Small Claims Tribunal Evaluation

Volume 1
Discussion Paper

Study Series 17
Policy and Research Division
Department of Justice
May 1986

SMALL CLAIMS TRIBUNAL EVALUATION

VOLUME 1 : DISCUSSION PAPER

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Study Series No. 17
Policy and Research Division
Department of Justice
Wellington
NEW ZEALAND

ISSN 0110-5779

May 1986

Foreword

The Small Claims Tribunals Act which became law in 1976, introduced to New Zealand a new approach to the resolution of civil disputes. The first three tribunals were opened on a pilot basis in 1977. By October 1985 the number had increased to 36 and a full national coverage is planned by the end of 1986.

In the first full year of operation there were 919 applications for tribunal hearings and by 1985 this had increased to 7436. Small claims tribunals are now an established and accepted part of our dispute resolution system.

Tribunal hearings are conducted by a referee who usually has no legal training. The tribunals are attached to a district court, are held in private, and the referee's role is as arbitrator to the dispute. Referees attempt to effect an agreement, but if one is not forthcoming, they are required to make a decision and institute an order.

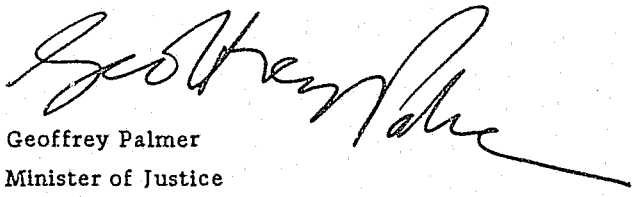
Why was this alternative form of dispute settlement established? At that time two concepts pervaded discussions in this area and prompted developments in New Zealand. The first was that all citizens should have access to justice undeterred by the costs normally associated with litigation. The second was that as techniques for dispute resolution, mediation and arbitration might prove more effective for some cases than adjudication by a judge.

The objectives of the small claims tribunals are to provide quick, inexpensive and common sense justice for the ordinary New Zealander. This approach to justice was initiated in the 1960s and 70s in the United States, Great Britain, Australia and

Canada. However, the small claims procedures in most of these countries are marked by the fact that by the time they had ceased to be theoretical and were applied, the original concept was compromised by the inclusion of judges and in some cases lawyers and normal judicial procedures. This did not happen in New Zealand and we have a relatively informal and inexpensive means of common sense justice.

This evaluation is primarily focussed on whether the objectives are being achieved. Its purpose is to determine after almost 10 years existence, how well the tribunal system is working and to suggest ways it can be improved.

This study will be considered by the department with a view to implementing administrative improvements. As well, a review of the Small Claims Tribunals Act is planned and the evaluation, together with any comments received on it, will assist that exercise.



Geoffrey Palmer
Minister of Justice

Acknowledgements

The small claims tribunal evaluation was very wide ranging. Projects were carried out nationally at all courts where tribunals are held and at the local level three case studies were carried out. The study took a year to complete and during that time from three to five full-time research staff were continually working on the evaluation. Also, during the summer, three people were brought in to assist us. Many people were directly and indirectly involved in this project.

First of all our thanks to all court staff members and referees who helped us with this study. In particular to those courts where the 21 tribunals of our study are located who provided us with all of their files out of which the Survey of Claims and Disputants' Survey grew and also to those who assisted with compiling information for the paper "Increase in Monetary Limit from $500 to $1000".

Many thanks to the court staff who answered the questionnaire that formed the basis of "A Survey of Court Staff", also to the referees who responded to the issues paper and the questionnaire which followed it.

Thanks to the disputants who answered the questionnaires that provided the information for the Disputants' Survey and for those members of the public who responded to the issues paper and whose replies formed the basis of "Submissions on the Issues Paper".

Special thanks to the referees, the registrars, deputy registrars and all those court staff attached to small claims at the district courts of Palmerston North, Otahuhu, Dunedin and New Plymouth where we carried out our pilot study and our case studies.

We would like to express our appreciation to the community organisations and their members in these case study areas who freely gave of their time and ideas to assist this evaluation, also to the disputants who spoke with us before and after their hearings.

Thanks to the individuals throughout New Zealand who responded to the "Public Awareness Study".

Thanks to Debra East, our research assistant, and to Geeta Parag and Peter Robinson for their help with the data collection.

At head office of the Department of Justice thanks to Mark Carruthers of Law Reform Division and Brian Hayes of Courts Division and Hugh Garland formerly of Courts Division for their ongoing and invaluable help throughout this project. Last of all we would like to thank Jan Julius for her untiring support in typing and retyping our drafts and keeping us on schedule.

