

**CLASS ACTIONS IN CONTEXT:
DISTINGUISHING REGULATION, TORT, AND PROCEDURE**

The description of the use of class actions in mass torts litigation as ‘*an evolutionary form of “privatised regulation”*’ is not normatively inert. It has the potential to shape the way we understand, justify, and evaluate mass torts class actions, with practical implications for their development. Unfortunately, the description is inaccurate and distorting. Class actions cannot be understood *as a form of* regulation. Neither substantive tort law nor its enforcement can be understood in terms of regulation without serious distortion. Use of the class action procedure does not change this. Rather, class actions fall to be evaluated against procedural norms of the civil justice system. In this regard, the use of some sort of class action procedure should be encouraged. However, the successful design and management of class actions raises different questions, to which regulatory considerations are neither here nor there – and rightly so.

1. INTRODUCTION

This essay could best be described as an exercise in clearing the field to cultivate the correct approach to thinking about the use of class actions in mass torts litigation. It is a critical response to the description of the class action as a form of ‘privatised regulation’, which has gained traction to varying degrees in Australia and elsewhere. Invoked to justify and evaluate the growth of this kind of private litigation, the description carries significant theoretical and practical implications. Unfortunately, as we will argue, the description is inaccurate and distorts the true relationship between regulation, tort law, and procedural law.

To recognise the problem with the description, we must acknowledge the distinction between saying that mass torts class actions (i) *may complement* regulation, and (ii) *is itself a form of* regulation. The difference lies in whether we see the paradigm of regulation as supplying ‘external’ or ‘internal’ evaluative criteria, respectively.¹

- (i) Although the ‘external’ criteria approach may reasonably inquire how best to calibrate the interaction between class actions and regulation, it recognises that tort law, procedural law, and regulation are distinct modalities of law with unique concerns. Accordingly, each is allowed to interact with the others primarily on its own doctrinal terms.
- (ii) By contrast, the ‘internal’ criteria approach seeks to understand the use of class actions *in terms of* regulation. Thus, mass torts class actions are subsumed within, and evaluated against, the paradigm of regulation. Features of tort law and/or the class action that cannot be explained within the regulatory paradigm are treated as anomalous and ripe for reform.

As we will demonstrate, the ‘external’ criteria approach must be correct. Tort law cannot be described *as a form of* regulation because the two are distinct modalities of law. The class action procedure does not change this. It cannot transform mass torts litigation into an instrument of regulation. Just as the enforcement of tort law does not necessarily advance and may impede regulatory objectives, the relationship between the use of class actions and regulation is contingent and incidental. Accordingly, despite anecdotal evidence indicating that class actions frequently complement regulation, they cannot be understood ‘*as an evolutionary form of “privatised regulation”*’ without distortion. Such distortion has practical consequences. Seeing mass torts class actions as a form of regulation gives rise to the tendency to give pride

¹ For general discussion of this distinction, see Robert Stevens, *Torts and Rights* (OUP 2007), 326; Christian Witting, ‘Tort Law as Regulation in the Financial Industry’ in Sandra Booyesen (ed) *Financial Advice and Investor Protection* (Elgar 2021), 40.

of place to regulatory considerations in debates over their design and reform. Consequently, more fundamental countervailing considerations are inappropriately overlooked or overridden.

Given that mass torts class actions cannot be understood as a form of ‘privatised regulation’, to ask if they are ‘*successful in that regard*’ is to ask a distorted question. Just as tort law and regulation have distinct modalities, so too does procedural law. Accordingly, class actions fall to be understood, not through the lens of regulation or tort, but the lens of procedure. In other words, the norms of procedural law supply the right ‘internal’ criteria for evaluating class actions. In this regard, it is clear that the use of *some sort of* class action procedure should be encouraged. However, the successful design and management of class actions raises different questions – to which, suffice it to say, regulatory considerations are neither here nor there.

2. RELATIONSHIP BETWEEN TORT LAW AND REGULATION

A. Regulation and Tort Law are Distinct Modalities of Law

‘Regulation’ is a slippery term. At its broadest, all legal norms might be described as regulatory, in the sense of having distributive effects that steer human conduct.² However, this stretches the concept beyond utility. In Jane Stapleton’s words, ‘We know the weather steers human conduct, but it does not fit regulatory rhetoric to say that the weather regulates or is a governance mechanism of human conduct.’³

² Hugh Collins, ‘Regulating Contract Law’ in Christine Parker et al. (eds) *Regulating Law* (OUP 2004), 18.

³ Jane Stapleton, ‘Regulating Torts’ in *ibid*, 124.

