Consumer and Products Class Action Practice Across Multiple Jurisdictions

Prepared for the International Association of Defense Counsel (IADC)

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I. Introduction

When a product crisis unfolds — whether in the pharmaceutical, automotive, industrial equipment, or medical device sector — legal exposure rarely stops at a single border. A recall announced in one country triggers regulatory inquiry in another. A regulatory admission in one proceeding becomes a roadmap for plaintiffs' counsel in three others. A settlement structure negotiated without regard for parallel proceedings in a second jurisdiction may unravel the first – or create unintended costs and consequences for years to come. Counsel who approach multi-jurisdictional crises through a single-jurisdiction lens are not managing risk- they are creating it.

Australia is considered one of the most likely jurisdictions outside of North America where a corporation may face a class action, with an entrepreneurial litigation funding industry and a well-established plaintiffs' bar. In Israel, the number of class actions filed has increased dramatically — from only a few cases per year in the first years following the enactment of the Class Actions Law, 2006, to more than 2200 annually within two decades.[2] In Canada, regulatory compliance and product liability litigation intersect in complex and evolving ways, with some provincial courts looking to voluntary product safety standards as benchmarks for what a reasonable manufacturer ought to have done in designing, manufacturing, and marketing a product. In the United States, plaintiffs increasingly advancing economic loss theories based on alleged overpayment or diminished value instead of the more traditional bodily injury-based cases. At the same time, the risk environment is amplified by the prevalence of high-value nuclear verdicts and corresponding settlement pressure, which can drive early resolution of claims that may have traditionally been highly contested. U.S. proceedings also frequently serve as a catalyst for copycat litigation in other jurisdictions, reinforcing the country's role as a global hub for product-related class action risk.

Taken together, these four jurisdictions illustrate how a single product crisis can generate simultaneous, overlapping, and mutually reinforcing legal proceedings across the globe. This paper examines the procedural frameworks, strategic pressure points, and practical defence considerations in Australia, Canada, Israel and the United States.

II. The Threshold: Who Can Sue, and How Easily?

A. Australia

[1] Thanks to Anna Stabb and Yassin Gagnon-Djalo (McMillan LLP) and to Jade Bouchier (Clayton Utz) for their assistance on this Paper

[2] CA (DC Ct.) 47147-04-21 *Liran Stern v. Kia Motor Co*., 6 Nevo Legal Database (Aug. 22, 2023) (Isr.).

The Australian class action statutory regime is considered to be relatively plaintiff-friendly, in part because there is a low bar for claimants to commence a class action — particularly as there is no certification process and no requirement for individuals to register from the outset to be part of a class.

Class actions may be commenced by a single claimant or multiple claimants, provided that: there are seven or more persons who have claims against the same respondent; the claims of those persons are in respect of, or arise out of, the same, similar or related circumstances; and the claims of all those persons give rise to a substantial common issue of law or fact — with no requirement for common issues to predominate over individual issues.

The practical effect of this low threshold is significant. Class actions in Australia range from consumer products, life sciences, employment underpayment actions, anti-trust, privacy, cyber, and shareholder and investor matters. It is not uncommon for class actions to "piggy back" off regulatory matters, such as relying upon admissions made in prior regulatory enforcement proceedings, issues identified in government inquiries or by relying on materials filed in overseas proceedings particularly United States Multi-District Litigation proceedings.

B. Canada

Before class actions can move towards trial in Canada, they must clear the initial procedural hurdle of certification or authorization, when a court evaluates whether an action is appropriate for class adjudication. This gatekeeping function is fairly lax: one Ontario judge remarked "I can certify a ham sandwich". [3]

At certification, in the common law provinces, the court does not assess the underlying merits of the claim. Instead, it asks whether the putative class has established that there is "some basis in fact" for each of the certification criteria: (1) whether the pleadings disclose a cause of action; (2) whether there is an identifiable class; (3) whether the claims raise common issues; (4) whether a class action is the preferable procedure; and (5) whether there is an appropriate representative plaintiff.

The court conducts this assessment in light of the three goals of class actions: access to justice, behavior modification, and judicial economy — goals that the Supreme Court of Canada has consistently endorsed through a purposive approach to interpretation.

Procedural variations among Canada's provinces add further complexity. Where multiple plaintiffs' firms seek to represent the same class, the court will hear a "carriage motion" to assess the credentials and capacity of each proposed class counsel — and where there is media attention on a potential issue, plaintiffs' counsel often file within hours of it becoming public. Ontario is known as a jurisdiction that has a more stringent test and cost consequences, whereas British Columbia and Quebec are more plaintiff friendly. Québec

[3] Justice Belobaba

takes a "first-to-file" approach, and there is typically no evaluation of the class applicant or counsel done prior to the authorization hearing.

Quebec, which operates under a Civil Code[4], has an authorization procedure which is considered extremely plaintiff friendly. The evidence considered at the authorization stage in Québec is strictly limited to what has been filed by the class applicant, and the court will take the allegations raised by the applicant as true. Defendants may introduce additional evidence only with leave of the court, and expert evidence is not permitted. While a brief and narrowly scoped examination of the proposed class representative may be authorized with leave, the overall evidentiary record remains highly restricted.

Given the low threshold for authorization and the limited scope of admissible evidence, it is not uncommon for claims that are authorized to proceed to be subsequently dismissed, in whole or in part, following a full adjudication on the merits.

