A COMPARISON OF THE CLASS ACTION FOR DAMAGES IN THE AMERICAN JUDICIAL SYSTEM TO THE BRAZILIAN CLASS ACTION: THE REQUIREMENTS OF ADMISSIBILITY

ADA PELLEGRINI GRINOVER,

University of São Paulo
(São Paulo, Brazil)

After describing the class action for damages in the American judicial system, with the requisites of 'prevalence' and 'superiority,' the study passes to the examiner of the requirements of the admissibility of the Brazilian class action for damages, concluding on the existence of the same requisites, even in a civil law system.

Keywords: common law and civil law; class action for damages; American system of class action for damages; prevalence and superiority; Brazilian class actions for damages; same requisites.

Recommended citation: Ada Pellegrini Grinover, *A Comparison of the Class Action for Damages in the American Judicial System to the Brazilian Class Action: The Requirements of Admissibility*, 2(1) BRICS LJ (2015).

Table of Contents

1. Introduction

It is known that the great novelty of the Brazilian Consumer Protection Code (*Código Brasileiro de Defesa do Consumidor*) [hereinafter *CDC*], in terms of jurisdictional protection, was the creation of the category of individual homogeneous interests or rights, which are really traditional subjective rights that are still subject today to individual procedural treatment but also, now, group treatment, by reason of their homogeneity and common origin.

Among the public civil actions in defense of homogeneous individual rights, the action provided for in Arts. 91–100 of the *CDC*, intended to be used for reparation of damages individually incurred, was called 'Brazilian class action,' because its precedent was found in the 'class action for damages' of the American system. But the United States has 34 years of experience with such actions, while in Brazil the compensatory action of Art. 91 ff. of the *CDC* has not progressed beyond being a general conviction, with practical application of the regulations occurring only in the process of paying damages to victims or their unknown successors, especially in the area of losses deriving from product defects.

Therefore, it was with great pleasure that I accepted the invitation of Dr. Michael Socarras, *Shook, Hardy & Bacon* Law Firm (Kansas City, Missouri), to meet, in the United States, with Professor Linda Mullenix, University of Texas, one of the greatest and most esteemed specialists in 'class actions' in that country. Being able to find out about the American experience up close, with personal explanations from experts about legal norms and especially jurisprudence, was a unique opportunity for this studious foreigner.

Therefore, I thank Professor Mullenix for her valuable contribution to a better understanding of Rule 23 of the Federal Rules of Civil Procedure [hereinafter FRCP], notably sec. (b)(3), which deals with 'class actions for damages,' and for the understanding of the difficulties encountered by the American courts in deciding on the admissibility (certification) of 'mass tort cases.' And I am grateful for the intelligent assistance of Dr. Socarras, a sharp observer of the similarities and differences between the US and Brazilian systems. My thanks also go to both of these individuals and to their assistants for the interest they showed with respect to the

legislative and doctrinal treatment of Brazilian actions in defense of diffuse, group, and homogeneous individual interests.

The inspiration for this study of comparative law was born in the days spent working together in New York and Miami.

2. Rule 23 of the Federal Rules of Civil Procedure

The institution in American law known as the 'class action,' based upon equity and rooted in the Bill of Peace of the 17th century, has been expanded so that it has acquired somewhat of a central role in law. Rule 23 of the FCRP of 1938 establishes the following basic rules: a) the 'class action' will be admissible when it is impossible to bring all of the members of the class together; b) control over *adequate representation* is a matter incumbent upon the court; c) the court will also be responsible for verifying the existence of *commonality of interests* among the members of the class. And, moreover, from the 1938 FCRP comes the systemization of the degree of commonality of interests, which, in turn, results in a classification of the 'class actions' into the categories '*true*, *hybrid*, and *spurious*,' depending on the nature of the rights of the subject dispute (*joint*, *common*, or *secondary*, or even *several*), with various procedural consequences.[1]

The practical difficulties regarding the exact configuration of each category of class action, with its own procedure, led the American specialists (Advisory Committee) to modify the regulation of the matter in the FRCP of 1966, giving a new shape to the former *spurious class action*, precisely that intended for cases in which the members of the class are holders of various and different rights, but dependent on a common question of fact or law, and therefore a single-purpose jurisdictional measure is possible for all of them. That is the origin of the Brazilian category of homogeneous individual interests.

