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## Lloyd and the Legislative Void: Representative Actions in Transatlantic Context

Suzanne E. Chiodo

*Osgoode Hall Law School of York University*, [schiodo@osgoode.yorku.ca](mailto:schiodo@osgoode.yorku.ca)

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## ***Lloyd* and the Legislative Void: Representative Actions in Transatlantic Context**

Suzanne Chiodo, Assistant Professor, Osgoode Hall Law School

**Abstract:** The Canadian class action regimes have had a strong influence on the development of collective redress procedures in England. Canadian class proceedings legislation provided a model for the competition law class action regime in the UK, and before then, it featured prominently in the Civil Justice Council's report that recommended the enactment of generic class actions legislation in England. It is fitting, then, that the UK Supreme Court's recent decision in *Lloyd v Google* referred to the Canadian jurisprudence on the representative rule, which allows one or more claimants to represent a group with the 'same interest'. While *Lloyd* did not follow the Supreme Court of Canada in allowing representative actions for individualised damages, the decision represents a more liberal reading of the representative rule than in previous cases. Specifically, it affirms the use of the rule for a declaration of the answers to common questions, with individual actions to follow (the 'bifurcated approach'). This article will situate *Lloyd* within the context of Canadian and English representative action jurisprudence, and, based on the rule's development in Canada, will make predictions for its use in England. Article length: 9,963 words.

### **Introduction**

The Canadian<sup>1</sup> class action regimes have had a strong influence on the development of collective redress procedures in England.<sup>2</sup> In its landmark judgment in *Merricks v Mastercard*, the UK Supreme Court (UKSC) 'regard[ed] the Canadian jurisprudence as persuasive in the UK not only because of the greater experience of their courts in the conduct of class actions but also because of the substantial similarity of purpose underlying both their legislation and ours.'<sup>3</sup> Canadian class proceedings legislation provided a model for the UK's competition law class action regime,<sup>4</sup> and before then, it featured prominently in the Civil Justice Council's report that recommended the enactment of generic class actions legislation<sup>5</sup> in England.<sup>6</sup>

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<sup>1</sup> References to 'Canada' include the provinces, territories, and the federal level.

<sup>2</sup> References to 'England' are to the jurisdiction of England and Wales.

<sup>3</sup> *Mastercard Incorporated & Ors v Walter Hugh Merricks CBE* [2020] UKSC 51 [42].

<sup>4</sup> Department for Business, Innovation and Skills, *Final Impact Assessment* (January 2013) [194]; Competition Act 1998, s 47, as amended by Schedule 8 of the Consumer Rights Act 2015, 2015 c 15 (CA 1998).

<sup>5</sup> 'Class actions' are a procedure in which a representative claimant commences litigation on behalf of a defined class, whereby all individuals who meet the definition are included unless they opt out. Class actions legislation usually allows for individual damages claims, which differentiates them from representative actions. They can encompass one sector or be generic.

<sup>6</sup> Civil Justice Council, *Improving Access to Justice through Collective Actions* (CJC 2008).

It is fitting, then, that England's recent representative action jurisprudence has referred extensively to the Canadian experience. The representative action is a rule of procedure that allows one or more claimants to represent a group with the 'same interest'.<sup>7</sup> It originated in the Court of Chancery and exists in various forms in most Commonwealth jurisdictions. In Canada, it formed the basis for class actions at common law (and, indirectly, by statute).<sup>8</sup> It was most recently considered by the UKSC in *Lloyd v Google*,<sup>9</sup> and the hope of many reformers was that Canada's experience would be repeated in England. It was not. Nevertheless, *Lloyd* represents a more liberal reading of the representative rule than in previous decisions. Specifically, it affirms the use of the rule for a declaration of the answers to common questions, with individual actions to follow (the 'bifurcated approach').

Where does that leave England's representative rule? This article will situate *Lloyd* within the context of Canadian and English representative action jurisprudence, and, based on its development in Canada, will make predictions for the use of the rule in England. In Part I, I explain what a representative action is, and discuss *Lloyd* in that context. Part II articulates how the courts in England and Canada have historically taken a very restrictive view of the rule, such that it has generally only been available where groups have pursued their collective, indivisible rights. Canadian representative action jurisprudence has largely been forgotten in favour of class actions, but in providing an explanation of how class actions developed in that country, it remains significant to law reformers in England and elsewhere. Part III describes how the rule has evolved in Canada, including the Supreme Court of Canada's *Dutton* decision that permitted the use of the representative rule for class actions for damages. I articulate how

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<sup>7</sup> CPR 19.6; Rachael Mulheron, 'From representative rule to class action: steps rather than leaps' (2005) 24 CJK 424, 427. As Mulheron points out, the other requirement of the rule is that 'more than one person' has an interest in the claim.

<sup>8</sup> *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46. Following the Supreme Court of Canada's decision in *Dutton*, most of the remaining Canadian provinces enacted class proceedings legislation. *Dutton* was part of a trilogy that provided guidance on class actions principles. The other two judgments were *Hollick v Toronto (City)*, 2001 SCC 68, and *Rumley v British Columbia*, 2001 SCC 69.

<sup>9</sup> *Lloyd v Google LLC* [2021] UKSC 50.

*Lloyd* stopped short of doing this. Part IV examines how the rule can be used in England now, compared to other collective redress procedures – specifically, the competition law class action regime and the Group Litigation Order (GLO) framework.<sup>10</sup> Part V concludes with some predictions about the future of England’s representative rule. Numerous data protection actions were commenced prior to the *Lloyd* judgment. That decision has rendered the rule impractical for data protection claims, although there are other, limited, circumstances in which it may be used.

### **Part I: The Representative Rule and *Lloyd***

The representative rule first emerged in 13th century England<sup>11</sup> and continues today in CPR 19.6. In the course of its evolution, it was exported to common-law Canada, the US, and throughout the British Empire.

The rule began as a flexible tool of procedure. Common law courts saw litigation in individual terms and therefore took a narrow view of the joinder rule. They held that individuals could only be joined to a proceeding if they consented and if their immediate interests would be affected. The Court of Chancery took a wider view. It sought to adjudicate the rights not only of persons before the court, but also of all those who would be affected by the dispute. Equity therefore called for the compulsory joinder of all interested persons, so any judgment would bind them all and ‘to prevent multiplicity of suits.’<sup>12</sup> However, the compulsory joinder rule threatened to prevent the parties from ‘coming at justice’<sup>13</sup> if it was not possible or practicable to join to the suit all who would be affected. Equity therefore allowed for the

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<sup>10</sup> CPR Part 19.III.

<sup>11</sup> Stephen Yeazell, ‘Group Litigation and Social Context: Toward a History of the Class Action’ (1977) 77(6) Colum L Rev 866.

<sup>12</sup> *How v The Tenants of Bromsgrove* (1681) 23 ER 277.

<sup>13</sup> *Duke of Bedford v Ellis* [1901] AC 1 (HL) 8.

representative action so that one person could represent all those interested, and any judgment would bind all of them.<sup>14</sup>

Following the fusion of the courts in England,<sup>15</sup> representative actions could be brought at common law under Rule 10, which directed that:

Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the court to defend in such action, on behalf or for the benefit of all parties so interested.<sup>16</sup>

The equivalent rule in Canada (except Québec)<sup>17</sup> was substantially the same. The rule is similar to class actions, in that they both involve groups represented by one or more claimants. They are also both ‘opt out’: the persons represented are bound by any judgment unless they take affirmative steps to opt out, making the class much bigger than in an opt-in action.<sup>18</sup> However, there are important distinctions between the two procedures, discussed further below. While in all Canadian jurisdictions (except the territories) the use of the rule has led to the introduction of class proceedings,<sup>19</sup> the situation in England has been quite different. Because of the restrictive interpretation of the rule there, it has remained a ‘procedural backwater’.<sup>20</sup>

The infrequency with which the rule was used, its restrictive interpretation, and the complexity and cost of representative actions, meant that it was not widely regarded as realistic for multi-party litigation when the latter rose in prominence in England in the 1980s.<sup>21</sup> In his *Access to Justice* Report, Lord Woolf acknowledged the inadequacy of the representative

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<sup>14</sup> Suzanne Chiodo, *The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act* (Irwin Law 2018) 16.