A better description of regulation is ‘the intentional activity of attempting to control, order or influence the behaviour of others’.⁴ Regulation is forward-looking because behaviour can only be ‘controlled, ordered, or influenced’ for the future. Applied to legal norms, ‘intention’ refers to the norms’ purpose – to serve as an instrument for bringing about behaviour. Such behaviour is often prescribed by legislation and enforced top-down, which explains the association of regulation with the State and its regulators. For this reason, regulation is often described as ‘public’. However, that is the wrong reason.⁵ The true reason is that there is no necessary role for private rights in the logic of regulation. Regulatory norms can, and often do, impose duties on individuals without conferring correlative rights on other individuals. Thus, the modality of regulation is *instrumental, forward-looking, behaviour-focussed, and public*.⁶

The modality of tort law is different. Any account of tort law must explain three fundamental features. Firstly, private rights are central to the analysis of tort liability. Tort law is concerned, not with behaviour in the abstract, but only behaviour amounting to the breach of private rights. Secondly, where a defendant has violated a claimant’s right, it comes under a liability to compensate the claimant (as opposed to a sanction or penalty). Thirdly, the extent of tort liability is determined primarily by looking backward to the breach and assigning responsibility for harms, rather than by looking forward to what measure would optimally modify behaviour. In Peter Cane’s words, ‘Structurally, and in the explicit understanding of the judges who make it, tort law is a system of rules and principles of interpersonal responsibility.’⁷ Responsibility is not an instrumental concept in the sense that regulation is. It is concerned

⁴ Julia Black, ‘Critical Reflections on Regulation’ (2002) Aust J Leg Philos 1, 27.

⁵ After all, recent approaches to regulation have emphasised the use of de-centralised and ‘self’ regulation.

⁶ Peter Cane, ‘Tort Law as Regulation’ (2002) 31 Comm L World Rev 305, 306.

⁷ *ibid*, 310.

with the normative relation between a claimant and defendant. Accordingly, the modality of tort law is *non-instrumental*, *backward-looking*, *responsibility-focussed*, and *private*.

A prime illustration of the inaptness of understanding tort law in terms of regulation is the leading English negligence case of *Fairchild v Glenhaven Funeral Services*.⁸ In *Fairchild*, it was established that the defendant negligently exposed the claimant to asbestos. The stumbling block for the claimant was the inability to prove, on the balance of probabilities, that the defendant's negligence caused the claimant to develop mesothelioma. Nonetheless, the House of Lords created an exception to the requirement and allowed the claimant's appeal on the basis that the defendant negligently increased the claimant's risk of developing mesothelioma.⁹ Three observations are pertinent for present purposes.

Firstly, from a regulatory perspective, tort law's general insistence that negligence liability is conditional on the defendant having caused the claimant damage makes very little sense. '[R]isk-based legal regimes that assign liability to the creators of risk – irrespective of whether these risks result in actual harm' – would be a more effective 'means of regulating risk-creating activities.'¹⁰ In contrast, the requirement makes sense from the tort law perspective. The compensatory principle shifts only those harms for which the defendant is responsible from the claimant to the defendant.

⁸ *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22.

⁹ *cf. Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128 where the Full Federal Court was unwilling to base liability on negligently increasing risk. Despite the defendant being found to be negligent in marketing a drug, Vioxx, that significantly increased the risk of heart attacks – and being forced to withdraw the drug by the regulator – the claim failed as the claimant could not prove that his heart attack was caused by Vioxx.

¹⁰ Eyal Zamir and Doron Teichman, 'Tort Law' in *Behavioural Law and Economics* (OUP 2018), 334.

Secondly, while the House of Lords created an exception to the causation requirement in *Fairchild*, it did so primarily for the sake of justice between the claimant and defendant.¹¹ Typical of how judges decide cases in many common law jurisdictions, including Australia,¹² there was no empirical consideration of whether introducing the *Fairchild* exception would generate the optimal level of deterrence from a regulatory perspective.¹³

Thirdly, as Lord Hoffmann observed extra-curially, cases applying *Fairchild* demonstrate how tort law, with its principles for delineating individuals' general rights, cannot be confined to specific contexts on public policy grounds.¹⁴ From the tort law perspective, prescribing a special liability rule for mesothelioma cases *only* would have been 'arbitrary'.¹⁵ In contrast, from the regulatory perspective, regimes should be tailored to context-specific policy goals.

The rise of statutory torts might appear to pose a challenge to our argument. Undeniably, we have in modern times seen the legislative 'commandeering' of tort law for regulatory purposes.¹⁶ Many overtly regulatory statutory regimes confer private rights of action on individuals, intending for 'private enforcement' to aid in regulation. It is a small step from this observation to conclude that at least these torts should be understood in terms of regulation.

On closer inspection, the challenge is misplaced. The rights that tort law protects are many, and the reasons why we have those rights are diverse. Regulating behaviour is one such

¹¹ *Fairchild* (n 8), [32]-[33], [36]-[43], [54]-[63], [108]-[116], [154]-[168].

¹² Kylie Burns, 'It's Just Not Cricket: The High Court, Sport and Legislative Facts' (2002) 10 Torts LJ 234, 247-254.

¹³ Compare, however, the use of 'Brandeis briefs' in the United States.

¹⁴ Lord Hoffmann, '*Fairchild* and After' in A Burrows et al. (eds) *Judge and Jurist* (OUP 2013), 65.