Rule 23 of the FRCP of 1966, which has a pragmatic and functional nature, embodies four prior considerations (prerequisites) and establishes three categories of class actions, two of them being mandatory and one non-mandatory.

The prerequisites for any class action are as follows:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

[1] For a detailed analysis of the 1938 FRCP and the jurisprudential development of the subject, *see* Michele Taruffo, *I limiti soggetivi del giudicato e le class actions*, 1969 Riv. dir. proc. 609, 619–28.

and
(4) the representative parties will fairly and adequately protect the interests of the class.

It is a question of threshold requisites.

Section (b), which follows, gives the requisites for prosecuting the class action, which in truth create three categories of class actions:

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
(1) prosecuting separate actions by or against individual class members would create a risk of:
(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
(3) the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
and
(D) the likely difficulties in managing a class action (emphasis added).

3. Specific Requisites of the Class Action for Damages in the American Judicial System: The 'Prevalence' of Common Questions and the 'Superiority' of Group Protection

A warning is appropriate at this point: secs. (b)(1)(A) and (B), as well as sec. (b)(2), focus on the mandatory class action, which in Brazilian nomenclature corresponds to

actions in defense of diverse and group interests. The present study will not concern itself with these, but it is nonetheless worthwhile to observe that sec. (b)(1)(A) signifies that if the class action is not brought, the individuals would be prejudiced, whereas sec. (b)(1)(B) indicates that the absence of the class action would prejudice the defendant. In turn, sec. (b)(2) deals – also with respect to the mandatory class action – with cases of obligations to seek or not to seek *injunctions* or declaratory judgments, still in the category that in Brazil corresponds to actions in defense of diverse and group interests.

But, it is in sec. (b)(3) where one encounters the legal system or structure known as the 'class action for damages,' which is not mandatory, in that it allows one to opt out.[2] It therefore corresponds to the Brazilian action in defense of homogeneous individual interests, precisely of the kind known as recovery for damages individually incurred.

The aforementioned sec. (b)(3), applicable specifically to 'class actions for damages,' did not exist in the FRCP of 1938, and therefore can be considered the great innovation of the FRCP of 1966.

In accordance with this rule, the 'class action for damages' (subject to the prerequisites of sec. (a)) must adhere to an additional two requisites:

1) the *prevalence* of the questions of common fact and law over questions of individual fact or law; and

2) the *superiority* of group protection over individual protection, in terms of justice and efficacy of the court decision.

Deriving from these two requisites set forth in sec. (b)(3) are the following specifications, secs. (b)(3)(A)–(D), which represent indicators that have to be taken into account for determining prevalence and superiority.

The general spirit of the rule derives from the principle of access to justice, which in the American system is broken down into two parts: first, facilitation of the procedural treatment of fragmented cases that would be very small taken individually, and second, achieving the greatest efficacy possible in the legal decisions made. Also, it attempts to adhere to the objectives of reducing time spent, effort, and expenses, and to ensure consistent decisions.

The requisite of *prevalence* of common over individual aspects indicates that, without this, there would be disintegration of the individual elements; and the requisite of *superiority* takes into account the need to avoid class action treatment in those cases where the class action can lead to insurmountable problems, with respect to the advantage, in the specific case, of not fragmenting the decisions.

---

[2] With respect to the *opt out* technique in American class actions, *see* Ada Pellegrini Grinover et al., Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto 765–66 (5th ed., Forense Universitária 1997).

4. Some Examples of American Rulings

The American courts have rigorously observed the requisites of prevalence and superiority in ruling upon the admissibility of an action as being a class action (*certification*).

An analysis of the most representative legal decisions made in the area of 'class actions for damages' shows that the existence of the aforementioned requisites has been recognized, in fact readily, in areas other than damages caused by product defects, such as environmental disasters, airplane accidents, collapse of structures, and injury of workers. There are many class actions for reparation of individual damages where there was certification.

It is worth noting, among others, the recent decision of *Mullen v. Treasure Chest Casino, LLC*, which concerns certification of a class of employees damaged by a defective ventilation system.[3] The court recognized the prevalence of common issues, mainly those involving causality, damages, and negligence, such that individual issues did not predominate as occurred in the *Amchen* and *Castano* cases.[4] The court affirmed the lower court's finding of superiority based on the fact that the dispute in the case would not present the handling problems found in the *Castano* case, and, on the contrary, made it possible to save procedural time and avoid multiplication of cases that might result in contradictory decisions.

