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Constitutional Affairs Committee

The courts: small claims

First Report of Session 2005–06

Report, together with formal minutes, oral and written evidence

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The small claims system, which operates in the county court, generally works well in providing a low cost, good quality procedure for large numbers of litigants. The procedure is informal and quicker than ordinary proceedings. It assists litigants to appear in person by providing greater judicial intervention and support and enables people to avoid incurring substantial legal costs in order to pursue small monetary claims. Nonetheless, while recognising the inherent qualities in the system, this inquiry has also identified a number of deficiencies and some potential for improvements

We have seen for ourselves that the county courts are still lacking proper IT facilities. We concluded that the provision of basic electronic document management and listing software could lead to substantial efficiencies. The current system is paper-intensive, which makes proceedings slower and leads to unnecessary waste.

It is also time for the Department to implement much sought-after improvements to the system of enforcing judgments. It is unacceptable that litigants, who at the conclusion of a case are led to believe that they have been successful, often find that the judgment that they have obtained is in a practical sense unenforceable.

The claims limits for cases involving personal injury and housing disrepair are in need of review. These are currently substantially lower than those for other claims which go through the small claims procedure. There is a need to protect vulnerable individuals, but disproportionate legal costs should not be recoverable.

Current proposals for a European Small Claims Procedure should prove a welcome improvement for those conducting cross border cases, but this system should not extend to wholly domestic cases.

1 Introduction

Background to the inquiry

1. The Constitutional Affairs Committee decided to undertake an inquiry into the workings of the small claims track in the county court as part of its oversight function of the Department for Constitutional Affairs.

Terms of reference

2. The inquiry's terms of reference were to answer the following questions:

- Does the small claims system facilitate access to justice?
- Is using the small claims track a simple and informal way of settling disputes?
- Does the system operate efficiently and effectively?
- Are cases properly allocated?
- Should the financial limits be reviewed?

Scope of the inquiry

3. During our inquiry we took oral evidence from two District Judges, the Association of Personal Injury Lawyers, Citizens Advice and the Law Society; and from Baroness Ashton of Upholland, the Parliamentary Under Secretary of State and Mark Ormerod, the Director of Civil and Family Justice at Her Majesty's Courts Service. We received a number of written submissions, particularly from the insurance industry. A number of Committee Members also visited various county courts to observe the small claims procedure in action.

2 The small claims track

4. The county court, often (erroneously) referred to as the "small claims court", deals with civil matters, such as:

- claims for debt repayment, including enforcing court orders and return of goods bought on credit;
- minor personal injury claims;
- breach of contract concerning goods or property;
- housing disputes.

5. The Civil Procedure Rules 1998, introduced following Lord Woolf's report "Access to Justice",[1] provided for a single set of rules for all civil claims in both the High Court and in the county courts and made specific provision for small claims. The Woolf reforms were introduced to simplify and expedite the civil claims procedure. These rules apply in England and Wales. Courts in Scotland have their own legal system.

6. With the implementation of the Civil Procedure Rules in April 1999, all defended civil cases in the county court are put before a District Judge for case management as soon as a defence is filed. The first case management direction is to allocate the case to the appropriate "track", which dictates how it will then proceed. Cases in the county courts are assigned to one of three tracks: the multi track (claims over £15,000, which can either be heard in the county court or the High Court, depending upon the nature of the claim), the fast track (claims between £5,000 and £15,000) or the small claims track. The small claims track is supposed to provide a simple and informal way of resolving disputes in comparison to the multi track or fast track, where as a general rule, the winning party would normally expect to recover their costs, including their legal costs, from the losing party.

7. Most county court cases are between people or companies who believe that someone owes them money. Claims for small amounts are generally straightforward and there is generally no need for those involved to use solicitors (although lawyers are frequently represented in cases involving personal injuries).

What is taken into account when allocating cases

8. The judge will take into account the views of the claimant and defendant and additionally:

- the amount in dispute—which should not be more than £5,000;[2]
- the type of claim—these will usually be claims for debt, which can be divided into: consumer claims (goods sold but not received; faulty goods or defective workmanship)

1 *Access to Justice*, The Right Honourable the Lord Woolf, Master of the Rolls, Final Report to the Lord Chancellor on the civil justice system in England and Wales, July 1996

2 Unless both parties agree that a higher claim can be dealt with appropriately through the small claims track

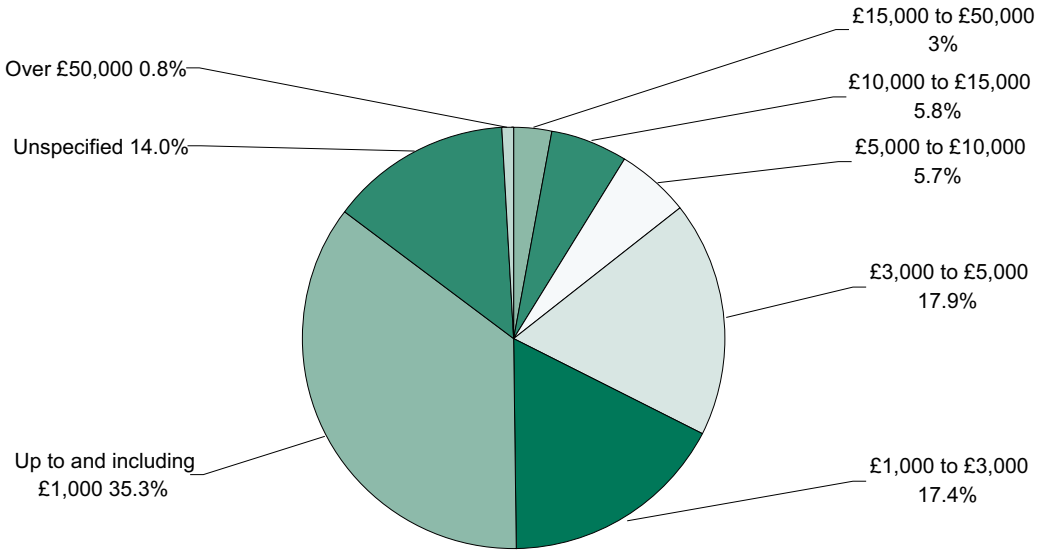
and small claims between companies often for similar reasons. The court also hears accident claims and disputes between landlords and tenants about repairs, deposits, rent arrears, but not claims for possession of a property;

- the amount and type of preparation needed to be able to deal with the case justly—the judge will have in mind that this procedure is intended to be simple enough for people to conduct their own cases without legal assistance, if they wish. The claim should require only minimal preparation for the final hearing, for example, cases in the small claims track will not normally involve large numbers of witnesses or complex points of law;

- If the claim is for less than £5,000, but includes a claim for personal injury, or for housing disrepair to residential premises and damages arising from the disrepair, the case will not be allocated to the small claims track unless the amounts claimed in respect of personal injury, disrepair and damages are each no more than £1,000.

9. As can be seen from the diagram (below) the vast majority of claims issued in county courts in England and Wales are of values below £5,000 (the small claims limit). Moreover of those claims, the majority (31,350 of 46,100 in 2004)[3] were claims for debt, although a substantial minority (10,249 in 2004)[4] were for personal injury or other forms of negligence.

County Court claims issued by amount of claim, 2004



Source: Department for Constitutional Affairs

3 Ev 26

4 *ibid*

Recovery of legal costs

10. The Department has indicated that it believes that:

> Perhaps the most important factor in making the small claims procedure accessible is what is known as the "no costs" rule (Civil Procedure Rule Part 27).[5]

11. The costs that can be recovered by the successful party in a small claim are strictly limited. For most types of claim, the court may only award:

- court fees and fixed commencement (solicitor) costs (under CPR Part 45);
- limited loss of earnings for party and any witnesses (currently £50 per day) plus travelling and overnight expenses; and the fees of a permitted expert (currently limited to £200);
- Where the claim includes the requirement for an injunction, a further amount (currently £260) can be claimed for legal advice and assistance in preparing the claim.[6]

12. Generally, no costs can be claimed for legal representation or for the services of a "lay representative". Although lawyers are not banned from small claims hearings in England and Wales (as they have been in some other jurisdictions), the lack of potential cost recovery discourages the use of legal representatives. That said, many small claims result from a car accident and parties to this type of claim are usually represented under the terms of their insurance policies. At the same time, the "no costs" rule is a major factor in reducing the risk at which parties are put by participation in a small claim. Research carried out in 1997 into the experience of those whose case was heard in "open court" (rather than in the small claims forum) found that:

> costs can … become the single overriding concern, and the anxiety and trauma of being entangled in the civil process itself can come in time to assume even greater significance for litigants than whatever was involved in the original dispute.[7]

13. The DCA is at present consulting (CP 20/05) on whether there should be a limit on the costs that an unsuccessful party should pay where there is an appeal from a decision made in the small claims track and whether small claims which are allocated or re-allocated to another track should have their costs limited to those available under Part 27 of the Civil Procedure Rules unless the court orders or the parties agree otherwise. The end date for this consultation is 2 December 2005.

14. Some of the evidence we have received supports the view that the small claims system works fairly well. In his written evidence, Professor John Baldwin indicated that:

> I have conducted research on the operation of the small claims system since the mid-1990s and published widely on the subject. In my view, the small claims procedure in

5 Ev 27, para 2.8

6 *ibid*

7 *Monitoring the Rise of the Small Claims Limit: Litigants' experiences of different forms of adjudication*, John Baldwin, LCD Research Series No. 1/97

> this country is a crucial part of the civil justice system and, despite certain important limitations, operates to the satisfaction of most litigants.[8]

15. Concerns have been raised however—for example the Law Society has commented that:

> Anecdotal feedback we received suggests that, although, the small claims track is simpler than the fast track, litigants in person still find it complicated and difficult to negotiate.[9]

16. A broad cross-section of issues, including recovery of legal costs, personal injury claims, the proposed European Small Claims Procedure and enforcement of judgments are dealt with below.

17. Sub Committee E of the House of Lords Committee on the European Union is currently also conducting an inquiry into the proposed European Small Claims Procedure. This issue is considered at Chapter 6 of the report.

18. **The small claims procedure provides an important avenue for consumers, businesses and other litigants to pursue claims with only a limited monetary value, in an informal environment, at low cost and at reasonable speed, without incurring disproportionate legal fees.**

8 Ev 53, para 1

9 Ev 42, para 10

3 Facilities

Provision of IT

19. Issues were raised by the judiciary about the facilities available to the county courts. This was a particular concern in relation to IT equipment, electronic document management and listings software. When we visited the county courts, we saw that the courts had little in the way of IT provision. This meant that everything had to be filed in hard copy and did not allow staff to minimise document handling. One of the District Judges commented to us informally during a visit that the PC's in the office functioned only as typewriters. In oral evidence, District Judge Walker said:

> Inevitably there is a need for more IT in the county court. Undoubtedly, anyone who visits the back office of the county court is just amazed by the amount of paper which is chased around on a minute by minute basis. At the moment it is an entirely paper based system… There is great scope for change, but it is immensely expensive and the resources, I am afraid, are not there. There is £25 million a year for investment in IT and civil and family business, and £25 million does not go very far between the 220 county courts.[10]

20. It emerged during the course of the inquiry that while the Department is rolling out some new listing software, this will not be accessible to the judges. When informally questioned about this, the Department raised compatibility issues. Nonetheless, it seems inefficient that a system is being purchased that will not allow judges the ability to manage their own lists without reference to a second computer or, in reality, the listing clerk. In his evidence, District Judge Oldham indicated:

> The judiciary have IT provisions, the courts have various IT provisions, but the two cannot speak to each other by and large which is not always helpful. As [District Judge] Michael [Walker] says, clearly the administration is the area which perhaps needs the greatest emphasis on better IT. Lord Woolf, when he prepared his report, of course, stressed the need for IT for civil justice generally and that largely has not happened.[11]

21. When these issues were put to Mark Ormerod, the Director of Civil and Family Services at Her Majesty's Courts Service, he explained that:

> I think it is recognised, as the Association of District Judges said, that the IT provision in the county courts is not satisfactory. There is some IT provision through the "CaseMan System". Over the last three years the DCA has spent £75 million on IT facilities in the county courts and principally on providing the LINK system. The historic position was that the county courts had standalone computers and the LINK provision allows linkages between the county courts… At the moment we are looking at a feasibility study looking at E-Filing, it is a web based application, which gets you over the cost of having to provide all the hardware in relation to the courts

10 Q 55

11 Q 56

> because you do it through the web. We have a feasibility study underway to try and see whether that would be a possible way forward and we are hoping to conclude that by the end of this year.[12]

22. In relation to the problems relating to the listing software, which the Department referred to a the "e-Diary project", he commented that:

> That is one of the things in relation to the pilot that we need to consider, whether it has helped the judiciary and indeed the court staff in relation to what it was set out to do.[13]

23. **The Department must place greater priority on providing adequate IT facilities to the county courts. While the provision of IT equipment and electronic document management software might be expensive in the short term, there would be clear scope for greater efficiencies if the current paper based system could be at least partially replaced, and service to the public would be improved.**

Listing procedures

24. Some of the evidence which we have received suggests that the listing of cases is not ideal. Anecdotally, complaints emerged that a number of parties were asked to appear at court at the same time, in order to ensure that court time was not wasted if cases settled, or parties did not turn up. It also appeared that parties were not warned in advance that this would happen, and so did not necessarily anticipate that these delays would occur. This appeared to exacerbate the problem.

25. Norwich Union commented that:

> In cases involving Norwich Union, we often find that there are adjournments because of the listing systems and the time allowed by the court is not sufficient. This in itself leads to a public perception that the system is inefficient and there can be no greater frustration for a party than having their case adjourned.[14]

26. In oral evidence, District Judge Walker noted the practical difficulties involved:

> Of course the problem there is do you list for the convenience of the judge or for the convenience of the parties. Inevitably it is a problem. If you list for the convenience of the judge, you list lots of cases at 10 o'clock or 10:15 or whatever, and they might not get on until 11:30. If you list for the convenience of the parties, you give them fixed slots and then, of course, cases settle, they are not effective for whatever reason and your waiting time just extends way into the next decade; that is the difficulty. It is a pragmatic approach. If you want to give people quick hearing dates, the only way you can achieve that, with the resources we have got at the moment, is to block-list and occasionally people will wait an hour, an hour and a half or so for their hearing. One does not do that without any warning; the notices which tend to go out these days will tell people that whilst they are listed for a certain time, they may not get on

12 Q 80

13 Q 88

14 Ev 62, para 11

> until lunch time and they should be prepared for that and make their arrangements accordingly.[15]

27. The issue as to whether cases were listed for judicial convenience, rather than that of litigants, was put to the Minister. In reply, she commented that:

> I went to a small claims court about two weeks ago… and I was surprised to see a listing system done in the way it was and then I saw what actually happened. What we had were three judges sitting. Up to 12 cases could have been heard on that day, but at the time—it was ten o'clock when we began—only two had both of the people there and any required witnesses. What actually happened in the course of the time I was there is that although it would look as if you had people arriving altogether, in fact they did not and it was very convenient both for the people involved and it was a better use of court time because otherwise we would have had time when the judges were simply hanging around and we more or less avoided that.[16]

28. **We accept that there are practical difficulties in listing cases to the convenience of both the judiciary and the parties involved in the action. Some waiting at court seems inevitable, due to overruns, parties not appearing and other difficulties. It is also important to ensure that court time is not wasted. However, it is possible that in some instances greater efforts could be made so that the interests of parties are not overlooked. Clearer warning to parties that their cases may not get on at the time they are requested to appear at court would at least have the effect of allowing parties better to organise their time and to avoid unrealistic expectations.**

15 Q 42

16 Q 89

4 Enforcement of judgments

29. The enforcement of judgments has been identified as a problem by almost all our witnesses.[17] Professor John Baldwin was a strong critic of the current procedure, stating that:

> In my own research on this question, only a minority of the claimants who succeeded at small claims hearings received payment from the other party in full and in the time specified in the court order. A substantial minority received nothing at all. Nor are the court-based enforcement options very effective in securing payment. In my view, ineffective enforcement procedures undermine the credibility and integrity of the civil courts—and the credibility and integrity of small claims—more than any other factor.[18]

30. Moreover, the extent of the problem could also be underestimated, since certain categories of defendant, such as insurers, almost certainly pay 100% of the time.[19] This gives the impression that there is a core of individuals or companies who either cannot, or will not, pay judgments which have been entered against them. Both the Association of District Judges and the Department recognised that there was a problem. In its written evidence, the Association indicated that:

> […]enforcement of judgments has been highly unsatisfactory for many years. We understand that, statistically, only one third of judgments are paid in full. Some payment is made in half the remaining cases, but in one third of cases no payment is made at all. We suspect that, since insurance companies or other commercial litigants will meet their obligations in full, the great majority of litigants whose judgments are unsatisfied are private individuals. This is a deplorable state of affairs. The Government is currently addressing this and, we understand, intends to introduce reforms in the forthcoming Courts and Tribunals Bill. There is a desperate need for new enforcement measures.[20]

31. District Judge Walker summarised that problem in oral evidence:

> There is a whole issue relating to enforcement which, in fairness to the Department has recognised and recognised for some while. There are numerous problems. There is the big issue of separating the "can't payers" from the "won't payers". The "can't payers" just cannot pay and at the end of the day some people cannot pay, they are just unable to. On the other hand, there are people who are just not going to pay, the "won't payers", and one has to try and distinguish the two.[21]

32. On its website, Her Majesty's Courts Service points out to potential claimants considering bringing a claim that "if the person you are claiming from has already been

17 See for example Qq 9; 13 and 16

18 Ev 56, para 16(v)

19 Q 18

20 Ev 39, para 22

21 Q 60

taken to court by others, and has not paid, you may also have little chance of getting your money".[22] Nevertheless, it is not clear that ordinary members of the public would generally think to obtain such information before launching a claim. The website does suggest writing to the Registry Trust Ltd to find out whether the person you are suing has unpaid county court judgments entered against them for a small fee, which appears to be a useful service and a wise precaution.

New measures to assist enforcement of judgments

33. In the context of poor enforcement, the Department, in its written evidence, made reference to the Civil Enforcement Review which arose out of Government's commitment to improve access to and the efficiency of civil justice in England and Wales. The Department stated that the review "is based on the premise that creditors who have established a legitimate claim should be able to pursue it through a straightforward and accessible system, and if necessary enforce a judgement by the most appropriate means. In addition, debtors who genuinely do not have the means to pay should be protected from the oppressive pursuit of their debts".[23]

34. The Review began in March 1998, and the Report of the First Phase of the Enforcement Review was published in July 2000. As part of the review, views were sought first from small groups of experts and subsequently from a wider audience via a series of consultation papers. The Report concluded that "all enforcement procedures should be retained and improved. Each gives access to a different type of asset, and removal of any one of the procedures would deprive creditors completely of access to that particular asset".[24] The Report contained 40 proposals, some aiming to improve the effectiveness of particular procedures, others designed to cut out delay. The proposals were split into those requiring primary legislation, those requiring secondary legislation, those requiring updated guidance, and areas where change was not recommended.

35. Whilst those changes requiring only secondary legislation were implemented, the Department has indicated that "changes requiring primary legislation will be taken forward as soon as Parliamentary time allows".[25]

36. The various measures yet to be enacted include:

- Widening access to charging orders:

Access to charging orders would be widened, so that a creditor could obtain a charging order against an asset even where the debtor is subject to an instalment order with which he or she is complying. The extension of access to charging orders would be counter-balanced by the creation of additional safeguards to protect the debtor. The legislation would contain provision to set financial thresholds regarding applications for charging orders and orders for sale. Debtors who were not in arrears with instalments, and who

22 www.hmcourts-service.gov.uk

23 Ev 33, para 4.18

24 *ibid*, para 4.19

25 *ibid*, para 4.21

wished to sell the property which was subject to a charging order, would be able to ask the court to lift the charging order to allow the sale to take place.

- Attachment of Earnings Orders (AEOs) Fixed Tables:

County court fixed tables would specify (given the debtor's net pay over a certain pay period) the percentage of their salary that would be deducted each period to pay for the debt. There would be a lower limit (to be determined in secondary legislation) meaning those who earned under a certain amount per pay period would have a 0% rate. There would continue to be provision for any party to request a review of the fixed table deductions, meaning those who genuinely could not pay would be protected.

- Attachment of Earnings Information Gateway:

The Attachment of Earnings Orders (AEO) Information Gateway would open a legislative link between the civil courts and Her Majesty's Revenue and Customs (HMRC). Where a debtor was subject to an AEO and failed to inform the court that they had moved to another employer, this would allow the debtor to be traced to their new job. Tracing would only occur if the debtor had failed to provide the court with new employment details when, and if, they changed employment whilst an order was in place.

- Data Disclosure Orders

The Data Disclosure Order (DDO) would be a new mechanism enabling the court to seek information on a judgment debtor who had failed either to respond to the judgement or to comply with court-based methods of enforcement. Information would be sought from relevant third parties in both the public (HMRC and DWP) and private (banks and credit reference agencies) sectors, to help the creditor make an informed choice about how to enforce a judgment. Clear constraints would be imposed on the secondary use of data. Any personal data obtained and used under statutory powers for the purposes of enforcement would not be used or stored for secondary purposes. Information obtained by a DDO would only be used to enforce civil judgements, which are orders of the court.

37. The Association of District Judges supported these measures, but was concerned that they should be implemented expeditiously. In particular, District Judge Walker commented that:

> There has been a lot of progress. The Department, in its evidence to this Committee, does set out some of the ideas which it has in the hope that it can get the legislative slot and get those provisions on the statute book. …certainly what the Department is now suggesting, the data disclosure orders, better attachment of earnings orders and the like, I am sure will make a significant difference.[26]

38. **We are pleased that the Department is coming forward with new ways for successful litigants to enforce their judgments. It is obvious that this has been an area of substantial weakness in the past and therefore the new measures should be introduced as expeditiously as possible.**

26 Qq 62 and 66

39. **Given the considerable criticism of the current procedures, it is essential that the Department monitors the success of the new proposals once they have been introduced, to ensure that litigants gain proper access to justice and not simply unenforceable judgments which must reduce confidence in the entire civil justice system.**

5 The Small Claims limit: limits on claims for Personal Injury and Housing Disrepair

40. In May 2004, the Better Regulation Task Force, a Cabinet Office-sponsored organisation examining more efficient ways to regulate, released a report concerning the regulatory aspects of litigation and compensation called *Better Routes to Redress*. While the report claimed that the "compensation culture is a myth", it also considered "how people with genuine grievances—especially those who in the past may not have had access to justice—can have better access to redress, and make recommendations about how the process can be improved". One such recommendation concerned changes to the small claims court, and called on the Government to "carry out research into the potential impact of raising the limit under which personal injury can be taken through the small claims track". The Better Regulation Task Force has suggested the possibility of amending the limit for allocating personal injury claims to the small claims track from £1,000 to £5,000.

41. The issue of legal representation for cases involving more substantial injuries (which attract higher awards of damages) is at the heart of this debate. Unsurprisingly, solicitors are not supportive of the proposed change. The Law Society, in its written evidence, has claimed that "most personal injury cases are for less than £5,000". This implies that any changes to the current small claims limit would bring most personal injury claims within the small claims limit. If this occurred, the Law Society claims that most personal injury claimants would be unrepresented and it believes that this will deter a large number of claimants. In its submission, the Association of Personal Injury Lawyers (APIL) claims that up to 70% of personal injury cases are worth less than £5,000.

42. In contrast, the insurance companies claim that the limits must be raised, to take into account the impact of inflation and to prevent disproportionate legal costs being awarded for relatively minor injuries. In a written submission to the Committee, Norwich Union indicated that:

> There are today only five types of injury within the JSB [Judicial Studies Board Guidance] where damages start at under £1,000. Inflation on damages has inevitably risen, but more worryingly not as fast as inflation on costs. For personal injury cases where damages are over £1,000, costs represent 65% of the damages paid to the claimant or 40% of the total sum (damages and costs) paid. For example, a non-contentious claim attracting damages of £3,000 will typically have £2,000 costs associated with it. Steps have been taken through the Civil Justice Council to create a better balance in the Damages / Costs equation, but in the long term the costs associated with these low level damages cases is not sustainable. Looking at inflation generally since 1991, the figure of £1,000 should now be in the band £2,500–£3,000. For future inflation proofing beyond 2005, a figure of £4,000–£5,000 would be more pragmatic.[27]

27 Ev 62 , paras 20–23

43. The Association of District Judges accept that raising the personal injury limit to £5,000 could cause potential injustice, but have suggested a figure of £2,500 as a potential compromise alternative. The District Judges provided useful oral evidence on this point. District Judge Walker gave a number of examples of the sort of injuries sustained in the £1000–2000 range:

> If you look at the sorts of claims which are now valued at £1,000 or more: a male, trivial scarring, minor only, £1,000 to £1,900, in other words, one would not have a male scar at all now coming within the small claims track at all now. A female, in exactly the same situation, gets £2,150. The loss or damage to one front tooth is £1,250 to £2,150, so the sorts of cases Lord Woolf was thinking about… the trip on the pavement or the slip in the supermarket, are now going to be completely outside the small claims track, and we think there is an undoubted argument on inflation grounds alone for saying the figures have got to be increased.[28]

44. Lord Justice Dyson also wrote to the Committee, supporting a change in the claims limit for personal injury cases. He also suggested that the limit for housing disrepair cases could be raised to £5000.

45. He stated in particular that:

> There is anecdotal evidence that claimants are being encouraged by certain legal representatives to allege that the housing disrepair of which they complain has caused them to suffer modest personal injury, eg asthma. The potential for abuse here is obvious. The second reason given is that housing disrepair cases often require expert evidence. This is true. But so, for example, do small building claims and small claims by landlords against their tenants for damages for breach of their repairing obligations. And yet in respect of these claims, the small claims limit is £5000. In my view, it is entirely illogical to accord special treatment to housing disrepair claims.[29]

46. In relation to disrepair claims, the typical claim that would fall into the small claims track would be claim for damages and/or an order for works to be carried out. The Law Society has indicated in its written evidence that the main reason that the CPR positively discriminates in favour of residential tenants with outstanding repair is one of "social policy based upon the law relating to disrepair".[30]

47. Damages for disrepair are calculated by establishing the severity of the conditions a tenant is living in because of the disrepair and the length of time that has elapsed since the landlord knew about the repairs but failed to repair. In its evidence, the Law Society contends that "despite the adverse effects of damp or unsanitary condition damages for disrepair are relatively low: about £1600 per year for the most severe cases. Often tenants of residential tenancies come from groups who are socially excluded from society […] and do not have the educational resources to represent themselves or the financial resources to instruct professional advisers".[31] Since public funding is not normally available for cases in

28 Q 71

29 Ev 41, paras 2 and 3

30 Ev 43, para 24

31 *ibid*

the small claims track, at the time the rules were made it was decided it would be iniquitous to force such tenants to wait three or four years in such conditions before representation could be provided in court proceedings.

48. One of the issues which arose was the usefulness of legal representation at the hearing itself. In answer to a question as to whether a party who was represented was at an advantage vis-à-vis an unrepresented claimant, District Judge Oldham indicated that:

> I would say not necessarily. A lot of the litigants in person have done a lot of homework before they come, they have found out about their case. I think there is still a need for much greater opportunities for people to get some advice before they come, to find out what the real legal implications of their case are. I certainly would not say it is inevitably an advantage if one party is represented and the other is not.[32]

49. Some of us were able to observe the distinction between cases where litigants were represented and those where they were unrepresented when we attended the county court. As the judges tended to take a fairly interventionist approach where parties were not represented, it was not apparent that the presence of lawyers gave substantial added value. In oral evidence, District Judge Walker indicated that "we always take a proactive role, that is the nature of the beast. A district judge is always interventionist in small claims cases and that is what really distinguishes a small claims hearing from a fast-track or multi-track trial".[33] **What almost all our witnesses agreed upon was that the most important issue was whether the parties were properly informed and advised before they came to court, rather than whether they were represented at court.**[34]

50. The Minister recognised this concern in oral evidence:

> Our concern is to make sure that the quality of advice that people get at the beginning, not only through the courts, a lot of people go to Citizen Advice Bureaux, to law centres, to other methods of support, is as good as it can be.[35]

51. It is plain that while great care is needed not to disadvantage the vulnerable, the small claims limits for personal injury and housing disrepair are in need of reconsideration. There are almost no personal injury cases which now fall within the limits, even where a claimant is likely to make, or has already made, a full recovery. Whilst more substantial claims may require complicated medical evidence, the level of knowledge to pursue claims for minor injuries such as whiplash, or sprains which clear up within months is not necessarily higher than that to pursue many other types of technical claim (such as defective goods, contracts involving a subcontract etc). In oral evidence District Judge Walker explained that not all injury claims were complex:

> The sort of case we are talking about, to be honest, is the sort of case you could decide either by just looking at the individual, quite often, or with a very simple report from a general practitioner. That is what it was designed to deal with and not

32 Q 45

33 Q 44

34 See for example the evidence of the Law Society, Q 39, Citizens Advice, Q 40 and District Judge Walker, Q 44

35 Q 122

> the full blown P[ersonal]I[njury] case where you have a 20 page medical report from a consultant of 30 years' experience and the like. That obviously is very expensive and very detailed and in its place extremely helpful, but for these low value cases really an extravagance which the system cannot support.[36]

52. It may be proper for some distinction to be drawn between more complex personal injury claims which require a medical report and those injuries which clear up within months, where the only available evidence is likely to be from the general practitioner or physiotherapist.

53. In those circumstances, the compromise suggested by the Association of District Judges, of adopting a claims limit between £2,000–£2,500 for personal injury claims in the small claims track seems to be the most appropriate. This would allow for inflation and for the fact that the type of injuries which fall in that bracket are of the more minor type.

54. **The Small Claims limits for personal injury and housing disrepair cases are in need of reconsideration. It is plain that some minor injuries that were originally intended to fall within the small claims system and which have no medium to long term health implications for claimants, now fall outside the system. Claims for personal injuries which are worth less than £2,500 could be considered under the small claims system without unduly disadvantaging claimants.**

55. **In order to ensure consistency of approach, it would be sensible if the limit for housing disrepair cases was raised by the same amount. When considering the housing disrepair limit, however, it will be essential to ensure that vulnerable tenants are not unduly disadvantaged by any change. Any such disadvantage in both types of case could be ameliorated by better provision of advice and support before the parties attended court.**

36 Q 78

6 The European Small Claims Procedure

56. According to the written evidence of the Department, in October 1999, the Tampere European Council, which set out a multi-annual programme of work for the EU in the justice and home affairs fields, included a mandate to the European Council, based on proposals by the European Commission "to establish special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims".[37]

57. That mandate was renewed last year in a new multi-annual work programme adopted at the Hague. The Government indicated that it supports the establishment of a mechanism to facilitate the resolution of small claims across European borders and that the Department would be giving priority to the proposal during the UK Presidency of the EU.[38]

58. The Department informed that Committee that negotiations were at an early stage and that some of the aspects of the proposal are controversial and might change before agreement is reached. The Commission's proposal is that the European Small Claims Procedure (ESCP) would allow claimants to use a simplified procedure for obtaining judgment for cases with a value of up to €2,000. That is significantly less than the limit in England and Wales, but significantly more than has hitherto been contemplated by some other member states. Particular features of the scheme include:

- A specific form to facilitate the introduction of the claim.
- The system would provide a purely written procedure, unless the court considered an oral hearing necessary. In that event, the proposal envisaged that hearings could be conducted and evidence taken by modern communications methods including audio and video conference, so as to avoid the necessity for parties to have to attend in person at a court which might be some considerable distance away.
- The nature and extent of evidence and the ability to use expert evidence would be at the court's discretion.
- Parties could, but need not be, legally represented and litigants could have unpaid and non-professional representation.
- Costs would be payable by the losing party or at the court's discretion; however, an unrepresented losing party might be sheltered from paying the fees of any lawyer employed.
- A single appeal would be available, if this was allowed for in the relevant Member State, and the defendant could apply for a review if he/she did not receive the claim in sufficient time to prepare a defence.

59. In its written evidence, the Department indicated that:

37 Ev 36, para 7.1

38 *ibid*, para 7.2

> Although the Commission originally proposed that ESCP should apply to internal cases as an alternative to the current procedures in each Member State, it is clear that almost all Member states take the position that it should operate only in cross-border cases between the member states of the EU. However, a passage in the preamble to the proposed Regulation will remind Member States that it is open to them to adopt similar procedures for their internal cases if they wish. This may help persuade Member States that do not have well-developed small claims systems to adopt such procedures. [Emphasis Added][39]

60. A number of witnesses expressed support for the proposition that this new procedure should only apply to cross border cases, even though this would lead to the existence of two stand alone procedures. The main reasons were due to the perceived deficiencies in the ESCP. The two main concerns were that legal costs might be payable in very low value claims and that the claims limit would be substantially reduced from £5,000 to €2000. A submission by the National Consumer Council to Sub Committee E of the European Committee of the House of Lords makes the point succinctly:

> […]our small claims procedure offers a high level of protection and is generally considered to work well. There would be no reason for consumers in England and Wales to use the ESCP instead of our internal procedure, since the £5000 limit in England and Wales is much higher than the €2000 limit proposed for the ESCP. Further, the stringent costs limits in our domestic systems are also more generous than those currently proposed for the ESCP.[40]

61. The Association of District Judges stated that one of its main concerns was in relation to the costs regime implicit in the ESCP:

> …costs are a very big issue and costs overall in litigation, civil litigation particularly, have really become a major concern all round. They always were a concern. Lord Woolf had a significant concern about them. He hoped that his access to justice arrangements would result in a reduction in costs overall, but I think it is generally accepted that in most spheres that simply has not happened. It is in the smaller cases where the costs have become completely disproportionate to the amounts that are actually being litigated about. That is why we feel the small claims scheme, as it currently is, with the very significant limits on costs which there are, is very valuable as access to justice.[41]

62. The Association of District Judges did not believe that the existence of two separate systems would be a problem.[42] This position was supported by the Association of British Insurers[43] and Which?, the consumer body, who commented that:

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39 Ev 37, para 7.6

40 'European Small Claims Procedure', National Consumer Council submission to Sub Committee E of the European Committee

41 Q 69

42 Q 70

43 'European Small Claim Procedure', Association of British Insurers submission to Sub Committee E of the European Committee

> […]we do not agree that the additional option of the ESCP provides any substantial advantage to consumers with purely national claims. We would therefore support the UK position that the ESCP should be available for cross-border cases and that it should be limited to such cases.[44]

63. The European Small Claims Procedure could be of real benefit in cross border cases, but we are concerned that the claiming of disproportionate legal costs and the unrealistically low limits could undermine its value; furthermore, we see no reason to extend the European Small Claims Procedure to wholly domestic cases, where the existing system is available with lower cost risk and has been shown to work relatively well.