¹⁵ *ibid.*

¹⁶ See Pieter Gillaerts, 'Instrumentalisation of Tort Law: Widespread yet Fundamentally Limited' (2019) *Utrecht Law Rev* 27.

reason that justifies our rights, even at common law.¹⁷ Thus, a reason for the right of possession, which the tort of conversion protects, is to channel redistribution through property law's facilitative rules and principles.¹⁸ However, it does not follow that, where tort law intervenes to correct the breach of that right, its modality is regulatory. Whatever reasons support the existence of our rights in the first place, the court's approach to determining liability *following the breach* of those rights adopts the tort law (rather than regulation) modality.¹⁹ The same reasoning applies where legislation, for whatever reasons, creates a private right of action.

[B]. Regulation is a Contingent and Incidental Effect of Enforcing Tort Law

Admittedly, support for the 'internal' criteria approach, of understanding tort law in terms of regulation, can be found in the law and economics school of thought. On this view, tort law must be understood as a *functionalist system*.²⁰ Seen through a regulatory lens, tort law comprises, not just substantive rules and principles, but private-litigant-driven mechanisms for monitoring and enforcing compliance with those standards.²¹ Even if the modality of tort law's substantive rules is not regulatory, the operation of the 'tort system' as a whole (substantive and procedural) reveals its true regulatory functions.²² Accordingly, the 'tort system' falls to be assessed in terms of their instrumentality in performing those functions.

¹⁷ I M Jackman, 'Restitution for Wrongs' (1989) 48 Cambridge LJ 302, 302-305.

¹⁸ *ibid*, 310-311.

¹⁹ Stevens, 'Justice' (n 1), 320-340.

²⁰ Discussed in Cane (n 6), 312-319.

²¹ *ibid*.

²² Like optimising the level of safety in society: Richard Posner, 'A Theory of Negligence' (1972) J Leg Stud 29.

However, given that substantive tort law cannot ‘fruitfully be seen as “regulation”’,²³ it is difficult to see how the ‘tort system’ could measure up any better. Examining the interaction between tort law and regulation quickly reveals that enforcing tort claims does not necessarily advance, and may impede, regulatory objectives. In other words, the relationship between the enforcement of tort claims and the advancement of regulatory objectives is merely *contingent* and *incidental*. Indeed, even if a perfectly efficient and accurate system could be devised for adjudicating all tort claims, the mismatch between tort law and regulatory objectives would persist. All private rights would still be vindicated through a system of interpersonal responsibility, rather than the implementation of a coherent regulatory regime.

(i) Common Law Torts

Firstly, in respect of common law torts, regulatory non-compliance does not automatically give rise to tort liability. As explained, unless a claimant can prove the elements of a cause of action – some of which, like causation of damage in negligence, have no regulatory rationale – there is no tort liability. Thus, an undesirable activity from a regulatory perspective may not give rise to tort liability. Tort law cannot be relied upon as a safety net for regulatory lacunae.

Secondly, regulatory compliance is not generally a defence to tort liability at common law. A defendant *prima facie* liable in nuisance cannot escape liability by showing compliance with planning permission.²⁴ Unless the narrow defence of legislative authority applies,²⁵ a defendant may incur tort liability for an activity that is desirable from a regulatory perspective.

²³ Stapleton (n 3), 122.

²⁴ *Noel Uren and John Zakula v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145, [229]-[241] (considering *Coventry v Lawrence* [2014] UKSC 13, [92]).

²⁵ *ibid*, [223].

Thirdly, while regulatory norms ‘may influence the [tort] liability analysis they are not in and of themselves determinative of the outcome.’²⁶ In a negligence claim, the fact that a defendant did not comply with regulatory standards is evidence, but does not dictate the conclusion, that it fell below the standard of care.²⁷ Subject to contrary legislation, tort law asserts the authority to set its own standards.

These observations reveal that deterring behaviour that is undesirable from a regulatory perspective is neither necessary nor sufficient to justify tort liability. True, interaction between regulation and tort law often results in the alignment of their standards. Accordingly, the *effect* of enforcing tort claims may be to incentivise future regulatory compliance. However, even so:

‘... tort law interacts with regulation on its own terms, thereby maintaining its normative independence. And this remains true no matter... how often the result of the tort analysis happens to coincide with that of the regulatory process.’²⁸

(ii) Statutory Torts

Even where legislation confers private rights of action on individuals affected by breaches of regulatory norms, bringing such claims may not advance regulatory objectives. Since private claimants are entitled to choose whether and when to exercise their rights of action, there is no assurance their decisions will ‘necessarily coincide’ with ‘regulatory decision-making’.²⁹ From

²⁶ Donal Nolan, ‘Tort and Regulation’ in James Goudkamp et al. (eds) *Taking Law Seriously* (Hart 2021), 189.

²⁷ *Blamires v Lancashire & Yorkshire Railway Co* (1873) LR 8 Ex 283, 289.

²⁸ Nolan (n 26), 192.