<sup>15</sup> Supreme Court of Judicature Act, 1873 (UK) 36 & 37 Vict, c 66 (SCJA 1873); Supreme Court of Judicature Act 1875 (UK) 38 & 39 Vict c 77.

<sup>16</sup> Rule 10 of the Rules of Procedure, being scheduled to SCJA 1873, *ibid*.

<sup>17</sup> Québec has never had a representative rule.

<sup>18</sup> *Lloyd* (n 9) [27].

<sup>19</sup> All the provinces now have class proceedings legislation, and class proceedings are also available at the federal level under the Federal Courts Rules, SOR/98-106, Part 5.1.

<sup>20</sup> CJC 2008 (n 6) 165.

<sup>21</sup> Jillaine Seymour, ‘Representative Procedures and the Future of Multi-Party Actions’ (1999) 62 MLR 564; Supreme Court Procedure Committee, *Guide for use in Group Actions* (HMSO 1991) 16-17.

rule.<sup>22</sup> He noted that there was no specific procedure dealing with multi-party actions, and that the mass litigation of the 1980s and 1990s had revealed the weaknesses of the system in dealing with group claims.<sup>23</sup> As a result, he recommended a new procedure, the Multi-Party Situation (MPS), a version of which was enacted in 2000 as the GLO.<sup>24</sup> Following the changes to the civil procedure rules based on Lord Woolf's Report, the representative rule continues to be available under CPR 19.6. The 'same interest' requirement remains:<sup>25</sup>

- (1) Where more than one person has the same interest in a claim –
  - (a) the claim may be begun; or
  - (b) the court may order that the claim be continued,by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

Consultation papers that subsequently advocated for class action reform acknowledged that the rule continued to be construed narrowly.<sup>26</sup>

It was in this context that the UKSC released its judgment in *Lloyd*.<sup>27</sup> The class in *Lloyd* consisted of an estimated 4.4 million users of the Safari Internet browser. It was claimed that Google had collected their personal information without their consent, in breach of its duty under section 4(4) of the Data Protection Act 1998.<sup>28</sup> The representative wished to serve the claim out of the jurisdiction, and this required the court to determine whether there was a 'real prospect of success' and a 'good arguable case' that damage had been sustained within the jurisdiction.<sup>29</sup> This raised the substantive legal question of the meaning of 'damage' under s 13

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<sup>22</sup> Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996).

<sup>23</sup> *ibid* Chapter 17.

<sup>24</sup> CPR Part 19.III. The opt-out features of the MPS were not enacted in the GLO: Mark Mildred, 'Group Actions' in Andrew Grubb and Geraint G Howells (eds), *The Law of Product Liability* (Butterworths 2000) 398.

<sup>25</sup> The conversion of the old representative rule to the CPR has involved some changes in terminology, but not in substance: Mildred, *ibid* 397.

<sup>26</sup> CJC 2008 (n 6) 34.

<sup>27</sup> *Lloyd* (n 9).

<sup>28</sup> 1998, c 29 (DPA 1998).

<sup>29</sup> *Lloyd v Google*, [2018] EWHC 2599 (QB) [33]-[36].

of the DPA 1998, and the procedural question of whether the action was properly constituted under the representative rule.

According to the rule's jurisprudence, discussed below, an action for damages cannot proceed if it requires an individualised assessment of the damage sustained by each class member. The UKSC confirmed this, stating that the scope for claiming damages in a representative action is limited by the compensatory principle which underlies damages for a civil wrong – that is, the object of putting the claimant in the same position as if the wrong had not occurred. Because damages are usually different for each individual, that means a claim for damages usually requires an individualised assessment and is therefore unsuitable for representative treatment.<sup>30</sup>

The claimant in *Lloyd* attempted to circumvent this by stating that each class member had experienced loss of control of their data, and this qualified as 'damage' for the purposes of s 13 of the DPA 1998. He argued that a uniform per capita sum of £750 could be awarded per class member, which would represent the 'lowest common denominator' of individualised damage (because some class members would have experienced additional loss consequential upon the loss of control).

The UKSC did not accept this argument. It interpreted 'damage' under s 13 of the DPA to require financial loss or mental distress, and not merely loss of control. It held that even if the claimant's interpretation was correct, the 'loss of control' analysis would require a determination of Google's processing of the data in each individual case to determine the damages to be awarded (and any 'lowest common denominator' measure would result in *de minimis* damages that would not be recoverable).<sup>31</sup> Because the effect of the defendant's

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<sup>30</sup> *Lloyd* (n 9) [80].

<sup>31</sup> M Brooks, 'The Future of Data Breach Class Actions After the Supreme Court's Ruling in *Lloyd v Google*' (*W Legal*, 4 January 2022) <<https://wlegal.co.uk/the-future-of-data-breach-class-actions-after-the-supreme-courts-ruling-in-loyd-v-google>> accessed 16 February 2022.

actions was not uniform across the class,<sup>32</sup> any attempt to cap class members' damages, as the claimant had done, contravened the compensatory principle. In order to comply with that principle, the Supreme Court held that individualised enquiries were necessary and damages could not therefore be pursued as part of the representative action.<sup>33</sup>

Despite this conclusion, *Lloyd*'s interpretation of the 'same interest' requirement is expansive in several ways. First, the court held that the 'same interest' test must not be rigidly applied or taken out of context.<sup>34</sup> The test articulated in *Duke of Bedford v Ellis*<sup>35</sup> was that the class must have a common interest, a common grievance, and seek relief beneficial to all.<sup>36</sup> As discussed in the next section, prior jurisprudence interpreted the test as a fairly rigid tripartite requirement that only allowed the representative rule to be used for the litigation of rights held by a group – that is, indivisible rights – and not individually-held private rights.<sup>37</sup> According to this restrictive approach, even if the rights were identical, they would not meet the 'same interest' test if one class member could sue on her own rights without affecting the rights of any other class member. This was the situation in *Lloyd*, where redress arising from the very same data breach had in fact been pursued in individual cases.<sup>38</sup>

However, the court in *Lloyd* reviewed the 20<sup>th</sup> century jurisprudence and found that *Ellis* should not be interpreted as laying down a tripartite test.<sup>39</sup> Furthermore, the court held that separate causes of action are not a bar to a representative claim,<sup>40</sup> and can be pursued where damages can be assessed in the aggregate without the need for individual enquiries,<sup>41</sup> or where

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<sup>32</sup> *Lloyd* (n 9) [87].

<sup>33</sup> *ibid* [80]-[87].

<sup>34</sup> *ibid* [70].

<sup>35</sup> *Ellis* (n 13).

<sup>36</sup> *ibid* 8.

<sup>37</sup> *Smith v Cardiff Corpn* [1954] 1 QB 210.

<sup>38</sup> *Vidal-Hall v Google Inc* [2016] QB 1003.

<sup>39</sup> *Lloyd* (n 9) [71].

<sup>40</sup> *ibid* [80].

