1974

CALVER, G.W. Small claims courts

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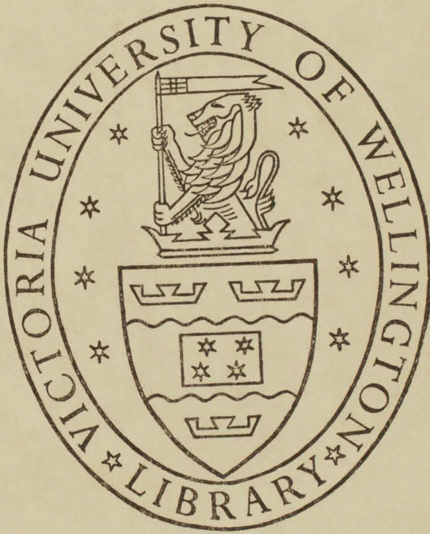
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Bill Calver, 1974

SMALL CLAIMS COURTS

In this paper I set out to examine small claims courts under 3 headings; their raison d'etre, the overseas experience, and possible schemes for New Zealand.

Small Claims Courts: why?

"In their studies of simpler societies around the world, anthropologists have told us of the functions of myth and abstraction in sustaining popular and uncritical faith in social systems. Our legal system could have benefited considerably if some of these anthropologists had stayed home and studied it. For precisely the same phenomena of myth and abstraction have persisted to make the legal system appear to be what it is not. Accordingly, lawyers and judges can maximize their parochial interests undeterred by external scrutiny, challenge and reform.

The easy abstraction, for example, that if people have legal rights, they have justice, or the myth that citizens have access to and can use the legal system, were repeated so often and so authoritatively by the legal establishments that they became, ..., articles of faith to be intoned rather than propositions to be examined. Law students were told that this is a government of law, not of men, without the qualification that the thought is far more an ideal than a reality. Such a qualification might have focused the students' attention on ugly data and dismaying empirical studies......."[1]

While these words of Ralph Nader's may be somewhat overstated in New Zealand context, it is nevertheless true, that a major defect has existed, (with very little criticism having regard to the seriousness of the problem) in the New Zealand legal system for a number of years, and it is only recently that a dialogue has begun about it, and suggestions been made for reform.

The defect of which I speak is the problem associated with the processing of small claims by our courts. And the major drawback with the promulgation of small claims is that the claims are not economic, the cost of taking the claim makes it just not worthwhile to do so. There are of course other problems with our present

1. R. Nader: Introduction to "Counsel for the Deceived: Case Studies in Consumer Fraud" by Philip Schrag.

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SMALL CLAIMS COURTS

Bill Calver 1974.

CORRECTIONS :

The typing of this paper was completed on the day the paper was due, and so there was no time to check for typing errors. There are a number of these, most of them are readily apparent, but there are some where the meaning may not be clear, and these instances are set out below.

✓ Page 5 line 16 only defended ....
✓ Page 16 line 24 is alleging fraud against the other ....
✓ Page 19 line 2 of the cases not still ....
✓ Page 19 line 9 27 were ....
✓ Page 30 line 23 who do not have a majisterial background ....
✓ Page 45 line 26 "the law observed"
✓ Page 47 paragraph headed Reform line 2 however while taxing ....
✓ Page 48 line 13 the strength of the argument ....
✓ Page 51 line 4 as is done in Queensland....

system in dealing with small claims; delay, excess formality etc., but cost is the main problem.

An exception here are the great number of pure debt claims processed annually by our courts. The Consumers' Institute, 2 years ago, surveyed Magistrates Courts in Auckland, Palmerston North, Wellington, Christchurch and Dunedin. One out of every 5 claims of an amount less than $300 were looked at.

The data collected has not yet been processed by computer, but I was involved in coding the information and can state quite categorically two things; that the overwhelming majority of the claims were claims for payment for the provisions of goods or services, and the overwhelming majority of those were undefended. And, as every law clerk soon learns, an undefended claim can be processed reasonably cheaply and reasonably quickly, since normally no messy contested hearing is involved; indeed if default summons procedures is used the whole thing can be done without any court hearing at all.

It may be that the debt collection procedures of the Magistrates Courts could be further streamlined, but this is not the problem with which I concern myself. It is clear, even from a cursory glance at the unprocessed survey data that only a tiny proportion of cases (I would estimate less than 1%) involved consumers suing traders.

The Consumers' Institute Complaints Advisory Service, in the period July 1973 - July 1974 received over 9,000 complaints (see annexed seminar paper "Small Claims Courts: Is There a Need?" presented by the writer earlier in the year), and I think that the Institute would not hesitate to admit that there are probably many more disputes between consumer and trader where the consumer does not contact the C.A.S.

Since there is as yet very little available statistical information which would point out the need for a small claims court, I do not intend to dwell on this aspect. Put shortly, there are 3 reasons which I consider prove the need:

- the first is the easily provable fact that if a consumer wishes to pay a lawyer to spend a morning in the magistrates court over an argument with a drycleaner, then his expenses are likely to exceed the cost of the garment,

- secondly, and partially allied with the above, I noted with some sympathy (in the course of my duties with the Institute) the helplessness of the plight of a consumer with a justifiable claim against a recalcitrant trader,

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- thirdly, while our Magistrates Courts are less formal than the Supreme Court, the degree of formality that does still pertain is likely to be somewhat daunting to a consumer suing a trader. This factor of course is not limited merely to consumer claims; many criticisms of allegedly needless formality are made of the Magistrates and higher courts generally.

With these preliminary general statements in mind, the writer now commences an examination of overseas small claims courts.

OVERSEAS EXPERIENCE

United States of America

It was the Americans who first seemed to have developed the notions of small claims courts, though it should be borne in mind that I use this term rather loosely in this context, to denote simpler procedures for dealing with small claims, as well as separate courts having their own personnel and rules etc.

As early as 1913 Roscoe Pound of the Harvard Law School said: "it is a denial of justice in small causes to drive litigants to employ lawyers and it is a shame to drive them to legal aid societies to get as charity what the state should give as a right".[2]

It was some years later that reform gained momentum, and it took the form (not surprisingly in view of the structure and the United States judicial system) of piecemeal amendments to the court rules of individual states, and in some cases, individual counties. What is probably the best known of the American small claims courts, the New York courts, were introduced in 1934.

Set out below is a chart showing the state of development (as at the end of 1971) of American small claims courts.[3]

2. Original source unknown. Secondary source "Consumer Reports" (U.S.A. Consumers Union) - p.624 October 1971.

3. Source: Consumer Reports - October 1971 opcit.

	Name of Court	Where located	Maximum amount of suit	Are lawyers ordinarily allowed?	Is court procedure informal?	Who can appeal? Plaintiff	Defendant	Roughly what does it cost to sue?
ALABAMA	County Court, Court of Common Please, or Civil Court	County-seats	$200 to $1500	Yes	Yes	Yes	Yes	$3 to $5
ALASKA	District Court	Larger towns	$3000	Yes	Yes	Yes	Yes	$11 to $15
ARIZONA	Justice Court	County seats	$500	Yes	No	Yes	Yes	$5 to $10
ARKANSAS	Municipal Court	Most towns	$300	Yes	Yes	Yes	Yes	$15
CALIFORNIA	Small Claims Branch of Municipal or Justice Court	Larger towns	$300	No	Yes	No	Yes	$5
COLORADO	No small claims court	-	-	-	-	-	-	-
CONNETICUT	Small Claims Division of Circuit Court	Many towns	$750	Yes	Yes	No	No	$3
DELAWARE	Justice of the Peace or Magistrate's Court	Most towns	$1500	Yes	Yes	Yes	Yes	$10
DISTRICT OF COLUMBIA	Small Claims Branch of Court of General Sessions	Washington	$750	Yes	Yes	No	No	$2
FLORIDA	Small Claims Court, Court of Record, or Magistrate's Court	County seats and larger towns	$250 to $1500	Yes	Yes	Yes	Yes	$3 to $10
GEORGIA	Small Claims Court. Justice of the Peace, or Recorder Court	County seats	$100 to $1000	Yes	Yes	Yes	Yes	$2 to $15

	Name of Court	Where located	Maximum Amount of suit	Are lawyers ordinarily allowed?	Is court procedure informal?	Who can appeal? Plaintiff	Defendant	Roughly what does it cost to sue?
HAWAII	District Court	Each island	$300	Yes	Yes	Yes	Yes	$7 to $8
IDAHO	Small Claims Court or Justice Court.	Larger towns	$200	No	Yes	Yes	Yes	$5
	Magistrates Division of District Court	County Seats	$200					
ILLINOIS	Circuit Court	County Seats	$1000	Yes	No	Yes	Yes	$7.50
INDIANA	No small claims court	-	-	-	-	-	-	-
IOWA	Conciliation or Small Claims Court, Division of Municipal Court	Larger cities	$500 to $3000	Yes	Yes	Yes	Yes	$3
KANSAS	Magistrate Court	Larger cities	$500 to $3000	Yes	Yes	Yes	Yes	$5 to $15
KENTUCKY	Magistrate's Court. Justice Court, or Justice of the Peace	Most towns	$500	Yes	No	Yes	Yes	$3
LOUISIANA	City Court or Parish Court	Parish seat	$1000	Yes	Yes	Yes	Yes	$1 to $20
MAINE	Small Claims Division of District Court	County seats and larger towns	$200	Yes	Yes	Yes	Yes	$3
MARYLAND	District Court	County seats and larger towns	$2500	Yes	Yes	Yes	Yes	$4 to $13
MASSACHUSETTS	District Court	Larger towns	$300	Yes	Yes	Yes	Yes	$1.78

	Name of Court	Where located	Maximum amount of suit	Are lawyers ordinarily allowed?	Is the procedure informal?	Who can appeal? Plaintiff	Defendant	Roughly what does it cost to sue?
MICHIGAN	Conciliation Division Detroit Court of Common Please.	Detroit	$300	No	Yes	No	No	$8.50
	District Court	Larger towns	$300					
MINNESOTA	Conciliation Court	County seats	$300 to $550	Yes	Yes	Yes	Yes	$2
MISSISSIPPI	Justice of the Peace	Larger towns	$200	Yes	Yes	Yes	Yes	$6.50
MISSOURI	Magistrate Court	Larger towns	$3500	Yes	Yes	Yes	Yes	$11
MONTANA	Justice Court	Most Towns	$300	Yes	No	Yes	Yes	$7
NEBRASKA	No small claims court	-	-	-	-	-	-	-
NEVADA	Small Claims Division of Justice Court	County seat and larger towns	$300	No	Yes	Yes	Yes	$7
NEW HAMPSHIRE	District Court or Municipal Court	Most towns	$200	Yes	Yes	Yes	Yes	$2.68
NEW JERSEY	Small Claims Division of District Court	County seats	$200 $500 for rent security cases	Yes	Yes	Yes	Yes	$4
NEW MEXICO	Small Claims or Magistrate's Court	Albuquerque	$2000	Yes	Yes	Yes	Yes	$14
	Magistrate's Court	Larger towns	$500					
NEW YORK	Small Claims Branch of Civil or City Court	Larger cities	$500	Yes	Yes	Yes	Yes	$3
		Smaller cities	$500					

	Name of Court	Where located	Maximum amount of suit	Are lawyers ordinarily allowed?	Is the procedure informal?	Who can appeal? Plaintiff	Defendant	Roughly what does it cost to sue?
NORTH CAROLINA	Small Claims Division of District Court	County seats	$300	Yes	Yes	Yes	Yes	$3 to $6
NORTH DAKOTA	Small Claims Court	County seats	$200	Yes	Yes	Yes	Yes	$3
OHIO	Small Claims Court	County seats	$150	Yes	Yes	Yes	Yes	$2.75
OKLAHOMA	Small Claims Division of County Court	County seats	$400	Yes	Yes	Yes	Yes	$8 to $10
OREGON	Small Claims Court	County seats	$200	No	Yes	No	No	$2 to $5
PENNSYLVANIA	District Justice Court Municipal Court County Court	Most towns Philadelphia Pittsburgh	$500 $500 $500	Yes	Yes	Yes	Yes	$7.50 to $15
RHODE ISLAND	Small Claims Division of District Court	Larger towns	$300	Yes	Yes	No	Yes	$1.57
SOUTH CAROLINA	Court of Magistrate	Most towns	$100	Yes	Yes	Yes	Yes	no fee
SOUTH DAKOTA	Municipal Court or Justice of the Peace District Court	Most towns County seats	$500 $500	Yes	Yes	Yes	Yes	$2
TENNESSEE	Civil Division, Court of General Sessions	County seats	$3000	Yes	Yes	Yes	Yes	$8.75
TEXAS	Justice of the Peace	Most towns	$200	Yes	Yes	No	Yes	$5 to $7.50
UTAH	City Court or Justice of the Peace	Larger towns	$200	Yes	Yes	Yes	Yes	$6

	Name of Court	Where located	Maximum amount of suit	Are lawyers ordinarily allowed?	Is the procedure informal?	Who can appeal? Plaintiff	Defendant	Roughly what does it cost to sue?
VERMONT	Small Claims Division of District Court	Most towns	$250	Yes	Yes	No	No	under $5
VIRGINIA	Civil Court or County Court	Most towns	$300 to $3000	Yes	Yes	Yes	Yes	$5
WASHINGTON	Small Claims Division of Justice Court	County seats	$200	No	Yes	No	Yes	$2 to $5
WEST VIRGINIA	Justice of the Peace	Most towns	$300	Yes	Yes	Yes	Yes	$5
WISCONSIN	Small Claims Branch of County Court	County seats	$500	Yes	Yes	Yes	Yes	$4.50
WYOMING	Justice of the Peace	Most towns	$200	Yes	Yes	Yes	Yes	$6

The fact that most states have procedures for dealing with small claims dos not imply however that American consumers are necessarily well-off in this context. The quality (from a consumer viewpoint) of the Courts varies from state to state.