²⁹ *ibid*, 197.

the regulatory perspective, there is bound to be ‘negative side-effects or externalities because the private litigant only considers their costs and benefits’.³⁰

In particular, bringing a private claim – when, from a regulatory perspective, an alternative method of achieving compliance would have been preferable – interferes with regulation. Modern ‘responsive regulation’ takes a ‘pyramid approach’ to enforcement. This approach recognises that regulatory objectives are best advanced by beginning with softer measures aimed at persuasion and progressively escalating to more coercive measures as needed.³¹ Regulators, like ASIC and ACCC, have various tools to support this approach – from guidance, infringement notices, enforceable undertakings, to civil and criminal proceedings.³² However, the pyramid approach may be undermined by a private claimant jumping the gun by bringing a claim. This may undercut the defendant’s incentive to respond to a regulator’s measures, while also hampering the regulator’s ability to progressively escalate by removing an intermediate rung.³³ Such concerns do not qualify the private claimant’s entitlement to bring a claim, indicating that liability is determined within the tort law modality.

³⁰ Michael Legg, *Public and Private Enforcement of Securities Laws: The Regulator and the Class Action in Australia’s Continuous Disclosure Regime* (Hart 2022), 77.

³¹ See Michael Legg, ‘Regulatory Theory, Litigation and Enforcement’ in Michael Legg (ed) *Regulation, Litigation and Enforcement* (Thomson Reuters 2011).

³² The Hayne Royal Commission marked a temporary shift by ASIC from the pyramid to the more uncompromising ‘why not litigate?’ approach. Under the latter approach, regulators were to first consider the appropriateness of litigation before exploring alternative measures: Kenneth Hayne, *Final Report (Volume 1): Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2019), 427-442. However, ASIC has since reverted to the pyramid approach: ASIC, *ASIC Corporate Plan 2021-2025* (2021).

³³ Legg (n 30), 27-33.

C. Tort Law is Not a Form of Regulation

Tort law cannot be seen as *a form of* regulation without distortion. Understood on its own terms, tort law is concerned with vindicating private rights through a system of rules of interpersonal responsibility. The relationship between regulation and tort law is that of distinct modalities of law which may, contingently and incidentally, complement each other.

3. CLASS ACTIONS ARE NOT ‘PRIVATISED REGULATION’

If neither substantive tort law nor its enforcement (i.e. the ‘tort system’) can be understood as *a form of* regulation – and the class action is a procedure for enforcing substantive tort law consistently with the procedural norms of the civil justice system – it follows that mass torts class actions cannot be described as “*privatised regulation*”.

A. Class Actions Have Not Transformed Mass Torts Litigation into Regulation

The false premise underpinning the description of class actions as an “*evolutionary form of* “*privatised regulation*”” is that – whatever might have been said about traditional tort law – the class action procedure has somehow transformed mass torts litigation into *a form of* regulation.

(i) Increased Enforcement of Tort Law is Not Regulation

That class actions increase the enforcement of tort law by enabling otherwise impractical tort claims to be vindicated cannot be denied. However, increased enforcement of tort law is not regulation. As explained, even if a perfect procedure could be devised for enforcing all tort claims, the result would not be a coherent regulatory regime. *A fortiori*, this is true of class actions.

Regardless of the level of enforcement achieved by using class actions, the relationship between enforcing tort claims and advancing regulatory objectives remains contingent and incidental. This is neatly illustrated by the leading mass torts class action case of *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*,³⁴ surrounding the Longford Gas Plant explosion. In that case, breach of workplace safety regulations resulted in an explosion at Esso's Longford gas plant, which interrupted Victoria's gas supply for weeks. A class action was brought before the Supreme Court of Victoria under Part 4A of the Supreme Court Act 1986.³⁵ The class comprised two sub-classes – one in which the right-holders suffered economic loss consequent on property damage and the other in which the right-holders suffered pure economic loss. A duty of care was found in respect of the former but not the latter. From the regulatory perspective, the fact that the level of liability Esso faced depended on how each of the right-holder's economic loss was occasioned is arbitrary. The operation of certain rules and principles of tort liability only make sense within the tort law modality, regardless of the level of enforcement.

(ii) The Class Action Procedure Does Not Alter the Substance of Tort Law

Accordingly, the only way the class action procedure could transform mass torts litigation into *a form of regulation* is if it alters the modality of the underlying tort claims. However, it does not. Use of the class action procedure does not change the fact that the underlying tort claims are based on vindicating the private rights of each member of the class. Indeed, the 'claims which are... pursued collectively could all, at least in theory, be individually pursued by ordinary claim... under the protection of the overriding objective.'³⁶

³⁴ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27.

³⁵ While there are some differences in the class action regimes of the Federal Court and the Australian states, the state regimes are modelled on the Federal Court regime.

³⁶ *Merricks v Mastercard* [2020] UKSC 51, [43].

Neither does the determination of common questions through the class action procedure enlarge a defendant's liability beyond its extent under substantive tort law. The Federal Court of Australia's Practice Note on Class Actions provides that class actions should usually be split into two phases. The first 'initial trial' phase is dedicated to resolving questions common to the class or a subset of them. Once the common issues are determined, a second phase takes place where the court resolves all outstanding issues for individual class members' claims.³⁷ While it is true that many class actions are settled prior to the second phase, the fact that many tort actions are settled without a determination on the merits is hardly revelatory.³⁸ The fact remains that class members' claims can never be 'smuggled past' a defendant who insists on its right to robustly and individually test them.