<sup>41</sup> *ibid* [82].



the rule is used for a declaration on the common questions, with individual issues regarding liability or damages to be answered in individual claims to be commenced separately.<sup>42</sup>

This latter course is the second mark of the court's expansive interpretation. Prior jurisprudence regarded the bifurcated approach (pursued in *Prudential Assurance*)<sup>43</sup> as having been overturned by the Court of Appeal in *Emerald Supplies*.<sup>44</sup> However, the UKSC in *Lloyd* held that the *Emerald* court only refused to follow the bifurcated approach because of the way the class was defined in that case.<sup>45</sup> The court held that *Prudential* remains good law and 'mark[s] a welcome revival of the spirit of flexibility which characterised the old case law.'<sup>46</sup>

Finally, the UKSC held that the 'same interest' requirement 'needs to be interpreted purposively in light of the overriding objective of the civil procedure rules and the rationale for the representative procedure.'<sup>47</sup> Crucially, the court held that many of the considerations included in the overriding objective will militate in favour of allowing a representative action to proceed.<sup>48</sup> It concluded that, in the absence of class action legislation, the representative rule had to be interpreted in a liberal and purposive manner.<sup>49</sup>

The court's interpretation of the 'same interest' test was a departure from the restrictive approach pursued throughout the 20<sup>th</sup> century. The next section will discuss this approach and how it was reflected in Canada and England.

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<sup>42</sup> *ibid* [48], [80]-[81].

<sup>43</sup> *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229, 255 (overturned on other grounds: [1981] Ch 204 (CA)). The Supreme Court of New Zealand endorsed a similar approach in *Southern Response Earthquake Services Limited v Ross* [2020] NZSC 126.

<sup>44</sup> *Emerald Supplies v British Airways Plc* [2010] EWCA Civ 1284 [6], [65].

<sup>45</sup> *Lloyd* (n 9) [58]; Rachael Mulheron, 'Emerald Supplies Ltd v British Airways Plc' (2009) 8 Comp Law 159.

<sup>46</sup> *Lloyd*, *ibid* [48].

<sup>47</sup> *Lloyd*, *ibid* [71]; CPR 1.1(1).

<sup>48</sup> CPR 1.1(2); *Lloyd*, *ibid* [75].

<sup>49</sup> *Lloyd*, *ibid* [68], [71].

## Part II: The Restrictive Approach

In England until recently, and in Canada until the 1970s, the courts took a narrow approach to the representative rule. It is this approach that differentiates the rule from a class action, and prevents ‘easily analogies between’ the two.<sup>50</sup> According to the restrictive approach, a case can only properly proceed as a representative action if it pursues rights held by a group *as a group*, and if the relief sought is either equitable or involves damages claimed from a common fund or that are easily quantifiable in the aggregate (so that no class member is over- or under-compensated). These two requirements will be discussed in turn.

First, the case must involve rights possessed by a group as a whole, and not individual private rights. These rights are, by definition, indivisible – for example, rights to the use of land.<sup>51</sup> The wrong to be redressed must involve a breach of those collective rights. As the court held in *Markt*, discussed below, a representative action cannot be brought if there is no common right.<sup>52</sup> In some older cases, that meant that individual contracts with the defendant were fatal to a representative action.<sup>53</sup> In later cases, however, courts allowed a representative action to proceed if the individual contracts were identical; it was the differences between the terms or formation of the contracts that were fatal.<sup>54</sup> In the English case of *The Irish Rowan*, for example,<sup>55</sup> a ship owner brought a representative action seeking indemnity from a group of insurers for the payment of cargo claims.<sup>56</sup> The Court of Appeal held the action could proceed, despite the existence of numerous separate contracts, because the contracts were identical and there was no dispute as to the proportionate shares of liability and the damages payable.<sup>57</sup> The

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<sup>50</sup> Yeazell (n 11) 876.

<sup>51</sup> *Guarantee Co v Caisse Populaire de Shippagan et al* (1988), 86 NBR (2d) 342 [22] (NBQB).

<sup>52</sup> *Markt & Co, Ltd v Knight Steamship Co, Ltd* [1910] 2 KB 1021 (CA), 1029-1030, 1040.

<sup>53</sup> *Shields v Mayor*, [1953] 1 DLR 776 (OCA).

<sup>54</sup> *Stephenson v Air Canada*, 1979 CanLII 1896 (ONSC); *Naken et al v General Motors of Canada Ltd et al*, [1983] 1 SCR 72, 96, 103-104.

<sup>55</sup> *Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan)* [1990] 2 QB 206 (CA).

<sup>56</sup> *ibid* 216.

<sup>57</sup> *ibid* 227, 244.

court in *Lloyd* also held that a representative action could be pursued for the breach of individually-held rights, stating that it is not a bar to a representative action that each class member has a separate cause of action, or that damages are being claimed.<sup>58</sup>

Similarly, the Canadian courts' position on this point softened in the late 20<sup>th</sup> century. In *Stephenson v Air Canada*, for example, the Ontario Superior Court held that rights under individual contracts could be pursued as part of a representative action, but not if the circumstances of those contracts differed between class members.<sup>59</sup> In *Kelly*, too, the court held that a representative action could be brought for the breach of individually held rights.<sup>60</sup>

The second element of the restrictive approach is that the relief claimed must flow to the group as a whole; it cannot involve individual damage awards personal to each class member.<sup>61</sup> Relief that is suitable for representative actions includes declaratory relief or aggregate damages. The latter can be pursued only if the damages can be calculated on a group basis, without reference to individual circumstances.<sup>62</sup> If the claimants do not have the same interest in the remedy, then there is a risk of over- or under-compensation and the representative action cannot proceed. Later English cases suggest that if damages can be accurately calculated for the group as a whole, then difficulties with determining individual entitlements will not bar a representative action, because what the class members do with any global damages award is a matter between them and does not involve the defendants.<sup>63</sup> Furthermore, where damage is an element of the cause of action, and some group members may have sustained damages

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<sup>58</sup> *Lloyd* (n 9) [80].

<sup>59</sup> *Stephenson* (n 54).

<sup>60</sup> *Kelly et al v Lacey (JJ) Insurance Ltd (Bankrupt)*, 1997 CanLII 16039 (NLSC) [15]-[16], [43].

<sup>61</sup> Rachael Mulheron, 'Creating, and Distributing, Common Funds Under the English Representative Rule' (2021) 32(3) *King's LJ* 381, 392-393.

<sup>62</sup> *Millharbour Management Ltd v Weston Homes Ltd* [2011] 3 All ER 1027 [22].

<sup>63</sup> *EMI Records v Riley* [1981] 1 WLR 923 (Ch) 926; *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch) [28].

whereas others may not, the defendant will have different defences against different group members and the ‘same interest’ requirement will not be met.<sup>64</sup>

These factors mark the main differences between a representative action and a class action. Put simply, a representative action has traditionally involved one communal claim, rather than (as in a class action) an aggregation of individual claims.

The characteristics discussed above found their expression in the strict tripartite test for the ‘same interest’ that courts took from Lord Macnaghten’s phrase in *Ellis*: ‘[g]iven a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.’<sup>65</sup> *Ellis* involved growers of fresh produce who sought a declaration of their statutory right to sell their wares in Covent Garden Market, as well as other remedies. While the growers did not have a joint proprietary interest and were held to be a ‘large and fluctuating class’, it was a class nevertheless ‘capable of being ascertained’.<sup>66</sup> This was because the class was defined as sellers of produce they had grown themselves, who were entitled to preferential rights under the relevant statute (thus creating a common interest).<sup>67</sup> They were claiming a breach of those statutory rights that were conferred on them because of their identity, and the relief claimed, which was the same across the group, also arose from that identity. A majority of the House of Lords therefore found in the growers’ favour.

