INDIVIDUAL ISSUES AND THE CLASS-ACTION MECHANISM: DETERMINING DAMAGES IN SINGLE-ACCIDENT MASS PERSONAL INJURY CLASS ACTIONS

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In a personal injury class action, the extent of the injuries and the quantum of damages suffered by each member are individual issues. The problem is that in a personal injury class action, if the class consists of a large number of victims and each victim is required to present oral evidence to prove his or her damages individually, the trial may take years to conclude, and some claimants could possibly pass away by the time the court delivers judgment. It would overburden proceedings and cause undue delay. Accordingly, it is necessary, in such circumstances, to utilise alternative innovative, practical and time-efficient procedures that would enable the determination of each individual's damages. Our courts have not properly considered the approach to be followed when determining damages in mass personal injury class actions. This article evaluates certain alternative methods to determine damages in mass personal injury class actions in view of the existing procedural framework developed by our courts, with specific regard to the approaches followed by certain foreign jurisdictions.

I INTRODUCTION

Our courts have not considered the approach to be followed when determining damages in mass personal injury class actions. It is unclear what approach they will follow, specifically what procedural device(s), if any, they will utilise to determine damages in these actions. In this article, certain alternative methods to determining damages in mass personal injury class actions will be evaluated in view of the existing procedural framework developed by our courts, with specific reference to the approaches followed by selected foreign jurisdictions.

In *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)*,[1] Wallis JA listed as a certification requirement that the relief sought or damages claimed must be ascertainable and capable of determination.[2] However, in a mass personal injury class action, the quantum of each class member's damages is typically an individual issue. The problem in a mass personal injury class action is that, if the class is numerous and each class member must give oral evidence to prove his or her damages, the trial may take years to conclude. In fact, some of the class members could pass away by the time the court delivers judgment in the matter. In other words, such an approach may overburden proceedings and cause undue delay. Accordingly, it may be necessary, in such circum-

[†] BA LLB (Stellenbosch).
[1] 2013 (2) SA 213 (SCA).
[2] Ibid para 26.

stances, to utilise procedures that would enable the determination of each individual's damages. These procedures should be innovative, practical and time-efficient.[3]

II TERMINOLOGY

At the outset, it is necessary to consider the meaning of the term 'mass personal injury'. It is not statutorily defined and its meaning has not been expounded upon by our courts. However, it may be instructive to consider the attempts made to define the term 'mass tort' in the context of claims aggregation in the United States. In this regard, Chamblee states that the 'broad term mass tort can refer to anything from an airplane crash, to a chemical spill, to a defective product affecting a considerable number of people'.[4] She refers with approval to the following definition of 'mass tort' by the Advisory Committee on Civil Rules and the Working Group on Mass Torts: 'Mass tort litigation emerges when an event or series of related events injure a large number of people or damage their property.'[5]

According to Hensler, 'mass tort' is 'not a formal legal designation but a term of art that has come to describe a large number of tort claims arising out of the same factual circumstances and alleging the same or similar injuries'.[6] More specifically, however, the term is used to describe either a mass accident that involves a single event (single-accident mass torts)[7] or personal injuries sustained on a widespread basis typically involving defective products (dispersed mass torts).[8]

Single-accident mass torts are single incidents in which a number of people are injured, for example, an airplane crash involving injuries sustained by many individuals. In other words, they involve a known number of claimants who are injured or killed in a common accident having a single, determinable cause.[9] It is generally the case that all class members concerned are injured simultaneously. Other examples of single-accident mass torts include a hotel fire, the collapse of a structure, a bushfire,[10] or an explosion.[11]

Dispersed mass torts occur where personal injuries are incurred over an extended period. These injuries have a common cause and are generally

[3] W L de Vos 'Judicial activism gives recognition to a general class action in South Africa: *Children's Resource Centre Trust v Pioneer Foods* (50/12) [2012] ZASCA 182' 2013 *TSAR* 370 at 373–4.

[4] L E Chamblee 'Unsettling efficiency: When non-class aggregation of mass torts creates second-class settlements' (2004) 65 *Louisiana LR* 158 at 164.

[5] Ibid at 165.

[6] D R Hensler 'Has the fat lady sung? The future of mass toxic torts' (2007) 26 *Rev Litig* 883 at 890.

[7] See M F Connor 'Taming the tort monster' (2000) 4 *Briefly* 1 at 3.

[8] Ibid.

[9] Ibid.

[10] For example, the 'Black Saturday' bushfires of 7 February 2009 ravaged large parts of Victoria, Australia, which gave rise to a series of class actions.

[11] Connor op cit note 7 at 3.

manifested at different times and in different ways, often over a period of months or years.[12] Examples of dispersed mass torts include defective products or dangerous substances such as silicone gel breast implants, diet drugs or other medical devices, and exposure to asbestos.[13] In some instances, the exposed victims know of their exposure and have suffered injury. In other instances, exposed class members may know of their exposure, but have not developed any injuries.[14]

Whereas single-accident mass torts seldom involve complex legal issues, causation is usually an issue in the context of dispersed mass torts.[15] For example, in an asbestos-related dispersed mass tort, the variations in individual factual issues that would need to be taken into account, such as smoking or pre-existing illnesses, may constitute significant considerations when determining whether there is a sufficient causal link between the conduct and the injury. There may also be different levels and timing of exposure, different types of injuries suffered and the gravity of those injuries among the individual claimants would typically vary greatly.[16]

This article refers to a mass personal injury class action as a type of class action where the proceedings relate to claims arising from personal injury. It distinguishes between a mass personal injury class action based on a single accident[17] and a mass personal injury class action based on a dispersed incident.[18] This distinction is important because the individual's risk in dispersed-incident mass personal injury class actions may overwhelm the fact that class proceedings may be otherwise appropriate, thereby possibly rendering the claims unsuitable for class-action treatment.

III DETERMINING DAMAGES IN MASS PERSONAL INJURY CLASS ACTIONS

In considering the possible methods to determine damages in South African mass personal injury class actions, the approaches followed in Australia, Ontario (Canada) and the United States will be considered. Federal law of Australia and the United States will be considered, unless otherwise stated. Apart from the fact that these jurisdictions are the leaders in the field of class action litigation,[19] their systems of civil procedure are all of common-law origin that can be traced to the unwritten practices of the English Chancery

[12] I R M Panzer & T E Patton 'Utilizing the class action device in mass tort litigation' (1985–1986) 21 *Tort & Ins LJ* 560 at 560.

[13] R H Klonoff *Class Actions and Other Multi-Party Litigation in a Nutshell* 4 ed (2012) 331 and 723.

[14] Such claimants are commonly referred to as 'future claimants'.

[15] Connor op cit note 7 at 3.

[16] K R Feinberg 'The Dalkon Shield Claimants Trust' (1990) 53 *Law and Contemporary Problems* 79 at 82–9. See also Connor op cit note 7 at 3.

[17] Single-accident mass personal injury class action.

[18] Dispersed-incident mass personal injury class action.

