SMALL CLAIMS IN SCOTLAND
- A DISCUSSION PAPER

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preface

When the new small claims procedure was introduced into Scottish sheriff courts in November 1988, the Scottish Consumer Council celebrated. We had campaigned long and hard for a more straightforward procedure to allow consumers with disputes about smaller amounts of money to take their cases to court without it costing them huge amounts of money in lawyers' fees or court costs.

We were under no illusion, however, that our work in this area would stop. Now, almost two years on, many people are wondering how well the procedure is working in practice. The Government have been monitoring the operation of small claims, and we eagerly await the publication of the results of this research. I know from the views that were expressed to us by solicitors, CAB workers and trading standards officers that there have been some teething troubles with the new procedure and I hope that these can be easily ironed out once the research report is available.

Our legal advisory officer, Lynne MacMillan, visited the U.S.A. and Australia last year and has returned with lots of ideas about how the operation of small claims might be developed in Scotland. My Council believes that we can learn a lot from experiences abroad, and I hope that these ideas will help fuel the debate about "user-friendly" court procedures in this country. Some of the suggestions may appear controversial, for instance, the suggestion that sheriffs may not be the most appropriate people to handle small claims cases. We are no strangers to controversy and would welcome the views of those involved with the operation of small claims, whether they are judges, administrators, advisers or consumers. Next year we are planning a major conference on this subject, and we hope that all those with views on this will feel motivated to attend. After all, we share a common responsibility and common interest in the effective delivery of justice.

I continue to be depressed by how difficult it is to change the law and legal procedures. I am also concerned that with the narrowing of the range of those entitled to legal aid and the spiralling costs of litigation, justice often appears to be denied to all but the very poor and the very rich. With small claims, we have a chance to make a difference to all that. Consumers of the future will be grateful if we spend time now getting it right.

Barbara Kelly
Chairman
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Annex A Small Claims Mock Court Leaflet

SMALL CLAIMS IN SCOTLAND

A discussion paper from the Scottish Consumer Council

Chapter 1.

Introduction

The Scottish Consumer Council has had a long and continued interest in the development of simplified court procedures in Scotland for handling disputes about small amounts of money. We welcomed the provisions in the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1985 which allowed for the introduction of a small claims procedure into the sheriff courts in Scotland. We responded to the Lord Advocate's consultation on the detailed rules of the new procedure, which was finally introduced on 30 November 1988.

Our concern has always been that as much as possible, procedures for handling small claims should ensure that ordinary people will be able to take such cases to court themselves without legal representation, and, in order to fulfil this objective, that the small claims procedure should be simple, cheap, quick and informal. Since the new procedure was introduced in 1988, its operation has been monitored by researchers from the Scottish Office and a research team from the Universities of Dundee and Strathclyde. It is expected that the results of this research will be available by the end of 1990.

This Paper is issued as a precursor to the publication of the results of this research. In the two years since the introduction of the small claims procedure, the Scottish Consumer Council has been conducting its own, very limited, monitoring exercise. In 1988 we decided to carry out a series of structured discussion session interviews with groups of people who were commonly involved in giving advice to consumers about the types of disputes and problems likely to arise in the small claims procedure. These included solicitors, trading standards officers, Citizens Advice Bureau workers, and other advice providers. The view had been expressed in the past that these advisers' widespread lack of confidence in the ease with which ordinary people could use the summary cause procedure (which before the introduction of small claims was the method of dealing with claims for small amounts of money) was partly instrumental in its downfall. We therefore considered it important to find out the views of these advisers about the new small claims procedure as they developed. We conducted a first
series of discussions in October-November 1988 to establish a baseline of opinion, and repeated the process a year later.

As a separate exercise, the Scottish Consumer Council instructed System Three Scotland to find out how public awareness of the small claims procedure developed. We asked them to find out what the level of knowledge of the imminent introduction of the procedure was in 1988, and the extent of public knowledge of the existence of the scheme in Spring 1989 and again in the Autumn 1989, a year after the introduction of small claims. What we found out was that after a low level of knowledge of the procedure in September 1988 (while 25% claimed to be aware of the imminent introduction of a new simplified court procedure, only 22% of these could name it), this rose to 38% in March 1989, of whom 25% could accurately name it. In September 1989, almost a year after the introduction of small claims, public awareness of a new simplified court procedure was 35%, with 33% identifying it as the "small claims procedure". System Three Scotland considered that this level of awareness of the new scheme, relative to its limited general promotion and the fact that this was largely concentrated in the first couple of months of its existence, is very satisfactory. Most noteworthy is the length of the awareness and recall, which compares well with the commercial marketing of products and services when awareness and recall can often decrease significantly immediately after the end of an advertising campaign.

The reasons for this are difficult to determine, but it is possible that at least part of the relatively high level of awareness of the scheme may be due to promotion of the procedure by advice providers in their dealings with members of the public. In any event, System Three Scotland concluded that further promotion of small claims to the public at this stage may not be the most appropriate use of available resources.

As another separate piece of work, the Scottish Consumer Council's Legal Advisory Officer visited various states in the United States of America and Australia in October to December 1989 as part of a wider SCC project to find out about ways of improving the accessibility of the courts in Scotland. As a result we were able to find out a good deal about the operation of small claims procedures in other jurisdictions. This discussion paper sets out the findings of that work, and makes various tentative suggestions about possible improvements that could be made in the Scottish procedure. This is done taking into account the concerns expressed during the interviews with advisers, which are discussed in the next section.
The purpose of this paper is to stimulate debate about the future of small claims in Scotland, bearing in mind the possibility that following from the publication of the research from the Scottish Office, the Government may wish to consult on changes which should be made to the procedure. In addition, the Scottish Consumer Council intends to organise a major conference on the subject in the course of 1991.

We would welcome any comments on the views expressed in this Discussion Paper.
Chapter 2.

The Concerns of Advisers

The research carried out by Marketingline in October and November 1988 was an attempt to establish a baseline of opinion about how small claims might work before the scheme was introduced. In that way, we hoped to find out a year later, when the process was repeated, how these attitudes had been affected by actual experience of the operation of the new procedure. Marketingline's report is available from SCC's offices (A Study to Investigate Attitudes of Advisers to the Small Claims Procedure in Scotland, May 1989).

The second series of structured discussion sessions conducted with advisers was carried out in October 1989, on behalf of the Scottish Consumer Council by System Three Scotland. The advisers who took part had around 10 to 11 months of experience of the small claims procedure in operation. A copy of the Report from System Three on these meetings is annexed.

Participants were asked to consider various aspects of the operation of the small claims procedure, including such matters as awareness, use and impact of the procedure, the division between pursuit of claims by individuals, and by commercial claimants, an evaluation of the forms and guides relating to the procedure, and the financial aspects of using the scheme. Concerns were expressed in some of these areas, but two issues quickly emerged to dominate discussion in all four meetings - these issues were representation and the formality of the court proceedings. We shall consider these in turn.

(i) Representation.

The concerns expressed about representation were as follows:

the lack of availability of legal aid for small claims was seen as unfair because traders and commercial organisations continued to employ solicitors;

the resources of other advice providers who may be able to represent individuals in court (such as CABx and trading standards departments) were not adequate to ensure that everyone who wanted representation assistance could get it;

in any event, the small claims procedure was supposed to encourage individuals to take and defend their own cases in court, yet opinion was that this was not happening;
the presence of any representatives in court, legally qualified or not, may be preserving the formality and legalistic nature of the small claims procedure.

(ii) Formality.

There was unanimous agreement in the discussion sessions that the Scottish small claims procedure is insufficiently user-friendly to enable the vast majority of consumers to pursue a claim on their own - particularly if it progresses to a full hearing. The procedure is not as informal as it could be. Complaints were made that small claims cases continue to be heard in normal courtrooms, sheriffs are wearing wigs and gowns, and in many courts, small claims cases are given low priority in the court timetable, involving individuals having to sit in the courtroom for long periods of time observing the variety of other cases being processed. Also, since many cases brought under the small claims procedure are debt collection cases, and largely undefended, this could involve individual litigants having to sit through large numbers of cases where solicitors appear formally to ask for decree.

It is easy to see how confusing this could be for lay people. Inevitably, the presence of legal professionals using obscure language results in individual litigants becoming more and more intimidated by their surroundings and does nothing to relax or reassure them about their own appearance. Undoubtedly there are courts where judges and court staff are making great efforts to make the procedures more accessible to lay people, but it is also clear that the variations across the country on this issue do not help to increase confidence in the procedure.

In the discussion sessions it was suggested that sheriffs in dealing with the normal adversarial procedure used in criminal cases and ordinary civil actions, may find it difficult to take a more active and inquisitorial role in small claims cases. There was also some discussion of the appropriateness in resource terms of sheriffs who are highly paid and highly qualified, spending large proportions of their time listening to disputes about comparatively small amounts of money.
(iii) Miscellaneous Concerns.

The discussion sessions raised several other issues which it is important to consider. Participants expressed various opinions about the costs involved in taking a small claim case, and there were also concerns about the accessibility of the printed material, timetabling of small claims cases, and the enforcement of decrees.

a) Costs

The small claims limit of £750 was criticised as being too low. Since many household or personal items cost more than £750, somewhat artificial claims were being lodged in order to stay within the small claims limit. For instance, claims were being limited to part of a car repair rather than all of it, or the value of two items in a three piece suit rather than the whole amount. An increase to around £1500 – £2000 appeared to be more acceptable.

Concerns were also expressed about court dues, particularly where these could not be recovered for claims less than £200. Court dues of £21 are payable on all claims above £50 and this could act as a disincentive for people on lower incomes.

There were anxieties about the expense involved in bringing evidence of expert witnesses to court, particularly in personal injury cases. In such cases it will always be necessary to produce a medical report which can easily cost more than the £75 maximum payable in expenses. Also, given that it can sometimes be difficult to assess how much a personal injury claim is worth, it is often difficult to know under which procedure the action should be raised.

b) Timetabling of Cases

We have already mentioned the fact that small claims cases seem to be given a relatively low priority in the diaries of some sheriff courts, resulting in some individuals having to spend a considerable amount of time sitting in court waiting for their cases to be heard. As well as this having an intimidating effect, it can also involve considerable expense for parties, who may have arranged time off work in order to come to court, and lost wages. It was again suggested (as SCC has done in the past) that some consideration should be given to holding small claims sessions in the evenings or at weekends.
c) Enforcement of Decrees

Concern was expressed about the difficulties which could be encountered by successful claimants trying to obtain payment from the defender after the court had granted decree. Even the eventual employment of sheriff officers to enforce decree did not guarantee success, but did result in further expense to the claimant.
Chapter 3.