Before this case, *certification* had been granted in actions for reparation for damages caused by coal dust (*Biechele v. Norfolk & Western Railway Co.*) and by the discharge of chemical matter into the Chesapeake Bay (*Pruitt v. Allied Chemical Corp.*), as well as 'agent orange,' for the benefit of soldiers that fought in Vietnam.[5]

But there have been more problems with recognition of prevalence and superiority with respect to 'class actions for damages' in the area of reparation for damages to consumers that have occurred due to a product defect.

As a result, in the 34 years in which the FRCP of 1966 have been applied, there have been few instances of *certification* for 'damage class actions' in this area. We can point out, among others, the case of damages caused by consumption of the pharmaceutical product (Bendectin) in which the 'mass tort case' was certified, although in the second phase the class action was rejected based on merit.[6] There are also earlier cases in which the issue had to do with the warranty on the product purchased, as in the

---

3 *Mullen v. Treasure Chest Casino*, *LLC*, 186 F.3d 620 (5th Cir. 1999).

4 *See infra* secs. A and F, nn. 8, 16, and 17.

5 *See* José R. Cruz e Tucci, 'Class action' e mandado de segurança coletivo: diversificações conceptuais 29–30 (1990).

6 Telephone Interview with Linda Mullenix, Professor of Law at the University of Texas School of Law, Austin, Texas (Jan. 27, 2000). *See also In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984).

Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975 (*Feinstein v. Firestone Tire & Rubber Co.* (on the manufacture of imperfect and unsafe tires); *Mullins v. Ford Motor Co.* (for unfitness of the automobile lubrication system); and *Skelton v. General Motors Corp.* (for the installation of defective gears)).[7]

It should be noted, however, that despite the few instances of *certification* in the area of damages caused by product defects, this does not mean that the institution has failed, because 90% of the cases decided have been resolved by settlement, through alternative dispute resolution (ADR) in the multi-district jurisdictions in which the class actions were brought.

Now let us look at the most significant decisions in the area of damages from consumption of defective or harmful products, which were not allowed as 'damage class actions' because the requisites of prevalence and superiority were not met.

A. The *Castano* case,[8] involved reparation for damages caused by dependence on nicotine, based on the allegedly fraudulent suppression of information on the manipulation of the level of nicotine in cigarettes to increase the level of dependence.

The court decertified the class on appeal because of the lack of prevalence of common issues and because the class failed the superiority requirement of Rule 23(b)(3). The court found that after the group proceeding, the individual class members would still have to demonstrate reliance in individual proceedings. Thus, common issues were only a small part of the decision.

With respect to superiority, the court observed that certification of the class action would lead to insurmountable pressures on the defendants to settle, *i.e.* 'judicial blackmail,' it being true that group treatment could have an affect on the destiny of an entire industry. The decision refers to the precedent of Judge Posner[9] on the analysis of superiority. On the other hand, the court pointed out that each claimant could receive compensation in the millions of dollars, it not being a waste to bring these claims to justice individually. It further observed that the parties would spend years in litigation, because reliance predominated over the common issues.

B. The *Allison* case,[10] involved allegations of racial discrimination at a company with regard to its hiring, promotions and compensation, and training policies. The purpose of the action was to establish the parameters of liability, if any, and reparation for damages. Here we will examine only the *damage* aspects of the *class action*, in which the court refers to the precedents of the *Castano*[11] and *Amchen*.[12]

---

7 *See* Cruz e Tucci, *supra* n. 5.

8 *Dianne Castano et al. v. The American Tobacco Co. et al.*, 84 F.3d 734 (5th Cir. 1996).

9 *See infra* sec. D, n. 14.

10 *James E. Allison et al. v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

11 *See supra* sec. A, n. 8.

12 *See infra* sec. F, nn. 16 and 17.

Prevalence was not recognized on appeal because the liability for reparation for damages could only be determined through examination of the personal circumstances of each claimant. It was deemed that the individual issues predominated over the common issues, the following individualities being noted: what kind of discrimination there was; how it affected each plaintiff emotionally and physically, both at work and at home; what type of medical treatment each claimant received; and the cost involved in the treatment, *inter alia*.

Moreover, the appellate court found a lack of superiority noting that the problems of group treatment would be exacerbated because there were more than one thousand individual claimants and the high value of the individual claims removed the barriers to individual actions.

