PUBLIC IGNORANCE AND THE small claims court

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How can small claims tribunals increase access to justice if the public doesn't know they exist?

Increased access to justice for small civil disputes is one of the major aims of the Small Claims Court.[1] This article considers public awareness and convenience issues related to access to justice, based on an evaluation of the Tasmanian Small Claims Court. The methodology involved a survey of disputants, file survey, personal and participant observations of small claims hearings and extensive interviews with small claims court personnel as well as with personnel from supporting agencies such as Consumer Affairs. The issues include the removal of financial barriers, scheduling hearings at convenient times, accommodation of the multicultural needs of disputants, and so on. Elsewhere I consider in detail the procedural aspects of access, such as restrictions on lawyers, privacy of hearing, opportunity to present one's case and the importance of an informal, unintimidating setting.[2]

A necessary precondition to the achievement of access to justice is an awareness by the disputant that the Small Claims Court exists. Having the best system in the world will be of little avail if people do not know about it. Mr Barry Hamilton, one of the co-founders of the Small Claims Court in Tasmania, felt that when it was first established the existence of the Small Claims Court was well publicised. The first full-time Special Commissioner (now magistrate) for Small Claims, Mr Michael Hill, played a pivotal role in educating the community about the existence of the Small Claims Court. When asked whether he thought Small Claims should be advertised more, for example, by speaking to various community groups, he replied:

> Definitely so. I know I visited all the Rotary Clubs. I remember speaking to one group as small as six in Lindisfarne (a number of business people were thinking of using the court to pump through their debt collections and I talked them out of that. It was before the Act was amended to require a dispute) and another meeting of 140 plus at the Hobart Rotary Club ... They were very important PR exercises. [Personal communication, 7 February 1991]

Mr David England, the chief court administrator, Magistrate Hemming and court staff generally felt that after five years of operating, the Tasmanian community was becoming generally aware of the existence of the Small Claims Court. When asked how people found out about it, the response was 'by word of mouth' and by referrals from such groups as insurance companies, Legal Aid and Consumer Affairs. Mr Hamilton also noted that 'Small Claims' was advertised in the phone book under department headings and that a notice board was occasionally put up in various seminars and conferences. He stated that the Small Claims Court was also well known amongst legal practitioners, the Consumer Affairs Department, and the people who work in the court structure generally. While the public is becoming more aware of the existence of the Small Claims Court, most magistrates agreed that even more publicity was needed, though a caveat was expressed that the resources of the system were already under significant strain. Interestingly, the supporting groups such as Consumer Affairs and Hobart Community Legal Service thought that Small Claims was *not* sufficiently publicised. Compared to Small Claims magistrates and court staff, the supporting groups were more adamant that greater publicity was required.

Awareness of small claims procedures

Even if people know of the existence of the Small Claims Court, they may hesitate to use it if they are uneducated about its procedures. Thus,

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related to the issue of general public awareness, is the need, in a forum where people conduct their own cases, for accurate information about Small Claims procedures. All of the interviewed magistrates agreed that the more prepared people are, the better the Small Claims Court can function and carry out its goal of providing affordable, speedy and fair dispute resolution. The theme of access to justice was further elaborated by Russell Viney, District Registrar of Small Claims in Burnie:

> I think one of the real advantages is that it [Small Claims Court] gives people easier access to the court, quicker access rather than the sometimes cumbersome procedures through the Court of Requests. We are able to give people a certain amount of advice with their small claims, whereas we are very limited with what we can tell them, the documents we can assist them with in the Court of Requests. Very, very seldom would anyone in the Court of Requests file their own claims and summons, for instance. I think the real purpose of Small Claims is to give people easy access. When they know that the hearing is only going to be between the parties involved, no solicitors around, it seems to give them a little confidence; they know they are there on equal terms.