Small Claims in America and Australia

During SCC's Legal Advisory Officer's visit to America and Australia, she was able to find out about the operation of small claims procedures in different states and how some of the difficulties identified by the System Three research are handled in different jurisdictions.

Small claims procedures in America have been in place for a much longer period than in Scotland. In fact the first American small claims sessions were established in 1913 in Cleveland, and Massachusetts adopted a statewide small claims procedure in 1920. With such a history of experience in the provision of simple, prompt, informal and inexpensive court procedures the Scottish Consumer Council hoped that we would be able to learn lessons that perhaps might appropriately be applied in Scotland.

In all, four American states were visited - Massachusetts, Washington, D.C., Wisconsin and California. The two states visited in Australia, New South Wales and Victoria, have removed consumer claims from the court process and set up tribunals to deal with them.

The aspects of each state system which have relevance to the Scottish procedure are described briefly in turn.

These are:

1) Financial limits - the advisers considered that in Scotland a small claims limit of £750 is too low. What are the small claims limits in other jurisdictions?

2) Court dues - the fact that for claims of below £200 no expenses are payable to successful parties means that some pursuers cannot recover the £21 fee they have to pay as court dues. How do other jurisdictions handle this?

3) Representation - this has raised various concerns, detailed above. Most importantly, how do other small claims courts ensure that parties are able to represent themselves in small claims cases, or are they provided with representation?

4) Formality - it was claimed by the advisers in our discussions that the Scottish procedure is too formal and that this inhibits individuals from taking their own cases to court. Is this the case in other
jurisdictions, and how do they help individual litigants to use the court? What alternative methods of disposing of small claims are employed by the courts?

5) The cost of going to court - again various concerns were expressed including the questions of the financial limits of small claims and court dues, but it would also be useful to consider what kind of expenses awards are made in other jurisdictions, particularly in relation to the costs of expert reports and medical reports for personal injury actions.

6) Timetabling of Cases - it was felt that having individual litigants waiting around in court all day while other types of cases were processed was unsatisfactory. What methods have been employed in other jurisdictions to minimise this? In cases where lawyers are involved, for instance in debt collection cases, have any attempts been made to separate these from claims involving individuals as claimants, within the small claims procedure?

7) Enforcement of Judgments - are there any ways that this can be made easier or more effective but at the same time preserving the balance of fairness between creditor and debtor?

Small Claims in Massachusetts

A considerable amount of time was spent in Boston, Massachusetts, with an opportunity to observe several small claims hearings in court, as well as the mediation of small claims disputes as an alternative to going to court. Meetings were also held with judges, administrators, mediators and trainers, and officers of the Office of Consumer Affairs and the Attorney General's Department.

The Administrative Department of the Trial Court in Massachusetts has produced a set of "standards" or guidelines for the use of judges and clerks in small claims cases. These guidelines are not binding, but they set out best practice in the handling of small claims cases. They have been drawn up over a number of years by a committee made up of judges, clerks and representatives of the Massachusetts Consumers Council. These have been in use since 1984.

Like the Scottish small claims procedure, the Massachusetts system is intended to provide a simple, prompt, informal and inexpensive mechanism for resolving small claims. It was recognised, however, that for various reasons, including
confusion about court procedures, the presence of commercial plaintiffs, and difficulties in enforcing judgments, lay claimants could become frustrated. The standards acknowledge the special role of the Judge who presides over the small claims session because the parties are normally unrepresented by lawyers.

"The Judge must be especially sensitive that people, not cases, are the focus of the proceedings, but must still provide full due process rights to each side and be person-blind in rendering decision." (Small claims Standards 1:00 Commentary)

The standards contain both structural guidelines about the place of small claims within the whole gamut of the work carried out by the District Court (where small claims are heard) and procedural guidelines, all aimed at reducing time spent in court, making it easier to satisfy judgments, and emphasising to court staff that small claims is an important part of the court's business.

Guidance is given on putting up signs directing litigants to the small claims department of the court, or to the small claims court itself, and on training for court staff on how to handle party litigants' queries. Attention is drawn to the fact that staff must make an extra effort to be patient with lay litigants not familiar with court procedures.

1) Financial Limits

At present $1,500 is the upper limit for small claims in Massachusetts. Under Chapter 93A of Massachusetts General Law (Consumer Protection Act) consumers can bring an action for double or triple damages. The limit is then increased to $3,000 or $4,500.

2) Court Dues

"Filing fees" in Massachusetts are $14.00 for claims of $500 or less, or $19.00 for claims over $500. If the plaintiff wins, these fees are returned to him/her. The clerk can also waive fees under Indigent Court Costs Law. This would seem to get round the Scottish problem where for claims below £200 no expenses are paid including the court costs.

3) Representation

In Massachusetts, non-lawyers are permitted to assist parties in their cases when the court considers this would make presentation easier. This would normally only occur where there was a special reason, eg language difficulties, preventing an individual from presenting his/her own case.
The judge has discretion and would normally only allow someone with a close connection to the individual in question (e.g., relative, spouse, or employees) to appear. The judge would also need to be satisfied that the person is authorised to appear and that "substantial justice" can be achieved. However, no one who is not a lawyer is allowed independently to argue a party's case in the court.

Lawyers are allowed to represent litigants in small claims cases, but according to the Small Claims Standards, the presence of an opposing lawyer should not be allowed to inhibit a full presentation by the unrepresented litigant, nor make him feel at a disadvantage. The judge has wide discretion, and in appropriate circumstances may refuse to allow unco-operative counsel to examine witnesses.

In the short time available and given that there was no opportunity to interview individual litigants, it was impossible to be conclusive about whether parties felt more able to represent themselves than in Scotland, but from observation of hearings it certainly seemed that ordinary individuals did not find the whole procedure too daunting.

4) Formality

Small claims cases are heard in the district courts in the State of Massachusetts, which despite the name is more equivalent to our sheriff courts, and deals with both civil and criminal cases. Cases are heard by judges. Hearings were much more informal than in Scotland, and a lot of this appears to be due to the advice given in the Small Claims Standards, with their emphasis on the Judge adopting an inquisitorial approach to the hearing of cases -

"... the principle communicator on behalf of the Court is the trial judge... It is extremely difficult to acquire just the right technique in courtroom communications, particularly in explaining the Court's actions to defendants or witnesses... the trial judge must be sensitive to his responsibilities in this regard and consciously work on the improvement of his technique." (Small Claims Standards, 1:00).

Small claims clerks have also consciously considered the needs of individual litigants in small claims cases. The clerk in charge of small claims at East Norfolk District Court in Quincy, Massachusetts, had introduced various innovations aimed at ensuring a more relaxed atmosphere in the handling of small claims. These included mediation and the separate timetabling of debt collection cases, and through staff training he ensured that those involved with small claims cases were particularly aware of the need to give a good impression. He took the view that for many
people involved in small claims cases, this was the first time that they would have come into contact with the courts, so it was important that the experience of the civil justice system should be as positive as possible.

The court was an autonomous unit, hiring and firing its own staff, and the people handling small claims were chosen carefully to ensure that they have a strong sense of the worth of what they are doing. It was quite clear that the public appreciated the court’s work - with some grateful consumers bringing chocolates and pot plants to staff members who had been specially courteous and helpful!

The Standards recommend that the list of cases is called by the clerk before the Judge takes his seat on the bench. The clerk should begin by making a brief announcement to everyone in court about what will happen during the small claims session. An explanation will be given of the meaning of legal terminology such as "plaintiff" and "defendant", and guidance is given on what will happen if the case is going to a hearing that day, or if only one of the parties to the case has turned up.

The Small Claims Standards explicitly encourage the use of mediation as an alternative to having small claims disputes heard by a judge. In Massachusetts whether or not to try mediation is always a matter for both parties to decide. The process involves the airing of the issues in dispute with one or two neutral third parties, who will then explore the possibilities of settlement of the claim. If settlement is reached, it is binding on the parties and is legally enforceable.

The courts consider that the use of mediation has the advantage of reducing the number of small claims requiring a contested hearing, so saving court time. However, there are other, possibly more important advantages. There is a view that the "winner takes all" approach of the traditional adjudication is not always the best solution for some types of disputes. If there is a continuing relationship between the parties, for instance a neighbour dispute, to have one of them lose completely and the other win completely might not always be conducive to a positive future relationship.

In Massachusetts, many mediations take place in the court building itself. East Norfolk District Court had its own mediation programme, and cases which were considered to be specially appropriate to mediation were selected earlier by the clerk. At the beginning of the court session the clerk spoke to everyone explaining the potential benefits of mediation and encouraging people to use it. The cases which had been pre-selected were singled out for special attention.
Mediations took place either in a smaller room off the courtroom or in another empty courtroom. At East Norfolk Court the mediators were volunteers from Harvard Law School.

Even where the mediation is not successful, there is often scope for the parties to agree on some of the facts, which can make the eventual hearing before the judge simpler. If mediation is not successful then the case is heard before the judge on the same day.

Massachusetts Attorney General's Department provides grants to 27 Local Consumer Programmes which handle 16,000 written complaints a year and through an informal process of telephone advocacy and mediation annually save Massachusetts consumers an average of $3 million. These programmes are a valuable source of advice and information on many types of consumer problems. The Department provides accommodation and funding for a Volunteer Mediation Programme which is a telephone advice service staffed by law students.

Harvard Law School has a Small Claims Advisory Service which is staffed by students on a voluntary basis and funded from contributions from the alumni. They provide a telephone advice line and help litigants prepare for their small claims hearing.

5) The cost of going to court

The judge has a discretion to award additional expenses of up to $100 against any party who has set up a frivolous or misleading claim or defence, or has otherwise sought to hamper a speedy and fair determination of the claim. There is a similar rule under the Scottish small claims procedure.