C. The *Vorhis* case,[13] also known as the *Suhrheinich* case (name of the judge), involved liability for a product (artificial penis) that had required a number of prosthesis replacements, injuries, pain, and discomfort.

The court found a lack of prevalence in that case because issues of fact and law differed 'dramatically' from individual to individual, without a common cause of damage. The court observed that generally, with respect to product defects, the individual issues can numerically exceed the common issues. However, in this specific case, there was no proximate cause applicable to each potential class member. The defense (such as not following directions, acceptance of risk, concurrent negligence, and the level of limitation) could depend on facts specific to each claimant. Moreover, the products were different, each claimant had a different complaint, and each received different information and expectations (*assurances*) from their doctor.

With regard to superiority, the court found that the specific problem of each claimant would lead to insurmountable problems in a class action, keeping in mind that the individual disputes differed depending on the model of the prostheses, which were made over a 22-year period. The court noted that the individual actions, on the other hand, would be relatively simple, since they were based on a claim regarding a specific model or on the statements of a particular urologist.

D. The *Posner* case[14] (from the name of the judge), involved allegations of negligence by a group of hemophiliacs who were infected with the AIDS virus because of contaminated blood.

The main argument against superiority in this case was the risk of bankruptcy with respect to companies that might not have been legally liable. In fact, Judge Posner was particularly concerned that one jury hearing a single class action case could determine the destiny of an entire industry. He emphasized that there were, individually, varying degrees of liability, in part because of the various state standards of negligence.

---

13 *In re American Medical Systems, Inc., et al.*, 75 F.3d 1069 (6th Cir. 1996).

14 *In re Rhone-Poulenc Rorer, Inc., et al.*, 51 F.3d 1293 (7th Cir. 1995).

E. The *Cimino* case,[15] involved reparation for damages caused by asbestos. The case was already in the third phase; in the first phase, many defendants had made an agreement and many had gone bankrupt, so only five of them remained. In the first phase, the court found that the defendants knew or should have known that their asbestos insulation caused a risk of illness in plaintiffs. In the next phase (sampling), the court decided if there were exposure to the product between the years 1942 and 1982, if the exposure took place for sufficient time and intensity to cause lung damage, and if the asbestos were present in the product, in some cases it would have been the cause of illness. The compensation was calculated for each claimant, based on the type of disease (mesothelioma, lung cancer, other type of cancer, asbestosis, pleural illnesses).

The decision was reversed on appeal, invalidating the proceeding from the last phase (sampling) forward, including the agreement plan (*parties' settlement plan*) and the application proceedings (*extrapolation cases*). The grounds for reversal were the absence of prevalence, in that it could not be determined that the product had been the cause of the illnesses, this being a case of a judgment for damages in which the individual issues predominated over the common issues.

F. The *Amchen* case, also addresses damages caused by asbestos.

On appeal,[16] prevalence was not recognized because, although there was a common issue (the ability of asbestos to cause physical injury), the members of the class were subjected to different products containing asbestos for different periods of time, in different ways. Some members were not ill or had only asymptomatic diseases, while others suffered from lung cancer, asbestosis or mesotheliomas. Each claimant had a different history with respect to smoking, and treatment expenses had also varied. The court recognized that they had little in common, which meant there was an absence of prevalence.

Additionally, the court affirmed that in asbestos class action cases, the absence of predominance of common issues was a typical problem because of a large number of significant individual issues.

Moreover, the court noted a lack of superiority which raised problems with respect to the efficiency and the fairness of the decision, due to the existence of too many uncommon issues and an excessive number of class members, which barred certification as a class action. On the other hand, the court noted that each claimant had a significant interest in maintaining control over his or her individual claim and that, moreover, the damages were relevant. Therefore, the court found that it was inappropriate for each claimant to be bound by a group judgment.

---

15 *Cimino et al. v. Raymark Industries, Inc., et al.*,151 F.3d 297 (5th Cir. 1998).

16 *Georgine et al. v. Amchen Products, Inc., et al.*, 83 F.3d 610 (3d Cir. 1996).

The *Amchen* case reached the Supreme Court of the United States,[17] which invalidated the global settlement agreement signed by the parties in the first instance because the class could not satisfy the requirements of common issues, predominance, and adequacy of representation. And, referring to the arguments of the appeals court, which were transcribed in the decision, it decided it was not enough that the claimants had the shared experience of exposure to asbestos, given the large number of issues peculiar to each category and the significance of the non-common issues.

