Should differences of tort liability in cases of widespread damages be cured by class actions?

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1. Introduction

At first glance, class actions may be an effective way for plaintiffs to spread the cost of litigation and obtain justifiable damage compensation that would not have been sued for, if one party or a limited number of parties had to bear all the cost of the entire litigation. Especially in cases with complicated procedures and costly burdens of proof, such as product and environmental liability, class actions appear to be a useful tool to achieve adequate compensation for all victims, and an important incentive for undertakings to internalize costs they otherwise can easily externalize to a wide and diffuse number of people and properties. However, both empirical data and certain practices by class action law firms seem to suggest that class action lawsuits mostly enrich lawyers and that class members rarely get adequate compensation. These findings indicate that class actions are not doing what class action law firms assure plaintiffs what they are doing. This might imply that class actions rather generate a net social loss, rather than a net social profit.

2. Pros versus cons

A class action is a type of civil lawsuit often found in common law countries, where a plaintiff or a group of plaintiffs submit a lawsuit representing a larger group of potentially several thousands of unnamed 'plaintiffs'. These unnamed plaintiffs form a "class", an unidentified group of individuals who share a similar claim against a common defendant.

At first glance, the pros are most obvious. Plaintiffs may bring small legal claims that would be too costly to litigate individually before a court, which equalizes the difference in legal power between robust entities and individuals without significant resources. As a group, the class is able to amplify their ability to litigate and negotiate and settle disputes.

When for example an insurance company refuses to deny all legitimate claims under € 50, it does so because it knows lawsuits cannot be filed under € 51, so clients wouldn't bother to sue, even if there is a 100% probability of being awarded the compensation.
When a producer of baby foods sells flavored tap water as apple juice and sells it at only 35 cents per bottle, it can be quite certain that a consumer will not sue for disinformation. One could argue that at 35 cents per bottle, the money the consumer saves on such a cheap product accounts for the price of being misinformed.

Class actions could also prove to be a useful mechanism for victims who don't know they are victims, like in the case of the apple juice producer. This, in turn, gives companies an incentive to be honest and fair in even the smallest transaction. This approached has helped in uncovering some important malpractice controversies like Enron[1], WorldCom, Tyco and Adelphia, as it provided access for individual investors who otherwise could not afford to hire a counsel.

A third seemingly positive feature is its "strength in numbers". If a large group of people has the same legal right, being able to let many of those people testify in the same court case can help convince a jury that what they are saying is true. There have been behavioral studies that indicate the number of testimonies can have a substantial influence on jury decisions in favor of the plaintiff, regardless of the righteousness of the claim itself[2].

A fourth supposedly interesting feature of class action suits is that companies are more likely to settle than take the case to court, in comparison to lawsuits with one or a few plaintiffs. One would assume that this would result in fast and effective pay-out for the plaintiffs and class members, but the cited empirical data (*see below*) does not seem to support this claim.

The number of arguments against class suits are however more numerous and seem to be more supported by empirical studies on the matter and important case law. First of all, an important feature of class actions constitutes that named plaintiffs can accept settlements that are binding on all class members, including the unnamed plaintiffs. This means the unnamed plaintiffs have very little to no control over the case.

1 *Skilling v. United States*, 561 U.S. 2010, 554 F. 3d 529 (CA5); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 2005, 374 F. 3d 281.
2 H. Wegener, F. Lösel, J. Haisch (eds.*), Criminal Behavior and the Justice System*, Springer-Verlag, 1989, 181-189; S. Redondo, *Advances in Psychology of Law*, Walter De Gruyter, 1997, 542.