Judge S.K Wright[4] of the U.S. Court of Appeals has said:

"the promise of the small claims courts has not been fulfilled, for in actual operation there is little correspondence between the professed aims of these courts and the ends they serve...... It is primarily the businessman, not the poor man, who reaps the advantage of the inexpensive and speedy small claims courts.... In 1966, 11 ghetto retailers in Washington D.C. reported 2,690 judgments, one for every $2,200 of sales....."

Judge Wright is making the point that if no limitation is made on the class of people who may sue in small claims courts, they inevitably become instruments for the mass collection of debt. Thus one of the things that will be suggested lated in this paper is that only defended debt actions will come within the small claims courts jurisdiction.

However, the court should be set up in such a way as to avoid the criticism with the American Consumers Union have levelled[6] at the present American courts.

"Small claims courts have been in large a point of disappointment to those who though they would serve the poor by creating a forum where costs are low, lawyers were unnecessary, procedures were simple, and justice was nevertheless dispensed. The poor man who is a debtor is likely to stop paying when he discovers the merchandise is defective, the transaction is fraudulent, or the price is excessive. He then becomes a defendant in a case brought by the retailer or the finance company. Then the small claims courts, like other civil courts, becomes a weapon against poor people. All the trappings intended to serve them will victimize them instead. The speediness of the proceedings takes on the character of railroading. The informal procedures and pressure from the bench in some cases enable the company representative to manoeuver consumers out of telling their story".

The Consumers Union concludes that: "A new kind of small claims

4. New York Times Magazine "The Courts have Failed the Poor, March 9, 1969.
5. Consumer Reports - October 1971 opcit
6. Consumer Reports - opcit p.627

court is called for - one specially designed as a consumer forum".[7] It will be this "consumer forum" concept that I will be looking at in the New Zealand context.

Consumers Union then goes on to make specific proposals:

- "Every state should establish a system of small claims courts where proceedings are informal and strict rules of evidence are not required - in short, where plaintiffs and defendants can state their case to a judge or an arbitrator without aid of lawyers and with reasonable expectations of a fair settlement.

- The maximum size of suits admissable as small claims should be $1000. In higher courts, where larger suits are heard and where small claims are sometimes heard at the behest of defendants, consumers who win judgments should be entitled to reimbursement of a reasonable attorney's fee.

- Neither plaintiffs nor defendants should be permitted to have attorneys in small claims court. To help plaintiffs prepare their suits and to advise defendants of their rights, officials especially trained in the law and procedures of the court should be on duty at all times in the clerk's office.

- The use of small claims courts as debt-collection agencies must be curtailed. Plaintiffs should be restricted to filing one suit at a time and a very limited number of cases per year. That way, small businesses could sue an occasional customer for unpaid bills, and the overpowering mass of claims made by lending institutions and credit merchants would find their way into other civil courts.

- In other civil courts, where it is important to have a legal counsel, the low-income plaintiff or defendant should have the free services of a lawyer regularly assigned to the court, not only to represent him there but also to assemble the facts needed to strengthen his case. Such legal services could come from community legal services offices, legal aid societies, supervised third-year law students, bar association interns or large law firms that lend their associates for community service.

- The use of small claims court as a place of redress should be promoted by agencies serving the poor, by bar associations, and by the court itself.

- The courts should be brought to the people. Small claims courts should ride circuit, going regularly into poor neighbourhoods and sitting nights and Saturdays for the benefit of working people. While

7. Opcit p.628

justice may be blind, it is not lame, and the distance to the courthouse is often unbridgeable by the poor."[8]

The nearest the Americans have come so far to the above ideal is the Harlem small claims court, founded in January 1972.

The Harlem Court

Located in the ghetto area itself, the court is staffed by a judge assisted by a panel of volunteer experienced lawyers, most of them black. The court office is open on Monday to Wednesday till 5.30 p.m. and on Thursday till 10 p.m. A simple complaint form is filled out and on the consumer's payment of a $3 fee the defendant is served with the complaint by registered mail. Hearings are normally held 2-3 weeks after service.

Employees of the Department of Consumer Affairs are available to assist complainants in the preparation of their cases, and they also serve as mediators and attempt to bring the parties to pre-trial settlements. Since many of the litigants are Puerto Rican, the Department of Consumer Affairs also ensures a Spanish speaking interpreter is available. Booklets entitled "How To Sue" are printed in both languages and distributed. The existence of the court is widely publicized through the community.

The Court hears about 100 cases every evening.

The Other New York Courts

As said previously, New York State introduced small claims courts in 1934. The limit of the courts' jurisdiction was then $50; it has since risen to $500. Prior to the opening of the Harlem Court, there were 5 courts in New York; one for each borough, New York County (Manhattan), Kings County (Brooklyn), Bronx Country, Queens County and Richmond Country (Staten Island).

Procedures in these courts are simple, but seemingly there is not as great a degree of assistance available to litigants as at the Harlem Court. Possibly less assistance is needed; this would be especially so at the Manhattan Court where most litigants are white and often middle class.

Any real person can sue. Corporations, partnerships and associations cannot. This means landlords can sue. Any person under 21 years needs a friend or relative over 21 to accompany him before he can be heard. The complainant must choose a court in the borough where he lives or where the defendant lives or carries on business.

8. Opcit p.628

To initiate a suit the complainant goes to the office of the court. He pays to the clerk $2 and a mailing fee of $1. The clerk records the name and address of the defendant, the amount being sued for, and the grounds of the claim.

The complainant must establish the correct name of the defendant. In the case of companies, he can do this by searching the business records at the office of the County Clerk, in the county where the business is located.

If the complainant is not fluent in English, he can make a request to the court clerk for an interpreter to be made available. After the clerk has helped the complainant fill in the necessary papers, he will allocate a date for the hearing, normally several weeks later. If the complainant wants a witness to attend, but is unsure whether he will do so voluntarily, he can ask the clerk to subpoena the sitness. Failure to attend renders the witness liable to a fine of $50 for contempt of court.

There is no charge for the subpoena, but the complainant must pay $2 to the witness as conduct money. The complainant must not serve the witness with the subpoena; he must get someone else (aged over 18) to do this.

If the actual summons cannot be served (for instance the defendant may have moved) it is returned to the complainant who must arrange for its service, either personally on the defendant or an officer of a dependant corporation. If the defendant is a corporation the complainant must know the name of the person served and the office he holds. Once again, the complainant cannot serve the document himself, but must get someone (over 18) to do it for him.

When the summons is served, an affidavit of service must be completed by the complainant, notarized by a notery public and returned to the court office.

Apart from the Staten Island Court, which sits in the morning, all the New York Courts (including Harlem) sit at night, generally commencing at 6.30 p.m.

A clerk reads the following statement at the commencement of proceedings:

"It would physically be impossible for the one judge sitting here tonight to try all cases on the calendar; therefore, at the request of the court we have ... arbitrators who possess the qualifications of a judge of this court to hear this case. You obtain an immediate trial if you go before the arbitrators. The only difference is that you will not be able to appeal from the arbitration award. When your name is called you will be sent out to an arbitrator unless you state that you wish the judge to

hear your case".[9]

Not surprisingly a majority of people choose the arbitrators; firstly because they can get their case over with more quickly, and secondly because they realize that the only real advantage of a hearing by the judge, the chance to appeal, is largely cancelled out by the expense involved in such an appeal.

The decision whether to choose the judge or an arbitrator is the complainants alone; the defendant has no choise.

The clerk reads out the list of cases for that night, and if the complainant is ready to proceed, on hearing his name called he says "ready" (if he wants his case heard by an arbitrator) or "ready by the court" (if he wants his case heard by the judge).

If the complainant chooses arbitration he and the defendant sign a consent form by which they agree to be bound by the arbitrators award.

If the defendant does not appear, a procedure called "an inquest" is adopted. The complainant deposes his evidence to the judge or arbitrator and if it is felt that enough evidence favourable to his case has been adduced, the complainant obtains judgment by default.

Lawyers are allowed to appear for either party. The procedure at the hearing itself is simple. The arbitrator or judge explains the procedure to the parties. Then the complainant gives his version of the facts, producing such relevant documents and papers as he has in his possession. He can call any witness he has. The defendant gives his version of the facts. The arbitrator or judge asks questions as the case proceeds. Each party has an opportunity to ask the other questions.

Normally a decision is not given on the spot. The arbitrators for instance, normally make their decisions later on in the evening.

The complainant can find out the result by phoning the court office the next day and asking the clerk to look at his file and find the result.

If the complainant wins he is entitled to a refund of his $3.

If the defendant does not pay the judgment, the complainant can go to a sheriff or a marshall for assistance. The charge for this collection service is around $4. The defaulting defendant is liable for a further sum (up to $15, but no more than 5% of the amount of the judgment).

A Ralph Nader Study Group, after looking at the nations small claims courts concluded that New York had the best system of courts in the country.

9. "How to Sue in Small Claims Court in New York City" - New York Department of Consumer Affairs.

Even so, there are still drawbacks. Probably the main drawback is that for many consumers, victory is hollow. The New York City Department of Consumer Affairs found that about 1 in 3 of successful complainants were unable to enforce the judgment. Since the sheriffs and marshalls are paid little for collecting sums won in small claims, they generally do not attempt very vigorously to enforce judgment.

Notwithstanding this drawback, the writer concludes, on the basis of his readings, that the New York courts are the most successful of the American courts. They handle around 10,000 cases a year, and the number of claims has increased by 40% in the past 3 years. (I assume a good part of this increase can be attributed to the opening of the Harlem Court, and to continuing publicity; an essential feature for any small claims court).

SCANDINAVIA

Since Scandinavia is generally acknowledged as being in the forefront of progressive social change, it is perhaps surprising that in the area of the settlement of small claims, the Scandinavians are not as advanced as they might be.

Denmark

In Denmark there is as yet no small claims court as such. However, the Forbrugerradet or Danish Consumer Council was instrumental in establishing small claims committees, which hear disputes involving drycleaning, shoes, car and television appliances, travel agencies and household goods. These committees are composed of representatives of consumer interests and trade organizations. The consumer however is not bound by the decision and can proceed with his claim in the courts if he wishes.

Additionally, the Consumer Council has established a complaints Department, who, on payment of a small fee by the consumer, will look into a complaint and attempt to obtain redress if the complainant seems justified. As with our own Consumers' Institute, the possibility of adverse publicity is often instrumental in obtaining this redress, as cases of interest are published in the Council's magazine "Taenk" (Think).

A Consumer Committee has for the past few years been investigating procedures for the settling of disputes; a report and recommendation for legislative reform are expected in the not too distant future.

Norway

Norway also has no small claims courts as such. Consumer disputes

are at present heard by the Forliksradet or Mediation Boards, of which there are one in every county. Lay judges preside and lawyers are excluded. The Board attempts in every case to get the parties to agree to a fair settlement. If the parties cannot agree the dispute is heard in an ordinary court. In theory the Boards are aimed at quick and inexpensive resolution of disputes, but the Forbrukerradet or Norwegian Consumer Council says that "the system does not work too well in practice, mainly because the Board's gradually have developed into a formal procedure before the dispute can be brought to ordinary courts.[10]

The Council is at present negotiating with trade organizations to set up claim committees similar to the Danish committees. An Insurance Claim Committee and a Travel Claim Committee have already been set up.

Additionally a complaints department run by the Consumer Council employs 20 people who deal with some 15,000 complaints yearly.

In June 1971 the Norwegian Government appointed a commission to report on small claims. The Consumer Council is represented on the commission. The Council says the outcome is likely to be the setting up of a small claims court, or at lease a general claims committee.

Sweden.

Sweden does not have a small claims court. It does have however a special tribunal, called the Public Complaints Board which was set up in 1968.

The tribunal hears about 2,600 complaints annually; of these about 30% are from inhabitants of Greater Stockholm. The tribunal however has its limitations. Its decisions are only recommendations and cannot be enforced. While some 70% of complaints are from areas outside Stockholm, the Public Complaints Board has no local associations outside Stockholm to follow complaints up.

But probably the major archilles heel the Tribunal has is that it cannot actually hear the parties or interview witnesses which means that if there are conflicting statements, it cannot deal with the case.

Representatives of both consumer and trade organizations sit on the tribunal and proceedings are informal.

The Swedish Ministry of Justice has investigated the question of small claims and has recommended legislative changes to enable small claims procedures to be instituted. The main reason for the desirability of change is seen as the expense of promulgating small claims, on average an action for less than 3,000 croner will cost nearly the

10. Letter to N.Z. Consumers Institute, dated 6.2.73.

figure claimed.

The proposals are for new procedures to be adopted which will enable the Swedish Government's policy that "Legal proceedings must assume such a form that the costs stand in a reasonable proportion to the value of the matter in dispute;"[11] to be achieved.

Most consumer claims will be covered. Clauses in contracts purporting to oust the jurisdiction of the court will be void.

Court procedures will be simple enough to enable the complainant to proceed without legal representation. The complainant will be able to make his submissions either orally or in writing; though normally he will be heard orally. The Court will sit, when necessary, during the evenings as well as in the day-time and it will sit at various localities. The judge will not be bound by formal rules of evidence and procedure.

The present rule that the losing party is liable to pay the legal costs of both parties will be modified. Only the cost of the application fee and witness expenses and the expenses of collection of judgment will be reimbursable as legal expenses. Counsel's fees will not be recoverable. Public monies will be used to pay any experts whose services it is necessary to engage. Appeals will only be allowed in exceptional circumstances.

The Public Complaints Board will continue its work as before, but any disputes which cannot be resolved by it will be referred to the small claims court.

The Swedish small claims courts are scheduled to come into operation on the 1st of July 1975.