5. The Protection Requisites of Homogeneous Individual Interests: Common Origin and Homogeneity

The requisites of Brazilian law for jurisdictional protection of homogeneous individual interests are well-known. Section III of the Sole Paragraph of Art. 81 of the *CDC* (applicable to a public civil action by operation of Art. 21 of Law No. 7.347 of July 24, 1985, introduced by Art. 117 of the *CDC*) conceives of 'homogeneous individual' rights or interests as 'those deriving from a common origin,' thus permitting protection thereof by the group.

Homogeneity and *common origin* are therefore the requisites for group treatment of individual rights.

Let us begin with common origin. Common origin may be *de facto* or *de jure*, and as noted by Kazuo Watanabe, the term

> does not necessarily signify a factual and temporal unit. The victims of repeated deceptive advertising in the media of a product injurious to health that was acquired by various consumers over a long space of time in diverse regions have, as a cause of their damages, homogeneous facts such as to give a 'common origin' to all of them.[18]

But it is also essential to note that common origin (cause) may be proximate or remote. Proximate or immediate, as in the case of an airplane crash, in which a number of people are the victims; or remote, mediated, as in the case of injury to health attributed to a potentially injurious product, which may have had as proximate cause personal conditions or improper product use. The more remote the cause, the less homogeneous the rights will be.

Regarding homogeneity, little has been said. Perhaps the very wording of the law leads one to believe that 'homogeneity through common origin' may be

---

[17] *Amchen Products, Inc., et al. v. Windsor et al.*, 521 U.S. 591, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997).

[18] Kazuo Watanabe, Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto (6th ed., Forense Universitária 1999).

a unique requisite. Rights would be homogeneous provided that they had a common origin.

Nevertheless, it is evident that common origin – above all if it is remote – may not be sufficient to achieve homogeneity. In the consumption of a potentially injurious product, there will be no homogeneity of rights between one consumer who was exclusively victimized through the consumption of that product and another consumer, whose personal health condition caused him or her physical injury independently of the use of the product or one who improperly used the product. There is no homogeneity between situations of fact or law in which the personal characteristics of each consumer behave in a completely different manner.

6. Homogeneity and Prevalence of Common Interests. The Legal Potentialities of the Petition

Now then, consideration must be given to the criteria of *prevalence of the group dimension over the individual* as embodied in Rule 23 of the FRCP, so that one can determine from a practical point of view whether or not the individual rights are, in fact, homogeneous because of their common origin.

If the prevalence of the group aspects is nonexistent, it is my belief that the rights are heterogeneous, even though they may have a common origin. In theory, one can likewise state that this common origin (or cause) will be remote and not proximate. In this case, if homogeneous rights are not involved, group protection cannot be admitted because of the absence of the legal potentialities of the petition.

If jurisdictional protection of individual rights through a group action is circumscribed within the Brazilian system to *homogeneous* rights, the absence of this characteristic must lead to inadmissibility of the class action in defense of homogeneous rights. If heterogeneous rights are involved, the petition for group protection will have no 'legal possibility,' a condition of admissibility in civil law.

Using this route, the conclusion arrived at is that the *prevalence of common questions over individual ones*, which is a condition of admissibility (*certification*) in the American system of 'class actions for damages,' is also a condition in Brazilian law, which allows group protection of individual rights only when they are *homogeneous*. With the individual questions prevailing over the commonality questions, the individual rights will be heterogeneous and the petition for group protection will become legally impossible.

7. Superiority (*rectius*, Efficacy) of Group Protection and Interest in Acting. Evidence of the Causal Connection

The requisite of *superiority* for group protection, with respect to the individual, in terms of justice and efficacy of the court's decision, can be approached in Brazilian

law from two aspects: that of the interest to act (another condition of admissibility in civil law) and that of the effectiveness of the proceeding.

However, it is first essential to note that, instead of requiring superiority (appropriate to a legal system that, according to some,[19] gives preference to individual procedural protection over group procedural protection), under the Brazilian system one would more properly speak about the need for the *efficacy of group protection*.