It is important to remember that in the U.S.A. the "costs follows success" rule does not apply as it does here, so the general approach in small claims is that if the parties think they require an expert report and can personally afford to pay for one, then they will get it. Even if successful, the claimant would not be reimbursed, either by the court or by the defendant, for the cost of obtaining an expert report or bringing an expert witness to court. In Massachusetts personal injury cases are not excluded from the procedure, but claims against the government (e.g. pavement cases) would have to be brought before the superior court. In practice not many personal injury cases are raised as a small claim. A lot of cases are outwith the limit, and with the existence of contingency fee arrangements, most people would not have too much difficulty in finding a lawyer.
6) Timetabling of cases

The Small Claims Standards encourage the separate timetabling of small claims cases:

"Small claims sessions should be separate from all other criminal and civil sessions. When possible, separate sessions or starting times should be scheduled for consumer and commercial small claims plaintiffs." (Standards, 3:05).

The Small Claims Standards recommend that small claims hearings should not as far as possible, be scheduled more than 1 month ahead, and that busy criminal days or times should be avoided. It is also suggested that courts should have experiments to find out which day of the week or time of day best suits the needs of the local community.

East Norfolk District Court schedule consumer claimants and commercial claimants separately, although all cases are dealt with within the small claims procedure. Cases involving consumers are scheduled for 9.30am and the list is called at that time, and those where the parties wish to mediate are sent to mediation. Cases which are not suitable for mediation go to the judge. At 10.00am commercial claimants' cases are called. Parties are given different times to attend court depending on whether they are individual consumers or whether their case is brought by a commercial claimant. It appears to work well, and avoids consumers having to observe a whole series of debt collection cases before their own case is called.

Clearly this involves some preparation on the part of the small claims clerk. He has to scrutinise cases far enough in advance to send parties notice of when is the appropriate time to turn up, then he has to ensure that the cases are processed quickly enough on the day so that he keeps up with the timetable. In small claims cases, it would normally be the clerk (who is legally qualified with some quasi-judicial powers) who will call the small claims list in court.

However, the effort would appear to be worth it if it means that individual litigants are less confused by their observation of other types of cases being presented by lawyers.

7) Enforcement of Judgments

This was commonly referred to as a problem in Massachusetts and more generally in other jurisdictions. The Office of Consumer Affairs referred to difficulties as did the Harvard Law School Small Claims Advisory Service.
If someone fails to satisfy a court judgment within 30 days, then the plaintiff has to get in touch with the court which requires the defendant to return to court to explain why he has not paid. If the defendant does not show up voluntarily he can be arrested. The court has the power to fine or imprison for failure to pay.

Normally at the end of the small claims hearing once the judge has made his decision, if he has found for the plaintiff he will question the defendant on his ability to pay and can make a payment order, either requiring payment at regular intervals or by a specified date. But the court has no involvement in the actual supervision of payments, and if the defendant does not keep to the arrangement it is up to the plaintiff to seek enforcement of the judgment in other ways, by attaching earnings or property.

The concern is that too much is left to the plaintiff to do on his own, involving subsequent court appearances and expense. However, these are problems that exist in the Scottish system too, and it is difficult to know how the position could be made more acceptable to claimants and yet still maintain a balance of fairness between claimants and debtors.

Small Claims in Washington D.C.

Rather less time was available in Washington D.C. to look at how small claims operated in the District of Columbia. However, there was an opportunity to observe the small claims mediation process and to find out about the Multi-Door Dispute Resolution Programme that operates in the Superior Court.

1) Financial Limits

In the District of Columbia the upper limit for small claims cases is $2,000. Claimants are allowed to add 6% interest per annum to the amount of the claim. The $2,000 limit does not include interest.

2) Court Dues

The filing fee is $2.55 for the first defendant, plus a small mailing charge, and $1.55 plus postage for each additional defendant. The charge for having a witness subpoenaed (issuing an order demanding the individual’s appearance in court on specified time and date) is $33.00.

Similar powers exist as in Massachusetts to have these fees waived if the plaintiff cannot afford to pay.
3) Representation

The small claims booklet which is issued by the Superior Court emphasises that individuals do not need to employ a lawyer, but they are advised to seek legal advice beforehand. Corporations and incorporated businesses have to use legal representation. The booklet does not give any information about whether non-lawyers may represent parties. Since no hearings were observed, it is not possible to say how easy it was for parties to represent themselves.

4) Formality

Again, since no hearings were observed it is not possible to comment on whether or not hearings are formal. In Washington D.C., small claims are heard in the Superior Court and hearings are heard by a judge. It was possible to observe the clerk of court calling the list at the beginning of the small claims sessions. Proceedings were held in a large courtroom which was very full and very hot. The clerk of court read the list very quickly and did not repeat any of the names with the result that there was a constant stream of people going up asking whether she had called their case yet! There was no separation of consumer cases from commercial claims, so lawyers were also present in the court.

The Superior Court operates a Multi-Door Dispute Resolution Programme which includes small claims mediation, which is mandatory for the parties. Not all cases are considered suitable for mediation. For instance, cases in which lawyers are involved would not go to mediation automatically. After the cases were called by the clerk, cases which had not already settled were assigned to mediators.

When the mediator co-ordinator was asked about the attitude of the clerk toward litigants there was considerable embarrassment that this clerk had been observed. Apparently she is the worst and not typical. It would appear that the D.C. Superior Court’s efforts at user-friendliness were more directed towards the Multi-Door Programme and mediation than in improving normal small claims procedures. The mandatory nature of the small claims mediation is rather unusual. It is argued that such an arrangement makes administration of the system easier. Also, parties who really do not wish to mediate cannot be forced to do so, and the mediator would ensure that the case went back before the judge immediately. However, the mandatory nature of the programme gives the mediators the opportunity to inject a measure of realism into the proceedings. They point out to all litigants the limits of what the judge can do, and that ultimately one of the parties will come out of the case winning and the other
will lose. In some cases the best remedy might not be money and mediation allows for the possibility of more creative settlements, such as a requirement that the defendant should complete a piece of work to the plaintiff's satisfaction.

The Multi-Door Dispute Resolution Programme is sponsored by the American Bar Association and does not simply relate to small claims. The idea is that through its Intake Center, individuals can be directed to the best means of resolving their particular dispute, whether this is through normal adjudication procedures in court, or by mediation or arbitration either in the court or through other community based services. The Superior Court itself provides small claims mediation, domestic relations mediation, civil mediation and civil arbitration.

The court has also started an annual "settlement week" when for one week every year the oldest cases on the court's calendar are ordered into mediated settlement conferences conducted by volunteer lawyers. These cases are not normally small claims cases - 80% of them are tort actions, primarily negligence and personal injury, and in 1989 43% of the cases were settled at this stage. The value of claims ranged from $469 to $60,000,000. Settlement weeks are considered an unqualified success because of the overwhelmingly positive reactions of the participants, regardless of whether they are lawyer or litigant, plaintiff or defendant. Even those whose cases did not settle demonstrated a high level of satisfaction.

Due to lack of time it was not possible to find out about the costs of going to court, or recovery procedures in Washington D.C. Apart from handling small claims cases separately from criminal and other civil cases, there were no innovations in the timetabling of small claims.

Small Claims in Madison, Wisconsin

Small claims hearings before the Court Commissioner were observed. Meetings were held with the Court Commissioner in Dane County, Wisconsin and with one judge. Meetings were also held with officers of the Department of Consumer Affairs.

1) Financial Limits.

The small claims limit in Dane County, Wisconsin, is $2,000. Evictions can also be brought under the small claims procedure regardless of the amount of rent owed. Actions
for replevin (repossession of property) can be brought if the value of the goods is not more than $2,000 or if the dispute concerns consumer goods leased or purchased on credit from a dealer. Garnishments (attachments of earnings) can also be brought if the amount owed is $2,000 or less.

2) Court Dues

The small claims fee is $23.00 plus mailing fees. Fees can be waived upon filing and approval by the court of an affidavit that, because of poverty, the person is unable to pay the costs of the action, and that the person believes he is entitled to redress, setting out brief details of the claim.

3) Representation

Legal Representation is permitted in Wisconsin but it is not very common. One of the cases involving a lawyer which was observed was where he was actually a party to the action. He tried to go through the hearing in a very legalistic way, objecting a lot to the relevancy of the plaintiff's questions and to the allowing of hearsay evidence, which of course does not matter in small claims cases.

4) Formality

Cases are heard at first instance by court commissioners (legally qualified clerks) in the county courthouse. They have some of the powers of judges. Some are assigned to do certain duties in criminal cases, probate, family cases and small claims cases. They have to have at least three years practical legal experience, many of them going back to private practice afterwards. They are employees of the county, and serve without limit of term. They take a tremendous load off the circuit judges. Often retired judges hear cases.

The court commissioner hears all of the contested cases first time round and comes to a decision. It is only those who are dissatisfied enough to file a written demand for a circuit court trial, who would come to a circuit court judge. This is called a "de nova" hearing - hearing all the evidence again. This only happens in 5% of cases.

Proceedings are quite informal. The small claims rules provide that the proceedings before a court commissioner shall not be governed by the rules of evidence. The record of the proceedings is limited to the time and location of the hearing, the parties, witnesses and lawyers present and the commissioner's decision.
The hearings that were observed took place in the Court Commissioner's office, in private. The Court Commissioner always asked if there was a possibility of settling the case before beginning proceedings.

The first case was a claim for return of a security deposit. Wisconsin has very well-developed landlord/tenant laws, including a detailed code relating to the holding and return of security deposits. The tenants were claiming the return of the deposit they had put down when they took up the tenancy, and the landlords were defending the action on the basis that the tenants had caused damage. The landlords were legally represented, the tenants were not.

The proceedings were quite informal, with the tenants' six year old child being present throughout. The landlords had withheld all of the security deposit claiming that the tenants had damaged the property, and the tenants were claiming return of twice the amount of the deposit, which was permitted in terms of Wisconsin's landlord/tenant law. The Court Commissioner decided that the damage referred to by the landlord was fair wear and tear, and found in favour of the tenants.

One of the other cases observed was interesting because the defendant was a lawyer. It was an action by a surveyor for payment of his survey fee. The surveyor had sued a lawyer who he thought was in partnership with the person who had instructed the survey. It turned out this was not the case. The case was dismissed because the plaintiff had sued the wrong person. The defendant throughout conducted his case as if he was in an ordinary court, he objected to the relevancy of some of the plaintiff's questions, and he also objected to hearsay evidence despite being told that in small claims courts the normal rules of evidence did not apply. He cross-examined the plaintiff in an unnecessarily formal fashion.

