association of personal injury lawyers

**THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)**

# RESPONSE TO THE BETTER REGULATION TASK FORCE REPORT - *'BETTER ROUTES TO REDRESS'* (MAY 2004)

## SMALL CLAIMS TRACK

**A POLICY DOCUMENT BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS**

**JULY 2004**

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 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.

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**SMALL CLAIMS TRACK**

## Introduction

1. APIL welcomes the opportunity to put forward its comments to the Department for Constitutional Affairs (DCA) in respect of the recent report by the Better Regulation Task Force, and in particular Recommendation 2 concerning the small claims track[1]. APIL has responded previously in relation to the inclusion of personal injury cases in the small claims court - in 1993, 1997 and lastly in 2003 – and this policy document reiterates these responses. In summary, APIL's position has always been that personal injury cases have no place in the small claims court because they involve complex evidence which almost always demands legal guidance, and the cost system of the small claims procedure does not provide for this facility. It is also grossly unfair that most personal injury claims are made against big business, or an insured defendant, who is almost always legally represented in the small claims court. While there is meant to be support from the presiding district judge, this help is often inconsistent and 'rough-and-ready'. The judge will also tend not to get involved when one of parties is legally represented – i.e. the defendant. 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.

2. The above factors, combined with the time cost involved in preparing a defence, means that the small claims court process adversely affects the most disadvantaged of claimants, and any increase in the financial threshold level would further restrict their access to justice. A possible further restriction for personal injury claimants is the difficulty with funding that an increase in the small claims limit would introduce.

[1] Better Regulation Task Force – *'Better Routes to Redress'* (May 2004), Recommendation 2: Small Claims Track, page 25-26.

3. APIL feels that the expanded use of the small claims court for personal injury actions would actually increase costs, both for claimants and the Government, with the only beneficiaries being large insurers. These increases in costs would be by virtue of more claimants choosing not to pursue their respective personal injury cases, because of the time cost and complexities involved, and relying on state support to help them cope with their injuries. An additional aspect which would increase costs is that there would be no incentive for defendants or insurers to settle a case due to the lack of any cost penalties within the small claims court. It is in their interests, therefore, to continue a case unnecessarily in the hope that the claimant will run out of money or time.

4. Finally, APIL suggests that the need to address legal costs via altering the small claims limit is premature as concerns about legal costs are already addressed in the civil justice system. For example, APIL is directly involved with the continuing development of the RTA predictable cost scheme, fixed success fees and the Department for Work and Pensions (DWP) pilot schemes.

**Complexities of the legal process**

5. APIL believes that personal injury cases have no place in the small claims court because they involve complex evidence which almost always demands legal guidance, and the cost system of the small claims procedure does not provide for this facility. Personal injury claims are hugely complicated. Initially the 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*

For a copy of the report, please see http://www.brtf.gov.uk/taskforce/reports/8874betterroutes.pdf

*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"*[2]. 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"*[3].

6. 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"*[4]. For example, in order for a claimant to succeed in his action, he must not only prove the fact 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.

7. APIL considers that 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, small personal injury claims have to be worth below £1,000 in value. 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. APIL members have produced numerous examples of people seriously injured being offered paltry sums of compensation by their respective insurance companies. It is only through discussion and

[2] 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
[3] Ibid

investigation with a lawyer that the true worth of the claim can be ascertained. For example, an 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.

8. Determining quantum – i.e. the value of a case – is made more problematic 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 than would have naturally occurred; or the claimant may not recover as well as his doctor hopes; or he may have symptoms which need to be further investigated. These determinations are further influenced by the majority of claimants having little or no experience of how to request a medical report.

9. APIL believes that even once a claimant has received the medical report, there is still a need for legal assistance as there is often a certain level of technical knowledge required 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 'pain and suffering' and compensation for that or the principles involved in putting together a special damages claim for loss of earnings*"[5]. APIL feels that 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. This again illustrates the need for an experienced legal practitioner to be involved within any small personal injury claim.

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[4] Ibid

10. There is support for APIL's contention that personal injury claimants are vulnerable in the small claims litigation process due to the complexities and vagaries of legal practice within the research quoted by the Better Regulation Task Force in its report. Professor John Baldwin states 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"*[6]. He continues 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"*[7].

11. APIL feels that it is often the level of complexity and the need to present a coherent case in the small claims court in front of a judge which inevitably leads to a large number of people being intimidated and not proceeding with their claim, personal injury or otherwise. Indeed the research 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"*[8].

12. 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. APIL considers it manifestly unjust 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

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[5] *"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

[6] *"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

[7] Ibid

[8] 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.

their negligence. While £1000 may be low in relation to other types of damages, to 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.

13. 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 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. As previously detailed, however, in a personal injury case quantum is often the most difficult aspect to ascertain with any certainty.

> *"The whole process* [of the small claims court] *is designed to be more informal and less adversarial."*
> Better Regulation Task Force – 'Better Routes to Redress' (May 2004), page 26

14. APIL believes that the complexity of conducting personal injury litigation makes its inclusion in the small claims court unsupportable, as the lack of necessary legal knowledge means that claimants which *"receive no legal assistance* [are] *at a considerable disadvantage"*[9]. In reference to the Better Regulation Task Force quote above, APIL contends that the experience for most injured claimants using the small claims court is no more informal or less adversarial than a normal court, and without the assistance of a legal representative, APIL considers that the experience may even be more formal and adversarial. Indeed:

[9] *"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 46

*"[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."*[10]

**Uneven playing field**

15. APIL believes that it is grossly unfair that most personal injury claims are made against big business, or an insured defendant, who is almost always legally represented in the small claims court. 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.

16. 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"*[11]. Indeed the claimant's difficulties were highlighted as being *"compounded by the fact that they usually faced experienced reparation lawyers"*[12].