C. Israel

The procedure for bringing a class action in Israel is divided into two main stages: the certification stage ("First Stage")[5] and examining the class action on its merits ("Second Stage"). Every class action begins with a Motion to Certify the claim as a Class Action ("Certification Motion"), supported by affidavits, documents, and expert opinions.

At the First Stage, the court examines whether the statutory conditions for certification are met: first, that the claim has a reasonable chance of success, in terms of reasonable cause of action and merits of the case;[6] second, that it raises common questions of fact or law;[7] third, that a class action is the efficient and fair method for adjudicating the dispute;[8] and fourth, that the Applicant and counsel can adequately represent the class.[9]

Importantly, the Israeli certification stage is not merely a procedural filter. Israeli courts tend to examine class actions on their merits already at the First Stage. The Israeli Supreme Court has repeatedly clarified that the evidentiary threshold applicable at the First Stage is materially lower than the burden borne by the Applicant at the Second Stage — the Applicant must show, inter alia, that the claim raises material questions of fact or law common to members of the class who share a similar cause of action, and that there is a reasonable possibility that such questions will be resolved in favor of the class. This position is applied consistently across Israeli courts, and it contributes to a certification environment that is relatively favorable to Applicants, which in turn may give rise to meaningful financial exposure for Respondents.

D. United States

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[4] *Civil Code of Québec*, CQLR c CCQ-1991.
[5] § 8, Class Actions Law, 5776-2006, SH. 2054 (Isr.); see also LCivA 2128/09 *Phoenix Ins. Co. v. Amosi*, Nevo Legal Database (Jul. 5, 2012) (Isr.), discussing this provision extensively.
[6] § 8(a)(1), Class Actions Law, 5776-2006, S.H. 2054 (Isr.).
[7] Id.
[8] Id. § 8(a)(2).
[9] Id. § 8(a)(3)-(4).

In the United States, class actions serve as the central mechanisms for aggregating claims on behalf of a large group of plaintiffs. Class actions can be filed in federal or state courts, allowing plaintiffs to strategically determine the best forum for their suit depending on the claims, amount in controversy, and the breadth of the underlying class. While Federal Rule of Civil Procedure 23 governs certification in federal courts, many states have analogous, although not identical, procedural rules. Some state courts – such as California and New York - are perceived as more favorable to plaintiffs in class action litigation due to favorable state laws, lenient class certification standards, and more plaintiff-friendly jury pools. The Class Action Fairness Act of 2005 ("CAFA") expanded federal jurisdiction over certain that did not meet the traditional requirements for federal subject matter jurisdiction to try and curb forum shopping.[10]

Regardless of forum, plaintiffs seeking to proceed as a class must satisfy certification requirements that function as a key gatekeeping mechanism for the litigation. In federal court, the class must demonstrate (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy.[11] Additionally, the class must demonstrate that common issues predominate over individual ones, and that a class action is the superior method of adjudication. Courts apply a "rigorous analysis" at this stage, often engaging with aspects of the merits. State courts generally apply similar criteria, though the intensity of review and procedural nuances can vary by jurisdiction. Certification is frequently contested, involves substantial motion practice and intensive discovery. A denial of class certification can effectively end some litigation as many class actions do not involve significant individual harm, meaning it's no longer economically feasible for the individual cases to be pursued.

It will be of no surprise to anyone even somewhat familiar with United States litigation that there are no significant barriers to bringing a class action suit. Most plaintiff attorneys utilize contingency fee arrangements which reduce financial barriers for plaintiffs. Additionally, broad discovery rules can provide leverage for pressuring a quick settlement once a claim proceeds past the certification stage. Defendants can seek to protect themselves in certain circumstances by using mechanisms such as arbitration clauses, including class action waivers, to limit suits to individual, rather than collective, claims. Without such protections, however, the availability of multiple forums and plaintiff-favorable litigation incentives means that claims can often still be brought with relative ease.

III. Opt-Out and Class Composition

A. Australia

Class actions in Australia adopt an "opt out" procedure. All persons who fit the group member description are considered to be part of the class and are bound by the court's decision, unless they have notified the court at the specified time that they wish to "opt out." The court will order the terms and method of distribution of the opt out notice aimed

[10] *Class Action Fairness Act of 2005*, Pub. L. No. 109-2, 118 Stat. 4 (2005).
[11] Fed. R. Civ. P. 23.

at ensuring that group members are made aware of the class action and can exercise their right to opt out if they so choose.

B. Canada

Canada does not have a uniform national approach. Jurisdictions differ on the opt-in/opt-out question: British Columbia, Newfoundland, and New Brunswick require non-resident class members to actively opt in, while Ontario, Manitoba, Nova Scotia, Alberta, Québec, and the Federal Court take the opposite approach, binding all potential class members unless they opt out.

This divergence has significant implications for defendants in a national class. Where a concurrent proceeding has been commenced in Québec or another province and class counsel in that jurisdiction declines to participate in the settlement, the purported national class may need to "carve out" that province — a settlement may be approved for the remainder of Canada while the proceeding in the carved-out province continues independently. Recent judicial experience confirms that coordinating parallel provincial class actions raises complex issues of notice, opt-out deadlines, and class period alignment that must be carefully managed at the outset.