44 'European Small Claims Procedure', Which? submission to Sub Committee E of the European Committee

Conclusions and recommendations

The small claims track

1. The small claims procedure provides an important avenue for consumers, businesses and other litigants to pursue claims with only a limited monetary value, in an informal environment, at low cost and at reasonable speed, without incurring disproportionate legal fees. (Paragraph 18)

Facilities

Provision of IT

2. The Department must place greater priority on providing adequate IT facilities to the county courts. While the provision of IT equipment and electronic document management software might be expensive in the short term, there would be clear scope for greater efficiencies if the current paper based system could be at least partially replaced, and service to the public would be improved. (Paragraph 23)

Listing procedures

3. We accept that there are practical difficulties in listing cases to the convenience of both the judiciary and the parties involved in the action. Some waiting at court seems inevitable, due to overruns, parties not appearing and other difficulties. It is also important to ensure that court time is not wasted. However, it is possible that in some instances greater efforts could be made so that the interests of parties are not overlooked. Clearer warning to parties that their cases may not get on at the time they are requested to appear at court would at least have the effect of allowing parties better to organise their time and to avoid unrealistic expectations. (Paragraph 28)

Enforcement of judgments

4. We are pleased that the Department is coming forward with new ways for successful litigants to enforce their judgments. It is obvious that this has been an area of substantial weakness in the past and therefore the new measures should be introduced as expeditiously as possible. (Paragraph 38)

5. Given the considerable criticism of the current procedures, it is essential that the Department monitors the success of the new proposals once they have been introduced, to ensure that litigants gain proper access to justice and not simply unenforceable judgments which must reduce confidence in the entire civil justice system. (Paragraph 39)

The Small Claims limit: limits on claims for Personal Injury and Housing Disrepair

6. What almost all our witnesses agreed upon was that the most important issue was whether the parties were properly informed and advised before they came to court, rather than whether they were represented at court. (Paragraph 49)

7. The Small Claims limits for personal injury and housing disrepair cases are in need of reconsideration. It is plain that some minor injuries that were originally intended to fall within the small claims system and which have no medium to long term health implications for claimants, now fall outside the system. Claims for personal injuries which are worth less than £2,500 could be considered under the small claims system without unduly disadvantaging claimants. (Paragraph 54)

8. In order to ensure consistency of approach, it would be sensible if the limit for housing disrepair cases was raised by the same amount. When considering the housing disrepair limit, however, it will be essential to ensure that vulnerable tenants are not unduly disadvantaged by any change. Any such disadvantage in both types of case could be ameliorated by better provision of advice and support before the parties attended court. (Paragraph 55)

The European Small Claims Procedure

9. The European Small Claims Procedure could be of real benefit in cross border cases, but we are concerned that the claiming of disproportionate legal costs and the unrealistically low limits could undermine its value; furthermore, we see no reason to extend the European Small Claims Procedure to wholly domestic cases, where the existing system is available with lower cost risk and has been shown to work relatively well. (Paragraph 63)

Witnesses

Tuesday 11 October 2005

Tuesday 1 November 2005

List of written evidence

Formal minutes

Tuesday 22 November 2005

Members present:

Mr Alan Beith, in the Chair

James Brokenshire	Jessica Morden
David Howarth	Keith Vaz
Barbara Keeley	Dr Alan Whitehead
Mr Piara S Khabra	Jeremy Wright

Draft Report [The courts: small claims], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 63 read and agreed to.

Summary read and agreed to.

Conclusions and recommendations read and agreed to.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No 134 (Select Committees (Reports)) be applied to the Report.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned till Tuesday 29 November at 4.00pm

Reports from the Constitutional Affairs Committee

Session 2004–05

First Report	Freedom of Information Act 2000 — progress towards implementation	HC 79
	Government response	*Cm 6470*
Second Report	Work of the Committee in 2004	HC 207
Third Report	Constitutional Reform Bill [*Lords*]: the Government's proposals	HC 275
	Government response	*Cm 6488*
Fourth Report	Family Justice: the operation of the family courts	HC 116
	Government response	*Cm 6507*
Fifth Report	Legal aid: asylum appeals	HC 276
	Government response	*Cm 6597*
Sixth Report	Electoral Registration (Joint Report with ODPM: Housing, Planning, Local Government and the Regions Committee)	HC 243
	Government response	*Cm 6647*
Seventh Report	The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates	HC 323
	Government response	*Cm 6596*

Oral evidence

Taken before the Constitutional Affairs Committee

on Tuesday 11 October 2005

Members present:

Mr Alan Beith, in the Chair

James Brokenshire
David Howarth
Barbara Keeley
Mr Piara S Khabra
Jessica Morden
Julie Morgan
Keith Vaz
Dr Alan Whitehead
Jeremy Wright

Witnesses: **Georgina Squire,** Chair, Civil Litigation Committee, The Law Society; **Allan Gore QC,** President, Association of Personal Injury Lawyers (APIL) and **James Sandbach,** Social Policy Officer (Legal Affairs), Citizens Advice, examined.

Chairman: Georgina Squire, from the Law Society, Mr Gore, President of the Association of Personal Injury Lawyers, and Mr Sandbach from Citizens Advice, we welcome you all and are very glad to have your help on this short but, I think, important inquiry from the point of view of many of our constituents. We have an obligation to declare any relevant interests that we might have as Committee Members before we start the proceedings.
Jeremy Wright: Only that I have formerly practised as a barrister in criminal law.
David Howarth: I am a legal academic who has published several books on the law of tort.
Keith Vaz: I am a non-practising barrister; my wife holds a part-time judicial appointment.
James Brokenshire: I am a non-practising solicitor and a member of the Law Society.

Q1 Chairman: As I say, we are very glad that you have given the time to come before us today. We also very much appreciate the written evidence that we have received from some of the bodies which are represented in front of us. Have you any general comments you want to make initially about the working of the small claims track?
Allan Gore: Not for your part, other than that we would wish it to continue working as it is at the moment—with the possible consideration of the European procedure being rolled out across the board for small claims procedure in this country.

Q2 Chairman: We will come to a specific question about that. That is running at the same time as our current inquiry. Mr Sandbach, are there particular problems that you think are faced by litigants in making use of the procedure?
James Sandbach: I think there is a wide variety of problems. I think it is a very timely review because there are so many issues that are now being looked at. The Commission's Directive on the small claims procedure—and it is about legal costs—is being debated amongst the new community Civil Justice Council and others, and possibly new measures and new regulations coming in through the legal services reform white paper that may affect working law, but not how lawyers costs are regulated. This is a very timely inquiry because the small claims process is supposed to be there for the ordinary consumer, for the ordinary person, who is not easily able to afford the whole array of insurance providers and legal service advisers. I think there is more and more concern building up rapidly, and it is actually very difficult for an ordinary person litigant, say, to represent themselves adequately in the small claims court.
Georgina Squire: I think that is one of the issues that has come out of the Law Society's deliberations on this.

Q3 Chairman: You are putting it forward as your view—the Law Society and CAB—that it is difficult for the litigant in person in the small claims court?
Georgina Squire: Indeed, yes. I think if we look at it from a value perspective, £5,000 is a lot of money to me, presumably it is, therefore, a lot of money to an individual. There is a huge difference between someone handling a claim over, I do not know, a wonky hoover for about £50 to them dealing with a claim which is right up at the £5,000 end, which might be an extremely serious issue for them personally as an individual; their house may be collapsing if they have a problem with their builder, for example, and they are in a desperate situation. If they then have to run that claim themselves it might have quite complex issues within it and they are not able to afford legal representation which they know they have to pay for out of their own pocket in addition to the loss of the money that they are suing for. I think that is where the issues come in about the access to justice and actually the balance of fairness to the individual in terms of being expected to pursue that claim without any legal advice. I think there is a huge differential over the range of value up to £5,000, between claims which are very easily dealt with by anyone and are really quite simple, to those which are up at the complex, higher end of that spectrum where the same rules at the moment apply. We are finding, anecdotally, views coming back that

people would love to have some advice and assistance where issues are complex but they just are not able to afford any.
Chairman: We will come back to the limits a little later in our proceedings.

Q4 Jeremy Wright: I want to concentrate a bit on costs. I suspect, from what you have just said, I can guess what some of your answers may be to these questions. May I just invite your comments (I suspect from all three of you in fact) on, first of all, whether or not you believe that the principle of limited costs recovery in small claims courts has something to commend it? I accept, obviously, that what you are saying to us so far is that it has negative aspects because people are not able to afford legal assistance. Do you see advantages to it?
Georgina Squire: In being allowed to recover a certain fixed level of costs?

Q5 Jeremy Wright: A limited amount.
Georgina Squire: Yes. I think at the more complex end of the small claims raft of claims, yes, definitely there could be benefit there. In unusual situations there is the recovery of something in the region of £260 (I recall) at some levels. That sort of limited financial assistance in terms of legal costs could be enormously beneficial to a private individual who actually just needs some help on a complex point that has arisen in the course of their claim. I would definitely think that the Law Society would advocate that. Obviously, it would have to be kept proportionate and be sensible and restricted in order to allow the small claims track still to work in a sensible way.

Q6 Jeremy Wright: What about the CAB point of view? Do you see advantages to this?
James Sandbach: Yes. The difficult areas are where costs are actually hidden. If your costs are predictable and you know what you are doing at the beginning of the case and how much it is going to cost you, then the principle that you find a way of paying for that, whether it is through public subsidy or through some other system and that should not be recoverable from the other side because we should not get into the whole litigation type of culture, I think that is a defensible premise, but so many costs of taking a claim tend to escalate once you start the process off. You might think an expert report from your GP will cost you £50 but the GP might say: "You need a specialist to establish this level of injury" so your costs will then go up from £50 to £250. So often litigants find their costs are not as predictable as they thought they were originally going to be. That puts people off claiming, if you think you are going to get into a cycle of increased costs after increased costs with a bill coming at you from somewhere you did not expect it to come from. So if you have taken out an insurance policy to underwrite your costs—

Q7 Chairman: We are talking about the small claims court.
James Sandbach: I know we are talking about the small claims court, but even in the small claims court you can pay legal insurance to cover your costs.

Q8 Jeremy Wright: Is what you are really saying that you can only recover a certain amount from the small claims court? The limit is capped, is it not? Specifically in relation to expert witnesses there is a cap of only £200 for the expert report. Are you saying that some people may find that although they expected their expert report to cost £200 it actually cost £250 so they would be bearing the extra £50? Is that what you are saying?
James Sandbach: It can do, yes. I think it is misleading. I think we tend to see costs within the isolated context of the legal process, but you have actually got to look more broadly at what the costs are to the consumer of going down a particular avenue of pursuing the claim and what are the costs to them, not only in financial terms but in personal terms as well—if they have to take time off work to take the case and represent themselves in court, travel distance. So one has to look at costs in the wider sense and ask whether this particular avenue that the consumer is going down is proportionate to what they are trying to achieve.

Q9 Jeremy Wright: This, I think, is a question you can probably help us with as well. Moving on to the practicalities of things, are you confident that, within the limitations you have set out, people who are able to recover limited costs are able to do so practically and that there are no obstacles to them actually collecting the money? Does the system work as it should in that regard?
James Sandbach: Not at the enforcement end. I think one of the weaknesses of the small claims system is that if you have got a successful court order you do not necessarily get that enforced. You might have to go back to court to get another enforcement order in order to get the other side to pay up. There seems to be a double process. I think it does need to be viewed as to whether a double process is needed or whether any court judgment should have some sort of automatic enforcement order attached to it.

Q10 Jeremy Wright: So it is bound up with the enforcement issues? I do not want to steal other colleagues' thunder when we are going to come on to that. Let me ask you about something else. Perhaps this is something for the two lawyers to comment on. The issues that arise from the small claims track are, first of all, what happens if the case is transferred from the small claims track to another track within the civil justice system; so the litigant in person presents his case to the District Judge expecting it to be tried on the small claims track and, in fact, it is transferred elsewhere, where the costs are dissimilar? Is it your view that as and when that happens the cost implications for the litigants in person in question ought to be capped or restricted in some way?
Allan Gore: From the perspective of personal injury litigation I am not sure it happens very often. Personal injury cases enjoy a slightly different

position within the small claims procedure compared to other categories of litigation, which is why the Association is able to support the current arrangements but with the rider that extending to a degree costs recoverability through, for example, the European procedure if implemented would in fact promote access to justice. We would entirely agree that the absence of recoverability of costs and the potential for costs disadvantage, which is one of the issues that arises in your question, is an inhibition on people bringing claims. You will have seen from the evidence that we submitted in the context of personal injury litigation that Mori have conducted a survey that indicates that 64% of the public who responded in their thousands would be disinclined to pursue a claim for personal injury if they did not have access to advice and representation from a professional adviser. Under the current arrangements, that inhibition only applies in relation to the small claims track, and while the limits are set at the position at which they are set, that acts as an inhibition in a relatively small proportion of personal injury cases. The concern that the Association has is that extending the limit to any significant degree substantially increase the size of the class of litigants who will suffer that inhibition through the inability to recover costs. We have submitted, and indeed that is endorsed by the submission of the Association of District Judges, that in the particular context of personal injury litigation where the injured person faces usually an insured if not a corporate defendant, that inhibition is a powerful inhibition and represents an inequality of arms that offends the overriding objective that lies at the heart of the civil procedure rules.

Q11 Chairman: Let us leave personal injury aside for the moment. Mrs Squire, if I was the litigant I think I would be more inhibited by any fear that the thing might go out of the small claims track and I could be landed with the costs of the other side. I would be more ready to pursue my claim for a modest compensation confident that it was going to stay in the small claims track and I was not going to be landed with the other side's costs.
Georgina Squire: I think the corollary to that is: "If my claim is a good one then why should I not be able to recover my costs from the other side for pursuing it?" If that is a deterrent—

Q12 Chairman: Cases that people think are good are overruled in courts every day of the week.
Georgina Squire: Indeed, but there are also some people who are inherently litigious and love to sue for everything and do not necessarily have the right to sue, and the defendant who receives those claims then has a major headache. I think if that is encapsulated within a low threshold then, effectively, there is a limitation on how horrendous that headache can be for the defendant who is having to deal with a frivolous claim from someone who really has no grounds on which to pursue it, whereas if that were allowed to rise into more complex issues then I question whether the level playing field and the balance exists because these days anyone with a meritorious claim with a value in excess of the small claims limit should be able to go to a solicitor, obtain a CFA and be able to run on a no-win-no-fee type basis, as is becoming very common now. That is just an assessment of the merits.
Allan Gore: There may be one procedural answer as well, if I may be permitted a short second bite? The claimant who wishes to limit the extent of their claim to the limit of the small claims track might, in fact, be able to purchase protection in relation to the costs arrangement within the small claims track so as to diminish exposure to that type of risk. The downside of that, of course, is that they may be restricting the ambit of their claim in order to buy that protection to a level that does not properly reflect the justice or the merits of their claim.

Q13 Keith Vaz: Mr Gore, in answer to the Chairman, said that he thought the procedure was working okay, in principle although obviously there are individual concerns about certain aspects of the procedure. Are you happy with the procedures that are in place for the enforcement of judgments?
Georgina Squire: I think enforcement of judgments is a wholly different arena all of its own because, of course, we have, as I understand it, the same methods of enforcement for small claims as, indeed, for any claims. It is fair to say that all those methods are very varied; some quite long, some quite complex and, usually, all quite expensive for anyone seeking to enforce a judgment of any size. What Mr Sandbach said is entirely right; once someone has got to the stage of achieving a judgment and then cannot actually see payment it is very frustrating to have to start on a second raft of litigation. Speaking from a personal perspective, my clients feel equally frustrated whatever the value of the claim if they have got to start again from scratch and then look at methods of enforcement to try and recover money.

Q14 Keith Vaz: Mr Sandbach, how many complaints would you get from litigants about the procedures that we have at the moment? They have gone through the system, they have filled in their forms, the judge has been very polite and courteous to them, they have got their judgment in their hand but they cannot get their money. What sort of level of complaint is there about the end of the process?
James Sandbach: We have a lot of complaints not just over small claims but tribunals as well. Off the top of my head, I think we had about 800 on this last year.
Chairman: This might be something you could give us a note on if you have the opportunity to check the figures.

Q15 Keith Vaz: Ten thousand is an absolutely enormous level of complaints. Is it on the increase or has it always been at that level?
James Sandbach: It is on the increase. This is applied right across the spectrum of courts and tribunals about the problem of enforcement.

Q16 Keith Vaz: Who is at fault in trying to make sure that people get their judgment enforced?
James Sandbach: It is the whole system, the whole service, not really delivering on what it is structured to do. At the enforcement end I think there is a lot of policy debate going on about what are the best methods of enforcement. Is it sending round bailiffs or are there better methods? So I think there is confusion in enforcement policy as to which methods are best.

Q17 Keith Vaz: Do you think there is sufficient awareness for the litigants when they begin the process that at the end of the process they may have to start the whole thing again because they cannot get their money? Should more be done to make them think long-term?
James Sandbach: I think more should be done to make potential litigants think long-term, but the big gap, though, is that there are other ways of resolving these disputes. What we need to look at are ADR route alternatives—

Q18 Keith Vaz: That is a different issue. We are talking about the bit at the end, after they have got their judgment. Mr Gore, what about from your point of view? What are we going to go about this enforcement issue?
Allan Gore: Again, I think personal injury litigation is in a special position in this regard because, usually, the defendant in a personal injury will be insured and recovery of the damages tends not to be a problem. In the small claims track, where there is no recovery of significant quantities of costs, what is a problem in the fast track, which is the recovery of the costs, therefore, does not arise. I think personal injury claimants enjoy an advantage compared to others in the small claims arena in that regard.

Q19 Keith Vaz: Are there any procedures that anyone can think of that would make the system work better as far as enforcement is concerned?
Georgina Squire: Just thinking off the top of my head, obviously without any reference back to the Law Society (and I am very happy to go back and see if there are any ideas that we can submit to you afterwards), it just strikes me that one of the issues right at the outset is: is the person you are suing good for the money? It is a basic question, and someone could actually do a relatively quick check. Certainly, as solicitors, we have a professional obligation not to sue someone if they are, say, bankrupt or, if it is a corporate organisation, if they are insolvent. That is a check that is routinely done as a general, professional obligation. I would have thought something to get a claimant to think about before they start their claim on an unrepresented basis is whether it is actually worth their while in what they are trying to get at the end of the day.

Q20 Keith Vaz: Who should make the claimant think? Should that be in the literature or should it be the District Judge?
Georgina Squire: I would have thought if something were put in the literature of the claim form, something like a health warning.
Chairman: There is, I think, something there now.
Keith Vaz: Apart from that, you cannot think of any new procedures that would help?

Q21 Chairman: We will give you the opportunity to go back and think about it.
Georgina Squire: I will, absolutely.

Q22 David Howarth: It has just occurred to me that one of the problems of doing that is that it will encourage, in the end, potential defendants to look for ways of making themselves judgment-proof. What would you suggest in the following situation (which is actually a real case—it happened to a constituent of mine): he got a judgment for £2,000 but it was against a self-employed person, so an attachment of earnings did not work. He tried a warrant of execution and found that the goods belonged to the wife, not to the defendant; he had the same problem with the charging order, that the house was in the wife's name, and then having got to the third party debt order was told that she could not find out which bank had held the accounts of the defendant because that was private information and it was therefore a data protection problem.
Georgina Squire: Sounds familiar!
David Howarth: Is there any way through this? Are there any suggestions that people have come up with in the past, as this is obviously a very familiar situation?

Q23 Chairman: As a supplementary to the same thing, I was told it is not the court's business to try to trace bank accounts; that is your job as the person who has been given the judgment. If you have any ideas on any of this do come back to us.
Georgina Squire: We certainly shall.

Q24 David Howarth: Particularly on the working of the third party debt order, which was offered as a solution to a lot of these things and apparently has not worked.
James Sandbach: These are some of the issues that the national enforcement service will need to look at. There are proposals to establish what has been called the national enforcement service. No doubt it will probably be more of a virtual organisation but there might be additional capacity there to address some of those issues.

Q25 Dr Whitehead: Returning to the question of personal injury claims, the Better Regulation Task Force did suggest the raising of the limit for personal injury claims to £5,000 along with other routes in small claims. Mr Gore, the evidence the Association of Personal Injury Lawyers has submitted is that you think personal injury cases have no place in the small claims court. I assume you are levelling that with the fact that you would agree with the present £1,000 limit?

Allan Gore: Yes. We are not strongly advocating the removal of all personal injury cases from the small claims track. That issue was considered at another time during the civil justice review that led to the civil procedure rules. It was acknowledged at that time, in 1998, that special rules were justified in relation to personal injury litigation and we are not advocating a removal of those rules as they currently operate, subject only to our endorsement of the European procedure as a model for small value personal injury claims that may be adopted across the board in the future. It is our position that what justified that decision in 1998 remains true today; there is an inequality of arms in relation to the conduct of personal injury litigation that does disadvantage injured people compared to those that are the usual defendants in that class of litigation. That disadvantage is acknowledged in the evidence of the Association of District Judges, and it is also supported by the Mori poll to which we drew attention, identifying the reluctance of injured people to pursue claims if they do not have access to advice and representation. The Better Regulation Task Force, as I understand it, did not in fact advocate the increase of the small claims limit for personal injury litigation to £5,000 but merely advocated that that was one of the issues that could be properly explored. We do not dispute that exploration of that type of issue is justified but we do submit, for the reasons set out in our written submission, that an extension in the particular context of personal injury litigation would be inappropriate.

Q26 Dr Whitehead: Yet, according to the evidence that you have submitted, as it happens, the vast majority—as you very helpfully pointed out—of personal injury claims are under £5,000. You suggested 70% are under £5,000.

Allan Gore: A distinction has to be drawn for this purpose between the overall value of the clam, which is what that research was directed to examining, and the present jurisdictional limit in the small claims track which looks only at the level of award for pain and suffering and loss of amenity without any reference to financial loss. So there is a sense in which the two questions invite a comparison of apples and pears rather than comparing the same. The present limit relates to the valuation of the appropriate award for the injury itself, and the class of case that our research was drawing attention to, where overall settlements were above that limit, are cases where there was representation so that, by definition, there were claims for in excess of £1,000 for the value of the injury.

Q27 Dr Whitehead: So, in fact, if we bear in mind that, I think, there are only five types of injury where damages even started out to be under £1,000, yet taking into account the additional, as it were, inflationary costs, you might say, by way of representation, that suggests a good number, perhaps half, of the cases fall into the category of, let us say, £1,000 to £2,500/3,000. Indeed, in the category suggested by the Association of district Judges as a possible compromise figure.

Allan Gore: I saw that interesting reference to the level of awards suggested by the Judicial Studies Board for personal injury cases. My understanding of the legal position is that there is, in fact, no minimum sum that a claimant is entitled to recover for injury or illness. Although the Judicial Studies Board guideline figures may indicate what they do indicate, they do not reflect the fact that there are no minimum limits below which the court cannot award. So that, in that sense, we would dispute that there are, in fact, only five classes of case where as little can be awarded. Even if that were not the case, as Ms Squire has indicated, the figures in the £2,000 to £5,000 category are a lot of money to injured people. These are sums that can have and do have a significant effect on their day-to-day lives.

Q28 Dr Whitehead: I understand, perhaps, the higher end, the £2,000–£5,000 but, as the Committee noticed, I did not declare any interest as being a lawyer because I am not one, so from a lay-person's point of view the idea of £1,000–£2,500 would not suggest there are fundamentally different notions of personal injury in a claim that is, say, £1,500, £2,000 as opposed to £1,000, which the Society accepts should remain within the small claims procedure. What sort of injuries would that represent? Would the compromise idea of £2,500, perhaps, retain the idea that people in the higher brackets ought perhaps be represented, but actually put cases that are rather similar together?

Allan Gore: It implies the level of injury from which there is usually a full recovery. That is not universally true. For example, in current litigation before the courts the guideline figure suggested by way of provisional award for pleural plaques in asbestos litigation is £3,500, and this is a health concern that people who suffer from that condition face for the rest of their lives. It may not be disabling but it is something that is ever present in their psyche and affects them, therefore, for the rest of their lives. So it would not necessarily be correct to think that all awards at that kind of level are for conditions from which there is a relatively full recovery. I come back to the point that our research and evidence suggests that if you increase the small claims threshold at this kind of level it would act as an inhibitor on people bringing claims that at the moment they do bring and they do bring with conspicuous success. If that is an inhibition it will operate adversely on the access to justice because it will operate to prevent or disincline people to bring good claims for tortiously inflicted injury that, at present, they can bring and do succeed in.

Q29 Dr Whitehead: Conversely, in terms of what one might say is the good administration of justice, the evidence that we have received suggests that a non-contentious claim, which might attract

damages of, say, £3,000, will have, routinely, £2,000 costs attached to it—ie, inflation in terms of the procedures that have been suggested is getting on for 100%.

Allan Gore: I think that is a different question. That question, of the proportionality between damages and costs is also being focused on perfectly properly by the Better Regulation Task Force. Indeed, also, by the members of the organisation that I represent and their usual opponents, the insurance industry, in the sense that we are always actively looking at ways by which the process can be simplified and the costs involved in pursuing it can be reduced. But that is a quite separate issue from the question of whether people should have confident access to advice and representation in the knowledge that they can recover costs, thereby promoting their willingness to seek the compensation that the law is saying that they are entitled to.

Georgina Squire: I think, from a general perspective, not being a personal injury practitioner, the way I would look at this is that a claim for personal injuries, in terms of a legal claim, is actually quite a complicated claim. It requires expert evidence. There are numerous different ways in which people recover from injuries. It is fair to say, as Mr Gore has already mentioned, that the large majority of defendants in this area of work, uniquely, are represented because the claims are being funded by insurance companies. That is primarily the case, as I understand it. It is therefore quite a different type of claim to any other sort of routine claim that one might imagine would suitably go in the small claims track because those insurance companies do have highly experienced lawyers, claims handlers, claims assessors and people investigating those claims on their behalf whose primary aim is, of course, to seek the lowest possible level of settlement as far as the claimant is concerned. So all I would say on this is whatever the ultimate decision in terms of a level of appropriate damages for the purposes of cut-off in the small claims, I think one should be aware of the fact that there is an imbalance, and if one has an unrepresented claimant trying to recover what to them is a very important amount of money, albeit only £1,000 or £2,000 because of the impact on their life, they are going to be up against someone who is infinitely more experienced than them and, probably, with the benefit of a lawyer.

Q30 Dr Whitehead: Is it not possible to simplify the law procedure for the purposes of small claims? For example, a statement from a GP rather than expert medical advice and representation?

Georgina Squire: Potentially. It would depend on the level of the problem. There are situations where, say, for example, someone puts in a claim to an insurance company, the insurance company sends someone round who says: "You need a bit of physio. Take five or six sessions of physio. That'll do. That's fine, isn't it? Sign the form. Thank you very much"—end of claim, and then actually the claim develops into something else and, of course, it has been signed off.

Q31 Chairman: If it is a broken finger from which you have recovered fully you know that sort of thing—

Georgina Squire: Absolutely, and that is the difference. It is where the level changes from the broken finger to something that could have more, potentially, long-lasting effects.

Q32 Chairman: If I calculate rightly, the level has been at £1,000 for around 14 years. So if you go on at the present rate you would eventually receive Mr Gore's objective that you do not get any personal injury claims in the small claims track.

Georgina Squire: I do not think there has been much inflation.

Allan Gore: I saw the written submission of the Norwich Union in that regard and their reference to 1991 is accurate. However, in the meantime there has also been a wholesale reconsideration of this issue at the time of the Civil Justice Review conducted by Lord Woolf. Not only did that consider the question of the general threshold for the small claims track, but it also specifically considered, and indeed changed its mind, in relation to the limitation so far as personal injury litigation is concerned. So that although there has been no change since 1991 there was an acknowledged justification for the retention of those levels in 1998. There has been, we would submit, relatively little inflation since 1998 when those figures were last considered and last revised. In that regard, if there has been any movement it more closely approximates the sort of limitation that is suggested in the European procedure where the 2,000 euro limit is suggested, which if my arithmetic has not deserted me accords with about £1,400 sterling today.

Q33 James Brokenshire: It seems to me as if there are two approaches here. You can have quantum and you can look at the complexity of the case, and quantum may not necessarily be linked inextricably with the complexity of the case. Is there any merit to taking a different approach when assessing and actually looking at complexity rather than looking on the actual quantum that you are likely to recover on that injury?

Georgina Squire: Very much. From the Law Society research of the sorts of areas where, perhaps, unrepresented claims could warrant some representation on which they can recover their costs, I think complexity is the key. There may be a very simple claim with a value of £5,000 or so, which can easily be handled by someone on their own; they feel perfectly confident and they can go through the court process on the small claims track. Conversely, there could be a claim of a £2,000 value which has complexities in it because it is to do with things like building works, which is slightly more difficult,

where they could value a lawyer's assistance, and I would strongly support that because I know that is the Law Society's view.

Q34 James Brokenshire: So would you say it is more a question of an assessment on the tracking and not necessarily getting so hung up on the quantum or the threshold level on the small claims track?
Georgina Squire: Yes. I think something on that could be done through the allocation questionnaire. Those of you who may be fully familiar with the litigation process will know that when a claim is issued there is a decision made almost immediately on allocation by virtue of the parties having to fill in this huge form called the allocation questionnaire, which is actually very difficult to circumvent and quite a lot of lawyers find it quite difficult to complete, so I question how unrepresented claimants find it. The Law Society is certainly advocating a review of the questionnaire so that it is made more relevant. One of the issues that could be brought into it is complexity so that the judge then looking at the case can allocate more fairly.

Q35 James Brokenshire: I wondered if Mr Gore had any thoughts on that, given that obviously he was advocating very firmly that there should not be an increase in the limit at all.
Allan Gore: That remains the position of the Association. Can I add that complexity very often depends on the eye of the beholder? What appears not to be complex to me as a personal injury litigator who has been undertaking this sort of work for over 25 years now may not be the same as viewed from the perspective of the injured person who is forced to face the decision about whether or not to claim. Indeed, with respect to the perspective of the Association of District Judges, in that respect I would venture to suggest that their perspective is similar to mine and is based on experience. If you contemplate making complexity the yardstick for this purpose it ought to be judged from the perspective of the user of the services, namely, in relation to personal injury, the injured person claimant.
James Sandbach: I think one further consideration is how claims are settling out of court as well and whether that has any bearing on where is the level for the small claims track. At the moment, a large proportion of claims, under £2,000, are simply settled out of court by the insurers. I think, coming back to the costs of this process, when you start to do research on low value personal injury claims we found, particularly for the cases that were settling out of court, that it was not always clear who was bearing the costs of this process, and that particularly the claims handlers at a very early stage, before anything was ever getting into court, were getting people to sign up to insurance agreements—ie, consumer type agreements to underwrite whatever the costs in the final process were going to be. A lot of these products turned out to be very, very costly to the consumer, and in a lot of those cases, in fact, people, several years later, are still getting bills from their creditors who have funded loans to take these cases.

Q36 Chairman: That is not covered in your written evidence. If you wanted to add, please do.
James Sandbach: Certainly, yes.

Q37 David Howarth: I think we are now at the heart of the matter, which is: what added value do the lawyers bring? We have been talking all along about this, but I suppose there are several more points to make. One is, how much added value? One of the things we know from research is that 75% of people get some legal advice before making claims in the small claims court. It might not be very much, it might be from a variety of sources—and, obviously, the CAB comes into play. So the question is what is the margin of effect in getting more legal advice? I was wondering whether there was anything in the research that shows anything about that—whether, for example, represented claimants are more likely to win cases that are contested or whether they are more likely to get a higher settlement than those not represented? That is my first point: is there any quantitative evidence of improvement in the position of the litigant because of representation? I heard what you said about perception but this is not about perception, it is about whether it works. The other two points, I suppose, are these: how would you respond to the, perhaps, cynical view (though this is the view of the economic research in this field) that shifting from the "each side bears its own costs" basis (the American) to the English rule "winner takes all" has two effects? One is to make people drop cases early when they find out the risk of the extra costs and that especially affects risk-averse claimants (and risk-averse claimants are usually individuals whereas companies tend to be risk-neutral). So shifting from the American rule to the English rule, which is effectively what we are talking about, favours organisations against individuals. The second point is that that move also causes people to invest more in legal services if they are optimistic and have decided not to drop. That is because the stakes are getting higher and so it is worth investing more in legal services. So, of course, the two legal representatives have an obvious interest in arguing for the English rule to be adopted in as many cases as possible.
Allan Gore: Can I deal with the first part of that question? We have in fact offered you some quantitative evidence in our answer to the questions that you raise. Firstly, in relation to the Mori polling that was taken, which is referred to in our submission, that suggests that 73% of respondents would be unable to work out the value of their claim in relation to personal injury if left to their own devices, and 80% of those respondents also felt that they would not be confident that what they would be offered by insurers would necessarily be the correct and proper level of compensation justified by their claim. The second piece of quantitative evidence that we submitted to you related to our own survey of our own members on the class of cases and litigation, to

which Dr Whitehead referred in the questions that he asked me. In those responses we found that the final settlement figure achieved in those cases, by and large, was 50% higher than the level of compensation that may first have been offered by the insurer on the other side. So that, insofar as you asked the question: "What value do lawyers add within the context of personal injury litigation?" we would answer, firstly, "To inform and advise injured people as to what their entitlements really are and, secondly, then to negotiate the delivery of that in accordance with the advice that they have been given". The public in that sense—the community of injured persons—would lose if deprived of those services in that way. You asked the questions of me as a representative of the providers of legal services, but in fact the core aim of the Association of Personal Injury Lawyers is to represent the interests of injured people, and it is injured people that I speak for in this regard, not lawyers.

