DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

THE EUROPEAN SMALL CLAIMS PROCEDURE

CP(L) 12/05

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

(APIL10/05)

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Allan Gore QC	President, APIL
Richard Langton	Vice President, APIL
Frances Swaine	Secretary, APIL
Martin Bare	Executive Committee member, APIL

Any enquiries in respect of this response should be addressed, in the first instance, to:

Miles Burger
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585
Fax: 0115 958 0885

E-mail: miles.burger@apil.com

EUROPEAN SMALL CLAIMS PROCEDURE

Executive Summary

- APIL provisionally supports the ESCP as it appears to offer many potential benefits, both in its own right and in relation to the current UK small claims court.

- APIL believes that the European small claims procedure should replace the current small claims court procedure in England and Wales.

- APIL is concerned that the definitions currently used within the ESCP fail to cover the possibility that a defendant – usually a business or employer – may be represented by someone who is not a legal professional but is still exceptionally experienced and adept at handling claims, such as an insurer.

- There is a need for a clear definition of what exactly is meant by *"costs of proceedings"* in Article 14 (1) and *"payment of expenses"* in Article 14 (2) prior to any implementation of the ESCP. APIL also suggests there needs to be greater clarity concerning the ambiguous phrase *"on an equitable basis"* in relation to the *"payment of expenses"* in Article 14 (1).

- APIL recommends that if a claimant, who is represented by a lawyer, is unsuccessful he should bear the *"costs of the proceedings"* only if he has some form of cost-indemnity insurance – e.g. a before-the-event (BTE) insurance policy or an after-the-event (ATE) insurance policy. Claimants without such insurance would be exempt from paying the costs of the proceedings if they lose the case.

- APIL is opposed to any suggestion that the ESCP limit should be increased above its €2000 (approximately £1,400) proposed limit, at least in regards personal injury claims.

Introduction

1. APIL welcomes the opportunity to put forward its comments on the Department for Constitutional Affairs (DCA) consultation on the 'European Small Claims Procedure'. Please note, however, that while the consultation letter indicates that the new European small claims procedure (ESCP) will *"make life easier for consumers and businesses alike"*[1] it will also directly affect negligently injured people who have a small personal injury claim to make. As a claimant representative organisation, APIL's response will therefore concentrate on the implications of the ESCP in relation to negligently injured claimants, and particularly how the new procedure will either help or hinder them in gaining appropriate access to justice.

2. APIL provisionally supports the ESCP as it appears to offer many potential benefits, both in its own right as well as in relation to the current UK small claims court. For example, APIL welcomes the fact that the ESCP allows for cost recovery upon a small claim being won, with any legal advice or representational costs being reimbursed in the majority of cases[2]. As detailed later in this response – and in Appendix A – this aspect of the ESCP is not reflected in the current UK small claims court. The ESCP also provides for a single cross-border procedure which will allow claimants injured overseas to receive appropriate compensation without the need to go through the current complex and convoluted procedure. Finally, by allowing claimants to use a simplified written procedure for obtaining judgment cases should be concluded, and damages awarded, more promptly.

[1] Consultation letter – page 1 (see http://www.dca.gov.uk/consult/smallclaims/pdf/letter.pdf for a copy of the letter).
[2] Article 14 (1) states that the *"unsuccessful party shall bear the costs of proceedings, except where this would be unfair or unreasonable"*. If the unsuccessful party is a *"natural person"*, however, while he will have to pay the costs of the proceedings he will not have *to "reimburse the fees of a lawyer or another legal representative of the other party"* - Article 14 (2).

Replace current small claims court with ESCP

3. APIL believes that the European small claims procedure should replace the current small claims court procedure as currently exists in England and Wales. While APIL agrees with the European Commission that *"claimants should be given the opportunity to use the procedure in internal cases"*[3] – this is option 3 within the Partial Regulatory Impact Assessment (PRIA) – we disagree that the use of the ESCP should exist as *"an alternative to the current procedures in each Member State"*[4].

4. APIL considers it manifestly unjust, for example, that under the proposals being 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.

5. In addition, APIL feels that the operation of two small claims systems alongside each other – as suggested by the European Commission and detailed within option 3 of PRIA – will only lead to confusion amongst consumers over the correct or most beneficial system to use. A single well-defined system, such as the ESCP, will avoid this possible confusion.

[3] Partial Regulatory Impact Assessment on EU Proposal for a Regulation creating a European Small Claims Procedure – page 3 – paragraph 10 (see http://www.dca.gov.uk/consult/smallclaims/pdf/ria.pdf for a copy of this document).