[19] D L Bassett 'The future of international class actions' (2011) 18 *Sw J Int'l L* 21 at 22-4.

and the adversarial system of litigation. The basic principles that underlie these systems are therefore similar.[20] Today, class actions in these jurisdictions are largely creatures of statute and rule.[21]

(a) Class-wide damages

In assessing the quantum of delictual damages after a damage-causing event, the aim is to compensate the injured or prejudiced plaintiff(s) by placing them in the same financial position they would have been in had the damage-causing event not occurred. The plaintiff is inter alia burdened with the duty to prove the loss he or she has suffered, including the uncertain future loss that might not yet have transpired at the time the claim is lodged. In civil cases, the standard of proof is a balance of probabilities. This means that plaintiffs must prove that they have more likely than not suffered damage, and they must also prove the exact amount of damages that should be awarded to compensate for their loss.[22]

With the above in mind, one possible method to determine the quantum of damages in mass personal injury class actions is to replace individual damage trials with a class-wide calculation of damages. In other words, a court determines the damages payable by means of an aggregate award against the defendant, so that the damages sustained by the class as a whole can be computed by class-wide proof.[23] Aggregate assessment may occur either by way of a global or lump-sum award against the defendant or by the application of a formula to individual class members' claims. The individual class members are not required to prove their actual loss or damages in separate trial proceedings.[24] Once damages are calculated on a class-wide

[20] W de Vos ''n groepsgeding in Suid-Afrika' 1985 *TSAR* 296 at 304. E Hurter 'Class action: Failure to comply with guidelines by courts ruled fatal' 2010 *TSAR* 409 at 413 states that the class action is effectively an American phenomenon and that other Anglo-American jurisdictions that have opted for formal class-action devices have been influenced by the American class action. According to Hurter, it is clear that South African class-action developments mirror this trend. Although Ontario is a Canadian province, it was specifically selected for comparison because it was by far the most influential jurisdiction that the South African Law Commission (as it was known at the time) took into account in the drafting of its final report in 1998 titled *The Recognition of Class Actions and Public Interest Actions in South African Law*. The Ontario Law Reform Commission had, in 1982, prepared an exceptional and voluminous treatise that comprehensively explored the numerous policy and practice challenges regarding class-action procedure in Ontario, which eventually resulted in the introduction of the Ontario Class Proceedings Act 1992, SO 1992, c 6. The current South African class-action procedural framework clearly mirrors, to a large degree, the Ontario class-action model.

[21] R B Marcin 'Searching for the origin of class action' (1974) 23 *Cath U LR* 515 at 517.

[22] L Steynberg '"Fair" mathematics in assessing delictual damages' (2011) 14(2) *PER/PELJ* 1.

[23] R Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 407.

[24] Ibid at 408.

basis, they can be distributed individually, usually through a type of claims process or to the class as a whole.

Although a class-wide calculation of damages avoids the burdensome approach of conducting individual trials for each class member, it does give rise to due-process concerns and concerns regarding inaccuracy in the calculation of the aggregate assessment.[25] In the United States, federal courts have mostly rejected proving individualised damages through the class-wide calculation of damages in the context of mass personal injury class actions. The prevalent view, endorsed by the United States Supreme Court, is that a determination of the quantum of damages generally requires individual assessment.[26] A similar approach is followed in Ontario, where s 24(1)*(c)* of the Class Proceedings Act[27] ('the Ontario Act') provides that a court may determine the aggregate or a part of a defendant's liability to class members and render judgment where the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. It has been held that this section is not appropriate in the context of a mass personal injury class action as the claims could not be 'reasonably determined without proof by individual class members'.[28] Similarly, in Australia, the Federal Court of Australia Act[29] provides that the court must not make an aggregate award 'unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment'.[30]

One way to establish class-wide proof of damages is through extrapolation.[31] Extrapolation occurs when cases are tried after being selected randomly according to probability principles on the basis that the extrapolated cases could have statistical validity for the entire field of cases.[32] The use of random sampling and probability analysis for damages calculations, by determining individual trials for randomly selected plaintiffs in each category of plaintiffs and then extrapolating the average damage award to all class members in that category, has for the most part also been disapproved of in the United States.[33] The same disapproval has generally been shown toward

[25] Klonoff op cit note 13 at 639.

[26] M H Greer *A Practitioner's Guide to Class Actions* (2010) 495–9; *Wal-Mart Stores Inc v Dukes* 131 S Ct 2541 (2011).

[27] Op cit note 20.

[28] See, for example, *Bywater v Toronto Transit Commission* 1998 OJ No 4913 (QL), 27 CPC (4th) 172 (Gen Div).

[29] Act 156 of 1976.

[30] Section 33Z(3) of the Federal Court of Australia Act of 1976.

[31] According to Greer op cit note 26 at 712, extrapolation involves the use of statistical analysis to derive individual damage verdicts from the trial of sample cases or from the determination by a jury of aggregate damages.

[32] Ibid at 694.

[33] See for example the Eastern District of Texas decision in *Cimino v Raymark Industries Inc* 751 F Supp 649 (ED Tex 1990). The Federal Appellate Court later found the 'extrapolation' phase improper, holding that it violated the defendants' Seventh Amendment right to individualised evidence as to causation and damage issues for

statistical sampling as a way to circumvent the need for individual hearings to determine the quantum of damages.[34]

Federal courts have generally rejected the use of statistical sampling or extrapolation to determine damages in personal injury cases on the basis that the class-action device does not trump the requirement that plaintiffs must individually show proof of damages.[35] As one court explained, proof of injury 'is in no way lessened by reason of being raised in the context of a class action'.[36] The class-action mechanism 'does not alter the required elements which must be found to impose liability and fix damages'.[37] In *Wal-Mart Stores Inc v Dukes*[38] the Supreme Court held that it was not possible to replace individualised adjudication with extrapolation and the use of statistical methods in that a 'class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims'.[39]

South African courts should follow a similar approach when deciding on the permissibility of class-wide proof of damages in mass personal injury cases because class-wide proof of damages would, in a South African context, conceivably also raise due-process concerns. For example, the individual class members could argue that they are entitled to provide the court with individualised proof of the damages that they have suffered. The defendants, in turn, could argue that they should be entitled to contest the damages claims of individual class members. A further concern would be the questionable accuracy of methods utilised to prove damages on a class-wide basis, such as extrapolation or statistical sampling.[40]

In 1998 the then South African Law Commission[41] ('SALC') considered the appropriateness of an aggregate assessment of damages in the context of mass personal injury class actions. The SALC stated that in some cases it may be appropriate for the court to determine the monetary claims as a common

each of the class members: 151 F 3d 297 (5th Cir 1998). See also Mulheron op cit note 23 at 266–7.

[34] See Greer op cit note 26 at 498; Klonoff op cit note 13 at 342. See also, for example, *McLaughlin v American Tobacco Co* 522 F 3d 215 (2d Cir 2008); *In re Fibreboard Corporation* 893 F 2d 706 (5th Cir 1990); *Cimino v Raymark Industries Inc* 151 F 3d 297 (5th Cir 1998).

[35] Greer op cit note 26 at 498–9. See also *McLaughlin v Am Tobacco Co* supra note 34; *Cimino v Raymark Industries Inc* supra note 34; *Arch v Am Tobacco Co* 175 FRD 469, 493 (ED Pa 1997); *Bell Atlantic Corp v AT&T Corp* 339 F 3d 294 304 (5th Cir 2003); *Piggly Wiggly Clarksville Inc v Interstate Brands Corp* 100 F App'x 296, 300 (5th Cir 2004); *Broussard v Meineke Disc Muffler Shops Inc* 155 F 3d 331, 342–3 (WD NC 1998); *Windham v Am Brands Inc* 565 F 2d 59, 68 (4th Cir 1977); *Plekowski v Ralston Purina Co* 68 FRD 443, 454–5 (MD Ga 1975); *Ralston v Volkswagen-Werk AG* 61 FRD 427, 432–3 (WD Mo 1973).

[36] *Bell Atlantic Corp v AT&T Corp* supra note 35.

[37] *Cimino v Raymark Industries Inc* supra note 34.

[38] Supra note 26.

[39] Klonoff op cit note 13 at 341–5.

[40] Ibid at 639.