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CHAPTER 1

Introduction

1.1 PURPOSE OF THE EVALUATION

The first three small claims tribunals were introduced in New Zealand in 1977 on a pilot basis. At the time it was accepted that the overall concept, as well as some specific provisions, were on trial. Since then small claims tribunals have been progressively introduced so that by October 1985 there were 36 tribunals, giving a reasonable geographic coverage of New Zealand.

Over the past nine years it has been generally accepted that small claims tribunals are a "good thing", though complaints about specific aspects have come to our notice. The time is right to see if small claims tribunals are fulfilling their promise.

The strategy used for the evaluation was first to understand the development and purpose of small claims tribunals. This involved document research plus interviews with administrators. Secondly, a reading and interviewing process was put in train to identify potential issues for evaluation. This included interviews with consumer groups, administrators, referees and court staff, and observation of tribunal hearings and referee training seminars.

The resultant issues paper[1] was distributed and submissions sought. As well as presenting a list of specific issues, that exercise concluded that the evaluation

(1) Sullivan, 1985

should adopt a user perspective. Two significant themes emerged:

(i) To what extent do the public know about small claims tribunals?

(ii) Do disputants, both claimants and respondents, think that the small claims tribunal works fairly?

Following this, the third phase established the aims of the evaluation. The terms of reference were:

> To ascertain how effective small claims tribunals are in providing fair, low cost and swift resolution of small claims.
>
> In particular:
>
> (i) to assess public awareness and use of small claims tribunals;
>
> (ii) to describe how small claims tribunals work;
>
> (iii) to describe the outcomes of this process;
>
> (iv) to assess whether these outcomes are the desired ones;
>
> (v) to ascertain whether the outcomes can be attributed to the small claims tribunal process;
>
> (vi) to identify reasons for demonstrated shortcomings and to suggest remedial actions.

This in turn gave rise to a comprehensive research programme, involving seven research projects, the results of which are reported in the accompanying volume to this report. The projects are listed and briefly introduced in section 1.4 below.

This paper presents and discusses the results and conclusions of the seven research reports. It will assist a continuing debate and provide a basis for deciding if changes are needed.

Throughout this evaluation exercise it has always been accepted by people at all levels of involvement that the small claims tribunal concept is a good one, and it has never been contemplated that maybe small claims tribunals should not exist. Rather it has been a matter of discovering whether the tribunals are being used to best advantage, and if not, identifying problem areas in order to improve their usefulness.

1.2 THE PURPOSE OF SMALL CLAIMS TRIBUNALS

The principle behind small claims tribunals is that every person should have ready access to a fair means of resolving small disputes. The small claims tribunal is the method suggested when the dispute involves a claim too small to warrant the expense of civil litigation, but is still large enough to have a significant impact on the lives of the disputants. Arising from this principle the New Zealand small claims tribunal has one substantive goal[1] plus an ancilliary system-related[2] one:

1 To provide a fair, low cost and swift resolution of small claims.

2 To reduce the workload of district courts by removing potential small claims from its jurisdiction.

The policies and procedures implemented to effect these goals are set out in the Small Claims Tribunal Act 1976.[3]

In accordance with the user-oriented conclusion of the issue-identifying exercise, this evaluation concentrates on the first goal and not the second, although there are some results that have a bearing on the latter.

1.3 A MODEL OF THE SMALL CLAIMS TRIBUNAL SYSTEM

The earlier issue-finding exercise and the research itself gave rise to numerous issues to be considered by the evaluation. They are many and they are varied. They range from grand philosophical assumptions (eg does the informal, conciliatory approach actually attract ordinary people and does it result in justice?) to administrative and procedural problems (eg how to take evidence at a distance).

(1) NZ Parliamentary Debates, vol 46, 1976, p2773
(2) Department of Justice, Ministerial Policy Review, Nov-Dec 1984
(3) Unless otherwise stated, references in this paper to sections of an act refer to the Small Claims Tribunal Act 1976.

In order to cope with and make sense of so much material operating at very different levels I have drawn up a model of the small claims tribunal process which helps put each issue in perspective. The model is portrayed in figure 1.1. It is a very general and ideal outline, describing the small claims tribunal system as a process. It provides an analytical framework by identifying the major inputs, activities, and outputs. Or, to put it more descriptively, it lists the various people involved, they being the major resource, and describes the dispute; it describes what happens to them and how they interact; and it states the intended results of this interaction. In this case there are three levels of results. First there is the immediate outcome of a hearing, which is ideally an agreed settlement, or a decision if this is not possible. Secondly, there is the intermediate outcome, or objectives of the scheme. The outcome of a tribunal hearing is said to represent a low cost, speedy and fair resolution of a dispute. Thirdly, there is the ultimate outcome or the overall goal of the system. Resolutions with these attributes are the way to ensure that justice is available for ordinary people.