Class action lawsuits are also very costly and time-consuming, which contradicts the argument that class action lawsuits are the easiest way for plaintiffs to cash-in on their damages. In fact, the data suggests that the primary beneficiaries of class action lawsuits are the plaintiffs' lawyers, rather than the plaintiffs themselves. For example, in the famous *Blockbuster settlement*[3], plaintiffs were given a discount coupon to Blockbuster's service of video rental, a practice that still requires Blockbuster's service and participation by the plaintiffs. The lawyers on the other hand, who sued on behalf of the shareholders, made millions. Because of the settlement, Blockbuster's stock tanked, which meant a net loss for the shareholders: the downfall of Blockbuster's share value cost them more than the value of the coupon. In fact, Milberg Weiss, a prestigious American law firm, was indicted for criminal conspiracy for ripping off shareholders by "renting" misinformed plaintiffs at a price of $ 1000 per hour[4]. This can justify legislation obliging lawyers to disclose any payment, fee or discount offered to a plaintiff to engage in litigation.

Indeed, class actions can ruin plaintiffs: In 2005, a life insurance company was sued for alleged overbilling of policy holders on their premiums. After 5 years of litigation, the insurance company wrote settlement checks for the whole class of customers of $ 38.20 each. At first glance, this seems a net social profit: individually, the customers wouldn't sue for that money, but collectively, they had their damage compensated. However, the settlement cost the insurance company so much money it had to increase its premiums, which was in the long run more expensive for the plaintiffs[5].

Another prime example of how class action lawsuits can backfire on plaintiffs are the *Agent Orange settlements* of the early 1980's[6]. In the aftermath of the war in Vietnam, a war veteran named Charles E. Hartz sued on behalf of all American soldiers who were active in the war, for compensation of damages against wartime manufacturers of Agent Orange, a highly toxic dioxin which was allegedly insufficiently tested for human exposure. The corporate defenders

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3http://news.google.com/newspapers?nid=861&dat=20020113&id=3S5SAAAAIBAJ&sjid=GTYNAAAAIBAJ&pg=3688,2670335

4 *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 1998.

5 *Nationwide Life Insurance Company v. Commonwealth Land Title Insurance Company*, U.S. Court of Appeals for the Third Circuit, 579 F. 3d 304.

6 M. Rose, *Tort Reform for a Civilized Society? Implications of Tort Reform for Toxic Tort Lawsuits*, 17 B.C. Third World L.J. 133-53 (1997); R.F. Blomquist, *Bottomless Pit: Toxic Trials, The American Legal Profession, and Popular Perception of the Law*, 81 Cornell Law Review, 953-88; *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219 (D. Mass. 1986); *Anderson v. Cryovac, Inc.*, 508 F2d1 (1st Cir. Mass. 1986); *Anderson v. Beatrice Foods Co.*, 127 FRD 1 (D. Mass. 1989).

(Dow Chemical, Monsanto and Diamond Shamrock) blamed everything on the US government, but eventually settled just hours before the jury selection was to begin, at $ 180 million[7]. The victims were outraged by the settlement: the highest pay-out only amounted to $ 120.000, spread out over 10 years of down-payment, and most of the victims got excluded from state benefits for disabled servicemen because of the settlement. One widow only received $ 3700, who lost her welfare benefits, including housing, food stamps, public assistance and a government pension[8]. The victims could not appeal to a higher court because Hartz' widow (he died during the trial) was the only named plaintiff and therefore the only one who was allowed to decide on accepting or denying the settlement.

Another risk of class actions is that individuals are being tricked by lawyers into believing they are victims, while they are really not, resulting in a net social loss. In the 2007 case *Comer v. Murphy Oil*, a class action lawsuit was filed to force fossil fuel and chemical companies to pay for damages for global warming. The case was dismissed because of serious lack of evidence of fault, damage and causal link. Trial attorney Gerald Maples eventually confessed he only filed the class action lawsuit to make a statement and to get media coverage on the subject of climate change. Meanwhile, he cashed in on named plaintiffs who signed in on the deal and the targeted companies already made significant litigation costs for defense attorneys[9].