Unfortunately, certain features of class actions are said to have altered the modality of the underlying tort claims. These are used to cast mass torts class action as a form of regulation. Scrutiny of these features reveals that some of them are not of a product class actions at all. The significance attached to these features in class action debates is both a cause and symptom of the theoretical distortion this essay seeks to correct. The class action *procedure* does not affect the *substance* of tort claims.

1. Third-Party Standing

The first aspect is that class actions are brought by representative parties on behalf of other right-holders, rather than by the right-holders acting individually. This aspect makes it tempting to think of the representative party as having been transformed into a 'private attorney general'

³⁷ Federal Court of Australia, *Class Actions Practice Note* (20 December 2019), [9.2(1)], [13].

³⁸ For statistics on the outcomes of class actions in Australia see: Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: The First Twenty-Five Years of Class Actions in Australia* (July 2017); Vince Morabito, *Empirical Perspectives on Twenty-One Years of Funded Class Actions in Australia* (April 2023).

‘taking on a public role and acting as a quasi-public servant.’³⁹ In actuality, there is nothing novel about conferring standing on a third-party besides the right-holder to bring a tort claim.

Although by default only the right-holder has standing, this is not an inflexible rule.⁴⁰ Exceptions have been recognised without fanfare⁴¹ – including the Court of Chancery representative procedure, the progenitor of the class action.⁴² This is possible because, as far as tort law is concerned, ‘[p]rivate law rights and duties remain invariant across different enforcers.’⁴³ Even though the claim is brought by another, the representative’s role is strictly confined to vindicating the right-holders’ private rights⁴⁴, as opposed to performing a regulatory role *per se*.

2. Aggregate Damages

The second aspect is the award of aggregate damages, for example under s.33Z of the Federal Court of Australia Act 1976 (‘FCAA 1976’). Those inclined to see class actions as having transformed mass torts litigation into a form of regulation, point to aggregate damages as confirmation. In particular, the assessment of damages by reference to the loss suffered by the class as a whole rather than any individual⁴⁵ – and the attendant risk that a defendant is required

³⁹ John Coffee, *Entrepreneurial Litigation: Its Rise, Fall, and Future* (HUP 2015), 2.

⁴⁰ Timothy Liao, *Standing in Private Law* (OUP 2023), 91.

⁴¹ See *ibid*, 279-306.

⁴² In New Zealand, it is still formally the foundation of the class action: Rule 4.24 of the High Court Rules 2016.

⁴³ Liao (n 40), 36.

⁴⁴ And only the right holder’s claims or defences that give rise to ‘common issues’ that are part of the class action: *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44.

⁴⁵ See Rachael Mulheron, ‘Revisiting the Class Action Certification Matrix in *Merricks v Mastercard*’ (2019) King’s LJ 396.

to pay more (or less) than its actual liability under substantive tort law⁴⁶ – are cited as departures from the compensatory principle, which is a fundamental aspect of tort law.

In turn, through the feedback loop of legal interpretation, aggregate damages are invoked as a bridgehead to suggest reforms that align substantive tort law principles for assessing damages with regulatory objectives.⁴⁷ If, indeed, class actions have transformed ‘traditional litigation’ into a form of regulation, it would be ‘inappropriate to impose upon [them] strictures derived from earlier times’,⁴⁸ especially if they conflict with regulatory objectives.

The misconceptions surrounding the award of aggregate damages – that it has somehow altered the modality of the underlying tort claims and transformed mass torts class actions into a form of regulation – stem from a failure to appreciate its *evidential* and *procedural* nature. Once this is appreciated, it becomes clear that ‘there is nothing in s 33Z that requires damages to be assessed otherwise than in accordance with recognized legal principles’.⁴⁹

The precondition for awarding aggregate damages under Part IVA of the FCAA 1976 – that a reasonably accurate assessment can be made of the total amount to which class members will be entitled⁵⁰ – is premised on the continued application of the compensatory principle as

⁴⁶ See Michael Legg, ‘Access to Justice and Compensation Through the Class Action’ in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30 Year Perspective* (Federation 2023).

⁴⁷ See, especially, David Rosenberg, ‘Class Actions for Mass Torts: Doing Individual Justice by Collective Means’ (1987) 62 Ind LJ 561; David Rosenberg, ‘Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss’ (2002) 88 VA L Rev 1871.

⁴⁸ *Graham Barclay Oysters Ltd v Ryan* [2002] HCA 54, [267]. See also *ACCC v Golden Sphere International Inc* (1998) 83 FCR 424, 448, accepting that aggregate damages altered substantive tort law principles for assessing damages.

⁴⁹ *Mobil Oil Aust Pty Ltd v Victoria* [2002] HCA 27, [23]. For a statement to the same effect in Canada, see *Pro-Sys Consultants Ltd v Microsoft Corpn* [2013] SCC 57, [133].

⁵⁰ S.33ZF(3), FCAA 1976.

a matter of substantive law. Aggregate damages assessments still aim to reflect the defendant's actual liability under tort law.