It was in the subsequent decision in *Markt* that the Court of Appeal interpreted *Ellis* as laying down a tripartite test.<sup>68</sup> In that case, Lord Justice Fletcher Moulton took Lord Macnaghten’s phrase to mean that, ‘where the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable. The relief that he is seeking is a

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<sup>64</sup> *Rendlesham Estates plc v Barr Ltd* [2014] EWHC 3968 (TCC) [88]-[92], [270]; *Seafarers International Union of Canada et al v Lawrence*, 1979 CanLII 2110 (ONCA).

<sup>65</sup> *Ellis* (n 13) 8.

<sup>66</sup> *ibid* 5.

<sup>67</sup> *ibid* 13, 16.

<sup>68</sup> *Markt* (n 52) 1035.

personal relief ... and does not benefit in any way the class for whom he purports to be bringing the action.<sup>69</sup> In *Markt*, the plaintiffs sued on behalf of 44 other shippers for goods that had been damaged when a Russian warship destroyed the defendant's vessel. The court found the group did not meet the *Ellis* test because they did not have a common interest (each had separate contracts with the defendant), they did not share a common grievance (each had different damages), and relief would not be beneficial to all (the damages sought were personal to each shipper).<sup>70</sup>

The Canadian courts also applied this restrictive interpretation of the 'same interest' test, which revolved around the following points, many of which were also discussed in *Lloyd*:

1. Individual damages assessments cannot be circumvented by placing a cap on damages that can be claimed by each class member.

This was the approach in *Naken*,<sup>71</sup> which was also followed by the claimant in *Lloyd*. *Naken* involved nearly 5,000 purchasers of certain models of vehicle. The plaintiffs capped damages at \$1,000 per member, which was stated to be an approximate reflection of the diminution of resale value of the vehicles. However, just as the UKSC found in *Lloyd*, Justice Estey for the Supreme Court of Canada (SCC) held that damages would be different for each class member, and that this could not be circumvented by capping each member's claim.<sup>72</sup> As in *Lloyd*, Justice Estey held that *res judicata* would prevent those with more extensive damages from pursuing their rights in subsequent actions, and that such a result 'would be serious'.<sup>73</sup> The Newfoundland Supreme Court (Trial Division) came to a similar conclusion in *Kelly*.<sup>74</sup>

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<sup>69</sup> *ibid* 1035, 1039.

<sup>70</sup> *ibid* 1029-30, 1035, 1040.

<sup>71</sup> *Naken et al v General Motors of Canada Ltd et al*, 1975 CanLII 498 (ONSC); revd 1977 CanLII 1317 (Div Ct); revd (1979) 21 OR (2d) 780 (CA); revd *Naken* SCC (n 54).

<sup>72</sup> *Naken* SCC, *ibid* 99.

<sup>73</sup> *ibid* 100-101.

<sup>74</sup> *Kelly* (n 60) [54], [67]-[69].

2. The 'same interest' test will not be met if individual damages assessments are necessary because of the variety of class members' circumstances.

This was the courts' conclusion in both *Naken* and *Lloyd*.<sup>75</sup> In Prince Edward Island, too, the Supreme Court (Trial Division) refused to approve the settlement of a representative action where damages could not be calculated without recourse to individual enquiries.<sup>76</sup> As in *Lloyd*, the PEI Supreme Court held that the distribution of the common fund using the pro-rata method proposed by the plaintiffs meant that the compensation 'may bear no similarity to their loss or damages',<sup>77</sup> and would thereby contravene the compensatory principle. The court cited an unreported Nova Scotia case in which convenience store owners/operators had allegedly lost income due to the wrongful termination of agreements to operate video gambling machines.<sup>78</sup> The plaintiffs based their claim for each class member on their own average monthly net income from the terminals. However, Bateman J held that there was no basis for assuming the plaintiffs' income reflected that of the other convenience store operators. As the court held in *Lloyd*, the only way to calculate the damage to the class in accordance with the compensatory principle was to pursue the 'bottom up' approach – to look at the individual circumstances of each class member, which was fatal to a representative action. There was no reliable way to calculate the damages to the class from the top down, *ie* on an aggregate basis.<sup>79</sup>

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<sup>75</sup> *Lloyd* (n 9) [87]; *Naken* SCC, *ibid* 99-100; *Holtslag v Alberta*, 2000 ABQB 351 [10]; *Inshore Fishermen's Bonafide Defence Fund Association v Canada* (1994), 132 NSR (2d) 370 (CA); *Seafarers International* (n 64).

<sup>76</sup> *Horne v Canada (Attorney General)*, [1995] PEIJ No 60 [27], [40]-[41].

<sup>77</sup> *ibid* [28], [39]-[40].

<sup>78</sup> *Audenhove v Nova Scotia* (September 9, 1994, NSJ 384), cited in *Horne*, *ibid* [45].

<sup>79</sup> *Lloyd* (n 9) [86]-[87].

3. Differences between class members' circumstances on liability will be fatal to a representative action.

This was the holding in *Naken* and other Canadian cases.<sup>80</sup> The contractual claim in *Naken* was based on the defendant's warranties to the class members, and Justice Estey found there was an infinite variety of differences in GM's representations in its advertisements as well as individual class members' reliance on them, such that there was no 'same interest' even though the claims arose from the same vehicle model.<sup>81</sup>

In Newfoundland,<sup>82</sup> the *Kelly* case involved the liquidation of an insurance company and the cancellation of 22,000 policies, resulting in \$20 million in unrefunded premiums.<sup>83</sup> The court held the claims did not involve the 'same interest' because they would necessitate individual enquiries into when the insurance broker and the policyholders knew or ought to have known of the company's precarious financial situation, as well as the manner in which the broker handled each class member's premium payments,<sup>84</sup> and this would require the class 'to be significantly redefined and reshaped as the evidence comes out.'<sup>85</sup>

In *Holtslag*, too, the court stated that the issues of reliance and the relevant standard of care varied between class members.<sup>86</sup> In order to overcome these variances, the representative plaintiff would have to have the 'lowest common denominator characteristic', *ie* to have purchased a home without actual reliance on the defendant's approval of the roofing material.<sup>87</sup> Just as in *Lloyd*, the court held that this could prove prejudicial, from a *res judicata* perspective, to those class members who did rely on the defendant's approval.<sup>88</sup>

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<sup>80</sup> *Kripps v Touche, Ross & Co*, 1986 CanLII 758 (BCSC) [15]; *Hayes v British Columbia Television Broadcasting Systems Ltd*, 1990 CanLII 1525 (BCCA); *Interclaim Holdings Ltd v Down*, 1999 ABQB 892 [30].

<sup>81</sup> *Naken* SCC (n 54) 103-104.

<sup>82</sup> All references to Newfoundland are to Newfoundland and Labrador.

<sup>83</sup> *Kelly* (n 60) [4]-[11].

<sup>84</sup> *ibid* [61]-[64].

<sup>85</sup> *ibid* [58]; *Inshore Fishermen* (n 75) 378.

<sup>86</sup> *Holtslag* (n 75) [13]-[14], [17]-[21], [23]-[25].

<sup>87</sup> *ibid* [18].

<sup>88</sup> *ibid* [19]-[20].

4. Conflicts within the class will be fatal to a representative action.

The Canadian case law held that ‘[n]one of the members of the class may have an interest antagonistic to the other members.’<sup>89</sup> While this issue did not arise in *Naken*, it was key to some other cases. In *Horne*, for example, the plaintiffs were asking the court to approve a settlement that would be binding on those who had objected or not consented to it, but who may have had damages in excess of their pro-rata share of the settlement fund. The court held that the differences in class members’ circumstances with regard to damages meant their interests were necessarily antagonistic.<sup>90</sup> As discussed below, however, a representative action can proceed if the class members’ interests are merely divergent.<sup>91</sup>

5. Courts applying the restrictive approach called for class action reform by way of legislation.

The *Naken* court agreed with the Ontario Law Reform Commission in holding that ‘the skeletal nature of Rule 75 suffers from a host of procedural deficiencies that ... can be addressed only by wholesale reform of the law of class actions in Ontario.’<sup>92</sup> The *Holtslag* court expressed similar sentiments.<sup>93</sup> In *Lloyd*, too, the UKSC ‘agree[d] with the highest courts of Australia, Canada and New Zealand that ... a detailed legislative framework would be preferable’.<sup>94</sup> However, the UKSC’s ultimate conclusion on this point was more liberal than the SCC’s in *Naken*, as will be discussed in the next section.

