

Mass Justice

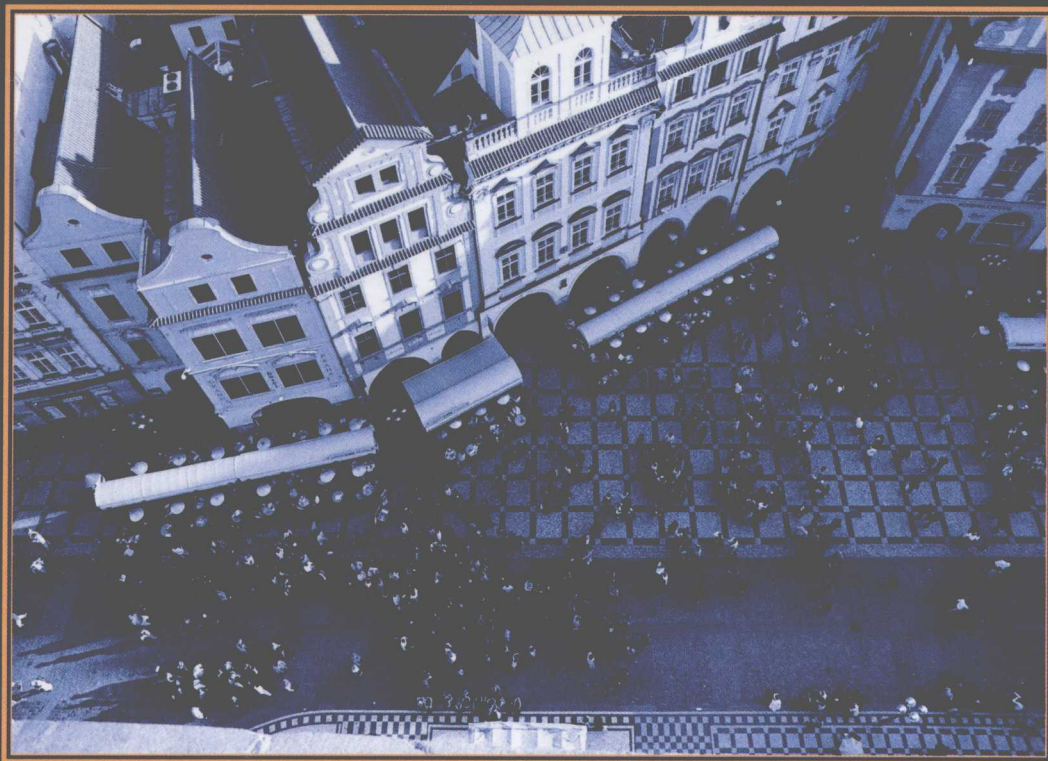
CHALLENGES OF REPRESENTATION
AND DISTRIBUTION

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Mass Justice

Challenges of Representation and
Distribution

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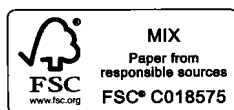
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1. Mass justice and its challenges

Jenny Steele and Willem H. van Boom

1. INTRODUCTION

Our legal world is one of growing “massification”. Standard contracts affect multiple customers, mass torts (whether arising from product injuries or disastrous events) involve numerous victims and sometimes numerous tortfeasors; environmental problems affect communities as a whole and may have scattered or hard to trace effects; and insolvencies concern a collective of creditors. Various pressures can deepen the impact of these developments, including the economic feasibility of mass rather than individual representation on the claimants’ side, given the economies of scale enjoyed by many defendants. At the same time, the emergence of shared goals and a common interest in deterrence or “peace-keeping” functions of civil liability may create a demand for collective representation, in some instances leading to a blurring of the boundaries between public and private law as collective solutions take on a regulatory or at least “public interest” flavour. The motivation for this collection lies in a recognition that the search for “mass” civil justice throws up novel challenges for legal systems which have so far barely been addressed. For example, the ambition to deliver or secure “mass justice” raises questions about the possibility of fair representation of all individual interests in the context of settlements reached on behalf of a group; about questions of access and civil procedure; and about the very goal or purpose of “compensation”. Inherently, the balance between individual and collective interests, and between private and public goals of civil law, is called into question in new ways by these developments. For example, “group” interests may be said to stand somewhere between the interests of individuals, and of the public as a whole, raising questions of hybridisation from the start. Alternatively, the interests of members of the group may actually be in competition, for example where compensation must be made to a large number from limited resources. There may also be efforts to maximise the sources of compensation, for example through reinsurance, or through early settlement and reduced transaction costs.