Overall the hearings observed seemed to be reasonably satisfying for the parties participating. Although the proceedings were quite informal, the Court Commissioner was able to inject an atmosphere of authority into the proceedings, despite the fact that hearings took place round a table, and in quite a small room.

There are few sources of advice for individuals pursuing claims in Wisconsin. Wisconsin Department of Justice's Office of Consumer Protection and Citizen Advocacy receives 20,000 individual complaints every year. The department claims that many of these are successfully mediated by them resulting in the return of almost $1 million to citizens
annually. The Department has produced a four page leaflet giving people advice on how to prepare for their small claim case.

5) The cost of going to court

The successful party is entitled to be paid filing fees, out of pocket court costs, and statutory lawyers' fees, if a lawyer took part. The lawyer's fee is based on the amount awarded. In July 1988 these fees were $100 for $1,000 - $2,000 awards, $50 for awards between $500 and $1,000, $25 for $200 - $500, and $15 for awards under $200. Fees for expert witnesses are not reimbursed. If people want to get an expert to attend they have to pay for him/her themselves.

6) Timetabling of Cases

For the hearing before the Court Commissioner, the case is scheduled for a specific time. Parties have to file written answers, or appear at a first hearing. Many cases are settled at this time. The system, however, is sometimes criticised because it could involve three appearances in court.

The procedure is widely used for commercial debt recovery, but most of these cases do not go to a hearing, and because of the separate timetabling of cases, they do not have a detrimental effect on other cases.

7) Enforcement of Judgments

If the court orders the payment of money damages, the court orders the defendant to send a statement to the plaintiff setting out his name, address, employers and their addresses, any heritable property he owns, any bank accounts, etc. he has. This must be sent to the Plaintiff within 15 days of the judgment. If the debtor fails to provide the information then he can be held in contempt of court. The recovery procedures once the financial information has been disclosed are similar to Scottish procedures. There are limits to the amount of wages that can be attached, and the types of benefits.

Small Claims in California

Meetings were held with small claims advisors and administrators, and with the Supervising Attorney of the State Office of Consumer Affairs.

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1) Financial Limits

As from 1 January 1989, the small claims limit in Californian courts is $2,000. The court also has the power to order someone to do something, such as put right a piece of shoddy work. The limit will be increased to $2,500 on 1 January 1991. Actions against a guarantor, however, are limited to amounts up to $1,500.

In all cases, the plaintiff can waive the difference between the upper limit and the true amount of the claim if this exceeds the limit. Also, a plaintiff can sue for recovery of an item, even if the value exceeds the small claims limit.

The limit includes any interest that accrued before raising the action.

An experiment conducted on behalf of the California Judicial Council and the Administrative Office of the Courts in 1980 increased the then limit of $750 to $1,500 in six courts. It was found that by increasing the limit the proportion of claims filed by corporations dropped for claims, between $750 and $1,500, yet in this range the proportion of claims raised by individuals increased. Property damage and personal injury cases increased.

2) Court Dues

If the plaintiff has filed no more than 12 claims in the past calendar year, the fee is $6.00 - if more than 12 the fee per claim is $12.00. This is not really to discourage frequent use, but to reflect administrative costs. If the plaintiff wants the claim served by the court by certified mail then there is an additional charge of $4.00 per defendant. These fees can be recovered from the defendant if the plaintiff wins. The fee can be waived if the plaintiff cannot afford to pay.

3) Representation

In California, lawyers are not permitted to appear in the small claims court. They can give advice before the hearing. A corporation may appear through an employee or an officer or director of the corporation, but it cannot be represented by someone who is solely employed to do representation in the small claims court. Similarly small claims advisors are not permitted to appear in court - you must represent yourself. It is considered that the involvement of attorneys would increase costs and dilute the informal atmosphere of the procedure.
4) Formality

Some courts in California use temporary judges to hear small claims cases. They are all qualified lawyers admitted to practice in the State of California. Parties are given the option of having their case heard before the temporary judge or before the municipal court judge. Parties are encouraged to use the temporary judge because he/she can hear cases sooner than the municipal judge, and in practice most cases are heard by temporary judges. Some courts require temporary judges to attend an orientation and training programme, both as pre-service and in-service training.

Cases are heard in the normal municipal courthouse, although many designate a particular room as the small claims court. Santa Clara County has a separate annex used exclusively for small claims.

No small claims hearings were observed. The Department of Consumer Affairs has produced a sourcebook, Resolving Consumer Disputes for small claims judges and clerks, in which the need to ensure that the atmosphere in court is informal enough to allow claims to be handled by the parties themselves, is stressed. That is one of the reasons why lawyers are excluded. The normal rules of pleading and evidence, particularly prohibitions on certain types of hearsay, are not strictly applied. The judge has to deal directly with the individuals who are involved in the case, and he must bear in mind the tremendous influence he can have on how people perceive the entire justice system. A small claims judge, the sourcebook says, needs to play an active role, "quickly grasping the essential facts and issues and then resolving the matter without extensive deliberation". The sourcebook recommends that a judge in a small claims case should have a good grasp of the law and be able to explain how it applies to particular cases. This should be seen as a special challenge and an opportunity to employ his judicial skills to put an end to the dispute by the way in which the decision is framed and explained.

The plaintiff has no right of appeal against the decision of the small claims court, but the defendant does.

The sourcebook advises that most small claims proceedings should be conducted quite informally, with the judges encouraging the parties to present their side of the dispute in everyday words and in a narrative style. Although given this advice it is understood from anecdotal evidence that judges would normally hear cases from the bench wearing gowns, including temporary judges.
The Court Assistance Experiment, set up in the late seventies by the Department of Consumer Affairs, included a mediation programme in San Diego which was used in cases where both parties were willing to attempt to reach a settlement. A recommendation was made to the legislature that courts should be authorised by statute to sponsor or co-sponsor informal dispute resolution programmes such as mediation, conciliation, or arbitration for small claims cases. This recommendation was implemented in 1986. For instance, Santa Clara County did have a "Med-arb" programme, where parties went before a lawyer- mediator/arbitrator, who would try to reach a settlement of the case with the parties. If this did not succeed, the mediator would then go on to arbitrate the dispute – reaching a decision on the merits of the case. This had been felt not to be so successful because the parties were not always clear about the purpose of the hearing, or whether at any stage they were mediating or arbitrating.

In the late 1970s the State Office of Consumer Affairs in California conducted an experiment into small claims as a response to increasing concern about whether the small claims court was delivering full justice at a bearable cost to consumers. The court was often seen as inaccessible or intimidating to individuals wishing to pursue or defend cases. The Project experimented with small claims legal advisors, evening and Saturday court sessions, law clerks, litigant manuals, and mediation. As a result some recommendations were made which were aimed at improving the accessibility of the courts. One recommendation which was implemented has led to a requirement that every county government in California has to provide, free of charge to users, some form of small claims advisory service. In Santa Clara county this takes the form of a telephone advice service, and San Francisco Government employs an attorney with volunteer assistance to advise claimants on a full-time basis.

Santa Clara County's Small Claims Advisory Service began in December 1983 with one Consumer Affairs Investigator/Small Claims Advisor providing telephone information to the public.

Now the service is staffed by two full time advisors and several volunteer "para legals". In addition to procedural information, the advisors help litigants to review and organise the evidence involved in the dispute. They handle around 1,000 telephone enquiries per month, compared with around 2,000 small claims filings per month. The Service runs a "Mock Court" for plaintiffs and defendants, a workshop which helps parties prepare and present their case, and is used by around 1,000 people per year. (A publicity leaflet for the Mock Court is annexed).
The workshops take place in courtrooms throughout the county. Participants include a Municipal Court judge, private attorneys and staff from the Advisory Service. The Advisory Service also organises small claims presentations to civic and business groups and public seminars.

The Small Claims Advisor employed by San Francisco City Government is a fully qualified lawyer who has several volunteers to assist her in giving advice to the public about how to conduct their small claims cases. Her office is based in City Hall where clients are encouraged to help themselves by consulting textbooks in the extensive public library after receiving basic legal advice.

Santa Clara/San Jose Small Claims Annex also provides an information hot-line for those with ‘touch-tone’ telephones, which delivers a pre-recorded message on matters such as court hours and location, how to file a small claim, the legal advisory service, and appeal and collection procedures.

5) The cost of going to court

Costs that can be recovered if the plaintiff wins include filing fees and service fees, witness fees and mileage (but not expert witness fees which again would have to be paid for by the individual), and fees for citing witnesses, and sometimes, interest. The judge has a discretion in relation to other types of costs.

6) Timetabling of cases

Different courts have different small claims schedules, but generally cases are scheduled for a specific time and date. Some courts hold evening or Saturday sessions (Santa Clara holds a night court every second Wednesday). Each small claims division of a municipal court with four or more judges must conduct at least one night session (after 5pm) or Saturday session per month.

There is not such a great problem about keeping consumer and commercial cases separate because lawyers are not permitted to appear in the small claims court. Also, debt collection agencies are not permitted to use the small claims courts for collecting debts that have been assigned to them.

7) Enforcement of Decrees

In recognition of the fact that it is often difficult to collect debts even once a decree has been granted, the State of California Department of Consumer Affairs has produced a book "Collecting Your Small Claims Judgment" which is available for sale.
Like Wisconsin, California courts require the debtor to complete a statement of assets, which must be completed and returned to the court within 35 days of judgment being entered. The court can also order the debtor to be orally examined about the whereabouts of his assets in court. Judgments are enforced in similar ways to Scotland: By attaching earnings or bank accounts; or moveable and heritable property; all of which are subject to certain exemptions.

Most of the leaflets produced about small claims in California and, indeed, in the other states, stress the importance of considering at the outset the possible difficulties in enforcing the judgment.

**Consumer claims in New South Wales, Australia**

Meetings were held with consumer claims referees and two hearings were observed. The way that consumer disputes are handled in New South Wales and in Victoria is interesting because they have been removed from the jurisdiction of the courts. Those involved in the system in New South Wales consider this to be more satisfactory because courts are too intimidating. Other types of cases are dealt with in the local court, but it was not possible to investigate this aspect.