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<sup>89</sup> *Caisse Populaire* (n 51), cited in *Horne* (n 76) [24].

<sup>90</sup> *Horne*, *ibid* [24], [35]-[38].

<sup>91</sup> *Dutton* (n 8) [54]; *Lloyd* (n 9) [71]-[72].

<sup>92</sup> Ontario Law Reform Commission, *Report on Class Actions* (Ministry of the Attorney General (MAG) 1982) 76, cited in *Naken* SCC (n 54) 93; *Caisse Populaire* (n 51) [16]-[17]; *Western Canadian Shopping Centres Inc v Bennett Jones Verchere*, 1998 ABCA 392 [20], *affd* *Dutton* (n 8); *King & Dawson v Government of PEI*, 2020 PECA 13 [103].

<sup>93</sup> *Holtslag* (n 75) [5]-[6].

<sup>94</sup> *Lloyd* (n 9) [68].



Part III will discuss the Canadian courts' more expansive interpretation of the representative rule in the 1970s, as well as the SCC's decision in *Dutton* that permitted the rule's use for class actions.

### **Part III: Canada's Expansive Approach**

Canadian courts became more receptive to collective redress mechanisms in the 1970s, following the introduction of class actions for damages in the US, and as the need for such mechanisms became more apparent. The first signs of a more expansive interpretation of the representative rule were seen in British Columbia, where such actions were governed by Ordinance 16, Rule 9 of the Rules of the Supreme Court (1961).<sup>95</sup> This was very similarly worded to its counterparts in other provinces and was almost identical to its English equivalent.

This expansive interpretation consisted of two strands. The first was the adoption of the 'common success' test; the second consisted of courts' interpretations of the rule to bypass the restrictions of *Markt*.<sup>96</sup> Each of these strands will be addressed in turn, with comparisons to *Lloyd* throughout.

The BC Court of Appeal adopted the 'common success' test in *Shaw v Real Estate Board of Greater Vancouver*.<sup>97</sup> A group of estate agents brought a representative action for an accounting, alleging the defendant had wrongfully withheld portions of their sales commissions. The Court of Appeal held the matter was properly constituted as a representative action, even though it sought the return of sums that differed for each group member, because the relief sought was equitable and not for personal damages. In addition, the court found that the 'same interest' requirement was satisfied by the group members' common interest in the success of the action.<sup>98</sup> Similarly, in *Chastain v British Columbia Hydro and Power*

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<sup>95</sup> In 1976, this became Rule 5(11) of the Supreme Court Rules, but the substance remained the same.

<sup>96</sup> Chiodo (n 14) 27-28.

<sup>97</sup> (1973), 36 DLR (3d) 250 (BCCA).

<sup>98</sup> *ibid* 254.

*Authority*,<sup>99</sup> the plaintiff sought a declaration that the defendant had no authority to request a security deposit from new customers with low incomes, as well as an injunction forbidding the defendant from keeping deposits already collected. The court allowed the representative action to proceed, even though it was essentially a claim for a monetary remedy that would require the return of different amounts to each customer, because the group members all had the ‘same interest’ in the success of the action. In the Ontario case of *Cobbold v Time Canada*,<sup>100</sup> the court held that a claim for damages was not fatal to a representative action because the primary consideration was common success.<sup>101</sup>

*Lloyd* did not adopt the ‘common success’ test. The UKSC held that the class members all had the same interest in the claim, because the individual claims raised common issues and there was no conflict of interest among the class members. However, the representative action included a damages claim and, because the class members’ damages required individualised assessment, the ‘same interest’ test was not met. It was not sufficient that ‘if the plaintiff wins the other persons he purports to represent win too’,<sup>102</sup> because there was no principled way of calculating the damage to the class.

The second way in which the representative rule was interpreted more liberally in Canada was in the courts’ approval of such actions, even where assessing damages would potentially be complex and cumbersome, and where individual issues would remain to be answered after a decision on the common questions. In *Ranjoy Sales & Leasing v Deloitte*,<sup>103</sup> the class members’ investments varied in nature, the alleged deficiencies in the financial statements varied by year, and the consequences of class members’ reliance (*ie* damages)

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<sup>99</sup> (1973), 32 DLR (3d) 443 (BCSC).

<sup>100</sup> (1976), 13 OR (2d) 567 (ONSC).

<sup>101</sup> *ibid* 568.

<sup>102</sup> *Shaw* (n 97) 254.

<sup>103</sup> *Ranjoy Sales & Leasing Ltd v Deloitte Haskins & Sells*, 1984 CanLII 3636 (MBQB), *affd* 1984 CanLII 3022 (MBCA).

would therefore vary by year.<sup>104</sup> Nevertheless, the court held that ‘it would be premature to refuse a class action because those or other distinctions might arise during the proceedings ... The better procedure would be to redefine the class to exclude any persons where there is evidence ... that indicates that such a person may be prejudiced if included in the class.’<sup>105</sup> This was a much more liberal approach than in *Kelly* and *Inshore Fishermen*, which held that it was not appropriate for the class to be significantly redefined as the evidence came out.<sup>106</sup>

In two Alberta cases, the courts held that a representative action could proceed even though each class member’s damages would be different. In *Korte v Deloitte, Haskins & Sells*, a securities action, the court held that individual damages calculations were not a barrier to proceeding and that reliance could be addressed in common (because the claims of breach of fiduciary duty meant that proving actual reliance might not be necessary).<sup>107</sup> In *Alberta Pork Producers*, a representative action for price-fixing in the hog industry, the court found a commonality among class members who all belonged to the plaintiff marketing board and sold their hogs through the same scheme.<sup>108</sup> The damages for each class member would be different, but the court held that the same methodology could be used to establish the quantum of damages for each class member.<sup>109</sup> The Court of Appeal upheld the decision,<sup>110</sup> holding that the Supreme Court had distinguished this case from *Naken*<sup>111</sup> because the issue of determining the common fund and individual members’ entitlements was common across the class. This was enough to establish a ‘common interest’.<sup>112</sup>

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<sup>104</sup> *Ranjoy* MBCA, *ibid* [22]-[23].

<sup>105</sup> *ibid* [54]; *Alberta (Pork Producers Marketing Board) v Swift Canadian Co* (1981), 129 DLR (3d) 411 (QB) [46], *affd* 1984 ABCA 175.

<sup>106</sup> *Kelly* (n 60) [58]; *Inshore Fishermen* (n 75) 378.

<sup>107</sup> 1993 ABCA 78 [17]-[19].

<sup>108</sup> *Alberta Pork Producers* QB (n 105) [17]-[18].

<sup>109</sup> *ibid* [18]-[19], [26]-[28].

<sup>110</sup> *Alberta Pork Producers* ABCA (n 105).

<sup>111</sup> *ibid* [17]; *Naken* SCC (n 54) 95-96.

<sup>112</sup> *Naken* SCC, *ibid* 96. Alberta’s Rule 42 was worded slightly differently from the other provinces’ rules, requiring a ‘common interest’ rather than the ‘same interest’, but most courts and commentators held that the two phrases were interchangeable: John Kazanjian, ‘Class Actions in Canada’ (1973) 11 OHLJ 397, 416-418.

