator might compromise its independence, the Foundation's board revised its articles of association to sever its relationship with the Regulator, a move the Regulator initially resisted. The history of the Vie d'Or Foundation suggests that its commitment to its independence stemmed more from the personal characteristics of its board members than from the special rules on class representation in the Netherlands.

Chile's class action law confers authority to bring class actions and also to intervene in class actions brought by private lawyers on SERNAC, the national consumer protection agency. The intent of this structure is to guard against perceived agency problems in private class actions. In the La Polar case, SERNAC used its power to negotiate a better settlement on behalf of the company's consumers than had been negotiated by a private lawyer who was appointed as class counsel. But SERNAC's efforts came in response to the private lawyer vigorously pursuing recompense for the class members, after SERNAC had presided over a mediation that produced scant benefits for the consumers who had been charged illegal fees. SERNAC's belated effort to strike a better deal for consumers seems to have been motivated by a desire to protect its own reputation as the Chilean consumers' champion. And by negotiating the settlement that was ultimately approved by the court, SERNAC denied the private lawyer the fees for his efforts—which had arguably set the stage for SERNAC's success—and in the long run may have disincentivized private lawyers from bringing class actions.

The BP oil spill case (Chapter 5) presented unusual principal-agent problems. The lawyers who brought a class action for economic loss on behalf of Gulf property owners and commercial fisherman charged Kenneth Feinberg, appointed by BP to administer the Gulf Claims Facility, with having a conflict of interest because he was handsomely compensated for his time and efforts by BP. Because Feinberg had previously administered similar claims facilities *pro bono* and became a national hero for his stewardship of the 9/11 Victims' Compensation Fund, the class action lawyers felt that the oil spill claimants needed to be put on notice that in this instance Feinberg was working for BP, which arguably gave him an incentive to offer less compensation than he might have if he were serving *pro bono.* Concerns about Feinberg's independence did not prevent more than 169,000 gulf residents and businesses from accepting compensation from the fund. However, the claims facility was ultimately replaced by a settlement fund established as a result of settling the parallel class action and Feinberg's position was terminated.

As is common in mass money damage class actions, the BP oil spill class members' interests were potentially adverse to each other: if BP set a cap on the compensation it was willing to pay to resolve the class action, whatever amounts were paid to some class members would leave less to be paid to others. US Supreme Court decisions have held that certification is usually inappropriate in such situations; at a minimum, the Court held that when class members have adverse interests, the trial judge should require that the class be divided into sub-classes, each with its own lawyer. However, the judge who presided over the BP class action did not require sub-classing. Concern that perceived conflicts within the economic class might derail certification and judicial approval of their negotiated settlement likely contributed to BP's agreement to an uncapped fund. Arguably when a fund is uncapped one class member's recompense has no effect on others'.

Having argued in favor of the proposed settlement at the district court, BP quickly reversed course when the amounts paid out by the fund administrator—whose appointment the company had supported—proved larger than BP had expected. Although formally a court officer (as the court retained jurisdiction), in practice the fund administrator was (like Feinberg) an agent of BP, as he was distributing their corporate funds. BP's attempts to undo the settlement terms and fire the fund administrator were turned away by the appellate courts on the grounds that the multinational corporation had been well represented during the settlement negotiations and must have understood the consequences of the settlement's terms.

In Canada (Chapter 11), the two case studies illustrate the conflicts of interest that can arise when lawyers' fees are contingent on the class' success and are deducted from the common fund to be distributed to the class. In the Atlas securities case, the judge rejected class counsel's fee request on the basis that it was too high relative to the outcome achieved for the class and ordered that a greater proportion of the settlement fund be paid to the class. Although the decision inured to the financial benefit of the class, lawyers for the class nevertheless appealed the ruling in an effort to promote their own financial self-interest. In the *Hislop* pension benefit case, the government defendant successfully argued that class counsel's contingency fee could not be deducted from the trial judgment as a result of pension law designed to protect pensioners from creditors. The legal maneuver created a conflict between counsel and the class members, forcing the attorneys to take collection proceedings against their clients, and causing one Crown lawyer interviewed for this book to opine that class actions create inherent conflicts of interest between lawyers and individual claimants.