Note that the interest to act under the provisions of civil law is the condition of action that demands, for the exercise thereof, the need and usefulness or expediency of the jurisdictional measure invoked, in addition to its appropriateness for protecting the right claimed. This is to say that one can only seek judicial channels when necessary, *i.e.* when the forces of substantive law are shown to be insufficient for resolving the dispute, and the usefulness or expediency corresponds to verifying specifically that the legal action invoked will be useful or expedient for ensuring the well-being claimed by the principal. The requisites of need and expediency are placed on the plane of procedural economics because the jurisdictional measure, which demands an expenditure of energy, can be activated only when it is necessary and useful.

In turn, the adequacy requirement means that the legal action measure invoked must be adequately adjusted for protecting substantive law; this principle is responsible for choosing the procedural channel established by law that is best suited to protect a specific interest.

Thus, it is not difficult to establish the correlation between the *superiority* requirement of the class action, with respect to other means for resolving disputes (proper to common law), and the interest-expediency and interest-appropriateness of civil law. If the jurisdictional measure resulting from the public civil action in defense of homogeneous individual rights is not as effective as when it derives from individual actions, the group action will not show itself to be expedient for the protection of the aforementioned interests. And moreover, it will not be characterized as an adequate channel for protection thereof.

The explanation: the public civil action in liability for damages individually incurred, as is well-known, leads to a generic condemnatory decision that recognizes the liability of the defendant for the damages caused, and orders said defendant to make reparations to the victims or their successors, even though these successors may not be yet identified (Art. 95 of the *CDC*). What follows is an execution of the verdict or judgment, on an individual basis, in which it will be necessary to evidence

---

[19] This is the position, for example, of Professor Linda Mullenix who arrives at this understanding from Rule 23 and from the considerations of the Advisory Committee, stating that the prevalence of common issues is not *per se* sufficient to justify a sub (b)(3) class action, in that another method of handling the lawsuits may be more advantageous. *See* Fed. R. Civ. P. 23(b)(3) commentary at 123 (1999) (amended in 1966).

to those who qualify the personal injury and the causal connection between the latter and the general damage recognized by the verdict, in addition to quantifying the losses.[20]

Now then, proof of the causal connection can be so complex, in the specific case, that it will render the generic judgment in favor of plaintiffs under Art. 95 practically ineffective, which only recognizes the existence of general damages. In that case, the victim or his or her successors will have to face an executionary proceeding as complicated as an individual condemnatory action, because there the defendant must be assured of the guarantees of legal due process, and notably the right of cross-examination and ample defense. And the route of group action will have been inadequate for obtaining the protection sought.

The same difficulty will be encountered in all public civil actions in defense of homogeneous individual rights. Think about a petition for the restitution of an unconstitutional tax on a class of taxpayers, or the refunding of overpaid monthly school tuition, or moreover the payment of a difference due by the Social Welfare Fund or by banks when implementing monetary indexing rules. In these cases and in many others, the recognition of general damage will be extremely useful and adequate for executions that will demand sufficient simple proof.

The problem is found specifically in the area of damages caused by product defects, and is restricted to actions for recovery of losses individually incurred (the so-called 'Brazilian class action'), *i.e.* precisely the action provided for in Arts. 91–100 of the *CDC*, which corresponds to the class action for damages under the American system.

Even with respect to these class actions, proof of a causal connection can be simple: in an airplane crash, in an accident caused by the collapse of a building, in a factory explosion, in the injuries to consumers because of difference in weight of the product sold, the usefulness of the group sentence will be unquestionable. But in other cases, everything will still have to be proven in the settlement proceeding, making the generic guilty verdict a fallacy.

Some examples will give dimensionality to this statement: first, let us look at some appropriate cases from the American experience, regarding reparation for damages caused by tobacco, racial discrimination, a penal prosthesis, blood contamination and asbestos.[21]

---

[20] I previously noted that the Presidential veto under the Sole Paragraph of Art. 97 of the *CDC* ('The execution of the judgment, which will be by articles, may be carried out in the domicile of the executing party, with only the connection of causality, the damage, and the amount thereof having to be evidenced') was harmless. Leaving aside the matter of jurisdiction – which motivated the veto and which must be resolved on the basis of Art. 101(I) of the *CDC* – it is the very nature of the condemnatory sentence under Art. 95 that the execution must be carried out by articles, with proof being demanded of individual damages and causal connection, as well as quantification of the losses. *See* Pellegrini Grinover et al., *supra* n. 2, at 788.

[21] *See supra* Ch. 4, secs. A–F.