Q38 Chairman: Ms Squire, perhaps you would like to look at the same issues from the rest of the area, not just the personal injury area.
Georgina Squire: Indeed. I have not got any qualitative research to hand but I will certainly refer back to the Law Society and if there is anything we will submit it to you afterwards. In terms of what do lawyers bring to the process, I think we as lawyers do bring to the process value in terms of, as Mr Gore said, a proper assessment of the value of the claim. Sometimes someone has a problem but they do not know what to do about it and they do not understand the basis upon which a recovery can be made. If they are a defendant they do not whether they have a defence or not or whether they are properly liable and they are, therefore, looking for guidance and assistance in that respect. Then, secondly, assisting to negotiate and compromise and resolve the claim in the most practical and sensible way, using the court process or alternative methods of dispute resolution—indeed any of the processes that are available these days, and giving that sort of advice and achieving the result. I think that is really what we bring.

Q39 Jeremy Wright: I know that in what you have both said neither of you have mentioned advocacy in the course of the court hearing itself. We know that District Judges are supposed to take a very interventionist line on the small claims track because they are supposed to do a lot of what, perhaps, the advocates might do in other claims tracks. Is it your view, therefore, that we do not really need lawyers to present the arguments within the small claims track because the District Judge's way of doing it is adequate to meet those needs?
Allan Gore: I am not sure that I agree with that. I discovered in preparing for giving evidence to you this afternoon the paper that was prepared for the Department for Constitutional Affairs considering the position of litigants in person and unrepresented litigants in first instance proceedings by Professor Moorhead, which I discovered has now been posted to the Department for Constitutional Affairs' website earlier this year. It does draw attention in that regard to judicial concern about departing from the role of what they call passive arbiter in the process in order to provide for the equalising of the process that you are referring to. They also draw attention to what they report to be some judicial misgiving about that role and indeed a possible inconsistency of approach and the questioning of whether unrepresented litigants' interests are, in fact, being effectively handled in that type of arena. It was posted on the DCA website in February this year.
Georgina Squire: I think the small claims track is there for a good reason, which is to allow people to be able to dispose effectively and quickly with disputes. I think the issues that the Law Society have are to ensure that the right sort of disputes go there and that to the extent an unrepresented claimant needs some representation they are able to achieve it. I would not necessarily say that there is a need for a lawyer advocate in all small claims cases as if they are perfectly simple there is no reason why the District Judge cannot deal with the proceedings and help them along. So I think my view is perhaps more tempered in that respect.

Q40 Chairman: Mr Sandbach, do you want to add anything?
James Sandbach: An important element is that claims are actually grounded upon a legal basis, and that is having the argument set out clearly on paper. I think the more that the process encourages the involvement of highly skilled legal professionals there is almost an inevitable dynamic by which costs are going to be padded, and by which costs are going to be increased because there are too many incentives within the system to do that. So it is extremely important at the front end that there is advice available and advice that is actually based on the legal analysis of cases, so that less vexatious cases go through to the courts and that claimants are properly supported through the whole process, or whether we evolve, at the other extreme, the kind of culture whereby we are involving more and more professionals and intermediaries in the process.

Q41 Barbara Keeley: Returning to the European small claims procedure, on which we have touched on a number of points already, there are a couple of points there. Views may differ about whether this should replace the current small claims court procedure but of course it does include an award of costs. Are there any points you want to add or to emphasise about that because we have touched on it quite extensively in terms of personal injury, but perhaps there are other types of cases? If it were the case that we ended up with that same procedure what impact would introducing cost recovery have on litigants?
James Sandbach: With respect to the European procedure, if it is going to be adopted widely around the European Union and you have a situation whereby you can sue somebody in another country and get your costs recovered but you cannot here, that does raise an issue about whether our

proceedings are more fair compared to other jurisdictions. So I think it is how the European claims process is implemented within our jurisdiction which is going to be quite a pressing question.

Georgina Squire: I think I would endorse that view. The Law Society's view generally is that the European proposal is a very good one and makes sense. It allows people to be able to deal on a cross-border basis, and I think more and more these days we are seeing that there are transactions at a very basic level and we need something in place that makes the system more simplified. At the moment it is incredibly complex. We are also of the opinion that there would need to be fairness in the system because if it were to run in parallel with the domestic system it should be similar; it would be quite wrong, as Mr Sandbach has already said, for costs to be irrecoverable just because the claim was a cross-border claim as opposed to a purely domestic claim. Then the claimant would question why they have to pay a court fee as well, for example, if it is only a domestic claim, whereas they do not if it is a cross-border claim. I think the idea of the judgment being enforceable across the EU without any further process is a very good one as well, coming back to the issue of enforcement that was discussed earlier. Perhaps we could look at that more closely in terms of our domestic process too.

Allan Gore: I would endorse what Mrs Squire has said. In relation to personal injury litigation, it would seem to us to be odd that an injured person from London should be at an advantage if the cause of his injury was a Frenchman rather than an Englishman on the streets of London. That would be the position if the European procedure was confined to cross-border claims. We would therefore advocate what I think the Department for Constitutional Affairs call Option 3, which is the rolling out of the procedure to apply to all small claims, for the reasons that we have already advocated. We understand why there might be concerns about costs recovery under Article 14 in the procedure. So far as personal injury litigation is concerned, we believe that that could be met by an amendment of Article 14 so that an unsuccessful claimant would not have to bear the costs penalty of meeting the costs of a successful defendant where that defendant had been insured in respect of the liability that was under consideration. So that in the context of personal injury litigation that would not visit any unfortunate cost consequences on the injured people.

Mr Khabra: What is the relationship between the legal costs and the level of the claim? In certain cases the legal costs are so high, and it means that some of the people, if they wish to make a claim, are restricted in their ability because, at the end of the day, it is not worth taking. Secondly, when a claim is valued, is it after conviction or when the claimant, in the personal injury case, actually makes a claim?

Q42 Chairman: The first question goes back to the discussion we were having earlier about the deterring of claimants once costs go beyond the present small claims track.

Georgina Squire: I think there are other schemes being considered and, indeed, I think there is a scheme enforced for RTA—Road Traffic Act—cases whereby the costs are restricted. Certainly, if there were any recoverability of costs in the small claims track, then, as mentioned earlier, it would certainly be sensible for them to be reflected in some respect so that they were proportionate to the value of the claim because otherwise there is the problem that you indicated where the costs can soon outweigh the value of the amount at stake. In terms of the other point, that is probably something which Mr Gore will be able to comment on more because it relates to personal injury.

Allan Gore: A partial answer to your question must focus on the way in which the claims are conducted by both sides. Our empirical research, as we have drawn attention to in our written submission, draws attention to one feature which clearly has an effect on escalating the volume of legal costs associated with the handling of personal injury claims and that is that admissions of liability are only made in the protocol stage of the process in about one third of the claims in which compensation is eventually paid. That necessarily means that a significant quantum of costs are incurred in progressing a claim to a much more advanced stage when that could be avoidable by an earlier recognition of responsibility or liability. We recognise that there has to be an encouragement to promote early and economic resolution of disputes in the context of personal injury litigation. In that respect, the representatives of injured people work closely with the insurance industry, in particular, to explore avenues by which those frictional costs can be reduced.

Q43 David Howarth: Just to be clear, was that all cases, small claim cases?

Allan Gore: That was in the raft of cases which we undertook the research in relation to which Dr Whitehead referred to, those claims that achieved a settlement of £5,000 or less within that category. An early admission of liability was only made in one third of the cases which ultimately attracted compensation.

Chairman: Thank you very much for your evidence this afternoon and for your willingness to bring forward any further information which you may find. Thank you very much for your time.

Witnesses: **District Judge Michael Walker,** Hon Secretary and **District Judge David Oldham,** Chairman of the Civil Committee, Association of District Judges, examined.

Chairman: District Judge Walker and District Judge Oldham, welcome to our proceedings. Thank you very much for giving your time to help us look at this matter and for the assistance we have also received in enabling members and officials of the Committee to come and look at procedures in the small claims track in county court. Some have already done so. I am going tomorrow, I think we all find that very helpful indeed. Perhaps we can press on.

Q44 David Howarth: Can I start with your reaction to the question we have been pursuing in various ways about the added value which lawyers bring to the proceedings, given the remark we have already heard that district judges often take a more proactive role in small claims and track cases. Is it really worth changing the system so that lawyers become more involved?
District Judge Walker: When you say that district judges often take a proactive role, I think, to be honest, I would disagree with you. We always take a proactive role, that is the nature of the beast. A district judge is always interventionist in small claims cases and that is what really distinguishes a small claims hearing from a fast-track or multi-track trial. It is a hearing where you are endeavouring to get to the bottom of the case as quickly and as simply as possible. The presence of a lawyer often helps; sometimes it may not be quite as helpful as what you would wish. Where lawyers have a real point of helping, which does not happen at the moment, is that many cases come before us where people obviously have not had legal advice before they brought the case. They do not understand how to present their case. If they are defending, they do not understand what their defence may or may not be. There is great scope for lawyers giving assistance to people at that stage, even if they do not go on to represent either the claimant or the defendant at the actual hearing. Help beforehand would be immensely useful.
District Judge Oldham: I have nothing really to add to that.
Chairman: We will now adjourn for a short division of 15 minutes.

The Committee was suspended from 5.45pm until 6.00pm for a division in the House

Chairman: I think we can resume at this point. The good news is we are not expecting further votes during the time of the meeting.

Q45 David Howarth: You were saying that the more effective time for legal advice would be early on in clarifying the situation. I was wondering about your experience of legal representation at the trial stage and to what extent you have observed the legal representation to be an advantage or perhaps a disadvantage to a litigant?
District Judge Oldham: My experience would be that principally legal representation occurs in road traffic cases. That is by far the greatest proportion of cases where both parties are legally represented, usually by counsel. It depends on counsel as to whether it is an advantage. Undoubtedly there are cases whereby taking a more interventionist approach one can deal with the issue much more quickly, but it is unfair on counsel to be suggesting that is their fault. In other cases it is much rarer, but there are obviously cases where there are important legal issues, important points of law, which need to be addressed. Very often it may be helpful to have counsel—hopefully we have picked up on them anyway—point us in the right direction and to explain the situation to the other party if they are not represented.

Q46 David Howarth: What about cases where one side is represented and one is not? Is it a great advantage for the representative to be represented in your experience?
District Judge Oldham: I would say not necessarily. A lot of the litigants in person have done a lot of homework before they come, they have found out about their case. I think there is still a need for much greater opportunity for people to get some advice before they come, to find out what the real legal implications of their case are. I certainly would not say it is inevitably an advantage if one party is represented and the other is not.

Q47 Chairman: Is it more difficult for you if one is represented and the other is not?
District Judge Oldham: No, I do not think it is more difficult. I think it is part of the process that we are used to. Obviously if we are having propositions of law put to us we have to make sure that we explain or make sure that the unrepresented party fully understands what it is that is being talked about. That is part of our job in adjudicating.

Q48 James Brokenshire: In the previous session we had a discussion about tracking and how you assess a particular case in terms of whether it is appropriate to take it down the small claims track and the difference between assessing something on quantum and assessing on complexity. I wonder if you have got any comments on the issue of complexity as to how you go about assessing and whether there are any ways in which we could look at the procedure in order to make your job a little easier and perhaps allow some cases with higher quantum to come through if they are not as complex.
District Judge Walker: Mr Brokenshire, we could not do that at the moment. We can allocate a case up if it is complex but of low value, but what we cannot do is allocate a case down, unless both parties agree, if the value were taken into a higher track. If you have got a case of £10,000, that is going to be in the fast track unless both parties say yes, they are comfortable with it being allocated to the small claims track. If they are unrepresented, they may well be and, in fact, we will try and encourage that, but you could only do it with their agreement.

Q49 Chairman: That does happen?
District Judge Walker: Yes, very often. It is not uncommon that I would have a fast track trial of £10,000 with unrepresented parties on both sides. The very first thing I would say to them at the

commencement of the trial, knowing that they are both unrepresented so that costs are not an issue is, "Would you like me to allocate this case down to the small claims track? It means I can adopt an interventionist approach; I can help you with the way you present your evidence; I can ask you questions where otherwise I might not be able to, and generally I can take a much more proactive approach". On the whole litigants will say yes, that is what they would prefer.

Q50 James Brokenshire: Do you think that is something which should be encouraged?
District Judge Oldham: I think it is widely known that it is something which district judges can do and do do. Going beyond what Michael said, quite often a case will come in purely on paper for the purposes of allocation and when we look at it one can see that the claim is said to have a value in excess of £5,000. Even on paper one can then send out a notice to parties saying, "The court thinks this maybe suitable for small claims, do you consent to this being dealt with as a small claim?". Sometimes the parties themselves will have indicated on the allocation questionnaire that they would like it dealt with as a small claim. One has to be slightly careful about that because they may not fully understand the implications of it, but certainly at a number of stages we can try and promote an allocation to the small claims track.

Q51 James Brokenshire: In terms of access to justice, part of that is ensuring that cases are dealt with promptly, efficiently and effectively. If a case has been allocated to the small claim track, how long on average would it take to go from the start to finish, if I can put it like that, and how would that compare with cases on the other tracks?
District Judge Walker: The Department's target is 15 weeks from allocation until the final hearing, and I think that is well met in most courts without any difficulty.

Q52 James Brokenshire: Listing arrangements in terms of the actual practicalities of being in court and having to wait around for your case to be heard and allocated, do you think there are any improvements that could be made in terms of people's experiences of coming to court and that part of the whole procedure?
District Judge Walker: Of course the problem there is do you list for the convenience of the judge or for the convenience of the parties. Inevitably it is a problem. If you list for the convenience of the judge, you list lots of cases at 10 o'clock or 10.15 or whatever, and they might not get on until 11.30. If you list for the convenience of the parties, you give them fixed slots and then, of course, cases settle, they are not effective for whatever reason and your waiting time just extends way into the next decade; that is the difficulty. It is a pragmatic approach. If you want to give people quick hearing dates, the only way you can achieve that, with the resources we have got at the moment, is to block-list and occasionally people will wait an hour, an hour and a half or so for their hearing. One does not do that without any warning; the notices which tend to go out these days will tell people that whilst they are listed for a certain time, they may not get on until lunch time and they should be prepared for that and make their arrangements accordingly.

Q53 James Brokenshire: Do you feel that this is an acceptable and satisfactory arrangement at the moment?
District Judge Walker: To be honest, it is the best one can do with the resources we have got. That is the trouble, it is inevitably a compromise. To take an example, in my court this morning we had all our cases listed for 10.15 and by 11.30 every one of those cases had started, so people had not waited that long.

Q54 James Brokenshire: When you talk about resources, what do you mean? Is it purely financial issues, is it human resources?
District Judge Walker: It is judicial time, buildings, court room space and things like that.

Q55 James Brokenshire: Obviously the court system and the whole legal system is, in general speaking, quite paper driven and in other cases we are seeing a lot greater use of technology, document management systems, scanning of the documents on discovery and those sorts of things. Do you think there is a greater role in terms of IT support coming into the county court, the small claims process?
District Judge Walker: Inevitably there is a need for more IT in the county court. Undoubtedly, anyone who visits the back office of the county court is just amazed by the amount of paper which is chased around on a minute by minute basis. At the moment it is an entirely paper based system which has not really changed in the 160 years that we have had county courts. There is great scope for change, but it is immensely expensive and the resources, I am afraid, are not there. There is £25 million a year for investment in IT in the civil and family jurisdictions, and £25 million does not go very far between the 220 county courts.

Q56 James Brokenshire: In practice, what sort of IT support do you have to support this process?
District Judge Oldham: The judiciary have IT provision, the courts have various IT provision, but the two cannot speak to each other by and large which is not always helpful. As Michael says, clearly the administration is the area which perhaps needs the greatest emphasis on better IT. Lord Woolf, when he prepared his report, of course, stressed the need for IT for civil justice generally and that largely has not happened. In certain areas the use of telephone hearings for certain types of application have been very successful and, as you know, the Department has proposed some increases in that. That is more difficult in dealing with final hearings in small claims, which is what we are concentrating on here, because a lot of litigants would feel very uncomfortable about having to deal with matters like that on the telephone.

Q57 James Brokenshire: Can you explain the use of the telephone at the moment? Is it more like a directions type approach?
District Judge Oldham: I think perhaps most case management hearings in the larger claims are dealt with by telephone. These are cases where we are setting a timetable for a case of any size or complexity to bring it to a conclusion. The advantage we find of having hearings on the telephone is very often the parties—apart from the obvious cost-savings, they are not having to travel to court from courts which may be somewhat distant—they get their heads together in advance, they discuss the Directions they think are appropriate, they can send those through, we can discuss them with them over the telephone and the whole thing can be done very simply and in a straightforward way.

Q58 James Brokenshire: Would it be fair to say that there is a need to certainly increase the IT and potentially the use of telephone hearings particularly at the earlier stages of a trial?
District Judge Oldham: Yes, although, of course, small claims do not have earlier stages generally. So, yes, certainly in the larger claims.
District Judge Walker: The Department piloted the use of extensive telephone hearings in three courts, and there is a consultation paper out at the moment which is suggesting that is nationally rolled out, and I think there is general support for that. There are arguments on the periphery about precisely what telephone hearings should be extended to but there is general support.

Q59 Chairman: You do not know where you are in the Department's plans for IT development in the civil courts?
District Judge Walker: At the moment, as I understand it, it is £25 million a year, which, as I said already, does not buy you very much, certainly not when you need to write comprehensive new software packages. You would get nothing for £25 million. We desperately need more.

Q60 Keith Vaz: Judge Walker, welcome back. You have given evidence so many times to this Committee that you really ought to be on this side of the table. In your evidence to us on this inquiry you describe the enforcement of judgments as being in a deplorable state of affairs. That is very un-judge like language. Why are you so cross?
District Judge Walker: Because what we try and do is offer people not a Rolls-Royce service, but at least a decent service to get them to the point of a judgment, and we would like to think that the cases get the judgments which the cases deserve. Then the winning party is left to his or her own devices effectively to enforce that judgment. The courts' response is a reactive one to the enforcement of judgments rather than proactive. We will do what the successful party asks us to do. As we said earlier on, the problem is very often that the bailiff will say there are no goods on which it is possible to levy execution or one gets an attachment of earnings' order but the debtor will have moved on to another employer, if indeed he were an employee in the first place. You may not know where they bank. There is a whole issue relating to enforcement which, in fairness to the Department, it has recognised and recognised for some while. There are numerous problems. There is the big issue of separating the "can't payers" from the "won't payers". The "can't payers" just cannot pay and at the end of the day some people cannot pay, they are just unable to. On the other hand, there are people who are just not going to pay, the "won't payers", and one has to try and distinguish the two. So there is the big issue of the "can't payers" against the "won't payers". There is also the issue of information where there is a big issue between the need to have information and human rights. A data disclosure order may be fine, but that means a creditor could get disclosure from the DWP or the Inland Revenue or whoever as to where a debtor is working. Of course, on the human rights' side people will say that is a gross intrusion of their human rights and should that happen. There is a big debate about things like that.

Q61 Keith Vaz: This has been going on for many years. How many years have you been a judge?
District Judge Walker: Eleven and a half years.

Q62 Keith Vaz: This has been a real problem with the system, but there seems to be absolutely no improvement. Presumably you have raised these concerns with the Lord Chancellors' Department, as it was then, and the Department for Constitutional Affairs, but still there has been no progress?
District Judge Walker: There has been a lot of progress. The Department, in its evidence to this Committee, does set out some of the ideas which it has in the hope that it can get the legislative slot and get those provisions on the statute book.

Q63 Keith Vaz: What do you think of those ideas? Do you think they will help?
District Judge Walker: Yes, every one of them. There has been a lot of discussion over a long period of time. None of what is in the Department's evidence came as a surprise to us; it is what we will support.

Q64 Keith Vaz: I wonder if you can explain this: they have been through the system, as you said, they have appeared before yourself and your colleagues, they have done whatever is required of them and they cannot enforce their judgments. Do they blame the judges or the court system?
District Judge Walker: They have become very disenchanted with the system. Interestingly Professor Baldwin—who has sent in evidence—some while ago interviewed people three months after the hearing and asked them the simple question, "Have you recovered your money?". He discovered that in a third of the cases people had, in a third of the cases they had not recovered anything and in a third of the cases they had recovered something. After that period of time people were beginning to think they had got all they could

recover. You have a third of the people who are just wholly dissatisfied with the outcome of the proceedings; they have won and they have lost.

Q65 Keith Vaz: Do you think there is a responsibility—perhaps Judge Oldham can join in here—on the judges themselves, right at the start of the process, to advise the litigants that this is a two-way, two-stage process, winning is just part of that process and after that you have to get your money back. Maybe the judges should take a much more proactive role in advising people right at the start of the process.

District Judge Oldham: I think the difficulty about that is if one starts off by saying to the litigant, "We are happy to hear your case, but really you do not have much chance of recovering any money", it does not appear to me to accord with access to justice. It is a very difficult situation. The usual time when it may well be discussed with the judges is at the conclusion of the case when the litigant says, "How do I go about getting my money". As judges all we can do is indicate the sorts of options which may be available, we cannot make recommendations or offer advice. We can point them in the direction of where they can get appropriate advice, but it is very unsatisfactory. Earlier in the afternoon it was suggested that the litigant has to start all over again from scratch and I think that is wrong. Of course they have got a judgment, but that is not worth a great deal to them unless they can turn it into money. That is where the system is letting them down at the moment.

District Judge Walker: If I may say so, what I have discovered is the most effective remedy of all is pointing out to the paying party that if they do not pay within whatever period of time I allow them then the judgment will be registered with the Registry of County Court Judgments. The trouble is that works as a manoeuvre the first time but, of course, if the response is, "I have several already", it is a waste.

Q66 Keith Vaz: You have not seen a particular enforcement order in any other country or in any other jurisdiction which is something we do not have that we could perhaps adopt that would make our process slightly better?

District Judge Walker: No, but certainly what the Department is now suggesting, the data disclosure orders, better attachment of earnings' orders and the like, I am sure will make a significant difference.

Q67 Chairman: I think the issue which Mr Vaz raises is one which many of us have experienced with constituents, the small man who does not get his money either from a relatively large payer or from another small player. There is another issue which has cropped up which is where you have got big players, finance houses, pursuing debts within the small claims jurisdiction area who obtain charging orders. By this means they get themselves into the position that instead of having an unsecured debt for which they are charging 19% interest, they have actually got a secured debt for which they still charge 19% interest, this seems to have grown exponentially recently. Is my impression correct?

District Judge Walker: Yes, it is. It is acknowledged to be a problem. The DTI are certainly well aware of it. At the moment, however, there is nothing much one can do to prevent it, save to say this. The unsecured lender may get his security, but getting an Order for Sale is something totally different. They may have their judgment, they may have the security of the charging order, but if they then make an application for an Order for the Sale of the property, what we would very much do as district judges is bend over backwards to ensure that the debt is paid by instalments and not at the expense of the property being sold.

Q68 Chairman: That would apply if the borrower had in the first place obtained a loan against the value of the house because the sale issue still exists for the lender.

District Judge Walker: To be honest, I would say it is easier for a high street lender who has lent money on the security of the house to get an order for possession than it is for an unsecured creditor to get an Order for Sale, to be honest.

District Judge Oldham: I think the number of applications for orders for sale is very, very low compared with the numbers of charging orders which are made. Certainly in my experience we see very, very few applications for orders for sale.

Q69 Julie Morgan: Why do you not want to see the European small claims procedure extend into domestic cases because I know you support the concept of cross border co-operation, but not domestic cases?

District Judge Oldham: In our written evidence we have identified two particular areas where we think our system is better. One is the financial limit and the European scheme, which is 2,000 euros, is obviously substantially lower than £5,000. The second is in relation to costs. There has been a lot of discussion this afternoon about costs, but costs are a very big issue and costs overall in litigation, civil litigation particularly, have really become a major concern all round. They always were a concern. Lord Woolf had a significant concern about them. He hoped that his access to justice arrangements would result in a reduction in costs overall, but I think it is generally accepted that in most spheres that simply has not happened. It is in the smaller cases where the costs have become completely disproportionate to the amounts that are actually being litigated about. That is why we feel the small claims scheme, as it currently is, with the very significant limits on costs which there are, is very valuable as access to justice. For most people it means they know they can go to court and seek a remedy without any significant burden in terms of costs coming on them.

Q70 Julie Morgan: Would it be fair to have two similar systems ready, do you think, where you think you could have very similar cases but just

considering you are suing somebody who is abroad then you are entitled to the costs and there are different financial benefits?
District Judge Oldham: I do not think it would be unfair. As we have already said, I think the European scheme obviously has advantages for cross-border disputes. There is a single cross-border dispute mechanism, but internally we believe the current small claim system, subject to any refinement that may be needed, is a preferable system.
Chairman: The situation probably as unfair is not having any readily accessible recourse at all.

Q71 Jessica Morden: The Association says that there could be a case for increasing the £1,000 limit for personal injury claims to £2,500, and obviously there is some opposition to this. We had some discussion about that earlier today. One of the reasons, as you say, being the disadvantage to lay people. I wonder if you can expand on why you feel there is an advantage to going up to £2,500.
District Judge Walker: I am so glad you asked me that. I brought with me this afternoon the seventh edition of the *Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases*. Effectively it is the bible on damages awards. It is not just the judiciary who have this professionals have it as well. The seventh edition is the most up to date edition it states the value of awards as at May 2004, so the figures are 18 months old. If you look at the sorts of claims which are now valued at £1,000 or more: a male, trivial scarring, minor only, £1,000 to £1,900 in other words, one would not have a male scar at all now coming within the small claims track at all. A female, in exactly the same situation, gets £2,150. The loss or damage to one front tooth is £1,250 to £2,150. So the sorts of cases Lord Woolf was thinking about for the small claims track, the trip on the pavement or the slip in the supermarket, are now going to be completely outside the small claims track, and we think there is an undoubted argument on inflation grounds alone for saying the figures have got to be increased.

Q72 Jessica Morden: Do you think that the actual value that is being put to these accidents is going up?
District Judge Walker: Obviously it goes up with inflation.

Q73 Jessica Morden: Beyond inflation?
District Judge Walker: No, I do not feel it is. Indeed, in fairness to the profession, the way they are always argued in front of us, normally the fast track, is to look at the value of previous reported cases and apply an index factor to them. There is no attempt to increase the general level of reward.

Q74 Jessica Morden: In successful personal injury case which was worth over £1,000 but under £2,500, how much would the defendant expect to pay in legal costs on average?
District Judge Oldham: It is a difficult question to answer because it would depend on what issues had to be resolved. It is unusual for cases in that bracket to be litigated or to come to trial purely on the quantum of damages, it is far more usual where there is an issue on liability. In fact, large numbers of road traffic cases that we deal with as small claims are deliberately issued purely for the insurance excess of £100 so that a decision is obtained on liability and there may be other issues which may include personal injury that will be resolved between the insurers. The numbers of cases that actually come to trial on quantum only for between £1,000 and £2,500 I suspect is extremely small. Undoubtedly, if such a case were to come to trial, the costs would certainly exceed £2,500, it could well be double it—I would have thought—because there are conditional fee agreements, there may be after the event insurance policy premiums and there may well be a success fee element, all of which build up the costs to very considerable amounts. That is one of our particular concerns about keeping the existing level or eliminating personal injury claims altogether from the small claims process. There has to be a balance struck between the proportionality of the legal cost which might be involved and the awards themselves.

Q75 Chairman: One of the issues which was raised in the earlier evidence session that if there is not a lawyer involved, the litigant may be unaware that he would be justified in seeking a larger claim. Is that something you might point out?
District Judge Oldham: The danger is it might not get to us at all on that basis. I think the concern which is being expressed is that a claim may be intimated simply by a litigant writing to the other driver's insurers. Claims handlers become involved from the insurers and they then attempt to settle the case, possibly by offering a figure which is well below the true value of the case. In many ways that is an argument for keeping such claims within the small claims process, so that there is an impartial adjudicator available to the litigant at minimal cost who can make a reasoned decision based on experience as to what the proper level of damage should be.

Q76 Chairman: Would you ever say to a litigant, "Perhaps you should think again about whether this is the appropriate level of claim to be making"?
District Judge Oldham: The only time that really arises is if we are being asked to approve a settlement for a child. Cases involving children still need the court's approval for any settlement. Very often we may look at the medical evidence which has been provided and we may ask the child and the litigation friend, the mother or father, whoever it is: "Has Charlie recovered? "Is he still getting headaches?", this sort of thing, and very often we find he says, "Yes, he is", even though the doctor had expected a full recovery within six months and we may well send it away and say "We need to follow this up, we are not prepared to approve this at the moment". We do not get the opportunity to do that in cases involving adult claimants because if the settlement is done, it is done either before court or before the matter gets to any sort of trial.

Q77 Dr Whitehead: I wonder if it would be possible to clarify, as it were, the opposite. Judge Walker, you very helpfully read out some cases of people with broken teeth and minor scarring, and this leads me to think what on earth it could be that one would have to suffer from in order to lodge a claim of less than £1,000. What would those sorts of cases be?
District Judge Walker: A road traffic accident with whiplash injury and one night of some discomfort with full recovery within one or two days, £750.
Chairman: The claims I should have made in the past!

Q78 Jessica Morden: In the cases worth less than £2,500, would it be practical to present a simple medical report?

District Judge Walker: The sort of case we are talking about, to be honest is the sort of case you could decide either by just looking at the individual, quite often, or with a very simple report from a general practitioner. That is what it was designed to deal with and not the full blown PI case where you have a 20 page medical report from a consultant of 30 years' experience and the like that obviously is very expensive and very detailed and in its place extremely helpful, but for these low value cases really an extravagance which the system cannot support.
Chairman: Thank you very much indeed. We are very grateful for your concise answers. You have set us thinking on a number of points which we will follow-up with ministers and in our final report.

Tuesday 1 November 2005

Members present:

Mr Alan Beith, in the Chair

James Brokenshire	Jessica Morden
David Howarth	Julie Morgan
Barbara Keeley	Dr Alan Whitehead
Mr Piara S Khabra	Jeremy Wright

Witnesses: **Baroness Ashton of Upholland**, a Member of the House of Lords, Parliamentary Under-Secretary of State, Department for Constitutional Affairs, and **Mark Ormerod**, Director, Civil and Family and Customer Services, Her Majesty's Courts Service (HMCS), examined.

Chairman: Baroness Ashton and Mr Ormerod, welcome. I think we have one or two interests we have to declare today.
Jeremy Wright: I am a non-practising criminal barrister.
David Howarth: I am an academic lawyer specialising in civil compensation.
Barbara Keeley: I have an outstanding motor accident insurance claim which might be covered by some of the business today.

Q79 Chairman: Those are all the interests that we have. Is there anything you want to say to us before we start?
Baroness Ashton of Upholland: No, I do not think so. It is very nice to be back in front of you.

Q80 Chairman: The pleasure is ours. Why do county courts lack basic electronic document and records management facilities? Why is it that a judge can say that anyone going to the back office of a county court will be amazed by the amount of paper which is chased around on a minute by minute basis?
Baroness Ashton of Upholland: I am going to hand that over to my colleague, Mark Ormerod, who has come along today specifically to talk about this issue because I know it is important to the Committee. One of the interesting things for me when I went across to Constitutional Affairs was to see the paper based nature still of our courts system. As you will know, Chairman, there are a lot of areas where we are trying to address that right across the courts system, but I will ask Mark to give you some specifics about what we are doing in terms of the small claims courts in particular.
Mark Ormerod: I think it is recognised, as the Association of District Judges said, that the IT provision in the county courts is not satisfactory. There is some IT provision through the "CaseMan System".[1] Over the last three years the DCA has spent £75 million on IT facilities in the county courts and principally on providing the LINK system. The historic position was that the county courts had standalone computers and the LINK provision allows linkages between the county courts. We provided that and Money Claim Online, which is an award winning system for lodging claims, and also lap-top provisions for judges in the county courts. It is recognised that that is not sufficient. At the moment we are looking at a feasibility study looking at E-Filing,[2] it is a web based application, which gets you over the cost of having to provide all the hardware in relation to the courts because you do it through the web. We have a feasibility study underway to try and see whether that would be a possible way forward and we are hoping to conclude that by the end of this year.

Q81 Chairman: So by the end of this year you might have an idea of which way to go forward with it.
Mark Ormerod: We will know whether the web based E-Filing option provides a way of dealing with it. The fact of the matter is that we have spent the money that has been allocated in the best way that we possibly can, but that provision has not produced the IT facilities that we would wish to see.

Q82 Chairman: So if that option does not look promising we are going to have to start again and think of some other ways, are we?
Mark Ormerod: The next generation in relation to the CaseMan System is to put that on what is called a "SUPS CaseMan",[3] which is an advanced level. We have been doing preliminary work in relation to that to try and advance that onto a different platform. The whole DCA and HMCS IT provision will go through a "re-compete" shortly under what is called the DISC[4] programme.
Baroness Ashton of Upholland: I am the Minister responsible for this.

Q83 Chairman: Would you like to try some alternative wording?

[1] *Note by witness:* The main case management system operating in the civil courts.

[2] *Note by witness:* A three month feasibility study looking at the potential to introduce an Electronic Filing and Document Management System in the civil and family courts, similar to those that have been introduced in some US States, Australia and Singapore. The study is to complete in December 2005.

[3] *Note by witness:* Service Upgrade Project—a project to develop and pilot modernised and technically upgraded versions of the main IT case management systems in the courts.

[4] *Note by witness:* Development Innovation and Support Contracts—a programme to re-tender the Department's main IT contracts, currently spread across a number of different suppliers, all of which expire during the period 2006–08.

Baroness Ashton of Upholland: No. I have grown to love re-compete!

Q84 Chairman: Does that mean it is going out to competition?
Baroness Ashton of Upholland: It is a question of trying to make sure that we get the procurement right. Members of the Committee who have had the opportunity, either through their professional life or as a member of the Committee, to see the back offices will appreciate that what we have to do is find systems that will be secure and accurate and that will give us what we really need to happen within a cost basis that is feasible for us, bearing in mind that inevitably in all departments we have to be very cautious. At the moment we are looking to see whether we can procure a better system by bringing together our existing systems without losing anything on the way which, as you will know, is also very important right across all of the courts system and right across DCA.

Q85 Chairman: In the meantime are you rolling out a system for listing which the District Judges cannot actually access?
Mark Ormerod: There is what is called the e-Diary Project, which is a listing project in relation to that.