Magistrates and court officials pointed to the existence of a Small Claims booklet available to disputants in small claims cases. Court staff pointed out that the booklet has undergone several changes and been steadily improved, though further modifications are required. Consumer Affairs and Hobart Community Legal Service were of the view that the booklet was inadequate in the following respects:

- parties do not appreciate the importance of witnesses, and of detailed statutory declarations;
- disputants do not realise that, in dealing with a trader, they must sue the person who owns the business, and that a business name will often not be a legal entity. Many consumers do not realise that they need to go to Corporate Affairs and find out who owns the business; and
- people do not understand the enforcement process, nor do they realise that they will not be able to recover the cost of witnesses.

Several of the respondents commented on their returned questionnaires that the Small Claims booklet was 'biased in favour of claimants'. These disputant comments were corroborated by the results of the disputants' survey which found that only 10% of claimants stated they were unprepared. In contrast, approximately one-third of the respondents stated that they were unprepared for their Small Claims hearing. Also, almost a quarter of claimants and a third of respondents stated they did not know before the hearing that they could bring witnesses; and 40% of the disputants stated that they did not know there was no right of appeal on the merits of the case against a decision of the Small Claims Court. These figures suggest the need for more information about Small Claims, especially for respondents.

As in the case of the need for more publicity, agencies such as Consumer Affairs and Hobart Community Legal Service were more critical than court staff of the degree of community knowledge about Small Claims procedures.[3] For example, Mr Marron (Hobart Community Legal Service) observed:

> The court also needs to be 'de-mystified' . . . People need to understand not only the role of the court but the workings of the court so that more will use it and use it more effectively.
>
> As it stands now, on the day of the hearing people often do not have their evidence assembled, they haven't prepared properly, they have no idea of the rules of evidence. Even though formal rules are suspended many litigants do not understand the basic rules which do exist. For example, when the Commissioner says they can cross-examine, many think that means they present their own case. There needs to be a lot more education about the roles and procedures operating in the court.

After five years of operation, community awareness of the Small Claims Court has grown considerably, but greater awareness of both the court and its procedures is necessary. Consequently, there is a need for the Small Claims Court to ensure that the different actors — judges, disputants, court personnel, community groups, businesses, etc — 'converge' in their understanding of one anothers' roles and behaviour.

Psychological access

In addition to the 'cognitive' element of knowledge that the Small Claims Court exists and awareness of its procedures, there is another element of access which relates to more 'affective', psychological barriers which prevent some people from going to a 'court' to resolve their disputes. Many of the features of the Small Claims Court — its informality, privacy, removal of strict rules of evidence, absence of lawyers, etc. — are designed to enable disputants to feel relaxed and confident enough to conduct their own cases. The importance of empowering people, giving them confidence in conducting their own cases was reinforced by Magistrate Hill when addressing the importance of speaking at Rotary Clubs and other community groups:

> They were very important PR exercises. I distributed pamphlets, gave out copies of the forms and told them how the court worked. It is very important for people to feel that they can do it themselves, to get the perception that they can do it. If they just hear the words 'Small Claims Court' they might be intimidated. But if they hear the average claim is 30-40 minutes (about the same as a dentist — sometimes more painful, sometimes less) and both sides just tell their story, no fisticuffs and you can ask questions of each other, and at the end of the day I say 'you win, you lose' — they get a perception that it is their court. If you can keep it simple, they get attracted to it. If you don't sell it, people fade away and don't use it.

Access for particular groups

An examination of access issues must also account for the utilisation of the system by particular groups within the community.

Accessibility for migrant groups

If access is to be more than symbolic, the court needs to stay in touch with the diverse groups who are touched by small claims and for whom their most likely experience with the legal system will be in a Small Claims Court. It is in the light of their experience in the Small Claims Court that most citizens will form their perceptions of the judicial system as a whole. Court officials also need to be open to the fact that different people and groups see reality differently. This explains much of the contrast between the views of court staff, the supporting groups such as consumer affairs and legal advice services, magistrates and the disputants themselves. Lieberman, for one, talks of the 'traditionalist' view of courts as legal decision makers versus the 'adaptationist view' of courts as agents of conflict resolution and social welfare.[4] These different roles are also seen in the disputant comments, some stating that they wanted the judge to make a decision, others to reach an agreement.