6. APIL suggests that replacing the current UK small claims procedure with the ESCP will enable the large number of injured people who have, in effect, become disenfranchised due to the irrecoverability of legal costs within the current system to rightfully claim for the injuries which they have sustained due to negligence. For example, current figures suggest that *"only 31 per cent of accident victims actually claim compensation using legal processes"*[5]. While this figure does not necessarily reflect the number of injured people who fail to pursue a claim via the small claims court – i.e. for injuries worth below £1,000 – it suggests a general reluctance for people to claim for compensateable injuries. Naturally there may be numerous reasons for this but - in a recent MORI omnibus survey commissioned by APIL – respondents indicated that, if they had suffered a personal injury through someone's else's negligence, they were unlikely to pursue the claim through the small claims court without an independent solicitor helping them[6]. In the context of the UK small claims court – and the lack of any cost recovery for legal representation – this fact can be seen as a possible reason for people not claiming their entitlement. With cost recovery for legal advice being granted under the ESCP in certain circumstances, APIL believes that a fairer and more equitable system for claimants, in particular personal injury claimants, would exist.

7. Please note that APIL has commented extensively on the injustices associated with the inclusion of personal injury claims within the current UK small claims track, a summary of which can be found at Appendix A[7].

---

[4] Ibid
[5] Citizens Advice Bureau (CAB) – *'No win, no fee, no chance'*: CAB evidence on the challenges facing access to injury compensation (December 2004) (see http://www.citizensadvice.org.uk/microsoft_word_-_no_win-_no_fee-_no_chance_report_final.pdf for a copy of this report).
[6] Of the 2,283 British adults aged 15+ asked this question, 40 per cent said they would be 'not very likely' and 23 per cent they would be 'not at all likely' to pursue a claim through the small claims court without an independent solicitor helping them. (Results of the MORI / APIL survey can be obtained from Lisa Wardle – APIL's Press & PR Officer).
[7] Appendix A – *'A Better Route to Redress?: Possible changes to litigation within the small claims court'* - an article to be published in the September 2005 issue of Journal of the Personal Injury Law (JPIL).

'Legal Professional'

8. APIL is concerned that the definitions currently being used within the ESCP fail to recognise that a defendant – usually a business or employer – may be represented by someone who is not a *"legal professional"* but is still exceptionally experienced and adept at handling claims, such as an insurer. While not legally qualified, the insurer may well have the same, if not more, knowledge of the intricacies of the small claims process than a legal representative. The consequence of this is that the claimant will either be at a severe disadvantage in the process or, on winning his case, will be unable to reclaim his legal costs if he has retained a lawyer to correct this imbalance. This inequality of arms therefore inhibits claimants' access to justice.

9. In addition, APIL assumes that the ESCP's use of the term *"natural person"* is not meant to permit large organisations to escape from paying costs if they lose. We are concerned that insurance companies may evade a responsibility to pay costs by hiding behind the fact that the defendant may be a 'natural person' – e.g. such as the driver in a motor claim. APIL therefore advocates that the term 'natural person' should apply to insurers whenever they 'stand behind' a defendant to meet a claim.

10. In terms of who should be included within the category of 'legal professional', APIL believes that it is essential that the injured person is represented effectively and efficiently and therefore needs someone who is legally qualified. We suggest that a 'legal professional' – as defined within the ESCP – should be someone who is legally qualified and is regulated by a recognised statutory body, such as the Law Society, Institute of Legal Executives or the Bar Council. This stipulation will mean that unregulated organisations, such as claims management companies, will be unable to represent injured claimants or conduct their claims. APIL suggests that such

representatives should also be accredited. For example, all APIL members will soon be required to become APIL accredited. The finalisation of this accreditation process is currently underway and will mean that an injured person will receive specialist accredited and regulated services for his claim when using an APIL member.

Costs – Article 14

11. While APIL appreciates that the language used in European initiatives is vague in order to allow Member States a margin of interpretation concerning their implementation, in terms of the ESCP, we feel there is a need for a clear definition of what exactly is meant by *"costs of proceedings"* in Article 14 (1) and *"payment of expenses"* in Article 14 (2). In particular, APIL would recommend that it is made clear that *"costs of ... proceedings"* includes the base costs of legal representation and all necessary disbursements. APIL also suggests there needs to be greater clarity concerning the ambiguous phrase *"on an equitable basis"* in relation to the *"payment of expenses"* in Article 14 (1). We suggest that the payment of expenses should be no more restrictive than the current principles laid down for summary or detailed assessment of costs.