C. Israel

The default mechanism for inclusion in a certified class in Israel is opt-out: class members are included automatically unless they give notice of their desire to be excluded within 45 days of publication of the notice of certification, or by a later date prescribed by the court.[12]

D. United States

The approach related to opt-out in the United States is dependent on type of certified class. For classes certified under Federal Rule of Civil Procedure 23(b)(3), the default is an opt-out system as, per the Rules, all individuals who fall within the class definition are automatically included and will be bound by the judgment or settlement unless they affirmatively request exclusion. The notice required for the class members must include a clear explanation on a variety of things, including the right of class members to opt out, along with the procedure and deadline for doing so.

By contrast, class actions certified under Rule 23(b)(1) or 23(b)(2), which typically involve injunctive or declaratory relief, do not ordinarily provide class members with an automatic right to opt out. This is a result of the different nature of the claims and remedies at issue in these types of class action cases.

If a class has not yet been certified by the time settlement is reached in a class action case, the rules applicable to classes certified under Federal Rule of Civil Procedure 23(b)(3), including notice and an opt-out system, is applicable to the class of those settlements.

[12] Class Action Law, *supra* note 3, § 11(a).

IV. Discovery and Information Gathering

A. Australia

During the litigation process, parties will gather information by way of document discovery, subpoenas, and sometimes interrogatories. Australia does not have depositions. Instead, parties are generally compelled to provide the other side with documentary evidence relevant to the issues in dispute.

Traditionally, parties had an obligation to provide "general discovery," which requires the production of all documents relevant to the dispute in their possession, custody, or control. However, given the significant increase in the volume of data due to electronic communications, especially in class actions, courts more commonly order discovery based on categories.

Parties are subject to an implied undertaking not to use any information obtained through the court processes, including discovery and evidence, for any purpose other than the proceedings at hand.

B. Canada

Following certification in Canada, there will be oral and documentary disclosures. For example, Ontario's Rules of Civil Procedure require each party to identify all relevant documents in a specified format (the affidavit of documents), produce such documents for inspection, and produce at least one representative to be examined by the other side.[13] There is also a deemed undertaking rule, similar to that in Australia. Oral discovery rights are much more constrained than in the United States.

In Québec, once authorized, the proceeding follows the general course of a civil matter: the class representative files an originating application, the defendants file their defences, expert reports are prepared, and the parties proceed with the usual discovery process, consisting of documentary exchanges and depositions, subject to certain restrictions. While the defendants may examine the class representative, they may not depose other class members without leave of the court.

An important discovery consideration arises in the context of partial settlements involving cooperation obligations. Canadian courts have confirmed that where a settling defendant agrees as part of a settlement to provide documentary disclosure to the plaintiff, non-settling defendants are entitled to receive the same documentary disclosure contemporaneously.[14] Courts have affirmed that examinations for discovery and document requests are essential elements of the pre-trial phase in civil matters, whose goal is to facilitate the search for truth, ensure that trials are conducted fairly and efficiently, and encourage out-of-court settlements — and that courts should encourage the fullest and earliest possible disclosure of evidence in line with the duty of transparency and

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[13] *Rules of Civil Procedure*, RRO 1990, Reg 194.

[14] *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 SCR 623, at para 24.

cooperation required for the sound management of proceedings.[15] A settling defendant's cooperation obligations, if treated as a form of pre-trial document production, must therefore be communicated to all parties rather than flowing exclusively to plaintiff's counsel. Defence counsel negotiating cooperation clauses in product liability settlements must account for the risk that those clauses may be characterized as documentary discovery, triggering symmetrical disclosure obligations to non-settling defendants.

C. Israel

Disclosure in Israeli class actions is limited, particularly at the First Stage. Courts generally restrict document production to small, specific sets of documents directly relevant to the threshold conditions for certification. This limitation is intended to prevent "fishing expeditions" where plaintiffs might file unsubstantiated claims and seek supporting evidence after the fact.[16]

A plaintiff seeking disclosure must demonstrate that the requested documents are relevant to the certification requirements and provide an initial evidentiary basis for the claim. Alongside standard document discovery, Israeli civil procedure allows the use of interrogatories, but depositions are not available, and e-discovery is rarely used — though it has become somewhat more common in recent years, particularly in large, complex cross-border cases.

D. United States

Discovery in class actions can occur both before and after class certification, and courts will often bifurcate discovery to focus first on certification, and later, the merits. Certification-related discovery typically focuses on topics such as commonality, predominance, and adequacy of representation. Merit-related discovery mirrors discovery typical of that in the United States, only it tends to be incredibly more broad, cumbersome, and costly than individual case discovery.

Discovery in the U.S., including class actions, include document requests, interrogatories, requests for admission, and depositions of parties, fact witnesses, and experts. Depositions are a central feature of U.S. practice and may be used both to discover information and to preserve testimony for trial. In addition, in Federal cases, parties are subject to mandatory initial disclosures, requiring the early exchange of key information without awaiting formal requests.[17]

E-discovery plays a prominent role in U.S. class actions, often involving large volumes of ESI. Courts frequently require parties to negotiate detailed protocols governing the scope, search methodologies, custodians, and production format. Defendants increasingly seek limitations through the court due to the cost and time involved in e-discovery when an agreement cannot be reached with plaintiffs and emphasize things like proportionality

[15] *Association pour la protection automobile (APA) c. Nissan Canada inc*., 2021 QCCS 4490, at para 11.
[16] LCivA 10052/02 *Boaz Yifaat v. Delek Motors et al*., 520 Nevo Legal Database (June 3, 2003) (Isr.).
[17] Fed. R. Civ. P. 26.