ENGLAND AND WALES

In 1970 the U.K. Consumer Council produced a booklet called "Justice out of Reach" which outlined the reasons why it was often not economically feasible for consumers to take or defend cases in the county courts. The point was made in the booklet that to win £100 in a defended case, a consumer plaintiff risked losing £250 if he lost, £125 for his lawyer and witness expenses, and a similar amount for the defendant's costs. Formal rules of evidence would be dispensed with and procedures would be greatly simplified.

The Lord Chancellor (Lord Hailsham) came out against the proposal, although he saw that clearly some reform was necessary, and on his instigation a conference of judges, registrars and chief clerks of county courts

11. Document issued by Govt. Press Conference 14.3.72.

was held in December to formulate proposals to be considered by the County Court Rule Committee.

I quote from a speech made by the Lord Chancellor at the Council of County Court Judges dinner in October 1972:

"We must, however, be absolutely clear about one thing. Contested litigation, criminal or civil, is neverpleasant and can never be cheap. There are many ways of solving disputes, and litigation is not the best. The best way is to avoid wherever possible the occasion for litigation, and the second best way is wherever possible to settle your disputes by agreement and concession outside the Court. This must be true in large, or small matters, and one should constantly remember that small disputes may involve questions of fact or law as difficult or intricate as large. Unnecessary expense, and unnecessary formality are, of course, the enemies of justice. But precisely because justice is what the state purports to administer it cannot afford to be other than reliable in its results. The very least that justice involves is a fair hearing before an experienced professional judge, be he judge or registrar, with a mind attuned to the resolution of conflicts of evidence, and the application of legal principle to fact. But it often means also the assembly of witnesses, the copying of documents, sometimes the viewing of property or the scenes of accidents. Solicitors or counsel who advise clients with small claims to keep out of the Courts are simply telling them a fact of life, - that there are many disputes that must necessarily cost more than the subject matter of the claim. To suggest, as some do, that they will cost less, or be more worth fighting, if the cost is transferred to the public, is not necessarily to do the litigant or the public a service. Cost effectiveness must be applied to litigation as it is to other human activities.

Nevertheless, it has been my policy to extend the scope of civil legal aid, (criminal is outside my ministerial sphere). I have already done this by extending the financial limitations. It may be possible before very long to improve the arrangements for legal advice. These seem to me to be the first priorities in the civil field, and concurrently with this, a review of County Court procedure by making it more adaptable to situations where litigants wish to conduct their own cases, and perhaps later by extending once again the jurisdiction of registrars. I regard this as a far more practicable approach and a far more economic use of skilled manpower and court accommodation than to man and staff a new range of courts to do part but (not all) the work which County Courts already do very well. I do not expect the results to be spectacular, as some, if not most, of the desirable reforms are already being adopted

by some of the more progressive courts. But the thing will be to pool the best of the new ideas, and then bring the general level up to the level of the best. I hope that the Conference of Judges, Registrars and Chief Clerks, held on my initiative in December 1970 will have yielded a number of changes in the rules which can be carried out, and the Rule Committee has already given preliminary consideration to some of the suggestions made. I am also setting up a small working party to suggest improvements in the forms available to litigants with a view to elucidating the real essence of a dispute at the very earliest moment in proceedings".

A number of suggestions emerged from the Conference. However, the Rule Committee thought that changes should not be formulated merely for the benefit of litigants generally.

A number of changes were made to the rules. Some were relatively minor, like the dropping of the term "praecipe" in favour of "request", but others were more far reaching. With minor exceptions, every liquidated claim now has to be brought by default action.

With the greatest of respect, the writer suggests that this particular "reform" is likely to be detrimental to consumers. While the speeding up of the throughput of court business will be beneficial to court staff and debt collectors, one tends to think that some consumers may get the feeling that they are being "railroaded".

Every ordinary action is required to have a "pre-trial review" conducted by the registrar. The registrar has extended powers regarding interlocutory motions and the striking out of pleadings disclosing no cause of action or defence. If the defendant fails to appear or fails to take steps to defend the Registrar without further ado can enter judgement and fix a rate of payment. Normally the claim will not be a liquidated one and if the plaintiff is not ready to prove his damages, judgment can be entered for damages to be assessed.

If the Registrar thinks that the defendent has a defence, he will attempt to ensure that the issues are clarified and properly formulated and he will estimate the length of trial to enable the case to be set down on the list.

In default actions, the Registrar will also have the power to hold a pre-trial review. This could be used where, for instance, the defendant delivers a defence which appears to the Registrar not to be valid, or where a defence is raised which raises complex issues on which pre-trial directions would be desirable.

There are various other changes effected by the County Court (New Procedure) Rules 1971:

- A claim for the cost of repairs to a vehicle alleged to have been damaged by the defendents's negligence will be treated as a liquidated claim unless the court otherwise orders; so these claims will now normally be brought by a default action in respect of the repairers bill.

- An order can now be made for the service of a default summons out of the jurisdiction.

- All claims arising from hire purchase agreements, or founded on contracts for the sale or hire of goods under which the money is payable by instalments, shall be now commenced in the court where the defendant resides or carries on business or resided or carried on business when the contract was made.

- A plaintiff now has the right to enter judgment for the amount claimed and costs when the defendant is debarred from defending. If the claim is unliquidated, the judgment will be for damages to be assessed.

- Amended particulars or defences may be filed without leave before the return day, which would include the day fixed for the pre-trial review, and so on.

The above are the type of amendments which were made to the country court rules. The writer submits the rules in no way constituted any really meaningful reform from the English small claimants point of view. They did simplify procedures to a degree, and there were one or two amendments of someinterest to consumer claimants. For example, the Consumer Council (U.K.) criticised the old Admission and Defence form 18A in "Justice out of Reach", because it was thought that by it a defendant could be misled into admitting a claim. The form has now been simplified, and it is now produced on A4 paper so that the admission/part admission is set out to one side and the defence appears on the other.

A new rule now provides that where the sum of money by which the costs are regulated is less than £20, solicitors costs will not normally be allowed.

However, these charges are minor and the writer suggests that they went only a tiny way towards relieving the plight of the English small claimant. In fact, since the overwhelming number of actions for small amounts of money brought in the country court are debt collection actions (in "Justice Out of Reach" the Consumer Council sets out the results of

the examination of 1200 cases examined from the files of 6 country courts; 90% of the summonses were issued by firms or public utilities; 75% of these were debt claims in respect of goods and services against individuals; not one case was found of an individual suing a firm regarding such matters), the amendments to the rules would seem to favour traders more than consumers, since they allow speedier and less complex propulsion of claims through the courts.

The U.K. Consumer Council had produced a book entitled "How to Sue in the County Court", and a consumer plaintiff could use it to discover how to take his own claim. But while the publication is a laudable step in the right direction, it is submitted that only a consumer with a reasonable level of education could successfully promote his own claim using it. The fact that the Council had to devote the whole of a reasonably lengthy publication to directing consumer plaintiffs through the labyrinth of the court's processes, seems to be an indictment of the present court system.

A further reform was carried out last year. From October 1st 1973 an amendment to the County Court Rules made provision for an arbitration scheme within the County Court system. The Registrar now has the power to refer proceedings to arbitration where the sum involved is less than £75 or where both parties consent. Normally the Registrar will be the arbitrator.

There is an exception to the Registrar's power to order arbitration over amounts of less than £75; if one party is alleging fraud against the other, he must consent before arbitration is possible. (The rationale behind this exception is clear, although it disadvantages the consumer alleging fraud.)

The proceedings will be private and will be informal. In general, the strict rules of evidence will be dispensed with.

The award of the arbitrator will be entered as the judgment in the proceedings. Normally provisions relating to arbitration will apply; it will only be possible to have the award set aside on the exceptional grounds justifying such a course.

The Registrar has increased powers to refer questions to experts for advice; he will be able to order this for claims under £75 or with the consent of the parties.

A major change is that the upper limit of £20 below which no costs other than those of issuing the summons could normally be recoverable has increased to £75. However the Court has been given a discretion

to order costs to be paid to a successful litigant where it considers that they have been incurred through the other parties unreasonable behaviour. The effect of the change is likely to discourage legal representation in claims of under £75. Instead, parties to an arbitration will be allowed to take a friend or relative with them to assist them if this is necessary.

Here at last was a reform of same moment for small claimants. It is a step in the right direction, but it is submitted that the £75 limit is several hundred pounds too low. However, the Solicitor-General has said[12] that the setting of the limit is the province of the County Court Rules Committee who will decide whether to raise or lower it after ascertaining how the new scheme is functioning.

The Lord Chancellor thought that the reforms which had been instituted went a long way towards remedying small claimant's plight, and he said further:[13] "Quite clearly, to my mind, the original proposal for a new set of courts was unacceptable. It cannot really be contemplated, in the present state of manpower and of business, that a new set of courts, each with presumably separate court accommodation, court staff, judges and various other impedimenta, should be set up parallel with the existing courts. This would not be a rational course of action at all. Nor as a matter of policy could I restrict access to the Queen's Courts to particular classes of litigants, which was one of the proposals made. It seems to me that constitutionally, this is wholly unacceptable. The Queen's Courts are open to all those who desire to make use of them".

The Lord Chancellor does not consider here the possibility that a small claims court could be divisional court of the county court, an idea which I will be looking at in the New Zealand context. And for reasons which I shall also later state, I do not believe that arbitration is necessarily in the small claimant's best interest.

Mention of arbitration brings me to the Manchester Arbitration Scheme for Small Claims.

The Manchester Scheme

The Manchester Scheme opened in July 1971; established as an experimental basis, with financial support from the Nuffield Foundation limited to the initial three year research period. This support came

12. Hansard - 3 April 1973, p.357

13. Hansard - 12 April 1973 - columns 780-1

to an end in July this year, and unless some other organization steps into the financial breach, the scheme is now no longer operating. Due to pressure of time, I was unable to ascertain the current position at the time of writing this paper. If the scheme has closed, this would be unfortunate since only £2500 (largely for the Secretary's salary) would be needed for the continuance of a scheme serving a million people.

Initiative for the scheme stemmed directly from the publication of "Justice Out of Reach". Interested Manchester organizations carried out the planning in conjunction with the Consumer Council. The scheme was controlled by a committee consisting of nominees from the Manchester City Council, the National Citizens' Advice Bureaux Council, the Manchester Consumer Group, the Manchester Citizens' Advice Bureau Committee and the Manchester Law Society.

Finance was supplied by the Nuffield Foundation on the basis that the scheme might provide valuable insight into the need for, and the possible form of, a nationwide scheme.

The scheme was aimed at providing a method of solving disputes over amounts of less than £150. The claimant had to be a private person. Only contractual matters were covered.

Both parties had to first agree to arbitration and to the arbitrators decision. The claimant and the "defendant" submitted their claims and defences. The arbitrator could, if both parties agreed, decide the dispute on the basis of the written argument in front of him, but more often he would see the parties in person.

Lawyers were barred and hearings informal. Decisions might be given on the spot or delivered later after deliberation.

The fee for each party was £2.50 if the claim was under £76; £5 for over £76. The parties could be required to contribute up to a further £6.50 if an expert's opinion was required. Normally the arbitrator ordered the losing party to reimburse the other for his fees.

The scheme could, I think, be called only a limited success.

As at the end of April last year, the total number of inquiries to the scheme stood at 1,064. Some 400 of those inquiries were outside the scheme's jurisdiction; most for geographical reasons (only claimants who resided within geographical boundaries in Manchester were eligible), some because the inquiry came from a business concern. Others still were non-contractual matters; for example quarrels with Government Departments or Tortious matters.

Some 420 inquiries were within the ambit of the scheme, but did not proceed, and 232 people actually began a claim. Of the cases not still in progress, arbitration awards were made in 19% of cases; 29% were settled to the consumers satisfaction; and in 52% the respondent refused to arbitrate. Sometimes there was an express refusal; sometimes no reply was received and in other cases, the respondent was untraceable or in liquidation.

It can thus be seen that the voluntary nature of the scheme was one of its main drawbacks. Of the 37 arbitration awards actually made, 27 were decided in favour of the consumer, which tends to show that the majority of the consumers seeking arbitration probably have legitimate grievances. One could further speculate and theorize that the traders who refused to arbitrate are probably the sort of traders against whom the consumers involved had a legitimate grievance. Vera Ellison, the Secretary of the Scheme, said in January 1973 that "Judging by the experience so far in Manchester, 60% (the figure later dropped to 52% as mentioned above) of the claims made will not be resolved, and these are almost certain to include those claims that are most justified. In Manchester, solicitors seem quite properly to be advising respondent clients with everything to lose, not to agree to arbitrate".[14]

Ms Ellison goes on to say that "It seems from our experience that a voluntary Arbitration Scheme cannot be more than 40% successful. For Manchester this is a highly desirable service which cannot be obtained elsewhere, but for a permanent solution to the small claims problem it appears inadequate and wasteful to say the least".

She then goes on to recommend the adoption in England of a scheme similar to that of New York, where attendance is compulsory but the parties have a choice between an arbitrator and a judge.

Ms Ellison states that the possibility of schemes based on the Manchester scheme has been investigated in Cardiff, Bolton, Belfast, Bradford, and Westminster and says that if schemes were to be set up the only source of finance would be Local Authority funds. This she says would mean the undesirable state of piecemeal development of small claims settlement procedures.

Ms Ellison refers to a conservative Committee pamphlet (whether by this she means conservative party is unknown) called "Square Deals for Consumers" which advocates the establishment of Consumer Arbitration Service to hear claims of up to £500.