1) Financial Limits

Consumer claims up to a limit of $6,000 (which is approximately £3,000) are heard in the Consumer Claims Tribunal. Consumer claims are claims that arise between customers and suppliers that do not involve consumer credit. All other claims below are handled at the local court. The Tribunal also has the power to order the respondent to put right a defect in the goods and services to which the claim relates, or to order the deliver of goods.

2) Court Dues

The Consumer Claims Tribunal’s fees are $10.00 and $2.00 if the claimant is a full-time student or if he/she is receiving a Government pension or on social security benefits.

3) Representation

Lawyers are not allowed to represent parties at hearings. Corporations must be represented by an officer of the company; firms must be represented by a partner in the firm; and sometimes if the tribunal decides that one of the
parties would be disadvantaged if not represented, representation is permitted as long as the representative has enough personal knowledge of the disputed issues to be effective at the tribunal.

In a situation where one of the parties involved in the case was a lawyer the Consumer Claims Tribunal would advise the other party of this, and advise them that they might want to employ the services of a lawyer if they would feel unhappy about appearing against a lawyer in person. However, no financial assistance is given with this.

4) Formality

Consumer claims are heard by "referees" who are qualified lawyers, appointed by the Governor to hear these cases, and they can be employed on a full-time or part-time basis, although the majority are part-time. Referees are paid around $240 gross a day, and they are paid according to the number of days' worked. Most of the referees were qualified lawyers, but not all of them, and there was some concern that these non-legal referees should have been getting legal training. There appears to be a mix of married women with children who work part-time, other referees who may be in private legal practice some of the time, or involved in law teaching. They undergo training for their role as referees. Cases are held in various offices throughout Sydney and in country offices around New South Wales. Hearings take place in private in small but pleasant rooms. The referee sits at the top of a table with both parties at either end.

The first hearing was about a claim brought by a consumer who had bought some hair replacement treatment which involved supplying him with a wig which required to be renewed periodically. The claimant was Italian, and claimed that he had not understood that he would have to return time and time again to have the wig replaced. The salesman who had sold him the treatment appeared for the wig company, and gave a video presentation to the referee, claiming that this video, which had been shown to the consumer, made it quite clear that the wig had to be replaced every now and again. The referee ruled in favour of the claimant, finding that because he did not have English as a first language, the salesman should have been particularly careful to ensure that he understood what would be involved. The New South Wales Consumer Claims Tribunal Act 1987 explicitly directs tribunals to take account of the need to come to a fair and equitable decision bearing in mind such matters like inequality in bargaining power, relative educational backgrounds of the parties under influence and so on.
The other hearing was a claim against a dry cleaning company for damage allegedly done to a consumer's blouse. The owner of the dry cleaner's had had the blouse analysed and was claiming that the manufacturers were responsible because the cloth was flawed. There is provision in the consumer claims rules to bring in third parties, so the referee decided on the basis of the report which supported the dry cleaner's view, that the manufacturers should be cited, so the case was adjourned for this purpose.

The Act provides that referees must try to conciliate claims. At the beginning of both hearings the referee invited the parties to try and settle the matter, and offered to help with this. In neither case was this offer taken up.

In both hearings the atmosphere was quite informal and parties on both sides appeared to be at ease with the procedure. The normal rules of evidence do not apply.

5) The costs involved in going to the tribunal.

The Act states that a tribunal has no power to award costs to or against a party to a consumer claim. A successful claimant would not even have the administration fee returned. In the case about the damaged blouse the dry cleaner had to pay for the analyst's report himself.

6) Timetabling of Cases

Parties are given a specific date and time to attend their hearing, and each hearing is allocated one hour, and will not generally be allowed to exceed that period. Hearings are not held in the evenings or at weekends.

7) Enforcement of judgments.

Where the order made by the Consumer Claims Tribunal relates to the payment of money, if it remains unpaid, the person wishing to enforce it can do so by filing it in the local court, or this can be done by the registrar of the tribunal, and the normal enforcement procedures would follow.

Where the order is in relation to remedying defects in goods or services, delivery, return or replacement of specified goods, or any order requiring the claimant to do anything, different rules apply. At the time of making the order, or later, the referee can give leave for the claim to be renewed if the order is not complied with within a specified period. The tribunal can make another order instead.
Small Claims in Victoria, Australia

A meeting was held with the Senior Referee of the Small Claims Tribunals and his Depute. There was also an opportunity to meet with other referees and observe hearings.

Small claims Tribunals are divided into three different areas and there are separate tribunals for each subject area. The Small Claims Tribunal deals with disputes arising between consumers and traders; the Residential Tenancies Tribunal deals with all disputes about tenancies, ranging from failure to provide locks to eviction and the construction of tenancy agreements. The Residential Tenancies Tribunal has wide ranging powers to compel and restrain parties to do or not to do something. There is also a Credit Division of the Small Claims Tribunal which deals with consumer credit issues. Since there was no opportunity to observe Residential Tenancies hearings or Credit hearings we concentrate here on other small claims which involve disputes between consumers and traders.

1) Financial Limits

The limit for all cases brought before the Small Claims Tribunal is $5,000. Claims exceeding $5,000 in relation to credit are dealt with by the Credit Tribunal but under a much more formal procedure.

2) Court Dues

The fee payable to lodge a claim is $5.00. There does not appear to be any provision for waiving this fee.

3) Representation

No one is represented by a lawyer unless both parties agree and the Referee approves of this. Normally, parties would be unrepresented, and at all hearings that were observed there were no lawyers present.

4) Formality

In contrast to New South Wales all Victorian referees are legally qualified, but again many of them are part-time. They have undergone extensive training for their role as referees which includes role-play, observations and updating on legal changes. Conferences are held every six weeks to ensure that any problems are discussed and resolved and that there is some consistency in operation.
The atmosphere in hearing rooms are more formal than was observed in New South Wales. All hearings are heard in public, and this was one of the reasons given for the courtroom like appearance of the hearing rooms. Another reason given was that if the rooms look more like courtrooms, then the proceedings will have more authority and parties will be less likely to assault the referees!

Everyone stood up when the referee came into the room, and parties were advised to address her as "Madam". As in New South Wales the referee has a duty to try and settle the claim, but this part of the proceedings is emphasised more in Victoria. The Senior Referee considers that the hearing can be described as a type of a mediation because the referee will try to settle the case before proceeding to adjudication. It is probably closer to the "med-arb" idea encountered in California. However, the criticism of the way it had operated in California perhaps cannot be made about Victoria. It was argued that to try and combine mediation and arbitration by the same person is impossible because parties will feel confused by the dual role. In Victoria because of the concern that referees could be accused of unfairness to either party, they have developed and follow a stylised form of settlement.

Parties are advised that they only have a 50% chance of success, that they have no right of appeal, of the risks attached to any kind of litigation and of the benefits to be gained from avoiding someone else imposing orders on them. Some suggestion may be made about the amount which might be acceptable in settlement, but at all times it is stressed that anything the referee says along these lines can be completely ignored. At the hearings that were observed, after this discussion had taken place, the referee left the room to allow the parties to have a discussion. When she returned she asked if they had been able to agree a settlement, and when they had not, the hearing was proceeded with.

While the Senior Referee acknowledged the difficulties of an adjudicator trying to settle a case, he considered that this stylised form avoided most problems. He had had no complaints from the parties about the process, only that the adjudicators had not always been vigorous enough in their attempts to settle cases.

5) The costs of going to the tribunal.

As in New South Wales, no expenses are awarded in favour of the successful party, so that means that anyone wishing to bring witnesses, or get expert reports would have to pay for this themselves.
6) Timetabling of cases

As in New South Wales, hearings are allocated a specific date, time and must be heard within a specific length of time. They are not heard in the evenings or at weekends.

7) Enforcement of Judgements

As in New South Wales, orders of the Tribunal are enforced through the ordinary courts.
Chapter 4.

Conclusion

This paper does not attempt to lay down a blueprint for the future development of small claims in Scotland. It is always difficult to compare procedures in other jurisdictions with our own especially when these procedures must be seen within the wider context of their own legal systems. Practices which are appropriate to Massachusetts, for instance, may not be suitable in Scotland.

In addition, the qualitative research conducted on our behalf into the attitudes and opinions of advisers involved in the Scottish small claims procedure cannot be taken as conclusive evidence that the concerns expressed in the discussion groups are representative generally of views about how small claims is working out in Scotland. The results of the official monitoring process will reveal the validity or otherwise of these concerns. Nevertheless, we would tentatively suggest that concerns about issues related to representation, formality, the financial limits, costs involved in going to court, timetabling and scheduling of cases and enforcement of decrees, are likely to feature prominently in any changes which may be proposed to the small claims procedure in Scotland. It will do no harm to open the debate now, and to look at various methods that have been employed in other jurisdictions, and possible solutions.

This Discussion Paper contains no firm recommendations, but we would like to make some proposals about ways forward that could be explored once the results of the official monitoring study have been published.

Representation

One of the most serious concerns expressed in the structured discussion sessions related to representation in small claims cases. Advisers were anxious that the procedure would be fine for the articulate, confident, middle-class person who would be able to represent him/himself, but other people would not have the confidence to put their own case in a courtroom setting. There was also a view that because traders were continuing to employ solicitors, party litigants would feel at a disadvantage unless they had someone equally competent to represent them. The non-availability of legal aid for small claims cases may have been intended as a disincentive for lawyers, in order to preserve the informality of the proceedings, but the fact that they continue to be employed by commercial litigants appears to result in unfairness to inarticulate and disadvantaged consumers who would not feel confident facing
a solicitor in court. The only alternatives for them would appear to be to find a competent lay representative, or to forget about raising or defending the claim. As expressed by one respondent:

"...a proportion of the population are excluded from going to court for actions of under £750 - those who have not much money and are not confident enough to represent themselves."

Another, more subtle concern expressed in the discussion groups was about the involvement of lay representatives in the small claims system. The view was that while solicitors were still involved, lay representation to some extent was needed to fill the gap. However, is this not creating another professional group - made up of those lay advisers who have developed a specialism in representation? It was even suggested that the use of such representatives may perpetuate the tendency for traders to employ solicitors and hence preserve the formality of the proceedings.

"It's possible that if a trader thinks the client is being represented then he might make sure he also has representation whereas he might not bother otherwise."

The question that must be addressed then, is this. What kind of balance should be maintained in the role of the adviser, as between provision of advice about how to conduct a small claims case, and actual representation?