The original purpose for constructing the model was to study the evaluation issues in relation to a schema in order to identify the stages at which things are not working as they should, and consequently direct remedial action. It helps to focus the evaluation. In doing this it also serves another purpose in delineating what has been called the "theory of action"[1]. That is, it sets out the assumptions about the links between inputs and activities and how these are expected to lead to goal attainment. Very simply, the model of the small claims system is that cost and alienation are major reasons why people do not bring small claims to court. In order to keep costs down, avoid delays and encourage use, the small claims process must reject some of the traditional requirements of civil litigation: first, investigation and conciliation in private replace adverserial adjudication as the mode of conducting hearings; secondly, as well as the law, the substantial merits and justice of the case are criteria for decisions; thirdly, there is no legal representation;

(1) Patton, Michael Quinn, 1978

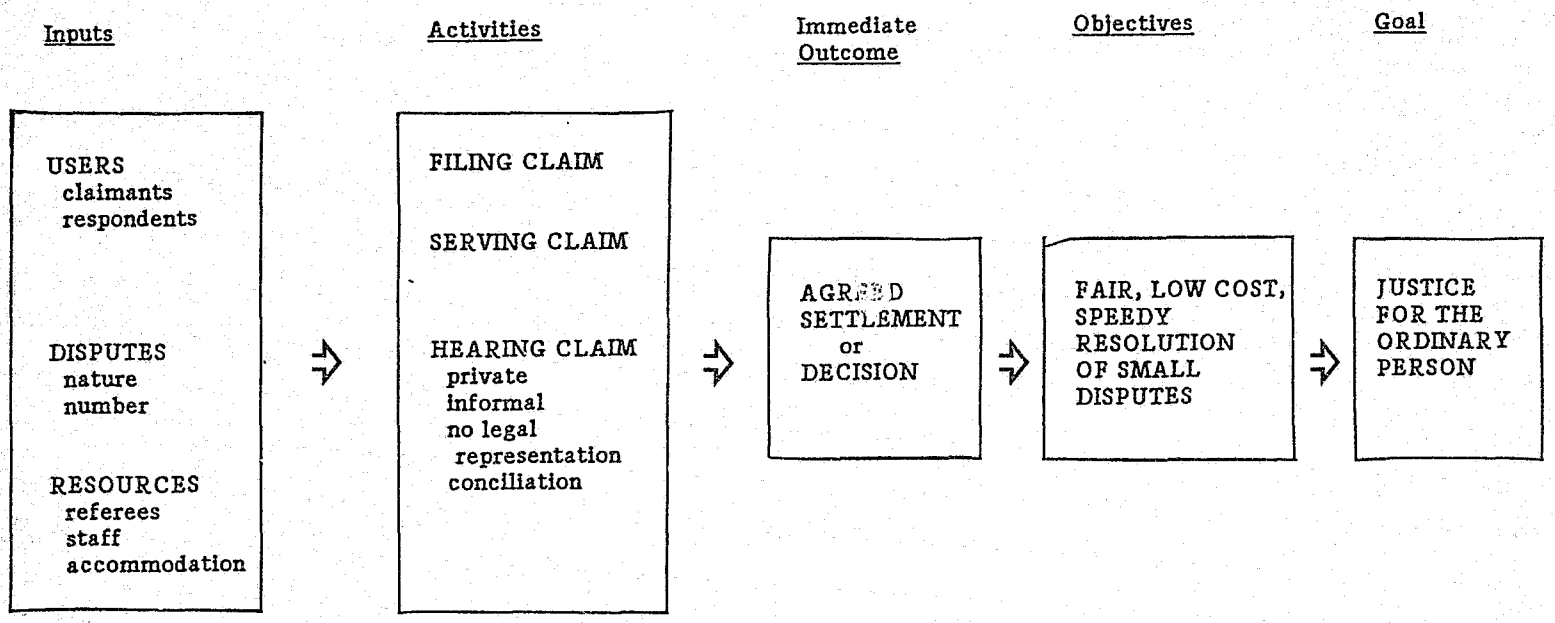

Figure 1.1 MODEL OF THE SMALL CLAIMS TRIBUNAL SYSTEM

fourthly, procedures are simplified; and fifthly the grounds for appeal are limited. In these circumstances, the argument continues, the referee can attempt to bring the parties to an agreed settlement which leads to a fair, low cost and swift settlement and ultimately justice for all parties.