12. APIL anticipates that the definitions within Article 14 will be clarified if, and when, the UK Government produces draft regulations implementing the ESCP. As such APIL would like to offer its considerable technical knowledge and support in helping to draft the UK ESCP regulations.

Unsuccessful claimants who are represented by a lawyer

13. APIL believes that it is the civil legal right of any person who has been negligently injured to claim redress from the person or organisation which caused the injury – i.e. the 'polluter pays' principle. While the proposed ESCP offers huge benefits over the current system, we are

concerned that under the current drafting of the ESCP 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 potential cost penalty may act as a disincentive for many injured people from pursuing a genuine and justified claim. APIL recommends that if a claimant, who is represented by a lawyer, is unsuccessful he should bear the "costs of the proceedings" only if he has some form of cost-indemnity insurance – e.g. a before-the-event (BTE) insurance policy (as may be attached to house or car insurance[8]) or an after-the-event (ATE) insurance policy. Claimants without such insurance would be exempted from paying the costs of the proceedings if they lose the case. This solution will enable those claimants with meritorious claims on low-incomes, who do not have either a car or house on which BTE insurance could be attached, to gain appropriate access to justice via the small claims system.

ESCP proposed limit

14. APIL is opposed to any suggestion that the ESCP limit should be increased above its €2000 (approximately £1,400) proposed limit, at least as regards personal injury claims. We are therefore concerned to learn that the *"Government is discussing with other Member States the possibility of making this* [the €2000] *a minimum limit"*[9]. While an increase may be appropriate for other types of cases within the ESCP, we believe the €2000 limit should be retained as the maximum financial threshold for personal injury cases. By setting the personal injury threshold at this level, more complex and demanding cases – which are unlikely to be appropriate for a small claims procedure[10] – will not be included.

[8] It is anticipated the majority of claimants would have some form of BTE policy which they could rely on in the event the case was decided against them. For example, DAS – a large BTE insurer – has recently stated that it has an 80 per cent penetration in the household and car insurance market.
[9] Consultation letter – page 1
[10] See research within Appendix A

Appendix A

A BETTER ROUTE TO REDRESS?:
POSSIBLE CHANGES TO PERSONAL INJURY LITIGATION WITHIN THE SMALL CLAIMS COURT

TO BE PUBLISHED IN THE SEPTEMBER 2005 ISSUE OF
THE JOURNAL OF PERSONAL INJURY LAW (JPIL)

A BETTER ROUTE TO REDRESS?: POSSIBLE CHANGES TO PERSONAL INJURY LITIGATION WITHIN THE SMALL CLAIMS COURT

Miles Burger[11]

Miles Burger considers proposals to increase the small claims limit in personal injury claims to £5,000 and reports on APIL research as to the impact this would have on access to justice for the injured person. ML

Introduction

In May last year the Better Regulation Task Force (BRTF) – a Cabinet Office-sponsored organisation examining and recommending more efficient ways to regulate – released a report concerning the regulatory aspects of litigation and compensation called 'Better Routes to Redress'. While the report proclaimed that the *"compensation culture is a myth"* – a claim the Association of Personal Injury Lawyers (APIL) has been trumpeting for many years – 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 Government subsequently agreed with this recommendation and the necessary research *"is currently under way"*[12]. This article summarises the research that has already been done in relation to personal injury actions in the small claims court - including the findings from APIL's recent membership survey and commissioned MORI survey - in particular the difficulties that injured claimants are likely to face if such a suggestion becomes reality.

Complexities of the legal process

[11] Miles Burger is the Policy Research Officer at the Association of Personal Injury lawyers (APIL). He can be contacted at miles.burger@apil.com

[12] Bridget Prentice - Parliamentary Questions (PQs) [2824] – 13 June 2005: Column 184W

"[T]*he 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"*[13].

The over-riding difficulty with having personal injury cases in the small claims court is that they intrinsically involve complex evidence which almost always demands independent legal guidance, yet one of the explicit features of the small claims process is the non-recoverability of legal costs. The complexity of personal injury cases means that, in most instances, the initial decision to take action over an injury requires an assessment as to the legal basis of a claim. This would normally involve a consultation with an experienced legal practitioner. The lack of funding for legal representation within the small claims procedure prohibits this course of action, however, unless the claimant is independently wealthy or has funding from the state. Both of these possibilities are unlikely. Research from Scotland - relating to the small claims limit - has found that *"most victims* [of personal injury] *were not aware of the basic principles of reparation law, such as duty of care, fault/negligence, harm and causation, to make* [the decision to pursue a claim] *unaided"*[14]. In addition "[f]*ew of those who had raised personal injury actions under small claims procedures were aware of its existence prior to seeking legal advice, let alone the implications of small claims procedure or risk and expenses"*[15].