Q86 Chairman: I think I have seen it at Snaresbrook, is that right?
Mark Ormerod: That is a Crown Court.

Q87 Chairman: Is it basically the same project or is this a different one?
Mark Ormerod: This is a different one relating to the county courts. At the moment that is being piloted and then we will decide whether that is to be taken forward.

Q88 Chairman: We were picking up from the District Judges that it looked like a system that was not going to help them.
Mark Ormerod: That is one of the things in relation to the pilot that we need to consider, whether it has helped the judiciary and indeed the court staff in relation to what it was set out to do.

Q89 Jessica Morden: Do you think the listing system is arranged for the convenience of judges? Do you see any way in which it could be improved so people do not have to hang round at court all day?
Baroness Ashton of Upholland: I went to a small claims court about two weeks ago and I took along a group of MEPs from the European Parliament JURI[5] Committee, which is a Committee that we deal with in terms of our presidency on civil justice, and I was surprised to see a listing system done in the way it was and then I saw what actually happened. What we had were three judges sitting. Up to 12 cases could have been heard on that day, but at the time—it was ten o'clock when we began—only two had both of the people there and any required witnesses. What actually happened in the course of the time I was there is that although it would look as if you had people arriving altogether, in fact they did not and it was very convenient both for the people involved and it was a better use of court time because otherwise we would have had time when the judges were simply hanging around and we more or less avoided that. Some of the courts have been trying to patch time a little better by saying, "You'll be on before 11.30 and not before 11.00, so try and come around that time and we will fit you in." Normally I would be against having a system where people all turn up at the same time, but in the circumstance I saw it was probably the best use of time and people did not wait very long.

Q90 Jessica Morden: Do you think that is the norm across the service?
Baroness Ashton of Upholland: I asked that question of the judges involved because it was unusual and they felt I was seeing a very typical court on a very typical day and therefore that was the case. They themselves said they would not do it this way if they felt it was going to hold people up, but the reality was that if in very many of the cases when they got to them they did not have all the witnesses there they would have been wasting their time. It is that balance which I think is probably about right, but we need to keep an eye on it.

Q91 Jessica Morden: Moving on to the point about people not turning up. Do you think that judges should be more easily able to penalise people who do not turn up?
Baroness Ashton of Upholland: I think it is difficult because it depends why they have not turned up. The circumstances I saw were where you had somebody stuck in traffic, somebody who had not received the letter from their solicitor that told them they should be there and who raced across London as soon as they were rung up to be told, and somebody who had settled as they arrived, so it was a range of different reasons. It is hard to generalise. I think we have always got to be mindful that we use courts effectively and if people are not showing up, they need to be clear why. All the circumstances were, one way or another, pretty understandable.

Q92 David Howarth: I want to bring you on to the issue of enforcement of judgments which is an issue that I think the Committee is finding increasingly interesting. We have heard evidence that one-third of successful claimants recover nothing and only one-third recover their judgments in full. What is your view of why that is happening and what could be done about it?
Baroness Ashton of Upholland: We have been looking at enforcement because, I agree with you, it is very important if the small claims process is going to work that people actually get what they are entitled to at the end of it. Some people may be successful, but they have to make a decision as to whether it is actually worth pursuing the person they have got the judgment against and some people

[5] *Note by witness:* JURI is the legal affairs committee of the European Parliament and has responsibility for considering the proposal for a European small claims procedure as part of the "co-decision" procedure.

decide not to do so, rightly or wrongly. Secondly, there is an issue about making sure that people realise they have to pay. I am particularly interested in what more we can do to support the person who has been successful in making sure that the information that they need to pursue the claim is available to the court earlier. I think it is also about making sure that the judges, in delivering their judgments, are very clear with the individual in terms of the expectations on them and that we make the system overall much more geared towards ensuring that the person who is successful is able to get the money that they want at the end.

Q93 David Howarth: There are two separate tracks there. There is one track that is basically administrative and does not need any more legislation and the other track is different legislation. Just taking the legislative one first, there have been proposals for better interaction between organisations on the attachment of earnings and also the possibility with the Data Disclosure Order because people are finding it very difficult especially to enforce Third Party Orders. Is there any chance of that sort of legislative proposal coming forward soon?
Baroness Ashton of Upholland: In the Courts and Tribunals Bill we have a proposal that would enable the better sharing of information, which is one of the issues that is a difficulty, through a gateway that would enable DWP information, for example, to be shared with the Inland Revenue and so on. Obviously the Data Protection Act is very clear about the purpose of information being kept. When I get a slot for the Courts and Tribunals Bill—which I keep my fingers crossed for and any influence would be gratefully received—there will be some issues within that. There is a whole national enforcement strategy which is meant to be looking right across the civil and criminal justice system at how we can better enforce judgments that are made which I think will also be of some value in that sense. The legislation within the Courts and Tribunals Bill will go some way towards dealing with this and I hope that we are successful in getting that Bill on the Statute Book soon.

Q94 David Howarth: Will that need any revision of the Data Protection Act itself or is it just going to be within the existing legislation?
Baroness Ashton of Upholland: We do not need to revise the Data Protection Act per se. We can create the gateway because we are allowed to do that.

Q95 David Howarth: So you do not think there is any problem with Data Protection in reality even though apparently some people think there is a problem with Data Protection in, for example, the Third Party Order?
Baroness Ashton of Upholland: We are using the Courts and Tribunals Bill to create the gateway. As data has to be collected for the purpose for which it is collected and therefore not shared inappropriately you have to create the specific circumstances, which the Bill will do. I do not think there is anything inherently wrong with the Data Protection Act on that. I am also responsible for Data Protection in the Department. I am always very mindful of either people's perceptions of what the Data Protection Act does and does not do but, also, making sure that where we need to share data for good reason, we do it properly using legislation where appropriate. In this particular circumstance I think the Bill does do that and it will be very helpful in those particular circumstances.

Q96 David Howarth: Let us turn to what can be done without primary legislation. One of the things that have been said to us is that people often get to the end of the process, they succeed in their claim and only at that point do they discover that the defendant is judgment proof, that he has no assets and there is a whole string of other county court judgments against them. Is there any way of providing that sort of information about the status of the defendant to the claimant earlier on so that effectively they do not waste their time?
Baroness Ashton of Upholland: We do recommend that people check very carefully for other judgments for precisely the reason that sometimes you do not bother to recover because there is nothing to recover. I am always hesitant about trying to get the courts to provide information on somebody in a way that I am not always convinced is particularly helpful, because the fact that somebody has a judgment against them does not mean that you should not pursue your case and does not mean that you could not recover the assets. We want to be careful the court does not skew you into a different course of action. What I am looking at is whether we could get more information from both sides at the beginning of the hearing which will enable it to be easier to pursue someone because you have got more information about them. One of the issues is that even if you are successful, the person then walks out of the door and you do not know where they live, you do not know about their bank account, you do not have any information and you are then required to go and find that out one way or another. We are looking at whether, in an even-handed way, one could ask people to supply more information, even if it were only the latest information on where you live, with proof of that and so on and so forth. I could probably bring ID cards in here just about. I need to think about that to make sure we are not skewing it in any particular way, but I do think there is more we could do and more information being lodged might help.

Q97 David Howarth: And that could be done without primary legislation, could it?
Baroness Ashton of Upholland: It could, yes.

Q98 James Brokenshire: Chairman, my apologies for the late arrival. I am a solicitor, non-practising and a member of the Law Society. I want to touch on the provision of information. I was at Romford County Court yesterday morning watching the small claims procedure and one thing that struck me, in terms of the litigants and persons who were arriving,

was the fact that they were not necessarily as informed as they could be in terms of bringing documents with them. Is there anything that you are doing and looking at in terms of how to try and best inform them and therefore prepare the claimant to ensure that they are in the best position they can be to present or defend their case given that obviously in most circumstance lawyers are not really involved?

Baroness Ashton of Upholland: I agree it is a really important problem. I am delighted you raised it because I have got a leaflet I want to leave with the Committee for you all.

Q99 Chairman: It is a very good leaflet. You remind people to consider checking on the register for county court judgments already taken against people.

Baroness Ashton of Upholland: I am glad you think they are good. This is one about a new pilot project in Reading which we are just starting and it is precisely to deal with the issue that you have raised, which is how do you ensure that both sides have access to high quality information. We have a dedicated individual within the court in Reading who is available for people to come and talk to about how to fill the forms in, how to make a claim, what it means if they have received documentation saying that a claim has been made against them, what will happen in the procedure, what they should come with, what documents they need and so on. I was reading a newspaper article about it and it said that when the individual began they were concerned that perhaps nobody would come for the first few months and they found they had 20 people in the first two weeks. If it is successful, which I think it probably will be, we do have the resources to roll it out nationwide and I think that would make an instant and very important additional resource for people precisely to address the point that you have raised, Mr Brokenshire. We are also doing more training with some of the staff right across the courts service to enable them to provide the kind of advice people want on a day-to-day basis, but hopefully this particular pilot will be in large part the answer to people's needs.

Q100 James Brokenshire: That should mean people are bringing the right documents and contracts with them, all the basic material to ensure that from a legal perspective you have got the nuts and bolts there to argue the case. Do you foresee that if the pilot is successful you would need additional resource to roll it out across the country?

Baroness Ashton of Upholland: I have got the resource to do it. We are making sure we have got it right in terms of whether we need this person to be full-time, what kind of skills set and so on, but if it works, which I think it will in some form as it is, then as soon as we have looked at it properly we will be able to roll it out and we have the resources to do that. It will invest to save because it will save the court time if people arrive with better documentation and they are clear about what they are doing.

Mark Ormerod: One of the unexpected side effects of it is that people are settling earlier and not pursuing the case through, which we had not expected at all. It is very early days; it only started in June.

Q101 Chairman: One of the methods that the Department favours for improving enforcement is the use of Charging Orders, which only works if people have got property on which the order can be placed. There are a couple of anxieties about this experience to date. One is—and this is an anxiety expressed by debt advisers, for example, the CAB and others—that people who have already made an arrangement and are paying a regular arrangement suddenly find that the high street lender comes along to the small claims court or to the county court and slaps a Charging Order on them which effectively defeats the benefit they thought they had got by making regular payments. The other is that when high street lenders do it against small individuals the high street lender then has a charge on the property but is still charging 19% interest, if it is credit card debt or something like that, so they are paying an unsecured rate of interest on a loan with ample security.

Baroness Ashton of Upholland: This is an important area. We think Charging Orders are important and they have a place. The issue about the rate of interest and the issues around perhaps not such reputable lenders of money as perhaps the high street would be is something that we are pursuing with the Department of Trade and Industry because, as you will know, the Consumer Credit Act 1974 is now being reviewed. What we hope to do is look at the question of ensuring that credit is done properly and effectively so people do not end up in huge debts with the kind of interest rates that are exorbitant. We would not want to move away from Charging Orders per se because they have a place. The issue that we would want to see addressed we will address in a different way. I hope that will mean that Charging Orders will have a better reputation because they are used more effectively and where you have exorbitant rates of interest.

Q102 Chairman: The businesses that are using this are often household name credit card providers who find it a way of dealing with the debt problems they encounter and one which gives them the benefit of a charge, but they still have the high rate of interest they had when it was a credit card bill.

Baroness Ashton of Upholland: I take your point. I think we have got to look at this on the basis of the Consumer Credit Act. The issue of what has happened is that you have a court judgment which puts it in a slightly different position than it was in before.

Q103 Barbara Keeley: I want to ask some questions on the European Small Claims Procedure proposal which I understand the Department has begun giving some priority to during our EU Presidency. Firstly, will that procedure apply only to cross-border cases between EU Member States?

Baroness Ashton of Upholland: The proposal is that we will interpret Article 65 to mean cross-border only. Certainly in all of my discussions with the Council of Ministers, when I chaired the Council of Ministers on civil justice issues and in talking with the Commission, we are very clear that that should be the case. Belgium is still particularly keen to try and get both the order for payment and the small claims to apply internally as well. The view we have taken as Presidency is that, beginning with 21 states and now ending with 24 states, there is absolute clarity that this should be cross-border only and if people wish to adopt the procedure internally, that is for them to do within their own national legislation.

Q104 Barbara Keeley: We would have the two distinct systems with the European Small Claims Procedure applying where goods were purchased from individuals or countries in other individual Member States. Could you tell us what implications you foresee now? In one case you would be entitled to legal costs and not in the other. I just wonder how you view that. You could say that is a degree of complication to have two different sets of standards applying.
Baroness Ashton of Upholland: One of the interesting things about the working groups where all Member States come is that everyone arrives with their own system as being the model and, as you can imagine, there are 25 systems and 25 models. The principle we have adopted is that this is never going to work unless it is very simple, straightforward, easy for people to use and it is cheap and that means a largely paper based system so that you make your claim on paper and if you have to appear for a particular reason, we try and use, where we can, new technology to do that, so video conferencing and so on. As I mentioned earlier, I brought some Members of the European Parliament from different countries over to look at small claims. One of the things some of them were particularly interested in is the role of using telephone conferencing, not to try and settle the claim, but to try and deal with some of the issues. In a sense we have tried to develop the scheme as far as we can that way because if we get into the business of trying to replicate a system here we will end up with huge costs and huge difficulties. There are going to be difficulties, for example, about translation. One of the proposals we have just put forward into the working group, if you think of the number of documents you can have in a small claim, is rather than having all the documents translated, you simply have a list of documents available to the court and the court determines which, if any, it feels it needs to have translated to keep costs down. We have not yet got a fixed position across Member States on costs because some would want to be able to recover all the costs of the person who lost. Our view is we want to have a system where people deal with their own costs as far as possible with perhaps the reservation of the court if there were particular circumstances. It is not meant to be a comparable system because it is trying to deal with a very particular set of issues about people purchasing or dealing with goods across Member States. However, if it were a system that was very successful I anticipate some Member States—maybe us, I do not know—might begin to adopt, at least in part, some of the principles of the scheme because it works very well.

Q105 Barbara Keeley: Are there implications in terms of equipping courts with video and telephone conferencing facilities? Presumably there are.
Baroness Ashton of Upholland: There are. What we have to do is work with the technology of each nation state. There are also cultural differences. For example, German colleagues in the European Parliament cannot deal with the idea of using the telephone to do anything because it is not at all what you would do in Germany, which is why they were keen to come and look at what we were doing. In some courts they have fairly sophisticated systems and in others they do not. I think we have to work with states as they develop this, enabling them to get involved in the scheme. Meanwhile we are going for the paper based system because everybody can deal with that.

Q106 Julie Morgan: Does the Government have any plans to raise the small claim limit for housing disrepair cost cases?
Baroness Ashton of Upholland: We have a consultation which is about to begin looking at the issue of raising costs. You will know that there are very different—and I think you had equal and opposite views on this—and very strong views about, particularly because housing disrepair and personal injury tend to get locked together, what is an appropriate level where people do need expertise and guidance from legal advice and equal and opposite views that say you do not and that nowadays when you think about what you can get on a personal injury claim, £1,000 is very low.

Q107 Chairman: We will come on to personal injury in a moment. We are just trying to deal with the other cases.
Baroness Ashton of Upholland: We are going to consult right across the board on this to see whether we can get some general consensus on it.

Q108 Julie Morgan: Are you aware that in the Wales and Chester circuit there were only 24 non-possession housing disputes disposed of in 2004? It does seem such a small number that I wonder if tenants, in particular, are not deterred from going into the small claims court because of the lack of representation, the lack of Legal Aid and whether this small number reflects the fact that they think there is no point in going.
Baroness Ashton of Upholland: That is one of the reasons for having the consultation. In some areas of housing Legal Aid is still available. There is an issue about the most vulnerable tenants, who are often very vulnerable people, being supported appropriately and that is what I want to explore as part of the consultation. If we simply raise the limit but do not deal with the vulnerability of the individuals then I am not sure we will have achieved

what we want to do. I did not know about the Wales and Chester circuit. There are examples we need to look at as to where the courts are finding that people either are not coming forward or where they are very certain that, if people are going to come forward, they are going to need advice and the support perhaps of a solicitor in order to do that, and I want to check and test that out very carefully before we make any decisions.

Q109 Julie Morgan: Has the Department done any research on that at all?
Baroness Ashton of Upholland: We have not done any specific research on it as far as I am aware, but there will be research going on to inform what we send out in the consultation paper. I have not seen the consultation paper yet because it is not due to come to me until the end of this month and therefore it has not yet reached the pile on my desk. We are trying to get from our stakeholders and people who are involved in the small claims world some very clear views as to how best we can take this forward because small claims is a success story and we need to make sure we keep it that way.

Q110 Julie Morgan: At the moment a £1,000 small claims threshold applies only to those housing disrepair cases with claims for outstanding repairs. Should £1,000 apply to all housing disrepair cases?
Baroness Ashton of Upholland: I want to think about that. There are arguments that you could easily make that say it would be logical to extend it, but we need to make sure that we have got this right. I pick up that there are different views about what makes most sense again depending on what you are trying to achieve for the individual concerned. I just want to check and confirm that we have that right before we make any moves in that direction. I am not trying to avoid answering the question. I genuinely do not know at this stage whether we should or we should not and it is much better to consult people who can tell us what would make most sense.

Q111 Chairman: If you know what the repair cost is and the landlord has persistently refused to do it and you have got a couple of estimates which give you a reasonably reliably indication of what it would cost you and it is £1,500, is not a £1,000 limit unnecessarily restrictive and your opportunity to do it at minimal cost by going to the small claims court?
Baroness Ashton of Upholland: If that were the issue then that makes a lot of sense. We will have to check the way in which we have set up the system and make sure the opportunities people have to get local support fit together. I do not know whether that means we should raise the help or whether we need to be clearer about the kind of cases that are appropriate for small claims. We just need to test it out properly. I am not evading your question; I just think we need to think about it. I do get very different views depending on who one talks to about whether we ought to raise the limit or whether we ought to think more carefully about the use of Legal Aid or do it slightly differently.

Q112 Chairman: What is the Government's general view on raising the limits because not to do so economically would be to assume that the small claims court should somehow freeze and take a decreasing proportion of cases? To raise it by a modest amount might be to recognise that the small claims track could do rather more with things like that, where the amount involved is not really so large in modern terms that you want to incur serious legal costs by going into the normal county court procedure.
Baroness Ashton of Upholland: That is precisely why we are consulting. You are absolutely right, it is important that we keep in our minds whether the limits are right at the moment or whether they need to go up. I do not want to prejudge the consultation. We want to ask people what they think should happen and then we will look at, both in terms of housing and personal injury; whether we need to do something different and I do not want to prejudge that. When we have got the results of the consultation I will be very happy to come and share them with you.

Q113 Chairman: The Better Regulation Task Force has views on the subject.
Baroness Ashton of Upholland: It certainly does.

Q114 David Howarth: I just wanted to ask whether the consultation will cover the particular phenomenon that a lot of us are seeing when we go to the small claims courts, which is that the party themselves agree to the small claims track even with higher value claims or that they litigate only one part of their claim to keep within the limit. Does that not show there is some sort of market demand out there for the small claims track and that that is perhaps an argument for raising the limit?
Baroness Ashton of Upholland: Indeed.
Mark Ormerod: You can argue it the other way round, that in some circumstances the limit is immaterial because the District Judge can assign or the parties can agree in relation to where it goes. I think that cuts both ways. There is provision if the case is just over the limit for District Judges to allocate it.

Q115 Chairman: With the consent of the parties.
Mark Ormerod: That is true.

Q116 Dr Whitehead: I think you have anticipated some of the thoughts that the Committee might have about personal injury. As you certainly alluded to, we have had a lot of evidence about small claims already before us on this Committee. On the one hand, an argument that as far as personal injury is concerned, litigants would be desperately disadvantaged because there would be no equality of arms because by and large in personal injury they would be facing perhaps an insurance company or a well-supported defence without legal representation of their own and, on the other hand, evidence that the vast majority of personal injuries would be outside the limit now and information about small scarring on the male visage would not be within the

small claims area, for example, and virtually no personal injuries other than whiplash from which you have recovered almost immediately would be. There seems to be irresistible force meeting movable objects arguments. Where do you think the Government stands on the force of those particular arguments, particularly in terms of arguments on inflation and indeed what the Better Regulation Task Force considered?

Baroness Ashton of Upholland: This is precisely why I want to consult on it. As you rightly say, the strength of feeling on this is very strong. There is a concern that when you are dealing with personal injury you quite quickly get to a point where people may need real expertise and possible legal support. On the other hand, as you rightly say, if you look at the kind of costs or the way in which redress happens and the amounts of money, you are very quickly beyond the limit. At this point I am not sure which way we ought to go and that is why I think one of the great advantages of doing a genuine consultation—and this is—is to try and get a sense from the different parties involved, not just the obvious and equally opposite parties, about what would make most sense for the Government. We will be very mindful of not making people more vulnerable, that is the critical underlying issue for me, but if we believe that by changing it we create more vulnerability for individuals, where they are not able to get the support that they need to achieve what they need, then I would not want to do that. We need to be very clear about that. The starting point is what is best for the individual in making these claims, how would the small claims service be able to provide support, what are the kind of limits that there ought to be and then we will discuss it and, of course, the Lord Chancellor will make his decision.

Q117 Dr Whitehead: A suggestion for a starting point could be a number of anomalies would continue to exist in the world of small claims generally, for example the extent to which claimants in personal injury would be able to recover legal costs for relatively trivial personal injuries where they made a full recovery, but were they to enter a comparable claim, not on personal injury, they would not be able to recover legal costs. Presumably that anomaly would need to be tucked in to whatever might be decided.

Baroness Ashton of Upholland: Yes. You could also argue the anomaly is a very important factor. If you have got somebody who is injured and therefore in a very particular way vulnerable then they may incur particular costs which they could not possibly avoid in order to get the expertise they need to make their claim. I know you can argue it in other areas as well, but I would argue that in personal injury it is a particular issue. Then you would have to be clear that what you describe as an anomaly is not actually just a very good way of making sure those people get the best support. The plan is to look very carefully at what people need to make a good and genuine claim, what are the limits that make most sense where you are not making people more vulnerable by increasing the limits and how we make sure that we recognise the amounts of money that are genuinely and generally payable to people at this stage. If we can try and find some way through that then hopefully we will end up with a policy at the end of it that takes on board all those issues and may or may not change the limit and may or may not iron out what might be an anomaly but also could be seen as a positive.

Q118 Dr Whitehead: Have you undertaken research as a Department, for example, on the extent to which having a lawyer present in relatively low value personal injury claims does bring any value compared with, say, other equally complex claims not of the personal injury nature where perhaps there is no added value but nevertheless a resolution is achieved?

Baroness Ashton of Upholland: I am smiling partly because of the concept of added value in a case. My experience of small claims is that I have sat through cases where I am not sure the lawyers did bring much added value and I have sat through cases where, not having a lawyer, the people conducted their own prosecution or defence magnificently. I do not really know how we would go about looking at what is genuine added value in that sense because I think it depends on the quality of the legal advice and it depends on the particular set of circumstances. Having said that, I take your point, which is that the purpose of the small claims process generally is to allow people to conduct themselves, with the support of the judge, with better advice in advance and not to have to have recourse to lawyers if that is not what is needed. The ultimate objective is to make it as simple and easy a process that people feel confident with in order to deal with what are minor but important issues for individuals.

Q119 Dr Whitehead: Indeed. There is at least an arguable claim put forward certainly on behalf of District Judges that the added value perhaps comes from the different ways in which the court operates and the guidance is thereby given. Would your consideration include those sorts of aspects in terms of what you yourself mentioned was the difficult concept of added value as far as the intervention of a lawyer is concerned?

Baroness Ashton of Upholland: My overall ambition for small claims is that people only involve the legal profession, who have got plenty to do in other areas, where that is necessary and ideally for many of these claims what we are looking for is people to feel able to come into court. The judges I have seen working do a fantastic job in helping and guiding people through the process and making it very simple and very straightforward, at the end of which they are able to dispense justice and people feel they have got something out of it. It has been cheaper for them, it is cheaper all the way round and I would argue it is as good a system as having the more formal situation with the legal profession there. That is an ambition. It does not mean that in every circumstance it is inappropriate to have legal advice present in the

form of a lawyer or a junior barrister. I have seen all of these in operation. My ideal is that, where possible, people do not feel the need to do that.

Q120 Dr Whitehead: Presumably your pilot might have some bearing on this.
Baroness Ashton of Upholland: I hope so. If people get better quality advice to begin with and are able to come into the court system feeling more comfortable—because it is daunting, although the judges do a magnificent job at putting people at ease—then that will be very beneficial. I think it is the way we ought to go with this when we can.

Q121 Jeremy Wright: It did occur to me from what you were saying about the Small Claims Support Service that it might have the potential to deal with one of the points that was made by the Association of District Judges to us, which was that although they did not necessarily think the presence of lawyers within the claims hearing itself was of particular benefit in every case, they did think that legal advice before you got to the claims hearing was extremely valuable and no doubt helped in narrowing down the issues. You would say the Small Claims Support Service might have a role in helping people to do that. The other thing I wanted to ask you about was the equality of arms point which is being made to us by a number of different bodies, not all of whom, I accept, are entirely impartial on the subject. One of the scenarios which occurs to me which may cause difficulty is that even if legal costs are not recoverable within a small claims hearing and therefore neither party would be able to get back the money they have paid for legal advice, if you have a scenario in which somebody is making a relatively small value claim against either an insurance company or a holiday company or something of that nature, the holiday company or the insurance company may still think it appropriate and indeed vital to have legal advice and assistance because the value of the claim, although it may be small in each individual constituency, if it were to open the floodgates to hundreds and hundreds of claims, would cost them a great deal of money. In the interests of preventing a precedent they might think it appropriate to have quite high value legal advice. Does the Government have any thoughts on how in a small claims environment you avoid the process being hijacked by high value legal advice creating a real inequality of arms problem?
Baroness Ashton of Upholland: I have seen exactly the situation that you describe, where it is just the norm that an insurance company or whoever will bring with them their in-house or their usual barrister. I think there is a particular onus in a sense on the judge in those circumstances to make sure that the individual who is not represented is able to deal with this. I do not think in any court you can always guarantee that you will get equal quality because, as you will be aware, people can afford different people and there are different qualities of members of the legal profession. Therefore, you do find that that can be the case. We have, fortunately, in this country a very good system where the judges are very clear about the way in which they wish to ensure that justice is done and whether that is in a case where someone chooses to defend themselves, which of course they are entitled to do in a major case or in small claims, it is a responsibility of the court to make sure they do get equality. Whether or not you agree that that is always the case, I think we have to work on the principle that that does happen and that justice is dispensed fully. The experience, which is not huge, that I have gained of watching cases where that could happen is that it does not follow that because you have got a high paid barrister you win. It follows that you will have good legal argument and the judge will have a slightly different conversation, but the conversation they are having with the other individual may be of a different type. I am reasonably confident from what I have seen that we have got that about right.

Q122 David Howarth: Also on this point about early legal advice being better than late legal representation, has the point been made to you that, whatever the answer is, to try to produce a situation where people get early advice does lead to better settlements because people realise what the situation is? The answer probably is not the traditional cost rule as found in the other tracks because what that tends to do is to encourage people to pile costs in late. It is like a bet where the pot is getting bigger and they are tempted to try and bet more at that stage. Obviously we need to find the answer, but I doubt the answer is the one put forward by the Association of Personal Injury Bodies.
Baroness Ashton of Upholland: You may well be right in that. Our concern is to make sure that the quality of advice that people get at the beginning, not only through the courts, a lot of people go to Citizen Advice Bureaux, to law centres, to other methods of support, is as good as it can be. So people set off down this journey and once they have got to the court process we need to make sure we provide them with the support in the courtroom they need to do this. That is a much better solution in my view than any other.

Q123 Mr Khabra: In personal injury cases worth less than £2,000 or £2,500 detailed and very expensive reports are produced which may be totally unnecessary. Do you consider that, in view of the judges' views on this, they are totally unnecessary? Has your Department considered the use of a simpler system in personal injury cases worth less than £2,500 whereby a more basic medical report could be presented rather than a detailed expensive one by experts? My personal view is that it often happens that the legal cost of the case is much higher than the value of the claim itself. Would your Department be prepared to consider a simpler method?
Baroness Ashton of Upholland: We are very keen, as part of the whole way that we look at streamlining the systems, to make sure that we keep things as simple and as cost effective as possible. It is always difficult on personal injury cases to generalise about why people have spent more money on one

particular report than another. In general terms you are absolutely right. It seems to me that we are trying to find ways that the costs of the case in a sense do not exceed what the person is seeking to claim. There will be exceptions to that. What we would like to do is make the system as streamlined and simple as possible and to use the right kind of reports and to make sure that the courts get the right kind of information. Again, in some cases there seems to be heaps and heaps of documentation and information, not all of which you could argue is particularly necessary. With the way that judges move them around you can tell that they have a lot of information that is superfluous. Partly that is about better advice to begin with to individuals about what is needed and what is relevant rather than sending everything. You have a good point, if we get the system to be more streamlined and more straightforward, which is what we are seeking to do, then the reports themselves could become that and inevitably more cost effective. Yes, we will be looking at that.

Q124 Chairman: If a case goes out of the small claims court either on appeal or because it is re-allocated the claimant loses the cost protection which they have got in the small claims court and that can mean that a well endowed party with substantial means can then deter a claimant from taking the matter further. I know you are consulting on whether this could be carried forward in the small claims court. Can you say anything more about that?

Baroness Ashton of Upholland: We are asking people whether they agree that what we should do is continue, even though it moves into a different track, to have the same cost base as the small claims on the grounds of fairness. That is where people started off, that there is a choice to be made about moving it into a different track that may be the right track for all sorts of reasons, but someone could then be confronted with a cost base that they were not expecting and perhaps they would have made a different decision. The consultation is asking whether or not it is better that we stick with the small claims costs if a case moves out into a different track. I have not had the results yet otherwise I would share them with you.

Q125 Chairman: You are looking at that both in relation to appeals and in relation to mere re-allocation, are you?

Baroness Ashton of Upholland: Exactly.

Chairman: I think those are all the points that we wanted to put to you today. We are very grateful for the time and attention you have given to the matter. Thank you very much indeed.

Written evidence

Evidence submitted by the Department for Constitutional Affairs

1. Introduction

1.1 This memorandum provides details of the small claims procedure and its context, as well as information about relevant initiatives. We understand that the Committee is particularly interested in assessing whether the procedure:

- facilitates access to justice
- is simple and informal
- operates effectively and efficiently
- allows cases to be allocated properly
- whether financial limits should be reviewed

1.2 The memorandum will cover each of these areas:

Section 2: Describes the small claims procedure and its usage.

Section 3: Examines the accessibility of the procedure and litigants' views, and gives details of various initiatives aimed at increasing accessibility.

Section 4: Focuses on the procedure's efficiency and effectiveness, including the processes of enforcement.

Section 5: Covers the allocation process and the use of the allocation questionnaire in small claims.

Section 6: Looks at the development of the financial limits and the arguments for and against change.

Section 7: Gives information about the proposals to develop a "small claims" procedure for cross-border claims across the European Union.

The Committee is being provided separately with:

- copies of the leaflets and forms provided to those bringing/defending a claim in the county court.
- copies of the report of research carried out by Professor John Baldwin in 2002 on *Lay and Judicial Perspectives on the Expansion of the Small Claims Regime* (Lord Chancellor's Department Research Series No 8/02).
- copies of the discussion paper *Telephone Hearings in Civil Proceedings* (CP 14/05).
- copies of the consultation paper *Proposed changes to Civil Appeal rules* (CP 20/05).

All tables and charts in this memorandum are drawn from the Department's *Judicial Statistics Annual Report 2004*.

2. The small claims procedure

2.1 The small claims procedure is one of three case management "tracks" to which defended civil claims in the county courts are allocated by the court. The other tracks are the fast track and the multi-track. The system of allocation is a key part of the case management approach, and was introduced as part of the Civil Justice Reforms following Lord Woolf's Review of the civil justice system in England and Wales. All proceedings in the county courts are governed by the Civil Procedure Rules (CPR). Through allocation, the court aims to ensure that cases are dealt with in a manner appropriate to their value and complexity, and at proportionate cost.

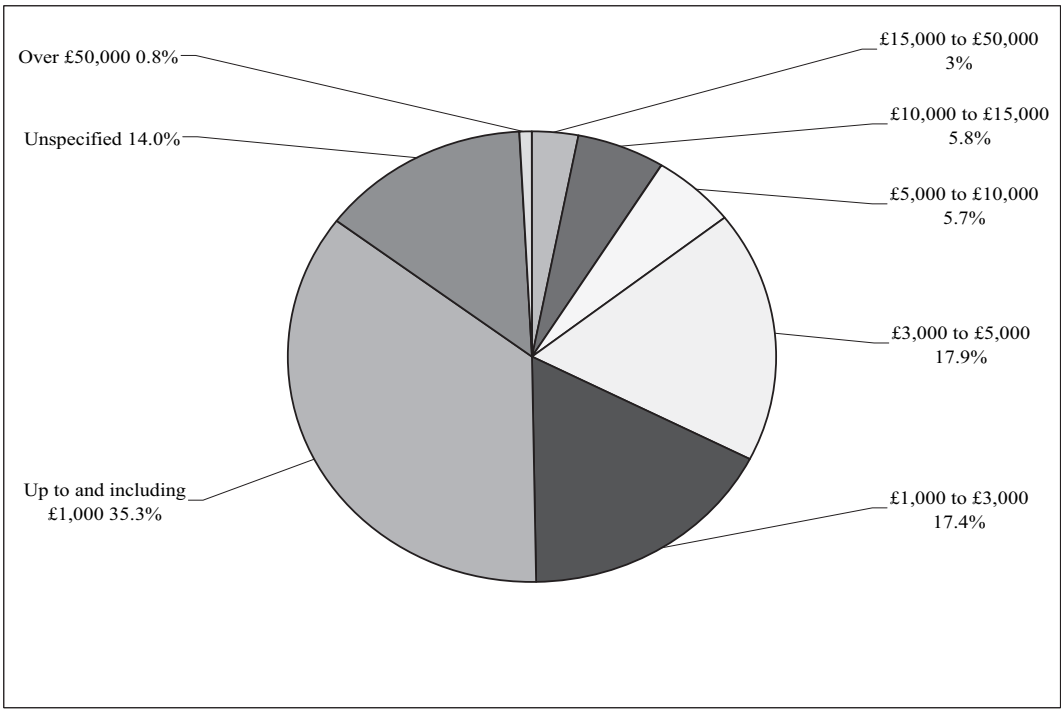
2.2 The simplest way of distinguishing between cases is on the basis of value, and each track has value limits which determine the normal track for the case, though the court will take other factors into account when deciding to which track the case should be allocated. A case may be allocated to a "higher" track (eg a case with a value appropriate to the small claims track allocated to the fast track) if it is unusually complex. Allocation to a "lower" track (eg a case with a value appropriate to the fast track allocated to the small claims track) may only take place with the consent of both parties.