The model is both a logical and chronological representation. This report takes the same route, from the raw materials at the beginning to the final analysis where "what is" can be compared with "what should be" in terms of the goals of the system.

1.4 A NOTE ON THE EVALUATION METHODOLOGY

The major direction of the evaluation has been to improve or preserve benefits of the small claims tribunal system for users. This requires an understanding of the system as a whole; not only from the users' perspective, but also the referees' and the tribunal staff's views. Such an holistic approach involves multiple perspectives and multiple methods - both quantitative and qualitative - thus increasing confidence in the interpretation of social data.

In practice this involved seven discrete but compatible research projects, the results of which are brought together in this discussion paper. There were two levels of enquiry. The first was an overview of small claims tribunal operations throughout New Zealand. All tribunals and their communities were included to give an overall description of the nature and scope of small claims in New Zealand. The second level of inquiry was an intensive study of how tribunals work and their impact in selected areas. The purpose of this was to fathom some explanations for the demonstrated variety of responses and attitudes. Taken together, we have results to help explain how and why small claims tribunals are or are not successful.

Some of the projects fitted neatly into the first level of inquiry, eg a survey of all

claims filed in New Zealand courts. Some fitted definitely into the second category, eg the case studies of three communities. Still others straddled both, with elements of representativeness and demonstrations of singular responses, eg the questionnaire answered by all referees.

The eight projects are:

(i) A representative survey of the New Zealand public's awareness of small claims tribunals.

(ii) A representative survey of all small claims filed in New Zealand and their progress through the system. Data came from documents held in the courts.

(iii) An analysis of the effects of the change in the monetary limit from $500 to $1000 on the number and value of claims filed.

(iv) A survey of small claims disputants. A questionnaire was sent to both claimants and respondents from a sub-sample of the claim survey.

(v) Case studies of three small claims tribunals and their communities: Otahuhu, New Plymouth and Dunedin. These in-depth studies involved observation of hearings and tribunal environs; interviews with community groups, disputants, referees and court staff.

(vi) An account of the referees' point of view. Two sources of information were used for this: referees' submissions to the original issue paper and a questionnaire sent to all of them.

(vii) A survey of court staff. A questionnaire was sent to small claims staff at all tribunals.

As well, an analysis of submissions to the original issues paper by people and

organisations other than referees was done and is included as an appendix to the research volume. One of the main contributors here was the Consumers' Institute.

Details about the people researched, research questions and other methodological matters are reported in the individual research reports. I repeat what is pointed out in the introduction to the research volume and what is implicit earlier in this chapter. Each of the reports, although very revealing, is a partial view of how small claims work in New Zealand. This does not imply that any of the material is less "true" or less valuable than any other. The premise of this type of evaluation is that all data is a necessary contribution towards a fully integrated appreciation of the small claims system.

The research results and conclusions are the substance of this report. It would be unwieldy and unreadable to reference every single item of evidence, so, unless there is some special reason to suggest referring back to a more complete reading, the specific reference is not given. Generally the source will be clear. If the source is not one of the seven projects listed above, a reference is given.

CHAPTER 2

Setting the Scene

The purpose of this chapter is to describe the various elements that help define a small claims system: who are the users, what is it that they bring to a tribunal, and what resources does the administration contribute in order to resolve the dispute? This chapter canvasses a number of issues, including the important ones of public awareness and use of small claims tribunals, referee suitability, the nature of disputes, and jurisdictional matters.

2.1 LOCATION OF TRIBUNALS

When this evaluation was initiated and at the time of the research (August 1985) there were 21 tribunals operating across New Zealand. Since then, in October 1985, another 15 tribunals have been introduced, giving a fairly thorough coverage, though 24 district courts still do not have a tribunal attached to them. A list of the total tribunals as in early 1986 is given in Appendix 1.

Tribunals operate during court hours on weekdays. In most places, hearing small claims is not a full-time business. Most tribunals have one part-time referee, while nine have two or more part-time referees. At present in 1986 there are 32 referees.

2.2 PUBLIC AWARENESS OF SMALL CLAIMS TRIBUNALS

One of the goals of small claims tribunals is for justice to be within the reach of

ordinary people. There are a number of obstacles to achieving this, but one of the very first things is that people must be aware that small claims tribunals exist and of what they do and how they operate.