Yet once engaged within the litigation process, the low value nature of the claim does not remove the aforementioned legal requirements placed on the claimant. Indeed "[s]*mall personal injury claims are likely to be as complex as higher value actions"*[16]. APIL's membership survey revealed that in over 70 per cent of the cases which were provided for the study – all settled cases below £5,000 – there was some issue of complexity, the most prevalent being a complete denial

[13] *"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
[14] Legal Studies Research Findings No. 18 (1998) – *"In the Shadow of the Small Claims Court: The Impact of Small Claims Procedure on Personal Injury Litigants and Litigation"* Elaine Samuel.
A copy of the document can be found at http://www.scotland.gov.uk/cru/resfinds/lsf18-00.htm
[15] Ibid
[16] Ibid

of liability by the defendants and the facts of the case being disputed. Therefore, in order for a claimant to succeed in his action, he must not only prove the facts of the accident, but he must identify the correct defendant and show that a duty of care is owed to him. He must then prove there has been negligence or breach of statutory duty on the defendant's part, deal with any allegations of contributory negligence and establish that his injuries are a direct result of that negligence. He has to then show all the consequences of the injuries both in the past and in the future, to include medical and financial aspects. All this has to be achieved by a claimant who has no formal legal guidance or training, and with the defendant's disputing or denying important aspects of the case.

One of the most problematic aspects of any personal injury case is attempting to financially value the claim so as to assign the case to the appropriate level within the current three-track system; for example, personal injury claims have to be worth below £1,000 in value to be assigned to the small claims court. By being legally unassisted, the difficulty for the claimant within the current small claims court is that they do not know the appropriate level of damages for their injury, so are unable to accurately gauge the value of their claim. For example, in a recent MORI omnibus survey commissioned by APIL, 73 per cent of people asked said that they were unlikely to be able to accurately work out the value of their claim without an independent solicitor helping them[17].

A further difficulty for the unaided injured claimant is when the defendant makes an initial offer of settlement; it is only with the help and advice of an independent lawyer that offers of settlement by a defendant – in most cases a large insurance company – can be effectively assessed. This concern appears to be shared by the public at large as 80 per cent stated that they would not be confident that the correct amount of money would be offered by an insurer in pre-court negotiations without the help of an independent solicitor[18]. In addition, a recent survey by Kent Accident Link – involving claimants whose cases were settled with damages less than £5,000 – found that 93% of those asked would

[17] Please contact author for a copy of this research.
[18] MORI survey – please contact author for a copy.

not want to deal directly with a defendant insurance company and/or their solicitors on their own[19].

Consequently APIL has been contacted by many of its members with details of instances where seriously injured people have been offered paltry sums of compensation by their respective insurance companies. For example, one such APIL member recalls a case where an injured client was offered a full and final settlement offer of £1,000 by his insurer for a badly fractured leg. It was only after consultation with the APIL member, who was able to properly assess the value of the claim, that the injured client eventually received in excess of £10,000 in damages. Subsequent research by APIL – via a survey of its members – has shown that the above example is not an isolated incident. Indeed, on average, if claimants within the survey had accepted the first offers made to them, they would have been uncompensated by almost £1,000; this represents an average increase of over 50 per cent from the first offer to the final settlement[20]. Similar work by Catherine Leech of Pannone & Partners found that the *"average percentage increase between first offer and final settlements in the cases looked at was 52.57%[21]"*, while Crispin Edmunds of Burroughs Day solicitors – in a sample of 94 cases settled between 01/12/2004 and 22/02/2005 – found that there was an average increase per case of £1,395.12.