This kind of populist scare-mongering is quite common for class action lawsuits[10]. In *Pankhurst v. WASA*, a father of 2 children in de Washington DC area filed a class action lawsuit against the city supplier of tap water, for alleged elevated lead levels in the drinking water supply. He registered as "class" all children who had, at any time from 2000 to 2004, while six years or younger, consumed tap water from WASA. The case got dismissed because it was not clear if the class had, has or would suffer an injury due to the elevated lead levels in the drinking water. But in the meantime, there had been a tremendous panic among American parents, many of whom purchased expensive water filtrate systems, even though the panic was unfounded and ridicule[11].

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7 W. Scott, J., *The Politics of Readjustment: Vietnam Veterans Since The War*, 1999, 30.
8 J. Chambers, *Toxic Agents: Agent Orange Exposure, The Oxford Companion to American military history*, 1999, Oxford University Press, 275; J. Stanley, J. Blair (eds.), *Challenged in Military Healthcare*, 1999, Transaction Publishers, 164.
9 http://www.ca5.uscourts.gov/opinions/pub/07/07-60756-CV0.wpd.pdf.
10 D. Rosenberg, "The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Torts System", 97 *Harvard Law Review*, 1984, 851.
11 *Pankhurst v. WASA* (Court Order), Washington DC, Superior Court for the District of Columbia, Civil Division), Docket CA No. 2009 CA 000971 B. Motion No. 242275.

Probably the most striking example of class action scare is the case of *Smith v. Inco Limited*[12], in which the Inco nickel refinery in Ontario was sued for alleged nickel oxide poisoning of the surrounding properties and their owners. In the years leading up to the case, there has been orchestrated a big panic regarding the hazardous effects of nickel oxide diffusion into the air. In first instance, Inco was ordered to pay 36 million Canadian dollars in compensation to the landowners for loss of property. Detrimental health effects were found not be proven. The average loss per property amounted to 4.514 Canadian dollars. The Court of Appeal reversed the trial court's decision, because there was no proof of lost value of property because of the nickel, but because of the bad media coverage. The Court of Appeal clearly stated the devaluation took place 15 years after the refinery closed (in 1984), when public anxiety negatively affected the property values. The nuisance therefore was caused by public alarm, rather than by any real physical harm. So the plaintiffs' property devaluated only after media coverage of the alleged nickel poisoning and the class action, and not because of any nickel poisoning. What is very interesting in the Inco case is that the only named plaintiff, Ms. Smith, never sold her property, so she never suffered any loss of value. One could insinuate she took advantage of the fact that some people did sell their property and endured a real loss to file a class action lawsuit to higher her own chances[13].

3. Some empirical data on the effectiveness of class actions

MAYER BROWN has conducted an elaborate study in 2014 about the effectiveness of class actions[14]. The results are downright negative. Class members rarely benefit from class action settlements or judgments, even though they are supposedly filed to protect their interests. Those few recoveries that are achieved are typically minimal, and only after long delays. 14% remained pending 4 years after they were filed, and the longer the case lasts after those crucial 4 years, the less likely it is for class members to receive anything. 35 % of resolved class actions were dismissed voluntarily by the plaintiff (usually because of an individual settlement), while class members received nothing. 31% of resolved class actions were

12 Smith v. Inco Ltd., 2011 ONCA 628 (CanLII), 107 OR (3d) 321, Court of Appeal of Ontario, 7 October 2011.
13 L. Collins, "Material Contribution to Risk and Causation in Toxic Torts', 2011, 11 *Journal of Environmental Law & Practice*, 105.
14 http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

dismissed on the merits, which means nobody received anything. Although there is very little information regarding the distribution of class action settlements, Mayer Brown estimates individual plaintiffs behind the settled class action received between 0.0000006 and 12% of the total settlement, which leads them to conclude that class actions don't provide class members with anything close to the benefits claimed by their proponents.