[41] At the time it was known as the South African Law Commission. It became the South African Law Reform Commission in 2002.

issue and make an aggregate award that assesses the total liability of the defendant to the class.[42] According to the SALC, where the class members can be identified and the amount of their individual claims can be determined easily without their assistance, aggregate awards are appropriate. An example would be where individuals have been overcharged in respect of services rendered. In this kind of case, the court could order the defendant to produce its records to facilitate the identification of the class members and the evaluation of their claims. It would be unnecessary to require that class members prove their claims individually, which would be the case in a personal injury class action.[43] According to the SALC, in a mass personal injury class action, the quantum of damages is regarded as an individual issue and it is generally not acceptable to award damages to class members based on an aggregate assessment.[44] The view of the SALC is informed by, and accords with, the approaches of the above-mentioned foreign jurisdictions.

As is the case in the United States it is therefore likely that class-wide proof of damages through extrapolation, statistical sampling or otherwise would be problematic in a South African context. Accordingly, South African courts should in principle always require individual proof of damages in mass personal injury class actions. However, there may be devices that could be utilised to facilitate individual proof of damages in mass personal injury class actions. These devices, which will be considered in more detail below, could assist in achieving judicial economy without detracting from or infringing upon a party's right to a fair public hearing as enshrined in s 34 of the Constitution of the Republic of South Africa, 1996.

(b) Devices or mechanisms to determine damages

In Australia, Ontario and the United States, judicial burdens have been eased by the use of various judicially and legislatively directed devices that avoid the necessity of every class member giving his or her evidence individually. Mulheron[45] suggests that some departures from traditional methods of proof are justifiable within the bounds of necessity. The necessity that Mulheron refers to is the necessity of assuring effective and timely compensation to all deserving victims, which would otherwise be jeopardised by the limited resources of an ordinary judicial system. The aim of all such procedures is to resolve individual issues creatively and efficiently, while at the same time not derogating from or unlawfully infringing the substantive rights of the parties.

In view of the above, the drafters of the respective class-action regimes of Australia, Ontario and the United States have sought to assist courts in the

[42] See the discussion on aggregate assessment of monetary relief and distribution of aggregate awards of the Ontario Law Reform Commission *Report on Class Actions* (1982) 531–603.

[43] South African Law Commission Working Paper 57 (Project 88) *The Recognition of a Class Action in South African Law* (1998) para 5.36.

[44] Ibid.

[45] Mulheron op cit note 23 at 264.

management of class actions, by bestowing upon the courts wide powers to enable individual issues to be determined expeditiously and justly,[46] to prescribe measures by which to simplify proof or argument,[47] and to dispense with, or impose any procedural steps that the courts consider appropriate and consonant with justice to the parties.[48] The drafters of the Canadian provincial regimes have gone even further by permitting the use of standardised proof-of-claims forms, the auditing of claims on a sampling basis where the assessment and distribution of monetary relief is concerned,[49] as well as the possibility of statistical evidence.[50] These powers and the exercise of the court's inherent jurisdiction to control its procedures have resulted in an array of innovative procedures and time-saving measures being judicially developed and implemented.[51]

In Australia, Ontario and the United States, when deciding whether a class action should be certified, courts have been willing to consider alternative methods of proof that may be used later in the proceeding. Instances that have not survived judicial scrutiny have included: the application of the market share theory,[52] where there is uncertainty as to which of several possible defendants have been responsible for the plaintiffs' injuries; the use of epidemiological studies,[53] where there is doubt as to what caused the injuries;[54] and the use of random sampling and probability analysis for damages calculation, by determining individual trials for randomly selected plaintiffs in each category of plaintiffs and then extrapolating the average damages award to all class members in that category.[55]

There is a range of diverse mechanisms that have been employed across the

[46] Sections 12 and 25(1) of the Ontario Act; ss 33Q and 33R of the Federal Court of Australia Act of 1976.

[47] Section 23 of the Ontario Act; rule 23*(d)*(1) of the American Federal Rules of Civil Procedure; but, no equivalent in the Federal Court of Australia Act of 1976.

[48] Section 25(3) of the Ontario Act; s 33ZF(1) of the Federal Court of Australia Act of 1976.

[49] Section 24(6)*(a)*, *(c)* of the Ontario Act.

[50] Section 23 of the Ontario Act.

[51] Mulheron op cit note 23 at 264–5.

[52] Permitted in *Gariepy v Shell Oil Co* (2001) 51 OR (3d) 181 (SCJ) para 11. The theory applies in the case of an interchangeable substance, such as a generic drug, where the manufacturer of the substance used by a class member is unknown, but the product by different manufacturers is the same; each manufacturer's liability is limited to its market share.

[53] This evidence seeks to establish a causal relationship by comparing a class of persons exposed to the suspected agent with the general population.

[54] *Anderson v Wilson* (1998) 156 DLR (4th) 735 para 37 OR (3d) 235 (Div Ct) para 17, but overruled on appeal: (1999) 175 DLR (4th) 409, 44 OR (3d) 673 (CA) paras 28–30, leave to appeal refused: SCC 25 May 2000.

[55] *Cimino v Raymark Industries Inc* supra note 33. The federal appellate court later found the 'extrapolation' phase improper. It found that it violated the defendants' Seventh Amendment right to individualised evidence as to causation and damage issues for each of the class members: see supra note 34. See too Mulheron op cit note 23 at 266–7.

foreign jurisdictions to deal with the determination of the quantum of damages as an individual issue. An example of such an alternative can be found in *Gagne v Silcorp Ltd* ('*Gagne*').[56] In this case, the appellants were solicitors who had acted on behalf of the representative plaintiff in a class action against Silcorp Ltd. The action arose because the plaintiff and other persons had been dismissed from employment by Silcorp Ltd and had been offered less than the legislated minimum termination and severance pay.[57] A wrongful-dismissal class action was commenced on behalf of the former employees. After a motion for an injunction was adjourned, and after extensive negotiations, a settlement was reached and approved by the court. The settlement involved the certification of the action, a commitment to comply with the Employment Standards Act, a judgment against Silcorp Ltd, and a reference to enable the determination of the quantum of damages for each class member. This entailed a mini-hearing process involving a mediation stage and an arbitration stage. Class members were each permitted to be represented in the mini-hearing process by their own legal representatives, rather than by the appellant solicitors. The court held that 'the settlement provided for a creative and effective mini-hearing process that resulted in the complete resolution of all individual claims within little more than a year'.[58]

It is possible to delegate the assessment of damages to a registrar, a special master or a referee.[59] In *Webb v K-Mart Canada Ltd* ('*Webb*'),[60] the court ultimately ordered that members of the Bar, as court officers and referees, assess individual damages. The case arose out of the purchase of K-Mart by HBC and the merger of the K-Mart chain with the Zellers and Bay chains, resulting in the closing of approximately 31 stores across the country and the termination of employment of thousands of employees. The representative plaintiff argued that the employees were entitled to more severance pay and that their termination was a common issue 'sufficient to ground a class action for common law damages for wrongful dismissal'.[61] To quantify the individual claims, the plaintiff proposed a 'mini-hearing mediation and determination process, under court supervision'.[62] The defendant, in turn, argued that the case was not appropriate for a class action since the individual contracts of employment required individual consideration. Justice Brockenshire disagreed with the defendant. He held that even if issues of quantum and mitigation were personal to each member, there were sufficient common

[56] [1998] 1584 (ON CA).
[57] Employment Standards Act RSO 1990, c E.14.
[58] *Gagne v Silcorp Ltd* supra note 56 para 22.
[59] See also in Australia: *McMullin v ICI Australia Operations Pty Ltd* (No 6) (1998) 84 FCR 1, more fully discussed in *King v AG Australia Holdings Ltd* (2002) FCA 1560 para 6. In the United States: *In re Industrial Diamonds Antitrust Litigation* 167 FRD 374, 186 (SD NY 1996).
[60] (1999) 45 OR (3d) 425 (SCJ), 1999 OJ No 2268, 45 OR (3d) 389 (Ont Sup Ct).
[61] Ibid at 392.
[62] Ibid.