The considerations of the United States courts, including the Supreme Court, make obvious the problems that class actions of this type present, which are insurmountable barriers to the efficacy and fairness of the group decision.

One example taken from Brazilian class actions can be the petition for indemnification, consisting of compensation of smokers for damages caused by tobacco. In this case, one can opine that the group ruling, even if favorable, simply affirms that smoking *can cause* injury to health, ordering the indemnification of those who have, in fact, suffered damages, provided that the causal connection between their illness and the use of tobacco is proven. All such proof must be forthcoming in the execution proceeding, and would be precisely the same as that produced in each individual discovery action. The group judgment will not have had any practical expediency. And, even though it is admitted that the group ruling affirms (foolhardily) that smoking *causes* damage to health, the defendant will be entitled in each specific case to undertake a cross-examination of the personal conditions of the person entitled to indemnification, alleging or proving personal knowledge of the risk of the product, preexisting illnesses, the course that the illness would have taken even without the use of tobacco, the possible causes of death, *etc.* In truth, in this very case, proof of the causal connection would be so complex as to render the generic ruling useless.

It seems possible, therefore, to establish a correlation between the requirement of prevalence of the commonality aspects and the superiority (or efficacy) of protection through class actions. The more the individual aspects prevail over the common ones, the more group protection will be inferior to individual protection, in terms of the efficacy of the decision. In the language of the *CDC*, the more heterogeneous the individual rights, the less useful the generic sentence under Art. 95 and inadequate the route of public civil action for recovery of individual damages is. Thus, in our legal system, the absence of legal feasibility of the petition[22] will frequently increase the lack of interest to act (interest-usefulness and interest-appropriateness).

8. Procedural Technique and Effectiveness of the Proceeding: Efficacy and Justice of the Decisions

In Chs. 6 and 7 *supra*, we examined the requisites for prevalence of common issues and for superiority (or efficacy) of the group decision based on the category of the conditions of the action. But the procedural technique is at the service of the process, so that the latter can achieve not only its legal purposes (resolution of disputes of substantive law) but also its social (to appease with justice) and political (participation, including that of the adversary) purposes. And it is through the procedural technique that the final purposes of jurisdiction are ensured. Therefore,

[22] *See supra* Ch. 6.

procedural technique must be regularly revisited, in order to ensure the efficacy of the judgment.

The interpretation given in Ch. 7 *supra* on the interest-utility and the interest-appropriateness for admissibility of a group reparatory action for damages individually incurred is in accordance with the social and political purposes of the proceeding.

This means that the requisite of superiority of group protection, in terms of 'justice and efficacy of the decision' (Rule 23(b)(3) of the FRCP of 1966), must also be examined with respect to the need for the social function of the process, understood as an instrument that effectively leads to fair appeasement.

We are now entering upon one of the topics held most dear by modern Brazilian procedural specialists, that of the effectiveness of the proceeding and of its material instrumentality, to transform it into an instrument that is in accordance with the underlying social reality, and is suited for the effective resolution of disputes of substantive law.

A generic ruling that is not suitable for bringing pacification with justice and a group proceeding incapable of resolving the substantive law dispute cannot find shelter in modern procedural law, such as that of Brazil. The procedural technique must then be used for avoiding and correcting any possible detouring of a proceeding, which must always adhere to social realities.

Thus, the need is reinforced to avail oneself of the procedural technique, with institutions and conditions of action, in order to avoid having the proceeding result in something ineffective (in terms of usefulness of decision), inadequate (in terms of correlation between the claim for substantive law and the protection sought), or unfair (in terms of limiting the cross-examination). Or to correct its bearing or direction at any time, since it is known that there is no preclusion about the conditions of the action or about the guarantees of legal due process, which must be broadly ensured to the defendant in the settlement proceeding.

In those cases where the generic ruling of Art. 95 of the *CDC* is of such little use, to the point of being inadequate to resolve a dispute fairly, the verification of the interest-utility and the interest-appropriateness will transcend the scope of the procedural technique and become inscribed as a requirement of the effectiveness of the proceeding.

Nor should it be forgotten that a jurisdictional measure absent practical usefulness lowers the prestige of the process and constitutes a smokescreen before the broad vision of access to justice. Access to justice cannot be an empty process. Facilitating such access through the intermediary of collective or group actions is a major advancement, assimilated by Brazilian procedural law. Permitting public civil actions which are unsuitable for effectively managing useful legal procedures only discredits the legal procedure, all to the frustration of the consumers, to say nothing of lowering the prestige of the judicial branch.