To date, analysis of agency problems has been limited to those posed by the lawyer-class relationship in regimes that grant standing to class members. Scholarship on agency issues when standing is limited to ad hoc or pre-existing associations or government officials is sorely needed. Without such analysis, debates over standing rules for class actions will continue to rely on ideology and untested empirical assumptions.

Legal Financing Shapes Collective Litigation

In most societies, even those with the most plaintiff-friendly legal doctrine, when bad things happen to people their first thought is not about bringing a lawsuit against someone. Although the specter of a flood of frivolous litigation has been raised in virtually every jurisdiction that has debated adopting a class action procedure, the available evidence in the jurisdictions with the longest experience with class actions—the US, Australia, Canada and Brazil—does not support such fears. There are a variety of factors that militate against victims bringing suit, including victims' failure to recognize their legal rights, lack of information about how to access the courts and lack of disputatiousness. Perhaps most important though is perceived litigation cost.

Because of differences in legal financing rules, the expected costs of individual litigation differ substantially across jurisdictions. How legal financing rules affect the cost of collective litigation depends on how the financing rules intersect with the features of the collective litigation procedure (Chapter 7). In many jurisdictions that have adopted class

actions, legal financing rules constrain their use, in some instances all but eliminating claimants' ability to use the procedure. If a representative plaintiff has to pay the class counsel on an hourly basis and also bear the risk of adverse costs, few individuals or associations are likely to step forward to play this role. The unattractiveness of the class representative role will be exacerbated if class members are under no obligation to contribute to legal expenses if the class prevails, a classic 'free rider' problem. Where the class counsel is allowed to represent the class on a 'no win, no pay' basis, thereby freeing the representative plaintiff from laying out funds, there may be few law firms that are able to front the costs of class litigation.

The case studies reflect two responses to addressing these obstacles. In Canada and the US, judges have crafted special fee rules for class actions that reward lawyers for assuming litigation risk and eliminate the 'free rider' problem. Judges calculate the fee amount either as a percentage of the compensation fund created when plaintiffs prevail in a damages class action or by totaling hourly fees and adding a premium (the 'multiplier') to reflect the lawyers' risk and quality of representation. Under equitable fund doctrine, class members all contribute proportionally to the lawyers' fee award, so there is no 'free rider' problem. In the US, class action fee rules facilitated the Toyota brake litigation in which the judge awarded class counsel $227 million in fees and expenses (Chapter 5). In Brazil, the new Consumer Code that shifted fees from class action plaintiffs helped facilitate the consumer association's lawsuit against tobacco manufacturers (Chapter 3).

In jurisdictions where legislatures and judges have been more wary of changing the conventional fee rules, lawyers and others have responded with 'work-arounds'. In Australia, third-party funders emerged to pay lawyer fees while the litigation is ongoing and assume the risk of adverse costs; as a result the opt-out class action modeled on the US procedure was converted to an opt-in procedure, a move that was ultimately endorsed by the High Court (Chapter 9). The acceptance of 'closed classes' in the Australian regime also addresses the 'free rider' problem. In Canada, two provinces adopted public funds to provide up-front litigation costs and guarantee adverse costs; the public funds are replenished by taking a share of monetary awards in successful class actions (Chapter 11). In the Royal Dutch Shell transnational securities class action litigated in the US and the Netherlands, the lawyers adopted a different kind of 'work-around': with the Amsterdam Court of Appeal's consent, US lawyers were paid on a 'percentage of fund' basis (as they would have been in a US court) for their contribution to settling the

non-US claims, even though Dutch lawyers are not permitted by their professional responsibility rules to charge contingency fees (Chapter 8).

The development of special fee rules and institutional 'work-arounds' to address the constraints legal fees impose on class actions is another example of legal adaptation in response to mass claims pressure. Once rules and practices change for mass claims, the changes may migrate to other areas of law. Like the representative class action, third-party litigation funding is a legal transplant. Since its inception in Australia, litigation funding has spread to Europe and North America, where it has rapidly become a feature of general commercial litigation outside the collective litigation domain.