issues. Regarding the proposed process for determining the individual claims, he noted:

> '[T]eams of experienced mediators and referees, using expedited and simplified procedures in informal settings, should be able to quickly and fairly arrive at satisfactory awards that would exhibit some uniformity for claimants in similar circumstances across the country. ... In short, I conclude that using the Class Proceedings Act, and in particular a reference type of adjudication of individual claims is the preferable course ... and is likely to be simple and expeditious, less expensive than normal litigation, and not prejudicial to anyone.'[63]

Another device that has been used to deal with the evidence required from absent class members in order to resolve their individual claims is standardised claim forms[64] that are sworn to by the claimants and assessed by a panel of legal experts.[65] In *Butler v Kraft Foods Ltd* ('*Butler*'),[66] claimants' individual claims were assessed by three barristers. Two and a half thousand Australians had joined suit against Kraft, claiming injuries from eating contaminated peanut butter. Justice Raymond Northrop of the Federal Court of Australia oversaw an opt-in/opt-out settlement in which Kraft agreed to pay claimants between AUS$500 and AUS$50 000, depending on the seriousness of the illness suffered. Accordingly, claimants who had consumed the affected peanut butter and experienced symptoms or suffered demonstrable physical injury were able to recover in the resultant settlement, notwithstanding the individual nature of their reaction to consuming the product.[67]

Alternatively, class members can be required to depose to affidavits regarding individual issues. In *Maxwell v MLG Ventures Limited* ('*Maxwell*'),[68] the Ontario Court of Justice (General Division) certified a class action for misrepresentations contained in an offering circular, notwithstanding that some of the class members may have had actual knowledge of the matters alleged not to have been disclosed. The court ruled that any difficulties relating to the actual knowledge of undisclosed facts of each plaintiff could be addressed by requiring class members to depose to affidavits outlining the facts upon which they relied, and by permitting the defendant to cross-examine on these affidavits. In other words, the court held that determining such individual knowledge could easily be established by requiring each member of the class to file an affidavit swearing to their actual knowledge of the undisclosed facts.

In practice, most judges anticipate that parties to a mass tort class action will settle the individual damages claims without trial. This was the case in

[63] Ibid.

[64] *In re First Databank Antitrust Litigation,* 205 FRD 408 (DDC 2002); *Butler v Kraft Foods Ltd* (FCA) 19 Jun 1997.

[65] *Butler v Kraft Foods Ltd* ibid.

[66] Ibid.

[67] There does not appear to be a published judgment regarding the Federal Court's approval of the settlement.

[68] (1995) 54 ACWS (3d) 847 (Ont Ct (Gen Div)).

Jenkins v Raymark Industries,[69] where the defendants settled the claims of class members five weeks into the common-issues trial.[70] However, what if the parties do not settle? Conventional mechanisms for calculating damages may not be practicable in the context of a mass personal injury class action involving a numerous class. The traditional adversarial evidentiary hearing is a precise method to determine each class member's quantum of damages, but individual-damages trials for all, or even a substantial portion of, the class members may place an intolerable burden on the courts.[71] The availability and potential utility of judicial devices to assess damages should accordingly be a relevant matter that informs judicial discretion as to whether or not a court will determine a class action to be the appropriate method to adjudicate class members' claims.[72] In order to determine what approach South African courts should follow to determine damages in a mass personal injury class action, it may be worth briefly elaborating on the distinction between a single-accident mass personal injury class action and a dispersed-incident mass personal injury class action.

(c) Single-accident mass personal injury class action compared to dispersed-incident mass personal injury class action

As already mentioned, causation is usually an issue in mass personal injury class actions that arise from dispersed incidents. For example, in an asbestos-related dispersed-incident mass personal injury class action, the variations in individual factual issues that need to be considered may constitute significant issues when determining whether a sufficient causal link exists between the conduct and the injury. There may also be different levels and timing of exposure, and different types of injuries suffered, with the gravity of those injuries typically varying greatly among the individual claimants. Accordingly, when dealing with an application for certification of a dispersed-incident mass personal injury class action, the non-common issues requiring determination in order to dispose of class members' claims poses a risk that the class proceedings may break down into a long series of individual trials. In such a case any potential judicial efficiency would be lost. Class proceedings may therefore not be the appropriate mechanism to adjudicate class members' claims. This is why the Australian, Ontario and the United States jurisdictions are hesitant to utilise the class-action mechanism to adjudicate dispersed-incident mass personal injury class actions.[73]

[69] 782 F 2d 468, 473 (5th Cir 1986).

[70] D R Hensler *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000) 111.

[71] Klonoff op cit note 13 at 638–9.

[72] Mulheron op cit note 23 at 269.

[73] B Lipp 'Mass tort class actions under the Federal Court of Australia Act: Justice for all or justice denied' (2002) 28 *Monash University LR* 361 at 365; Klonoff op cit note 13 at 336–7; L S Mullenix 'Practical wisdom and third-generation mass tort litigation' (1997–1998) 31 *Loy L A L Rev* 551 at 554–5; S S Clark & C Harris 'The past, present and future of product liability and other mass tort class actions in Austra-

Mojapelo DJP recently certified the first South African mass personal injury class action. In *Nkala v Harmony Gold Mining Company Limited* ('*Nkala*'),[74] Bongani Nkala and 55 other individuals sought certification of a dispersed-incident mass personal injury class action on behalf of mineworkers for damages arising from silicosis contracted by mineworkers through their employment on the mines.[75] In certifying the class action, Mojapelo DJP held that although, for instance, class members' damages would need to be individually determined, 'there are sufficient common issues of fact and law that allow for, at least at the first stage, a single proceeding to be held where evidence and argument common to all the mines is entertained'.[76] Mojapelo DJP essentially found that the second stage of the class action, which would probably entail determining causation and damages, would have 'to be left to the trial court as that court would not be hamstrung by the same information deficit that besets this court'.[77] Mojapelo DJP accordingly confirmed that the class action would be bifurcated.[78]

Although no predominance of the common issues over the individual issues is required in South Africa, it is nevertheless worth questioning whether a class action would be appropriate to adjudicate class members' claims in a dispersed-incident mass personal injury class action. In *Nkala*, Mojapelo DJP acknowledged that

> '[i]t is obvious that not all the elements of the delictual action will be finalised once the common issues have been determined. We know for instance that as each mineworker's damages are unique to that mineworker, these will have to be individually determined. ... The mineworkers are acutely aware of this reality.'[79]

The certification of the class action in *Nkala* could therefore give rise to serious manageability concerns. However, apart from referring to the trial court's powers to manage class actions, Mojapelo DJP did not really grapple with these potential difficulties. Even so, this does not detract from the correctness of the court's decision to certify the class action. The size of the class ranged from 17 000 to approximately 500 000 members. Furthermore,

> '[t]he scope and magnitude of the proposed silicosis and TB claims is unprecedented in South Africa. The action, if it proceeds, will entail and traverse novel and complex issues of fact and law.'[80]
>
> ...

lia' (2009) 32 *UNSW LJ* 1022 at 1031. See also *Ortiz v Fibreboard Corp* 527 US 815 (1999); *Bright v Femcare Ltd* (2002) 195 ALR 574, 603; 1987 WL 9273 25 (ED Pa) (unpublished opinion); *Brown v Southeastern Pennsylvania Transportation Authority* 519 F Supp 864 (ED Pa 1981).

[74] [2016] ZAGPJHC 97.

[75] Ibid paras 2–3.

[76] Ibid paras 79 and 84.

[77] Ibid para 86.

[78] Ibid paras 77–8.

[79] Ibid para 84.

[80] Ibid para 7.