It is not only in reference to quantum – i.e. the value of a case – where the unaided claimant is likely to struggle. For instance, there may well be a need for a medical report to be requested in order to prove the presence and/or extent of any injury for which they are claiming. Yet once the claimant has ascertained how to request such a report – no easy feat – and received it, there is still a need for a certain level of technical knowledge in order to effectively interpret it. This interpretation is essential in order to establish both the level of quantum and the medical basis on which damages are to be claimed. One district judge stated that "[i]*t's totally beyond the capability of the average litigant to work out*

[19] Please contact Robert Harvey of Stephens & Son solicitors for a copy of the report.
[20] Ibid
[21] *'Better in than out'* – Law Society Gazette [102/01] (6 January 2005), page 10

'pain and suffering' and compensation for that or the principles involved in putting together a special damages claim for loss of earnings"[22]*.* It is manifestly unjust that the inexperienced claimant therefore needs to both present the medical report effectively - so as to illustrate his symptoms - as well as compare and contrast relevant cases in order to establish an appropriate level of quantum. A point well illustrated by Professor John Baldwin who has stated 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"*[23]*.*

The above arguments illustrate the difficulties an unrepresented claimant faces in the small claims court, and the benefits that independent legal representation provides. It is often the level of complexity, however, and the need to present a coherent case in court in front of a judge which inevitably leads to a large number of people being so intimidated that they decide to not even bother taking their cases to court. Indeed Scottish research has found that *"many unassisted litigants … grudgingly dropped their case or accepted what they believed to be a derisory offer as a result of their court experience"*[24]*,* while APIL's MORI omnibus results show that 64 per cent of people would not pursue a personal injury claim through the small claims court without the help of an independent legal advisor.

While the small claims court is intended for simple cases, this simplicity is still based on a legal decision. What is really meant by 'simple', however, in this instance is simple in terms of the law. Naturally what an experienced lawyer or judge may deem a simple case is unlikely to be seen as such by someone with little or no legal training – i.e. the majority of people who will take their cases to the small claims court. It unfair that injured claimants should be hindered in proceeding with their claim due to the difficulties within the small claims procedure, and that the offending company should be let-off paying for their negligence. While £1,000 may be low in relation to other types of damages, to

[22] *"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 78
[23] Ibid

many it represents a significant amount of money and will usually have to cover such necessities as loss of earnings. APIL feels the provision of legal advice will provide most claimants with a level of comfort so that they will feel happier in proceeding with their claims.

The level of complexity, as detailed above, significantly illustrates the huge burdens which are placed on injured claimants attempting to win appropriate damages within the small claims court. This complexity can be seen to be in direct contrast with the majority of cases which are dealt with in the £2000 to £5000 small claims court bracket. These claims tend to be consumer related – e.g. breach of contract – and do not have the same evidentiary needs placed upon them compared with personal injury claims. For example, it is unlikely that a medical report is required to prove a breach of contract. In addition, the level of quantum involved in a breach of contract case is easily quantifiable – i.e. how much did the faulty washing machine cost. As previously detailed, however, in a personal injury case quantum is often the most difficult aspect to ascertain with any certainty.

It is difficult to see how the BTRF's view that "[t]*he whole process* [of the small claims court] *is designed to be more informal and less adversarial"*[25] is justified, as it would seem that the experience for most injured claimants is the opposite. In fact without the assistance of a legal representative, the experience may even be more formal and adversarial. Indeed:

"[w]*here court proceedings are conducted according to the normative expectations of an adversarial system, the justice to which unassisted personal injury litigants have access under small claims procedure may be perceived as hollow."*[26]

Uneven playing field

[24] Legal Studies Research Findings No. 18 (1998) – *"In the Shadow of the Small Claims Court: The Impact of Small Claims Procedure on Personal Injury Litigants and Litigation"* Elaine Samuel.
[25] Better Regulation Task Force – 'Better Routes to Redress' (May 2004), page 26

With no funding for independent legal representation, the injured claimant is placed in a difficult situation as most personal injury claims are made against big business, or an insured defendant, both of whom will almost always legally represented. This tilts the playing field against the claimant and the end result could be that careless drivers or negligent employers will get away scot-free, while innocent victims of injury remain uncompensated.

Scottish research has found that claimants, in addition to not knowing how to deal with legal procedures, *"felt intimidated by the court and … usually faced specialist reparation lawyers acting on behalf of insurance companies and local government"*[27]. Indeed the claimant's difficulties were highlighted as being *"compounded by the fact that they usually faced experienced reparation lawyers"*[28]. Yet the BRTF seems to feel that "[e]*ven though a dispute may involve only a small sum of money, the small claims procedure gives litigants in person a fighting chance of success against a represented and wealthier opponent, without having to run the risk of financial ruin in the process"*[29], while in reality this is actually not the case. In fact *"[i]t is doubtful that the interests of justice would be served simply by leaving PI claimants to their own devices in preparing for the hearing as happens with other kinds of small claim"*[30].