2.3 The current value limits for small claims are:

- for claims for damages for personal injuries: £1,000
- for claims by tenants against landlords seeking an order requiring the landlord to carry out repairs: £1,000 for the repairs (or other work required) and £1,000 for any other damages claimed
- for all other claims: £5,000

2.4. The vast majority of claims issued in county courts in England and Wales are at values below the small claims limits.

COUNTY COURT CLAIMS ISSUED BY AMOUNT OF CLAIM, 2004



2.5 Although most of these claims are not defended, or settle before a hearing takes place, small claims are still the dominant form of proceedings in county courts.

PROCEEDINGS DISPOSED OF BY TRIAL OR SMALL CLAIMS HEARING BY CIRCUIT, 2004

Circuit	*Number*	*Trials %*	*Number*	*Small Claims %*
Midland	2,096	13	6,378	14
North Eastern	2,047	13	5,941	13
Northern	2,942	19	4,237	9
South Eastern:				
London	3,858	25	9,131	20
Outside London	2,395	15	11,431	25
Wales & Chester	1,157	7	2,704	6
Western	1,239	8	6,278	14
England & Wales	**15,734**	**100**	**46,100**	**100**

2.6 A wide variety of types of claim are dealt with in small claims hearings, although the majority is debt claims.

PROCEEDINGS DISPOSED OF BY SMALL CLAIMS HEARING, BY NATURE OF CLAIM AND BY CIRCUIT, 2004

Circuit	*Personal injury*	*Other negligence*	*Debt*	*Non-possession housing disputes*	*Other*	*Total*
Midland	708	564	4,291	60	755	6,378
North Eastern	353	563	4,526	71	428	5,941
Northern	764	386	2,589	47	451	4,237
South Eastern:						
London	1,896	992	5,423	180	640	9,131
Outside London	1,079	1,293	7,990	148	921	11,431
Wales & Chester	319	300	1,811	24	250	2,704
Western	491	541	4,720	47	479	6,278
England & Wales	**5,610**	**4,639**	**31,350**	**577**	**3,924**	**46,100**

2.7 The purpose of the small claims procedure is to provide a forum in which relatively straightforward, low value claims can be dealt with in an accessible and user-friendly way, quickly and at proportionate cost. In order to fulfil this function, the procedure is:

— *simple*—care has been taken to design the leaflets and forms for small claims to make them easy for "lay" people to understand and use; the normal procedural rules do not apply in small claims, and the judge may not take evidence on oath; there are limits on the witnesses, including expert witnesses, who can be called, subject to the court's agreement

— *informal*—the rules require the hearing to be conducted in an "informal" way, and the district judge is free to interpret this to meet the needs of the claim and the parties. Whilst hearings can be in a formal court setting, most are held in the judge's chambers, where the judge (in ordinary clothes) and parties sit around a table

2.8 Perhaps the most important factor in making the small claims procedure accessible is what is known as the "no costs" rule (CPR Part 27). The costs that can be recovered by the successful party in a small claim are strictly limited. For most types of claim, the court may only award:

— court fees and fixed commencement (solicitor) costs (under CPR Part 45)

— limited loss of earnings for party and any witnesses (currently £50 per day) plus travelling and overnight expenses; and the fees of a permitted expert (currently limited to £200)

— where the claim includes the requirement for an injunction, a further amount (currently £260) can be claimed for legal advice and assistance in preparing the claim

No costs can be claimed for legal representation or for the services of a "lay representative".

2.9 Although lawyers are not banned from small claims hearings in England and Wales (as they have been in some other jurisdictions), the lack of potential cost recovery discourages the use of representatives. That said, many small claims result from a car accident and parties to this type of claim are usually represented under the terms of their insurance policies. At the same time, the "no costs" rule is a major factor in reducing the risk at which parties are put by participation in a small claim. Research carried out in 1997[1] into the experience of those whose case was heard in "open court" (rather than in the small claims forum) found that "costs can . . . become the single overriding concern, and the anxiety and trauma of being entangled in the civil process itself can come in time to assume even greater significance for litigants than whatever was involved in the original dispute".

Costs in small claims appeals and transfers to another track

2.10 There are two circumstances where someone issuing or defending a low value claim could be liable for higher costs: where the case goes to appeal, or where it is allocated to a "higher" track. A consultation paper was issued last September, for response by 4 December, proposing changes to this. Copies of this paper: "Proposed changes to Civil Appeal rules" (CP 20/05) have been provided to the Committee. Below is a summary of the proposals.

Appeal costs

2.11 If a small claim goes to appeal, the "no costs" rule ceases to apply, and a party risks paying the other party's costs in full. This could deter unrepresented small claimants, who may fear that a wealthy defendant, with whom they would be on relatively equal terms at the initial hearing, might appeal an adverse judgement with a view to taking advantage of their greater financial resources. The threat of potentially unlimited costs on appeal might persuade a claimant not to appeal, or to fail to resist an appeal or even dissuade them from bringing the initial claim. The consultation paper proposes that a limit be placed on costs payable on appeal from a small claims track decision. Views are sought on three potential options:

— no change

— a cap of £1,000 on all costs between parties

— the costs rules in CPR Part 27 which apply to claims should apply to appeals also (ie only witness expenses and court fees in most cases)

2.12 However, it is proposed that costs may be ordered (as in CPR Part 27) where a party behaves unreasonably or where the appeal, on being heard at a substantive hearing, turns out to be without merit. The purpose of this last qualification is to prevent the appeals process being abused in the attempt to prolong proceedings in hopeless cases.

[1] *Monitoring the Rise of the Small Claims Limit: Litigants' experiences of different forms of adjudication,* John Baldwin, LCD Research Series No. 1/97.

Costs following allocation/reallocation to another track

2.13 A similar problem arises where a case which falls within the financial limits for the small claims track exposes litigants to the fixed costs regime in that track and transfer to the multi-track would potentially expose them to unlimited costs. A litigant who makes what he presumes to be a small claim may not necessarily be aware that the allocation to another track exposes him to a different costs regime. Where this happens, there is little he can do, save to discontinue the claim, which would still leave him, as the party who discontinued the claim, liable for costs up to that point.

2.14 The consultation paper (CP 20/05) therefore proposes that in these cases the small claims costs limits under CPR Part 27 should apply. However, because cases that begin as small claims but which are allocated to another track are usually more complex than cases which are dealt with in the small claims track it may not always be appropriate to apply CPR Part 27 costs. For that reason it is proposed that the court should be able to order that normal fast track or multi-track costs should apply.

2.15 Similarly it is proposed that the parties should be able to agree to fast track or multi-track costs if they consider that is appropriate in the context of the issues at stake. Because of the flexibility this approach would provide, a monetary cap similar to the one suggested for small claims appeals is not proposed, although it is open to respondents to suggest this.

3. Accessibility

3.1 Lord Woolf, in his Interim Report,[2] described the small claims procedure as "the primary way of increasing access to justice for ordinary people". Ensuring that the procedure is accessible to "ordinary people" is thus a primary aim of Government policy. Every effort is made, through the provision of leaflets and forms in Plain English, to make it easy for people to take advantage of it. Success in making the procedure accessible can be measured in a variety of ways. It is clear from the data in part 2 of this memorandum that a very large number of people use the small claims procedure, and that the majority of the participants in small claims hearings are individuals.

SMALL CLAIMS HEARD BY NATURE OF CLAIM, TYPE OF CLAIMANT AND DEFENDANT, 2004

Nature of claim	*Claimant Individual*	*Firm*	*Corp*	*Total*	*Defendant Individual*	*Firm*	*Corp*	*Total*
Debt	15,330	6,370	10,010	31,710	19,200	5,630	6,880	**31,710**
Negligence personal injury	1,250	200	120	1,560	1,130	270	160	**1,560**
Other negligence	5,080	80	660	5,830	3,250	860	1,720	**5,830**
Non possession	390	—	80	470	470	—	—	**470**
Other	5,000	590	940	6,530	3,520	1,410	1,600	**6,530**
Total	**27,060**	**7,230**	**11,810**	**46,100**	**27,570**	**8,170**	**10,360**	**46,100**

3.2 It is important to take account of litigants' views and experiences, and the Department has commissioned extensive research over the past decade to explore these. The results of this research are quoted below, and a copy of the most recent report, dating from 2002, has been provided to the Committee. The Department is also taking forward a range of initiatives which are intended to increase accessibility by:

- allowing money claims to be made online
- enabling hearings to be conducted by telephone
- making alternative dispute resolution more readily available to those with small claims

These initiatives are described in more detail below.

Litigants' experience of small claims

3.3 Three major pieces of research, all carried out by Professor John Baldwin of the University of Birmingham, have examined litigants' experience of small claims. The first, published in 1996, examined the efficacy of the small claims procedure to deal with claims below the limit of £1,000 that was then in force. The second research exercise was published a year later. This work took advantage of the rise from £1,000 to £3,000 to compare the experiences of those whose claim had been dealt with in the small claims procedure with the experiences of those whose similar value claim had been dealt with by trial. The third and most recent research exercise, published in 2002, looked at the views of litigants and the judiciary following the rise in the small claims limit to £5,000, and the procedure's position in the context of a civil justice system reformed on the basis of Lord Woolf's review.

[2] *Access to Justice* by the Right Honourable the Lord Woolf, June 1995.

3.4 In his interviews with litigants who have taken part in small claims proceedings, Professor Baldwin has consistently found that the overwhelming majority "could be said to be broadly satisfied with the way their cases had been handled and sympathetic to the informal approach that had been adopted".

3.5 According to his 2002 study:

> "as many as five out of six litigants said that, as a result of their experiences, they would not be put off from appearing again in the future at a small claims hearing should the need arise. Moreover, litigant satisfaction seemed to be high regardless of the criterion that was used to measure it. Thus, for instance, 72.2% of the litigants interviewed said, without reservation, that they were given a fair hearing; 80% raised no serious complaint about the way that the judge had handled proceedings; as many as 87.9% said that they were given a fair opportunity to say all they wanted at the hearing; and 85.7% claimed that they could understand what happened at the hearing without difficulty."

3.6 It is clear from the research that litigants find the procedure accessible, and that two of the major factors underpinning this are the reduced costs risk and the informal approach. As one of the respondents in Professor Baldwin's 1997 research put it:

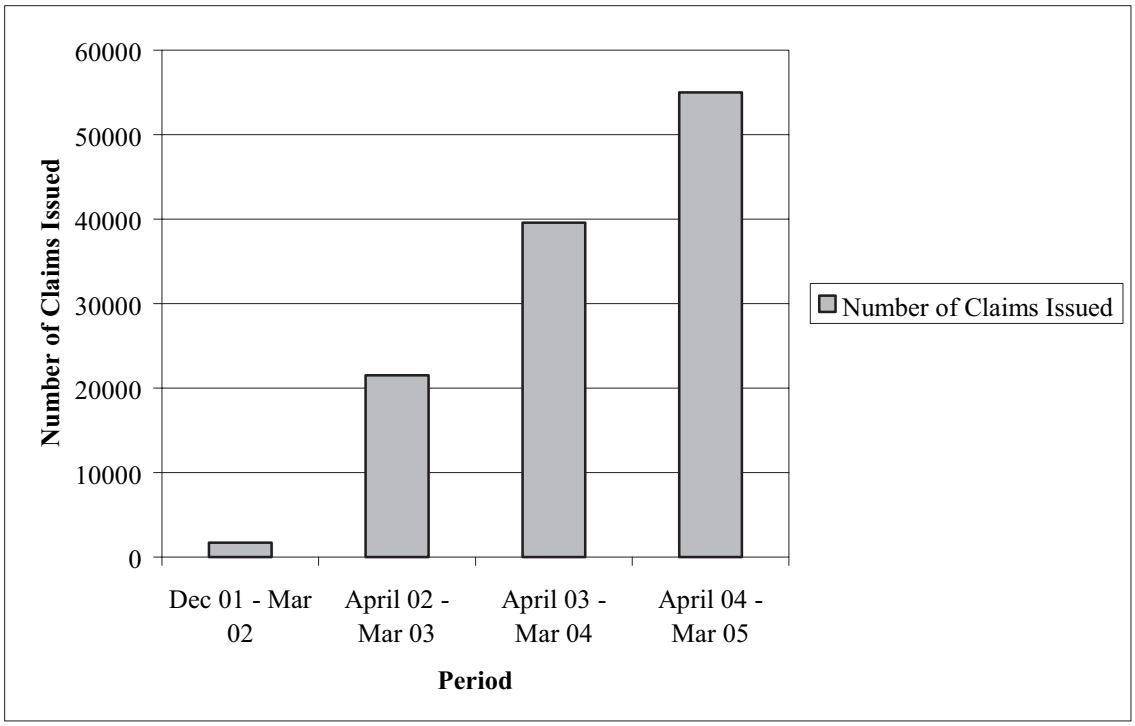
> ". . . We were able to go and argue it out in front of someone knowing it wasn't going to cost us a fortune . . . We both felt that we'd been able to deal with the problem in a way that left us both feeling satisfied. In other words, someone had listened to what we both had to say and judged it on an objective basis . . ."

Money Claim Online

3.7 Money Claim Online (MCOL), the Court Service's (now part of Her Majesty's Courts Service) first online service, came into existence in December 2001. The initiative offers a simple, convenient and secure service that enables individuals and organisations to issue claims over the Internet. MCOL allows claimants to request a claim online (for a fixed sum under £100,000), view the progress of a claim and, and where appropriate, request entry of judgement and enforcement by warrant of execution. Payment of any related fees is either by credit or debit card. If the claim is undefended, the money can be recovered without anyone having to go to court.

MCOL is now issuing more claims than any local county court—55,007 claims in 2004–05 compared to 39,589 in 2003–04. Over 90% of claims issued in each of these years were for £5,000 or less.

MONEY CLAIM ONLINE ISSUE FIGURES SINCE LAUNCH IN DECEMBER 2001



Telephone hearings

3.13 At present the court may order that an application or part of an application be dealt with by a telephone hearing. Telephone hearings should enable those who find attendance at court difficult, eg because of a disability or a caring responsibility, to take part in a case which affects them, improving access to justice. A pilot scheme was introduced in 1 September 2003 at a number of courts with a view to extending the range of hearings which may be conducted by telephone to include the following:

- hearings about allocation of cases to the appropriate case management track (small claims, fast track or multi-track)
- hearings about listing for trials
- interim applications eg for injunctions, conferences about how the case should be managed or reviews of cases pre-trial with a time estimate of no more than one hour

Any other application with the consent of the parties and the court's agreement.

3.14 These types of hearing may take place on the telephone unless all the parties are unrepresented; more than four parties wish to make representations at the hearing; or the hearing could result in the final determination of the whole or part of the proceedings.

3.15 The courts and the dates of the pilot are as follows:

Newcastle Combined Court Centre	1 September 2003–31 October 2005
Bedford County Court	1 February 2004–31 October 2005
Luton County Court	1 February 2004–31 October 2005

3.16 As a result of the emerging results from the pilot the Department launched a discussion paper: "Telephone hearings in civil proceedings" (CP 14/05) on 12 July, with a closing date for comments of 4 October. The Committee has been given copies of this paper. The outcome of the consultation will inform the extent and speed of any change to the current telephone hearings.

Alternative Dispute Resolution for small claims

3.17 As part of the Department's objective of encouraging "more proportionate and effective dispute resolution", Her Majesty's Courts Service (HMCS) has been launching a number of pilots and projects to increase the availability of alternative dispute resolution methods.

3.18 Most of these have to date focused on the development of court mediation schemes aimed at fast and multi-track cases, since mediation is often quicker, cheaper, and less adversarial than a court hearing, and may provide a better outcome for the court user. More recently, three pilots have been launched to establish the best ways to help people with lower value disputes settle their cases before a hearing. These new pilots are taking place in Exeter, Manchester and Reading.

3.19 All three small claims pilots are being evaluated by external researchers, and the results will be compared against a separate piece of research on small claims cases that go to a hearing.

Exeter

3.20 At Exeter, the Devon and Exeter Law Society (DELS) administers the scheme which is free to court users. The mediators conduct half-day mediation sessions at the County Courts at Exeter, Torquay and Barnstaple. Mediations last for up to an hour and are free to Small Claims court users. The pilot was launched on 1 June 2005 and will run for 12 months.

3.21 The current pilot draws on best practice from the small claims scheme that has been operating at Exeter since June 2002. Data collected by the Department as part of its evaluation of the scheme, showed that during the first two years of that scheme's operation:

- 432 cases were allocated to mediation (44% of all cases allocated to the small claims track during this period)
- 62% of cases allocated to mediation were actually mediated, and 69% of those cases settled at the mediation
- the average time from allocation to mediation appointment was 54 days, compared with 115 days for small claims hearings. Among cases mediated but not settled, the average time from allocation to small claim hearing was 158 days
- the vast majority of parties who attended mediations were unrepresented on the day, 87% of mediations involved litigants in person on both sides

3.22 Recent evaluation of the Exeter pilot has enabled the Department to make some changes to improve the scheme. Publicity and information have been improved, to ensure that litigants understand what is involved, and are aware that participation is voluntary. The training for mediators now places greater

emphasis on the specific skills required to mediate within the small claims track, and more time has been allowed for mediation appointments. The original scheme proved not to be economically viable, and the fee paid to DELS for each mediation session has therefore been reduced.

Manchester

3.23 The Manchester scheme has a trained in-house Mediator, employed by HMCS, to provide a free service for court users, which gives parties the option of a mediation session before the court hearing. Under the scheme, mediations, although not strictly time-limited, are expected to last up to one hour. If the mediation is not successful the case will progress to the hearing as normal. The scheme is initially based at Manchester County Court, although depending on the demand for the service, may be extended to other courts in the Greater Manchester Group. The pilot was launched on 13 June 2005 and will run for 12 months.

Reading

3.24 At Reading, the Small Claims Support Service has been set up to help customers in small claims cases who do not have a solicitor. This free service gives people the chance to talk to a small claims support officer who is a trained member of court staff, who will explain court procedures and help prepare them for their hearing. The support officer will also encourage them to consider resolving their dispute before the hearing by dealing directly with the person, company or organisation with whom they are in dispute. The pilot was launched on 6 June 2005 and will run for 12 months.

3.25 Those bringing claims in Reading also benefit from a pilot which trained staff to tell customers where they can get legal information about alternative dispute resolution, and to refer them to local advice providers. An increasing number of courts are now being credited as "Assisted Information Providers" under the Legal Service Commission's Community Legal Service Quality Mark scheme, to provide this type of help to litigants.

4. Efficiency and effectiveness

Timing

4.1 In keeping with the aim of providing swift resolution of relatively straightforward, lower value disputes, the lead times and hearing times for small claims are significantly shorter than those for claims in the other civil justice tracks:

AVERAGE WAITING AND HEARING TIMES FOR SMALL CLAIMS, BY NATURE OF CLAIM, 2004

Nature of claim	*Average waiting time in weeks (Issue of claim to start of small claims)*	*Average length of small claim (Minutes)*
Debt	25	76
Negligence personal injury	25	75
Other negligence	25	85
Non-possession housing dispute	23	84
Other	24	67
Total	**25**	**76**

AVERAGE WAITING TIMES FOR TRIALS BY CENTRE AND NATURE OF CLAIM, 2004

Average time between issue and allocation (weeks)	*Average time between issue and allocation (weeks)*	*Average time between allocation and trial (or date of disposal) (weeks)*	*Average time between issue and trial (or date of disposal) (weeks)*
London:	25	28	53
Personal Injury	28	31	60
Other	18	22	40
Outside London:	23	30	54
Personal Injury	23	29	53
Other	24	32	56
England and Wales	**25**	**28**	**53**

Figures are based on two months sample data and may not add up due to rounding.

4.2 As part of the SR2004 PSA 5 target the Department has taken forward, from the SR2002 PSA 4 target, the measure to reduce delays in small claims hearings. The target is to increase by 2%, from 79.9% to 81.5% by March 2008, the proportion of hearings which take place within the target time of 15 weeks from allocation to hearing. Performance is currently very good: July 2005 data shows 81.7% of hearings taking place within the target time.

Enforcement

4.3 The ability to enforce the judgement at the end of the procedure is a key element in the civil justice process. Enforcement in the county court is creditor led. Whilst the court can provide the creditor with information on the different types of enforcement available, it is for the creditor to opt for the method of enforcement he would prefer.

4.4 To assist the creditor in making an informed choice they may issue an application for an "order to obtain information". This is not a form of enforcement, but a procedure to obtain information about the debtor which will help the creditor to decide what, if any, enforcement step to take.

4.5 The debtor is ordered to attend court to be questioned, on oath, by a court officer. The information sought includes:

- employment status
- if appropriate, details of employer and wages or salary
- details of dependants and outgoings paid from income
- details of any additional income
- details of any property owned (house, car, caravan, etc.), which may have a saleable value
- details of any bank or building society accounts and the balances in them

Data issues/performance

4.6 The different types of enforcement available to creditors include:

- Attachment of Earnings
- Warrants of Execution
- Charging Orders
- Third Party Debt Orders

4.7 As enforcement commences after a judgement has been handed down, no distinction is made at this stage between judgements relating to small claims, to fast track claims, or to multi-track claims. Indeed, it is likely that much enforcement relates to judgements handed down "in default", where no defence to the claim was received, and the case was never allocated to a track. The data below covers all enforcement of judgements handed down in the county courts. Performance data is only collected on warrants of execution.

Attachment of earnings

4.8 An attachment of earnings order (AEO) allows a creditor to secure payment of a debt by applying for a court order telling an employer to make regular deductions from a debtor's salary, until the debt is paid in full. The outstanding debt must be over £50 and deductions can be made from earnings, pensions and statutory sick pay (but not social security benefits), but only after tax and national insurance contributions have been deducted.

4.9 AEOs are the second most popular enforcement method after execution against goods. Judicial statistics published in 2004 show that in 2003 79,511 applications were made for AEOs and 40,384 orders were recorded. It should be noted that this figure also includes re-directed orders.

Warrants of execution

4.10 The most common method of enforcement is the warrant (or writ) of execution against a debtor's goods, where, unless the amount due under the warrant is paid, saleable items owned by a debtor can be seized (by a bailiff) and sold to pay off the debt and costs.

4.11 A county court bailiff executes warrants of execution up to £5,000. The creditor can choose to transfer any county court judgment between £600 and £5,000 to the High Court for enforcement by writ.

4.12 Judicial statistics published in 2004 show that in 2003, 355,476 warrants of execution against goods were issued.

4.13 The performance data on writs and warrants are published in the Departmental Annual Report. According to the Annual Report of 2004–05, county court bailiffs' results for 2004 showed a collection rate against all correctly due and enforceable warrants of 90 pence in the pound. The High Court enforcement collection rates against all correctly due and enforceable writs were 58 pence in the pound.

Charging Orders

4.14 A charging order is a means of securing a debt by placing a charge onto the debtor's immovable property, particularly a house or land, although it can also be used against shares. A charging order also allows a creditor to apply subsequently to the court for an order for sale. Charging orders therefore provide a means by which a creditor can gain access to any equity a debtor holds in a property.

4.15 Judicial statistics published in 2004 state that in 2003, 34,756 charging order applications were issued.

Third Party Debt Orders

4.16 A third party debt order is a method of securing payment of a debt by freezing and seizing money owed or payable by a third party to the debtor. The debts most frequently targeted are accounts held with banks and building societies. Third party debt orders are the least used of all enforcement procedures.

4.17 Judicial statistics published in 2004 state that in 2003, 6,019 third party debt orders were issued.

Recent and planned changes

4.18 The Civil Enforcement Review arose out of Government's commitment to improve access to, and the efficiency of, civil justice in England and Wales. It is based on the premise that creditors who have established a legitimate claim should be able to pursue it through a straightforward and accessible system, and if necessary enforce a judgement by the most appropriate means. In addition, debtors who genuinely do not have the means to pay should be protected from the oppressive pursuit of their debts.

4.19 The Review began in March 1998, and the Report of the First Phase of the Enforcement Review was published in July 2000. As part of the review, views were sought first from small groups of experts and subsequently from a wider audience via a series of consultation papers. The Report concluded that "all enforcement procedures should be retained and improved. Each gives access to a different type of asset, and removal of any one of the procedures would deprive creditors completely of access to that particular asset." The Report contained 40 proposals, some aiming to improve the effectiveness of particular procedures, others designed to cut out delay. The proposals were split into those requiring primary legislation, those requiring secondary legislation, those requiring updated guidance, and areas where change was not recommended.

4.20 *Secondary legislative changes* delivered through the Civil Procedure Rules, came into effect in March 2002. The new rules provided unified procedures for the High Court and county court and aim to achieve more effective enforcement.

Part 70: Introduced new forms for the registration of tribunal and other awards for enforcement. The application to register must now contain a statement of truth.

Part 71: introduced "orders to obtain information", a streamlined procedure to achieve the debtor's questioning in a shorter period of time.

Part 72: Third Party Debt Orders—creditors do not need to supply details of the branch of the bank where a debtor's account is held. Under the new procedure, if the bank is served with an interim third party debt order it will have search for all accounts in that person's sole name and tell the creditor and court if there is enough money to pay the debt. Potentially all of the debtor's accounts may be frozen by an interim third party debt order.

Part 73: Charging Orders—a standard form is provided for the statement of truth. Proceedings must start where the case is proceeding although the debtor may ask for another court. Evidence for objections must be filed within seven days. A judge may make an interim charging order without a hearing.

4.21 Changes requiring primary legislation will be taken forward as soon as Parliamentary time allows, and are intended to include the following:

- Charging Orders:
  - Access to charging orders will be widened, so that a creditor can obtain a charging order against an asset even where the debtor is subject to an instalment order with which he or she is complying.
  - The extension of access to charging orders will be counter-balanced by the creation of additional safeguards to protect the debtor. The legislation will contain provision to set financial thresholds regarding applications for charging orders and orders for sale.

- Debtors who are not in arrears with instalments, and who wish to sell the property which is subject to a charging order, will be able to ask the court to lift the charging order to allow the sale to take place.

— Attachment of Earnings Orders (AEOs) Fixed Tables:

- County court fixed tables will specify, given the debtor's net pay over a certain pay period, the percentage of their salary that would be deducted each period to pay for the debt.
- There will be a lower limit (to be determined in secondary legislation) meaning those who earn under a certain amount per pay period would have a 0% rate.
- This is very similar to the way in which deductions under Council Tax AEOs currently work. This differs from the current system in the county court, where the court sets deduction rates; our consultation showed this can result in delay because it requires the completion of a means form by the debtor, and can lead to a lack of consistency in deductions from case to case.
- There will continue to be provision for any party to request a review of the fixed table deductions, meaning those who genuinely cannot pay will be protected.

— Attachment of Earnings Information Gateway:

- The Attachment of Earnings Orders (AEO) Information Gateway will open a legislative link between the civil courts and Her Majesty's Revenue and Customs (HMRC). Where a debtor is subject to an AEO and has failed to inform the court that they have moved to another employer, this will allow the debtor to be traced to their new job.
- Tracing will only occur if the debtor has failed to provide the court with new employment details when, and if, they change employment whilst an order is in place.

— Data Disclosure Orders:

- The Data Disclosure Order (DDO) will be a new mechanism enabling the court to seek information on a judgment debtor who has failed either to respond to the judgement or to comply with court-based methods of enforcement. Information will be sought from relevant third parties in both the public (HMRC and DWP) and private (banks and credit reference agencies) sectors, to help the creditor make an informed choice about how to enforce a judgement.
- Clear constraints will be imposed on the secondary use of data. Any personal data obtained and used under statutory powers for the purposes of enforcement will not be used or stored for secondary purposes. Information obtained by a DDO will only be used to enforce civil judgements, which are orders of the court.

5. Allocation Questionnaires in small claims

5.1 As explained in Part 2, where a defence is received to a civil claim, the case is allocated by the court to one of the three tracks. To help the court decide the track, both parties are sent an "allocation questionnaire" (AQ). This requests a range of information about the claim, and, in particular, about the way in which each party intends to prove their case—use of witnesses, experts etc. The questionnaire also asks each of the parties to which of the three tracks they believe the case should be allocated.

5.2 The court will consider various factors when deciding on allocation, in particular: the value of the claim, its apparent complexity, and the views expressed by the parties. The overwhelming majority of claims below £5,000 are allocated to the small claims track.

5.3 Some members of the judiciary, and other interested parties, expressed concerns that the unified system for handling claims (introduced in 1999) had made the procedure unnecessarily complex for small claims cases and particular criticism was made of the need to complete AQs for small claims. It was decided to test the need for an AQ in small claims cases by way of a pilot exercise in 2002.

5.4 Twelve county courts took part in the pilot. Seven pilot courts operated without AQs and the remaining five "control courts" continued to operate under the existing rules using AQs. Data collection sheets monitored the progress of claims through the two sets of courts and a comparison was made of the different processes the sample claims underwent to reach hearing or some other compromise. In order that the comparison was meaningful, it was important that the cases in each sample were broadly similar in type, value and party types.

5.5 The final report of the Pilot Scheme concluded that AQs should not be abandoned in small claims. The information collected demonstrated that in particular the AQ:

- promotes the settlement of cases rate
- makes the collection of allocation fees less resource intensive
- obtains information necessary to ensure appropriate allocation for example, regarding the need for experts and reduces the number of interim applications, saving resources

5.6 The major recommendation of the Report, which has already been considered by the Small Claims Sub-Committee of the Civil Procedure Rule Committee (CPRC), is that the format of the AQ and its notes for guidance should be reviewed to determine whether it could provide more help to litigants in person. The Sub-Committee will be making its own recommendations to the CPRC in November 2005. One option under consideration is the introduction of a separate and simplified allocation questionnaire for cases presumed to fall into the small claims track.

6. The small claims financial limit

6.1 The small claims procedure was first introduced in 1973, building on the judge's statutory power to refer cases to arbitration. The procedure itself has evolved gradually over the years, whilst retaining its essential informal character, and limited provision for cost recovery (see Part 2). The value limits have, however, changed very significantly. When the procedure was first introduced, the limit on claims that could be dealt with in this way was £75. This was raised only four times in the next 20 years, eventually in July 1991 reaching £1,000. Following Lord Woolf's Interim Report published in June 1995 the "general" limit was raised to £3,000 in January 1996.

6.2 At the same time, though, a system of differential limits was introduced. It was strongly argued that personal injury cases could not properly be dealt with in the small claims procedure because they were complex and it was difficult for litigants to assess the value of their claim. Whilst continuing to believe that personal injury claims below £1,000 were successfully dealt with as small claims, the then Lord Chancellor accepted that the value limit should not be raised in relation to this type of claim. Similar arguments were put forward by those involved with housing disrepair claims. Initially, this led to the special provisions for cost recovery in this type of claim (which will usually include the requirement for an injunction), and subsequently to a different limit being set for these claims: £1,000 for the disrepair itself and £1,000 for associated damages claimed. When, in April 1999, the general limit was raised further to £5,000 the two differential limits remained at the same levels.

Review of the financial limits

6.3 The Better Regulation Task Force (BRTF) in its report: Better Routes to Redress, recommended that the Government should carry out research into the potential impact of raising the small claims limit for personal injury claims. The Government undertook to carry out this research and at the same time indicated that it would review all the track limits. This work is currently underway and will inform a consultation paper which will be published in the Autumn.

Personal Injury

6.4 Those who oppose an increase in the personal injury (PI) limit point to the complexities of the legal process. They consider that PI cases involve complex evidence on which parties would require legal guidance, and the cost system of the small claims procedure does not allow the costs of this to be recovered. If the small claims limit were increased, so that claimants were likely to act as litigants in person, they believe that the claimant would have difficulty in:

- valuing the claim (and may thus be persuaded to accept less than their claim was worth)
- interpreting medical reports
- arranging for expert evidence

6.5 They also consider that increasing the limit would result in an uneven playing field. Claimants would have to manage and construct their own claims, and represent themselves, often against big businesses, or a defendant insured by a multi-national insurance company, which will almost always provide legal representation in court. It is suggested that insurers would be tempted to contest every claim hoping claimants will either run out of funds or time or both, with legal representation open to only the select few who have sufficient financial resources.

6.6 Those in favour of raising the limit consider it would result in:

- quicker/cheaper disposal of cases
- more predictability in claims resolution—leading to a possible reduction in insurance premiums
- more transparent access to justice
- economic benefits far outweighing the risks

They point out that claims would still be allocated to the fast track where appropriate.

6.7 In his 2002 research Professor John Baldwin concluded that if PI claims were to be heard in the small claims track, some adaptations would need to be made to the existing cost structure that applies in small claims.

6.8 In its response to the BRTF report the Government recognised that there are concerns about the potential lack of legal representation for claimants if the small claims limit for personal injury was raised from £1,000 to £5,000. But it also recognised concerns that the processes and costs in these lower value cases are often the most disproportionate. In addition to reviewing the limits, the Government therefore undertook to consider other options for dealing with these claims, and is currently working with stakeholders to identify how to make the claims process more timely, proportionate and cost-effective.

Housing disrepair

6.9 Many of the arguments against raising the limit for personal injury cases are also cited in respect of housing disrepair cases, for example:

— claimants would have difficulty in quantifying the damage

— they would have to interpret expert reports

— housing disrepair claims are usually against large organisations such as local authorities, who will be legally represented, resulting in an uneven playing field

— the dangers of excluding vulnerable tenants with outstanding repairs from remedies

In addition, housing disrepair claims may include a claim for personal injury, such as a child's asthma, or may be brought as a counterclaim to a possession action.

6.10 It is suggested that the housing disrepair pre-action protocol, which sets out what the parties must do before litigating, has resulted in claimants giving more particulars about their claims at an earlier stage, and has encouraged early settlement. There are concerns that housing disrepair is an area of increasing interest to claims management companies who encourage speculative claims. However, the Government has indicated that the Compensation Bill will enable the effective regulation of these companies.