Litigation and Regulation are Symbiotically Related

As resistance to the adoption of class actions outside the US has diminished, one legal norm remains potent: the belief that private class actions (and private litigation generally) should not become an ancillary mechanism for enforcing market regulations. Although the 'private attorney general' theory—the notion that an important function of private litigation is to deter illegal behavior—is deeply entrenched in US legal scholarship and is also recognized in Australian and Canadian jurisprudence, it is fiercely contested in countries that have a long tradition of relying on public law enforcement. The public policy debate as well as some continental legal scholarship set litigation and regulation in opposition to each other. The case studies challenge this framing of an oppositional relationship between private litigation and public regulatory enforcement. In mass claims circumstances, criminal investigation, public agency enforcement actions and private damage litigation often proceed in parallel and influence each other.

In some of the cases described in this book, private litigation or the threat thereof incentivized government investigations. The Toyota brake litigation (Chapter 5) provided grist for media reports of automobile accidents allegedly traceable to brake design, which in turn gave rise to an extensive investigation by the US National Highway and Transportation Safety Administration and a high-profile congressional investigation. The Gulf oil spill class action (Chapter 5) was part of a complex web of public investigations by the US Congress, federal regulatory agencies and a bi-partisan Presidential Commission; criminal and civil enforcement actions by the US Department of Justice; damages litigation by state and local government entities and private corporations that sought compensation for clean-up costs; and lawsuits by private property

owners, small businesses and independent contractors that claimed loss of income due to the spill. Proceeding in parallel with each other, these processes inevitably influenced each other.

Sometimes litigation described in this book contributed to the adoption of stricter regulatory standards. Regulatory reform in the face of litigation may reflect, in part, the desire of public regulators to protect their scope of authority and, ultimately, their institutional power. The Gulf oil spill, and subsequent public investigations and litigation, dramatically increased the legislative and executive branches' attention to the regulatory oversight mechanisms whose failure was determined to have contributed to the oil rig explosion. As a consequence, the pre-spill regulatory agency was eliminated and a new agency was established in its place. The Vie d'Or life insurance company insolvency litigation (Chapter 6) led to stricter regulation of life insurance products even as the State prevailed at the Supreme Court on its claim that consumers' losses were not attributable to lax regulation by the public Insurance Regulator. US litigation by private and public actors over contamination of water supplies by the gasoline additive MTBE contributed to changes in state regulations and federal law that ultimately eliminated the use of the gasoline additive, despite continuing fierce opposition from its manufacturers (Chapter 16). The Australian securities regulation agency, ASIC, played a novel role in class action litigation when it ruled on an interim basis that the litigation financing arrangement that the lawyer and class members had entered into with a third-party funder was not, as the defendant had charged, a violation of the federal Corporations Act. Later the relevant Minister introduced changes in regulation that made this clarification permanent (Chapter 9).

When they addressed the circumstances of mass claims, regulatory agencies and courts did not always arrive at consistent outcomes. To some this may reflect the failure of one or the other branch of government. But criminal prosecution, regulatory enforcement and private litigation respond to different incentives. The German Deutsche Telekom case study offers an interesting example of this. While the 'model case' proceeding was ongoing in the regional court, the public prosecutor was conducting a criminal investigation of Deutsche Telekom. That investigation ended without an indictment; however, both Deutsche Telekom and several of its directors paid substantial fines amounting to €5 million for the company. Although described as voluntary and paid to charities rather than the State, under German law such payments are considered an appropriate strategy for efficiently resolving large-scale criminal cases in complicated commercial matters, but should only be requested when the Public Prosecutor believes that a crime has been

committed (Chapter 13). The prosecutor's assessment, however, was not matched by the High Court's ruling in the model proceeding many years later, which rejected most of the plaintiff's claims that Deutsche Telekom had violated securities regulations.