A survey of the New Zealand public aged 18 years or over found that there is a relatively high awareness of the concept and the name. 42% recognised the concept of small claims tribunals when it was read to them and could freely recall the name. Those who could not freely recall the name were asked if they had ever heard the name "small claims tribunal". Another 44% answered positively, giving a total "prompted" awareness of 86%. This is very high, though we caution against wholehearted acceptance of the prompted figure which we think could be boosted by a compliance factor in some respondents. However the unprompted figure of 42% is very reliable.

Whether 42% is considered adequate awareness or not is a matter of judgment. There are several points to take into account in this assessment. First, presumably some of the prompted recall is "genuine" awareness, which could increase the level substantially. Secondly, the survey was a New Zealand-wide one which means it covered areas where there are no small claims tribunals. Awareness was lower in these areas. Thirdly, we know the public awareness of a New Zealand service in a related field. 23% of the Christchurch public knew of the Christchurch Mediation Service after 18 months existence.[1]

Using the unprompted measure, it was found that awareness differed significantly within some subgroups of the population. Unprompted recall was significantly higher among males (51%) than females (34%). 35 to 54 year olds had the highest level of unprompted awareness at 54%-55% and the two extremes of age group had the lowest level of unprompted awareness (26% for 18 to 24 year olds and 24% for those aged 65 and over). There was a noticeable difference in unprompted awareness levels when viewed by occupation and socio-economic levels. 60% of white collar respondents could recall small claims without prompting compared with

(1) Cameron, J and R Kirk, Evaluation of Christchurch Community Mediation Service, in preparation.

an average of 30% for the other occupational groups. The higher the socio-economic status, as determined by the household's main income earner's occupation, the greater the level of unprompted awareness.

The public survey did not record the race of respondents. However, referees were asked to assess the awareness of different ethnic groups and most agreed that Maori people and Pacific Island people are not aware of small claims tribunals whereas pakeha are quite aware. The case study interviews with community groups, particularly Maori and Pacific Island ones, confirmed this. Feedback from Pacific Islanders and Maori was that the dispute resolution method, the conciliatory approach, is closer to their traditional methods of dispute resolution than normal procedures in the other courts. As one Maori from Dunedin stated:

> .... This might be an ideal thing. This will suit Maori people.

Compared with the New Zealand population aged 18 years or more, women, the young and the elderly, those in low socio-economic groups, and Maori and Pacific Islanders are under-represented amongst those who are aware of small claims tribunals.[1]

At first sight the relatively high level of awareness shown by this survey is not consistent with the views expressed in the case studies.

The general consensus in that study was that the general populace did not know about small claims or, if they did, their awareness was basic and often misinformed; that is, they perceived it to be just another appendage of the justice system possibly less formal but nonetheless still intimidating. There were also some suggestions that small claims tribunals have a bad image. Where people had used it, however, their impressions were favourable and it was accepted as a useful and informal forum for their grievances.

(1) See Appendix 2 for details.

One further indication of awareness, is who suggested to claimants that they go to the small claims tribunal. One-third said it was through their own knowledge, reinforcing a relatively high level of awareness. For one-quarter of claimants their lawyer made the suggestion, for 14% it was an insurance company (in relation to motor vehicle claims), and for another 14% a friend or acquaintance. The other, less frequent sources were family, Citizens Advice Bureaux, debt collection agencies, the Consumers' Institute, the respondent.

There seems to be an important difference between knowing that small claims tribunals exist and appreciating how they operate and what their potential is. The public's awareness of the latter should certainly be improved. Whether the overall awareness rate is high enough or not, it certainly is inadequate amongst some groups: women, the young and the elderly, the lower socio-economic groups, and Maori and Pacific Islanders.

2.3 PUBLICITY

Associated with public awareness is the issue of publicity.

There are two main activities involved in national publicity. First, a campaign accompanies the opening of new tribunals. For example, the opening of 15 new tribunals in October 1985 stimulated newspaper advertising, a poster for distribution, and a new edition of the general pamphlet.

Secondly, and on a continuing basis an information pamphlet is widely distributed. The pamphlet is called "The $5 Solution" and is aimed at the general public and explains what small claims tribunals can do, where they are, and how they work. A new edition was prepared for October 1985, 15,000 were printed, and a reprint is already being arranged. The pamphlet is in popular demand from Citizens Advice Bureaux and courts.