We believe that as much as possible, small claims should be a do-it-yourself procedure where litigants should not feel disadvantaged by not having a solicitor or lay representative to appear on their behalf. We believe that lack of resources on the part of CABx and Trading Standards Departments may mean the balance of work will continue to be weighed more in favour of the provision of advice than representation. In an ideal world, this is an acceptable balance but at present there is a concern that because of the continued formality of the procedure and the continued presence of solicitors in small claims cases, many people will not be pursuing or defending cases in which they have a valid claim or defence.

We have seen the different ways in which this problem is tackled in other jurisdictions. Californian small claims courts do not permit lawyers to appear and this is also the case with the Consumer Claims Tribunal and Small Claims Tribunal in New South Wales and Victoria. In other states such as Massachusetts, Wisconsin and Washington DC, limitations are imposed on the role of lawyers (the Massachusetts Small Claims Standards give the judge a discretion to stop the lawyer taking over the conduct of the
case), or on the expenses that can be awarded. Some jurisdictions (California, New South Wales and Victoria) exclude debt collection cases, or only handle claims about the supply of goods and services.

We are tempted to suggest that the Californian model should be followed, that lawyers should be excluded and debt collection cases should be administered under the summary cause procedure. However, we do have a responsibility to disadvantaged and inarticulate consumers, who can often be on the receiving end of a debt action, and we would not like to deny them the potential benefits to be gained from the simplified court procedures.

On balance, we consider that at this stage, the arguments have not been made out for the blanket exclusion of solicitors from the small claims procedure. Nevertheless, we believe that the behaviour of legal representatives should be carefully supervised by sheriffs and as masters of the proceedings, they should feel free to stop solicitors from concentrating on procedural complexities. The Massachusetts Small Claims Standards make it clear that the judge’s discretion as to the extent of participation by counsel would include refusing to permit unco-operative counsel from examining witnesses. We would like to see greater recognition that the sheriff’s discretion, given in rule 19 of the Small Claims Rules, to conduct the hearing in such manner as she/he considers best suited to the clarification of the issue, and in an informal manner, would include limiting the behaviour of a solicitor in appropriate circumstances.

Formality

Responsibility for how hearings are conducted is with the sheriff in the Scottish small claims procedure. We understand that there have been variations throughout Scotland in terms of how the requirement that the procedure should be informal has been interpreted. In our view, there could be more guidance given to sheriffs and to court staff about how to preserve an informal but orderly and authoritative atmosphere in court, and also in how to present a positive face to people coming to the sheriff court for small claims cases.

The Small Claims Standards which were produced by the Administrative Department of the Trial Court in Massachusetts appear to provide a model for the kind of guidance that could be made available to sheriffs and sheriff clerks in Scotland. Drawn up by a committee of judges, clerks and consumer representatives, they draw together examples of best practice in the hearing of small claims cases in Massachusetts. We believe that there is
scope for the development of such guidance in Scotland, perhaps drawn up by a committee of the Sheriff Court Rules Council.

Overall, we were struck by the ability of judges and referees in other jurisdictions to adopt a much more inquisitorial approach when hearing small claims cases. We believe that this deserves much more emphasis in Scotland than it appears to receive at present. It is also interesting to note that one of the skills deemed to be important in Californian small claims and in Australia, is the need for a judge to have a good knowledge of the law and be able to explain how it applies in particular cases. This is clearly an issue requiring some discussion in Scotland, if small claims is to succeed without the presence of legal representatives.

We continue to believe that training should be introduced for sheriffs to help them to adapt to the more informal approach required in small claims cases. It has been suggested that sheriffs perhaps are not the most appropriate people to be hearing small claims cases, given the fact that they are used to adversarial court procedures, and also, given their position in the judicial hierarchy perhaps they are too highly qualified and highly paid to be hearing claims about small amounts of money.

We note that in the jurisdictions where lawyers are used instead of judges; hearings were for the most part quite informal and relaxed and a relatively small percentage of cases went on to a hearing before a judge, which would seem to indicate high levels of satisfaction.

We believe that there may be some benefit in some kind of experiment in the use of solicitors to handle small claims cases. This could be done in one sheriff court, and could be used as an opportunity to experiment with other methods of reducing formality in small claims. For instance, we believe that the use of mediation has much to recommend it as an alternative to adjudication. The preliminary hearing stage could be used more as an opportunity to settle cases and we would support further investigation in this area. We continue to believe that the court building itself could provide accommodation for an advice service about small claims cases, perhaps provided by an agency such as the Citizens Advice Bureau. This works very well in England and Wales and in New South Wales, the Chamber Magistrate in each Local Court is a valuable source of free advice to court users.

We also consider that there is scope for the separate timetabling of small claims cases in relation to other court business, such as criminal cases and ordinary civil matters.
Ideally, this could be achieved by having the administration of small claims dealt with independently of other business, particularly in larger courts. We were impressed by the approach adopted in East Norfolk County District Court, Massachusetts where the small claims court operated very positively for the benefit of ordinary users. This could provide another model for pilot projects in Scotland.

Financial Aspects

There is still a view that the small claims limit of £750 is too low in Scotland, a figure more like £2,000-£3,000 being preferred in the discussions. The limits in other jurisdictions studied were all higher than the Scottish one, and there would certainly appear to be an argument for increasing the Scottish limit. We also believe that exemption from court dues should be given for people on low incomes as is the case with the simplified divorce procedure.

The problem of payment of expert reports and witnesses fees continues to be a problem. In most jurisdictions such costs were not reimbursed and in many cases personal injury actions were not likely to be raised as small claims. We supported the inclusion of personal injury actions in small claims but we believe there are problems with expenses in such cases. There is a need for further discussion of this matter.

In all jurisdictions studied there appeared to be difficulties with enforcement of judgments. It is difficult to suggest any improvements to the Scottish system which would not result in unfairness, but we stress the need for claimants to be given clear advice about the need to consider potential difficulties at the outset, before raising court action.

Scottish Consumer Council

August 1990
Santa Clara County Municipal Court/Consumer Affairs

SMALL CLAIMS ADVISORY PROGRAM

SMALL CLAIMS MOCK COURT

FREE Workshop for Plaintiffs & Defendants
How to prepare and present your side of the case
All interested persons call 299-4216 to register.
REPORT OF A STUDY
TO INVESTIGATE THE ATTITUDES
TO THE
SMALL CLAIM PROCEDURE IN SCOTLAND

To: Scottish Consumer Council
314 St. Vincent Street
Glasgow G3 8XW

From: System Three Scotland
6 Hill Street
Edinburgh
EH2 3JZ

SIT: 1683
22 November 1989
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CHAPTER ONE - BACKGROUND AND METHOD

On 30 November 1988, a new court procedure was introduced in Scotland for handling small claims. The intention was that the new small claim procedure would "provide a simple quick, informal and cheap method of settling disputes", 1 where the claim is worth up to £750.

Immediately prior to the introduction of the new court procedure which replaced the summary cause procedure for claims below £750, the Scottish Consumer Council commissioned a qualitative research study amongst various groups of advisers who would be expected to give advice to consumers wishing to use the procedure. In addition, the new small claims procedure allows for lay representation and so, these advisers may well have a role to play in appearing in the sheriff court to assist consumers in the pursuit of a small claim. 2 A report on the findings of this initial study has been prepared by Marketingline (Scotland) Ltd. and published by the Scottish Consumer Council.

In order to evaluate the first year of the new court procedure, the Scottish Consumer Council commissioned System Three Scotland to undertake a second qualitative research study. As far as possible, the approach and methodology used in the initial study was replicated. Once again 4 group discussions were recruited, primarily comprising the same respondents as had participated in the initial study. The schedule of group discussions was as follows:

**Inverness:** This group consisted of volunteers from local Citizen Advice Bureaux as well as representatives of the Trading Standards Dept. of Highland Regional Council.

**Glasgow:** This group was comprised entirely of solicitors from Glasgow and the surrounding areas.

**Edinburgh:** Two groups were held in Edinburgh. The first one consisted of Trading Standards Officers from across the Central Lowlands.

The second group was made up of CAB staff from the Edinburgh area.

**Notes:**

As mentioned previously, almost all the respondents had participated in the initial study. When a respondent from the first study was unable to attend the group discussion, he or she was asked to nominate a suitable substitute. The fieldwork took place between 3-26 October 1989.

As in the initial study, the choice of the group discussion technique was specifically intended to elicit detailed reactions to the various pertinent issues, and to identify the opinions and attitudes of the respondents towards the small claims procedure after its first 9-10 months of operation. By their very nature, the contents of the various group discussions were wide-ranging, including:

- awareness, use and impact of small claims procedure
- division between pursuit of small claims by consumers and traders
- type of cases covered by small claims
- issue of self-representation and lay representation
- issue of formality in the court proceedings
- reaction to published materials - forms, guides etc.
- financial aspects of the small claims procedure

Each of the 4 groups was moderated by Tom Costley, a Director of System Three Scotland. Representatives of the Scottish Consumer Council attended 2 of the group discussions as observers.
CHAPTER TWO - FINDINGS IN DETAIL

This section of the report outlines, in some detail, the key findings from this qualitative analysis of the experiences of various advisers to the initial period of operation of the small claims procedure and their attitudes towards some of the prevalent issues. The following commentary should be considered as complementary to the findings of two further studies on the small claims procedure being undertaken by researchers at the University of Strathclyde, the University of Dundee and the Central Research Unit of the Scottish Office.

1. Awareness and uptake of the new procedure

In the first few months after the launch of the new procedure, there was a considerable amount of media coverage. Not surprisingly, this generated public awareness of the scheme and this was evident by the number of consumers asking specifically about the procedure in CAB and Trading Standards offices. Over the year, this "top-of-mind" awareness of the scheme has decreased and it now represents the final element in the portfolio of advice offered to consumers by lay advisers.

"People were made aware at the beginning because we did get a flood of enquiries about the small claims procedure; they'd read about it in the newspaper or heard it on the radio. But in recent months, we've had nobody asking, it's us who are telling them as opposed to them asking us".
Due to the qualitative nature of this study, it is difficult to quantify whether or not the introduction of the new procedure has resulted in a significant increase in the volume of cases being pursued by consumers anxious for a means of redress against traders et al. On the basis of the evidence emerging from these discussions, it would appear that the uptake by consumers has, to date, been limited and that the new procedure, if anything, has been used by traders pursuing customer debts.