(importance of the issues, the amount in controversy, and the burden versus benefit of proposed discovery.

To ensure confidential information is not disclosed to any unnecessary individual as a part of the subject litigation, the United States– particularly defendants – rely heavily on protective orders. These orders not only detail how to designate what information (documentation or testimony) is deemed confidential, but it also identifies who can access the information, how it can be used, how it must be protected, and typically what to do with said information upon the completion of the case.

Discovery disputes are common and can be managed via discovery conferences, motion practice, and hearings. Sanctions may be imposed for discovery misconduct, including failure to preserve relevant information. Overall, U.S. discovery is meant to facilitate the broad exchange of information to promote resolution on the merits, but often at the detriment of large, corporate defendants. For many such defendants, it is often costly and complex, especially in large-scale litigation such as class actions.

The other three jurisdictions covered in this paper are notably more restrictive on discovery than the United States — none permit the broad, merits-stage depositions that characterize U.S. federal class action litigation, and all exercise some form of judicial oversight over discovery scope. Australia and Israel both prohibit depositions entirely; in Canada it is permitted post-certification or authorization but only for the class representative. This has significant implications for multi-jurisdictional defence strategy: documents produced in broad U.S. discovery may be pulled into Australian, Canadian, or Israeli proceedings, but the reverse will rarely be true.

V. The Role of Regulatory Action in Shaping Civil Proceedings

A. Australia

In Australia, it is not uncommon for class actions to "piggy back" off regulatory matters, such as relying upon admissions made in prior regulatory enforcement proceedings or issues identified in government inquiries both in Australia or overseas. This dynamic is especially acute in the product liability context, where a recall, a regulatory finding, or a public inquiry can rapidly supply plaintiffs' counsel with the factual foundation — and the narrative — for a class action.

B. Canada

In Canada, you also see litigation triggered following regulatory action, however, the interplay between regulatory action and civil litigation is complex and depends on whether the remedy offered by the Company appropriately addressed the hazard and consequences flowing therefrom and there is evidence that those impacted by the regulatory matter were included.

Under the five-part certification test, certification requires that a class action be the preferable procedure — a fair, efficient, and manageable method that is superior to reasonable alternatives, which include individual actions, administrative schemes, and remedial programs such as recalls. Ontario's 2020 amendments to the Class Proceedings Act[18] strengthened this requirement by mandating that a class action be superior to all reasonably available alternatives, expressly to encourage voluntary compensation schemes and recalls. The legislative changes are why we see an increase in class action activity in British Columbia with national classes.

Cross-border recalls introduce additional complexity. Companies recalling products simultaneously in Canada and the United States frequently find themselves in a regulatory holding pattern: technically free to communicate with Canadian consumers, yet pragmatically constrained by the more stringent approval processes of the U.S. Consumer Product Safety Commission or the National Highway Traffic Safety Administration, for whom a simultaneous announcement is typically seen as operationally critical.

C. Israel

In recent years, there has been a steady increase in class actions filed in Israel, including against international corporations. This increase stems, inter alia, from Israeli Supreme Court rulings that have directly affected the ability to apply Israeli law to foreign corporations. Israeli courts have held that Israeli consumer protection laws may apply even where the terms of use include a choice-of-law section applying foreign law, where the international corporation operates its website with an "Israeli website configuration" or "conducts activities in Israel."[19]

D. United States

In the United States, regulatory action frequently serves as both a catalyst and a roadmap for civil litigation, particularly in the class action and other mass tort context. Regulatory investigations, recalls, public reports, and consent decrees issued by agencies such as the Food and Drug Administration (FDA), Consumer Product Safety Commission (CPSC), National Highway Traffic Safety Administration (NHTSA), Environmental Protection Agency, and Federal Trade Commission (FTC) often provide plaintiffs' counsel with detailed factual records, technical findings, and, in some cases, admissions that can be leveraged in later legal proceedings.

While regulatory findings do not automatically establish civil liability, they can significantly shape litigation by framing the alleged defect, defining the scope of impacted products or consumers/customers, and influencing theories of negligence, strict liability, or consumer protection violations. Moreover, parallel proceedings are common, with companies navigating simultaneous regulatory scrutiny and civil claims, raising strategic considerations around disclosures, timing of recalls, and coordination of communications.

U.S. courts generally permit the use of regulatory materials, subject to evidentiary rules, and plaintiffs often rely on these materials to survive motions to dismiss and to support class certification. At the same time, defendants may argue that proactive regulatory compliance, voluntary recalls, and remediation programs mitigate liability or render class treatment

[18] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.
[19] LCivA 6992/22 *AGODA Co. Pte. Ltd. v. Tzvia*, 30 Nevo Legal Database (May 27, 2024) (Isr.).

inappropriate, particularly where individualized issues of injury or reliance predominate. As a result, the interplay between regulatory action and civil litigation in the United States is complicated, often setting the trajectory for the entire dispute.

VI. Evidence and Expert Witnesses

A. Australia

Parties in Australia will usually be required to prepare expert and lay evidence. Generally, this takes the form of a written statement, which becomes the witness's evidence in chief, with counsel then cross-examining in court. Where there are multiple expert witnesses from similar disciplines, they may be ordered to confer and prepare a joint report notifying areas of agreement and disagreement, and may be sworn in to provide concurrent evidence at trial — a process sometimes called "hot-tubbing" — with experts cross-examined by counsel and often questioned by the judge albeit Australia adopts an adversarial system and not an inquisitorial one.