14. News Release issued by the Manchester Arbitration Scheme for Small Claims in January 1973.

It would be Government financed and have offices in each county. Its jurisdiction would cover both claims arising from contracts and tort. An investigator would report to the arbitrator to assist him in his deliberations. Ms Ellison implies such a scheme would be desirable if the arbitration was compulsory, but she favours a small claims court along the New York lines as the best solution. The writer doubts whether in the present climate of opinion, this is realistic to hope for.

The main body of opinion still seems to favour amendment to the county court rules along with complementary arbitration schemes. In line with this philosophy, last year a scheme similar to the Manchester scheme began in London. It is operated by the city of Westminster Law Society, and like the Manchester Scheme has a 3 year grant from the Nuffield Foundation. It deals with cases up to a limit of £250; fees of between £5 and £10 are to be charged. Arbitrators are volunteer solicitors. The writer wrote away for information on this scheme, but it had not arrived by the time this paper was ready for presentation.

AUSTRALIA.

Of all the overseas jurisdictions, Australia probably provides us with the most valuable insights into the possible solutions for the resolution of small claims. And curiously enough it was that curious amalgam of modern and old legal thinking, the much maligned "Peanut State", Queensland, which led the way for reform.

The plight of the Australian consumer is colourfully described by the journalist Michael Boddy in an article outlining the need for small claims courts.[15]

"I complain about the botched-up installation of our ducted heating system.

"You're getting hot air aren't you" demands the sales adviser belligerently? as if I should always be grateful for that, regardless of the way it's got. The aesthetics, the convenience and the proper working of the system is made to seem irrelevant, almost wicked; and one is a boor to bring it up.

One incident out of thousands - we all have our own stories, and in each case, service, in any real sense, is missing - the result, as I tried to point out in my last column, of ignorance and opportunism.

When Joe Bloe saves up to buy an appliance, he has a million-to-one chance of getting full satisfaction if it goes wrong. Technically he has rights and redress; practically he has none. The screen between

15 "The Bulletin" - 12 August, 1972

him and the people he wants to harass is too well constructed. Sometimes by design, but more often by default. The average life for clerical staff in Sydney is about six months. Consequently, with such a quick turnover, no organization can have a competent, knowledgeable voice fronting for it, because it takes a good six months to break in an employee who is to be any constructive use; and by that time he has moved on because the job is thought of short sightedly as a dead-end one and a fill-gap.

Because of this, administration in Australia has developed so that it is difficult as possible to get anything done through its channels. Enquiries are met with monumental ignorance and a positive lack of helpfulness which is in inverse proportion to good business sense. The closer to the public, the more hostile the reception, the more negative the approach. Formula answers are used which help no-one except the lazy executives you're trying to contact."

The Queensland Minister of Justice, Mr Knox put the situation a different way when introducing the Small Claims Tribunal Bill.[16]

"In departmental files, there is an intractable core of cases where a trader has refused to meet a just claim. The experience of the Consumer Affairs Bureau reveals that disputes occur regularly between consumers and traders and in many cases, the only way a satisfactory solution can be achieved, is for the consumer to bring court action against the trader. Invariably a consumer with a legitimate complaint does not commence court proceedings because of the cost and inconvenience involved or because he is overawed with the court system and atmosphere. As a result, unscrupulous traders and fly-by-night operators can deal with shoddy products and fleece the public."

Queensland

The Queensland Small Claims Tribunal Bill was passed in March of 1973. In introducing the Bill, the Minister of Justice said:[17]

"The objective of the Small Claims Tribunal Bill is to settle quickly, cheaply and informally, disputes between traders and consumers over goods and services.

I can say to honourable members, with confidence, that the proposals I have advanced will make small claims tribunals into the peoples' dispute settling forums, so that realistically, a citizen can look forward to his day before the tribunal when he feels that he has been unjustly wronged."

16 & 17 Hansard No.25 - 22 March 1973, p.3200 - no.14 - p.3200 op cit.

The bill was passed without amendment and the Small Claims Tribunal began operation in July 1973.

The first thing to note about the Queensland Act is the word tribunal. Only consumers can bring actions. "Consumer" is defined in Section 4, the Interpretation section, as meaning:

"a person, other than an incorporated person, who buys or hires goods otherwise than for re-sale or letting on hire or than in the course of or the purposes of a trade or business carried on by him, or for whom the services are supplied for fee or reward otherwise than in the course of or for the purposes of a trade or business carried on by him, or than as a member of a business partnership".

The limit of the court's jurisdiction is $450. "Small Claim" is defined in Section 4 as:

"(a) a claim for payment of a money in an amount not exceeding $450, or

(b) a claim for performance of work of a value not exceeding $450,

that in either case arises out of a contract for the supply of goods or the provision of services made between persons who, in relation to those goods and services, are a consumer on the one hand and a trader on the other".

"Trader" is defined as meaning:

"a person who in the field of trade or commerce, carries on a business of suppying goods or providing services or who regularly holds himself out as ready to supply goods or to provide services of a similar nature".

The tribunal is presided over by an officer called a "referee", appointed by the Government in Council for a term of seven years (or a lesser term) if stipulated in a particular case. There is an age limit for appointment and retirement of 70 years. No qualification requirements are laid down in the Act, but the first referee to be appointed (and to date the only one) was Mr George Kingston, who had recently retired as senior Magistrate in Brisbane.

The functions of the referee are laid down as being (Section 10):

"(1) the primary function of a referee constituting a Small Claims Tribunal shall be to attempt to bring the parties to a dispute that involves a small claim to a settlement acceptable to all the parties.

(2) Should it appear to the referee to be impossible in a par-

ticular case to attain to a settlement acceptable to all parties to a dispute, then the function of a referee constituting a Small Claims Tribunal shall be to make such an order with respect to the issue in dispute as is fair and equitable to all the parties to the proceeding concerning the dispute or, where he thinks the case requires it, an order dismissing the claim".

The referees third function is to report to the Minister of Justice on matters arising from the operation of the Tribunal.

The Act sets up a Registry of Small Claims in Brisbane to be the administrative centre of the Tribunal. The actual Tribunal can bee constituted at any place in the State.

When a case goes before the tribunal, the jurisdiction of other courts or tribunals is excluded unless the proceeding had already been commenced there.

Settlements or orders made by the tribunal are final and no appeal to a higher court lies. This rule is only slightly modified by Section 19:

"No writ of certiorari, or prohibition, or other prerogative writ shall issue, and no declaratory judgment shall be given in respect of a proceeding taken or to be taken by or before a Small Claims Tribunal or in respect of any order made therein save where the court before which such writ or judgment is sought is satisfied that the tribunal had or has no jurisdiction conferred by this Act to take the proceeding or that there has occured therein, a denial of natural justice to the proceedings".

The Tribunal can make 3 orders - an order giving effect to an achieved settlement; an order that a party to the proceedings (other than the claimant) pay to someone specified in the order, a sum of money, and an order requiring a party to the proceedings to perform work to remedy a defect in goods or services.

To enforce his order the claimant can file a copy of the order and an affidavit in the Magistrates Court. The order is then deemed to be a judgment of the Magistrates Court and it can be enforced accordingly.

Claims are started by the consumer filling out and filing a simple form. Brisbane consumers file in the Small Claims Registry; those living outside, file their claims in the office of the local Magistrates Court. The filing fee is $2.

The Registrar notifies the trader of the particulars of the claim

amd gives the parties a date, time and place of hearing. Hearings are on an appointment basis.

Brisbane claims are heard in the Referee's office, with the referee and the parties seated around a table.

Each party has the carriage of his own case. Section 32 (2) reads:

"A party to a proceeding before a tribunal shall not be entitled to be represented by an agent unless it appears to the tribunal that an agent should be permitted to that party as a matter of necessity and approves accordingly.

Section 32 (3) reads:

"In no case shall a tribunal approve of the appearance in a proceeding of an agent who has a legal qualification under the laws of this State or of any other place, or who is of the nature of a professional advocate, unless -

(a) all parties to the proceeding agree; and

(b) the tribunal is satisfied that the parties, other than the party who applies for approval of an agent, or any of them shall not therefore be unfairly disadvantaged."

Proceedings before the tribunal are in private. Evidence is given on oath, but the normal rules of evidence do not apply; the court having the power to "inform itself on any matters in such manner as it thinks fit". (Section 33).

If either party does not arrive at the appointed time, the tribunal can make a decision on the evidence it has before it. But if the absent party produces a sufficient excuse for his absence to the registrar within 7 days of the hearing, then a re-hearing can be ordered. If the absent party does not attend the rehearing, the original order is re-instated.

No costs are allowable to either party. No provision in a contract purporting to contract the consumer out of his right to have a claim heard by the tribunal is valid.

The Act contains a provision for the publication from time to time of the particulars of every reference to the Tribunal. The particulars which are published are the name of the claimant and the respondent, the issue in dispute and the result.

The normal provisions regarding contempt and perjury apply.

Last year in Brisbane I discussed the tribunal with Mr Kingston,

the tribunal's referee. Unfortunately this was in the week prior to the first hearings, so I was unable to see the tribunal in action. I posed various questions to Mr Kingston.

One of the questions I was interested in was the reason why the Tribunal's jurisdiction had been limited to consumer/trader contract. Three reasons were advanced:

(i) many Tortious issues are rather too complex for a tribunal of the nature envisaged;

(ii) it was thought that small claims arising out of minor accidents would be numerous and might tend to overload the tribunal;

(iii) it was never really envisaged that the tribunal would be anything other than a forum for settling consumer claims.

The first reason perhaps does not stand up to strong scrutiny, since many areas of consumer law involve very complex considerations themselves.

The other two reasons seem soundly based. It could of course be argued that it is illogical and unfair to put a consumer who has a claim against a trader for $50 in a better position than the motorist who has suffered $50 damage to his car through someone else's negligence. Probably the answer to this is that it is better to crawl before walking. If the Tribunal is a success in its present form then I have no doubt legislators will begin to think about extending it's ambit.

The Tribunal has a staff of 5 in Brisbane; the referee, a registrar, a clerk and two typists. Outside Brisbane, the Tribunal is serviced by the Magistrates' Courts. More staff will be engaged if they prove necessary. Another referee may well prove to be needed, since the present referee has to travel throughout the whole of Queensland to hear claims. This means that consumers in outlying areas may have to wait some months to hear their claims heard. This is undesirable since one of the stated objectives of the Tribunal is to provide for the <u>speedy</u> resolution of claims.

There would be two solutions to this: divide the State into two or three districts and appoint a referee for each, or secondly, to appoint part-time referees, who could be Magistrates, or perhaps lawyers holding the office in a similar manner as some New Zealand lawyers hold the office of coroner.

Queensland has a population of just under 2 million persons. With a staff of five, offices provided by the Bureau of Consumer Affairs, and other servicing provided by the Magistrates Court's staff, it can

be seen that the overhead of the Tribunal is not prohibitive, even allowing for the nominal nature of the filing fee. Finance is provided by the Ministry of Justice.

Not only does the Bureau of Consumer Affairs provide the offices for the tribunal; it also acts in an ancillary role by referring consumers to the tribunal in cases where it has itself been unable to achieve success.

I asked Mr Kingston if he thought that any unfair advantage would accrue to traders by reason of the virtual barring of lawyers from the tribunal. He said that he was very much aware that traders would often be sending along someone experienced in dealing with legal issues and much more articulate than the consumer, but he said that he saw it as his function to ensure no unfair advantage did accrue. Obviously one of the qualities essential for any adjudicator in a small claims court is patience and an ability to help an inarticulate consumer present his case. (He would also need to be astute enough to be able to deal with the garralous consumer, a problem I myself found at times taxing during my time with the Consumers' Institute).

Normally hearings will be during the day, though there is nothing in the Act to prevent the tribunal sitting at night. Mr Kingston expressed the main disadvantage of night sittings to be the practical one of problems with staff. Further day sittings were more convenient for the trader. The referee considered most Brisbane employers would have a reasonable attitude towards letting employee-claimants off work for several hours.

Mr Kingston explained the rationale of the $450 jurisdictional limit. Queensland bankruptcy laws provide that an unsatisfied debt of $500 is sufficient ground for the filing of a bankruptcy petition; and the legislators thought it undesirable that a judgment of the tribunal could cause the defendants bankruptcy. The $450 limit is a generous one, and I doubt that the supporters of any small claims court could hope for a much higher limit; but the bankruptcy argument does not seem to me to be strong. However, since the issue is a peripheral one, I do not propose to go into my reasons for so thinking.

I asked Mr Kingston whether the idea of a tribunal met with much opposition when it was mooted. His impression was that the scheme was welcomed by most interested parties. He said, and I agree with him, that reputable traders should welcome the tribunal, since if claims are brought against them, it will involve them in little or no expense in actually defending the claim. And in the long run their public image

should improve since one can I think assume that the Tribunal's decisions will lay down guidelines for both traders and consumers to follow.

In the first 12 months of the Tribunal's operation 932 claims were lodged. In 292 of these an order was made in favour of the claimant.

77 were dismissed
167 were withdrawn prior to the hearing (many probably because of a private settlement)
210 claims were dismissed after a conference between the parties and referees. (My information does not reveal why they were dismissed).
25 claims were rejected for want of jurisdiction.
The balance are still pending.

During the year the Referee visited 14 country centres, some more than once.

This information is of course too limited and too undetailed to enable a definitive pronouncement on whether or not the Tribunal is a success, but I think it does prove that the Tribunal is not a failure. It is very difficult to enunciate criteria for defining success or failure; I can only say that my (very general) criterion is that such institutions as small claim tribunals, should meet a proved public need. If people use the tribunal and it is instrumental in achieving just settlement of small claims, then I feel it is a success. I think that the number of nearly one thousand claims lodged in the first twelve months is quite encouraging. When the existence of the tribunal becomes more widely known, more people can be expected to claim; but offset against this increase will be the increasing number of traders who may be expected to settle claims when they come up against consumers whose threats of "taking you to court" are no longer empty.