On the local scene, referees and registrars are responsible for a range of publicity

activities. The list is not exhaustive, but talks to local service clubs seem most prevalent, followed by distribution of pamphlets, contributing to articles in local newspapers, talkback sessions, and material for public noticeboards.

The points made about publicity in the case studies were that there is not enough; that there is not enough follow-up to the initial publicity that is made when the tribunals first open; and that it is left up to the initiative and resources of the local referees and staff whether to do any or not.

Time and again in the case studies when asked how they knew about the small claims tribunal, disputants responded by making reference to the popular TV programme The People's Court. The positive link they made between The People's Court and small claims was that they can have "their day in court" and it is justice for the ordinary person.

The impressions emerging from the case studies were followed up by asking referees and court staff for their views on the publicity. Both groups confirmed the previous findings: both locally and nationally, publicity is considered to be inadequate or maybe adequate, but certainly very few would go so far as to say it was good. Many referees saw the lack as a major impediment and were concerned that it was leading to underutilisation, particularly by the groups in the community for whom tribunals could be of greatest assistance. The assumption is that all groups in the community have small disputes that need solving. The amount of publicity, rather than its quality, was generally the butt of the criticism. Several court staff commented that what publicity there is, idealises the system without warning about its pitfalls, eg difficulties in serving respondents, possibility of non-payment, and this can lead to disappointed users and criticism of the system.

This last point was also made by disputants themselves, both claimants and respondents. The most frequent suggested improvement made by both was for better information for disputants. This included suggestions for improved helpfulness, but many of the suggestions were explicitly for better written information explaining procedures and better communication on how to prepare for and keep abreast of developments in their own case.

All tribunals send information to the respondent in addition to the notice of hearing and a copy of the claim. The information that is sent is not standardised and varies throughout New Zealand. Nine tribunals send "The $5 Solution" pamphlet.

There needs to be more coordination of publicity. It should not be left up to the individual efforts of referees and registrars, valuable though these are. Publicity should be targetted towards the groups who are less aware of small claims tribunals: women, the younger and older, lower socio-economic groups, and Maori and Pacific Islanders. It should stress how small claims tribunals work; their relative ease of access, particularly in comparison with other courts; and their advantages, though at the same time being realistic about the possible obstacles. Genuine shortcomings identified in this evaluation should be rectified, but work on improving small claims tribunal's public image is needed if small claims tribunals are to fulfil their functions.

2.4 THE DISPUTANTS

So, who uses small claims tribunals? Is the "ordinary" New Zealander reaping the benefits or do claimants tend to be the articulate, economically advantaged, and socially adroit, whilst respondents are the socially and economically disadvantaged? Do Maori and Pacific Islanders use small claims tribunals?

Demographic information about claimants and respondents is not recorded in tribunal records. The most comprehensive source for this information is the disputants' survey (Report 4). The survey sampled claimants and respondents from all 21 tribunals and the results are representative of all disputants.

In summary claimants were: 69% male; 91% pakeha, 3% Maori and none were Pacific Islander; 49% were employed and 32% self-employed; the largest

socio-economic status groups, as measured by occupation[1], were the third and fourth highest (out of six levels); their median estimated annual income before tax was in the $10,000 - $16,000 group; 40% had post-secondary school education; 28% had been claimants in the small claims tribunal previously and 9% had been respondents; 24% had been plaintiffs and 7% had been defendants in civil proceedings in the district court.

In summary respondents were: 68% male; 83% pakeha, 7% Maori and 4% Pacific Islander; 48% were employed and 34% were self-employed; the largest socio-economic status groups were the fourth and fifth highest (out of 6 levels); their median estimated annual income before tax was in the $16,000 - $20,000 group; 35% had post-secondary school education; 10% had been respondents in the small claims tribunal previously and 15% had been claimants. 16% had been defendants and 19% had been plaintiffs in civil proceedings in the district court.

In most respects, claimants and respondents were similar. The only difference of any significance was that Maori and Pacific Islanders tended to be respondents rather than claimants.

If the people who are aware of small claims tribunals are unrepresentative of the New Zealand population, then users are too, but in different ways. Tribunals are used more by men; employed people, especially the self-employed people; with post-secondary school education; and, when it comes to claiming, people in the higher socio-economic groups and pakehas are overrepresented.[2] These results highlight again the need for targetted publicity and a real effort to ensure that small claims tribunals can be used by people who are not so articulate or adept at finding their way around institutions.

(1) Socio-economic status is defined in terms of education and income, and occupations are ranked according to this definition. (Elley, W B and J C Irving, 1985.)