9. Conclusion: Applicability of the Requisites of 'Prevalence' and 'Superiority' (or 'Efficacy') to the Brazilian Public Civil Action for Reparation of Damages Individually Incurred

Comparative law has irrefutable usefulness in all legal disciplines. By comparing foreign and domestic institutions, with a very clear view of their differences and their similarities, we can obtain a better understanding of domestic law and derive the inspiration to continue making improvements to it.

It is obvious that foreign solutions cannot be mechanically imported, since each system has its own peculiarities and social, political, and economic realities can vary a great deal from one country to another. But the foreign experience in confronting and seeking solutions to common problems must not be disregarded.

The United States of America has a long tradition of collective legal actions. The American courts have been working for 33 years in the area of class actions for damages and with the new regulations of the FRCP of 1966. Brazil cannot simply ignore this experience.

This is not about an unconditional acceptance of the particularities of foreign institutions. When the *CDC* introduced the group action into Brazilian law in 1990 in defense of homogeneous individual interests,[23] it was without doubt inspired by the American institution of class actions; however, Brazil adopted an original discipline, as can be seen for example from the nonexistence of the *opt out*, from the different treatment of *fluid recovery*, from the adoption of a *res judicata erga omnes*, but only for benefitting the holders of individual rights, which still can drive their personal actions following the dismissal of the group legal action.[24]

But, if the factual reality is the same, if the practical questions are similar, if there is a commonality of general principles (access to justice, effectiveness of the process, justice from the decisions, legal due process), certainly the foreign experience can offer parameters of undeniable usefulness.

Thus, it is with the requirements of prevalence of the common aspects over the individual aspects, and the superiority of group protection in terms of justice and efficacy of the decision, insofar as concerns class action for damages, to which the Brazilian public civil action for recovery of damages individually incurred corresponds.

The sole difference insofar as concerns 'superiority' is that this is required in a body of law – but not Brazilian – in which the individual aspects have preference over the social. For this reason, preference is given in the United States to the individual action

---

[23] Previous to Law No. 7913 of September 7, 1989, a form of class action was instituted for protection of the interests of investors in the securities market, but it restricted the Public Prosecutor's legitimacy to act, and provided the matter with a treatment very much different from that adopted by the *CDC*.

[24] Regarding the peculiarities of the Brazilian class action in comparison to the American class action, *see* Pellegrini Grinover et al., *supra* n. 2, at 766–69, 793–94, 803–09, *etc.*

over the group action where the efficacy is equal for both processes. In Brazil it is different: the trend is to move more and more from an individualized process to a social process, with substantive law trends accompanying this.

But even in Brazil, preference cannot be given to collective actions if these actions are absent efficacy at least equal to what one can attain in individual actions. If a group verdict does not serve for facilitating access to justice, if the individuals are obligated to exercise – in an execution proceeding – the same procedural activities or actions that they would have to exercise in an individual condemnatory action, the jurisdictional measure would be ineffective, representing absolutely no gains for the people.

With these observations, it seems to me that the requisites of prevalence of the common aspects over the individual aspects and requisites of superiority (*rectius*, efficacy) of group protection over individual protection are fully applicable to the public civil action for recovery of damages individually incurred. They must be demanded in the corresponding admissibility proceeding, in order to preserve the effectiveness of the proceeding.

References

Cruz e Tucci, José R. 'Class action' e mandado de segurança coletivo: diversificações conceptuais 29–30 (1990).

Pellegrini Grinover, Ada, et al. Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto 765–69, 788, 793–94, 803–09 (5th ed., Forense Universitária 1997).

Taruffo, Michele. *I limiti soggetivi del giudicato e le class actions*, 1969 Riv. dir. proc. 609, 619–28.

Watanabe, Kazuo. Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto (6th ed., Forense Universitária 1999).

Information about the author

Ada Pellegrini Grinover (São Paulo, Brazil) – Professor at the University of São Paulo, Honorary President of the Brazilian Institute of Procedural Law (Instituto Brasileiro de Direito Processual (IBDP)), Doctor honoris causa in Milan University (Italy) (600 Rua Silvia Celeste de Campos, São Paulo, 05462-010, Brasil; e-mail: adapell@ pbrasil.com.br).