> '[The class members are] poor, lack the sophistication necessary to litigate individually, have no access to legal representatives and are continually battling the effects of two extremely debilitating diseases.'[81]
>
> ...
>
> 'It was not disputed that the majority of mineworkers have little to no access to the South African justice system as they are all impoverished or indigent and are living in the rural areas of South Africa, Mozambique, Malawi, Lesotho and Swaziland, and are in poor health.'[82]

These individuals are unlikely to litigate independently in the absence of the certification of the class action.[83] Accordingly, it would appear that a class action is the appropriate method to adjudicate class members' claims. This is the case even though manageability concerns may arise during the second phase of the bifurcated proceedings. These concerns are overshadowed by the need for class members to be provided with access to justice. Such an approach, it is suggested, would be in the interests of justice.

However, circumstances may arise where manageability concerns, along with other factors that form part of the appropriateness-assessment, may render class proceedings inappropriate. Consider, for example, the case where a chocolatier in an upmarket neighbourhood has for a period of six months been selling a chocolate product that contains small traces of extremely poisonous inorganic mercury. The clients consume the chocolate in different quantities and over different periods. They also experience a variety of symptoms such as nausea, vomiting, extreme abdominal pain and kidney failure, which, in certain instances, results in death. However, some of the clients have pre-existing medical conditions, including kidney-related medical diseases.

In this example of personal injuries resulting from a dispersed incident, it is unlikely that the matter would be appropriate for class action treatment because the manageability concerns that arise from the extent of the individual issues that would require determination, including causation and damages, militate against the certification of a class action. Further, the putative class members do not comprise the poorest portion of our society and they are, for the most part, likely to have access to the resources necessary to pursue their claims individually. Joinder, as an alternative to a class action, may also be appropriate in the circumstances.

It is therefore not necessarily the case that our courts should certify a dispersed-incident mass personal injury class action, notwithstanding the existence of individual issues that require determination. Where there is no factor that outweighs the manageability concerns that may arise, such as the need to provide the putative class members with access to justice, courts should caution against certifying class proceedings. In light of the extent of the individual issues that may require determination, it is therefore more

[81] Ibid para 100.
[82] Ibid para 103.
[83] Ibid paras 106–7.

difficult (although not impossible) to succeed with a certification application in the context of a dispersed incident resulting in personal injuries, compared to a single-accident mass personal injury class action.

In view of what has been set out above, the proposal to determine damages in mass personal injury class actions below would therefore not resolve all the individual issues generally involved in dispersed-incident mass personal injury class actions. For example, it is not aimed at addressing problems of causality that typically arise in dispersed-incident mass personal injury class actions. The proposal will therefore be aimed at determining damages in single-accident mass personal injury class actions. However, it may be that the proposal could also be utilised by a court in the context of dispersed incident mass personal injury class actions.

(d) Proposal to determine damages in mass personal injury class actions

To enable South African courts to experiment with devices aimed at assessing the quantum of damages without the need for individual trials, they must enjoy a broad discretion in managing class actions to facilitate the effective adjudication of these issues. The '[t]rial court must be accorded the flexibility "to adopt innovative procedures, which will be fair to the litigants and expedient in serving the judicial process" '.[84] Under the United States federal and respective state rules 'the trial judge maintains a great degree of control over the conduct of a class action trial'.[85] Further, s 25 of the Ontario Act confers a wide discretion upon the trial judge to determine how individual issues are to be dealt with, including the power to dispense with the usual procedural steps. It is for the trial judge to determine how issues not determined at the common-issues trial will be decided. It is proposed that our courts' powers in respect of damages assessment in class actions should be similarly wide.

Such an approach has been endorsed on several grounds in the selected foreign jurisdictions. For one thing, class proceedings are not a traditional form of litigation, and it is inappropriate to impose upon it structures derived from earlier times and traditional procedures in litigation between individual parties. Moreover, if one accepts that class actions are proper procedural devices where individual suits are not economically feasible given the insignificant amounts involved, it follows by implication that individualised proof of damages of the type contemplated in traditional litigation may be neither practical nor economically feasible.[86]

Some of the methods utilised in the foreign jurisdictions to determine individual damages include small group trials and alternative-dispute-resolution processes.[87] Courts have also made use of innovative summary

[84] *Linder v Thrifty Oil Co* 2000 23 Cal 4th at 429, 440.

[85] *Gold Strike Stamp Co v Christensen* (10th Cir 1970) 436 F 2d 791, 792n2.

[86] Mulheron op cit note 23 at 411.

[87] For example, in *Jenkins v Raymark Indus*tries supra note 69, Parker J proposed to hold a single trial on the common issues of liability and punitive damages followed by

judgment procedures and lighter burdens of proof at the individualised damages trials to make it easier to quantify damages without abandoning the individual trial requirement.[88] However, these methods have not necessarily only been applied in the context of single-accident mass personal injury class actions. For the most part, they have also been used in the context of class-action settlements where both parties have agreed to use the specific method to determine damages. For example, the cases of *Gagne*,[89] *Webb*[90] and *Maxwell*[91] were not personal injury class actions and it is thus questionable whether the methods used therein to determine the quantum of damages could be utilised to determine the quantum of damages in the context of a South African single-accident mass personal injury class action. It would have been easier to propose the incorporation into South African law of a method that has been successfully utilised on a consistent basis in any of the foreign jurisdictions discussed herein. However, such a method does not appear to exist; at least not one that could simply be adopted locally.

It appears that the preference in mass personal injury class actions in Australia, Ontario and the United States is to conduct individual hearings to determine the quantum of damages in respect of each class member. As such, it may be worthwhile to consider developing a sui generis proposal that draws on the experiences of the foreign jurisdictions that can be utilised in the context of single-accident mass personal injury class actions in South Africa. This approach is detailed below.

(i) *Introduction*

There are generally two variables in single-accident mass personal injury class actions — the number of class members and the damage which each individual member has suffered. In most cases, either one or both of these variables will be present.[92] If an approach is followed in terms of which class members are required to opt into the second phase of the class action (i e where individual class members' quantum of damages is established), the number-of-class-members variable is removed. Such an approach is similar to *McMullin v ICI Australia Operations Pty Ltd*[93] and *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)*,[94] where orders were made precluding group members from maintaining claims for damages if they failed to take steps to identify themselves by a particular date. Once orders such as these are implemented, the precise number of group members who maintain a claim

multiple individual trials on damages in which juries would hear the cases of seven to ten plaintiffs at a time and determine the damages for each.

[88] Klonoff op cit note 13 at 639.

[89] *Gagne v Silcorp Ltd* supra note 56.

[90] *Webb v K-Mart Canada Ltd* supra note 60.

[91] *Maxwell v MLG Ventures Limited* supra note 68.

[92] Mulheron op cit note 23 at 412–3.

[93] (1998) 84 FCR 1.

[94] [2003] VSC 212.

in the proceeding may be clarified.[95] The Gauteng, Johannesburg division of the High Court of South Africa followed a similar approach in *Nkala*.[96] Mojapelo DJP referred to the bifurcated proceedings that would follow upon his certification of the class action and held as follows:

> '[T]he second stage of this bifurcated process involves the invocation of the opt-in method of identifying the total number of mineworkers who form part of the class action. This means that at the conclusion of the opt-in process the names and details of all the mineworkers who claim rights of membership to the classes will be known. There will be no need for them to issue summonses. The mining companies are already before court. All they will then need to know is who exactly the plaintiffs are.'[97]

(ii) *Exchange of affidavits*

When a court has to determine damages in single-accident mass personal injury class actions, it is proposed that it could, in the absence of agreement between the parties, approve a protocol in terms of which the requisite standard of proof would be met by the submission of an affidavit deposed to by each class member who has opted into the second phase of the class action. The affidavit should contain the facta probantia necessary to prove the class member's entitlement to the quantum of damages claimed. This would entail that the affidavit should have attached to it proof of the class member's medical condition in the form of an individualised report from a medical practitioner. The medical report would furnish information about any injuries suffered by the class member because of the accident that gave rise to the mass personal injury class action.

