REPORT OF A STUDY
TO INVESTIGATE THE ATTITUDES
TO THE
SMALL CLAIM PROCEDURE IN SCOTLAND

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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. 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 £750 - 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 behest 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.