B. Canada

Expert evidence is a central battleground in Canadian product liability class actions, particularly in pharmaceutical and medical device proceedings. The "first step" in every product liability case alleging a failure to warn is the determination of whether the product can cause the harm alleged in its ordinary use — a showing of general causation — and this determination must precede any inquiry into specific causation in an individual plaintiff's case. As a practical matter, expert evidence is required to show a breach of the standard of care, and the absence of an expert's report on causation, standard of care, and breach of the standard of care in a product liability case is frequently fatal to the plaintiff's claim.

Manufacturers have a duty of care to warn consumers of inherent dangers in a product's use that are known or ought reasonably to be known. However, a mere statistical association between a drug and a disease is not, without more, evidence of causation — it may give rise to a duty to warn, but absent evidence of general causation, there is no culpable negligence.

The admissibility of expert evidence in Ontario is governed by the principles affirmed by the Supreme Court of Canada, which require that an expert recognize and accept a duty to the court to be fair, objective, and non-partisan that overrides the obligation to the party calling them.[20]

For defence counsel, the causation requirement provides a powerful early dispositive tool: where a plaintiff cannot establish general causation on admissible evidence, a motion for summary judgment on that issue may resolve the proceeding entirely without the expense and risk of a full trial. Canadian courts have recognized that general causation can present a

[20] *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23, [2015] 2 SCR 182, at para 30.

"discrete, neat, gating issue" that can be resolved on a motion for summary judgment, thereby saving the parties cost and delay.[21]

C. Israel

Every class action in Israel begins with a Certification Motion supported by affidavits, documents, and expert opinions.[22] If the parties do not reach agreement on a consented resolution, a hearing on the Certification Motion will be held, during which the witnesses who submitted affidavits and expert opinions in support of the parties' arguments will testify.[23]

D. United States

Expert evidence plays a central role in U.S. class action litigation, particularly on issues of causation, defects, and damages. The admissibility of expert testimony requires trial judges to act as “gatekeepers” to ensure that expert testimony is both relevant and reliable. Courts assess factors such as whether the expert’s methodology is scientifically valid, has been tested, subjected to peer review, and is generally accepted in the relevant field. Challenges to expert evidence are commonly brought through pretrial motions to exclude or limit testimony via motion practice, which can be dispositive where a party lacks admissible evidence on essential elements such as general or specific causation.

From a procedure standpoint, retained experts are included in the parties’ exchanged written disclosures. These disclosure include an exchange of expert reports, which sets out the expert’s opinions, methodology, and the bases for those opinions. Expert witnesses are also subject to deposition prior to trial.

At trial, expert witnesses are typically examined and cross-examined in an adversarial format. Given the centrality of expert evidence and the rigor of admissibility standards, U.S. litigation often turns on the outcome of pretrial evidentiary motions, with summary judgment frequently granted where a party cannot marshal admissible expert evidence sufficient to create a genuine dispute of material fact. Damages experts – typically economists or industry specialists – can also be essential to plaintiffs substantiating exorbitant damages, which in turn results in the needs

VII. Legal Professional Privilege, Internal Investigations, and Crisis Communication Management

A. Australia

It is important in responding to a crisis that internal communications in respect to the issues are managed in a way that maintains a claim of legal professional privilege (LPP). In Australia, LPP applies to confidential communications that are created for the dominant

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[21] *Listovets v AstraZeneca Canada Inc.,* 2026 ONSC 220, at para 17.
[22] § 2, Class Actions Regulations, 5770-2010.
[23] Id. § 4 (Isr.).

purpose of giving or receiving legal advice or for use in actual or anticipated litigation. This privilege may be relied upon to withhold communications from compulsory disclosure, such as discovery. However, if the holder acts inconsistently with that privilege — for example by not maintaining confidentiality — the privilege may be waived and the communications disclosed.

In order to provide legal advice in a crisis, it is common for in-house or external counsel to commission a report from a third party or internal subject matter expert to investigate the facts, the root cause, and/or potential remediation. However, if the report is commissioned for multiple purposes — such as addressing regulatory concerns or reassuring shareholders — it will not be subject to LPP. Therefore, prior to the commission of any report, it is important to first carefully consider and document its intended purpose. If there are multiple purposes at play, counsel may want to consider whether it is more appropriate to commission separate legal and non-legal reports.

In certain scenarios, a party may be able to maintain a claim for LPP where it has disclosed the communication to a third party (such as a regulator or another entity in a global corporate structure) for a limited and specific purpose. This is called "limited waiver," and requires that the specific purpose be carefully documented alongside a confidentiality protocol.

B. Canada

In Canada, the equivalent of LPP is solicitor-client privilege, which protects confidential communications between a lawyer and their client made for the purpose of obtaining or giving legal advice.[24] A critical qualification — one directly relevant to product liability crisis management — is that solicitor-client privilege does not extend to disclosure of the underlying facts by those who communicated with the lawyer if those facts are otherwise discoverable and relevant; disclosure of discoverable facts to a lawyer does not render such facts protected by privilege. Defence counsel must therefore ensure that internal investigations are structured to distinguish between the legal analysis of facts — which may attract privilege — and the underlying facts themselves, which do not become privileged simply because they were conveyed to counsel.