The Belgian L&H securities fraud case (Chapter 14) illustrates the complete melding of criminal and civil actions. At the time that the L&H case unfolded, the primary way for investors to claim redress was to 'piggy-back' their claims on the criminal case brought by the State. The judge's determination that 'deep pocket' corporate defendants were not criminally liable for the fraud meant that only the investors' claims against the criminally liable but judgment-proof individual defendants remained viable. Under Belgian law, it was left for the criminal judge to decide these civil claims after he issued judgment in the criminal case.

Collective Litigation Challenges Power Structures

Legal regimes reflect the distribution of power within societies. If large corporations hold sway, substantive legal doctrine will likely reflect their perceived interests. If worker organizations command political support, the law will grant employees protections they may not enjoy in societies where these organizations are less politically powerful. If civil society organizations skillfully mobilize their supporters, the law will be more likely to reflect their concerns. In sum, substantive legal doctrine in every jurisdiction reflects a balancing of interests that matches the jurisdiction's political power distribution.

In ordinary litigation, less powerful litigants are generally at a disadvantage (Galanter, 1974). By providing mechanisms for mobilizing the less powerful in a society, collective litigation procedures have the potential to disrupt the power structure. The fear that collective procedures will disrupt the economic, political and social status quo powers much of the opposition to adopting class actions outside the US as well as the efforts to restrict class certification within the US.

The Taiwanese class action brought by parking lot attendants against the Taipei municipal government (Chapter 4), the Brazilian class actions against tobacco corporations (Chapter 3) and the Canadian class action that sought recognition of gay partners' rights (Chapter 11) all provide different examples of the ways in which parties may use collective litigation to challenge the status quo. As private contractors, the Taiwanese workers were disfavored in comparison to public employees and struggled to unionize at time when the Taiwanese government was hostile to unions. The workers were ultimately able to organize and their new union engaged in a variety of public activities to improve the workers'

economic situation, including bringing a class action for back pay. The dollar value of individual workers' claims was too small to justify individual litigation but when combined in a class action their total value was large enough that the municipality fiercely contested the litigation. Ultimately the workers won their case. But perhaps as a result, the union officials who led the fight lost their jobs—illustrating that it can also be dangerous to use class actions to take on powerful institutions.

Brazilian law has long permitted certain types of collective litigation. However, the corporate community viewed the 1990 adoption of a new consumer code as ushering in a new era for consumer class actions, which corporations fiercely resisted. Their fears were justified when an anti-smoking consumer association filed a class action against the Brazilian subsidiaries of multinational tobacco corporations. Not surprisingly, the tobacco industry vigorously contested the association's suit. Aided by provisions of the new consumer code that lowered their financial risk, the consumer association persevered and eventually prevailed on the merits. The plaintiff's victory was short-lived; years of appellate litigation followed from which the tobacco manufacturers emerged largely victorious. But by attracting media attention and civil society support (including financial support), the consumer association's class action sustained and empowered the political campaign against tobacco not just in Brazil but in other South American countries as well.

Litigation by gay rights groups in the 1990s led to a ruling by the Canadian Supreme Court that defining 'spouse' to apply solely to heterosexual partners for purposes of statutory benefit schemes was a violation of the Canadian Charter of Rights and Freedoms and subsequently led to amendments to pertinent statutes to bring them into compliance with the ruling (Chapter 11). However, the amendments to the statute that governs Canada's national pension plan denied retroactive compensation for the payment denials that the Court held violated the Charter. The financial consequences for Canadians who had lost same-sex partners to HIV-AIDS were substantial. Individual suits challenging the retroactivity provisions would have allowed the State to settle a few claims without redressing the losses of hundreds of similarly situated people, an attractive outcome for the State given its potential financial liability. To secure redress for all of those who had lost their same-sex partners, the national AIDS organization decided to file a class action. The class ultimately won a partial victory securing about eight years of pension payment arrears.

Process Outcomes Often Turn on Personalities as Well as Law

Historians have long debated the extent to which the outcomes of historical events turn on individuals: the 'great man in history' hypothesis. Would the American colonies have succeeded in their revolt against the British and their subsequent constitutional union without the influence of George Washington? What would the post-revolutionary era in France have looked like without Napoleon? Would the Soviet Union have crumbled if Mikhail Gorbachev had not appeared on the political scene? Although not of the same significance as these great turning points in history, litigation also has its heroes (and villains). Just as institutions help shape mass litigation, individuals do so as well. Their roles in turn are shaped by their unique personalities and experiences.