The affidavit should also have attached to it all further documentary evidence required to prove the quantum of damages claimed, such as an actuarial report where a loss-of-earnings forms part of the claim. It may also be, for example, that the hospital records of the trauma unit where the class member was admitted would need to be attached. The class member may also need to attach other medical reports, such as the expert report of a clinical or industrial psychologist whom the class member may have visited. This approach resembles the approach followed in *Butler*[98] and *Maxwell*[99] regarding the determination of the quantum of damages. In *Butler*,[100] as already mentioned, standardised claim forms were used. These claim forms were sworn to and assessed by a panel of legal persons. In *Maxwell*, as previously mentioned, individual class members deposed to affidavits regarding the individual issues.

It is proposed that the medical report should resemble the medical report found in the context of South African Road Accident Fund claims, entitled

[95] D Grave, K Adams & J Betts *Class Actions in Australia* (2012) 496.
[96] *Nkala v Harmony Gold Mining Company Limited* supra note 74.
[97] Ibid para 88.
[98] *Butler v Kraft Foods Ltd* supra note 64.
[99] *Maxwell v MLG Ventures Limited* supra note 68.
[100] *Butler v Kraft Foods Ltd* supra note 64.

'Claim for Compensation and Medical Report'.[101] The latter report is comprehensive and contains sufficient detail for the purpose of this proposal and to assist the court or its reference to assess the quantum of damages of the individual class members. Such an approach is similar to the Australian Federal Court decision in *Lopez v Star World Enterprises Pty Ltd*,[102] where the settlement scheme made detailed provision for the manner in which assessment of the claims made by group members would occur. Each member of the group had to submit a written claim verified by medical reports or medical certificates. The quantum of damages to which each group member was entitled then had to be assessed accordingly and the fund distributed pari passu.

(iii) *Defendant's affidavit*

A mere assessment of damages with reference to the affidavit and accompanying evidentiary material filed by each class member, but without affording the defendant the opportunity to dispute the quantum, could infringe the defendant's right to a fair public hearing as entrenched in s 34 of the Constitution and the audi alteram partem principle. The defendant should be given the opportunity to respond to the individual class members' claims through filing an answering affidavit which addresses the issues raised in each class member's founding affidavit. Attached to the answering affidavit could be annexures similar to those that are attached to the class member's founding affidavit including, for example, a medico-legal report and an actuarial report, where necessary. The defendant should therefore be able to call upon the class members concerned, through the class representative, to avail themselves for medical evaluations by the defendant's medical experts.

Consider, for example, a single-accident mass personal injury class action that arose from a trail derailment[103] where approximately 300 individuals sustained injuries and some of them died because of the accident. If the defendant has been found to be liable for the individual class members' damages sustained because of the accident, the second phase of the trial would entail determining the quantum of those damages claims. In this regard, it is unlikely that the defendant would dispute the claims of those individual class members whose claims relate to minor, superficial injuries incurred as a result of the accident if those individuals choose to opt into the second phase of the proceeding. This is because, first, the class members' claims, as mentioned, are set out in affidavits, deposed to under oath, supported by a medical report and other relevant documentary evidence. Secondly, it is unlikely that the defendant would incur the costs associated with disputing an individual's claim in such circumstances, especially where

[101] Sections 17(1) and 24(1)*(a)* of Act 56 of 1996 and reg 3(1) of the Regulations under the Road Accident Fund Act 56 of 1996.

[102] [1999] FCA 104.

[103] The example used by Wallis JA in *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* supra note 1 paras 44–5.

the probable difference in the outcome would be negligible, as it would inter alia entail subjecting the claimant to a further medical examination by the defendant's medical expert, at the defendant's expense. Rather, it is likely that some of the damages claims would be settled or agreed to by the defendant upon receipt of the affidavits of the individual class members. The defendant's answering affidavit would accordingly indicate whether it agrees with the quantum claimed by each individual class member and, in relation to those class members whose amounts claimed are disputed, the defendant would, for example, require further medical examinations by its medical expert(s).

It is suggested that a further opportunity to settle individual class members' claims presents itself through the filing of replying affidavits by the class members in circumstances where the defendant disputes their claims. The defendant may, upon receipt of the replying affidavit and in light of its contents, agree to the quantum of damages claimed by the individual class member concerned. It is accordingly a further opportunity to limit the number of claims that require adjudication by the court because of the settlement between the parties.

(iv) *Panel*

Once the above-mentioned exchange of affidavits has taken place, the court can request that a court-appointed panel of experienced and suitably qualified medical and actuarial experts conduct evaluations on behalf of the court to consider the damages claims filed by the individual class members. The court could refer any aspect of a class member's claim, or all of the class members' claims in their entirety, to the court-appointed panel for their consideration and evaluation. It does not happen automatically. For example, the panel may be required to report on the nature and extent of the injuries incurred or the estimated loss of earnings in the event of particularly conflicting medical or actuarial reports. Specifically, the medical experts would be responsible inter alia for conducting the relevant medical evaluations and/or referring the class member(s) for necessary additional examinations[104] to any specialist, compiling medico-legal reports and where necessary, providing the court with expert evidence.[105] The actuarial experts would be responsible inter alia for the calculation of past loss of earnings up to the present time, and the calculation of future loss of earnings.

The court-appointed panel would need to draft a report regarding its evaluation that is filed at court, along with the evidentiary material of the individual class members and the defendant. Ultimately, when the court receives the evidentiary material, it would need to weigh it up to make a finding 'on the papers'. It is suggested that a finding on the papers is necessary in order to avoid individual damages trials. This approach is justifiable if

[104] Such as CT scans, x-rays or blood tests.

[105] Should the court-appointed panel deem it necessary to medically consult the class member concerned, it should be able to do so.

regard is had to the approaches of the above-mentioned foreign jurisdictions. For example, it may be worth recalling that the Fifth Circuit Court in *Jenkins* held that 'necessity moves us to change and invent'.[106] Similarly, according to Mulheron, an approach has to be considered that would avoid the necessity of every class member giving individual evidence.[107] She further favours some departures from traditional methods of proof within the bounds of necessity (i e the necessity of assuring effective and timely compensation to all deserving victims), which would otherwise be jeopardised by the limited resources of an ordinary judicial system. The aim of all these procedures is to resolve individual issues creatively and efficiently, while at the same time not to derogate from or unlawfully infringe upon the substantive rights of the parties.[108]

However, it is proposed that if a South African court deems it necessary to receive oral evidence on a particular issue, it may request that the witness concerned attends at court for this purpose. The report provided by the panel of court-appointed experts may accordingly be supplemented where necessary by testimony in open court. For example, it may be that the court requires the actuarial experts on the court-appointed panel to deliver viva voce evidence regarding the application and explanation of mathematical or actuarial calculations in respect of future loss.[109] The judge should be responsible for questioning the witness so that the court can acquire the information that it deems necessary to make a finding as to the quantum of damages that should be awarded to each individual class member.

The implementation of the above-mentioned proposal would essentially entail that South African judges become more proactive in identifying issues and gathering evidence, and take full control of the proceedings and the participation of the parties. Judges would need to assume a wide-ranging role from the pre- to post-hearing stage; the judge would have to take charge of the case and of case management, and issue directions as to which particular matters and evidence require examination; the judge may also commission expert evidence.[110] It is suggested that this is the role that the judge should assume in the quantification of damages in single-accident mass personal injury class actions.[111]

[106] *Jenkins* supra note 69 at 473.