Litigation privilege is distinct from solicitor-client privilege and is of particular importance in the product liability context. While solicitor-client privilege protects the ongoing advisory relationship between lawyer and client, litigation privilege protects documents and communications created for the dominant purpose of use in actual or reasonably anticipated litigation.[25]

The scope of litigation privilege in the multi-jurisdictional product crisis context is critically important. The Supreme Court of Canada has confirmed that litigation privilege may retain its purpose — and therefore its effect — where the litigation that gave rise to the privilege

[24] *Solosky v. The Queen*, 1979 CanLII 9 (SCC), at para 28.
[25] *Blank v. Canada (Minister of Justice),* 2006 SCC 39, at paras 59-60.

has ended but related litigation remains pending or may reasonably be apprehended.[26] "Litigation" in this context may be defined broadly: at a minimum, it includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action. Proceedings that raise issues common to the initial action and share its essential purpose also qualify. The boundaries of this extended meaning of "litigation" are limited by the underlying purpose for which litigation privilege is granted — namely, the need for a protected area to facilitate the investigation and preparation of a case for trial by the adversarial advocate.

C. Israel

In Israel, client attorney privilege and litigation work product privilege provide meaningful protection to confidential communications between lawyer and client, as well as to documents and materials prepared for the purpose of existing or anticipated legal proceedings.[27] In the context of a product liability crisis, the initial phase is often marked by heightened media attention and public scrutiny, although this intense coverage frequently subsides relatively quickly. At the same time, active regulators, and in some cases politicians, may seek to initiate regulatory, administrative, or parliamentary inquiries at an early stage. As a result, company officers and other personnel may be required to respond to allegations before related civil proceedings have fully crystallized, creating early exposure well in advance of the affidavits, pleadings, and evidentiary positions that may later be taken in court. It is therefore important to manage the event carefully from the outset so that statements made in the media, before regulators, or in parliamentary or other investigative settings do not prejudice the company's position in subsequent litigation. In practical terms, this requires early legal oversight, disciplined control of internal and external communications, and close coordination among legal, business, regulatory, and public relations teams. It is also important to structure fact-gathering and internal reporting processes in a manner that maximizes the availability of privilege protections while ensuring that the company can respond promptly and consistently across all relevant forums.

D. United States

In the United States, the analogous protections are the attorney-client privilege and the work product doctrine. Attorney-client privilege protects confidential communications between a client and counsel made for the purpose of seeking or providing legal advice.[28] As in other jurisdictions, the privilege applies only to communications—not the underlying facts—and may be waived if confidentiality is not maintained or if the communication is disclosed to third parties outside the scope of the privilege. The work product doctrine, which can be particularly significant in the context of internal investigations, protects documents and tangible things prepared by or for counsel in anticipation of litigation.[29] This protection is broader than attorney-client privilege in that it can extend to materials

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[26] *Blank v. Canada (Minister of Justice),* 2006 SCC 39, at para 38.
[27] § 48 of the Evidence Ordinance [New Version], 5731-1971, SI 421 (Isr.). §§ 2, 19-21, Israel Bar Association Rules (Professional Ethics), 5746-1986.
[28] *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011).
[29] *United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

prepared by consultants, investigators, or other third parties retained or provided instruction by counsel, but it is not absolute and may be overcome in certain circumstances.

In managing a product liability or similar crisis, U.S. courts closely scrutinize whether internal investigations and related reports were conducted primarily for the purpose of obtaining legal advice or in anticipation of litigation, as opposed to ordinary business, regulatory, or public relations purposes. Where documents serve mixed purposes, courts may deny privilege protection, particularly if the investigation would have been conducted in substantially the same way regardless of litigation risk. Accordingly, it is critical that counsel direct and structure internal investigations, clearly document their legal purpose, and distinguish legal analyses from business communications. Companies should also exercise care in crisis communications, including interactions with regulators and public statements, as voluntary disclosures may result in waiver of privilege or provide discoverable evidence. While limited disclosure to government agencies may, in some circumstances, be argued not to constitute a broad subject-matter waiver, U.S. law in this area is nuanced and varies by jurisdiction, making it essential to adopt a cautious and coordinated approach across legal, compliance, and communications functions.

VIII. Costs and Litigation Funding

A. Australia

Generally, costs follow the event in Australia — a wholly successful party will be awarded their reasonable legal costs unless there is some special circumstance justifying another order. If a class action is unsuccessful, liability for the respondent's costs is borne by the lead applicant and not the group members at large; as a result, the applicant may be required to provide security for costs, which is usually met by the litigation funder.

Class actions in Australia are often backed by a litigation funder who pays the applicant's legal fees and provides security for costs throughout the litigation in exchange for a percentage of any settlement or award. Two types of cost orders may be made to address passive group members: "funding equalization orders," which redistribute costs across the whole class at the end of proceedings; and "common fund orders," where each group member who has obtained a benefit is required to pay a percentage commission to the funder.

B. Canada

The approach to costs awards varies across Canadian provinces. Ontario operates as a "loser pays" system: the unsuccessful party on a motion or at trial will usually be expected to pay a portion of the costs of the successful party. British Columbia, by contrast, does not expose class action plaintiffs to adverse costs awards, which is a significant driver of forum selection.

In Québec, as a rule, legal fees are non-recoverable, and each party must bear its own fees. However, reasonable fees of class counsel may be awarded and payable from the total award in favour of the class.