The role of individuals *qua* individuals was illustrated in several of the litigations described in this book. Mario Albanese, one of the three co-founders of the anti-tobacco consumer association that was established for the purpose of bringing class actions against the Brazilian tobacco industry, became an anti-smoking activist when his father died of smoking-related coronary disease in the 1950s (Chapter 3). José Rosemberg, another of the co-founders, was a physician who published the first Latin American research on nicotine dependency in the 1970s; he was the first Latin American awarded the prestigious World Health Organization medal on Smoking and Health.

When British Petroleum acceded to President Obama's request to establish a multi-billion fund to compensate Gulf Coast property owners and business operators for their losses due to its oil spill, the company's executives quickly turned to Kenneth Feinberg to head the fund (Chapter 5). Feinberg brought broad experience in designing and administering compensation funds, political savvy that served him well in dealing with the many private and public institutions that were engaged in addressing the aftermath of the spill and a reputation for dealing compassionately with victims that he had earned in the aftermath of the 9/11 terrorist attacks. It seems unlikely that a differently positioned individual would have been able to pay out more than $6 billion to some 220,000 claimants in less than two years.

The special purpose foundation established and funded by the Insurance Regulator to represent the interests of Vie d'Or's policy-holders in the insolvency litigation might easily have simply done the regulator's bidding, perhaps to the detriment of the policy-holders (see Chapter 6). Those familiar with the litigation attributed the persistent advocacy of the Foundation's board, which extended to suing the Regulator, to its chair Jaap van Rijn, a former bank executive who was widely respected for his

integrity and acumen. When Van Rijn retired from the board, his successor took up the torch on behalf of the policy-holders. With his singular leadership, Van Rijn had not only developed a legal strategy that served the policy-holders well but established a board culture that persisted through the protracted litigation.

Rami Ben-Nathan became the lead counsel in *Shemesh v. Reichart*, one of Israel's first securities class actions, after a district court judge conditioned certification in part on the representative plaintiff securing an experienced commercial litigator to act on behalf of the class (see Chapter 10). Ben-Nathan pursued an aggressive strategy that led to protracted litigation that was arguably not in his own financial interest. Through the rulings in Shemesh, Ben-Nathan helped shape Israeli class action law.

George Hislop played a heroic role in the Canadian litigation before the High Court on behalf of Canadians who had lost their gay partners to HIV-AIDS but were denied the survivor benefits that the national government afforded to survivors of heterosexual marriages (Chapter 11). A gay rights activist, Hislop came forward to represent a class of survivors at a time when many homosexuals were wary of disclosing their sexual identity. Hislop was advised by his lawyer that by agreeing to serve as class representative he was giving up a likely possibility of settling individually with the government. Agreeing to serve as class representative also put Hislop at risk of adverse costs if the class—which was taking on the federal government—did not prevail. Hislop died before the landmark case was finally decided.

The Globalization of Law Shapes Mass Litigation

With the exception of the Royal Dutch Shell litigation (Chapter 8), all of the litigation described in this book was 'domestic', meaning that the claims arose in a single country and were prosecuted on behalf of that country's citizens and against either its government or a corporate entity headquartered or doing business in that country. Notwithstanding these formal legal facts, several of these litigations had an extra-national legal dimension. US investors brought class actions against the Belgian L&H (Chapter 14) and the German Deutsche Telekom (Chapter 13) in federal courts in the US, based on the same facts that gave rise to the litigation in Belgium and Germany. The US Securities Exchange Commission (SEC) investigated L&H. Relying on a provision of the US civil code, the German plaintiff lawyers tried unsuccessfully to obtain documents that had been produced by Deutsche Telekom for the US litigation for use in the German litigation. Relying on The Hague Convention on the Taking

of Evidence Abroad, German trial court judges traveled to New York and San Francisco to conduct hearings with fact witnesses in Germany's consulate offices.