Seen in this light, permitting aggregate damages to be assessed by reference to the class is justified as an application of the well-established 'broad axe' principle to mass torts class actions. According to this principle, courts have never, as a matter of evidence and procedure, insisted on precise proof in assessing damages if to require it would destroy a claimant's right to compensation. Therefore, even in jurisdictions whose class action regimes do not replicate Australia's 'reasonably accurate' qualification⁵¹ – aggregate damages awards still conform to the tort law modality.

Admittedly, the United Kingdom Supreme Court in *Merricks v Mastercard* declared the award of aggregate damages to be a fundamental departure from the compensatory principle.⁵² However, in the same judgment, it endorsed the broad axe principle as the justification for aggregate damages.⁵³ Regrettably, the court erred by failing to clearly recognise that the broad axe principle is the way the courts *give effect to* the compensatory principle in the face of evidential uncertainty. Indeed, the scale provided by class actions allows for a more accurate assessment of the defendant's liability and each class member's entitlement, compared to individual proceedings conducted proportionately.⁵⁴

⁵¹ Like the United Kingdom's regime for certain competition law cases: s.47C of the Competition Act 1998 (as interpreted in *Merricks* (n 36)).

⁵² *Merricks* (n 36), [58], [77]-[78], [94]-[97].

⁵³ *ibid*, [51]-[54] (citing *inter alia* *Watson Laidlaw & Co Ltd v Pott Cassels & Williamson* 1914 SC (HL) 18, 29-30).

⁵⁴ Andrew Higgins, 'Due Process in Class Actions' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30 Year Perspective* (Federation 2023), 117.

3. Market-Based or Indirect Causation

The third aspect stems from the association of class actions with certain substantive law proposals. In particular, these include the market-based or indirect theory of causation, according to which causation of loss in certain categories of shareholder litigation can be determined, not by reference to individual reliance, but indirectly by how the market as a whole reacts to information available to the market. The debate over this theory is associated with class actions because, if accepted, questions of causation can be dealt with as common questions at the initial trial. Thus, the debate's outcome has practical consequences for the viability of class actions in the relevant categories of cases.

If mass torts class actions were seen as a form of regulation, a compelling argument in support of market-based or indirect causation would be the need to prevent frustrating the class action's regulatory function. The history of one such theory in the United States, the 'fraud on the market' doctrine, is illustrative. Without this doctrine, class actions brought under s.10(b) and r.10b-5 of the Securities Exchange Act 1934 could not satisfy the certification requirement of proof of a predominance of common issues under r.23(b)(3) of the Federal Rules of Civil Procedure. Accordingly, acceptance of this doctrine was propelled by the courts' recognition that, without it, 'the utility of the class action device... would be seriously undermined.'⁵⁵

In Australia, the fraud on the market doctrine was rejected in *TPT Patrol Pty Ltd v Myer Holdings Ltd* on the basis that there is no certification requirement in the Australian class action regime.⁵⁶ However, a more fundamental objection to the United States' approach is that it puts the *procedural* cart before the *substantive* horse.

⁵⁵ Zachary Starr, 'Fraud on the Market and the Substantive Theory of Class Actions' (1991) 65 St John's LR 441, 449.

⁵⁶ *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* [2019] 140 ACSR 38, [1535].

The debate over market-based and indirect causation is ultimately about whether, as a matter of *substantive* tort law, a different approach to causation can be taken where the loss flows from how everyone else in the market is acting. Even in first instance decisions in Australia where this theory has been accepted, the court has stressed that the answer must be resolved by examining the nature of each cause of action and the specific causal requirements for establishing it.⁵⁷ Accordingly, this is not an example of the class action procedure modifying or circumventing substantive conditions for tort liability. Rather, as the reasoning of the courts who have engaged with the debate makes clear, implications for the use of class actions follow *as a consequence of* substantive law choices.

B. Rejecting the ‘Internal’ in Favour of the ‘External’ Criteria of Regulation

There is some judicial support – particularly in the United States – for understanding mass torts class actions as *a form of* regulation. The United States Supreme Court has held that, ‘The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.’⁵⁸ However, such statements stem from a uniquely American understanding of tort law in terms of regulation – which, as explained, is untenable. They also rest on the premise that the aggregation of claims makes them regulatory – which, as explained, is not true.

Other judicial statements about the behaviour modification objectives of mass torts class actions, even in North America, are more equivocal. In *Western Canadian Shopping Centres v Dutton*, the Supreme Court of Canada held that class actions served multiple objectives, including (alongside compensating victims of tort) ‘ensuring that actual and potential wrongdoers do not

⁵⁷ *ibid*, [1638]-[1639].

⁵⁸ *Deposit Guaranty National Bank, Jackson, Missouri v Roper*, 445 US 326, 339, 100 S Ct 1166 (1980).

ignore their obligations to the public.’⁵⁹ At a high level of generality, all legal norms can be said to have guiding behaviour as a goal. In that sense, by enabling claims to be brought – which, but for the class action procedure, would not have been brought – class actions prevent private rights from becoming a dead letter and thus promote compliance with substantive tort law. However, this is not the same as saying that mass torts class actions are a form of regulation since, as explained, tort law is not necessarily in lockstep with regulatory objectives.