Removal of incentives to settle early

The current small claims court operates on the principle of each legal party paying its own costs. By extending the small claims personal injury threshold to £5,000 – as a means of controlling legal costs - a vital mechanism for ensuring that cases are settled early, both for the benefit of the claimant and the judiciary, will potentially be lost. It should be remembered that the claims process continues as long as the defendant decides to challenge the claimant's case. It is always in the hands of the defendant to end the litigation at any stage

[26] Legal Studies Research Findings No. 18 (1998) – *"In the Shadow of the Small Claims Court: The Impact of Small Claims Procedure on Personal Injury Litigants and Litigation"* Elaine Samuel.
[27] Ibid
[28] Legal Studies Research Findings No. 18 (1998) – *"In the Shadow of the Small Claims Court: The Impact of Small Claims Procedure on Personal Injury Litigants and Litigation"* Elaine Samuel.
[29] Better Regulation Task Force – 'Better Routes to Redress' (May 2004), page 26

[30] *"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 78

by settling the claim. The current incentive for insurers to settle a claim as early as possible is that if they lose a case they will have to pay their own and the other side's costs; so there is an ever-present costs penalty involved in prolonging a case. This is, of course, also true for the claimants. If a claimant pursues a baseless case, he will eventually lose and have costs awarded against him. With the removal of these costs sanctions there would be no incentive to settle. Inevitably it is easy to foresee a situation where insurers will be tempted to contest every claim, with the hope that the claimant will either run out of funds or time, or both.

Naturally the alternative to representing yourself in the small claims court is for the injured person to pay for legal representation himself. With there being no ability to claim costs within the small claims procedure, this option will, however, only be open to those select few who have sufficient financial resources. Ultimately the most disadvantaged – people with neither the time and/or money – will not be able to proceed with valid and necessary small claims litigation. .

Difficulties facing district judges in small personal injury claims

"In the small claims track the judge plays a proactive role at hearings. This role involves, in particular, helping litigants in person to present their own evidence and assisting them in putting questions to the other side[31]*."*

While the BRTF seems to feel that the judge within the small claims court is proactive in his assistance, in reality the aid which a district judge can provide to a litigant in person is limited. Research has found that the people leading the hearing, the Sheriffs in Scottish cases, *"were more reluctant to take an interventionist role where one party was legally represented, as it usually was in personal injury actions"*[32]. In most instances it is the defendant who is represented by either counsel or a solicitor. It is obvious that the claimant, the only one who does not have legal knowledge, is placed in a disadvantageous position. The level of proactivity by the presiding judge is further reduced by the

[31] Better Regulation Task Force – 'Better Routes to Redress' (May 2004), page 26

high volume of cases which they will hear. As one district judge commented *"I have a feeling that I am doing less than a perfect job – and it's way less than that on occasions"*[33]. Furthermore, expressions such as *"hit-and-miss", "rough-and-ready", rough justice", "inspired guess work"*, even *"quick and dirty"*[34] have been mentioned in relation to tackling cases, indicating the *"limitation that district judges recognise in the procedures they adopt in small claims hearings"*[35].

This author feels it is too important – in the context of the health and well-being of a person – to leave it to the 'rough-and-ready' justice meted out within the small claims system. The presence of a legal advocate, whether counsel or solicitor, would allow for the protection of a claimant's rights as well as allowing for someone experienced in matters of law to be able to gauge the equality of any judicial decision.

Exclusion of disadvantaged claimants

As already mentioned any change in the small claims limit will ultimately adversely affect the most disadvantaged members of society when they are injured through the negligence of someone else. For example, if a person decides to pursue his personal injury claim through the small claims court the amount of work which is involved will often mean that it is simply not financially or personally possible to continue once started. This will either result in an injured claimant settling the claim for less than its actual worth or giving up on the claim completely. In Professor Baldwin's research, when asked how much expense was involved in pursuing their claim through the small claim court he got a *"confused and uncertain"*[36] picture, the greatest difficulty being that it is *"almost impossible to form any realistic idea about the value of the litigants' own contribution"*[37]. Indeed "[s]*ome people described at great length in the*

[32] Legal Studies Research Findings No. 18 (1998) – *"In the Shadow of the Small Claims Court: The Impact of Small Claims Procedure on Personal Injury Litigants and Litigation"* Elaine Samuel.
[33] *"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 82
[34] Ibid, page 83
[35] Ibid
[36] Ibid, page 35
[37] Ibid

interviews the immense amount of work they had done on the case in preparing for the hearing, often involving many hours, even whole days, of their time.[38]*"* It is this cost which is unlikely to be able to be borne by injured claimants who work or whose personal situation simply does not allow for this level of time to be spent on the case. It should be noted that the previous quote and observation was made primarily in relation to the application of small claims court procedures to consumer matters. In respect of the further complexities involved in a small claims case for a personal injury matter – for example the need to get a medical report and calculation of quantum – it is anticipated that the amount of time needed to prepare the case will be considerably higher. In some ways it could be argued that it is this level of complexity which makes personal injury unsuitable for the small claims court, regardless of monetary threshold.