Even where legal action did not take place in multiple jurisdictions, an increasingly globalized legal system informally helped shape domestic litigation. The young Israeli lawyer who advised Shemesh to file a class action (who was a son of a friend) had studied for an LLM degree at New York University Law School where he had been exposed to US class action jurisprudence (Chapter 10). The lawyers for the Brazilian tobacco company defendants were advised by lawyers for British American Tobacco and Philip Morris International who were well versed in defending smokers' suits in other jurisdictions, including the US (Chapter 3). Shell's Swiss General Counsel had developed a sophisticated understanding of US plaintiff lawyers' litigation practices and strategies as General Counsel of ABB, whose US subsidiary was a prime target of long-running asbestos litigation in the US. Matías Cortés, the lawyer for the consumers in the Chilean VTR case had studied US class action law and worked with American class action lawyers. The English High Court judge who closely managed the Buncefield damages litigation is a frequent participant in international legal conferences where judges share their experiences managing complex litigation (Chapter 15). The English CEO of British Petroleum met with President Obama to discuss compensating US victims of the oil spill and the Japanese CEO of Toyota appeared before Congress to testify about Toyota's safety program and apologize for deficits in the company's quality control program (Chapter 5).

Whether it is because mass injuries or losses spill over borders, or because defendants are multi-national, or because judges and lawyers are now participants in a global legal system who are educated together, confer together and read each other's scholarship, practitioner guides and judicial opinions, mass litigation is increasingly global. The globalization of class actions is a symptom of this broader globalization of the legal system, as well as a contributor to it.

There is No One Size Fits All Response to Mass Claims

Although we can draw general lessons from comparative analysis of collective litigation procedures in different jurisdictions, the diverse experiences reported in this book indicate that there are many possible responses to mass injuries, mass financial losses and mass claims. The qualitative research approach does not provide the evidence that would be necessary to determine whether some responses are universally better than

others in terms of efficiency or fairness. Indeed, different participants in the legal system might apply different metrics to measure efficiency or fairness and would likely assign different priorities to these and other values by which they might assess dispute resolution procedures.

The comparative case studies suggest that the same procedure might produce different results in different factual circumstances both within a single jurisdiction and across jurisdictions. This is especially true with regard to class actions, which have only recently been transplanted to many of the jurisdictions represented in this book, and which are a better fit in some of these jurisdictions than others. A final lesson to be drawn from this comparative research is that what appear to be the same procedures when reviewing statutes and rules are likely to be implemented differently in different legal contexts and to achieve different outcomes, for all the reasons discussed in this chapter.

FUTURE SCHOLARSHIP

Most of the procedures discussed in this book are quite new to their jurisdictions and few have been subjected to empirical analyses. Legal scholarship in most parts of the world focuses on doctrinal analysis that considers philosophical underpinnings of legal norms and the logic that connects statutes, codes, judicial decisions and procedural rules. How law affects behavior is left to conjecture. Empirical legal scholars view doctrinal scholarship as the foundation for legal analysis, not its endpoint. Contemporary behavioral studies in economics and cognitive and social psychology demonstrate that many human intuitions are not supported by factual evidence. Because law is ultimately a tool for regulating human behavior, it is dangerous to proceed with legal development and law reform on the basis of untested hypotheses.

Both qualitative and quantitative methods can be deployed to test hypotheses about how substantive legal doctrine and procedural law operate in practice. Quantitative methods, often considered the hallmark of empiricism, collate information collected in a standardized fashion from or about large populations. Because such data collection is expensive and time-consuming, often the data is collected from representative samples of the population of interest, using rigorous selection procedures. The use of statistical sampling techniques and standardized data collection allow inferences to be drawn from quantitative data using statistical modelling.

To understand how different collective litigation procedures are being used and with what effects, scholars should collect information on:

(1) the frequency of different types of collective litigation (for example, securities, anti-trust, workers' rights, consumer protection);
(2) the monetary damages alleged (if any);
(3) the time from filing to disposition;
(4) the parties' costs to litigate;
(5) the public costs (for example, judicial time);
(6) the litigation's outcomes; and
(7) the distribution of monetary remedies (if any) to class members.