In Australia, it is widely recognised that the class action does not transform mass torts litigation into “*privatised regulation*”. Rather, consistent with the ‘external’ criteria approach, tort law and regulation continue to be understood as distinct – even if sometimes complementary – modalities of law. This nuanced understanding was reflected in the Australian Law Reform Commission’s 1988 report, finding that:

‘The expansion of access to legal remedies may lead to greater enforcement of legal liabilities and as a result increase the amount of monetary relief paid. *This may have a deterrent effect on the respondent’s behaviour, but that is incidental.*’⁶⁰

In mass torts litigation, the class action is no more (and no less) than a procedure to enable individuals to enforce their private rights consistently with the procedural norms of the civil justice system. In some cases, this advances regulatory objectives. In others, it does not. Regulation is not the right lens through which to understand or evaluate class actions. It follows that the success of the class action does not depend on its effectiveness as a form of regulation.

⁵⁹ *Western Canadian Shopping Centres v Dutton* [2001] SCC 46, [29].

⁶⁰ ALRC, *Grouped Proceedings in the Federal Court* (Report No 46, 1988).

C. Evaluating Mass Torts Class Actions Against the ‘External’ Criteria of Regulation

All being said, it is reasonable to evaluate the class action procedure against ‘external’ criteria supplied by regulation. The crucial difference is that the ‘external’ criteria approach recognises that – even if aspects of mass torts class actions do not align with the tenets of regulation – there may be good reasons ‘internal’ to the logic of tort or procedural law which justify them. Put simply, regulatory considerations are of subsidiary importance in the evaluation of mass torts class actions.

This approach is illustrated by the United Kingdom Supreme Court’s reasoning in *Merricks* where, having interpreted the principles for the award of aggregate damages within the tort law modality, it found that its conclusions were ‘*fortified*’ by their effect in restraining future wrongdoing by enabling wrongdoers to be ‘brought to book’.⁶¹

Taking this approach, anecdotal evidence attests that shareholder class actions, which comprise the largest share of class actions before Australian courts,⁶² frequently complement regulation. In 2005, the then ASIC Deputy Chairman, Jeremy Cooper, stated that:

‘ASIC cautiously welcomes the emergence of the shareholder class action in Australia... Vigilant shareholders and a vigorous, but appropriately balanced, shareholder class action landscape, will play an important part in maintaining the integrity of the equity capital market in years to come.’⁶³

⁶¹ *Merricks* (n 36), [53].

⁶² Vince Morabito, *An Evidence Based Approach to Class Action Reform in Australia: Shareholder Class Actions in Australia Myths v Facts* (2019), 16.

⁶³ Jeremy Cooper, ‘Corporate Wrongdoing: ASIC’s Enforcement Role’, presented in International Class Actions Conference, Melbourne (2 December 2005).

Similarly, in 2019, ASIC reported that '[s]hareholder class actions can play an important and complementary role in... fostering accountability.'⁶⁴ Extra-curially, Beach J observed that:

'securities class actions in Australia have had an influence in recent years of producing more compliance with continuous disclosure requirements than would otherwise have been the case if just regulatory enforcement proceedings had been taken.'⁶⁵

While it is important not to generalise in the absence of definitive empirical evidence, it seems that regulators are engaging with the class actions landscape in calibrating their approach to regulation. As ASIC explained, 'Where private action can achieve a similar outcome to that which action by ASIC could achieve, it allows ASIC to allocate its regulatory resources to other priorities.'⁶⁶ Furthermore, Michael Legg's case studies suggest that regulators are leveraging the risk of class actions to secure cooperation from regulated entities.⁶⁷ They also seem to be developing techniques to retain control of the 'big picture' regulatory strategy while accommodating private class actions.⁶⁸ This dynamic interaction promotes a complementary, rather than conflictual, relationship between mass torts class actions and regulation.

⁶⁴ ASIC, Submission 72 in ALRC, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, 2019).

⁶⁵ Jonathan Beach, 'Some Current Issues in Securities Class Actions' (2017) 36 CJQ 146, 151.

⁶⁶ ASIC (n 64), [9.29].

⁶⁷ Legg (n 30), 169.

⁶⁸ *ibid*, especially 'Effectiveness and Coexistence of Regulatory Enforcement and Class Actions'.

4. EVALUATING CLASS ACTIONS AGAINST PROCEDURAL NORMS

If class actions cannot be understood in terms of regulation, how should they be understood? How do we determine if they are successful and should be encouraged? If not regulation, what paradigm supplies the correct ‘internal’ criteria for understanding and evaluating class actions?

Given the emphasis in this essay on the distinction between the modalities of regulation and tort law, it might be assumed that – since the former has been rejected – class actions must be evaluated in terms of the latter. However, looking at class actions through the lens of tort law would be equally distorting. Focusing exclusively on the bilateral relationship between the right-holder and the defendant overlooks fundamental norms of procedural law. It ignores the interests of similarly situated parties, and equally importantly, other users of the court system ‘left in the queue awaiting justice.’⁶⁹ It is insensitive to the public interest in ensuring all those claims are resolved justly and at proportionate cost. We must not replace one distortion with another.