In *Farnham v Fingold*,<sup>113</sup> a representative action was brought on behalf of non-controlling shareholders who claimed they had been unjustly deprived of a premium that was paid to the controlling shareholders upon the sale of the company. They sought a declaration, an accounting, and damages, consisting of a pro-rata share of the gross premium above market price received by the controlling shareholders. The court held the premium could be calculated without recourse to individualised enquiries, and that each class member's individual share could be established in post-trial proceedings.

Similarly, the Court of Appeal for Ontario in *Naken* held the representative action could proceed (although this was overturned on appeal to the SCC) even though the claims involved individual contracts and individual questions of reliance. The court held there was a common interest among the class members who had relied on GM's advertisements, and the class would have to be narrowed to include only those people. Damages could therefore be sought in the aggregate and individual assessments would not be required. The 'same interest' test did not pose a barrier to proceeding, because individual questions of reliance could be determined after a trial of the common questions.<sup>114</sup>

The approach in *Farnham* and *Naken* has echoes of the bifurcated approach used in *Prudential* and endorsed in *Lloyd*, whereby a declaration of liability would form the basis for subsequent individual actions for monetary damages, although in *Farnham* and *Naken* the proposed post-trial proceedings would not involve separate actions.<sup>115</sup> In addition, the Canadian cases discussed above held, like *Lloyd*, that representative actions could be brought even where they involved redress for individual private rights. In *Alberta Pork Producers*, the court distinguished between an 'offensive accumulation' of claims (eg an action requiring an individual assessment of each class member's damages), and 'a proper combining of individual

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<sup>113</sup> [1972] 3 OR 688 (HC); [1973] 2 OR 132 (CA).

<sup>114</sup> *Naken* OCA (n 71).

<sup>115</sup> *Farnham* CA (n 113); *Naken* OCA (n 71).

causes of action'.<sup>116</sup> It held that an aggregate damages assessment would not be 'offensive' simply because it would equal the total of each class member's individual damages, as long as no individualised assessments were required.<sup>117</sup>

There is also some overlap between *Lloyd* and the SCC's decision in *Dutton*.<sup>118</sup> *Dutton* was an appeal from an Alberta decision. Although *Naken* had stopped the liberal interpretation of the representative rule in its tracks, the Alberta courts had distinguished *Naken* in several key cases.<sup>119</sup> Alberta was also one of the last provinces to enact class proceedings legislation, so its jurisprudence on the representative action was fairly well developed. It was therefore an Alberta case that led the SCC to reconsider its position on the representative action nearly two decades after *Naken*.

The SCC in *Dutton* not only upheld the Alberta Court of Appeal's decision allowing the action to proceed; it overturned *Naken* and held the representative rule could be used to prosecute class actions. In doing so, it modified the requirements for a representative action:<sup>120</sup>

1. The class is capable of clear definition;
2. There are issues of law or fact common to all class members;
3. Success for one class member means success for all; and
4. The proposed representative adequately represents the interests of the class.

There was no longer any requirement, as there had been throughout the case law, that '[n]o individual assessment of the claims of individual plaintiffs need be made.'<sup>121</sup> The court held that countervailing considerations that may outweigh the benefits of a class action had to be considered, with a balance to be struck between efficiency and fairness.<sup>122</sup> It also articulated

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<sup>116</sup> *Alberta Pork Producers* QB (n 105) [28].

<sup>117</sup> *ibid.*

<sup>118</sup> *Dutton* (n 8).

<sup>119</sup> See *eg Alberta Pork Producers* ABCA (n 105) [15], [17].

<sup>120</sup> *Dutton* (n 9) [38]-[41], [43], [48].

<sup>121</sup> *Korte* (n 107) [14]. In this case, that requirement would have been met: *Dutton*, *ibid* [15].

<sup>122</sup> *Dutton* (n 9) [42], [44]. The Ontario and BC legislatures had rejected this 'cost-benefit' test.

the requirements for notice (including the right to opt out) and the consideration of individual issues.<sup>123</sup>

The court found the class action was no longer an untested procedure.<sup>124</sup> Ontario, BC, and other jurisdictions had passed class actions legislation since *Naken*, and the court held that, when interpreting the representative rules of the various provinces, attention should be paid to that legislation.<sup>125</sup> In holding that the representative rule could be used for class actions, even where individualised assessments of damages were required,<sup>126</sup> the SCC erased the distinction between the two procedures.

The UKSC in *Lloyd* did not go so far. The balance of this section will compare and contrast the decisions in *Lloyd* and *Dutton*; this reveals that the interpretation of the representative rule in *Lloyd* is more expansive than in *Naken*, but more restrictive than in *Dutton*. Those restrictions, I argue, are based on an accurate reading of the jurisprudence and the nature of the representative rule that the *Dutton* court did not fully apprehend. The two decisions are similar in several ways:

1. Both courts approached the representative rule in a liberal and purposive manner, and stated that, in the absence of comprehensive legislation, courts had to fill the void under their inherent power to settle the rules of practice and procedure.<sup>127</sup>
2. In filling this void, both courts provided guidance regarding steps such as notice and opting out.<sup>128</sup>
3. Both courts held that conflicting interests were fatal to a representative action, but divergent interests or differences between class members were not.<sup>129</sup>

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<sup>123</sup> *ibid* [49]-[50].

<sup>124</sup> *ibid* [46].

<sup>125</sup> *ibid* [46]-[47], [51].

<sup>126</sup> *ibid* [43]. In *Cloud v Canada (Attorney General)*, 2004 CanLII 45444 (ONCA), the court went further by certifying a class proceeding even though the common issues made up only a very limited aspect of the liability question, and individualised assessments would be required to determine causation and damage.

<sup>127</sup> *Dutton*, *ibid* [34]; *Lloyd* (n 9) [68].

<sup>128</sup> *Dutton*, *ibid* [49]; *Lloyd*, *ibid* [77]-[83].

<sup>129</sup> *Dutton* (n 8) [54]; *Lloyd* (n 9) [71]-[72]. See also *Genius Sports Technologies Ltd v Soft Construct (Malta) Ltd* [2021] EWHC 3200 (Ch) [43]-[44], [48].

4. Finally, both courts anticipated that individual issues would remain to be resolved following the answering of the common questions.<sup>130</sup>

The main difference between the two decisions is their treatment of the issue of damages. *Dutton* permitted the use of the representative rule even where individualised damages assessments would be required,<sup>131</sup> and in doing so referred to the Ontario and BC class proceedings legislation that stated that such circumstances were not a bar to a class action.<sup>132</sup>

*Lloyd*, by contrast, held that where damages are different for each individual, the compensatory principle requires an individualised assessment – anything else will not put the claimant in the same position as if the wrong had not occurred.<sup>133</sup> While the court noted that the compensatory principle had been ‘radically alter[ed]’ in other contexts,<sup>134</sup> namely, under the statute allowing for class actions in competition law,<sup>135</sup> a rule of procedure could not be used to abrogate the ‘nature of the remedy of damages at common law.’<sup>136</sup>

In all other respects, however, the UKSC’s description of the scope of the representative action was similar to the SCC’s in *Dutton*. The UKSC in *Lloyd* overturned other strictures on the representative rule, such as the bar to separate causes of action and diverging interests. It also overturned the holding that a representative claim could not be maintained if damage was an element of the cause of action,<sup>137</sup> because the bifurcated approach could be used (with the

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<sup>130</sup> *Dutton*, *ibid* [50]; *Lloyd* (n 9) [81]-[84].

<sup>131</sup> *cf Korte* (n 107) [14], cited in *Dutton* (n 8) [35].

<sup>132</sup> *Dutton*, *ibid* [43].