Difficulties with funding arrangements

In terms of the legal marketplace, the proposed increase in the small claims limit will have a huge impact on the provision of legal funding throughout the industry, in particular for claims above the proposed £5,000 threshold level which retain funding for legal representation. The use of 'no-win no-fee' agreements means that cases are run on a 'swings and roundabout' approach; the cases lost, where no costs are recovered, are off-set against those which are won, and a success fee is claimed. This approach has meant that firms need to use a risk-averse strategy when deciding to take on personal injury cases. As previously described a central issue of any personal injury case is deciding on the level of quantum; this will decide whether the case belongs in the small claims court or the fast-track. Currently, while still not an exact science, most practitioners know the difference between a fast track case and small claim case. By raising the financial threshold to £5,000 this differentiation is made considerably more difficult, and PI practitioners are going to be extremely wary of taking on a case which is on this £5,000 borderline as they may lose the ability to reclaim their costs. For example, a case which is over

[38] *"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 35 & 36

£5,000 may be placed into the small claims court by virtue of a finding of contributory negligence. Contributory negligence is usually only ascertained either after some investigation or by the judges decision, so cannot be predicted prior to a certain amount of money being spent by the firm.

The use of CFAs also allows personal injury claims (other than those in the small claims court) which are relatively straightforward – as viewed by a legal representative – to provide funding for larger more risky personal injury actions. By raising the small claims limit firms will be deprived of a huge source of funds, which personal injury claims between £2,000 and £5,000 provide, so making it unlikely that larger risky cases could be pursued. APIL members have estimated that between a third and a half of personal injury cases they deal with are for damages around £5,000. By removing the ability to regain costs, firms will struggle to support personal injury practices, and in particular, will refrain from taking on cases which have any chance of being lost – i.e. only take on cases which have a 90 per cent plus chance of success. Fewer personal injury solicitors, means less freedom of choice and ultimately a restricted access to justice for many.

Financial loss to the state

Any increase within the small claims limit will precipitate a huge reduction in the number of claimants within the system. This in turn would lead to a greater reliance on the state for health and welfare services and the decrease of recoupable benefits from losing defendants. Any savings made by the Government, or hoped to be made by the Government, by limiting the amount of litigation which passes through the fast-track and multi-track litigation streams will be minimal at best.

While the complexity and cost, in terms of time, of the current system means that many claimants do not pursue their claims further, any increase in the financial threshold will only exacerbate this problem. These claimants will in turn resort to state support, as they will not be pursuing the negligent 'polluter' to pay for the consequences of their injuries. This support would take the form of state

payments such as incapacity benefit, unemployment benefit and disability benefit. In addition, it is probable that these injured claimants will call on the services of the NHS in order to deliver their medical and care needs.

Further Government money is lost via the inability to reclaim the above detailed state benefits back from the defendant's insurer. Recent years have seen the introduction of a number of recoupment schemes introduced by the Government in order to reclaim these state benefits which were incurred while an injured claimant's case proceeded through the courts. In the instance of a claimant winning his case, under the 'polluter pays' principle, the defendant is compelled to repay the benefits amount. The potential increase in the small claims level, and the subsequent withdrawal from the litigation process of people unwilling to represent themselves, will result in a steep reduction in any possible recoupable benefit.

With there being no perceivable benefit, financial or otherwise, to the Government from the increased use of the small claims court for personal injury action, it would appear that the only party which would benefit from such an increase would be large multi-national insurance companies. The question should therefore be asked whether the already considerable profits of large insurers are more important than the ability of people to gain their rightful compensation from the organisation which caused of the negligent injury.