Perhaps the New Zealand Press Association release of an item hailing the Tribunal as a success, only two days after the Tribunal opened was a trifle premature, but the writer has high hopes that the initial optimism will not prove unfounded. The N.Z.P.A. release, as it appeared in the "Auckland Star" of 21st July 1973, read in part:

"The 'LITTLE PEOPLE'S COURT' IS HAILED AS BIG SUCCESS".

".. The Tribunal has been hailed an outstanding success after only two days in operation and appears to have achieved its object of bringing recalcitrant tradesmen into line.

.. On the first day of operation on Monday, one trader admitted defeat before the tribunal and six others agreed to finish their jobs

properly rather than appear.

.. A Tribunal spokesman said most of the cases before the tribunal involved household painting, building and repair jobs, which the consumer claimed had not been done satisfactorily.

Monday's hearings included one by a man who charged a painter with failing to carry out a house job to a reasonable standard.

The painter, after discussions, agreed to return and do the job properly; the tribunal gave him a week in which to carry out his promise.

Another case involved a woman who said a builder had done an unsatisfactory repair. The case was adjourned for a fortnight so the woman could obtain a quote to indicate by how much the job fell below the expected standard.

The Tribunal spokesman said it appeared the tribunal might have to work faster to handle the number of cases before it, although it had been found that many traders, on receiving complaints through the tribunal, were volunteering to go back and do the jobs properly rather than confront the tribunal".

A rather more detailed criticism of the Queensland Act has been made by Mr O. Sperling, a lawyer and Deputy Chairman of the Australian Consumers' Association. In a letter to the Consumers' Institute[18] he made comments on the Act.

"I think that the aim of the title and operation of the legislation should be to remove, as far as ingenuity can devise, any connotation of court proceedings. One of the main problems with any sort of implication in this regard is that many people, especially those likely to be involved in small claims disputes, have both rational and irrational fears of courts, court rooms and court proceedings. The best name I have come up with so far is "Small Claims Adjustment Forum", but I suspect that there is a better one somewhere. What I wanted is a name and a procedure that will attract people (at best) or not scare them off (at least)".

While I share Mr Sperling's feeling to a large degree, I think that he is being over-sensitive in his implied reservations about the title "Tribunal". I am not convinced that the name is of great importance, if the "court" or "forum" or "tribunal" is one in which people do not feel overawed and fearful then word will soon travel. A rose by any other name.....

Further to this question of name, Mr Sperling states:

18. October 17, 1973

"Further consideration should be given to the title of the person who presides at hearings. In Queensland he is called "referee". This may be a satisfactory title, but others may be more suitable (consider umpire, assessor, recorder, adjuster, chairman, listener, arbitrator) and the eventual choice should be as far removed from overtones of "judge" or "magistrate" as possible".

I feel that assessor, recorder and listener are not specific enough to describe the adjudicating officer's function. Arbitrator suffers from being slightly misleading as to that officer's functions. Chairman suffers from the same defect; a chairman in the accepted sense normally plays a more passive role.

"Referee" and "umpire" may conjure up images of the sporting field, but this may be no disadvantage, for at least most people have a clear idea of what a referee or umpire is. He is the person who controls an activity. His word is normally final.

Mr Sperling goes on to say:

"The definition of small claim also needs further consideration. The limit of $450 in Queensland was based on the idea that bankruptcy proceedings ought not to be able to be based on a single transaction which did not arise from formal court proceedings. In New South Wales the suggested limit is $500, which is the lower limit of bankruptcy risk, and which is also within the ambit of the Court of Petty Sessions (which would, and do, hear small claims matters arising out of disputes that it is proposed to bring within the field of the new legislation). It has been thought that there is no practical justification for forcing the Court of Petty Session to take on a speciality jurisdiction for small claims which would otherwise fall within the scope of the proposed legislation, but which involve amounts of between $450 and $500. However, it has also been pointed out that many problems where the law provides inadequate remedies or the prospective burden of costs is too great to encourage any but those most able to take a risk to support a principle arise in the range of up to $1000, and that consideration should be given either to raising the money limit in the definition, or empowering superior courts to set aside contracts in whole or in part or to vary them when they contain any provisions that are unfair or harsh or unconscionable, especially when the contract has been induced by false or misleading representations."

Mr Sperling then goes on to make a point with which I agree.

"The Queensland Act does not appear to allow for a mixed claim for work and for money up to the total value of whatever limit is fixed, and needs clarification so that there can be no doubt that disputes relating to layby sales and credit transactions can be dealt with under its provisions".

Criticism is also aimed at the definition of trader:

"While it is clear that there should be a definition of "trader", it should be expansive, and not as in Queensland, limiting. The aim of the definition of "trader" should be to bring within the ambit of the Legislation, for the benefit of any person who falls within the definition of "consumer", any transaction that takes place between a consumer and a person who actually is, or represents himself to be, or allows himself to be misunderstood to be a trader, where that transaction does not exceed the financial limit fixed for the scope of the legislation".

With due respect to Mr Sperling, I feel that the definition of trader is reasonably expansive, and a person who represents himself to be a trader is caught by the definition.

With regard to Section 5, "Appointment of Referees", Mr Sperling says:

"A sufficient number of people should be appointed and contrary to what has happened in Queensland, an effort should be made to appoint people who do not have a magisterial background. Theappointment of one person to deal with the whole jurisdiction, and the tying in of procedures and locations with magistrates courts is self-defeating".

I agree with Mr Sperling's first point, as I earlier stated. I think there is need for the appointment of at least one other referee. I reserve my comments on what qualifications a person should have for appointment to the position as adjudicator for the later section on possible solutions for New Zealand.

I disagree with Mr Sperling's last comment. One has to look at the practicalities, I think here, largely of the economic practicalities. It would just not be possible to have a small claims Registry in each country town, unless the tribunal wasorganized on a volunteer part-time basis. Apart from the organizational difficulties, I am not sure that this would befit the status of a body, which after all, to be successful, should have the status of a judicial body backed by the the State. And apart from the enforcement of judgments, I disagree

that the procedures of the tribunal are tied in with those of the Magistrates courts. The legislation is aimed at making those procedures radically different from the Magistrates Courts.

Section 7: "Eligibility to hold office as a Referee".

"The Queensland Act places an age limit of seventy, but this may be a waste of resources. Many people over that age can be expected to have the sort of background that would be invaluable in helping settle small claims. Perhaps a shorter period of appointment (say two years) should apply after seventy".

I agree here. My comments on the use of retired magistrates is set out more fully later.

Section 10 "Functions of Referees":

"Consideration should be given to empowering persons presiding at all hearings of small claims disputes to report to the Consumer Council on the cirsumstances giving rise to any particular dispute. This would enable the Council to consider new consumer problem areas as they arise in the field and to make recommendations to deal with them".

Mr Sperling here refers to the New Zealand Consumer Council. Since the Council is independent of Government direction (or theoretically so), I doubt the advisability of his suggestion. If a small claims court is established here, the Consumers' Institute Complaints Advisory Service will almost certainly be referring to the court, many cases, helping the consumer fill in the required forms etc., as does the Consumer Affairs Bureau in Queensland. I think there will be trader opposition if the Court appears to be arm-in-arm with the Council. It would be better if problem areas and recommendations are dealt with in the Annual Report of the Justice Department. Presumably there will be liaison between the Court and the Council, but I would prefer that this be informal, rather than in the form of a mandatory reporting clause in the legislation.

Section 12: "Venue of Sittings"

"Consideration should be given to specifically stating that proceedings should not or need not be dealt with in a court room nor during ordinary working hours, nor on a weekday and that they may take place in an office or a private home."

I would agree, subject to the deletion of the words "should not". I believe any legislation should be aimed at making the operation of

the court as flexible as possible.

Section 17: "Exclusion of Other Jurisdictions"

"Clarification is required so that it is clear that a matter can be dealt with under the Act, even if prior proceedings have been commenced in a court (either by the trader or the consumer), so that a trader cannot exclude the operation of the Act by getting in first with a court summons or writ".

I agree, subject to the reservation that I think after judgment has been pronounced, the small claims court should have no jurisdiction. For instance, it would be undesirable if after the Magistrates court had entered judgment on a default summons, the small claims court could render that judgment null and void. That would be something in the nature of a slight on the Magistrate, and it would promote uncertainty. Similarly, if a consumer had sued a trader andhad obtained an unsatisfactory verdict, it would be undesirable if he could renew proceedings in the small claims court.

Section 20: "Orders of Tribunal"

"Consideration should be given to giving power to order the handing over of goods and the termination of repairers liens".

I agree with this; the consumer arguing with a trader about a repair bill or the efficacy of the repairs is in a cleft stick if the repairer will not release the goods until the consumer pays him.

Section 24: "Reference of Claims to Tribunal"

"Consideration should be given to allowing (perhaps under the aegis of the Consumer Council) group hearing of disputes where a number of consumers have similar disputes involving the same trader or group of traders".

Class actions are an excellent idea in principle. They tend to be faced with a multiplicity of problems in practice. I am not convinced that the small claims court would be an appropriate forum. First by its very nature of private and informal proceedings, the small claims court would be ill-placed to hear a claim with a number of plaintiffs and/or defendants. In such a claim, there must be formal rules or chaos ensues.

Second, the type of remedies normally sought in a class action would not be within the power of the small claims court to grant; for instance, environmental issues, situations arising from monopolies etc.

Thirdly, to be just, the Court would still have to hear each individual case since the facts may well differ. It would be more preferable if one consumer took a test case in the small claims court (assuming the remedy was one within the power of the court to grant and not in the nature of those mentioned earlier) and established a precedent.

Section 31: "Adjournment of Proceedings"

"Consideration should be given to having the person presiding at the hearing being responsible for giving notices of adjournment to absent parties. There seems to be little logic in requiring this to be done at a central office and it could lead to unnecessary delays in getting on with things if the person presiding has to notify the central office and then wait for the central office to send out notices".

I am not sure whether it is a good thing to burden the referee with too many administrative details. S.31 (2) states "The registrar shall cause to be given to any party to a proceeding who is not present or represented at the time when the proceeding is adjourned, a notice of the time and place to which the proceeding is adjourned". The problem Mr Sperling sees would be overcome by making the registrar of every magistrates court, a registrar of the Small Claims court, so that in every outlying town, there is an officer who can deal with all administrative details, instead of only receiving claims and forwarding them to a central registry.

Section 32: "Presentation of Cases"

"Consideration should be given to inserting a provision allowing the appointee of the Consumer Council, whether legally qualified or not, to intervene on behalf of, or appear as agent for a party to a small claims dispute".

It would be fundamentally unfair if consumers could have a skilled advocate appear and traders not. Sometimes the trader will have an articulate representative at the hearing facing an inarticulate consumer, but often the position will be reversed. A freezing worker consumer could face the manager of a credit agency, or a company secretary consumer could face a carpenter. Either both parties should be allowed to have advocates, or neitherof them - it is as simple as that. I think that in the interests of cutting costs, neither should be allowed a lawyer, and it should be the responsibility of the adjudicating officer to ensure both parties get a fair hearing. If he is a lawyer, which I will be suggesting he must be, he will be experienced in the art of examination and inquisition.

Section 33: "Taking of Evidence Before Tribunal"

"Consideration should be given to providing for the production of evidence to be compelled, as, for example by direction in writing from the registrar or the person presiding having the effect of a subpoena. The freedom of the person presiding to obtain expert opinion where it is needed, might be spelled out as a positive obligation to seek it, with provision for revenue financing of the expense involved".

Basically, I agree here with Mr Sperling, though I think that the referee should have a discretion to decide to seek expert evidence only when he thinks that this is necessary. The referee should have a discretion to make the losing party pay part or all of the cost of an expert when he thinks that morally they deserve to, otherwise this cost should come from the Justice Department. If both parties had actedhonestly and in good faith, then normally they would pay nothing.

This idea might well be met with the criticism that the user should pay. However, this expert advice can be seen as an ancillary service; an integral part of the decision making process. There is scarcely a better case for suggesting that the parties pay for the expert witnesses than there is for suggesting that the time of the clerks, typist and referee is costed out and charged to the parties.

Section 37: "Control of Tribunal's Procedures"

"Sanctions for failure to give evidence when required could be included here".

I agree that some sanctions should be provided for though S.38 (1) (e) partially covers this. A person who "without lawful excuse, disobeys a lawful direction of a Small Claims Tribunal given to him during the sitting of the tribunal" .... "may be summarily convicted by the tribunal of contempt". This section could be extended to cover directions made before the hearing, and worded to make clear that a direction to any person to produce evidence is a lawful direction. (Problems with Government Departments could arise here).

Section 41: "Mode of Giving Notices etc."

"It should be expressly stated that, provided the procedure for the delivery of a notice has been followed, it does not matter whether or not the notice has actually been received".

I have reservations about this. There could well be a conflict with the rules of natural justice if a defendant does not have the opportunity to be heard since he does not know of the proceedings.

Section 44: "Regulations"

"Consideration should be given to the incorporation of certain principles of procedure, either as a schedule to the Act, as a separate action, or as part of this section or of Section 37. Such principles of procedure would negate restrictions on the time and location of hearings, formal requirements of clothing for those attending, mode of address of parties, witnesses and persons presiding, attendance of minors as parties or witnesses, and formalities generally. The matter of payment of witnesses should have special consideration lest anyone be able to buy off the attendance and so attendance of witnesses, and so defeat the purposes of the legislation".

I agree largely with Mr Sperling here. I am not sure what he means as to payment of witnesses; my own view is that witnesses in small claims should be in the same position as Magistrates Courts witnesses.