However by its very nature, accurate measurement of the impact of the new procedure will be difficult. The procedure is intended to be a "last resort", a legal mechanism to be brought into operation if all other avenues for negotiation between consumer and trader have broken down. Consequently, it is to be expected that the majority of such disputes will not reach the stage of court proceedings. Nevertheless, there is a belief amongst some advisers that the introduction of the small claims procedure may well have had an impact on some traders, encouraging them to agree to a settlement during negotiations with a consumer. The perception of the trader was that the existence of the new procedure would encourage the consumer to proceed with the case where previously he or she would have been less likely to do so. In effect, this is an impact of the new procedure which cannot be quantified.

Also, assessing the extent to which the new procedure has been used by consumers through discussion with advisers represents a partial examination. The procedure was intended to encourage self-representation by consumers pursuing claims. Therefore, to what extent consumers have adopted this principle and used the new procedure, as a "last resort" or indeed, as a legal mechanism, will have to be examined in one of the other studies. Suffice it to say that, for various reasons which will be examined in some more detail later in the report, the belief amongst advisers is that the number of court cases involving consumers representing themselves has been minimal.

Two issues dominated the content of the four discussion groups - representation and the formality of the court proceedings. The next two sections of this chapter examine each of these issues in turn.
2. Representation

The introduction of the new small claims procedure was specifically intended to remove the need for a pursuer to require the services of a solicitor. Indeed the hope was that consumers would undertake the procedure on their own, seeking advice and assistance from advisers in Citizens Advice Bureaux and Trading Standards Departments. To date, it would appear that solicitors continue to be involved in the vast majority of cases brought under the small claims procedure. The following paragraphs examine in some detail, the various reasons behind this continued involvement.

First of all, as identified in the initial report, very few individuals would relish the prospect of proceeding with a small claim through the courts on his or her own.

"It's fine for the articulate middle-class person who can represent himself ....... for the rest, it isn't much use".

"There is a basic mistaken premise that lots of people are wanting to go to court on their own. They want to go to court, but the average person wants someone to represent them".

At this point, it must be recognised that many, if not the majority of cases which have progressed to the preliminary hearing stage under the small claim procedure have been raised by companies or organisations against a consumer, often pursuing debts. In this context, companies and organisations are more likely to retain the services of a solicitor as they do not perceive the small claim procedure to be in any way different from other court procedures. Legal matters affecting the company are dealt with by the company's solicitors without consideration of the resources required, and the resultant/financial cost.

"From the trader's point of view he is much more likely to use his solicitor rather than bother going to court himself because that's how he sorts out problems, he doesn't want to waste his own time".
Apart from this principle of "established practice", companies and organisations appear to be retaining the services of solicitors because they are concerned that their failure to win a case, where they are the defender may establish a precedent or indeed, if reported in the press, be unhelpful in terms of their public profile. Therefore, in these cases, the issue is not one of a limited monetary claim but rather, a much wider issue. Consequently, the apparently excessive investment in the services of a solicitor(s) can be justified on the basis of the long-term implications.

"... if his (the trader's) reputation emerges unscathed and it costs him, say £500, that's nothing compared with lost business".

"... Company X had sent a solicitor, in fact, an advocate, not because they had any interest in the employee, but to prevent a precedent being set".

Consequently, companies and organisations who are involved in the small claim cases, be it as pursuers or defenders, seem committed to the continued use of solicitors. Turning back to the consumer, and in particular, those who regard themselves as not being sufficiently articulate to pursue a claim on their own, what options do they have at their disposal?

First of all, the exclusion of the small claim procedure from the legal aid process was obviously intended to encourage a move away from representation by solicitors on such cases. In this context, it would appear to be effective as solicitors are encouraging clients who do not have the financial resources to pursue a claim without legal aid to seek advice from CAB and Trading Standards staff and are thus actively encouraging the greater involvement of lay-advisers. There are a number of serious implications of such an arrangement. First of all, this transfer to another adviser may be sufficient to discourage the consumer to decide that pursuit of the claim is not worth the hassle or aggravation. Secondly, the transfer assumes that the CAB or Trading Standards Department have the resources to deal with these consumers, in addition to their own client base. Thirdly, and probably of most importance, is the extent to which the denial of legal aid to claimants, both pursuers and defenders, is depriving certain sectors of the population of representation on small claims cases.

"... a proportion of the population are excluded from going to court for actions of under £500 - those who have not much money and who are not confident enough to represent themselves".
The second option if they do not wish to pursue a claim on their own is to seek advice and assistance from consumer advisers such as CAB or Trading Standards Departments. From the outset, the potential contribution of such advisers to the operation of the new procedure was recognised as being considerable, both in terms of offering advice and assistance but also, representing clients in preliminary and subsequent hearings. To date, for a variety of reasons, the balance appears to have been towards the former activity.

Initially, there was some concern, especially amongst CAB staff that the introduction of the new procedure would result in a flood of claimants desperate to take advantage of this easier access to the courts. Consequently, there appears to have been some reluctance in getting "involved" in too many cases prior to a better understanding of the commitment required in terms of staff time. However, the volume of cases has probably not been as large as expected and, while each CAB office can decide for themselves on the most appropriate course of action, it would appear that more and more will become increasingly involved in representing clients in court.

In a similar vein, the input from Trading Standards Departments to date has also been more oriented towards consumer advice and assistance with the small claim procedure rather than becoming heavily involved in representing consumers. While for some departments this reticence to become involved in representation of consumers reflects a similar concern to that of CAB staff, the primary constraint has been the uncertainty of their legal position with regard to representation. It would appear that this matter has now been satisfactorily resolved and that, almost without exception, Trading Standards staff envisaged themselves becoming much more involved in representation in the future.
This likely increased level of representation by CAB and Trading Standards staff should not deflect attention from the fact that these "advisers" will continue to have a vital role in advising and assisting consumers in the pursuit of a small claim. First of all, the court proceedings must be regarded as a final option and therefore, valuable advice and help will be offered in an attempt to reach a satisfactory negotiated settlement without recourse to the formal procedure. Secondly, the procedure as it stands at the moment is not particularly "user-friendly" in terms of understanding the explanatory literature and necessary legal forms. Therefore, the lay advisers have and will continue to have a vital role in guiding claimants in the right direction.

So far in this section on representation, the focus has been on its mechanics – the issue of cost for the use of solicitors and the resource implications of using "lay representatives". However, more fundamental issues are raised by the likely replacement of solicitors by lay representatives. The remaining paragraphs of this section of the report seek to identify some of these pertinent issues.

First of all, the new procedure was intended to encourage a "do-it-yourself" approach, dispensing with the use of solicitors. While there is some evidence that this has occurred, at least to a limited extent, it is widely recognised that lay advisers are necessary to fill the "gap" – the vast majority of consumers are unlikely to wish to proceed on their own without any advice or assistance from someone with previous experience of the small claim procedure. If this involvement in the procedure is taken to its maximum and the lay adviser becomes a lay representative, does this represent any difference from representation by a solicitor – leaving aside the question of the fee!

The fact that solicitors recognise the small claim procedure as having little, if any, value as a source of fee income will, undoubtedly, circumvent the defensiveness amongst some solicitors towards the increased presence of non-legally qualified advisers and representatives in the small claims court. The main concern expressed by the legal profession and indeed, by the lay advisers themselves, was the level of competency of the lay representatives.
In order to properly represent a consumer, the lay adviser will have to be regarded as competent, not only by the consumer but also by the court – the sheriff and the courts administration. Without such recognition, the system could easily become discredited in a particular area or sheriff court and act as a constraint on the use of the new procedure. One particular aspect of the competency question raised was – what recourse individuals would have if they were dissatisfied with the performance of a lay adviser? If one is employing a solicitor, their fee can be withheld and if the situation is not satisfactorily resolved, the professional body, the Law Society of Scotland can become involved in any such dispute. In contrast, the use of lay advisers, be they CAB volunteers or local authority employees will not involve a fee for their services. Consequently, it may well be that individuals will feel less able or indeed inclined to pursue a complaint against an adviser's performance on the basis that they were "doing their best".

The description "doing their best" is of critical importance because the level of competency likely to be expected of lay advisers will be considerable. Obviously, knowledge and experience of the legal details of the procedure will be paramount if for no other reason than they are likely to be dealing with a solicitor(s) representing the defender. This requirement, on its own, should not prove to be too onerous, as the experience of social security and industrial tribunals has shown, with lay advisers becoming "experts" in those particular areas of legislation. However, in addition, on the assumption that the formality of the court proceedings continue, in the short-term, the lay adviser will have to become competent in court procedures, the skills of cross-examination etc.

Recognising the need to address this issue of competent representation, there does appear to be a division of opinion between:

a) the creation of specialist advisers amongst both CAB and Trading Standards staff working primarily, if not exclusively, on small claim cases.

b) the maintenance of generalist staff, dealing with small claims as well as other areas of responsibility.
The primary argument in support of the first option is that this will ensure that those advisers representing consumers will develop their experience in small claims and build up the necessary competence in the application of the procedure. On the other hand, this could result in the creation of a quasi-legal specialist who, it could be argued, is only one step removed from the use of a solicitor. The second option would reduce the likelihood of new specialist advisers operating in the small claims area but may result in an overall lower level of competency and experience in the prosecution of small claims cases.

The final issue for consideration in this section on representation is the extent to which the increased involvement of lay advisers representing consumers pursuing small claims may well serve to accentuate the formality of the procedure. In particular, one line of argument is that the use of such advisers by consumers may result in companies or organisations continuing to use solicitors to pursue or defend their cases on the grounds that they will be faced by a knowledgeable and articulate representative, rather than an individual likely to be overawed by the court environment and procedure.

"It's possible that if a trader thinks the client is being represented then he might make sure he also has representation whereas he might not bother otherwise".
3. Formality

Although as is evident from the discussion outlined in the previous section, the issue of representation generated a number of varying, and at times, divergent opinions, there was unanimous agreement that the small claim procedure, as currently operated, is insufficiently user-friendly to enable the vast majority of consumers from pursuing a claim on their own - particularly if it progresses to the preliminary hearing stage. In a similar vein, there was widespread, if not unanimous agreement, that the intention of making the small claim court procedure as informal as possible, has not been successful. Although there appears to have been some notable exceptions to the general rule, the vast majority of sheriff courts have made little allowance for the new procedure and the whole concept of "appearing in court" remains as daunting as many people perceive to be the case.