Numerous legal malpractice cases suggest that the principal beneficiaries of class action lawsuits are the lawyers themselves[15]. FITZPATRICK has discovered that of the $ 33 billion in 688 class action settlements over 2 years (2006-07), 5 billion or 15% was awarded to class action lawyers[16].

4. Conclusions

Overall, arguments against class actions as a means to litigate for widespread damages seem to outweigh the arguments for it[17]. Class action lawsuits can be abused by rent-seeking lawyers and don't necessarily protect the interest of named and unnamed class members. The literature seems to agree that class action lawsuits are primarily serving the interests of class action lawyers rather than the plaintiff class. However, this doesn't mean class actions should be banned from the legal order. If we can find ways to bypass its flaws, it could prove to become a useful litigation instrument. A prime example of this "conditional" class action can be found in French Consumer Protection Law[18]. Claims can be filed to defend collective

15 *SEC v. Bear Stearns Co*., 625 F. Supp. 2d 402, 415 (S.D.N.Y. 2009); *Strong v. BellSouth Telecommunications*, *Inc.*, 137 F. 3d 844, 851 (5th Cir. 1998); Settlement Agreement at Turner v. Storm8, LLC, No. 4:09-cv-05234 (N.D. Cal. June 22, 2010) PACER No. 26-1.

16 B. Fitzpatrick, "An Empirical Study of Class Action Settlements and Their Fee Awards*",* *Journal of Empirical Legal Studies* Vol. 7, Issue 4, 811-846, December 2010.

17 A. Lin, "Beyond Tort: Compensating Victims for Environmental Toxic Injury", 78 *Southern California Law Review* 2004-05, 1439; H. McLeod-Kilmurray, "Hollick and Environmental Class Actions: Putting the Substance into Class Action Procedure", 34 *Ottawa Law Review* 2002-03, 363; H. McLeod-Kilmurray, "Hoffman v. Monsanto: Courts, Class Actions and Perceptions of the Problem of GM Drift", 27 *Bulletin of Science, Technology & Society*, 2007, 188; A. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem", *Harvard Law Review* Vol. 92, No. 3, January 1979, 664-694; J. Coffee, Jr., "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action", The University of Chicago Law Review Vol. 54, No. 3, Summer 1987, 877-93; B. Garth, I. Nagel, S. Plager, "The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation", 80 Tulsa Law Review, 2005-06, 1593; E.F. Sherman, "Class Actions after the Class Action Fairness Act of 2005", in D. Henseler, B. Dombey-Moore, E. Giddens, J. Gross, E. Moller*, Class Action Dilemmas: Pursuing Public Goals for Private Gain*, 2010, Rand Corporation, 636.

18 R. Mitchell, "French Ministers rubber stamp class-action bill", *Business Insurance*, Nov 10, 2013.

consumer interest, but each claimant must be individually named. This allows the prosecution and the judge to gather more and better information from every party in the case, so long-run losses for class members can be avoided. The French class action legislation forbids contingent fees and limits awardable damages to € 2000, thus protecting justice-seeking individuals and targeted corporations from rent-seeking lawyers. The law clearly limits the scope of class actions to consumer goods linked to standards contracts, and limits the right to file a class action lawsuit to a limited amount of government-approved consumer organizations with special disclosure requirements regarding fees and offers made to plaintiffs. However, just as in the *Inco*, *Pankhurst* and *Comer* cases, the law doesn't seem to prevent adverse effects from mass hysteria and, like in the *Agent Orange* case, doesn't include preventive measures for unintended consequences of successful class action litigation. As for cases for widespread environmental damages, class actions don't seem to be making the heavy burden of proof for plaintiffs easier to bear[19].

19 See *Cook et al. v. Rockwell International Corp., et al.,* Nos. 08-1224, 08-1226 and 08-1239, U.S. Court of Appeals, 10th Circuit September 3, 2010; *John Hillock v. Toronto*, Supreme Court of Canada, Dec. 1999.