As courts adopt information science technology (albeit slowly) to manage lawsuits, this data should become increasingly accessible to researchers.

The strength of quantitative analysis is that it allows inferences from the data collected to the population it represents. But the act of quantifying inevitably omits important information:

(1) What were the circumstances that gave rise to mass claims?
(2) Who came forward to organize or prosecute collective litigation?
(3) What were their goals?
(4) What conflicts of interest did they encounter?
(5) How did the litigation progress in the courts?
(6) What obstacles did plaintiffs and defendants encounter?
(7) How was the litigation financed?
(8) How did the form of financing affect the progress of the litigation?
(9) What approaches did judges and other court officials use to manage the litigation and encourage its resolution?
(10) Did the litigation encourage changes in substantive or procedural law?
(11) What was the relationship, if any, between the civil litigation and criminal prosecution or public regulatory action?

It is difficult to determine the answers to such questions using wholly quantitative methods. Qualitative case studies are the method of choice for investigation.

Typically, case studies are conducted within individual jurisdictions, to 'hold constant' the effects of substantive and procedural rules and other social, economic and political contextual variables. Confining case study research to individual jurisdictions, however, sacrifices the opportunity to understand how differences in legal regimes affect the uses and outcomes of similar substantive and procedural legal rules. Comparative case study research offers opportunities to investigate the consequences of different legal rules and norms in different social, economic and political contexts. Often comparative research also deepens our understanding of how legal

rules operate within a single jurisdiction. For example, studying the consequences of collective litigation procedures in the Netherlands or Germany helps one to identify the critical features of US class action and group litigation practice. By developing and sharing case study findings over time, scholars can contribute important insights into the operations and consequences of collective litigation in a variety of legal regimes.

EPILOGUE

Large-scale comparative research, both quantitative and qualitative, requires significant investments of time and financial resources. Often such studies are funded by contracts and grants secured by scholars at one or a few institutions and directed by principal investigators using a 'top-down' approach. This project evolved in a different fashion. The 14 scholars who participated in this project came together serendipitously as a result of meeting at conferences and professional networking. Although established legal scholars, most had not previously conducted empirical social science research on law. Some were at first somewhat surprised at the notion of learning about their country's collective litigation procedures by conducting qualitative interviews. (Many of the lawyers they interviewed were similarly surprised to be approached for information.) What united the participants was an interest in developing a better understanding of how collective litigation procedures were being implemented in their jurisdictions.

In the absence of a contract or grant requiring 'deliverables', the study evolved organically. Progress depended critically on electronic communication as ideas, research protocols, book outlines and ultimately draft chapters were shared using email, cloud storage and video conferencing. Progress was also facilitated by the establishment of an 'international research collaborative' under the auspices of the American Law & Society Association and by meetings at a series of international conferences on the globalization of class actions, co-sponsored by Stanford Law School, the Oxford Centre for Socio-Legal Studies, Tilburg University, Australian National University and Florida International University.

The research project has spawned a variety of other initiatives. The project's participants have invited each other to speak at national conferences and to give guest lectures at their own institutions, to co-author articles and to co-teach courses on comparative class actions. In the process it has created a model for global scholarship. But perhaps most importantly it has created a set of warm friendships among people of

different nationalities, generations, ideologies and training that will hopefully endure beyond the completion of this book.

REFERENCES

Greg Barrett, *Relief Workers Worried about Donation Fatigue*, The Times Picayune, 14 October 2005

John Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, (2000) 100 Columbia Law Review 370

Michele Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, (2003–2004) 53 DePaul Law Review 289

Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, (1974) 9 Law & Society Review 95

Bruce Hay, *Contingent Fees, Principal-Agent Problems, and the Settlement of Litigation*, (1997) 23 William Mitchell Law Review 43

Robert Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, (1993) 8 Ohio State Journal of Dispute Resolution 235

Alina Tugend, *After a Tragedy, Calculating the Best Ways That People Can Help*, The New York Times, 31 May 2013, available at http://www.nytimes.com/2013/06/01/your-money/contemplating-effective-relief-actions-when-tragedies-occur.html?_r=0