(2) See Appendix 2 for details.

2.5 THE REFEREES

The referees are, of course, of critical importance to the effectiveness of small claims tribunals. Many of the issues raised relate to them, falling into two general categories: their suitability for the job, and how they conduct the hearings and the subsequent decisions. At this stage, when we are looking at the resources available to the small claims system, the discussion concentrates on questions of suitability: referee representativeness, selection, qualifications, and training.

2.5.1 The Representativeness of Referees

It has been suggested that referees are a very unrepresentative group of people compared with either New Zealand society as a whole or with users of the tribunals. They are generally described as "retired men and middle-aged women". The bases of the concern about non-representativeness are presumably, one, that referees' perceptions of the "substantial merits and justice" of a case may not coincide with the ordinary person's, and two, that a person of similar background or race as the users will be less alienating and so encourage use of the tribunals. Report 6 details the demographic profile of referees. In summary: 20 were men and eight were women. They were not asked for racial affiliation, but very few if any were Maori. More than half the men were aged between 61-65 years, and only two were younger than 56. The ages of the eight women were spread from 36 to 66 or more. Half were retired or partially retired and half were still active in the workforce. All but six of them fell into the two top socio-economic groups and their estimated annual income (as at January 1986) tended towards the upper categories, with the median being in the $20,000 - $25,000 range. The "retired men and middle-aged women" label is not far wrong, though it has been pointed out that the part-time nature of the work is conducive to this. As a group, referees were predominantly male, pakeha, elderly, maybe retired, and in a middle to upper socio-economic position.

One of the tasks of the case studies was to discuss with the Maori and Pacific Island

groups within the case study communities their views on the appropriateness of small claims tribunals for their cultures. The views expressed were favourable towards small claims tribunals, and they were interested in better representation as referees.

One Maori group identified some of the factors to be considered:

(i) It was felt that the small claims tribunals could be useful for settling Maori-Pakeha, Maori-Islander, Maori-Maori disputes if there was an understanding of Maoritanga by referees (and that the ability at least to pronounce Maori names correctly was fundamental for all referees).

(ii) The group felt that the small claims tribunal like other parts of the court system is an alien place for the Maori. When they appear (a) they feel whakama, ashamed to be there, and (b) they are intimidated, and therefore verbally and strategically they perform badly.

(iii) Representation should be proportional to the Maori population.

(iv) The community itself should select who they want as referees. This would avoid nominal representatives.

(v) The Maori community members suggested that traditionally the Maori does things communally - generally the group, the iwi, the whanau, the hapu and other urban equivalents were considered by the Maori to be more important than the individual. They therefore suggested that someone to support or speak on behalf of the Maori disputant, for instance, a kaumatua, an elder, should be encouraged.

One of the points raised during field work in Auckland was that if Pacific Islanders were small claims tribunal referees, suspicion of prejudicial decisions because of national or island allegiances could be a problem. However, it was suggested that church leaders are recognised as being fair and responsible and if a high ranking individual from whatever island or country was chosen then his status and integrity

would place him above national or island favouritism or the suspicion of it; that their role in New Zealand is analagous to the mataii in Samoa.

On the other hand a young Samoan felt that it would be wrong to use elders in this fashion, that they have a role within Samoan society but in the palagi situation of the tribunal they would be out of context and their status questionable. He did, however, suggest elders be used as translators. It was further suggested that in the Pacific Island communities, there is a rejection of traditional values by some of the younger generation. The counter to this is that although there is some truth to this, younger members of these communities may well feel more comfortable with someone who understands their cultural background at a tribunal than with only pakehas around them.

One point that can be stated confidently is that the Department of Justice should go to Maori and Pacific Island communities for advice and nominations.

In conclusion, referees are not representative of either the users or the New Zealand population. Compared with users, referees were more often pakeha, male, older, retired, they had a higher socio-economic status and higher income, and they had more post-secondary school education. The comparison with potential users is similar.

As regards the age of referees, it probably is not so desirable for referees to be completely comparable with their potential clientele. The experience and maturity necessary to operate a common sense system in a conflict situation probably comes with years, but referees could still be a younger group than they are. This is difficult to arrange given the part-time nature of the job as it is at present. Full-time positions may be an answer, but this should be carefully thought through. Full-time refereeing could divorce the referee from the community and its concepts of fairness, merit and justice. Another possibility is for hearings to be held outside normal working hours.