Effect of continuing costs negotiations

"Given the work being carried out in the area of fixed fees …the Task Force believes that the time is now right to examine again whether the limit for personal injury claims should be raised above £1,000.[39]*"*

Regardless of the numerous issues of concern detailed above, discussions concerning changes to the small claims court in order to tackle legal costs would seem premature as this issue is already being addressed elsewhere in the civil justice system. In terms of what area of claims would justify an increase

in the small claims limit for personal injury claims, district judges argued that *"dealing with claims relating to routine injuries – whiplash injuries following a motor accident was cited as the prime example – was, both legally and factually, familiar territory for them"*[40]. The fixed fees scheme, however, has now put into place a structure to effectively control costs for simple road traffic accidents (RTAs) cases. It should be remembered that this scheme was agreed by claimant representatives, as well as insurers and the judiciary – as represented by the Master of the Rolls – and ratified by the Government via the Department of Constitutional Affairs. With the removal of simple RTA cases from the legal costs debate, it is difficult to justify the increase in small personal injury claims limit, as the majority of the remaining cases will be of a level of complexity which would be inappropriate for a small claims procedure. Furthermore, there are various ongoing initiatives – many of which APIL is actively involved in – which are looking at ways of tackling the thorny issue of legal costs. These include the ongoing negotiations regarding fixed success fees as well as work with the Department of Work and Pensions (DWP) into piloting a scheme to streamline the claims process and reduce legal costs.

The continuing development of the legal costs schemes, in addition to the bedding-in of the predictable costs scheme, suggests that there is little justification for the small claims limit to be examined at the present time, especially not until the success of the aforementioned schemes can be effectively ascertained.

Latest Developments

Since the publication of the Better Regulation Task Force's report in May 2004, there has been considerable debate and discussion concerning it's recommendations. Reassuringly the Lord Chancellor has recently stated that while we need *"research to tell us what would be lost by increasing the small claims limit for personal injury"*, he is *"not at all convinced that raising the small claims limit for personal injury is the answer"*. He continued: *"We will have to*

[39] Better Regulation Task Force – 'Better Routes to Redress' (May 2004), page 26
[40] Ibid, page 79

wait to see what the research says, but simply raising the limit will do nothing to address the underlying costs and may give rise to new problems. Although it might deter claims farmers and solicitors from taking on spurious claims, they would not take the genuine claim either"[41].

In addition, the European Union (EU) is currently in the process of looking at a European Small Claims Procedure (ESCP) for cross-border cases. There are, however, various suggestion surrounding this topic including the Commission's wish *"that the ESCP should not be confined to cross-border cases. It argues that claimants should be given the opportunity to use the procedure in internal cases as an alternative to the current procedures in each member state"*[42]. While this fact in itself is not too important, it should be mentioned that the ESCP would include appropriate funding for independent legal representation. Naturally APIL is monitoring the progress of this work very closely.

Conclusion

"We believe that allowing more personal injury claimants to go through the small claims track process will increase access to justice for many as it will be less expensive, less adversarial and less stressful"[43].

In many ways, the small claims court does not increase access to justice, will actually be more expensive, and will be no less adversarial or stressful than the current court process. While the recent comments made by the Lord Chancellor indicate a potential reluctance by the Government to meddle with the personal injury limit in the small claims courts, it should be noted that the current limit fails to adequately protect and promote the best interests of the personal injury claimant, and any extension of the corresponding financial threshold will continue to do so. It is easy, therefore, to concur with the sentiment that *"there are particular complexities that arise in PI cases which would make them very*

[41] Speech by Lord Falconer of Thoroton – Health and Safety Executive event, London – *'Compensation Culture'* (22 March 2005) (See http://www.dca.gov.uk/speeches/2005/lc220305.htm for a copy of his speech)
[42] For a copy of this consultation, please go the Department for Constitutional Affairs website - http://www.dca.gov.uk/consult/smallclaims/smallclaims.htm
[43] Better Regulation Task Force – 'Better Routes to Redress' (May 2004), page 26

difficult to accommodate within an unreconstructed small claims regime"[44]. For example, an APIL member, who also happens to be a deputy-district judge, said that he *"would be horrified to see a case involving … a broken arm with damages of £4,000 being dealt with on the basis of a bundle of decided cases produced by counsel for the insurers with the claimant being on his/her own and no cases to produce."*

In conclusion, personal injury within the small claims process restricts rather than enhances access to justice. Indeed as the research states, "[w]*hile small claims procedure may have extended access to justice removing the financial risks of litigation, access to justice has been reduced by restricting access to advice, negotiation and prelitigation assistance. This may be a more crucial component of 'access to justice' than the opportunity to litigate.*[45]"

[44] *"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 78
[45] Legal Studies Research Findings No. 18 (1998) – *"In the Shadow of the Small Claims Court: The Impact of Small Claims Procedure on Personal Injury Litigants and Litigation"* Elaine Samuel.