General limit

6.11 Professor John Baldwin's 2002 research concluded that few problems had been encountered as a result of the expansion of small claims to the current £5,000 limit. He noted that it was unlikely that further increases in the small claims general limit, no matter how substantial, would achieve more than a limited transfer of fast track claims to the small claims track. Stakeholders have expressed no strong views on whether or not the general limit should be increased.

7. European small claims

7.1 In October 1999, the conclusions of the Tampere European Council, which set out a multi-annual programme of work for the EU in the justice and home affairs fields, included a mandate to the European Council, based on proposals by the Commission:

> "To establish . . . special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims."

7.2 This mandate was renewed last year in a new multi-annual work programme adopted at The Hague. The Government supports the establishment of a mechanism to facilitate the resolution of small claims across European borders. The Department is giving priority to this proposal during the UK Presidency of the EU.

7.3 In March 2005, the European Commission adopted a proposal for a Regulation creating a European Small Claims procedure (ESCP). The proposal follows the general principle of the small claims procedures which currently exist in four Member States[3] (although other Member States may adapt or simplify their procedures for such claims). The ESCP should, in practical ways, bring real benefits to people and businesses who wish to pursue legal cases across borders, generating consumer confidence and boosting the internal market. At present, such cases are often disproportionately costly. It will be an optional measure, so that consumers will have the choice either to use ESCP or to pursue a cross-border claim in the ordinary way. Because of the optional nature of the ESCP, it is difficult to predict how much it will be used, but it is likely that its use would grow as confidence and familiarity with the procedure grows.

7.4 Negotiations are at an early stage, and some of the aspects of the proposal are controversial and may change before agreement is reached. The Commission's proposal is that:

— ESCP would allow claimants to use a simplified procedure for obtaining judgement for cases with a value of up to €2,000. That is significantly less than the limit in England and Wales, but significantly more than has hitherto been contemplated by some other member states

— a specific form would facilitate the introduction of the claim

[3] Spain, Ireland, Sweden and the United Kingdom have simplified procedures; Germany's courts may determine their procedures as they see fit for low value cases; and France uses a "*declaration au greffe*" to introduce small claims.

— the system would provide a purely written procedure, unless the court considered an oral hearing necessary. In that event, the proposal envisages that hearings could be conducted, and evidence taken, by modern communications methods including audio and video conference, so as to avoid the necessity for parties to have to attend in person at a court which may be some considerable distance away

— the nature and extent of evidence, and the ability to use expert evidence would be at the court's discretion

— parties may, but need not be legally represented, and litigants can have unpaid and non-professional representation

— costs will be payable by the losing party or at the court's discretion; however, an unrepresented losing party may be sheltered form paying the fees of any lawyer employed

— single appeal is available, if this is allowed for in the relevant Member State, and the defendant may apply for a review if he/she did not receive the claim in sufficient time to prepare a defence

7.5 The procedure will also streamline the enforcement of cross-border claims by abolishing the special court procedure known in Continental Europe as exequatur, which enables the recognition and enforcement of a judgement given in ESCP the other State,. The Government supports this approach which follows the precedent set in two other Instruments adopted in recent years. Its effect is to make mutual recognition of the judgments to which it applies virtually automatic, subject to appropriate safeguards for the interests of the defence. The first such Instrument was the European Enforcement Order,[4] which applies to uncontested claims only, and which will apply from 21 October 2005. The second is the European Order for Payment Procedure,[5] which is still under negotiation, and will provide a uniform procedure for enforcing uncontested debts.

7.6 Although the Commission originally proposed that ESCP should apply to internal cases as an alternative to the current procedures in each Member State, it is clear that almost all Member states take the position that it should operate only in cross-border cases between the member states of the EU. However, a passage in the preamble to the proposed Regulation will remind Member States that it is open to them to adopt similar procedures for their internal cases if they wish. This may help persuade Member States that do not have well-developed small claims systems to adopt such procedures.

7.7 The Commission's proposal was brought under Article 65 of the Treaty. The effect of the Protocol on the position of the United Kingdom and Ireland, in relation to proposals under Title IV of the Treaty, is that, in order to participate in the proposed Regulation, the UK had to opt in within three months of the proposal being made, which it has now done.

Department for Constitutional Affairs

September 2005

Evidence submitted by the Association of District Judges

1. The Association of District Judges represents all the District Judges of the County Courts in England and Wales.

2. A procedure for dealing with small claims was first introduced in 1973. Misleadingly, the process at that time was referred to as "arbitration", although the work was always conducted in the county courts. There has never been a stand-alone "small claims' court". Since 1993, the value of claims that could be determined as small claims has increased on a number of occasions.

3. The Civil Procedure Rules 1998, following Lord Woolf's reports *Access to Justice*, introduced a single set of rules for all civil claims in both the High Court and in the county courts, and made specific provision for small claims.

4. With the implementation of the Civil Procedure Rules in April 1999, all defended civil cases in the county court are put before a District Judge for case management as soon as a Defence is filed. The first case management direction is to allocate the case to the appropriate "track", which dictates how it will then proceed.

5. "Small claims" are those cases allocated to the small claims track in the county court. Under the Civil Procedure Rules 1998, cases allocated to the small claims' track are those where the financial value of the claim does not exceed £5,000 in value. For claims involving pain, suffering and loss of amenity in personal injury claims the financial limit is £1,000; the same £1,000 limit applies to the cost of repair and also the financial value of any other claim for damage in cases involving alleged housing disrepair.

[4] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

[5] Proposal for a Regulation of the European Parliament and of the Council creating a European Order for Payment Procedure.

6. Cases where the amount in issue exceeds £5,000 (or £1,000 for personal injury or housing disrepair) are allocated, if defended, to either the Fast Track (for claims up to £15,000) or to the Multi-track for larger claims.

7. Allocation of a claim valued at up to £5,000 to anything other than the small claims' track would be wholly exceptional. Even where the value of a claim exceeds £5,000, the parties can consent to the allocation of the case to the small claims' track. The Association recognises that allocation of a case to the small claims' track provides a degree of comfort to an unrepresented party, who will know that, in the great majority of such cases, only very limited costs can be awarded and so the financial risk of bringing or defending a claim is minimised.

8. All decisions in small claims (except appeals) are made by District Judges.

9. The essence of the procedure for resolving small claims has always been on speed, informality, and a minimum of cost. Normally, only very limited costs can be awarded in such cases. The informality is achieved by the District Judge conducting the hearing in his or her room, with everyone seated. No wigs or gowns are worn; the evidence is almost invariably not taken on oath. The District Judge hearing the case will adopt an interventionist role, addressing the real issues and asking questions at any stage of the hearing. The formal rules of evidence do not apply in small claims' hearings. This approach assists unrepresented parties to present their case in a more relaxed atmosphere.

10. The Civil Procedure Rules Committee has conducted a recent review of the small claims' procedure in consultation with the Association of District Judges, and as a result the forthcoming Civil Procedure (Amendment No 3) Rules 2005 (SI 2005/2292) will, with effect from 1 October 2005, introduce several amendments to Part 27 of the Civil Procedure Rules designed to:

(a) avoid the need in many cases for written witness statements by giving the court instead the power to order a party to provide further information

(b) clarify the circumstances in which a party may seek to rely purely on written submissions to the court (rule 27.9)

(c) enable the district judge to take an offer of settlement into account when deciding whether to order one party to pay the costs of another party

(d) ensure that a successful party or witness who takes a day's leave from his employment to attend a hearing may recover up to £50 loss of earnings

(e) provide, where a case exceeds the financial limit of the small claims' track but has been allocated to that track with the consent of the parties, that the small claims track costs apply unless the parties have agreed that the the fast track costs provisions are to apply

11. Practice Direction 27, which supplements Part 27 of the CPR, will also be amended to emphasise the power the court will have to require a party to give further information about his case. Whilst the court will retain the power to order a party to provide a witness statement, the court must before doing so have regard to whether either or both the parties are represented, to the amount in dispute, to the nature of the dispute, whether the need for clarification could be better dealt with by an order for further information and to the need for the parties to have access to justice without undue formality, cost or delay.

12. The standard directions set out in Practice Direction 27 are also to be revised and updated. The information the court will usually need in particular types of cases has been simplified and the parties are now expressly to be encouraged to contact each other with a view to trying to settle the case or to narrow the issues. And the opportunity has been taken to introduce a simpler form of Notice of Appeal for use in the comparatively few cases taken on appeal.

13. The Committee will also be aware that DCA are presently consulting (CP 20/05) on whether there should be a limit on the costs an unsuccessful party should pay where there is an appeal from a decision made in the small claims' track and whether small claims which are allocated or re-allocated to another track should have their costs limited to those available under Part 27 of the Civil Procedure Rules unless the court orders or the parties agree otherwise.

14. As small claims hearings take place at each of the 220 County Courts throughout England and Wales, there is relatively easy accessibility to local justice.

15. One of the objectives of the small claim process is to enable litigants to bring or defend the case without the need for legal representation. Except in road traffic cases, where barristers or solicitors are frequently instructed to appear at small claims hearings by the insurance companies involved, most cases proceed with one or both parties acting in person.

16. The target set by Her Majesty's Courts Service for small claims' hearings is that 77% of cases should be heard within 15 weeks from the date of allocation. Most courts achieve that target comfortably. Delay is therefore kept to a minimum.

17. Small claims have been the subject of extensive research in the last 10 years, particularly by Professor John Baldwin of the University of Birmingham. Professor Baldwin has produced two reports at the request of the Lord Chancellor's Department (as it then was), in December 1997 and September 2002.

18. In the conclusion to his second report, Professor Baldwin said that:

> "While so much of the civil justice system remains the focus of severe criticism, the small claims procedure continues to flourish. As the results of the research discussed in this report demonstrate, it is well liked by litigants and in large measure retains their confidence. And the interventionist role, which is so important in the satisfactory resolution of small claims, continues to be played with relish by most district judges. The judicial approach that is adopted in small claims has, indeed, proved to be so flexible that it has not been difficult to expand the scope of the small claims track to accommodate claims of much higher values. Although there may be continuing problems and dilemmas in small claims that are yet to be satisfactorily tackled, the small claims procedure is widely acknowledged to be the great success story of civil justice in England and Wales".

19. The Association recognises that there is always room for improvement in any judicial process, and welcomes the opportunity to make submissions to the Select Committee.

20. Professor Baldwin identified two particular areas of concern. These were the difficulty for litigants to gain an understanding and awareness of the law applying to their case before making or defending a claim and, secondly, the difficulty of enforcing a judgment once it had been obtained.

21. Although it would be possible for parties to attend a preliminary hearing at which the relevant law could be explained to them, the research found no enthusiasm for such hearings. The explanatory literature provided by Her Majesty's Courts Service could be expanded to inform litigants of relevant sources, such as Advice agencies, local libraries or the internet. The information on the HMCS website could provide, for instance, a walk-through of a small claim, with guidance as to how a party might prepare his/her case or present the evidence.

22. The Association recognises that enforcement of judgments has been highly unsatisfactory for many years. We understand that, statistically, only one third of judgments are paid in full. Some payment is made in half the remaining cases, but in one third of cases no payment is made at all. We suspect that, since insurance companies or other commercial litigants will meet their obligations in full, the great majority of litigants whose judgments are unsatisfied are private individuals. This is a deplorable state of affairs. The Government is currently addressing this and, we understand, intends to introduce reforms in the forthcoming Courts and Tribunals Bill. There is a desperate need for new enforcement measures.

23. The Association is aware of, and has commented on, proposals to introduce an integrated procedure for dealing with small claims across the European Union. We fully support the concept of cross-border co-operation. However, we have concerns about adopting the EU procedure in substitution for the present small claims' procedure in England and Wales. The two particular areas of concern are that the EU scheme would have a financial limit of 2,000 Euros, which is very much less than our £5,000 limit, and the EU procedure includes an award of costs to the successful party. The absence of awards of costs, except to a very limited extent, is a cornerstone of our present small claims' procedure, and one that should be retained.

24. Press notice No 3 of Session 2005–06 of 22 July 2005 identifies five headings which will be the focus of the Committee's investigation. We comment on each of these in turn:

(A) *Whether the system facilitates access to justice.*

The Association firmly believes that it does. The procedure offers an inexpensive, informal, and quick method of resolving disputes.

(B) *Whether the system is simple and informal.*

The system is easy to understand, and informal. Hearings are conducted in the judge's room, with the judge and the parties seated round the table. Evidence is rarely taken on oath. While parties may be nervous, because they are in an unfamiliar environment, the Association believes that they are put at their ease by the judge. The procedure is explained, and reasons for the judge's decision given orally at the time.

(C) *Whether the system operates effectively and efficiently.*

The research carried out by Professor Baldwin suggests that it does, with a high degree of user satisfaction. There is a need for an improved enforcement mechanism, which the Association believes is being addressed by Government.

(D) *Whether the system allows cases to be allocated properly.*

According to the Press notice, the Chairman of the Committee, The Rt Hon Alan Beith MP, expressed concern at anecdotal evidence suggesting that people who bring cases in the small claims' track can end up in higher courts and have their claims frustrated since they are financially unable to pursue them. The Association does not recognise this problem and is unaware of any concern about this issue. The only circumstances where it is possible that a case allocated to the small

claims' track could be allocated to either the fast track or the multi-track would be where a defendant files a counterclaim which exceeds £5,000 (or £1,000 if there is a claim for pain, suffering and loss of amenity in personal injury or repair and/or other claims in a housing disrepair case). These circumstances are comparatively rare and even then the judge can decide that the case should remain in the small claims' track. District Judges are astute at spotting the tactical pleading and obviously inflated counterclaims would not succeed in the allocation of what is a small claim to another of the three tracks. Even if (re)allocated to another track, the case would nevertheless remain in the county court, and would not involve transfer to a "higher court", although the procedure to be followed may be slightly more formal.

(E) *Whether financial limits should be reviewed.*

The current overall financial limit of £5,000 has been in place since 1999. The Association does not support any increase in the £5,000 limit. This is a substantial sum for most people, and to increase it would deprive consumers of the opportunity to seek legal advice on more substantial issues with any hope of recovering the cost of such advice.

The limit of £1,000 for claims either involving PSLA in personal injury cases or repair or other claims in housing disrepair cases has been in place since July 1991. At that time, this limit applied to all claims, not just those involving personal injury or housing disrepair. In January 1996, the overall limit was raised to £3,000, but for the first time the figure of £1,000 was preserved for personal injury and disrepair cases. This figure was retained when the Civil Procedure Rules increased the overall figure to £5,000 in 1999.

Since the £1,000 limit has been in place for over 14 years, the Association does consider that there may be a case for increasing the £1000 exception in personal injury cases slightly, perhaps to £2,000 or £2,500.

However we recognise that there is a strong body of opinion that considers such an increase inappropriate, for the reason that lay people would be disadvantaged if they had to arrange for investigation of the medical aspects of their claim, in all but the smallest cases, without the assistance of legal representation. In most cases, the defendants to such claims are insured, and insurance companies have powerful resources at their disposal. Claimants deprived of legal advice might be persuaded to accept far less than the true value of their claim. We recognise the force in these arguments.

The Association considers that the limit for housing disrepair cases, currently £1,000, could be increased to £2,000 or £2,500. There is merit in maintaining the alignment of personal injury and housing disrepair cases, not least as housing disrepair claims often involve an element of personal injury and as they share many similarities with PI cases, such as the need for expert evidence (possibly both technical and medical), the prevalence of technical issues and a well-resourced defendant with considerable expertise in such cases. The personal injury element of a housing disrepair claim might, for instance, be the exacerbation of asthma owing to the presence of dampness inside the tenanted property; the difficult technical issues in the same case might be whether the damp is condensation caused by a lack of ventilation (possibly the tenant's responsibility) or because of a failure of the damp proof course (the landlord's responsibility).

The Committee is no doubt aware of the review the Department for Constitutional Affairs is presently conducting into the limits of the small claims' and fast tracks as part of its response to the Better Regulation Task Force report into the alleged compensation culture; it is understood that DCA will be taking their deliberations out to public consultation in the near future.

25. In conclusion, the Association believes that the small claims' system works well, and provides an effective and efficient procedure for the resolution of disputes.

District Judge David Oldham
Chairman, Civil Committee of the Association of District Judges

September 2005

Evidence submitted by Rt Hon Lord Justice Dyson, Deputy Head of Civil Justice

1. I have read what I believe to be the final draft of the written evidence of the Association of District Judges. I agree with all of it except in one important respect. At paragraph 22(E), they discuss the question whether the financial limits applicable to the small claims track should be reviewed. They submit that the overall limit of £5,000 should not be increased, and I do not disagree with that. They say that the £1,000 limit for personal injury and housing disrepair claims "could" be increased to £2,000 or £2,500. I would support an increase in the limit for personal injury claims to £2,500. But I cannot accept that there is a case for maintaining the alignment of personal injury and housing disrepair cases. In my view, the limit for housing disrepair cases should be £5,000.

2. Two reasons are given for the special treatment of housing disrepair cases. The first is that they often involve an element of personal injury. I find it difficult to accept that more than a minority of such cases genuinely involve an element of personal injury. There is anecdotal evidence that claimants are being encouraged by certain legal representatives to allege that the housing disrepair of which they complain has caused them to suffer modest personal injury, eg asthma. The potential for abuse here is obvious.

3. The second reason given is that housing disrepair cases often require expert evidence. This is true. But so, for example, do small building claims and small claims by landlords against their tenants for damages for breach of their repairing obligations. And yet in respect of these claims, the small claims limit is £5,000. In my view, it is entirely illogical to accord special treatment to housing disrepair claims.

4. As the Association's paper makes clear, the whole question of limits will shortly be the subject of public consultation by the DCA.

Rt Hon Lord Justice Dyson
Deputy Head of Civil Justice

September 2005

Evidence submitted by The Law Society

Introduction

1. The Law Society of England and Wales is the regulatory body for more than 120,000 solicitors in England and Wales. It also represents the views and interests of solicitors in commenting on proposals for better law and lawmaking procedures in both the domestic and European arenas.

2. The Law Society welcomes the invitation to express its views on the issues raised in the call for evidence in respect of the small claims procedure by the Constitutional Affairs Committee.

3. This paper has been prepared by the Law Reform and Legal Policy Directorate of the Law Society.

Small claims

4. The small claims track provides a procedure for resolving low value disputes. Generally speaking, defended claims with a value up to £5,000 (£1,000 personal injury and housing claims with outstanding disrepairs) are assigned to the small claims track. These are heard by district judges and in most courts form the bulk of the claims resolved at a hearing.

5. The procedure for hearings is specified in CPR Part 27.8 as follows:

(1) the court may adopt any method of proceeding at a hearing that it considers to be fair

(2) hearings will be informal

(3) the strict rules of evidence do not apply

(4) the court need not take evidence on oath

(5) the court may limit cross-examination

(6) the court must give reasons for its decision

6. A number of other parts of the Civil Procedure Rules are specifically excluded from applying to small claims by CPR Part 27.2 as follows:

(a) Part 25 (interim remedies) except as it relates to interim injunctions

(b) Part 31 (disclosure and inspection)

(c) Part 32 (evidence) except rule 32.1 (power of court to control evidence)

(d) Part 33 (miscellaneous rules about evidence)

(e) Part 35 (experts and assessors) except rules 35.1 (duty to restrict expert evidence), 35.3 (experts—overriding duty to the court), 35.7 (court's power to direct that evidence is to be given by single joint expert) and 35.8 (instructions to a single joint expert)

(f) Part 18 (further information)

(g) Part 36 (offers to settle and payments into court)

(h) Part 39 (hearings) except rule 39.2 (general rule—hearing to be in public)

7. Legal aid is not available in small claims cases and apart from disbursements, legal costs are not recoverable by a successful party although a district judge does have a discretion to award costs in the event that a party has acted unreasonably.

Terms of reference

8. When conducting the investigation the Committee will be considering whether the small claims system:
   - facilitates access to justice
   - is simple and informal
   - operates effectively and efficiently
   - allows cases to be allocated properly
   - whether financial limits should be reviewed

Submissions

9. The small claims track is intended to provide a proportionate procedure by which most straightforward claims with a financial value of not more than £5,000 can be decided, without the need for substantial pre-hearing preparation and the formalities of a traditional trial, and without incurring large legal costs.

10. Anecdotal feedback we received suggests that, although, the small claims track is simpler than the fast track, litigants in person still find it complicated and difficult to negotiate.

11. Feedback suggests that the level of assistance provided by judges varies enormously. This means that the experience for the litigant in person can be something of a lottery.

12. One of the key problems is that all parties, represented and unrepresented, have to complete the allocation questionnaire. Concerns have been raised with us by the legal profession that the allocation questionnaire is too complex and not very user friendly. If this is how lawyers find it then litigants in person are likely to find it very daunting. A review of the allocation questionnaire to streamline it and make if more user friendly would be very helpful.

13. The problem with allocation cases to any of the tracks is that the only criteria currently widely used is value. In seeking to allocate to the small claims track only those cases which are relatively straightforward, value is a fairly blunt instrument. This means that some cases of low value but high complexity may end up in the small claims track, with the claimant struggling to represent complex issues without assistance, and a simple case of higher value may end up in the fast track, where the claimant can recover legal costs and therefore get assistance. Some combination of value and complexity as criteria may be more helpful.

14. As legal costs are not recoverable on the small claims track, claimants therefore tend to represent themselves. It is important that the small claims track is aimed at only the smaller, simpler cases which are manageable by an unrepresented client. For this reason the Law Society would strongly oppose any move to raise the small claims limit under the current system. To raise it could, in our view, prejudice access to justice.

15. The system currently operates in an informal way. However, as most claimants are unrepresented, they are sometimes offered greater leniency and flexibility than would a represented claimant. We would suggest that a greater burden lies with the judiciary to assist an unrepresented claimant and to control the proceedings so they move forward in a balanced and appropriate way, fair to all parties. Feedback from the solicitors' profession indicates that unrepresented claimants appear to be given inconsistent levels of support and flexibility. The concept of a level playing field for all court users would in our view be a positive improvement. Greater consistency of approach and a publication of the levels of flexibility permissible for unrepresented parties would be useful so as to create a level playing field for all parties to a dispute in the interests of justice.

16. Personal injury cases and housing cases currently operate under an exemption which provides that the small claims limit is £1,000. The Law Society would strongly oppose any changes to these exceptions for reasons set out both above in paragraph 14 and below.

Personal injury cases

17. The limit for personal injury cases is currently £1,000. The reason for this is that personal injury cases often involve complex issues of liability and quantum. The issue of liability can often depend on complex medical issues and may involve pre-existing conditions in some cases. These issues would be very difficult for a litigant in person to deal with. In addition, the claimant will almost always be against an insurer on the other side, who will have access to expert advice and representation from a legal team as well the advantage of in-house expertise. This is likely to put an unrepresented claimant in a very vulnerable position and may even deter them from bringing a claim which raises serious access to justice issues.

18. Most personal injury cases are for less than £5,000. This means that any change to the current small claims limit would bring most personal injury claims within the small claims limit. This would mean that most personal injury claimants would be unrepresented and we believe that this will deter a large number of claimants from bringing claims.

HOUSING CASES

19. The main source of housing cases in the County Court are possession cases and applications for demotion orders. The CPR provides that these claims fall to be considered by the Court under Part 55 and 56 respectively and they cannot be allocated to the small claims track.

20. In relation to disrepair claims, there are two situations in which a disrepair claim can appear before the County Court:

— as a claim for damages and/or an order for works to be carried out

— as a counterclaim to a possession action (as a possession action cannot be allocated to the small claims track this situation does not concern us)

21. In relation to a claim for damages only Rule 26.6 provides that "the small claims track is the normal track for any claim which has a financial value of not more than £5,000" (CPR 26.6(1)(i)).

22. In relation to a claim involving an order for works, the threshold below which a claim will normally be allocated as a small claim is lower where any claim includes "a claim by a tenant of residential premises against his landlord where the tenant is seeking an order that the landlord carry out work to his/her home, and the cost of the work is estimated to be less than £1,000, and the financial value of any other claim is less than £1,000 (CPR 26.6(1)(b)).

23. If a tenant has outstanding repairs and the claim for damages for breach of the landlord's repairing covenant is worth more than £1,000 then the claim will not be allocated to the small claims track.

24. The main reason that the CPR positively discriminates in favour of residential tenants with outstanding repair is one of social policy based upon the law relating to disrepair. Damages for disrepair are calculated by establishing the severity of the conditions a tenant is living in because of the disrepair and the length of time that has elapsed since the landlord knew about the repairs but failed to repair. Despite the adverse effects of damp or unsanitary condition damages for disrepair are relatively low: about £1,600/ year for the most severe cases. Often tenants of residential tenancies come from groups who are socially excluded from society and do not have the educational resources to represent themselves or the financial resources to instruct professional advisers. Public funding is not normally available for cases in the small claims track. It was decided it would be iniquitous to force such tenants to wait three or four years in such conditions before representation could be provided in court proceedings.

25. To avoid the small claim tenants need to show the outstanding works would cost more than £1,000 to repair. The reason behind this is that a relatively minor repair can cause severe discomfort (for example an outstanding patch repair on a leaking roof) or even cause or be likely to cause an injury to health (for example defective central heating).

26. In assessing the impact of increasing the £1000 limit it would be essential to know the cost of particular works so that the impact of any change for tenants with outstanding repairs can be assessed. The RICS (surveyors) may be able to help or or the Law Society could through its Housing Committee contact expert witnesses in the field for their views.

26. Reconsideration of the small claims limit is generally driven by concerns as to whether the costs of the existing allocation regime and proportionate to the value of claims. The costs are perceived as both the costs of representation and the cost in the use of valuable court time. In housing cases such concerns led to the development and implementation of the Disrepair Protocol. The Protocol covers all disrepair claims whatever their value. The feedback we have received from solicitors representing both landlords and tenants is that the Protocol has succeeded in resolving disputes which include damages and outstanding works. It has done so because the existing court procedures which stand behind the Protocol will penalise those who do not follow the Protocol. Prior to the implementation of the Protocol in December 2003 the bulk issue of disrepair claims without full consideration of their individual value and funded by conditional fee arrangements was a major concern for social landlords. As a result of the pre-action investigation and negotiation that is now required under the Protocol this problem has been largely resolved. It may be that intervention at the pre-action stage has more effect in resolving claims economically and quickly than raising the small claims limit. Particularly if this is balanced against the dangers of excluding vulnerable tenants with outstanding repairs from remedies by raising the small claims limit.

28. Where claims contain a claim of unlawful eviction, CPR 26.7(4) provides that:

> "The court will not allocate a claim to the small claims track, if it includes a claim by a tenant of residential premises against his landlord for a remedy in respect of harassment or unlawful eviction".

29. This rule covers claims for breach of the covenant of quiet enjoyment, claims under ss27 and 28 Housing Act 1988, Protection From Eviction Act 1977, or under the Protection From Harassment Act 1997. This concession reflects the fact that the remedy the tenant seeks is an order allowing re-entry to his/her home and/or an order preventing further harassment. Such claims are often complex both legally and factually and urgent. Access to a person's home is of fundamental importance to the wellbeing of the tenant.

30. In housing cases the proportionality of a court process cannot be reduced simply to an assessment of the costs of the proceedings against the amount of damages to be recovered. The most important cases are those where the dispute concerns whether the court should provide a non-monetary remedy such as an order that the landlord carries out works or an order preventing unlawful eviction and/or harassment.

Conclusion

31. We are aware that there are concerns about whether the costs in low value cases are currently proportionate to the costs of those cases. The implementation of the Woolf reforms, while successful at changing the culture of litigation, have come at a very high price particularly in relation to small claims as a result of frontloading of costs. We share those concerns and have been in discussions with other stakeholders within the system to try and identify ways to streamline the procedures for lower value claims. However, any proposal for simplifying the system must enable parties to access legal advice and representation, otherwise the system must be confined to only the very smallest and simplest cases.

However, we believe there is scope to develop a very streamlined system that provides for the claimant to have access to advice and representation, which should both cut costs and protect access to justice.

Law Reform and Legal Policy Directorate
The Law Society

October 2005

Evidence submitted by the Association of Personal Injury Lawyers (APIL)

The Association of Personal Injury Lawyers (APIL) was set up 15 years ago to protect the rights of people injured through negligence. Members comprise solicitors, barristers and academics. Our campaigning activity leads to regular discussions with the insurance industry, consumer groups, employers' representatives, unions, the Government and other parliamentarians. APIL's work aims to ensure that injured people gain full and fair redress for their injuries.

The following response relates to the select committee press release issued on 22 July 2005 entitled "Small Claims Under Scrutiny".

Introduction

1. APIL believes that personal injury cases have no place in the small claims court.

2. This is because in the small claims court it is virtually impossible for claimants to recover the vast majority of their costs—whether they win or lose the case. This is unlike higher courts where costs (including the cost of a legal representative) can be recovered if the case is won.

3. This means people bringing cases in the small claims court are not usually in a position to secure legal help.

4. This is problematic because personal injury cases require a much greater legal knowledge than a faulty appliance where the value of the claim can be easily established. It is much more difficult to value, say, a broken arm than a broken fridge, which is a problem for unrepresented claimants because they do not know how much compensation they should argue for.

5. There is support for APIL's contention that personal injury claimants are vulnerable in small claims litigation. In research carried out for the DCA in 2002, Professor John Baldwin stated:

> "that he has for a number of years held the view that the main problem or dilemma in expanding the scope of the small claims procedure is that litigants, however passionately they may feel about the legal rectitude of their position, need legal advice before the hearing about the validity of their case in law".[1]

He continued by saying that:

> "[i]t is unrealistic in [my] view to expect lay people to know how they should go about establishing the legal basis of their case effectively at a court hearing unless they are given some preliminary advice about how they should do so".[2]

6. APIL is extremely concerned that suggestions that the small claims limit should be increased to £5,000 for personal injury cases could mean almost three quarters of personal injury cases would fall within its remit, leaving more people to bring cases without the benefit of legal representation.

[1] *Lay and Judicial Perspectives on the Expansion of the Small Claims Regime* Professor John Baldwin, Department for Constitutional Affairs. Research Series No 08/02. September 2002. Page 45.

[2] *Ibid.*

Does the small claims court facilitate access to justice?

7. APIL believes that the small claims court impedes access to justice for personal injury cases.

8. A MORI survey,[3] commissioned by APIL shows that:

— 64% of adults would be unlikely to pursue a personal injury claim through the small claims court without an independent solicitor helping them

— 73% of respondents would be unable to work out the value of their claim without an independent solicitor helping them

9. It follows that the lack of legal advice in the small claims court acts as a disincentive for those with low value cases seeking compensation which is rightfully theirs, because a large proportion would not bring a legal case without a solicitor.

10. The average claimant will know very little, if anything at all, about putting together a personal injury claim and we believe it is highly unjust that the onus is on the injured person:

— to gather medical reports

— to present them properly in court

— and therefore to determine if the defendant is liable

11. Most personal injury claims—including those in the small claims court—are made against big business, or an insured defendant, who (unlike the claimant) is almost always legally represented. This tilts the playing field against the claimant.

12. APIL considers it manifestly unjust that injured people may be dissuaded in proceeding with their claims because they do not have the legal expertise to represent themselves, while defendants may take advantage of this lack of knowledge to escape their obligations.

Does the small claims court work effectively and efficiently for personal injury cases?

13. APIL believes that due to the lack of funding for legal advice available for claimants in the small claims court, it is neither effective nor efficient for those bringing personal injury cases.

14. Proving negligence is more problematic for an unrepresented claimant because there are frequently medical problems which prevent an early assessment. For example, an accident may have exacerbated a pre-existing condition causing the earlier onset of symptoms which would have naturally occurred over time; or the claimant may not recover as well as his doctor hopes; or he may have symptoms which need to be further investigated.

15. The net effect of a non-legally trained claimant attempting to carry out a legal task is that he may inadvertently accept an offer from an insurer which is too low, and be under-compensated as a result.

Should the small claims limit for personal injury cases be raised?

16. The Better Regulation Task Force reported to Government in 2004 about the compensation culture myth. One of its recommendations was that research should be conducted with a view to raising the limit in small claims cases with a personal injury element from £1,000 to £5,000.

17. APIL is concerned that any attempt to increase the limit in the small claims court to this level will disenfranchise many injured people and deny them the compensation which is rightly theirs.

18. As part of APIL's response to the Better Regulation Taskforce report APIL carried out a survey of its members to try to quantify the possible effect of raising the small claims limit.[4]

19. The research showed that contrary to popular belief the vast majority of personal injury cases are not of a very high value. According to our survey 70% of personal injury cases are valued at less than £5,000. This means that the vast majority of claimants could end up representing themselves.

20. Our survey also showed that for cases valued at up to £5,000, the difference between the first offer made and the final settlement for the cases analysed was, on average, almost £1,000. This represents an average increase of around 50% from the first offer to the final settlement. This suggests that if claimants were to accept the insurer's first offer, without the aid of legal help, they could be dramatically under compensated.

21. This supports up one of the other key findings in the MORI survey, which was that 80% of respondents were not confident that they would be offered the correct amount of compensation by an insurer in the pre-court negotiations if they did not have an independent solicitor helping them.

[3] APIL commissioned MORI to carry out research between 3–7 February 2005. 2,283 adults were interviewed at 201 sample points across the UK.

[4] APIL's membership survey was carried out in early 2005. 782 completed, or partially completed, surveys were completed. These surveys contained quantitative data in respect of 2,274 settled cases of personal injury, 2,242 of them with a final general damages award below £5,000.

22. APIL believes that this research highlights the need for legal advice in all personal injury cases as a way to ensure that injured people receive the full compensation which they are due. A copy of the full report can be provided upon request.

CONCLUSION

23. APIL believes that personal injury cases have no place in the small claims court.

24. We also believe that allowing such cases to be heard in the small claims court acts as a barrier to justice for injured people.

25. The complexity involved in personal injury cases, and the lack of funding for legal assistance in the small claims court make it inefficient and ineffective for personal injury cases.

26. If the limit were to be raised to £5,000 as suggested by the Better Regulation Taskforce, up to 70% of personal injury claims would go through the small claims court.