[107] Mulheron op cit note 23 at 264.

[108] Ibid.

[109] Steynberg op cit note 22 at 16.

[110] R Thomas 'From "Adversarial v inquisitorial" to "Active, enabling, and investigative": Developments in UK administrative tribunals' available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144457*, accessed on 12 December 2015.

[111] According to J A Jolowicz 'Adversarial and inquisitorial models of civil procedure' (2003) 52 *ICLQ* 281 at 281, simply characterising common-law countries' systems of civil procedure as adversarial and the system of continental countries as inquisitorial is somewhat flawed: '[T]he most that can be said is that some systems are more adversarial — or more inquisitorial — than others. There is a scale on which all procedural systems can be placed, at the one end of which there is the theoretically pure adversary system and at the other the theoretically pure inquisitorial.' It is sug-

The rationale for adopting a more inquisitorial approach in the context of the above proposal is that if the court is to take decisions that best implement policy goals,[112] then it should rely upon the best available information, rather than just the evidence presented by the parties. This requires an active style of adjudication.[113] According to Harms,

> '[a]n efficient trial requires that judicial officers cease to be passive onlookers and instead become actively involved in the management of the trial. To be passive is easy and not stressful; one does not have to concentrate; few decisions have to be made; one can place any blame on the lawyers; and one is safe from receiving reprimands from courts of appeal.'[114]

In essence, the manageability concerns require a more inquisitorial approach to be adopted when determining the quantum of damages in single-accident mass personal injury class actions. In so far as determining the quantum of damages in single-accident mass personal injury class actions is concerned, a typical inquisitorial proceeding should be followed where the trial is actively managed by a presiding judge, who determines the order in which evidence is taken and who evaluates the content of the gathered evidence. The court determines the credibility and relative weight of each piece of evidence without being constrained by strict rules in that respect.[115]

De Vos states that 'as the right to an oral hearing is not a hard and fast rule, it could be further qualified in order to expedite the proceedings and, thus, promote effective access to justice'.[116] He also states that it is 'in the interest of effective access to justice to restrict the principle of party control by providing for a certain degree of judicial control ... . [P]erhaps the exigencies of the present day South African society demand that the principle of case management be fully accepted as a necessary feature of civil litigation.'[117] It is accordingly suggested that, taking account of the sui generis nature of class proceedings and the approaches to determining the quantum of damages in single-accident mass personal injury class actions, the above-proposed approach should be aligned with the principle of effective access to justice. This philosophy, which has taken firm root in South Africa during the last decade, promotes expeditious and cost-effective proceedings as well as the early settlement of disputes.[118] Such a process would conceivably be less time-consuming than individual damages trials for each class member. It would also not substantially derogate from the litigants' right to a fair public

gested that the role of the judge in the context of the proposal is more inquisitorial than adversarial.

[112] Access to justice, judicial economy and behaviour modification.

[113] Thomas op cit note 110.

[114] L C T Harms 'Demystification of the inquisitorial system' (2011) 14(5) *PER/PELJ* 1 at 6.

[115] F Parisi *International Review of Law and Economics* (2002) at 1.

[116] W de Vos 'Civil procedural law and the Constitution of 1996: An appraisal of procedural guarantees in civil proceedings' 1997 *TSAR* 444 at 459.

[117] Ibid at 458–9.

[118] Ibid at 457.

hearing and audi alteram partem. It is moreover arguable that any limitation of these rights would be justifiable, especially in light of the class-action objectives. Such an approach would make it easier to quantify damages without abandoning the requirement that claims must be proved individually.

The identification and selection of neutral experts by the court is a critical step in ensuring the fairness of the proceeding.[119] It is envisaged that the appointment of the panel takes place after the first phase of the class-action litigation on the issue of liability, but before commencement of the second phase of the trial regarding the quantification of damages. This would avoid unnecessarily appointing experts to assist in the quantification exercise where there is no finding on liability, or where the matter is settled during the first phase of the litigation or shortly after a finding that the defendant is indeed liable. It is also proposed that the parties are not involved in the recruitment and selection of the court-appointed panel. The judge would need to assume responsibility for identifying suitable candidates from a pre-approved list of experts, rather than, for example, simply relying on informal recommendations from the judge's friends and associates. Such unsystematic approaches to identifying needs and recruiting experts would raise doubts about the extent to which the procedure provides the timely and neutral assistance warranted by the central importance of the experts' task.[120]

In compiling a list of pre-approved medical and actuarial experts, it may be worth considering the adoption of a similar approach to the one provided for in the context of South African court-annexed mediation. A list of persons accredited as mediators in terms of rule 86(2) of the Court-Annexed Mediation Rules was recently published. Rule 86(1) provides that the 'qualification, standards and levels of mediators who will conduct mediation under these rules, will be determined by the Minister', and rule 86(2) provides that a 'schedule of accredited mediators, from which mediators for the purposes of this article must be selected, will be published by the Minister'. This would require the adoption of a court rule or legislative provision in this regard. Ultimately, such a list should convey the full names of the experts, their designations and areas of speciality and the region where they practise.

Moreover, it is recommended that the proposed legislative provision authorising the court to refer the claims for further assessment by a court-appointed panel should be drafted in a similar fashion to s 38 of the Superior Courts Act.[121] Section 38 allows a division of the High Court of South Africa, with the consent of the parties, to order a referee inquiry of any matter requiring extensive examination of documents, accounts, or scientific, technical or local investigations that cannot be conducted by the court.

[119] J S Cecil & T E Willging 'Court-appointed experts: Defining the role of experts appointed under Federal Rule of Evidence 706' (1993) *Federal Judicial Center* 1 at 31.
[120] Ibid at 34.
[121] Act 10 of 2013.

The court may adopt the referee's report either wholly, or in part, either with or without modifications, and may even send the report back to the referee for further enquiry. Any person summoned to attend a referee inquiry would be liable to a fine or imprisonment of up to three months if he or she fails to comply. The primary difference between the proposed legislation and s 38 of the Superior Courts Act would be that, in the context of the damages assessment of a single-accident mass personal injury class action, the consent of the parties would not be required to refer the matter for investigation by the court-appointed panel.

(v) *The role of the judge*

Once again, the role of the judge in this process cannot be overstated. Judges must become active managers of the quantification process. As mentioned earlier, class-action law in Ontario and the United States generally mandates more active judicial management in class actions.[122] It is envisaged that the judge would, at the commencement of the second phase of the trial, explain to the parties the process that would be followed to determine the quantum of damages. Specifically, the judge would explain to them their respective roles throughout the process and, in consultation with the parties, decide on the timelines that would have to be met throughout the process. It would also be important for the judge to provide instructions to the court-appointed panel. This could take place via a conference call involving the judge, the expert, and the parties, informal conferences in chambers, and written orders, sometimes with enclosed documents and exhibits. Judges' instructions could be used to establish a record of the terms and conditions of the appointment, including the terms of payment; the legal and technical issues in the case that the expert is to address; the clarification of the role of the expert in relation to the role of the judge; and the establishment of procedures for assembling information, communicating with the parties and reporting findings and opinions.[123]

(vi) *Compensation of experts*

Regarding the payment of court-appointed experts, it could be argued that the court-appointed panel should be compensated in a similar fashion as is provided for in s 38(6) of the Superior Courts Act, which provides as follows:

> 'Any referee is entitled to such remuneration as may be prescribed by the rules or, if no such remuneration has been so prescribed, as the court may determine and to any reasonable expenditure incurred by him or her for the purposes of the enquiry, and any such remuneration and expenditure must be taxed by the taxing master of the court and shall be costs in the cause.'

However, the parties may resist compensating experts they did not retain and who offer testimony that is damaging to their interests. They would also

[122] C Piché 'The cultural analysis of class action law' (2009) 2 *J Civ L Stud* 101 at 128–30.