For those disputants from a non-English speaking (NESB) and non-Anglo-Saxon background, the prospect of going to court can seem particularly daunting. Previous studies have highlighted the need for courts to be particularly aware of the special problems of such disputants. However, there does not appear to be a problem in court access for migrants in

Tasmania, because, in contrast to most Australian States, Tasmania has a low percentage of NESB migrants. It was the unanimous opinion of all those surveyed that migrants, especially NESB migrants, enjoyed ready access to the Small Claims Court in Tasmania. The validity of these opinions is supported by the demographic characteristics of those surveyed, which reflected approximately the same proportion of migrants existing in the general population. This suggests that the Tasmanian Small Claims Court is equally accessible to migrants as to native-born Australians. As a percentage of population, one would expect that potential problems with migrants would not be as significant an issue in Tasmania compared to such States as Victoria and New South Wales where NESB migrants are located in much greater numbers.

Despite the fact that Tasmania appears to have few problems in creating small claims access to migrants, it is nevertheless important that the court remain vigilant in this area. For example, a few of those interviewed quickly responded that there was little problem with migrants because an interpreter was available if needed. Such a response overlooks the fact that the problems encountered by migrants are not purely linguistic; migrants are often unaware of the Australian legal system which is often vastly different from their own.[5] Court staff and supporting groups should be sensitised to these differences and problems so that every care is taken to see that no-one is denied access to the legal system because of multicultural barriers. These issues should also be part of court staff and referee training.[6] Indeed, it has been argued that Small Claims Courts, by reducing worries about the cost of litigation and psychological trauma associated with the formal adversarial system, make the legal system, as a whole, more accessible to migrant groups.[7]

Accessibility for the poorly educated

While migrants appear to find their way to the Small Claims Court, the same cannot be said of the less educated and, consequently, the poorer members of the community. The disputants' survey revealed that the court was more likely to be utilised by the educated and the middle- to upper-income earner (see *Table 1*). These people were also more likely to be successful in their claim and thus more satisfied with the court's performance.

Table 1:
Highest Level of Education

Response	Freq	%	Freq	%
Complete Uni/Tech	39	25.2	34	33.3
Some Uni/Tech	32	20.6	17	16.7
Trade Certificate	25	16.1	12	11.8
Completed Yr 12	24	15.5	14	13.7
Some Secondary	28	18.1	21	20.6
Completed Primary	6	3.9	4	3.9
Some Primary	1	0.6		

Notes
1. Base: individual claimants and respondents who attended hearing
2. No respons ; corporate claimants: 67; No response and corporate respondents: 43

Consistent with the employment picture, the educational level of the disputants is higher than one would find in the general population.[8] The Small Claims Court thus seems to be designed for, and working better for, the educated, the articulate and the comparatively more wealthy. It is disturbing to find that, for the lower-educated and lower-income groups, the goal of 'equal access to justice' appears to be more illusion than reality.

The Tasmanian study echoed the refrain of other studies which have recommended the need for measures to increase the public's awareness of the courts, improve the informational materials available to disputants, eliminate the legal jargon from court forms and better educate disputants as to how best to utilise small claims procedures. Court administrators, therefore, must be sensitive to the dissonance which certain disputants, especially those of low income and poorly educated, can experience in Small Claims Courts. Because they involve the participation of ordinary citizens in the process of the law, Small Claims Courts have the unique potential to bridge the gap which has historically existed between the legal system designed to serve as an 'agency of the politically and economically powerful'[9] and the average person. Thus, increased communication, letting litigants tell their own stories, an increased awareness of the legal system — all work to empower many who otherwise remain outside and removed from the law. By such processes, the Small Claims Court can play an important educational role because it is here that different classes are most likely to find themselves involved in the same lawsuit.

The information provided to disputants about Small Claims Courts tends to be weighted more in favour of the claimant than the respondent. Indeed, many respondents do not find out anything about the Small Claims Court until they show up for their hearing, assuming that they do show up. The significance of this issue was borne out by Weller and Ruhnka who similarly found that the 'difficulties faced by the unrepresented defendant constitute perhaps the major failing of our present Small Claims systems.'[10] Unfortunately, respondents in the Tasmanian Small Claims Court face many of the same problems.