Third-party litigation funding is available and judicially recognized in Canada, though it is subject to court approval and ongoing judicial oversight. Court approval of a third-party funding agreement requires the court to be satisfied that: the agreement is necessary in order to provide access to justice; the access to justice facilitated by the agreement is substantively meaningful; the agreement is fair and reasonable while protecting the interests of the defendants; and the third-party funder is not overcompensated for assuming the risks of an adverse costs award.[30] In addition, the third-party funding agreement must not interfere with the lawyer-client relationship, the lawyer's duties of loyalty and confidentiality, or the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or class members; the representative plaintiff must retain the right to instruct and control the litigation and must not become indifferent in giving instructions to class counsel in the best interests of the class members.[31] Ontario has now codified the third-party funding approval framework in section 33.1 of the Class Proceedings Act.[32]

A significant practical concern for defence counsel is that the deemed undertaking of confidentiality applicable to parties in class proceedings applies equally to the litigation funder under an approved funding agreement. The sharing of documents with the insurers or funders under an approved agreement will not constitute a waiver of privilege, provided the agreement requires the funder to maintain privilege and confidentiality including adherence to the deemed undertaking rule. Defence counsel must ensure, when negotiating settlement or cooperation terms, that the confidentiality protections applicable to the funder are properly documented in the funding agreement.

C. Israel

In Israel, law firms typically finance proceedings themselves on a contingency-fee basis. The Law does not include any provision allowing third-party funding by private, profit-oriented entities, and recent case law has produced conflicting interpretations — with one court holding that such funding may justify dismissal in limine of a Certification Motion (challenge led by Ron Peleg in a precedential manner)[33], and another holding that funding by a private investment fund does not, in itself, justify such a result.[34] This issue is expected to be reviewed by the Israeli Supreme Court and thereafter grant what is expected to be a very influential decision on the entire market.

[30] *Houle v. St. Jude Medical Inc., 2017 ONSC 5129*, at para 63*;* aff'd 2018 ONSC 6352.
[31] *Houle v. St. Jude Medical Inc., 2017 ONSC 5129*, at para 64*;* aff'd 2018 ONSC 6352.
[32] *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ss. 33.1.
[33] CA (DC Ct.) 28974-10-20 *Furth v. Monsanto Co.*, Nevo Legal Database (Aug. 7, 2025) (Isr.).
[34] CA (DC Jm.) 42026-05-20 *Israeli Consumer Council v. Lutonot Club Members Ltd.*, Nevo Legal Database (Dec. 3, 2025) (Isr.).

While the Israeli approach to class actions has traditionally been relatively liberal toward plaintiffs, and courts have generally awarded only modest costs even where class actions were dismissed or withdrawn so as not to discourage the filing of such claims, a recent Israeli Supreme Court judgment may signal a meaningful shift. In that case, following the withdrawal of a class action against automotive OEM, the Supreme Court accepted the defendants' argument (led by Ron Peleg) that the prevailing restrained approach to costs should be reconsidered in light of the growing volume of class actions in Israel. In a 2-1 decision, the Court held that, in appropriate cases, class action plaintiffs may be ordered to pay meaningful costs, thereby instructing lower courts to move away from the automatic assumption that costs should remain nominal.[35] The practical implication is that, although Israel remains a comparatively plaintiff-friendly jurisdiction in this field, defendants may now have stronger grounds to seek more substantial costs orders in response to weak, abusive, or improperly conducted class actions which may hopefully start a chilling effect on frivolous or artificially based cases.

D. The United States

Unlike Australia and many Canadian provinces, the United States generally adheres to the rule wherein each party bears its own legal fees, regardless of the outcome, absent a rare contractual or statutory basis for fee-shifting. In the class action context, this principle is tempered by the “common fund” doctrine, an equitable principle, which permits courts to award plaintiffs’ counsel reasonable attorneys’ fees from any settlement or judgment that creates monetary recovery for the class.[36] These fees are typically calculated either as a percentage of the recovery or through a lodestar method (calculating the reasonable number of hours spent by the reasonable hourly rate), and must be approved by the court as fair and reasonable under federal rules. By contrast, unsuccessful class action plaintiffs are not ordinarily required to pay the defendant’s legal fees, although courts may award costs (as distinct from attorneys’ fees) to prevailing parties under limited circumstances.

Third-party litigation funding in the United States has grown significantly in recent years but remains less formalized and more fragmented than in jurisdictions such as Canada. Funding arrangements are generally permitted, and are typically structured as non-recourse investments contingent on a successful recovery. There is no uniform federal regime governing disclosure or approval of litigation funding agreements, though certain courts and jurisdictions have adopted local rules or standing orders requiring disclosure in class actions or multidistrict litigation. Defendants can seek to learn whether third-party funders are involved through targeted written discovery. Federal bills have been introduced to see transparency to third-party funding, including as recently as earlier this year, but nothing has yet been passed. While funders do not typically assume exposure to adverse costs in the same manner as in loser pays systems, their involvement can raise issues relating to adequacy of representation, control of the litigation, and potential conflicts of interest, all of which may be scrutinized by courts in assessing class certification and settlement approval.

[35] CivA 22239-04-25 *Renault S.A.S. v. Gannot,* Nevo Legal Database (Apr. 13, 2026) (Isr.).
[36] *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

IX. Settlement, Partial Settlements, and Resolution

A. Australia

If the parties reach an in-principle agreement to resolve a class action in Australia, the settlement terms and discontinuation of the proceedings will be subject to the court's approval. The court must be satisfied that the agreed terms are fair and reasonable for all group members. Group members are required to be notified of the terms of the settlement and can object to the settlement, which will be taken into account by the court. The court does not have the power to modify the terms of any agreement.