CONCLUSION

The Queensland Ministry of Justice and the Consumer Affairs Bureau have realized that setting up the tribunal is not enough in itself. They are both continuously publicising not only the tribunal, but the rights and obligations of consumers generally. The Ministry earlier this year carried out an advertising campaign, placing a series ten large advertisement in metropolitan and country newspapers. The series was entitled "Lets Look at the Law" and explained in simple terms the purpose of the main consumer statutes and their provisions.

New South Wales

New South Wales does not have a small claims court. The Courts of Petty Sessions (Civil Claims) Act 1970 which came into force in 1972 repealed the Small Debts Recovery Act 1912.

Basically the Legislation merely streamlines debt collecting procedures. However present indications are that New South Wales will shortly follow Queensland and Victoria and establish a small claims tribunal.

West Australia, South Australia, Northern Territories

To the best of my knowledge, none of these States have small claims courts.

Australian Capital Territories

No small claims court.

In 1972 the Law Reform Commission of the Australian Capital Territory, (including among its members, Professor P.S. Atiyah) produced a "Report on the Civil Procedure of the Court of Petty Sessions with Recommendations on Amendments that will be Desirable if the Present Monetary Limit in the Court's Civil Jurisdiction is Increased by Several Thousand Dollars".

The Report states, inter alia:

"After much consideration, we recommend the adoption of a special procedure for small claims (of, say $300 or less) which will involve no practitioners' costs at all, and only minimum fees. This proposal was included in our working paper. The Law Society of the Australian Capital Territory, and several other persons and bodies, have expressed approval of it, and no-one has expressed any opposition to it.

The existence of a legal aid system does little to alleviate the problem, which is essentially not one of the want of means of the litigants, but of the cost of the procedure in relation to the amount on issue. Notwithstanding that a legal aid system is now in force in the Australian Capital Territory, and whatever changes may be made to it, we think that a small claims procedure will remain necessary".

The Commission then goes on to say:

"The fundamental point about our recommendation for a small claims procedure is that it is a recommendation relating to procedural law and not to substantive. Magistrates would still be charged with the responsibility of doing justice between the parties according to the rules of substantive law. But the manner in which they discharge this task would be considerably different. They would conduct the proceedings calling such witnesses, and for such documentary evidence, as they might require; the rules of evidence would not be binding; and some features of the adversary system of trial would not apply; for example, the magistrate would be required to play an active part in ensuring that all relevant facts, on each side, are brought to the notice of the court. In general the control of the case would be in the hands of the Court to a larger degree than is normal.

If the small claims procedure is to be effective to enable wage-earners to resort to it without financial loss, the courts hearing claims under it should, if required, sit out of normal court hours, for example from 5.30 p.m. to 10 p.m. and on Saturday mornings, to enable the parties and the witnesses to attend without loss of wages.

The small claims procedure itself would be as simple as possible. The forms used would be much more self-explanatory than at present, and the rules apply to the general procedure and would not apply to the small claims procedure except as specially provided.

A great deal would depend upon the skill, patience, and understanding on the part of the court staff, towards litigants under the small claims procedure. It should be their duty to assist prospective litigants in the completion of forms and the procedure to be followed. We have in mind that there should be an officer or officers available whose functions would be similar to those of a Chamber Magistrate in New South Wales.

The question of what right of appeal should lie from a decision made under the small claims procedure is one which has caused us some concern. Briefly, we are recommending that there be no appeal on questions of fact, but that there be an appeal by leave, to the Supreme Court, where there has been an error of law, or on procedural issues, where the course adopted by the magistrate was, in all the circumstances, unfair.

The small claims procedure should, we think, be regarded as in some degree experimental, and once established should be carefully watched. It may take some time before its full benefits become generally recognized in the community, and consideration should be given to some method of informing the public about it. We believe that at present there is a widely held, and indeed largely accurate, belief that there is no effective remedy for a person wishing to make a small civil claim, and to dispel this may take some time.

We wish to emphasise that our basic proposal to apply the procedure of the Supreme Court to the general procedure of the Court of Petty Sessions is dependent on acceptance of our recommendations with respect to the small claims procedure. The need for a special procedure for small claims will be greatly increased if the ordinary procedure of the Court of Petty Sessions is to be modelled on that of the Supreme Court. Accordingly, if our recommendations for a small claims procedure are not accepted, we would not favour the course proposed above. In that event we think it would be necessary to devise a different, and more flexible, procedure for the Court of Petty Sessions which would be appropriate for both small claims and claims of several thousand dollars."

In Appendix B to the Report the Commission goes on to make specific proposals.

1. "The procedure should be alternative to that available generally in the Court of Petty Sessions. Thus, a prospective plaintiff wishing to claim an amount in excess of $300 would sue under the general procedure unless he wished to abandon that part of his claim exceeding $300. If, however, he wished to claim an amount not exceeding $300 or wished to abandon the excess over $300 he would have a choice - proceed under the small claims procedure where there would be no costs and there would be an informal and speedy procedure; or proceed under the general procedure where he might recover professional and other costs but must comply with a more sophisticated procedure".

2. "If he chose to proceed under the general procedure, and the defendant wished to defend the claim, then the latter would have the option of allowing the case to proceed under the general procedure or of applying to have it heard under the small claims procedure. In such a case the defendant should be required to satisfy the magistrate that he has an arguable defence".

If the consumer is the defendant, then he can choose to proceed under the simple procedures. But in my view it would be undesirable if trader defendants had the right to elect to proceed under the general procedure. This would defeat the object of the legislation. Unless both parties agree otherwise, a case coming within the monetary limit should be heard under small claims procedures.

. "The practice, procedure, rules and forms prescribed and followed in the small claims procedure should constitute a simple, informal and inexpensive system for the prompt determination of claims in accordance with the rules and principles of substantive law.

. The hearing of cases should be conducted in a less formal manner than the traditional court hearing, with the magistrate conducting the examination of witnesses only with such assistance as he required from the parties or their representatives. The usual rules of evidence, pleading and procedure would not be binding. Accordingly the magistrate would probably make more use than is now customary of written reports (thus saving personal appearance of expert and other witnesses) personal inspection and judicial knowledge."

My earlier comments on the desirability of the above features apply here.

• The Commission in its recommendations states parties could appear personally or by unpaid agent, or by counsel. No costs with the exception of court fees and witness expenses would be allowed however.

• A nominal filing fee of $2 is recommended.

• "Service of the claim to be by the Court, either by registered A.R. post or at the option of the plaintiff by personal service in accordance with the rules applying under the general procedure. If service is by A.R. post the signature of the recipient to be prima facie evidence of service on him of the claim. Service on companies to be borne by the Court, and this is in keeping with providing justice for small claims at little cost to the parties. There must be one exception however; we recommend that a party who seeks an order for substituted service should pay the cost involved in complying with the order which costs would be recoverable if he is successful against the other party.

The defence to a claim might be filed either by post or by handing it in at the Court office. The Court would be responsible for posting or delivering a copy of the defence to the plaintiff".

I agree with the above with the exception that service on companies should comply with the ordinary provisions of the Companies Act; service should be, if not personal, at least by registered mail.

• "After the filing of a defence, the Court officer responsible for the listing of cases to allocate a hearing date. On allocation of the hearing date, the parties could be notified by post.

• Evidence at the hearing of claims under the small claims procedure would not be recorded but the magistrate should be required to take a note of the proceedings. This note would be available only to a party to an appeal from the magistrate's decision. In recommending no recording or taking down of evidence, we are of the view that in the small claims procedure, the cost of so doing is not warranted. The Ordinance or Rules should require the magistrate to take a note of the evidence, sufficient to enable him, in the event of an appeal, to provide a report to the Supreme Court in which he would state his findings of fact and his rulings of law".

I agree that basically this is all that is necessary.

• "The enforcement of judgments would be precisely the same as enforcement of judgments obtained under the general procedure".

This is inevitable. It would obviously be impossible (and undesirable) to establish a separate enforcement procedure for the small claims court.

• "There appears to be no necessity for the appointment of a guardian or next friend in proceedings brought in the small claims procedure because:

(a) no costs may be awarded against a party; and

(b) the magistrate would be in charge of proceedings much more so than usually and would have a duty to look after the interests of parties fsuffering from a disability".

This seems sensible.

• "Where no defence is filed within the prescribed time to a claim under this procedure, judgmant (final or interlocutory) might be obtained by the plaintiff coming to the Court office and filling in a simple form requesting this. Each plaintiff would be notified of the procedure to be followed at the same time as he has been notified by the Court of service of the summons (and this notification would be by a relatively simple form).

• Judgment by default should be prohibited if the defendant is a person who has not attained his majority".

These recommendations are in line with the spirit of the Queensland legislation, if not the letter. Next friends and guardians ad litem are not specifically mentioned in the Queensland Act, but it has sufficient flexibility not to need specific provision in this respect.

• "After the filing of a defence, the Court office would send a notice to the parties advising them of the trial date and enclose with the plaintiff's notice, a copy of the defendant's defence. At the same time, the parties would be advised that on the hearing or trial date, they should bring with them their evidence and any witnesses. Additionally the notice should invite the parties' attention to the fact that they may discuss any doubts or problems about the procedure to be followed with the appropriate Court officer.

A party wishing to withdraw his claim or defence, should be able to do so by lodging a letter to that effect, of which the Court office would advise the other party".

It is not necessary for the defendant to disclose his defence to the plaintiff, if that plaintiff is a consumer. The consumer would almost invariably not be preparing legal submissions and the dispute would be one of fact. There may be legal issues arising from the

fact situation but it should be the function of the adjudicating officer to isolate these anddecide on them. The consumer will have almost invariably discussed the problem with the trader, so in many cases, he will know what defence the trader will be raising. And, if the trader does not disclose his defence, it does not much matter in view of the inquisatorial nature of the proceedings.

. "Separate rules will obviously be necessary for the small claims procedure. The stage at which the rules of the general procedure or of the Supreme Court would become applicable, would be that of execution. The rules for the small claims procedure should be prescribed by a Rules Committee to be appointed by the Attorney-General".

. "An appeal from a decision made under the small claims procedure would be to the Supreme Court, by leave. Leave should be granted only where it appears that the magistrate made an error of substantive law, or where, on a question of procedure (which includes the reception or rejection of evidence) a decision of a magistrate was in all the circumstances unfair. It is to be remembered that we recommend that the rules of evidence are not to be binding in the small claims procedure. The Supreme Court should be empowered to dismiss the appeal if it is satisfied that there was no miscarriage of justice. The Supreme Court should have a discretion to extend the time for applying for leave, or to grant it out of time".

. "The usual position regarding costs on an appeal would apply, that is, the successful party would be entitled to an order for costs against the unsuccessful party, but the costs would be limited to the appeal and no costs would be awarded in respect of the hearing in the first instance."

I incline more towards the Queensland provisions regarding appeal. If leave can be given when there is an error of substantive law, the position would be little different from the present situation.

The Commission's report does not make it clear but it seems that claims by traders for debts incurred by consumers would also fall within the small claims machinery. If this is so, then the procedure would be subject to the same defect critics have complained of in relation to some of the American small claims courts; they have become cheap forums for the mass collection of debt.

I am not aware of how favourably the Commission's report was received. The "Auckland Star"[19] on its feature column "An Eye on Australia" commented on the Commission's Report:

19. 4th November 1972

"Supporters of the plan to do away with lawyers in these cases involving small amounts of money - and they include lawyers too - say there is no doubt many people are dissuaded from taking legal action over small but important amounts of money or are prevented from defending themselves because of the expense of legal representation and court costs.

Again the excessively formal and intimidating procedures of the courts often frightens the layman from taking action. Lawyers themselves have complained that adherence to stereo-typed procedures has had the effect of slowing down the work of the Courts and of causing long lists of cases for hearing, to accumulate.

The result has been, they say, that a substantial proportion of the population is cut off from access to the law at a point where access is genuinely required. This they say, could lead to a 'widespread feeling of dissatisfaction with, and ill-feeling towards, the law generally'.

But with all such idealistic plans, there are problems which even supporters of the scheme acknowledge".

"It would place an increased work load and burden on already taxed magistrates. They would be required to organize both sides of the case and ensure all relevant facts were placed before the Court - a job that lawyers now do.

There is also the danger that the reduced cost of going to law would vastly increase work of the Courts by boosting numbers of simple arguments people would be prepared to take for legal decision.

While going to law is costly, small arguments between neighbours, or between two sides to a small financial deal, tend to be either settled privately or forgotten. Under the new proposal, say its critics, there could be a big increase in the number of mischievous or trivial cases coming before magistrates".

I do not intend to extensively deal with the criticisms made above; suffice to say that by the appointment of extra magistrates, the extra burden on existing ones could be avoided. Overseas experience has not shown the vexacious litigant to be more of a problem than in any other type of court.

Victoria

Victoria has a small claims tribunal. The empowering Act differs from the Queensland Act in only a few minor respects.

For instance:

. the limit of the Victoria tribunal's jurisdiction will be $500.

. An order made in excess of the court's jurisdiction is not, as in Queensland, of no effect, but valid up to the limit of the jurisdiction.

° The penalty for contempt is a $500 fine or imprisonment for six months instead of $100 or 14 days as in Queensland.

Apart from these changes, the wording of the Act is virtually identical to that of the Queensland Act.

At the time of writing, no information was at hand as to how the tribunal is functioning.

NEW ZEALAND

Interest in small claims courts was first sparked in the early 1970's by an article in the Law Journal and by the 1971 Annual Report of the Justice Department. Then an article advocating their establishment appeared in CONSUMER in April 1972.

Some of the reactions to the article was favourable; others not quite so. In an article dated 6 June 1972, headed "JUSTICE ON THE CHEAP, But there's a lot of very real hitches" - New Zealand "Truth" said "Consumer Council charged in where angels fear to tread. It wants an informal small claims court to settle the little tussles over small amounts that never get to court, because lawyers costs are more than the disputed amount.