<sup>133</sup> *Lloyd* (n 9) [80].

<sup>134</sup> *ibid* [32], citing *Mastercard* (n 3) [76].

<sup>135</sup> CA 1998 (n 4) s 47C(2).

<sup>136</sup> *Lloyd* (n 9) [80]. On this point, the Supreme Court of Victoria established a class action regime through Order 18A of the Supreme Court (General Civil Procedure) Rules 1996. This was challenged as *ultra vires* the court’s rule-making power, because its aggregate damages provisions went against the compensatory principle and therefore compromised litigants’ substantive rights: *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545 (CA). In response, the Victorian government enacted legislation in the form of the Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000 (Vict) s 14. See Chiodo (n 14) 38.

<sup>137</sup> *Rendlesham* (n 64), overturned *ibid* [58].

common questions to be determined in one action, with subsequent individual actions to determine the fact and amount of damage)<sup>138</sup> or the class definition amended as appropriate.<sup>139</sup>

What explains the two courts' different approaches to the issue of damages? As noted above, the UKSC in *Lloyd* implied that the compensatory principle could only be 'radically alter[ed]' by statute. Various law reform reports have also recognised that using the representative rule for a class action would involve changes to the substantive law, including the use of aggregate damages, and legislation would therefore be required.<sup>140</sup> The *Lloyd* court therefore recognised two crucial points: the distinction between the representative rule and class actions, and the limits of its own power to erase that distinction.

The SCC in *Dutton*, on the other hand, did not consider the compensatory principle when removing the bar on cases involving individual damages assessments. Instead, it simply stated that this and other factors 'should no more bar a class action suit in Alberta than in Ontario or British Columbia',<sup>141</sup> despite the existence of class actions legislation in the latter provinces, and despite the court's prior decision in *Naken*. Underlying the *Dutton* decision and accelerating the acceptance of class actions were the numerous legal, political, and social changes that had, in the two decades since *Naken*, fundamentally altered the civil justice system as well as the perception of the courts' role in society. These changes have been detailed elsewhere.<sup>142</sup> They include the advent of the Canadian Charter of Rights and Freedoms,<sup>143</sup> which entailed a more activist judiciary with the ability to strike down legislation. In this context, even if the SCC had considered the compensatory principle, it would not have considered abrogating it an impermissible step.

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<sup>138</sup> *Lloyd*, *ibid* [58].

<sup>139</sup> *ibid*.

<sup>140</sup> CJC Report (n 6) 104-105; Ministry of Justice, *The Government's Response to the Civil Justice Council's Report* (TSO 2009) 12; *Report of the Attorney General's Advisory Committee on Class Action Reform* (MAG 1990) 24-25.

<sup>141</sup> *Dutton* (n 8) [43].

<sup>142</sup> Chiodo (n 14) 47-69.

<sup>143</sup> *The Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.



Furthermore, part of the court's reasoning in allowing the representative rule to be used for class actions was the fact that 'many jurisdictions have enacted comprehensive class action legislation.'<sup>144</sup> This assessment had the opposite effect than on the *Naken* court, which held that, '[t]he experiences and practices elsewhere sometimes properly restrain judicial ardour to ease the way of litigants by broader interpretation of a statute or regulation, particularly an older one, where its language is either sufficiently broad or ambiguous to do so.'<sup>145</sup> Much had changed in the decades between the two decisions.

It can be seen, therefore, that *Lloyd* demonstrates a liberal approach to the representative rule, while remaining within the limits of the compensatory principle. It is more generous than *Naken*, and more principled than *Dutton*. Where does that leave England's representative rule?

#### **Part IV: The Representative Rule Post-*Lloyd***

At first glance, it would seem that the bifurcated approach endorsed in *Lloyd* leaves a significant amount of space for class actions at common law. However, the issue of funding, which is a central consideration in collective redress, puts severe limitations on that approach. As the court in *Lloyd* noted, the claimant had not proposed a bifurcated process because a declaration at the first stage would not generate any financial return. Only individual actions for damages at the second stage would do so, and that would require each class member to take active steps to pursue their claims.<sup>146</sup> The number of claims – and therefore the pool of potential damages – would be much lower in such an 'opt-in' process than an opt-out process, not only because of lack of awareness of the proceedings but also because of 'the natural human tendency to do nothing when faced with a choice which requires positive action'.<sup>147</sup> In addition,

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<sup>144</sup> *Dutton* (n 8) [30]. England's GLO framework was on this list, even though it does not constitute comprehensive class action legislation.

<sup>145</sup> *Naken* SCC (n 54) 93.

<sup>146</sup> *Lloyd* (n 9) [85].

<sup>147</sup> *ibid* [27].

the administrative costs of commencing a claim, the costs of obtaining evidence from each individual to prove their claim, and the low amount of compensation that would probably be awarded,<sup>148</sup> means the second stage of an action such as *Lloyd* would not be economically viable, would not attract funding, and would probably not be pursued at all.

The bifurcated approach would therefore only be viable where individual actions for damages would generate enough of a financial return to attract funding. Such cases can already be pursued through the GLO framework, whereby numerous individual claims are collected on a group register, and common or related issues of fact or law pertaining to those claims can be addressed in one proceeding.<sup>149</sup> This includes data protection claims.<sup>150</sup> The GLO mechanism arguably renders the bifurcated approach otiose, as can be seen in the *Jalla* case.<sup>151</sup>

The Nigerian claimants in *Jalla* commenced a representative action under CPR 19.6, seeking remediation to damage to their land allegedly caused by an oil spill. In a back-to-front version of the bifurcated approach, the claimants were already pursuing their individual damages claims in separate actions.<sup>152</sup> The Court of Appeal endorsed *Prudential's* bifurcated approach,<sup>153</sup> stating that it was appropriate where the individual issues were subsidiary to the common issues. In this case, however, the Court of Appeal held that the remediation claims could not be justified without recourse to individual issues of causation, loss, damage, and limitation,<sup>154</sup> and those individual issues were therefore integral to the main issue in the proceedings.<sup>155</sup> As a result, one of the purposes of the representative rule – to avoid cost, delay,

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<sup>148</sup> *ibid* [25]-[28].

<sup>149</sup> CPR 19.III. The procedure may encompass test claims (CPR 19.13(b), 19.15) and the trial of preliminary issues (19B PD 15.1). Multiple claims giving rise to similar issues of fact or law may also be informally case managed together under the court's inherent power to direct its own procedure, or may be pursued by joinder or consolidation (CPR 3.1(2), 19.1, 19.3).

<sup>150</sup> *Bennett and others v Equifax Ltd*, case number QB-2021-003702; *Weaver and others v British Airways plc* [2021] EWHC 217 (QB).

<sup>151</sup> *Jalla v Shell International Trading and Shipping Company Ltd* [2020] EWHC 2211 (TCC), *affd* [2021] EWCA Civ 1389.

<sup>152</sup> *Jalla* TCC, *ibid* [70]; *Jalla* CA, *ibid* [21].

<sup>153</sup> *Jalla* CA, *ibid* [51].

<sup>154</sup> *ibid* [78], [81]-[83], [87], [89], [102], [104].

<sup>155</sup> *ibid* [97].

and procedural complexity – would be defeated.<sup>156</sup> The case could not therefore proceed as a representative action. As the Court of Appeal noted, however, more than 28,000 of the claimants had commenced individual actions for damages. They could therefore have pursued their claims through the ‘opt-in’ mechanism of the GLO.<sup>157</sup>

A GLO can capture claims that are economically viable, whether or not the individual issues are subsidiary to the common issues.<sup>158</sup> There are therefore very few cases that would be suitable for the bifurcated approach, that would not also be suitable for a GLO. The main difference between the two procedures is the stage at which the common issues are answered. In a GLO, claimants begin to join the register before they are answered (although, depending on the cut-off date, they may also join the register afterwards).<sup>159</sup> Under the bifurcated approach, on the other hand, individual claimants do not need to come forward until after the common questions are answered. This would increase the incentive and reduce the risk of commencing an individual action for damages, which could result in more claimants than a more ‘front-end’ opt-in scheme.