Among those interviewed, Registrar Paul Huxtable noted that younger claimants and respondents were more likely to be aware of their rights. He felt this educational advantage was due, in large part, to the coverage of the Small Claims Court and its procedures in Legal Studies Courses in Tasmanian secondary schools. Consistent with their educational level, managers, administrators and professional people were over-represented among the disputants who utilised the Small Claims Court (see *Table 2*).

Table 2:
Employment Status of Disputants

	CLAIMANTS		RESPONDENTS			
Response	Freq	%	Freq	%	Total	
Managers & administrators	24	15.4	8	8.0	32	12.5
Professionals	30	19.2	17	17.0	47	18.4
Para-professionals	9	5.8	8	8.0	17	6.6
Tradespersons	25	16.0	10	10.0	35	13.7
Clerks	12	7.7	8	8.0	20	7.8
Sales personal service	6	3.8	4	4.0	10	3.9
Plant & machine operators	2	1.3	7	7.0	9	3.5
Labourers	8	5.1	8	8.0	16	6.3
Home duties	14	9.0	13	13.0	27	10.5
Student	9	5.8	9	9.0	18	7.0
Pension/benefits	7	4.5	5	5.0	12	4.7
Old age pension	10	6.4	1	1.0	11	4.3
SelfeEmployed			2	2.0	2	0.8

Notes
1. Base: individual claimants attending hearing
2. No response; corporate litigants: 66; Respondents: 45

Note that if one compares the 1986 census figures, managers/administrators (8.9% census), professional people (12% census) are over-represented, while labourers (13.9% census), plant and machine operators (10.8% census) are under-repre-

sented.[11] Paul Huxtable also contends that the number of self-employed is understated. The remainder were as expected.

Financial barriers to access/convenience

With only a $20 filing fee, there are likely to be few financial barriers to the utilisation of the Small Claims Court. Most of those interviewed supported the maintenance of the existing $20 fee. Some suggested that pensioners and the unemployed should be able to have the fee waived if they filed a poverty affidavit. Mr Huxtable pointed out that, in a few cases, disputants who could not afford the filing fee were referred to Legal Aid with the result that the claimant's fees were paid for them. There was also some support for the view that the filing fee should be higher in order to discourage frivolous claims. Finally, an officer from Consumer Affairs suggested a sliding scale where the fee was based on the amount of the claim.

An examination of cost barriers to Small Claims Courts, however, must also consider the fact that over 50% of the disputants had to take time off paid employment in order to attend their Small Claims hearing. Moreover, 25% of claimants and 36% of respondents stated that it was quite inconvenient or very inconvenient to attend the hearing, with the most frequently stated reason being difficulties with work. Witnesses too, who are unpaid, will be reluctant to appear before the Small Claims Court if to do so would mean that they lose a day of pay or suffer some other significant inconvenience. When one factors in these additional costs, it can be concluded that there must be a 'chilling effect' which would deter some disputants, especially given the fact that the average amount of claim is only approximately $800.

Physical barriers to access: the location of the court

A final aspect of access relates to the convenience of the physical location of the court. In general terms, the Small Claims Courts in Tasmania are easy to locate because they have been integrated with the court system as a whole. Thus, with the exception of Hobart, each major district (Launceston, Burnie and Devonport) houses a Small Claims Court in the same court building as most or all other courts. The venue in Hobart has, unfortunately, led a gypsy existence and has alternated between the Executive Building on Murray Street and the Registry next to the State Library. However, both of these buildings would be reasonably well known to the public. Similarly, the court buildings in Launceston, Burnie and Devonport are well known community fixtures. Nevertheless, the researcher's observations found that the sign posting was generally inadequate. Signs relating to Small Claims were generally small, only in English, and often poorly placed. For example, a 'Small Claims' sign in the Launceston court building was so high that the researcher failed to notice it at all, an incident which a court official acknowledged was a common occurrence among the public as well. In the case of Devonport (and much to the surprise of the Registrar), there was no sign inside or outside the building which referred to 'Small Claims'. A sign highlighting the availability of interpreters was posted in Hobart, but was absent on the other Small Claims Courts when visited by the researcher.