The Association of Personal Injury Lawyers (APIL)

September 2005

Evidence submitted by Citizens Advice

INTRODUCTION AND KEY ISSUES

1.1. Citizens Advice welcomes the opportunity to provide evidence to the DCA Committee Select Committee on how well the small claims procedure, as established by the Woolf Reforms of the Civil Justice system, is working.[5]

1.2. The CAB service is the largest network of independent advice centres in Europe, delivering high quality advice from over 3,200 locations throughout England, Wales and Northern Ireland. In 2004–05 the CAB service dealt with nearly 5.2 million enquiries that included nearly 400,000 enquiries about legal issues.

1.3. Key issues for the Committee to consider, include:

- cost recovery
- complexity (and cost) of allocation procedure
- for claimants, whether the small claims process should be lawyer-free, legally aided or better supported by advice sector
- financial thresholds (whether they should they be raised as proposed by Better Regulation Task Force)
- expert evidence
- alternative remedies for consumers—ADR schemes etc
- ESCP—EU Directive on small claims

1.4. The small claims track was intended to provide a service in which cases would be dealt with expeditiously, with processes proportionate to the issues involved and the financial value of the case (principally though an informal hearing with a judge taking evidence from written submissions). The most common types of claim in the small claims track are:

- compensation for personal injury, where another party is at fault
- compensation for faulty services provided, for example, by builders, dry cleaners, garages and so on
- compensation for faulty goods, for example, televisions or washing machines which go wrong
- disputes between landlords and tenants, for example, rent arrears or compensation for not doing repairs
- wages owed or money in lieu of notice

1.5. Citizens Advice supports the principles behind a wide small claims jurisdiction—a system that is consumer friendly and does not require expensive legal professionals to service. Indeed we agree with the Better Regulation Taskforce that there is a strong argument that more cases could be dealt with through this process, possibly by raising the £2,000 threshold for personal injury cases to £5,000.[6] However, in practice, it is important to recognise that the system has changed since it was first created. The monetary thresholds have risen steadily through the years and it deals with an increasing proportion

[5] *Access to Justice* Final Report to the Lord Chancellor on the civil justice system in England and Wales Lord Woolf (1996).
[6] *Better Routes to Redress* BRTF 2004.

of legal claims. In this submission we present evidence from CABx in respect of whether the small claims process—as currently operated—is accessible and appropriate for dealing with low value consumer, housing and personal injury cases, and providing appropriate remedies and solutions.

2. Access to Justice

2.1. Even in a small claims system it is often unrealistic to expect potential claimants to know how they should go about establishing the legal basis of their case effectively at a court hearing unless they are given some preliminary advice about how they should do so. Access to appropriate advice and representation for small claims cases is often hard to obtain for the following reasons:

- changes to legal aid eligibility have taken away any public funding for some categories of small claims such as personal injury compensation
- there have been significant abuses in the market for claims processing services (known as claims management companies)[7]
- moreover, the principle market mechanism for funding cases—Conditional Fee Agreements (or CFAs for short)—are inappropriate for small claims due to the rules over the irrecoverability of costs in small claims cases. Small claims are inherently unattractive for private sector lawyers
- even though costs in the small claims track may be fixed, lawyers' fees for assisting in these cases are not fixed or regulated appropriately and can be a significant deterrent to the average consumer seeking redress
- in cases where legal aid could be available, claimants may still have difficulty in finding an appropriate lawyer. There is a dearth of publicly funded advice and representation in the field of consumer law, and in other areas of discrimination or social welfare law which involve small claims. In addition, there is a general problem about access to publicly subsidised lawyers due to the shrinking solicitor supplier base in the legal aid system[8]
- free advice agencies that may be able to help with small claims are often overstretched in terms of capacity. Occasionally they can be constrained in what they can do by rules of legal privilege

2.2. CABx often find themselves advising clients who start out as litigants in person, and bureaux advisers have reported the following comments:

- client received allocation questionnaire, does not understand one of the questions
- client unable to complete form without help
- small claims forms are too complicated for ordinary individual with no legal knowledge
- court staff unwilling to answer questions about their process
- court leaflets were very difficult to understand

2.3. In many cases it appears that the willingness of court staff to help claimants with procedures such as the allocation questionnaire is an important factor in processing cases. Even in the small claims jurisdiction, claimants can be left in serious financial difficulty if they do not get appropriate help and advice in preparing their case. For example:

> A Midlands CAB reported a case which their client fell outside the scope of legal aid, could not afford legal advice and instead became a litigant in person whilst the other side had legal representation. The client's lack of understanding of the law and process led to a judgment in default being entered against him, which made him liable for a debt of £3,000.

3. Small claims—a draft EU directive

3.1. Pressure for reform of the way that the small claims process works, is also coming from the EU's proposals for a harmonised procedure across the EU (ESCP).[9] An ESCP would not necessarily remedy existing access problems, but could potentially offer a more simple written procedure. In addition to the procedural simplifications that the ESCP might bring, it has a clear benefit in that it allows for cost recovery upon a small claim being won, with any legal advice or representational costs being reimbursed in the majority of cases. Too many citizens in the UK become legally disenfranchised due to the irrecoverability of legal costs within the current system. For example, only 31% of accident victims actually claim compensation using legal processes.[10]

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[7] These issues are set out in more detail in our report *No Win, No Fee, No Chance,* December 2004.

[8] These problems are spelt out in our report *Geography of Advice. An Overview of the challenges facing the Community Legal Service*. December 2003.

[9] www.dca.gov.uk/consult/smallclaims/pdf/procedure.pdf

[10] Figures from Royal Society for the Prevention of Accidents.

3.2. For this reason, we consider that ESCP should not be limited to cross border cases. It would manifestly unjust, for example, that under the options supported by the Government, a UK citizen who is injured in France will be able to pursue a claim via the ESCP with the unsuccessful party bearing the costs—which may include the fees of a legal representative—while a UK citizen who is injured by another UK citizen will have to bring the claim in the current UK small claims court where they will retrieve no costs, win or lose. In essence this means that under the ESCP it is possible for a claimant to be reimbursed for legal advice, while under the current UK system there is no costs recovery. By replacing the current small claims procedure with the ESCP, there will be a single uniform procedure open to UK claimants who have been negligently injured, regardless of where the injury was sustained.

3.3. However, ESCP would mean that injured claimants who pursue a small claim with the help of a legal representative will be liable for costs if they lose their case. This cost penalty may act as a disincentive for many people from pursuing a genuine and justified claim; such as cases were the issues of legal causation and liability are borderline. Claimants may take out legal insurance, but this system is by no means full-proof.[11] ESCP should have a provision that would enable judges to order a disregard of costs.

4. Alternatives

4.1. Quite apart from the "Equality of arms" issues in court proceedings, we would argue that the remedies provided in contract law under the small claims procedure, are often inappropriate to the needs of ordinary consumers. There is a need to be better options for resolving consumer disputes before they get to court.

4.2. In our discussions with DTI over their consumer strategy, we suggested that they reconsider their view on having a general ombudsman service for consumer disputes—this could support codes of practice approved by OFT. The challenge is how government can practically introduce ADR that is consistent, good quality, well publicized and available over a host of different markets and sub-markets for consumer goods and services where the biggest problems are often caused by small traders. Common consumer problems include:

- home-working—whilst this is mentioned in the Enterprise Act there is still no ban on upfront fees
- call centres—we see problems with call centres in a variety of settings. They can prove expensive (due to time getting a response and rates charged) and difficult to use, especially when there is no alternative
- cooling off rights—the range of the time periods causes confusion
- after sales service—we see a wide range of problems where businesses follow policies rather than legislation
- cash back schemes—we see a variety of these from furniture to extended warranties where claims are made and nothing received. Often the company which promised to provide the cash back is no longer trading
- liquidations/companies ceasing to trade—consumers have no protection and nobody to claim from
- unsolicited gifts and prizes mail—vulnerable clients are losing money following bogus claims of prizes won where money must be sent to make the claim to businesses outside the UK that consumers cannot trace

4.3. Some traders avoid their responsibilities. For example:

> A South East CAB reported that a major high street retailer refused to repair a recurring fault with their client's TV unless the client paid. The bureau was only able to resolve the matter through the manufacturer.
>
> A Midlands CAB report two stores in the same chain gave their client different information when she complained about the faulty trainers she had bought. One offered an exchange or a refund, adding that the customer is always right, whilst the other insisted the trainers would have to be sent away to head office for a decision about any recompense.
>
> A North West CAB's client sought advice when he was told that a major high street retailer's policy was only to refund within 28 days of the purchase. The £1,999 TV was under five weeks old when it became faulty, but it had been bought a month prior to delivery. The engineer had insisted on taking it for repair and had not returned it some six weeks later.

[11] *No win, No Fee, No Chance*—CAB evidence on the challenges facing personal injury compensation, December 2004.

4.4. What these cases illustrate is that potentially justiciable cases in the consumer field are extremely diverse. Bureaux often report clients' difficulties in taking up their rights:

> A South East CAB reported their client had decided it was too expensive to pursue her claim for a refund when, despite several promises, she failed to receive goods costing £20.
>
> A South West CAB's disabled client is disputing a bill for over £137 when an engineer had spent two hours examining her stair lift. He wanted to take it to their workshop for repair but her son pointed out it was only a broken pin and repaired it himself. She will write to the company but says it will be too stressful to go to court.
>
> A CAB in Derbyshire reported their client cannot pursue his claim for the return of a caravan holiday deposit the owner is withholding, because he bought on the Internet and has no geographical address.
>
> A Midlands CAB's 70 year old client cannot find out who she needs to pursue for damage to a newly refurbished headstone on her parents' grave. The local authority employed the contractor who damaged it but will not take responsibility and the client cannot afford to take the case further.
>
> A North Region CAB reported client has made numerous calls to a major double glazing company in an effort to take up a claim under a 10-year warranty on her windows. Their engineer said it would be resolve in five or six weeks but three months later the client is still usable to find someone at their call centre who can make a decision about the case.
>
> An East Region CAB's 72-year-old client cancelled her order for a medical bed, purchased after a five hour visit from a salesman. The cancellation rights were on the agreement but they still tried to deliver the bed and have failed to keep their promise to refund the £100 deposit paid to the salesman.

4.5. Bureaux also report discrimination, which may be justiciable under DDA or other discrimination legislation. Some companies are asking for additional money from vulnerable clients after the contract has been agreed:

> A Merseyside CAB reported their client's request for the details to contact the manager when she was refused a refund by a local clothes shop was met with personal insults. The shop referred to her as a "Paki".
>
> A South West CAB reported their client, a 64 year old man, had been refused a concessionary season tick to a football club which was available for women over 60.
>
> A London CAB's client sought advice when she received a letter from a company saying she must pay £6,092 for a mobility scooter when the price she had agreed with the salesman was £3,500.

4.6. Other businesses are more actively misleading in their approach, and indeed may raise potential issues of misrepresentation:

> A North East CAB reported their client had accepted an offer of free home security from a doorstep salesman who had assured her there was nothing more to pay. Later she was asked to sign for monthly payments of £25 for the monitoring service required to use the system.
>
> A Northern Ireland CAB reported a variation on unsolicited goods. Their client was contacted at work and asked to nominate a school to receive books. They named a local school and then received a letter asking for £146.10 for books provided.
>
> A South East CAB reported their client was offered a free week-end holiday when she bought a juicer by phone for £100. She later found that she had been enrolled in a holiday club who were using the information she had given to buy the juicer to debit £100 from her account as a joining fee.

4.7. Bureaux have reported a steady stream of cases where clients have been told they must register for under data protection legislation for fees well above the charge made by the Information Commissioner's Office. The OFT have used misleading advertising legislation to take a series of cases:

> An East Region CAB reported a variation on this theme when their client wanted to stop nuisance phone calls and contacted what they thought was the telephone preference service. They found later that a company was charging for this and debiting their bank account.

4.8. Bureaux regularly report problems with fitness club membership, where clients are misled about the cost and duration of the contract and, in some cases, about the suitability of facilities:

> A South East CAB reported their client found that £88 was being deducted monthly from his bank account as part of what turned out to be a one year contract for himself and a friend. They had been persuaded to join for one month only and paid £148, having been assured that the bank details they were asked for were just for the club records.
>
> A client from a CAB in Bedfordshire was assured that monthly payments for membership would be £25 but found that £42 a month was being deducted from his bank account. When he returned to see the person who sold the agreement she refused to speak with him. His cancellation of the payments was met with a letter from debt collectors.
>
> A pensioner client is seeking a refund. The health club he had joined reneged on their initial agreement that he could use facilities such as the swimming poor and sauna. He had joined for a year, during a free initial visit, following their advice that his health would benefit from using the gym.
>
> A client was told the fitness club contract could not be cancelled when she became ill. Despite letters from her doctor, confirming she should not use the gym equipment, she was pursued by debt collectors.
>
> Four bureaux reported their clients were being misled into buying World Service Authority Passports. The contact point in a web site and clients have reported payments from £100 to £1,000. These clients were asylum seekers with limited English. They thought they were buying a valid passport that would allow them to regain entry to the UK if they travelled abroad. What they have received is document resembling a passport that explains their human rights. One bureau reported their client paid £330 and knew others who had done the same.

4.9. Our evidence would suggest that there is a spectrum of consumer disputes which are not touched by the small claims process and contract law remedies, due to issues of proportionality, cost and appropriateness. Although it is incumbent on claimants to try and settle a claim before taking court action, there are insufficient robust ADR mechanisms to do this. Models from other jurisdictions need to be looked at. In Sweden there is a local consumer adviser for each district, working for the central Swedish consumer agency, Konsument Europa. The alternative dispute system for consumer problems means that consumers can file a form explaining their complaint with the Swedish consumer agency, the National Board for Consumer Complaints, as an alternative to taking a case to court. A panel with expertise in that product and in the law then looks at the problem and decides the case. This is free for consumers and although the decision is not binding on the trader the results are published annually in a contra indications list in their consumer magazine.

5. Enforcement

5.1. The issue of poor enforcement is pertinent to traditional consumer legislation (eg poor enforcement of existing legislation to tackle unfair terms/doorstep selling/credit legislation) but also to areas such as housing where there is an imbalance between the parties (eg tenants cannot enforce rights against landlords without risking eviction).

5.2. The problem is that enforcement is under resourced and this will be more of an issue as more consumer reliance is placed on it. For example, Law Commission Bill proposals include rights to written agreements and core terms but it is unclear who will police these rights. The new proposed Directive on Unfair Commercial Practices will fill gaps in legislation but will require enforcement.

5.3. We support properly resourced enforcement and would like consumers to be encouraged to inform the process. The comparative research by DTI/Treasury/OFT discusses the value of "tough" enforcement, which encourages consumers to complain succeeding through high initial investment followed by reasonable costs once it is clear that action will be taken. The research also says it is unusual for public enforcement to be delegated to lots of often small local authorities. We may be asked for a view on whether enforcement should be centrally controlled. This has attractions for providing equal service. In utilities, we see a need for the regulator to use a wider scope of enforcement powers where the market is not working.

5.4. Too often with small claims the claimant will have to go back to the same court to apply for an order to get any money awarded. Equally, this is also a problem for tribunal awards.[12] Now that the Government is considering establishing a National Enforcement Service, the issue of whether or not all civil judgments should have enforcement orders attached, or alternatively whether the revenue could be used to recover civil debts without further judicial process, could be looked at again. The more important priority is what the enforcement branch of the Court Service could do to bring parties together, so that enforcement can be discharged without hostility or hardship.

[12] *Empty Justice* (2004) *Hollow Victories* (2005) Citizens Advice Briefings on the non-payment of Employment Tribunal awards.

6. Costs to consumers

6.1. Consumers face costs over a variety of issues that could broadly be described as access to justice. Legal protection and the costs of access across consumer, utilities, health, housing, employment and education all rely on the ability of consumers to use rights in a setting that is manageable, accessible and not costly.

6.2. We have said that Enforcement Orders used in the enforcement of goods and services legislation (including the new Unfair Commercial Practices Directive) need a link to consumer redress so that the general practice is stopped and consumers are compensated for any loss suffered.

6.3. Across personal injury, disability benefits and employment there is a market for intermediaries who offer help to access compensation, benefits or tribunal representation but swallow the money consumers would gain from the process in fees. Free face-to-face advice is acknowledged in the DTI research as an issue for vulnerable consumers. It is under resourced (as illustrated by CAB problems with legal services partnerships) and its provision should be in the strategy, in addition to Consumers Direct.

6.4. There is a need both for better-resourced free advice and for a comprehensive strategy to support ADR, including tribunal representation and small claims courts. We therefore support the provision of ADR in the goods and services field but not to the exclusion of access to court and small claims procedures.

7. Full cost recovery by the courts

7.1. Finally, one further deterrent in pursuing small claims is the policy of full cost recovery. In 2000, Citizens Advice successfully campaigned for the abolition of the £80 allocation fee for defended civil actions in cases worth £1,000 or less. The CAB Service has long been opposed to the extra-parliamentary policy of "full cost recovery" on which the civil court fee system is based. Implicit within the civil justice reforms of 1999 was an aim to reduce the number of cases reaching the courts. If the principle of full cost recovery is retained, then it is inevitable that as the numbers of cases drop, fees will rise. We do not believe that the public interest role of the court system is being served by a funding strategy, which will place greater and greater barriers in the way of access to justice for those on low and moderate incomes. The policy of recovering almost the full cost of running the civil justice system from litigants fails to recognise the collective benefit in the administration of civil justice.

7.2. CAB evidence suggests that there are many people with income only a little above the support level, who find court fees are a real deterrent, and receive no assistance with costs:

> A CAB in East Yorkshire reported that a client, an unmarried father with no parental responsibility, could not afford the then £90 fee for a relevant order. To obtain parental responsibility he had to sign a Parental Responsibility Agreement, which requires the mother's agreement, or apply for a parental responsibility order, which requires a £90 court fee.

8. Personal injury cases

8.1. Particular policy issues arise with respect of intermediaries in personal injury compensation claims, though similar issues can arise in disability benefit claims and employment tribunal market. CABx report cases where all the money consumers might gain is swallowed up by the intermediaries.[13] Around 2.5 million people in the UK sustain accidental injuries every year. As a result they may lose income or independence, and face lifestyle changes. Fault may rest with the driver of another car, a public authority such as a local housing where there is an imbalance between the parties (eg tenants cannot enforce rights against landlords accident and the injury sustained. Under UK law the liable party must compensate the injured person for any loss (ie the polluter pays), so rather than a statutory (eg New Zealand) scheme, accident victims rely on the civil justice system for financial recompense.

8.2. Far from there having been a recent ("compensation culture") boom in consumers claiming compensation for injuries, only 31% of accident victims actually claim compensation using legal processes. Indeed the actual number of claims for injuries following accidents has reduced since the Woolf reforms were introduced and new methods of funding legal actions in personal injury cases, (conditional fee agreements), were rolled out as a way of replacing legal aid funding. CAB evidence would suggest that for many thousands of people who have experienced accident or injuries through no fault of their own, often suffering disabling effects, the system is failing. It is extremely complex for an unrepresented individual to pursue a claim for compensation. They will need legal advice on their likely prospects of success and help collecting their evidence and putting their case, which may need to go to court. So pursuing a claim efficiently and effectively is likely to involve using legal services and incurring court costs at some stage.

8.3. Funding personal injury cases through conditional fee agreements has introduced greater complexity for consumers. The complex financial and legal processes involved are often misunderstood by consumers, and consumers' needs can be misunderstood by the service providers. There is widespread mis-selling of legal

[13] For more on this see our report *No Win, No Fee, No Chance*.

and insurance products, and consumers are often induced into signing conditional fee agreements (CFAs) inappropriately. Consumers are misled into thinking the system will be genuinely "no win no fee" but can often find that costs are hidden and unpredictable, such as disbursement, loans and interest for after the event insurance policies, lawyers "success fees", and any commissions extrapolated by claims and insurance intermediaries. Many of these costs are incurred before ever getting to court, and too often settlements obtained by insurers are not inclusive of costs.

8.4. We have suggested that the DCA working with the civil justice system should review the legal costs system for personal injury in civil courts to examine whether there are any alternatives to frontloading most of the costs.

8.5. Part of the public misperception about the so-called "compensation culture" is that it is sometimes assumed that accident victims are entitled to significant damages arising out of common but irksome physical injuries such as fractured joints, whiplash, back strains, sprains, prolapses, and soft tissue damage. However this is rarely ever the case. The Judicial Studies Board "tariff" guidelines on the level (quantum) of compensation, which can be recovered for pain and suffering, states that the maximum amount of damages in such cases should be about £4,000. In 2002, 55% of awards issued by county courts were under £3,000.

8.6. CAB evidence would appear to confirm that under our "tariff" system of compensation, financial awards by way of damages and settlements are not only low value but often do not meet the criteria for fair and appropriate compensation or restitution. The following table is an illustrative sample of cases seen by CABx since 2001 shows, the use of conditional fee agreements to pursue low value personal injury claims can all too easily result in a "zero sum gain".

8.7. Compensation gained for 15 CAB clients:

Case	*Compensation awarded (£)*	*Legal/other costs (£)*	*Total received (£)*	*Total received as a percentage of compensation*
1	£2,300	£1,500	£800	34.8%
2	£2,100	£1,650	£50	21.4%
3	£1,925	£1,375	£550	28.6%
4	£1,700	£1,700	£0	0%
5	£1,600	£1,440	£160	10%
6	£1,600	£1,430	£170	10.6%
7	£1,665	£1,606	£59	3.5%
8	£1,200	£1,176	£24	2%
9	£2,500	£2,089	£411	16.4%
10	£1,500	£1,300	£200	13.3%
11	£2,100	£1,800	£300	14.3%
12	£2,500	£2,200	£300	12%
13	£100	£300	−£300	−30%
14	£2,160	£2,135	£25	1.2%
15	£1,600	£1,300	£300	18.8%

8.8. What our evidence suggests is that despite the Access to Justice Act Regulations, it is not always clear whether the costs to cover loan agreements taken out to fund after-the-event insurance premiums can be recovered from the other side, especially where cases are settled. This lack of clarity has led to problems for CAB clients where their cases are settled by the insurers rather than by court proceedings. Some have ended up repaying such loans which they had to take out to fund their insurance policy from their compensation awards, in some cases leaving little or no compensation.

9. Conclusion

9.1. There is a need to evaluate the Woolf Reforms from the standpoint of whether they have increased access to justice. The policy intention has always been that the small claims court is a court of law, but not designed for lawyers, rather a "do-it-yourself" kind of court, where ordinary citizens can handle their own cases, whichever side they're on. Evidence would suggest that there are areas of policy and practice that need to be tackled in order to achieve this.

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October 2005

Evidence submitted by Professor John Baldwin, Head, School of Law, University of Birmingham

1. I have conducted research on the operation of the small claims system since the mid-1990s and published widely on the subject. In my view, the small claims procedure in this country is a crucial part of the civil justice system and, despite certain important limitations, operates to the satisfaction of most litigants. The same cannot be said of more formal civil justice procedures.

2. Small claims are often dismissed by lawyers in this country as unimportant. Attitudes are, however, different in many other countries, including the United States. The extent to which affordable and satisfactory remedies are available to people when they run into legal difficulties is in my view a critical test in civil justice. Lord Woolf saw expansion of the small claims scheme as "the primary way of increasing access to justice for ordinary people" (1995: 100). If members of the public cannot afford to bring everyday disputes to the courts, then all talk of access to justice is bound to have a hollow ring. Fears about costs represent one of the main barriers inhibiting people from embarking upon litigation, particularly when the sums at stake are small. Without massive expansion of state-funded legal aid—something that seems unlikely and perhaps not the best use of scarce resources—there is no alternative to devising procedures (usually ones that dispense with legal representation) to allow claims of limited value to be heard in the courts.

3. In practice, the procedures that the district judges are obliged to adopt in resolving small claims are often rough-and-ready. The preoccupation is with cost, not procedural refinement. The adoption of Rolls Royce procedures is inappropriate in small claims where the legal coat has to be cut according to the cloth available. It is not possible (or even desirable) to provide refined judicial procedures for resolving all legal disputes, no matter what their monetary value. Lord Woolf argued that legal costs should be "proportionate" to the significance of the issues in dispute, and he rightly insisted that "what we must seek to achieve is a more proportionate but workable system, not one which is theoretically impeccable but unaffordable" (1996: 106). It is absurd that a high proportion of all civil claims cost more to resolve than the sums of money at issue, yet this is what Lord Woolf found. Traditional civil court processes are much too complex and cumbersome to provide a realistic means of resolving small claims. Since the costs involved in pursuing small claims are so heavily circumscribed, members of the public need not be put off pursuing them because of the costs they will incur. Again the same cannot be said of other civil justice procedures.

4. This is why the development of special judicial procedures for dealing with small claims is so important and why there is world-wide interest in the subject. In developing such procedures, it is intended that unrepresented litigants will have an opportunity to take relatively simple, low value disputes to the courts and, no less important, be given a fighting chance of succeeding against a legally represented opponent when they do so.

5. Throughout the common law world and beyond, procedures have been developed in an effort to ensure that low value claims can be heard in the civil courts without the parties running up financially ruinous bills. Although small claims hearings vary greatly from country to country, there are some common characteristics:

- proceedings are much simpler, more relaxed and more informal than is customary in the civil courts, the aim being to make hearings comprehensible to lay people
- legal representation is not necessary, the emphasis being placed instead upon self-representation (In some jurisdictions, legal representation is actually prohibited by law)
- small claims adjudicators are expected to play a proactive (or "interventionist") role at hearings, offering assistance to the parties to ensure relevant evidence is elicited, Judicial interventionism is fundamental when one or other of the parties is unrepresented and, unless adjudicators play this role—and, what is more, play it competently—small claims procedures simply will not work
- evidential and procedural rules are relaxed, giving judges great latitude in determining how to conduct hearings and in reaching decisions. In this country, the district judges are permitted to "adopt any method of proceeding at a hearing that [they consider] to be fair"
- the normal rule relating to the payment of costs is replaced by a "no costs" rule where the parties pay only their own legal costs, whether the judgment is in their favour or not. The avoidance of the risks of heavy financial loss, not to mention the distress and anxiety that frequently accompany civil litigation, makes a huge difference to litigants

Small claims procedures have been designed, then, with litigants in person in mind. The intention is to provide a cheap, simple and risk-free mechanism to allow people unfamiliar with the law and the courts to bring straightforward claims to the courts, with or without legal representation.

6. It is curious that, until recently, little interest was shown in small claims in this country, perhaps because the financial limit was (at least until 1996) set at a modest level compared to other countries. Yet a silent revolution has been occurring in the civil courts in this country ever since the small claims procedure was introduced in 1973, as the proportion of defended civil claims heard under the procedure has rapidly increased. This proportion was only 8.3% in 1973 but had soared to 87.4% a quarter of a century later. Numbers of formal civil trials have been dwindling and steadily replaced by these informal proceedings. The simple truth—often overlooked by lawyers—is that the small claims procedure now provides the dominant means by which defended claims are heard in the civil courts in this country.

7. When the small claims procedure was introduced in 1973, the financial limit was set at only £75. Although this was raised four times in the next twenty years, the increases were modest, intended more to keep pace with inflation than to expand the small claims regime itself. Before 1996, the financial limit was £1,000 but it was increased to £3,000 in 1996 and to £5,000 in 1999. (Only personal injury and housing repair cases were exceptions where the limit remained at £1,000.) These huge and dramatic increases occurred in a short period of time and nothing on a comparable scale has been seen anywhere else in the world, before or since. At £5,000, the small claims limit in England and Wales is now one of the highest in the world.

8. These rises in the financial limit have not, however, produced increases in the number of small claims. Indeed, the *Judicial Statistics* show an unprecedented fall in the number of small claims in county courts since 2000. Although there was an initial increase in numbers of small claims when the limit was raised from £1,000 to £3,000, this was modest and more than off-set by the considerable falls of later years. The figures are so remarkable that they are worth considering in more detail:

THE NUMBERS OF SMALL CLAIMS AS A PROPORTION OF DEFENDED CLAIMS IN COUNTY COURTS IN ENGLAND AND WALES BETWEEN 1990 AND 2003

		% of defended claims
1990	52,360	70.6
1991	61,919	70.7
1992	80,332	75.0
1993	105,843	80.7
1994	87,885	78.4
1995	88,170	78.3
1996	94,050	82.7
1997	97,813	86.3
1998	98,692	87.4
1999	88,389	86.8
2000	55,863	78.4
2001	58,333	81.3
2002	55,719	80.9
2003	52,143	77.5

9. Despite huge rises in the financial limit, the county courts have not been inundated with small claims (as some of us had predicted). It is, indeed, odd that the quintupling of the limit in the late-1990s coincided with years of substantial contraction in the small claims regime. This is all the more remarkable when one considers that, in almost every year between 1973 and 1996, the number of small claims increased, often very considerably. Although well over three quarters of all defended civil claims have been dealt with as small claims throughout the past decade, there were still only half as many small claims in 2003 as there were 10 years earlier. This was completed unexpected and no one has to my knowledge explained why it has happened.

10. In the research I have conducted on small claims, I have observed well over a hundred small claims hearings in county courts around the country, interviewed the district judges who conducted them and interviewed large numbers of litigants. The latter group included both claimants and defendants as well as a comparison group of litigants whose claims were dealt with under more formal judicial procedures. I have tried to find out whether lay litigants are able to present a competent legal case at small claims hearings, how the district judges play the interventionist role and how legal representatives fare at informal hearings of this kind. In small claims hearings, the legal ground rules have been changed, and it is important to see how the professionals and lay litigants cope in this relaxed legal setting.

11. While there are obvious dangers in accepting at face value all that litigants say, I attach great weight to the litigant's perspective. To me, this represents the acid test of judicial procedures like small claims. If one were to find, for instance, that litigants are frequently disgruntled because they cannot understand what happens at hearings or are unable to present their case adequately or else feel rail-roaded into submission by judges, a re-thinking of underlying principles would be required.

12. In a series of small claims studies that I have conducted, it has been clear that most litigants report favourable experiences. Most express remarkably high levels of satisfaction about the way that hearings have been conducted and the fairness of the methods the judges adopted. This has applied whether the decision is in their favour or not. I have encountered few litigants who have been perturbed about the rough-and-ready nature of proceedings and, whether involved in small claims or more traditional hearings, few have said that they would prefer greater formality at hearings. Quite the contrary: most would prefer greater judicial informality in relation to an even wider range of cases. Regardless of the value of the claim, most litigants have told me that they have been well satisfied with the standard of justice they have received and that they have found the "interventionist" role played by judges helpful to them in presenting their cases.

13. Whether one talks to professional, business or lay litigants, it seems that most are satisfied with their experiences, provided that the following conditions are met:

— the process has not cost them too much money

— there have not been undue delays

— proceedings in court have been straightforward and understandable

— litigants feel they have had an adequate opportunity to say what they want

— they regard the judge as independent, authoritative and fair-minded—any lack of fairness is generally felt almost as keenly as the failure to win their cases

To the great majority of litigants, the procedures adopted at small claims hearings much more adequately fulfil the above criteria than do more formal court procedures. Litigants want confident and authoritative adjudicators whom they can respect, and they are by and large satisfied, irrespective of the size of their claim, that the district judges in this country meet these expectations.

14. The district judges I have interviewed have also been enthusiastic about the small claims procedure and most now seem able to play the interventionist role at hearings competently and sensitively. It is not too difficult for lay people to perform adequately in this setting if they are given a helping hand. I reached the conclusion that the methods the judges adopt are appropriate to the resolution of claims of relatively low monetary value. These methods seem to suit the needs both of lay and business litigants.

15. As already noted, a certain lack of legal and procedural refinement is almost inevitable at small claims hearings. District judges often struggle to reach decisions in small claims because the parties fail to provide much evidence. The problem is that litigants tend to arrive at the hearing empty-handed, without witnesses and relevant documentation and expect the judge to reach a decision on the day on the basis of what they say at the hearing itself. The judges recognize that litigants do not want cases to be adjourned so that relevant evidence can be produced. If they are to reach a decision at all, it will often be the result of inspired guesswork. A robust judicial approach tends in consequence to be employed. When dealing with litigants in person, there is no place for standing on ceremony, for airs and graces or for pomposity. In practice, hearings tend instead to be characterized by good humour and common sense, seasoned with large doses of judicial pragmatism.

16. There are, however, problems with informal proceedings of this kind. These problems are encountered in other jurisdictions too, and the following seem to be the ones that most commonly arise:

(i) Lay people cannot be expected to perform adequately in an arena in which the legal rules are unfamiliar to them. Hearings might be relaxed and informal but they are still legal proceedings in which legal principles are applied. Litigants overlook this simple point at their peril. Yet these principles may well be quite alien to lay people and this inevitably puts those who receive no legal assistance at a considerable disadvantage, especially when they are up against a legally represented opponent. When litigants know something of the relevant law, it usually stands them in good stead at the hearing. Those who go it alone, trusting to common sense and their own sense of "justice", quickly find that they have a quicksand foundation. It is unsatisfactory in my view to leave it to litigants to prepare cases in whatever way they think appropriate and expect the judges to muddle through as best they can at hearings. Litigants need preliminary legal advice about whether their case will stand up in a court of law and whether it is worthwhile proceeding with it. Without this, they cannot be expected to grasp the legal complexities in their case or to assess its legal validity or to know what evidence they need to prove it. It may, indeed, only be at the hearing itself that they realize what the key legal issues are and that their case is without legal validity. Most judges strive to do what they can to assist unrepresented litigants, but there is a limit to what they can achieve and, no matter how helpful they might be, their responsibility is still to resolve the dispute according to the law. How to ensure that unrepresented litigants satisfy legal criteria of which they may have no knowledge is in my view the central dilemma in small claims.

(ii) There are wide differences in judicial approach at small claims hearings, not just from court to court but also between district judges sitting in adjacent courts in the same building. I found in observing small claims hearings that some judges adopt a relatively passive role, leaving it to the parties to present their cases in the way they think best; other judges are much more strident, seeking to get straight to the heart of the matter—"going for the jugular" in judicial parlance—restricting the parties to the key legal issues; yet others favour "mediated" settlements, trying to reach decisions that both parties will accept, almost independently of the strength of their respective legal cases. Although the beauty of the small claims procedure lies in its flexibility, disparities in judicial approach can lead to uncertainty and inconsistency.