Such an argument lies on shaky ground, however, given the experience of the one action that was commenced under the opt-in competition law collective redress regime, which enabled organisations to represent groups of consumers in the Competition Appeal Tribunal (CAT).<sup>160</sup> The regime was limited to ‘follow-on’ actions, where an infringement of competition law had already been established. The only action to be pursued under the regime was against JJB Sports Plc for overcharging consumers for replica football shirts. Despite the reduced risk and increased incentive of opting-in to a follow-on action, as well as extensive publicity, only 130 claimants opted in (0.00067–0.00083 per cent of the total affected).<sup>161</sup>

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<sup>156</sup> *ibid* [52], [57]-[58].

<sup>157</sup> *ibid* [59], [67].

<sup>158</sup> The claims must simply ‘give rise to common or related issues of fact or law’ (CPR 19.10).

<sup>159</sup> 19B PD 13.

<sup>160</sup> Competition Act 1998, s 47B, as amended by Enterprise Act 2002, 2002 c 40, sections 19, 279.

<sup>161</sup> *The Consumers’ Association v JJB Sports Plc* [2009] CAT 2 [7].

It was this experience that led the Office of Fair Trading, and later the Department for Business, Innovation and Skills, to recommend the introduction of opt-out class actions in competition law.<sup>162</sup> The result was Schedule 8 of the Consumer Rights Act 2015.<sup>163</sup> For the prosecution of competition law claims, the CAT class actions regime is preferable to a bifurcated procedure under the representative rule for two reasons. First, CAT proceedings can be pursued on an opt-out basis,<sup>164</sup> so that individual claims do not have to be economically viable and it is easier to attract funding. Second, section 47C of the CA 1998 departs expressly from the compensatory principle and allows liability can be established on a class-wide basis, so that individual class members are not required to establish loss even if this is an essential element of their claim.<sup>165</sup> In *Mastercard*, this meant the claim could proceed even though the calculation of damages per class member could not be done with precision.<sup>166</sup> In *Lloyd*, by contrast, the lack of precision and necessary departure from the compensatory principle was fatal to the representative action.<sup>167</sup>

The bifurcated approach therefore has very little utility, given the procedural alternatives available for the prosecution of numerous claims that share common issues of fact or law. What gaps does that leave in terms of collective redress procedures? *Lloyd* has the answer: unless they claim damages that can be assessed without recourse to individual enquiries (in which case the representative rule would be available), there is still no procedure for the prosecution of numerous claims that share common issues of fact or law that are not individually economically viable. Lord Woolf noted this gap in his *Access to Justice* report, in which he stated that the new procedures he proposed for multi-party actions should, amongst

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<sup>162</sup> OFT, *Private actions in competition law: effective redress for consumers and business: recommendations from the Office of Fair Trading* (OFT 2007); BIS, *Private actions in competition law: a consultation on options for reform* (BIS 2012) 26.

<sup>163</sup> CA 1998 (n 4).

<sup>164</sup> Whether the proceeding is opt-in or opt-out is within the discretion of the CAT: CA 1998, *ibid* s 47B(7)(c).

<sup>165</sup> *Mastercard* (n 3) [94]-[95].

<sup>166</sup> *ibid* [58].

<sup>167</sup> *Lloyd* (n 9) [80].

other things, ‘provide access to justice where large numbers of people have been affected by another’s conduct, but individual loss is so small that it makes an individual action economically unviable’.<sup>168</sup> More than two decades later, except for the area of competition law, that gap remains unfilled.

## Part V: Conclusion

The future does not look bright for England’s representative rule. Because of the limits on how that rule may be used, even after the UKSC’s judgment in *Lloyd*, it is likely to remain a ‘procedural backwater’.<sup>169</sup> The same was true in Canada before the passage of class proceedings legislation, despite courts’ attempts to interpret the rule liberally. In the wake of the SCC’s decision in *Dutton*,<sup>170</sup> several provinces saw actions commenced under their version of the representative rule.<sup>171</sup> Because of the lack of guidance provided by the rule, however, the actions became mired in procedural complexity and interlocutory appeals. In response to these difficulties, each province commenced its own class proceedings legislation, with Prince Edward Island being the last.<sup>172</sup> Where the representative rule continues to exist in Canada, its use is largely limited to claims made by limited and clearly ascertainable classes of persons, asserting a common statutory or collective right, or those who seek a common statutory declaration or remedy.<sup>173</sup>

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<sup>168</sup> Woolf Report (n 22), chapter 17[2].

<sup>169</sup> CJC 2008 (n 6) 165.

<sup>170</sup> *Dutton* (n 8).

<sup>171</sup> For Nova Scotia, see *MacQueen v Sidbec Inc*, 2006 NSSC 208; for PEI, see *King* (n 92). Class action legislation was introduced the year after these decisions in both provinces.

<sup>172</sup> Similarly, the New Zealand Law Commission recommended the introduction of class proceedings legislation shortly after the decision in *Southern Response* (n 43).

<sup>173</sup> These are the requirements for a representative action in BC, Saskatchewan, New Brunswick, and Alberta. These provinces (and Newfoundland) are the only ones to have retained their representative rules after the enactment of class proceedings legislation.

England's representative rule is therefore likely to suffer a similar fate. *Lloyd* has 'somewhat sidelined' the use of the rule for data breach claims,<sup>174</sup> and in February 2021 the UK government decided not to introduce an opt-out class action regime under the General Data Protection Regulation (GDPR).<sup>175</sup> Generic class action legislation is unlikely to be introduced, given the government's response to prior proposals.<sup>176</sup> Nevertheless, as recent experience in Ontario has demonstrated, class action reform is not a linear process.<sup>177</sup> English reformers with a comparative eye may therefore learn from the twists and turns that class actions in Ontario and other Canadian jurisdictions have taken, and craft a regime that fits more closely to the needs of their own jurisdiction.

There are also indications that class actions legislation will be introduced in sectors outside of competition law. For example, the Department for Business, Energy, and Industrial Strategy is considering opening up further avenues to collective redress for UK consumers.<sup>178</sup> In light of *Lloyd*, and as evidenced by the increasing number of cases being commenced in the CAT, legislation is the only realistic way to establish a thriving class actions regime in England.

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<sup>174</sup> Brooks (n 31). The UKSC in *Lloyd* left aside the question of breaches under DPA 2018, which replaced DPA 1998 and implemented the GDPR (Article 82(1) of which is worded differently to s 13 of DPA 1998 and refers to compensation for 'material or non-material damage'). The High Court allowed a representative action to proceed that claimed damages (amongst other remedies) for breaches under the new regime: *SMO (A Child) v Tiktok Inc & Ors (Rev1)* [2022] EWHC 489 (QB). However, that case has now been discontinued.

<sup>175</sup> Department for Digital, Culture, Media & Sport, *UK Government response to Call for Views and Evidence – Review of Representative Action Provisions, Section 189 Data Protection Act 2018* (DCMS 2021).

<sup>176</sup> MOJ Response (n 140).

<sup>177</sup> Recent amendments to Ontario's Class Proceedings Act (s 5(1.1)) arguably make certification more difficult, especially where numerous individual issues exist. PEI's class actions statute mirrors those amendments. This may increase the trend towards pursuing substantial damages claims outside the class actions framework.

<sup>178</sup> BEIS, *Reforming Competition and Consumer Policy* (BEIS 2021) 127.