B. Canada

Court approval of class action settlements requires courts to balance the best interests of class members against the practical realities of litigation. Key factors include the benefits provided to the class — whether financial or otherwise — the risks and costs of continued litigation, the appropriateness of the release's scope, and the integrity of the negotiation process. Courts recognize that a settlement need not be perfect, and that encouraging out-of-court resolution generally serves the interests of both the parties and justice. While the court will not rewrite a negotiated settlement, it may suggest amendments to address obstacles to approval.

Coordinating national settlements across multiple Canadian provinces presents a distinct logistical and legal challenge, as each province in which a class action has been authorized must independently approve any national settlement. Although approval judgments from one provincial court are not binding on others, courts will take cognizance of each other's decisions and expect any departure to be justified where the applicable criteria are sufficiently similar. This dynamic requires defence counsel to carefully manage both the sequence and substance of multi-provincial approvals, remaining alert to how objections raised in one jurisdiction, or variations in class definition or class period between provinces, may create complications elsewhere in the approval process.

In multi-defendant product liability proceedings in Canada, Pierringer-style agreements, which allow a settling defendant to exit litigation while non-settling defendants continue, are a well-established and important tool. However, the use of such agreements carries strict procedural obligations that, if not observed, can result in the drastic remedy of a stay of proceedings. There is a "clear and unequivocal" obligation of immediate disclosure of agreements that "change entirely the landscape of the litigation" : they must be produced immediately upon their completion.[37] Critically, confidentiality clauses in the agreements in no way derogate from the requirement of immediate disclosure.

C. Israel

[37] *Skymark Finance Corporation v. Ontario,* 2023 ONCA 234, at para 47.

An important and increasingly common mechanism in Israeli class actions is mediation — a voluntary and non-binding process that may be initiated by the parties themselves or recommended by the court at any stage of the proceedings. Mediation is conducted in complete confidentiality and communications exchanged during mediation are privileged and inadmissible in court.

Israeli law distinguishes between two types of consented resolutions: settlements and withdrawals. Settlements create res judicata, involve higher monetary compensation, and require extensive judicial review, including publication of the proposed settlement, an opportunity for objections by the public and regulatory authorities, and in some cases the appointment of an appraiser to assess fairness.[38] Withdrawals, by contrast, are typically used in weaker or unsubstantiated claims and are approved more quickly, usually without public notice or external review.[39] Unlike settlements, withdrawals do not create res judicata and therefore do not preclude the filing of a similar Certification Motion on the same matter after the withdrawal.

D. *The United States*

Class action settlements require court approval for any settlement, voluntary dismissal, or compromise of certified class claims. The court must determine that the proposed settlement is "fair, reasonable, and adequate" after considering a range of factors, including the strength of the plaintiffs' case, the risks, costs, and delay of continued litigation, the extent of discovery completed, the effectiveness of the proposed relief, and the terms of any attorneys' fee award.[40] Courts also scrutinize the negotiation process to ensure it was conducted at arm's length and free from collusion.

The approval process typically involves two stages: preliminary approval and final approval. At the preliminary stage, the court determines whether the settlement is sufficiently fair to warrant notice to the class. Class members must then receive the "best notice practicable under the circumstances," informing them of the settlement terms, their rights to object or opt out, and the procedures for doing so. At the final approval hearing, the court considers any objections and evaluates whether the settlement satisfies rule's requirements.

U.S. courts play a more active role than in some other jurisdictions and may require modifications to aspects of the settlement, such as notice procedures, claims processes, or attorneys' fees, before granting approval. However, courts generally refrain from fundamentally rewriting the parties' agreement. Particular scrutiny is applied to settlements reached prior to class certification, which may raise concerns about fairness to absent class members. Courts are essentially acting as a fiduciary on behalf of the class to ensure the overall settlement is fair.

Partial settlements are common in multi-defendant litigation. Under federal practice, settling defendants may be dismissed while claims proceed against non-settling parties. Such agreements often include bar orders or judgment reduction provisions to address

[38] Class Action Law, *supra* note 2, § 18-19.
[39] Id. § 16.
[40] *Armstrong v. Board of School Directors of the City of Milwaukee*, 471 F. Supp. 800 (E.D. Wis. 1979).

contribution or indemnity claims among defendants. Courts evaluate these arrangements to ensure they do not unfairly prejudice non-settling defendants or undermine the interests of the class.

Finally, once approved, a class action settlement is binding on all class members who do not opt out, and it generally has res judicata effect, precluding subsequent litigation of released claims. This finality underscores the importance of robust procedural protections, particularly notice and the opportunity to be heard, throughout the approval process.

XI. Conclusion

Product liability class actions are a global phenomenon, and the strategic decisions made in the first days of a crisis — what to say to regulators, whether and how to recall, which documents are subject to privilege, how to structure an internal investigation, whether to settle with some but not all defendants — will echo across multiple forums for years. The frameworks examined in this paper share important common features: judicial oversight of settlements, default opt-out mechanisms, restrictions on discovery that would be familiar to U.S. practitioners only in relative terms, and a consistent pattern of civil litigation following regulatory action.

The challenge for defence teams is not merely to understand each jurisdiction in isolation, but to build a coordinated strategy that recognizes the ways in which proceedings in each forum affect, and are affected by, proceedings in the others.