More problematic is the convenience of the Small Claims Court in areas, most notably rural areas, outside the regional centres. While Mr Hemming, the existing full-time magistrate, has made an heroic effort to occasionally travel to King Island, Sorell (a semi-rural area outside Hobart) and elsewhere, it seems some other arrangement (for example, the use of part-time magistrates, and the holding of small claims sessions in areas like Bridgewater — an outer suburb of Hobart, predominantly comprising public housing) would greatly improve access to rural areas and be more likely to reach low-income disputants.

Conclusion

As a result of the above study and its recommendations, a number of reforms have already taken place in Tasmania. Prospective disputants can now check out a video which presents information about the small claims procedures. More use is being made of registrar conferences to investigate the possibility of settlement and to ensure that parties are properly prepared for their hearings. Small claims forms have been, or are in the process of being, redesigned to improve layout and readability. Some evening sittings have been scheduled and have proved to be very popular. The processing of cases has improved so that all disputes are speedily resolved.

Finally, a new Hobart courtroom is being planned which will more adequately take into account the special needs of small claims hearings, and similar reforms are planned for the small claims settings in other regions of the State. Hopefully, these and future reforms will help increase access to the Small Claims Court, especially for lower socio-economic groups who have tended to use it least.

References

1. For a full discussion of recent studies involving small claims courts and tribunals, see Clark, E.E., (1991) 10 *University of Tasmania Law Review* 201; Whelan, C.J., Small Claims Courts: A Comparative Study, Oxford, Clarendon Press, 1990. See generally, Goldring, J., Maher, L., and McKeough, J., *Consumer Protection Law*, 4th edn, Sydney, Federation Press, 1993, Chapter 10, pp.386-408.
2. Clark, E.E., *Tasmanian Small Claims Court: An Empirical Study*, unpublished PhD Thesis, University of Tasmania, 1993.
3. For a detailed analysis of the general need for more access to legal advice see Mackirdy, A., *A Community Legal Centre for Tasmania*, unpublished LLM Thesis, University of Tasmania, 1986; see also, Dean, E., and Quarmby, D., *Legal Aid Services for Tasmania*, Department of Social Work, TCAE, Hobart, 1977; McIntosh, A., and McCleod, C., *An Investigation into the Legal Needs of Bridgewater*, unpublished study, Law and Society Unit, University of Tasmania, 1981.
4. Lieberman, J., (ed.) *The Role of Courts in American Society*, St. Paul, Minnesota, West Publishing Company, 1984, pp.83-8.
5. See generally, Bird, G., *The Process of Law in Australia: Intercultural Perspectives* (1988) Sydney, Butterworths, pp.163-231.
6. Sheppard, G., The Needs of the Ethnic Communities in the Courts Management Change Program (1985) Victoria, Attorney-General's Department at 11-14.
7. See Crouch, A., 'Barriers to Understanding in the Legal Situation' (1979) 53 *Law Institute Journal* 505, 507.
8. This pattern is similar to that reported by Ramsay, R., 'The NSW Consumer Claims Tribunals', (1987) 4 *Legal Service Bulletin* 145 ('31% of the CCTs' consumer plaintiffs are from the highest 19% of the population, while only 45% are from the lower 60% of the population', at 146).
9. Conley, J.H., and Barr, W.M., *Rules versus Relationships*, Chicago University Press, 1990.
10. Weller, S., and Ruhnka, J., 'Small Claims Courts: Operations and Prospects' (Winter 1978) *State Court Journal* 5, Research Essay Series Number E006, Williamsburg, Va, National Center for State Courts.
11. Previous studies of small claims tribunals in Australia similarly found that there was an over-representation of those from upper occupational categories. See e.g. Ramsay, above, p.146.