(iii) Doubts persist about the role of lawyers at small claims hearings and even about whether it is worth their while being legally represented. The advice in the Court Service leaflets has always been equivocal on the latter point. Legal representation is still not particularly common in small claims—even in claims in the £3,000 to £5,000 bracket, less than a third of litigants are represented. As a general tendency, the presence of lawyers makes for greater formality at hearings and this may serve to defeat the object of the exercise. It is still not clear how lawyers should fit into the informal atmosphere of these hearings, and difficulties arise where the lawyer's orientation is

"adversarial" and at odds with the judicial ethos in small claims. Not all lawyers find it easy to adapt to the informality of these hearings, where judges are likely to wish to speak directly to the parties. Some district judges deliberately sideline lawyers who fail to adapt to the spirit of the occasion.

(iv) Small claims procedures have been designed with lay litigants in mind but in practice it is not individuals who make most use of these procedures but small and medium sized businesses. Indeed, individuals more often appear in court as defendants than as claimants. It is apparent that commercial organisations have become more prominent at small claims hearings as the financial limit has risen. As a result, the county courts are commonly viewed as debt collection agencies, providing commercial organisations with a convenient means of recovering small debts. Although the idea of "access to justice" encompasses commercial organizations as well as individuals, there is a danger that business users will come to dominate and the original objectives will be thwarted. (This is why commercial organisations are prohibited in some countries from bringing claims under the small claims procedure.)

(v) The question of the enforcement of court judgments has been neglected in the past, yet it remains a serious difficulty in small claims. Most lay litigants are unfamiliar with enforcement procedures and assume that, once judgment is awarded by the court, full and prompt payment by t5he other side is guaranteed. This is of course one of the great myths in civil justice. A grim picture has emerged in relation to the enforcement of judgments in small claims (and civil claims in general). In my own research on this question, only a minority of the claimants who succeeded at small claims hearings received payment from the other party in full and in the time specified in the court order. A substantial minority received nothing at all. Nor are the court-based enforcement options very effective in securing payment. In my view, ineffective enforcement procedures undermine the credibility and integrity of the civil courts—and the credibility and integrity of small claims—more than any other factor. When enforcement mechanisms fail, claimants feel let down, if not cheated. Access to justice requires more than the provision of fair, expeditious and inexpensive procedures to resolve legal disputes; for judicial procedures to have meaning, the courts must in addition provide effective mechanisms by which litigants can enforce the judgment.

17. When discussing small claims, a key question is whether the financial limit might be raised beyond £5,000. Until the problems identified in the preceding paragraph are resolved, a cautious approach looks appropriate here. I do not think myself that the financial limit should be regarded as infinitely elastic, capable of encompassing ever more civil claims. Most small claims are resolved on the basis of the limited evidence that lay people provide at hearings and, while this can be justified in claims involving small sums of money on the grounds of "proportionality", it is a different matter where large sums are at stake. I am doubtful that these unrefined procedures and the inspired guesswork on which judges are obliged to base many of their decisions can be regarded as acceptable in resolving high value claims.

18. This said, I do think that there is scope for transferring many personal injury claims to the small claims track. Very few PI cases are currently dealt with as small claims since their value is well beyond the present limit of £1,000. Such claims are heard instead under fast-track and multi-track procedures where the costs are much greater for the parties than a small claims hearing would be. In my interviews with district judges, many have told me that they feel the financial limit for PI claims should be raised well beyond £1,000 and that large numbers of PI cases could easily be treated as small claims. Having a medical report available to the court is critical in resolving PI cases: as one experienced district judge told me, "Once you've got this, most cases resolve themselves." If a restricted costs regime were introduced, it would enable claimants to recover the costs (up to a prescribed maximum figure) of a medical report and of obtaining legal assistance from the other side. In my view, it would be worth considering whether the kind of minor injuries that very commonly are dealt with in county courts (eg whiplash injuries in road traffic accidents) might be absorbed within the small claims track. Even if it were not feasible to raise the PI limit to £5,000, this might be a better way of expanding the small claims regime than a wholesale increase in the financial limit.

19. In conclusion, would argue that the procedural and evidential changes to traditional court procedures in dealing with small claims have been largely successful in allowing lay people to bring straightforward civil cases to the courts and that the introduction of a small claims procedure has facilitated access to the courts that would otherwise have been denied. Calls from purists for greater legal refinement in court proceedings will only inhibit access to the courts. For most lay litigants, the alternative to cut-price solutions like small claims is not Rolls Royce justice, but no access to justice at all. There is, however, a danger that too much may be claimed for the small claims procedure and that it may be used in circumstances in which "do-it-yourself" case preparation and presentation are not appropriate.

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August 2005

Evidence submitted by Devon and Exeter Law Society

Small claims in court mediation

Principles

The principle of mediation in the "Small Claims Court" is exactly the same as that applied to all other mediations, namely:

(a) It is confidential
(b) It is under the control of the parties
(c) The mediator is non judgmental
(d) the mediator cannot give advice to either party
(e) either party is free to leave at any time
(f) any settlement is arrived at freely between the parties

You are referred to " A sudden outbreak of commonsense" by Andrew Ackland for further reading on mediation principles.

Whilst the guidance and training of Andrew Fraley for time limited mediation is appropriate to the small claims time limited procedure there are differences which mean that practice has to be varied in order to meet the requirements of the Court.

The small claims scheme is based on a limit of half an hours mediation per case (although some schemes are trying to push this to three quarters of an hour per case). This is of necessity a very limited time in which to meet and greet the parties, answer any questions about the mediation process and investigate each sides position, interests and needs in order to help the parties to come to a mutually satisfactory conclusion.

There are a number of models which are presently being investigated by the Department of Constitutional Affairs, the model which this guidance is based upon is that operated by the Devon and Exeter Law Society in Courts at Exeter, Barnstaple and Torbay. It is appreciated that the procedures in some other Courts may be different. Procedures can sometimes affect the view of the parties of the mediation process.

The principal elements of the small claims scheme are:

(a) That it is, at Exeter at least, an opt out scheme, that is the parties are advised by the Court that a Judge has considered the papers and has decided that the case might benefit from mediation and the parties are therefore required to attend at the Court on a certain day and at a defined time to meet a mediator. There is a provision for opting out but parties do not always see it and documentation may be changed accordingly.

(b) Mediation takes place at the Court. This is thought an important encouragement to settlement because although the parties are told at the very beginning that the mediator, albeit that he or she may be a lawyer, cannot give advice and is not sitting as a Judge, the parties often forget those words and treat the mediation as their day in Court. This means of course that the mediator has to exercise a certain amount of control in cases where parties get extremely emotionally disturbed, but sometimes allowing the parties to ventilate helps to achieve a settlement.

(c) The Judge often sees the parties before the mediation commences introducing the parties to the mediator. The Judge will also often see the parties after the mediation has been concluded and make any consequential order or directions if the mediation has been unsuccessful. This of course vests the process with considerable authority and it is thought, for instance, that where the Judge does not take part as set out above there is some anecdotal evidence to suggest that the number of successful mediations may be reduced by about 5%.

(d) Because of the shortness of time it is not unusual for both parties to be in the room at the same time for almost the entire mediation but see below.

Procedure

The parties are in the Exeter, Barnstaple and Torbay schemes provided with an explanatory leaflet at the same time as they receive notification of the mediation appointment. That leaflet has been criticised as being difficult to understand or inadequate and is constantly under review. Before the mediation the parties are asked to sign a consent to mediation form. There is very little time available to go into an in depth explanation if one is to keep anywhere near the Court timetable.

If the mediation is successful the mediator will draw up a memorandum of the terms of settlement and the accompany the parties back before the Judge and the Judge will then satisfy himself or herself that the parties have reached the agreement drafted by the mediator and will then approve an order based on that agreement. The agreement of the parties should not necessarily be confined to matters which the Court can order at the conclusion of a contested trial and it is quite often that one party will make a concession to another, perhaps by taking certain actions within an agreed time limit and that settlement and payment, if appropriate, will flow from those actions eg the claimant will give the defendant a credit note against goods

returned, a voucher for a service which will be rendered by the claimant and which would otherwise cause a fee to be raised, the carrying out of certain works by the claimant which are outside the terms of the contract but which have been agreed as a makeweight, and payment or withdrawal in terms which are agreed will then take place.

In the Exeter model the mediators are required, if the mediation has been unsuccessful, to advise the parties as to what the Court will expect by way of documentation (all correspondence in date order, numbered and in a binder, experts reports, signed witness statements to be exchanged, estimates for the completion of work not done or the rectification of work allegedly done badly etc) so that when the parties go back before the Judge they have a better idea of what is expected of them, a clearer idea of the issues (which may have been substantially narrowed) and therefore the trial time is likely to be shorter.

PRACTICE

In an ideal situation there will be three rooms available, one for the mediator and one for each party but that will often not be the case.

The mediator will have arrived at the Court probably an hour before the mediation or the start of the mediations if there is a list, and will have had an opportunity of reading the Court file and possibly making short notes. This means at the very least that the mediator has a rough idea of the issues, the amount involved and possibly of any side issues which may help to resolve matters or may stand in the way of a settlement.

Assuming as will normally be the case that there is one room, namely the mediator's room and the Court waiting room, the mediator should see each party separately briefly, introduce himself or herself, remind the party that he or she is not a Judge, that the mediation proceedings are completely confidential, that he or she cannot give advice to the parties during the mediation, that the discussions are all entirely without prejudice and cannot be relied upon if the proceedings have to continue and the mediator should then ask each party individually:

(a) whether they are prepared to go through the mediation process of that basis

(b) whether they wish to be seen separately or whether they are content to be in the same room as the other party

If the parties agree to the mediation but do not agree to share the same room then the mediator will have to see the parties individually. Except in exceptional cases it has been found that most parties are prepared to share the same space indeed being able to state ones case in the presence of the other party can be an important part of the process.

Assuming, for the purposes of this guidance, the mediator has seen both the parties separately and they have both agreed to go through the mediation process and are prepared to share the same room, the mediator should then invite them into his or her room and repeat the guidance given to each of them. He or she should then get both parties to sign the agreement to mediate. If the parties are to be seen separately they must of course sign the agreement also.

The initial procedure should take no more than about five minutes but it is essential that it is thoroughly complied with.

Mediators may first find it remarkable that comparatively small issues can raise huge amounts of emotion which will need to be carefully dealt with.

The mediator tries to assess not only the issues but also the depth of emotion by summarising the claimants case as he or she understands it and inviting the claimant to comment and then doing the same with the defendant. The procedure can very often result in a controlled discussion between the parties where issues can emerge which the mediator can help the parties explore by asking questions, eg do I understand it that the claimant having left some materials at the defendants property, the defendant then used the materials and had some benefit from them and/or has some materials left over which could be returned to the claimant and which it is possible the claimant might be able to use on other contracts and given allowance for etc etc.

If at all possible the mediator should try and put the parties at their ease but without seeming to make light of either a claim or defence.

In facilitating discussions between the parties the mediator is trying to ascertain each party's position each party's interest and each party's needs. From the needs point of view it is not at all uncommon for small claims parties to have found themselves in a confusing and rather frightening procedure over which they feel they have no control, that far from the matter being dealt with by a Judge simply agreeing with them they find there is work which needs to be done by way of proof for which they are sometimes not prepared, that there are usually two sides to each question and therefore there is no guarantee that a Court is going to find for one or the other of them, that they are losing money and time and may well have consulted Solicitors whose fees they cannot recover because it is a Small Claims Court etc etc.

The mediator can also ask how much it has cost each party to get to the stage where they are today and how much they estimate it is likely to cost them to get through trial including the costs of any legal representative or legal advice for which they will not recover the expense.

An opening question could be "what do you want to get out of today eg is it money, is it an apology, is it a combination of both, is it for one party to make an acknowledgement of some sort".

The technique of concentrating the parties' minds by questions from the mediator is one which is frequently applied the "I can see where you are coming from but do you think that a Court might look at it differently?"

Later in the mediation the mediator needs to establish what is each party's top/bottom line ie is there any flexibility?

There is not best practice in the small claims mediations at the moment and different mediators will undoubtedly have different techniques. The temptation which all mediators must experience from time to time is to try and intervene but this must be strenuously resisted. If the parties are prepared to move from fixed positions eg the claimant is prepared to accept less than the full amount of his claim and/or the defendant is prepared to make a greater payment than has previously been indicated, it may be appropriate to invite each party to write down their "bottom line" and to do it without the other party seeing. It is surprising how often when this technique is employed the difference between the parties is manifestly not worth fighting over and some further slight movement from each party can be encouraged but great care needs to be taken that the mediator is not seen to be favouring either party. Perhaps the furthest that the mediator can go is to say "the difference between you two is now blank pounds, can you suggest how that might be bridged?"

The parties need to be reminded that time is short and because of the shortness of time of course the mediator has to keep fairly tight control of the latitude that he allows each party to make their respective points. Often once the points have been made by each party and in the presence of the other, the parties will often show a willingness to settle.

Assuming that a settlement has not been achieved the mediator is then required in the Exeter scheme to advise the parties as to the future requirements of the Court and there are times when one or both parties will realise that further work and expense is going to be required from them, experts are going to be needed etc and will then indicate that perhaps some further movement is possible and settlement can be achieved. Where parties are particularly obdurate the writer has been known to say that it is quite plain that settlement cannot be achieved and invite the parties to join him and go back and tell the Judge that. This sometimes results in one party or the other who has been holding out against further movement showing a preparedness to move further and with agreement the mediation can resume and in a substantial proportion of cases will result in there being agreement.

At the end of the mediation if it has been successful the mediator should write down the terms of the agreement arrived at by the parties and get both of them to sign that agreement. The mediator then countersigns it and accompanies the parties back before the Judge where the mediator will explain to the Judge the terms which have been agreed and the Judge will then make an appropriate order.

If mediation has not been successful the mediator should tell the Judge that the parties cannot agree and the Judge then retakes control of the proceedings and gives directions for statements etc and for the trial itself.

Summary

The whole procedure is extremely dynamic and a quick reading of the papers is not going to equip the mediator to understand the issues that the parties often want to be addressed. Emotions can run extremely high but once then have been given the opportunity to be ventilated and each party understands the other party's point of view settlements are often achieved.

Imaginative settlements can it is suggested by floated by the mediator and can result in agreements being achieved where both parties had fixed positions which were irreconcilable but neither party wished to continue the process upon which they had embarked and needed some movement from the other party before they felt able to agree a solution.

Concerns have been expressed by the authorities that because of the time pressures, because of the fact that the parties are very often confused, apprehensive and unsure of their positions, litigants may find themselves agreeing to solutions which they afterwards regret but provided that the mediator has undertaken his or her task in a neutral non judgmental manner and that the parties have come to a solution of their own volition possibly with the help of the mediator asking questions designed to assist the parties to view their respective positions and possible outcomes from a different view point, it does not seem to the writer at least that time pressures, the lack of caucusing or the joint mediation sessions invalidate the procedure.

It is noteworthy that even where mediations have not been successful parties have expressed gratitude for the efforts of the mediator, it is not unusual for both parties to shake the mediator's hand on the conclusion of the mediation whether successful or not and the very high level of satisfaction even in cases which do not settle indicates that the mediation process as conducted in the Exeter group of Courts is regarded by litigants as helpful and constructive.

It is known that the Department of Constitutional Affairs regard the process as being helpful as it results in cases being diverted from the Judges and successful in so far as the overall settlement rates of something in the order of 60% average (which compares extremely favourably with three hour time limited mediations in the same Court) the process is a valuable service and might well ultimately form part of recognised Court procedures in England and Wales.

Jeremy Ferguson
Devon and Exeter Law Society

September 2005

Evidence submitted by Laurence E St Lyon, Solicitor

I am a Solicitor in Private Practice with a high street firm with a mix of LSC and privately funded clients. I wish to make the following, personal, observations on the operation of the "Small Claims" regime.

1. Access to Justice

It has been my experience that far from encouraging access to justice it inhibits it. The inability to have your legal costs paid by the other side if you win often puts client that I see in a lose-lose situation. It denies, often vulnerable, clients of access to justice. It is a fact that the majority of Litigants in Person are ill equipped to formulate their claim in the correct manner or present it properly in court.

The recent introduction of the Tailored fixed fee scheme for legal aid means that we no longer have the time to assist clients by drafting papers or advising them on formulating their claim. Sadly we have to turn people away as its just not costs effective to us to use precious matter starts in this manner. We try to provide some assistance pro-bono but we already do at least one hours unpaid work for every two hours paid work we do on the files that are funded by the LSC.

I have seen figures quoted of 70% of unrepresented litigants losing their cases in the employment tribunal. From my experience and from talking to other colleagues in my area a similar figure must hold true in the Small Claims Court.

2. Simplicity and formality

Whilst simple in comparison to its predecessors the fact that it is a legal process inhibits many individuals. In point of fact the supposed simplicity is a fallacy. Cases still require to be properly and adequately pleaded and the need to retain control of the court process itself inflicts a certain degree of formality.

This is often beyond the ability of the individuals whose claim is allocated to the Small Claims Track. People are nervous enough just going into court.

3. Effective and efficient operation

By definition any system which restricts access to justice is not effective or efficient. The current system has, according to a discussion I have had with a senior Circuit Judge placed an additional burden on the DJ's and, again through discussion with court staff, on their support staff.

This system cannot be run efficiently if there is a lack of proper legal advice and assistance from the beginning. Judges are there to judge not legally advise the litigant. Neither are the support staff who often bare the brunt of when the frustrations of the litigant in person, be they Claimant or Defendant, boil over.

Among solicitors and Barristers that I have spoken to is the feeling that being against a litigant in person imposes a severe constraint on the ability to represent your client. While you do not have a duty to the other side neither do you wish to be seen as taking advantage of an unrepresented party. To be seen to do so, even when that is not the case, is to find yourself fighting the judge. From personal experience this is an unhappy situation that serves neither the parties, the system nor justice herself.

I am ashamed to admit that I have seen cases where the advocate was not so scrupulous and was allowed to get away with it. I have also had many complaints from people who felt excluded as the Judge and the Barrister/Solicitor sorted the matter out amongst themselves and informed them of the decision!

4. Proper allocation of cases

The experience on the ground is that cases are being allocated totally on the basis of their value without reference to the legal or factual complexity of the individual matter.

There should be a requirement to take into account the need for assistance by the individual litigants in the allocation process. How can an illiterate gypsy woman be expected to pursue her (genuine) claim against a rich businessman who can afford a solicitor when she cannot understand the paperwork or the arguments. All she knows is she has been taken advantage of.

I see such matters on a fairly regular basis. But our scope for pro-bono is limited if we are to survive as a firm. Allocation to the small claim track is the kiss of death to a file. This is a commercial reality. My firm is not the only one in this position.

5. Financial limits

The financial limits should be abolished. £5,000 may not be much to government minister but its a lot of money to the small people who come through my door.

I would recommend the limit being abolished as fixed rule and given as a guideline only. The allocation exercise should take into account the following:

(1) Is the value of the claim sufficient to require allocation to one of the other tracks?

(2) Does the matter itself involve the need for legal argument or involve complicated issues of fact or law?

(3) Is the Claimant and or Defendant able to properly represent themselves and present their case taking into account their personal situation?

(4) If one of the parties is legally represented is the matter such that this provides an inequality of arms and a denial of Justice?

6. General observations

The Small Claims system cannot be examined in isolation but must be examined in the light of the diminishing legal help and advice available.

Many solicitors are looking to give up legal help work or we are forced to husband a limited amount of matter starts. The CAB's are massively oversubscribed and, while many are very good, the quality of advice and assistance does vary often quite widely.

The current system may assist the operation of the courts but at only on the basis of a denial of justice to those who cannot access the courts for financial and/or other reasons.

There is a growing body of, admittedly, anecdotal evidence that unscrupulous individuals and companies are providing shoddy services or goods to consumers in the certain knowledge that they will not be brought to court because the amounts involved are below the Small Claims limit. This, of course, does not include outright scams and fraud which often goes undetected longer than it possibly would if the parties were brought to court. This in the long run cannot be good for peoples perception of Justice in this country.

I cannot claim any great expertise or intellect on these maters I am merely an ordinary "street lawyer" and I offer these my observations on the operation of the Small Claims Track for the committees consideration.

Laurence E St Lyon, Solicitor
T Cryan & Co

September 2005

Evidence submitted by Norwich Union General Insurance

About Norwich Union

1. Norwich Union is the UK's largest insurer with a market share of around 14%. With a focus on insurance for individuals and small businesses, Norwich Union insures:

— one in five households
— one in seven motor vehicles
— around 800,000 businesses

2. Norwich Union products are available through a variety of distribution channels including brokers, corporate partners such as banks and building societies and Norwich Union Direct.

3. Aviva, Norwich Union's parent company, recently announced its acquisition of the RAC. The acquisition brings together the RAC's powerful brand and customer base with the expertise and leading position in motor insurance of Norwich Union Insurance.

4. The Norwich Union experience of the Small Claims Court is limited to property damage, personal injury and contractual disputes. Our comments are consequently confined to those areas.

Access to Justice

5. Norwich Union believes that there is no doubt that there has to be a Small Claims system in this country to allow small disputes to be resolved. The system has to be open to all members of society and ensure that both parties to a dispute have an equal opportunity to put their case.

Simple and informal

6. If we are to encourage the use of the system there has to be very simple procedures in place. Norwich Union believes that many types of cases could be determined provisionally by a Judge at an early stage once a Defence has been filed. Once the parties have considered the Courts provisional view they can then decide whether to accept the provisional decision or proceed to a final hearing.

7. This would promote early settlement and negotiation by the parties and also avoid many cases being unnecessarily listed by the Court which ultimately settle shortly before the hearing wasting precious judicial time and resources.

8. Norwich Union believes that there should at the very least be an earlier disclosure of documents and evidence as 14 days before the hearing is too late to allow either side to prepare their arguments.

9. The system of issuing standard directions and disclosure in the present format is out of date and is not in line with the Woolf reforms of active case management and narrowing the points in issue.

10. There are also many cases where Mediation with an appropriately appointed and approved Mediator with specific knowledge, for example engineers or surveyors may achieve a quicker and more informal resolution. Mediation should be a first consideration where the Courts provisional view does not facilitate a settlement.

Effectiveness and efficiency

11. In cases involving Norwich Union, we often find that there are adjournments because of the listing systems and the time allowed by the court is not sufficient. This in itself leads to a public perception that the system is inefficient and there can be no greater frustration for a party than having their case adjourned.

12. Norwich Union believes that the Court needs to make sure that its resources are used effectively and cases are only listed when discussions and negotiations have failed.

13. This will only work if the financial limits are reviewed by this committee as we have set out below.

The review of financial limits

14. There is no doubt that the financial limits must be reviewed and increased. We have read with interest the comment of this Committee's Chairman that many small claims court cases end up in a higher court resulting in a costs risk being created.

15. We believe that this can be resolved by raising the financial limits and jurisdiction of the Small Claims Court. The current financial limits are at risk of taking away Access to Justice and totally undermining the Small Claims Court system.

16. It is Norwich Union's position that the need for Lawyers in small personal injury cases is not required and the failure to raise the limits has over complicated the handling and settlement of small personal injury cases and resulted in increased legal costs and ultimately insurance premiums.

17. The position is similar for other types of cases, for example housing repair cases where the limit is £1,000. The majority of such cases would today in our opinion end up outside the Small Claims Court.

18. Norwich Union believes that this was clearly not the intention of the system and its effectiveness and purpose has been allowed to erode over time discouraging a Claimant from taking action to enforce their legal and contractual rights.

19. The last change in the limits for the Small Claims Court took place in 1991 when they rose from £2,500 to £5,000 for property, and from £500 to £1,000 for personal injury.

20. There are today only five types of injury within the JSB where damages start at under £1,000.

21. Inflation on damages has inevitably risen, but more worryingly not as fast as inflation on costs.

22. For personal injury cases where damages are over £1,000, costs represent 65% of the damages paid to the claimant or 40% of the total sum (damages and costs) paid. For example, a non-contentious claim attracting damages of £3,000 will typically have £2,000 costs associated with it. Steps have been taken through the Civil Justice Council to create a better balance in the Damages/Costs equation, but in the long term, the costs associated with these low level damages cases is not sustainable.

23. Looking at inflation generally since 1991, the figure of £1,000 should now be in the band £2,500–£3,000. For future inflation proofing beyond 2005, a figure of £4,000–£5,000 would be more pragmatic.

24. The equivalent property damage figure would be £12,500.

25. Using the Department of Constitutional Affairs judicial statistics for 2002, it demonstrated that 39% of all types of claims issued out of the County Court had a value under £1,000. Increasing the limit to £3,000 would take in a further 16%, and to £5,000 a further 15%.

26. This would mean that overall types of claims, personal injury and property, 70% of cases could be dealt with within the jurisdiction of the Small Claims Court. Raising property to £10,000+ would increase that further, freeing up Court time to deal with the more serious cases where judicial and lawyer skills can be more profitably employed to speed service to the public.

27. With that in mind, we strongly believe that the Small Claims Court limit be raised to £5,000 for personal injury and £12,500–£15,000 for property matters.

Norwich Union General Insurance

September 2005

Evidence submitted by the Motor Accident Solicitors Society (MASS)

REVIEW OF SMALL CLAIMS LIMIT FOR PERSONAL INJURY CLAIMS

We recently tried to arrange a meeting with Alan Beith and we note you are unwilling to meet at this stage of your deliberations and therefore I attach the MASS Position Paper (*not printed*) regarding the above. This was delivered to the Department of Constitutional Affairs and the Better Regulation Task Force in March this year.

MASS represents the experience of approximately 2,000 fee earners pursuing some 400,000 road traffic accident claims per annum, the majority of which involve a personal injury. With our considerable experience in handling cases of this nature, it is therefore our considered opinion that the raising of the small claims limit would have a devastating effect on the consumer and their Access to Justice.

The principal reasons for retaining the small claims limit at its current level in personal injury claims are summarised in page 13 of our report, the detail of which is below.

1. An increase will deny people Access to Justice because the Claimant will be deprived of advice, assistance and representation unless they pay for this from their own pocket.

2. The public will be faced with pursuing a claim against an insurance company and their solicitors and be persuaded to accept far less than their claim is worth.

3. Many claimants will be deterred from claiming at all (see the lack of claimants currently pursuing claims of < £1,000 in Appendix A).

4. To the overwhelming majority of the population a sum of £1,000 or £2,000 is a large sum of money. It is quite easy for lawyers and politicians to describe these sums as "low values" but to the claimant this represents real (if insufficient) redress.

5. Damages in low value claims have not materially increased over the last 10 years or so. Therefore, it would be wrong to uplift the limit by reference to say the RPI index.

6. The public have a lack of trust in the insurance industry to deal fairly with them without representation. Insurers, rarely put forward reasonable offers to settle when the claimant is represented. It is not credible to believe they will be fair towards un-represented claimants.

7. A rise in the small claims limit for PI will push claimants towards claims management companies (CMCs) for advice and assistance. Indeed, the CMCs will see this as a significant opportunity for business development and are likely to market to attract this work. The reward will be a slice of damages by way of a "fee".

8. Removing representation will mean more vexatious claims being presented to insurers, as the screening provided by solicitors is removed.

The latest figures show there were approximately 370,000 motor accident related personal injury claims lodged in the year 2003–04 (ROSPA). The table at Appendix A, suggests that nearly 60%, or 220,000 motor claims are worth no more than £2,000 for pain and suffering alone (ie having stripped out all other elements such as vehicle related damages, loss of earnings etc). Any increase in the small claims limit will therefore have a major impact on the ability of many tens or hundreds of thousands of innocent victims to pursue any claim at all.

Such a change would also have an effect upon the funding of all personal injury claims through before the event (BTE) and after the event (ATE) insurance. Premiums for both BTE and ATE insurance would inevitably rise dramatically to underwrite a very differently balanced book of business.

We have found, through the course of 2005, a considerable amount of agreement with the views expressed in our paper. However, should you have any queries or wish to discuss this further please do not hesitate to do so. As I am a resident of Morpeth, Northumberland, a meeting with Alan Beith, can very easily be arranged.

Tim Gorman
Chairman
The Motor Accident Solicitors Society

October 2005

Evidence submitted by the Association of British Insurers (ABI)

1. Introduction

1.1 This is the ABI's response to the House of Commons' Constitutional Affairs Committee call for written evidence in relation to the small claims procedure in England and Wales.

1.2 The ABI represents the collective interests of the UK's insurance industry. The Association has around 400 member companies. Between them, they provide 94% of domestic insurance services sold in the UK. The ABI is currently working on a wide range of issues on behalf of our members and their customers, from climate change to personal injury compensation reform.

1.4 The ABI believes that to ensure public confidence in the claims process it requires reform in order to reduce costs and delay. The small claims procedure however is an essential component of the civil justice system in England and Wales. It facilitates access to justice, although more should be done to ensure that litigation is considered a last resort. It is simple and informal, but there needs to be earlier active case management by the court. Its efficiency is undermined by the complicated and sometimes ineffective rules in relation to enforcement. The ABI believes that the limit for personal injury claims should be raised to ensure proportionate dispute resolution.

2. Does the small claims track facilitate access to justice?

2.1 The ABI believes that the small claims procedure has a crucial role to play in facilitating access to justice in England and Wales. However, court proceedings should be the last resort as entering the litigation process can still be stressful, time consuming and costly (for example, in relation to enforcement of judgements).

2.2 There should be more pre-litigation provisions to encourage settlement (for example, Alternative Dispute Resolution). To accompany the small claims procedure, other jurisdictions, such as Maine in the USA, have a free mediation service, which parties must attend. This establishes if a dispute can be resolved before proceedings can be issued in the small claims court.

2.3 The most significant, and welcome, consequence of claims being allocated to the small claim track is in relation to costs. Save for fixed costs or in circumstances set out in the rules (CPR Part 27.14), costs are not recoverable by the successful party. Therefore a claim can be brought or defended with the knowledge at the end of the process there will not be a potential costs liability, which would ultimately deter many in bringing a claim.

2.4 The informal approach of the small claims track, where the formal rules in relation to hearings and evidence do not apply, facilitates access to justice.

3. Is the small claims track simple and informal?

3.1 The ABI believes that in general the small claims procedure is simple and informal but that there should be earlier active case management by the court. There needs to be however earlier active case management of small claims. Often evidence is exchanged a few weeks before the final hearing. This is too late in the process to provide guidance to parties, in particular those unrepresented in relation to presentation of a claim. Furthermore the opportunity could be lost for narrowing the issues and/or early resolution. This is important, because to ensure access to, and understanding of, a small claims procedure, it must have not only simple procedures in place but straightforward guidance and active case management.

4. Is the small claims track effective and efficient?

4.1 The ABI believes that the efficiency of the small claims track is undermined by the rules in relation to enforcement. The rules set out a process that is not easy to follow and even when a judgement is obtained, there is no guarantee that it will be satisfied. Litigants would be better served by a streamlined set of rules.

4.2 The advantages of effective small claims procedure can be lost if the success rate in relation to enforcement of judgments is particularly low. According to the Judicial Statistics Report in 2004 only 15% of registered judgments were satisfied. Although nearly a further 10% were cancelled, this figure is still

low. This can render the whole claims process ineffective for a litigant. Following the Civil Enforcement Review changes to the enforcement procedure were to be implemented through primary legislation when time allowed. The ABI believes that this is important measure to take forward in order to give credibility to the claims process.

4.3 The average waiting time from the issue of a small claim to final hearing is reasonable (25 weeks), but it should be emphasised that the final hearing should be the last resort and cases should only be listed once settlement efforts have failed. The court should take an active role in small claims earlier on in the process (see Para 3.1).

4.4 The ABI favours features of the small claims track that encourage proportionate dispute resolution, including the money claims online, telephone hearings, written submissions for hearings, and the claims pilots in relation to lower value disputes.

4.5 The ABI also welcomes the proposal for a European Small Claims Procedure (ESCP). It would remove some of the barriers that may currently be deterring legitimate claimants from bringing cross-border claims. However the ABI believes that the proposed €2,000 limit unnecessarily restricts its potential effectiveness and should be removed. The ESCP should only apply to cross-border claims as domestic claims can already be brought under more effective domestic small claims procedures. The ABI is opposed to the proposal for the recovery of costs and instead recommends adopting the rules that apply under the small claims procedure in England and Wales.

5. Does the small claims track allow cases to be allocated properly?

5.1 The ABI is not aware of any problems in relation to allocation of cases by the court.

6. Should the financial limits be reviewed?

6.1 In relation to personal injury claims the ABI agrees that the small claims limit should be reviewed (as recommended by the Better Regulation Task Force) and increased.

6.2 The personal injury small claims track limit is £1,000. This has not changed since 1991 despite the rising levels of personal injuries damages inflation (between 1998 and 2002 the annual average rate of inflation growth of motor personal injury claims has been around 9%). The majority of personal injury claims are therefore allocated to the fast track where there is the presumption of recoverability of costs for the successful party. As a result the costs incurred for simple low value claims are disproportionate. It is now accepted that for every £1 awarded in compensation at least 40 pence is spent on claimant's costs and in some cases more. These costs are ultimately passed on to the consumer through higher premiums.

6.3 Only five types of injury fall within the JSB guidelines where damages start under £1,000. It is clear therefore that the small claims limit for personal injury claims is not in line with damages inflation.

6.4 Raising the limit for the small claims track would take into account of damages inflation, and would have little impact on people's access to justice, as representation from a solicitor is not restricted as it is in other jurisdictions. Besides, the majority of personal injury claims are motor claims, when claimants have access to Before The Event insurance, which facilitates access to legal representation. To accompany an increase in the limit, payment of fees could be extended in the small claims court to cover other disbursements such as medical report fees.

6.5 Claimants in other jurisdictions represent themselves in court in relation to small claims, for example in Holland. This does not raise any arguments in relation to access to justice and indeed promotes early dealings direct with the insurer without the need of redress through the courts. This demonstrates that the majority of low value personal injury claims are relatively straightforward.

6.6 The majority of low value personal injury claims can be sensibly dealt with outside the court process. A scheme should be developed to facilitate early resolution of claims via a simple, cost effective and transparent claims process where solicitor involvement focuses on legal advice rather than claims handling.

6.7 There is scope to simplify the personal injury claims process further (for example, by arranging expert evidence and valuing a claim to ensure transparency in the system and protection of the claimant). This would result in proportional dispute resolution instead of the disproportionate costs currently placed on the low value personal injury claims system.

Association of British Insurers

October 2005

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