"Clients are being told, "it's informal" and when they get there, there's the judge with his wig and all the lawyers in gowns ..."

As interpreted by most of the respondents participating in this exercise, the proposed informality of the new procedure would have resulted in small claims being held outwith courtrooms, with sheriffs and solicitors appearing without their formal "trappings" of wigs, gowns etc. By and large, this has not been the practice to date. To exacerbate the situation, small claim cases appear to have a low priority within the court timetable. Those individuals involved in the case often have to sit within the sheriff court building for a long period of time, observing the variety of other cases being processed. This results in the pursuer becoming more and more intimidated by the surroundings and does nothing to relax or reassure the individual about his or her own appearance.

However, it must be recognised that any attempt to encourage a more informal approach to the court proceedings will primarily be at the be... - of the sheriff - he will dictate the extent to which a degree of informality is introduced. It would appear that there is considerable variation across the country on this issue and that it does reflect the personalities of individual sheriffs.
Of wider significance is the issue as to whether sheriffs represent the most appropriate mechanism for hearing small claim cases. First of all, the approach required for small claim cases is often in direct contrast to a sheriff's normal role:

"Sheriffs are having to be schizophrenic. One minute they're sitting in the small claims court where in theory they're having to be inquisitorial, then later be dealing with matters in an adversarial manner. To most of them, it's completely against their training".

This need to switch from traditional civil cases to the new procedure for small claims can make it difficult for the sheriff to immediately "tune-in". The following example appears to be a well-established anecdote:

".... the lawyer for the other side suggested to the sheriff that his client's opponent was at a disadvantage because they were being represented by a CAB volunteer. The sheriff agreed and told the person to go off and get a lawyer. The CAB volunteer objected to this, the sheriff refused to hear the case and eventually, after advice from his clerk, he admitted he was wrong and heard the case".

In resource terms, the allocation of a highly-qualified, highly-paid sheriff to make a judgement on claims with a maximum value of £750 must be questioned. In this, and indeed other areas, comparison has been made with the procedure for social security and industrial tribunals - in both situations, the monetary value involved can be considerably in excess of £750. The settlement of a small claim dispute requires an independent chairman or arbiter to make an informed judgement on the evidence presented to him or her by the 2 sides. While it was recognised that there were several advantages in that such a person should be legally-trained, the case for sheriffs to retain their monopoly on the small claim procedure would be difficult to justify.

"The average person just wants an authoritative decision. They don't care if it's a sheriff that gives them it".
This removal of a sheriff from the proceedings would also have the benefit of encouraging a switch away from the courtroom environment and probably lead to a reduction in the formality of the overall proceedings. The "model" of a tribunal-style approach was regarded as appealing by most of the participants in the study, as being an appropriate forum for the types of cases being considered at present.

"Part of the problem is that it's a bit ridiculous to have £48,000-a-year sheriffs dealing with these cases. If industrial cases, may be worth £14,000 can go to tribunals, why can small claims not be heard by may be other solicitors? They could be held completely outwith the court".
4. **Cost**

Secondary to the 2 primary issues of representation and formality, was the issue of the financial considerations of the scheme. First of all, the criticism that the maximum ceiling of £750 was too low and consequently, inappropriate was a universal complaint. Many household or personal items cost more than £750 and therefore, somewhat artificial claims were being lodged to ensure that it did not exceed the limit. In particular, claims were having to be adjusted on household suites, restricting it to 1 or 2 items rather than the whole suite - part of a car repair rather than all of it. The general opinion was that, in the short-term, the ceiling should be at least doubled to £1500 - £2000.

Although discussed previously, the absence of legal aid has implications for the payment of the court dues. At their present level of £21, this still represents a considerable "slice" of a person's income, especially if they are restricted to supplementary benefit.

As identified in the initial study, the use of the small claims procedure for personal injury cases is fraught with difficulties. Primarily, at the outset, it is almost impossible to estimate the value of your claim and consequently, whether it should be a small claim or remitted elsewhere. Secondly, with the ceiling on costs of £75, this has been used to the advantage of insurance companies:

"There is this tacit understanding that if the personal injury claimant has warranted an award of £500 in the past, then an agreed level of fees was paid, which really was the client's money, but that was your fee (the solicitor) - you got it direct, .... now, a lot of the answers say, "We're only going to give you £75".

Related to this is the issue of expert witnesses and the fact that the level of allowable expenses in no way reflects the likely outlay for an expert to appear or write a report pertinent to the particular claim. One solution would seem to be the removal of all personal injury cases from small claims and, where an expert witness is required in a small claims case, that it is remitted to a higher court, such as summary cause, where the constraints on allowable expenses are not as restrictive.
Another issue which has a direct financial bearing is that of appeals. Unlike the small claim case, the limit of a maximum of £75 expenses does not apply. Consequently, there may be a disincentive on behalf of the consumer to pursue a claim by going to appeal on the grounds that they may have to outlay an unknown amount if they subsequently lose the case, and the sheriff awards expenses against them.
5. Printed Material

As noted previously, there was general agreement that the new procedure was not particularly user-friendly, especially in terms of the court procedures. This criticism was also levelled at the printed material relating to the procedure - the guidebook as well as the form to be completed by pursuers.

Comprehension of the details of the procedure by an individual reading through the guide on their own was felt to be highly improbable, evident by the practice amongst advisers of taking a client through the procedure in stages. In addition, it was felt that one area of advice and assistance which was particularly useful to clients was the adviser sitting down with them and completing the form.

"It's got to be simple. It's virtually indistinguishable from the summary cause forms which I don't think any of us would have sent out to a client to fill in".

"I don't think the forms are user-friendly, particularly the large booklet. I think that's very difficult for a person of average intelligence and to expect someone to understand that without any knowledge of consumer law ... whereas, the DHSS have done a good job in making their forms user-friendly and I don't see why a lot of the jargon on the small claim forms couldn't be explained in much more simple terms".
6. Promotion and Training

After the media coverage of the launch of the new procedure, which undoubtedly generated consumer awareness of the small claims scheme, advisers are now informing consumers about the small claim procedure as one element in the portfolio of choice offered by advice agencies. As the procedure is intended to a "final option", this balance would appear to be about right. Consequently, further general promotion of the existence of the procedure is unlikely to be the most appropriate approach.

Instead, it could be useful to inform and reassure consumers about the ease of using the procedure and the potential benefits. One option might be to ensure wider press coverage of small claim cases which would have the dual benefit of establishing the credibility of the scheme with consumers and also, act as a deterrent to traders.

Amongst advisers there appeared to be little evidence of the need for further training in the details of the small claim procedure. The belief was that experience in completing the procedure was now of more value - training being no substitute for practical experience. However, with the likelihood of an increased level of representation in sheriff courts, there was a concern that competency in court proceedings was an area in which they would benefit from further training. Even amongst those who had considerable experience of tribunals, it was felt that a sheriff court was a very different environment.
7. Miscellaneous Issues

In the course of the discussion groups, a number of other issues emerged which could not be included within any of the previous sections. Two appear worthy of mention and brief discussion:

- alteration to the timing of small claim courts
- recovery of claims

As another manifestation of the lack of user-friendliness of the small claim procedure, the current practice of holding small claim hearings during the working week and not at a specified time - merely sometime in the morning or afternoon, may also act as a constraint on its use. Individuals appearing on a small claim case may have to forfeit a day or part of a day's wages to attend a hearing. This loss of income may, on balance, negate the value of their claim, even if they are successful. Proceeding with the case then becomes as much a matter of principle, rather than for financial recompense.

Re-scheduling small claim hearings to evenings and at weekends has been proposed as an alternative. While there was little apparent opposition to this suggestion amongst solicitors and the professional advisers, there was a concern that, within the existing sheriff court framework, administration is conducted by civil servants who would require overtime payments for such an arrangement. Such an increase in public expenditure was unlikely to result in such a re-scheduling being regarded as a practical alternative.

On the assumption that a pursuer who has represented himself or herself wins the claim, the procedure to obtain the courts award from the defender is another issue. There was a concern that an individual might encounter extreme difficulty in making progress with a reluctant trader or company and may, in the end, be forced to use the services of a solicitor to legally obtain the award. To some extent, it is unfortunate that, having taken advantage of the new procedure to win the claim, there is no facility available to ensure that payment is readily forthcoming.
CHAPTER THREE - CONCLUSIONS

In attempting to draw together some conclusions from this examination of the operation of the small claim procedure in its first year, the brevity of the time-period must be recognised. There was a belief that the experiences of the first year may not be an accurate reflection of the way in which things will develop in the future.

It would appear from this qualitative examination that there are certain issues which require further consideration. Some of these issues may well be dealt with in more detail in the other research exercises being conducted on the implementation of the small claims procedure. Therefore, the following list of issues is provided as a checklist.

1. It would appear that the aim of a "do-it-yourself" procedure is unlikely to be realised in the foreseeable future. As a consequence, the role of lay advisers will become increasingly important as the primary means whereby members of the public will be able to access the procedure. The issue for consideration is whether these advisory agencies will be adequately resourced in order that access to the procedure is not denied to individuals on the grounds of scarce resources?

2. This representation by lay advisers may well result in the continued use of solicitors by traders and thus reinforce, rather than reduce the formality of the proceedings.

3. To date, with a few notable exceptions, the informality intended for the procedure has not been evident. Ranging from the legalistic language and style of the guide and form to the daunting surroundings of the sheriff court, the small claim procedure remains very formal and far from user-friendly.
4. The precedent established by Social Security and Industrial Tribunals is one which should be closely examined for the small claim procedure. The justification for a sheriff's involvement and continuing to hold the hearings in the sheriff court is limited. There does seem to be an argument that the introduction of a tribunal-style approach would, at a stroke, reduce the formality of the proceedings and make them more user-friendly.

5. Finally, a review of the financial ceiling is necessary along with serious consideration of the removal of certain types of cases from the small claims procedure, such as personal injury and where a case required the involvement of an expert witness. In such a review, it would be advisable to examine areas where the introduction of the small claim procedure has made it easier for a trader or company to take a customer or client to court.