Just as tort law and regulation have their own modalities, so too does procedural law. Procedural law is tripartite in nature. Not only does it regulate the relationship between litigating parties, it also upholds the public interest in the administration of justice, and mediates the relationship between public and private interests.⁷⁰ The function of class actions is to promote procedural norms, not tort law or regulatory concerns generally. Accordingly, the modality of procedural law supplies the right ‘internal’ criteria for evaluating class actions.

In this regard, putting to one side the question of the design of class actions, the use of some form of class action should be encouraged. Class actions promote ‘access to justice’ for prospective litigants, including victims of mass torts, by modifying procedural rules that make

⁶⁹ *UBS AG v Tyne* [2018] HCA 45, [45].

⁷⁰ For general discussion see Adrian Zuckerman et al., *Zuckerman on Australian Civil Procedure* (Lexis Nexis, 2019), Chapter 1.

it too risky or economically irrational for them to bring individual claims. Class actions also promote the public interest in the administration of justice – in particular, the principles of finality and proportionality.⁷¹ They ensure that the courts are not clogged up with thousands of claims raising the same questions. They reduce the risk of inconsistent judgments which corrode public confidence in the justice system and undermine the rule of law.⁷² Defendants are not vexed defending the same questions on multiple occasions. Claimants are not put to the waste of proving facts that have already been established by the court in separate proceedings. By combining multiple claims into a single proceeding, courts have a much better chance of understanding the practical significance and size of the dispute. They are also better able to resolve that dispute at proportionate cost, as required by the ‘overarching purpose.’⁷³

The successful design and management of class actions in a way that respects procedural norms poses its own unique challenges. Whereas case management disputes can often be reduced to a balance between the public and the parties’ interests, class actions often raise a further conflict between the parties to the proceedings and those they represent – many of whom will be ‘absent’ class members with little, if any, knowledge of the proceeding and limited opportunities to actively participate in it. Even within the represented class there may be significant conflicts of interest, which is why adequacy of representation is crucial to the fairness of class actions. Thus, the right to adequate representation is protected in Australia by s.33T of the FCAA 1976;⁷⁴ in the United States, it receives Constitutional protection through the due process clause.⁷⁵

⁷¹ See *Carnie v Esanda Finance Corporation Ltd* [1995] 182 CLR 398, 429-430.

⁷² Andrew Higgins, ‘The rule of law case against inconsistency and in favour of mandatory civil legal process’ (2019) 39 OJLS 725.

⁷³ S.37N, FCAA 1976, and state equivalents.

⁷⁴ And equivalent state legislation.

⁷⁵ *Hansberry v Lee* 311 US 32 (1940); *Phillips Petroleum Co v Shutts*, 472 US 797 (1985).

The question of how to balance these competing public and private interests looms large over every design choice of lawmakers drafting class action statutes, and every court exercising its discretionary powers that those statutes confer on them.⁷⁶ The Australian courts are now honing in on these questions with commendable laser-like focus. In the last four years the High Court and intermediate appellate courts have considered:

- (i) Whether and in what circumstances multiplicity of class actions is abusive and how a court should choose which of the competing class actions is the most suitable vehicle for resolving the dispute.⁷⁷
- (ii) Whether a court has the power to order class members to contribute to the costs of funding the claim brought on their behalf, even in the absence of a contractual agreement, and how such contributions should be calculated.⁷⁸
- (iii) Whether a court has the power to directly or indirectly ‘close the class’ (thus shutting class members out from the benefit of any settlement or judgment) with the aim of facilitating a final resolution of the dispute through alternative dispute resolution processes.⁷⁹

Space prohibits us from considering the merits of these issues. However, what is tolerably clear is that the potential of class actions to contribute to, or detract from, regulatory objectives has not featured in the courts’ consideration of them – and rightly so.

⁷⁶ See eg s.33ZF, FCAA 1976.

⁷⁷ *Wigmans v AMP Limited* [2021] HCA 7.

⁷⁸ *BMW Australia Ltd v Brewster* [2019] HCA 45. The Full Federal Court has currently reserved judgment in *Jade Elliot-Cardé & Anor v McDonald’s Australia Limited* (VID726/2021) on whether it had the power to make a common funder as part of an approved settlement under s.33V of the FCAA 1976.

⁷⁹ *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66; cf. *Parkin v Boral Ltd (Class Closure)* [2022] FCAFC 47.

5. CONCLUSION

The scale of class actions, which can involve millions of class members, naturally leads many to consider their value as a regulatory mechanism, in every field of law they cover including tort. However, in this essay, we argue that tort, regulation, and class actions all have distinct modalities. Attempting to evaluate either tort law or class actions *as a form of* regulation risks distorting them. The correct ‘internal’ criteria for judging the success of class actions are the norms of procedural law. Designing and managing class actions in a way that respects due process norms poses significant and unique challenges. However, there is no doubt that class actions in general successfully promote certain fundamental procedural norms, in particular finality and proportionality. Accordingly, their use should be encouraged.

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