Against this background, we suggest there is an obvious need for consideration of what we would like to call “mass justice”, and of the challenges which are raised by this aspect of legal evolution. We observe that while standard law school curricula tend to remain focused on individual claims and doctrinal details, legal systems have begun to shift to give effect to “mass justice” issues in a range of ways, in numerous areas which can at first appear entirely separate, but which give rise to certain shared themes and challenges. Questions of procedure, representation, costs, and effectiveness, at least as much as doctrinal detail, are key to these developments.¹

We have particularly selected for emphasis the issues of representation and distribution which arise from the “massification” of claims. These are, to some extent, issues which require a focus on relevant actors (legal and other). The reality is that the boundaries and evolution of “private law” rights and duties are, in this context, deeply influenced by collective issues, whether through the availability of insurance funds (and the organisational response to liabilities of insurers), by the operation of class or group actions in the more formal sense, by the need to negotiate with or compensate a wide range of individuals, by the mechanisms of fair distribution of insufficient assets in insolvency proceedings, or simply by the spectre of a large number of potential claims. Equally, collective action and, more broadly, the need to have regard to the interests of numerous parties with diverging interests raise their own issues of practical justice.

Issues of representation may arise for example if a foundation or association litigates a mass tort case in the interests of, but not as the authorised representatives of a group of injured persons. On what basis, other than consent or contract, can an organisation litigate on behalf of individuals? The legitimacy to act in the interest of others may be equally troublesome where a labour union bargains for collective employment conditions in the interest of workers but where only a minority of those workers are actually union members. Relevant matters in distribution include the extent of the “*pari passu*” rule in insolvency, and the related dilemma of liability insurers having to distribute an insured sum among multiple claimants whose claims exceed the value of the sum. These are, typically, issues relating to limited funds.

We argue that “massification” and the need for “mass justice” raise particular questions of legitimacy and accountability which are made more apparent through a focus upon representation and distribution. The contributions to this book address a number of such questions. With this chapter, we introduce the contributions and identify the general themes of the volume.

2. THE THEMES OF THIS VOLUME

2.1 A Diverse Experience

As can be expected, the topics covered under the banner of “mass justice” are of wide variation. Mass justice involves a range of thematic issues which have exercised policy-makers, courts and legal advisors throughout the world, but have only recently begun to be seriously debated by academic lawyers in European jurisdictions. Modern legal systems have to deal with the question how the law should react in cases where a large number of parties – victims, injurers, and others – are involved. At the same time, issues of mass justice can be seen to operate in a diversity of legal contexts which have rarely been investigated together. These contexts include environmental and consumer litigation, and personal injury claims arising from industrial disease, for example; collective bargaining in the context of industrial relations; distributional issues arising from corporate insolvency for unsecured creditors; and the distribution of liabilities between insurers, whose funds underpin the availability of civil compensation. This volume is not comparative in the narrower sense of setting out to compare the same issues across a range of jurisdictions. Rather, it draws upon diverse experience to generate themes of common concern and to debate a range of problems and solutions. As such, it sets out to assist in the identification of the parameters of “mass justice” issues in contemporary law.

We have roughly ordered the contributions into five kindred categories. Although by no means watertight, the division between the categories reflects the emphasis of the various contributors. The first category concerns mass resolution of mass torts with particular emphasis on procedural issues and their wider implications, and the second brings to the fore issues of enforcement and access to court. We then turn to questions about the availability and distribution of funds. The third category deals with insolvency as a distributional mechanism of mass justice, and the fourth with the closely related issues of insurance and funds. The fifth category finally deals with collective bargaining and the issues of representation it evokes.

2.2 Mass Resolution of Mass Torts

Wherever “mass torts” are discussed, attention will inevitably turn at some stage to the United States and its distinctive “class action” – whether as a model for future development, or as an indication of the dangers that lie in massification of civil claims. The US class action has never been immune from deep controversy in its homeland, and the nature of its