> *"Even 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".*
> Better Regulation Task Force – 'Better Routes to Redress' (May 2004), page 26

17. In reference to the Better Regulation Task Force quote above, APIL believes that the lack of legal representation, coupled with the presence of experienced lawyers for the defendants, puts the claimant at a distinct

[10] 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.
[11] Ibid

disadvantage, with little chance of success, within the small personal injury claims process. APIL agrees that *"[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"*[13].

**Removal of incentives to settle early**

18. APIL considers that the introduction and expansion of the small claims rules, in particular with reference to the restriction of costs, has removed a vital mechanism for ensuring that cases are settled early, both for the benefit of the claimant and the judiciary. 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 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 within the small claims court there is now no incentive to settle. APIL foresees that insurers will be tempted to contest every claim, with the hope that the claimant will either run out of funds or time, or both.

19. 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.

[12] 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.
[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 78

20. APIL feels that this is a further demonstration of the unsuitability of the small claims court to personal injury litigation, as both of the above facts will mean that 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**

21. APIL believes that 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"*[14]. In most instances it is the defendant who is represented by either counsel or a solicitor. It is easy to see that the claimant, the only one who does not have legal knowledge, is placed in a disadvantageous position.

> *"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."*
> Better Regulation Task Force – 'Better Routes to Redress' (May 2004), page 26

22. In reference to the Better Regulation Task Force quote above, the level of proactivity by the presiding judge is further reduced by the 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"*[15]. Furthermore, expressions such as *"hit-and-miss", "rough-and-ready", rough justice", "inspired guess work"*, even *"quick and dirty"*[16] were mentioned, indicating the *"limitation that district judges recognise in the procedures they adopt in small claims hearings"*[17].

[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.
[15] *"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
[16] Ibid, page 83
[17] Ibid

23. APIL feels that the health and well-being of a person is too important to leave it to the 'rough-and-ready' justice meted 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**

24. APIL firmly believes that any increase in the small claims limit, particularly if it increases to £5,000, will 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"*[18] picture, the greatest difficulty being that it is *"almost impossible to form any realistic idea about the value of the litigants' own contribution"*[19]. Indeed "[s]*ome people described at great length in the 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.*[20]*"* 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

[18] Ibid, page 35
[19] Ibid
[20] *"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

complexities involved in a small claims case for 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. It is this level of complexity which makes personal injury unsuitable for the small claims court, regardless of monetary threshold.

**Difficulties with funding arrangements**

25. APIL believes that the increase in the small claims limit will have a huge adverse 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 wide-scale introduction of conditional fee agreements (CFAs) in 1999 lead to a radical new approach to funding personal injury litigation. 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 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 £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 by the firm has been spent.

26. 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. APIL believes this will further restrict injured claimants access to justice.

**Financial loss to the state**

27. APIL envisages that an increase in the small claims level would reduce 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. APIL believes 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.

28. 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.

29. 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.

30. 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, APIL considers that the only party which would benefit from such an increase would be large multi-national insurance companies. APIL feels the question should 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**

31. APIL suggests that the need to address legal costs via altering the small claims limit is premature as this issue is already 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"*[21]. 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, APIL is actively involved in negotiations regarding fixed success fees as well as being directly involved in the Department of Work and Pensions (DWP) pilot schemes to reduce legal costs.

> *"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."*
> Better Regulation Task Force – 'Better Routes to Redress' (May 2004), page 26

32. In reference to the Better Regulation Task Force quote above, APIL believes that 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.

## Conclusion

33. APIL believes that the current small claims procedure 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. APIL concurs with the sentiment that *"there are particular complexities that arise in PI cases which would make them very difficult to accommodate within an unreconstructed small claims regime"*[22]. Indeed 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*

[21] Ibid, page 79

*with damages of £4000 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."*

> *"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".*
> Better Regulation Task Force – 'Better Routes to Redress' (May 2004), page 26

34. In reference to the Better Regulation Task Force quote above, APIL feels that the small claims court does not increase access to justice, will be more expensive, and will not be any less adversarial or stressful. The lack of access to justice for claimants can be seen by the fact that, for example, a claimant has to tackle complex legal, quantum and evidentiary issues without the aid of legal advice; present his case against experienced and well-financed defendants; and will have considerable difficulty in locating and receiving appropriate legal funding for his case.

35. APIL believes that allowing more personal injury claimants through the small track claims process will actually be *more* expensive to both claimants and the Government. The huge amount of preparation needed to conduct a defence will mean that a considerable amount of claimants will pay more in terms of both work time and personal time. This will have the knock-on effect of discouraging many claimants from proceeding with their claim, and not pursuing the negligent polluter for their injuries. Instead these claimants will turn to the state to provide medical and benefit support. In addition the Government will not be able to recoup these benefits as there would be no damages award to offset them against.

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[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

36. APIL considers that the small claims process is no less adversarial than a normal court. In addition, without the aid of a legal representative the adversarial nature of the procedure is firmly to the advantage of the defendant, who will be legally represented. Also, as with all litigation, it is within the defendant's power to end the case via agreeing to settle. The removal of the costs penalty which exists in other areas of litigation, however, will mean that it is to the defendant's advantage to continue the small claims process as long as possible as they will inevitably have deeper pockets than the claimant.

37. APIL believes that the small claims procedure is no less stressful than normal litigation. Indeed the need for the claimant to present his own case, without any legal knowledge in the majority of cases, means that the small claims procedure is considerably more stressful than normal litigation. In contrast, in normal litigation, the claimant has the comfort of knowing that his personal injury case is being handled by a legal representative with the ability and experience to deal with the complex issues involved.

38. In conclusion, APIL sees the small claims process as restricting rather than enhancing 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.*[23]"

[23] 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.