The idea has plenty going for it.

But the green field of justice has many hidden traps. The Council in an effort to get cheap instant justice for the consumer, has advocated dumping lawyers and the courtroom and relieving the overworked magistrate of minor disputes.

.. The injustice of the small claim being priced out of court has to be considered as part of the larger issue.

.. But improving the system becomes complex and those who know what they are talking about, find difficulties to be resolved.

.. Judges are already in short supply.

There is the question of cost to the taxpayer. If "Justice" becomes easily available at little or no cost, the number of claims will inevitably increase. That would provide a heavy burden on the administration of the courts and the people who hear the cases.

Doing away with lawyers for these cases is also questionable.

Minor litigations are often just as complicated as bigger cases and the layman often needs considerable help in establishing the necessary proof.

And hearings, inevitably will still need to be adjourned to gather all the facts, because without expertise, the layman will leave evidence at home, and wander from the subject, at the taxpayers expense.

Quickfire justice can be good, only if it IS justice.

Ideally, the system should be cheap, adequate and just. That knocks out the tribunal and its judge".

"Truth" in its usual inimitable fashion dashes into the fray, probably on the basis of a chat a sensation-hungry reporter had over a lunchtime beer with a lawyer friend. In my respectful submission, none of its criticisms are valid.

The first substantive criticism is easily answered. More "judges" can be appointed from the swelling ranks of the profession.

The question of cost is of course probably the major consideration hanging over the whole question of the establishment of small claims courts. It is the writer's view that it would not be prohibitive. Facilities can be shared. There is no need to erect Small Claims Courthouses. Few staff would be needed. Since the hearing of small claims would be separate from the Magistrates Court, they would by no means impose a heavy burden on the existing courts.

Doing away with Counsel is not questionable. Cost is reduced because instead of 3 lawyers; claimant's, defendant's and adjudicator, there will be one - the adjudicator. I am the first to agree that complex issues of law will arise (though I hope the court will not take too many technical points up)but it will be the function of the presiding

officer to elicit the facts and ascertain and apply the law.

Unnecessary adjournments can be avoided by providing all claimants and defendants with a simple instruction sheet telling them what to bring and what to expect.

A rather more rational look at small claims courts was taken by the "Auckland Star" of 11th December 1972 in an article entitled "Diddled, eh? A small-claims court could be the answer". The paper quotes Dr Findlay, the Minister of Justice, as being interested but wanting a great deal more of information to study the question. (Shortly after this a 5-man caucus committee was set up to study the issue).

The "Star" lists what it sees as the following problems:

- Presiding officers may have difficulty in dealing with technical matters without retaining experts.
- "Cranks who have all the time in the world to waste" might be attracted to the court.
- The question of appeal.
- The problem of lawyers.
- Enforcement of judgments.

However, the Queenslander's and Victorians seem confident that these matters are not insuperable problems and have legislated accordingly.

A number of other articles relating to small claims have appeared in newspapers and periodicals in New Zealand. In addition Mr F. O'Flynn set out his ideas in a paper delivered last year at the Legal Research Foundation seminar at Auckland, and Mr P.J. Downey in a radio broadcast on "The Law ~~as Served~~ Observed", on 11th April 1972. I do not however propose to exhaustively examine this material. At this stage of the paper I intend to leave the examination of published material largely alone and advance some ideas for reform in New Zealand. I do not claim that all these ideas are original ones.

But I would like to examine a proposal made recently to the Minister of Justice by the Association of Citizens' Advice Bureaux.

The Association states, inter alia:

"For some time, our members have noted a fair proportion of enquiries over problems with small claims and with other types of minor disputes (for example, between neighbours). A large number of the consumer difficulties seem to involve motor vehicles repairs usually about amounts of up to $100. Often, members of the public feel that legal proceedings are just not worthwhile because of court and other costs. Much help has been given by the Consumers' Institute and by the legal advice service in each Bureau arranged through local law societies. However, you have recently indicated that the Government is considering the question of "small claims courts" and our Association would like to support the concept and to make one or two further suggestions.

Firstly, there is the need for such a service to be easily available to the public. We would suggest that centres such as ours which are located in the community could provide suitable accommodation for the setting of small claims disputes especially at those times which are more accessible to the general public (for example, Saturday mornings).

Secondly, the scheme could perhaps come under the general umbrella of a "Neighbourhood Conciliator". Such a person we suggest, should preferably be someone with legal training perhaps to initially work on a part-time basis. In a way, the scheme could be seen as a parallel to the Marriage Guidance service which is already sponsored by the Justice Department".

"The emphasis on legal qualifications however, would mean that a dispute that could not be settled by a conciliator would then be referred to the appropriate institution or profession for further action. It is suggested that the Neighbourhood Conciliator may also relieve the pressure on the existing courts. We feel that there are some useful precedents in New Zealand (such as the Race Relations Conciliator, the Marriage Conciliator and so on) to indicate the function we have in mind. Obviously, informality, availability and communication between parties will be the three key aspects of this suggested scheme. The specific cases could include any dispute or claim that a person may wish to bring - such as small claims or debts, fencing disagreements and so on. By integrating such a scheme with a general neighbourhood social service centre then many of the problems and difficulties that occur in our society could be resolved at the grass roots level. Thus as help or assistance is required with budgeting, or marriage guidance counselling or whatever then this can be arranged at the community level."

The Associations proposals seem to me to have merit. Certainly I agree that in certain cases it would be appropriate for the court to use the facilities of the local advice bureau to hear cases.

I am unsure how successful the conciliator would be. I have my suspicions that since he would not have powers to make an order which is binding on the parties conciliation might suffer from the same drawback as the Manchester Arbitration scheme, the intractable Traders merely ignored the arbitrator's efforts. However, it is better if claims are settled equitably between the parties themselves, and if the conciliator was only successful in a minority of cases his existence might still be justified. Suffice to say that the Association's proposals merit investigation.

REFORM.

Perhaps up to this point this paper may have seemed a slightly tedious exposition of overseas practice. However, while ~~thinking~~ taxing on the reader, the preparation of that exposition gave the writer the opportunity of reflecting on possible reforms for New Zealand.

The views I have come to are these;

1. There should be set up a small claims court in New Zealand, to hear disputes involving amounts of up to $500. This amount should be reviewed periodically to take account of factors like inflation.

2. Initially a pilot scheme should be set up, preferably in Wellington but otherwise in one of the 3 other main centres.

3. This pilot court should run for a trial period of 12 months, and if successful it should be extended. While it may seem discriminatory if one city's citizens have a legal service not available to others, it is better that some people are fortunate than none at all. It would at any rate only be for a limited period.

4. For the trial period the court would hear only consumer claims. On the basis of the first 12 months experience a decision could be made whether to continue with the court at all, or whether to not only continue it but also to extend its jurisdiction to cover tortious actions as well.

I am still ambivalent on this particular point. On the one hand I can see the strength of the argument that a person claiming $50 from Woolworths should not be in a more favourable position than another person claiming $50 from his neighbour for accidentally bumping into his car. On the other hand the principal reason for the establishment of the court should be to provide the machinery to remove the impotence of the wronged consumer faced with the realities of his position. My own view is that the success of the court need not necessarily be judged on the number of claims lodged or heard. The mere existence of the court will be a deterrent, and success in this respect is probably not measurable by means of empirical data.

5. The question which has most troubled me, and which is central to the question of form the court should take, is that of who should adjudicate.

I eventually narrowed the field down to 4 possibilities. I discarded a fifth and sixth possibility, Magistrate or Supreme Court Registrars, and Justices of the Peace, since it will not be possible to dispense with lawyers unless a legally trained person adjudicates, adopting an inquisitorial method.

The four possibilities are:

(i) Retired Magistrates. There are many retired Magistrates whose still very agile brains could be employed in the capacity of small claims adjudication. I do not subscribe to the view than anyone over sixty-five is likely to be senile, my only reservation about using retired Magistrates in this role is their ability to adapt from the adversary to the inquisitorial approach. However I am satisfied that there would be several retired Magistrates with the ability to adapt, even at that age. Whether the particular persons would want to take the job on is however another question. There are very likely only a few men with the right qualifi-

cations and disposition for the job; and it would be best if only a few adjudicators are appointed so as to ensure those adjudicators gain experience and become skilled in this particular area. This is an obvious efficiency promoting measure. However, if only a few men are appointed then they are obviously going to have to undertake a reasonable amount of travelling, and this may be incompatible with their ideals of retirement.

(ii) Newly appointed Magistrates. Small claims adjudication would be the first duty of newly appointed Magistrates. Ideally there would be two Magistrates appointed, one in Auckland to cover all but the Southern tip of the North Island, and one in Wellington to cover the lower part of the North Island and the South Island. This need not be regarded as a probationary period, but it would be a way to tap the energy of the younger Magistrates. On the appointment of a new Magistrate the longest serving of the two would take up ordinary magisterial duties.

This is the solution I favour most, but I realize the practical difficulties. To persuade good lawyers to accept the financial step-down and the onerous duties of the Magistracy is by all accounts becoming by no means easy. It might be made even more difficult if they thought that the handling of small disputes in the first part of their tenure was demeaning to them. There is also the lack of variety of work. I believe it would be rewarding and interesting work, but it might be difficult to persuade prospective Magistrates of that.

The other advantage of new Magistrates is that they would still be adaptable. Some Magistrates, after years on the bench, develop a tendency to regard the courtroom as a microcosm over which they have absolute dominion, and it this type of autocratic approach which I was thinking of when I suggested in (1) that if retired Magistrates were to be appointed, tolerance and flexibility would be essential attributes. As a general rule it might be that younger Magistrates might be thus better equipped for the job.

(iii) Existing Magistrates. The simplest way to implement procedures for dealing with small claims would be to institute a new set of rules within the existing Magistrates Court rules, setting our small claims procedures. Selected Magistrates would be given small claims warrants. There are several problems with this however. Firstly, I have doubts about the ability of Magistrates to step from a courtroom after hearing the advocates advancing their cases, into a small office and then adopting a different mantle, eliciting the facts themselves, ensuring proceedings are informed, and generally setting

the parties at ease.

Secondly, it may be practically speaking easier to persuade the general public and lawyers and the judiciary in particular, to accept the concept of a separate consumer forum than it would be to persuade them to make a special exception from the ordinary rules governing civil litigation in the Magistrates Court. One can see that lawyers would balk at being disallowed the right of hearing before an ordinary Magistrate, and there might also be grave reservations expressed by the more conservative members of the profession about the relaxation in the rules of evidence and procedure, and about the lessening of formality.

(iv) Practicing Lawyers. There are two possibilities here; to either use lawyers on a voluntary basis to arbitrate, or to pay them for their services. Obviously volunteer adjudicators would have the advantage of lowering the cost of the court. The disadvantages would be the difficulty of obtaining suitable people who would be willing to devote time to this task, and the fact that there would inevitably have to be a roster to distribute the work, and those on the roster would hear too few cases to become quickly experienced in this field. And since no lawyer would presumably be prepared to take time off work to travel to other cities on an unpaid basis there would have to be lawyers appointed in most cities and towns. This would not only exacerbate the problem of there then being too many adjudicators for the number of claims but also would increase the possibility of bias through the lawyer knowing one or both of the parties. Allied with this problem is the whole question of judicial independence. Even at the small claims level this is desirable. Additionally, the greater the number of adjudicators the longer the time it would take to build up a body of principles for the ensuring of a reasonably consistent treatment of small claims throughout the country.

Having a small panel of paid lawyers who would each, say, devote a morning or an evening per week to the hearing of the claims would mean that each lawyer would soon acquire experience. If a lawyer knew a party he would disqualify himself. Having regard to the difficulties mentioned in (i) and (ii) lawyers may be the most practical solutions. Lawyers do, on occasions, sit in a semi-judicial capacity, for instance in the Coroners court.

Arbitrator or Judge?

There are many who would argue that the lawyer in private practice would be better suited for the role of arbitrator, rather than for a formally judicial role.

Arbitration, whether compulsory or voluntary, is not a suitable solution to the small claims problem. It is firstly generally private, and no publicity results (this could be remedied by publishing the results of disputes as is done in ~~Auckland~~ Queensland, and should, I recommend, be done here).

Secondly and more fundamentally, it was my experience while at "Consumer" that arbitrations often acted to the detriment of consumers; this was most noticeable in building disputes where the contract contained a provision for arbitration which removed the consumer's normal common law rights. Why this is so I am unsure, but it seems that traders and those of the commercial world generally seem to be better equipped in coping with arbitration than consumers.

Lawyers, I conclude, could be used if they were paid, acting as judicial officers and not as arbitrators, and if there were sufficiently few to ensure they quickly become experienced rather than having "small claims duty" every 2 or 3 months.

If lawyers were used, care must be taken to ensure that those with a possible bias are excluded. Lawyers with a large commercial experience would be largely unsuitable, since they would tend to dwell too largely on the technical points of law involved rather than look at the substantial justice of the matter. They might also tend to be rather too much aligned to the business viewpoint.

The Report of the Committee on Court Business, released in May 1974 incidentally states the small claims could be disposed of by "possibly a roster system of barristers who would be prepared to sit in the Small Claims Court on the understanding that there were no legal representatives of the parties". (p.32).

On mention of the Committee on Court Business I should perhaps mention Mr F.D. O'Flynn Q.C's paper set out in the appendix of the Report. Mr O'Flynn states that he thinks the correct solution for New Zealand is that a small claims court should be run by the Registrar of the Magistrates court as a branch of the court. I reject his solution for the reason advanced earlier, if lawyers are to be dispensed with then the presiding officer will need to have legal training. If the registrar is a qualified lawyer then of course my objection is over-ruled.

6. Venue. Obviously venues would be dictated by the circumstances in individual cities and towns. There would need to be at least one central registry, and possibly one in each of the 4 main centres.