[123] Cecil & Willging op cit note 119 at 35–6.

already have incurred expenses regarding the medical and actuarial examinations undertaken by their own experts — the parties would probably be reluctant to contribute further to such assessments conducted in respect of the individual damages claims. In addition, if the parties fail to pay, the judge must either enforce payment by means of a formal order and a hearing, thereby disrupting the litigation and possibly increasing the level of acrimony between the parties, or postpone payment, thereby leaving the expert uncompensated for an indefinite period.[124]

It stands to reason, therefore, that the experts who constitute the court-appointed panel should be paid a fee similar to the prescribed fee payable in the context of rule 38 of the Uniform Rules of Court, which permits a party to compel the presence of a witness to testify at a trial by means of a subpoena issued by the registrar and served on the witness by the sheriff.[125] In this regard, s 37(1) and (2) of the Superior Courts Act provides that the witness fee is determined against a fixed tariff, but that certain considerations, such as distance travelled to appear at court or the profession or occupation of the witness, may result in payment of a higher allowance to the witness above the fixed tariff.[126] It is therefore recommended that the proposed legislation should also make provision for payment of a reasonable fee according to a tariff in circumstances where the court exercises its discretion to use a court-appointed panel of experts to determine the quantum of damages in the context of a single-accident mass personal injury class action.

To determine whether a fee is reasonable, it is suggested that one could consider factors similar to those listed in clause 9.2[127] of the Colorado Interprofessional Code.[128] Clause 9.2 provides that 'an expert is entitled to fair and reasonable compensation for providing expert testimony'. It states that, to determine what constitutes a fair and reasonable expert witness fee, some or all of a range of factors should be considered, including:

> '(1) The amount of time spent, including review, preparation, drafting reports, travel, or testimony; (2) The degree of knowledge, learning, or skill required; (3) The amount of effort expended; (4) The uniqueness of the expert's qualifications ... .'

[124] Ibid at 57.

[125] The rule deals with ordinary subpoenas and subpoenas duces tecum, affidavit evidence in trial proceedings and evidence on commission. See also *Laskarides v German Tyre Centre (Pty) Ltd (in liquidation)* 2010 (1) SA 390 (W).

[126] The commencement date of s 37 is yet to be proclaimed.

[127] Expert Compensation and Expert Witness Fees.

[128] The Interprofessional Committee 'Interprofessional Code' 3 ed (2010), available at *https://www.cobar.org/in dex.cfm/ID/226/CITP/Interprofessional-Code*, accessed on 14 June 2017. The Code comprehensively regulates the interaction between the medical and legal professions and in the absence of similar suitable guidelines locally, it serves as a fitting example of the type of factors that could be considered to determine whether an expert's fee is reasonable.

IV CONCLUSION

Ultimately, the approach outlined above to determining the quantum of damages in a single-accident mass personal injury class action, or variations thereof, should be made possible through the adoption of legislation regulating class actions. This proposal echoes the view of the SALC in so far as it is stated that '[a]lthough South Africa has no similar case history, it is suggested that the "newness" of the whole concept of a class action procedure requires that a matter such as this should be put beyond doubt by the inclusion of an express provision'.[129]

It is recommended that the proposed legislation should adopt, as a point of departure, the recommended provision of the SALC that '[t]he court shall not be precluded from certifying an action as a class action merely by reason of the fact that there are issues pertaining to the claims of all or some of the members of the class which will require individual determination, or that different class members seek different relief'.[130] It may further be worth adopting a legislative provision that is similar to s 33Q of the Australian Federal Court Act, which provides that if it appears to the Federal Court that determination of the issue(s) common to all group members will not finally determine the claims of all group members, the court may give directions in relation to the determination of the remaining issues. This may include directions establishing a sub-group of group members and the appointment of a person to be the sub-group representative party on behalf of the sub-group members. Such a provision would expressly enable South African courts to bifurcate the class action and to establish sub-classes for the purpose of assessing the quantum of damages. It also expressly empowers the court to determine individual issues and to give directions as to the procedure to be followed to determine such issues.

At the same time, legislative provisions that provide for the resolution of the individual issues in a more detailed manner should also be adopted.[131] Specifically, our legislature should draw on the experiences of Australia, Ontario and the United States, particularly the legislative provisions that they have adopted to regulate the determination of the quantum of damages in mass personal injury class actions. Borrowing from their approaches, the legislation should bestow upon the courts wide powers to enable individual issues to be determined expeditiously and justly,[132] to prescribe measures to simplify proof or argument,[133] and to dispense with or impose any procedural steps that the courts consider appropriate and consonant with justice to

[129] South African Law Commission Working Paper 57 (Project 88) op cit note 43 para 5.33.

[130] Ibid at 92.

[131] Ibid para 5.35. See also the detailed discussion in Ontario Law Reform Commission op cit note 42 at 605–24.

[132] Sections 12 and 25(1) of the Ontario Act; ss 33Q and 33R of the Federal Court of Australia Act of 1976.

[133] Section 23 of the Ontario Act; rule 23*(d)*(1) of the Federal Rules; but, no equivalent in the Federal Court of Australia Act of 1976.

the parties.[134] We should draw on their experiences because, as Mulheron contends, it may result in our courts developing and implementing an array of innovative procedures and time-saving measures.[135] Regarding the Ontario regime, the SALC stated that 'the conclusions of the Ontario Commission with regard to common and individual issues are sound and that a similar approach should be adopted for the purpose of drafting a class action statute for South Africa'.[136] Accordingly, the proposed legislation should provide that the court may conduct further hearings, appoint someone to conduct a reference and direct that the issues be determined in any other manner.[137]

In order to relieve our overly burdened courts, the legislature, acting in a clear and precise manner, must provide for devices geared towards the determination of damages in single-accident mass personal injury class actions. As mentioned above, it may be that such devices could also be utilised in the context of dispersed-incident mass personal injury class actions. This would serve to promote judicial economy and be aimed at ensuring that certification of a class action is not denied solely on the basis that the class action is unmanageable. It requires trial innovation, innovative means of adjudication and workable solutions to dispose of claims economically and fairly.[138]

The above proposal to determine damages in single-accident mass personal injury class actions is persuasive in terms of necessity, public policy and judicial economy. It is aimed at phasing the trial to encourage settlement, thereby reducing the use of a court's time and resources.[139] It takes account of the fact that the class action is aimed at conserving 'the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion'.[140] For example, where the individual class members are geographically dispersed across South Africa, adopting the above proposal would mean that, as individual hearings regarding the quantum of damages claimed are not required, it would not be necessary for each individual claimant to take the time and to incur the costs associated with travelling to court for the purpose of giving viva voce evidence. From the court's perspective, adopting the proposal would mean that it would not need to allocate resources to enable adjudication in an individual class member's damages hearing. The defendant would also

[134] Section 25(3) of the Ontario Act; s 33ZF(1) of the Federal Court of Australia Act of 1976.

[135] Mulheron op cit note 23 at 264–5.

[136] South African Law Commission Working Paper 57 (Project 88) op cit note 43 para 5.32.

[137] See s 25(1) of the Ontario Act.

[138] P Zimand 'National asbestos litigation: Procedural problems must be solved' (1991) 69 *Washington University LR* 899 at 899.

[139] Ibid at 909.

[140] *General Tel Co v Falcon* 456 US 147 155 (1982), quoting *Califano v Yamasaki* 442 US 682 701 (1979).

benefit from implementation of the proposal, in so far as the costs to be incurred in preparing for individual damages trials of numerous class members would be avoided. Thus, although class members would be required to submit individual proof of injury, the procedure is designed to give effect to the overarching purpose of the class-action mechanism.