Convenience would probably dictate that these should be located in the Justice Department near the Magistrate's Courts, for the reasons set out in 9.

Other than the actual administrative centre(s) the court could be constituted where the adjudicator directs; in a Justice Dept. office, a schoolhouse, a country district town hall, a private home.

7. The Crown. Small claims courts should have jurisdiction to hear claims against the Government, independent corporations, and Local bodies. If N.A.C. overbooks an aircraft, or the Post Office overcharges a telephone subscriber, the consumer should have the same rights of redress as a consumer sold a faulty product by a private trader has. It disturbed me that the Consumers Institute lacked the resources and the courage to investigate Government Departments and Public utilities at any more than a very superficial level. Actions by small claiments, publicized in accordance with 8. would go part way towards the removing of the helplessness of the consumer faced withe the omnipotence of the "faceless bureaucrat".

8. As in Queensland, names of parties, the facts of a dispute, and the decision reached should be published regularly in the daily newspapers.

9. I see no alternative to the enforcing of judgements than by the consumer registering it in the Magistrates Court and enforcing it as a normal debt. This may be a weakness, but it would be quite out of the question to set up a separate enforcement agency for small claims. Hopefully most traders would pay the amount of the judgment or do the work ordered when ordered to do so. Publication of defaulters would be an effective way of ensuring that this occured. Only the shadiest of traders would be unruffled by publicity of this nature.

10. Procedure should be simple, in this regard the New Zealand legislators could do well to study the Queensland and Victorian Acts closely. Normal rules of evidence should be dispersed with. Proceedings should be low key and informal.

11. As in Queensland, lawyers should be excluded unless the adjudicator sees a compelling reason for allowing them.

Such a reason could be a request by a consumer with a complex problem and who indicates that he doesn't mind paying for his lawyer. In such a case the trader would also be allowed a lawyer. Neither party would be allowed costs in respect of the lawyers, however, unless the claim was obviously frivolous or vexacious.

If the circumstances warranted it the parties would be allowed to bring a friend, or relative to reassure them, or as interpreter. The adjudicator would decide whether this was warranted.

12. Consumers with a dispute would file in the registry a simple claim form setting out the details of the dispute. The redress claimed would not be necessary, the adjudicator could decide the appropriate redress after hearing both sides.

Help in filling out the forms could be sought from a solicitor, the clerk at the registry, or at the Consumers Institute Complaints Advisory Service. Many of the claims would be forwarded by the L.A.S. after they themselves had been unsuccessful in obtaining the appropriate redress.

13. Finance for the scheme would come mainly from Government, though a scale filing fee would be charged. To keep Treasury happy filing fees could be;

Claims up to:		Filing fee
	$100	$3
	$200	$5
	$300	$6.50
	$400	$800
	$500	$10.00

These are suggestions only. If no particular amount is claimed the consumer could pay a fee commensurate with his rough estimate and an accounting could be done later.

If the consumer was successful in his claim then the Trader would pay the same amount, not to the consumer to reimburse him, but to the court.

Obviously the fees would not meet the full cost of the court, they would at most amount to a subsidy.

Consumers would not be reimbursed their fees by unsuccessful defendants, unless in exceptional circumstances, when the adjudicator thinks that the conduct of the trader merited this. In that case the trader would thus have to pay a double fee. In most cases, however, a "user pays" principle would pertain (or at least "user contributes").

14. As stated in 4. for a trial period the court would hear only consumer claims. These would include consumer/plaintiff actions, and defended consumer debt claims. The Magistrates Court would automatically transfer cases where a consumer files a notice of intention to defend to the

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small claims court. Procedure would then be the same as for consumer initiated claims.

15. In each city or town there would be a panel of experts, perhaps supplied free by, e.g. the Master Builders Federation, the Automobile Association, or the Electricians Association. When the small claims adjudicator found himself faced by a Technical problem too complex for him he would call on the services of the expert. If volunteers could not be found, then the cost should be met by the court, and not by the parties, unless it was a frivilous or vexacious claim or unless in all the circumstances having regard to the defendant's conduct the adjudicator thinks he should meet the cost.

16. The legislation should be sufficiently flexible to allow not only the tribunal to be constituted at any <u>place</u>, but also at any <u>time</u>. If the litigants found it inconvenient to attend during working hours (for example a consumer might lose wages or a small trader might lose business) then the court should be able to sit in the evenings or on Saturday. This would not necessarily disadvantage the adjudicator who would have a corresponding amount of free time during the week.

Sittings of the Court would be on appointment basis. The Registrar would estimate the amount of time needed to hear each case.

CONCLUSION.

I have set out some of the features I would like to see incorporated in a New Zealand small claims court. It can be seen that many of my ideas are borrowed from the Queensland tribunal and I make no apologies for this. The Queensland and Victoria tribunals seem to me to have the advantages of simplicity, flexibility, informality, and relative economy. There are of course serious and weighty problems to be considered in the establishment of a small claims court in New Zealand. The greatest obstacle is that which faces the multitude of persons suggesting the reformation of a particular institution, or the establishment of a new one, money. But the cost of a properly thought out scheme is by no means prohibitive.

Apart from cost there are other problems to be overcome; for instance finding suitable people to adjudicate, but these problems are not insoluble, as overseas experience shows.

As our health services, our educational services, our transport services etc. change in form, modernize and progress to fit changing social and economic circumstances, so must our legal services. There must be growth and regeneration otherwise the courts will grow to be anacronistic

and ill-fitted to modern conditions.

It is time for a small claims court.

SOURCES

The material which I drew on in the preparation of this paper is largely drawn from the files of Consumer's Institute, and their co-operation in making it available to me is gratefully acknowledged.

Much of this material is in the form of correspondence between Consumer's Institute and overseas consumer bodies. I have not listed any of this correspondence since it is unpublished.

The other material is almost all in the form of magazine and newspaper articles.

The only book read during the preparation of the paper was "Counsel for the Decieved, A Case Study in Consumer Fraud," by Phillip Schrag.

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"It is a prime duty of a civilised society to provide an easily accessible means of settling disputes" - U.K. Consumer Council. "Justice Out of Reach" (1970)

SMALL CLAIMS COURTS: IS THERE A NEED?

I have confined this paper largely to an examination of the reasons why consumers need a simplified claim procedure, leaving open the question of the need for simplified debt collection procedures for traders.

The first task the writer of any essay normally sets himself is to define his terms. What do I mean by "small claims courts?" At this stage however, I myself have only a hazy idea of what I mean in a concrete sense, suffice to say that by "small claims court" I mean a method of solving disputes which involve a relatively small amount of money. "Court" may be a misnomer here, conjuring up as it does, images of pomp and judicial trappings, while it may be that small claims could be settled in a local school hall by an arbitrator talking to the parties concerned over a cup of coffee. However this is the province of my later research paper on small claims ~~work~~ courts, their possible functions, structure and jurisdiction, overseas experience and so on.

But first it is essential to look at a question which is fundamental to any discussion on small claims courts; why do we need them?

I had hoped to base this paper entirely on hard statistical information in order to add more credence than mere assertion to my thesis. The Consumers' Institute last year sent questionnaires to 500 lawyers to gather information on the extent of lawyers' involvement in small claims, and their attitude to them.

However, since (a) relatively sophisticated methods of analysis are needed to correctly interpret the results, (b) the survey results are as yet unpublished by the Institute (which of course is entitled to publish them first), this is not possible.

Thus some of the material in this paper is necessarily subjective, but still, I hope, points to the need for an inexpensive and simple method of settling small claims.

While it is difficult to point to reliable research which shows the need for a small claims court, it is not difficult to find generalized statements.

I instance 3 such statements:

"... there's no doubt at all that lawyers are compelled to tell many people who have a dispute with someone else, that it just isn't worth taking to Court; that the amount of money involved in the dispute doesn't warrant a Court case unless they're prepared as some people say they are, to go to Court purely on the question of principle. And this means of course for most people, they've got to accept what they think as an unfair compromise in many cases or just drop the matter altogether". Bruce Slane, Auckland lawyer. Y.C. Broadcast 27.1.73.

"It simply does not pay to take a small dispute before the Courts. This is not a question of rapacious solicitors. The lawyer, like the labourer is worthy of his hire. Nor is it a question of stubborn or unreasonable plaintiffs and defendants. The dilemma is that at a certain point, not so very low in terms of money, the proper cost of legal representation approaches or exceeds the value of the claim".

"Plainly the answer does not lie with legal aid. I believe however that to some degree the state must assume the burden of providing the machinery by which small claims can be simply, quickly and above all cheaply settled. One answer might be an effective small claims court. The introduction of such a Court has been suggested recently in England and in New Zealand to deal with petty disputes on principles of equity and good conscience".

Mr E. Missen, Secretary of Justice, 1971 Justice Department Report.

"We found, in brief, that solicitors do not welcome clients with potential consumer claims; that some solicitors will not accept such clients at all, and that as a result, people with consumer claims may be shuffled from one solicitor to another, or else, because of expense, they may be advised that their complaint, however sound, is not worth pursuing".

"There is a tendency among lawyers to think that it is no bad thing that people do not use the Courts to settle disputes over small or mundane matters. They consider that the majesty of the law should be invoked only for matters of grave import and not for disputes, involving for instance, mere household goods. This attitude is ironic when one considers that the purpose for which the Courts, or at least the county Courts are in practice principally used, is collecting debts owed for those very same household goods".

U.K. Consumer Council "Justice Out of Reach" 1970.

The preceding statement is borne out by a random sampling survey which the U.K. Consumer Council did of 6 Country Courts. Of the 1,200 cases examined, there was not one case of an individual suing a firm. In 50 cases however, a defence was filed, and in 64% of these, the action was withdrawn after the defence was filed.

While I cannot go into detail, the preliminary indications of the Consumers' Institute's own survey of Magistrates' Courts in Auckland, Wellington, Christchurch, Dunedin and Palmerston North, also indicates that the proportion of individuals suing firms is also extremely low in New Zealand, as is the proportion of defended claims.

Apart from cost (which I personally think is the major reason why consumers do not pursue small claims (or perhaps defend debt claims)), another reason advanced for small claims courts is that consumers are deterred from taking small claims in our present Courts, in that they are frightened or overawed by their formal procedures.

It may be that the fear of many people of being involved in Court proceedings is an irrational one, but it is still very real. Some elderly people, for example, are very fearful of having to "go to Court". I feel if they knew that the hearing was going to be informal, that it would be in a private room, with the parties sitting in comfortable chairs around a table, that they could smoke a cigarette and perhaps sip a cup of coffee, that they would not be subjected to a forceful cross examination by the other party's lawyer, their fears might be dispelled, at least to a large degree.

The factors tending to show the need for a simplified and informal small claims procedure are neatly summarised by the Consumers' Association of Victoria:

"Where a small claim is involved, a litigant is deterred in the Magistrate's Court by the cost of being in Court. He will be liable for legal fees for a solicitor before the case, and possibly a barrister as the hearing, not to mention witnesses expenses and his own loss of wages. He is also intimidated by the legal process and rules of evidence. Although these are designed for his protection, they do not always work that way. The adversary system of British orientated Courts may mean that a man with a true and sad story of faulty car repairs which a garage will not make good, can be presented to the Court by a clever barrister as a lying, shifty drag racer, or, alternatively, a guivering idiot who did not know what he wanted".

"Consumer Comment" - December 1973

Even supposing that our present facilities are unsatisfactory for dealing with small claims, would there be enough claims to justify the setting up of a small claims court?

As stated earlier, because of the as yet unavailability of the Institute's survey results, it is difficult to give an accurate prediction of how many consumers are likely to avail themselves of a small claims court; but I believe the need for such a facility is pointed out by the number of complaints received by the Consumers' Institute.

On June 1 last year a formal Complaints Advisory Service was initiated, at the suggestion of the Government and financed by a special grant. Prior to this, the Institute did deal with complaints on an informal basis, mainly from members, but no accurate statistics were kept as to the numbers. In the Consumers' Council's Annual Report to Parliament, the Council reported that in the 7 months the Complaints Advisory Service had then been running, 4,972 complaints had been received. The total has risen to 9,407 5 months later.

Presumably the complaints received by the Complaints Advisory Service represent only the tip (albeit, a very substantial tip) of the iceberg. I posit this view because since the Service is still new, there will be a substantial number of New Zealanders who are still unaware of its existence, others may wish to consult their solicitors instead of the C.A.S. Others (and I think here especially of minority ethnic groups) may not only be unaware of the C.A.S., but also be unaware that the law does afford them certain protections.

Of the 9,407 complaints received so far by the C.A.S., the Institute says that:

- 48.92% of complaints were considered justified and redress was obtained
- 36.01% were solved by an explanation to the complainant which was accepted
- 4.24% were referred to other bodies, for example price complaints which are the province of the Department of Trade and Industry
- 1.47% were considered justified but the C.A.S. was unable to obtain redress
- 4.09% of the complaints were considered to be unjustified
- 5.27% were still under action (pending).

The figure to look at first here is the 1.47% total, which in number is only 138 complaints. 138 cases in 12 months is hardly enought to justify the establishment of a Court to deal with them.

However I suspect that the number would be bolstered by:

- Complaints from "pending", many of which the Institute has been pursuing for some time.
- Some complaints from "redress obtained" category, since "success" includes compromises which were the best possible in the circumstances, but still less than the redress the complainant was legally entitled to.
- And (the bigh unknown factor) by complaints from persons who did not contact the C.A.S.

It msy be thought that the above is largely speculation, and this it may be, but the mere fact that we do not know the approximate number of complaints which the courts would adjudicate upon, is not a valid argument against establishing them. A pilot scheme could be set up in one of the main centres to test the need for the scheme, but I suspect that the least of its problems would be underwork.

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