Community groups strongly argue that referees should represent a wider range of the community. The attributes that are particularly mentioned in this context are

ethnicity, socio-economic status, and gender. If referees are to apply common sense to their decisions, they need to be able to appreciate the values and concepts of all New Zealanders, and to understand the consumer situations they find themselves in. A greater range of referees would help spread this appreciation throughout the system.

2.5.2 Selection of Referees

Referees are appointed by the Governor-General on the advice of the Minister of Justice. It is not clear where names of nominated appointees come from but it has been suggested on several occasions that referees may be appointments of the "jobs for the boys" variety. Some court staff have asserted this, with some resentment, especially if their own suggestions and background work have been ignored. The extent of this is not known. Political appointments are not necessarily bad appointments, and the court's network may be no wider nor more representative than the "political" one.

If the range of referees is to be expanded, whether in order to make small claims tribunals more attractive, to improve the quality of decision, or to extend the tribunal's jursidiction, then maybe selection techniques used in other areas of management should be introduced. For example, advertising, although innovative in New Zealand judicial appointments, is practised in some overseas jurisdictions, and was also used for initial selection of mediator trainees in the Christchurch Community Mediation Service.

2.5.3 Qualifications

In the New Zealand scheme, referees need not be legally qualified. Section 7 states they may be a barrister or solicitor, or a person "otherwise capable by reason of his special knowledge or experience of performing the functions of a referee". This has been interpreted in the current administrative guidelines as:

Essential Qualities

1 A broad experience of public community or business affairs.
2 Common sense and practical judgment.

3 Fairmindedness and impartiality.
4 Ability to relate to a wide variety of people, and especially in areas where there are significant ethnic minorities, the capacity to understand and command the confidence of members of these groups.
5 Ability to deal tactfully but effectively with difficult people.
6 Patience; the ability to listen constructively.

Useful Qualities

7 Experience in arbitration or dispute resolution.
8 General knowledge of lower court procedures and of basic legal principles.

The guidelines operating at the time the referees in our sample were appointed were similar, but less specific.

So what are the qualifications and experience of the 28 referees in this survey?

The only source of information for this was the referees themselves. As regards formal education, only one was legally qualified. Twelve had university qualifications and six others had polytechnic or job related qualifications.

Referees were asked what community or work experiences or personal qualities they possess that helped their nomination as a referee. A myriad of experiences were, of course, recorded.

The one single, specific experience which was mentioned by seven referees was their experience as a justice of the peace. Work experiences that were noted included professional, managerial and director positions; court experience as expert witness, arbitrator, or court registrar; skills developed such as dealing with contracts, personnel, management, ability to arbitrate and negotiate; only two mentioned specifically legal knowledge/skills.

Much experience was gained from involvement in community affairs: service clubs, sports clubs, church, school, dealing with the young and/or elderly, local body positions, and many other community commitments. Two mentioned work with citizens advice bureaux and one with a budgetary advice service. Skills associated

with being a parent were mentioned twice.

Referees were not so forthcoming about personal qualities but the following were noted: familiarity with everyday problems and all socio-economic groups; sensitivity to human need and justice; ability to keep one's cool; ability to mediate and counsel; confidence of and acceptability to public.

A definite assessment of referee suitability emerged from the disputants' survey. Seen within the context that most disputants were satisfied and would use a small claims tribunal again, the most frequent weakness mentioned by respondents and second most frequent by claimants was that the referee was not suitably qualified. Often this was elaborated to mean that the referee did not have the technical or specialised knowledge needed to appreciate the details of the dispute. This was also a major reason given by disputants who say they would not use a tribunal again. A few referees feel themselves vulnerable in technical or unfamiliar areas and said that such cases require more preparation before a hearing than usual. It is for this very reason that the provisions for expert advice were initially incorporated into the scheme.

A perennial question is whether referees should be legally qualified. The rationale behind the present position was that if small claims tribunals are to be readily accessible to ordinary people, they have to be cheap, informal and non-threatening. Compulsory legal argument and legal representation were seen as definitely mitigating against this. In turn this meant a common sense approach and an emphasis on facilitating agreements became important elements of the system. Legal training was not considered necessary to achieve this; other attributes were equally important.[1]

On the other hand, questions are now asked as to whether disputants are being deprived of their legal rights and protection, or at the more practical level, are decisions being made which, given the law, are not fair?

(1) See Section 3.2 for discussion of jurisdiction history and issues.

A few disputants in the survey said they would have liked more legal argument, a legal ruling, or a referee with more legal knowledge. However, this reaction was very much outweighed by the strong support, particularly by claimants, for the non-legal nature of the system by frequently citing it as one of its strengths.

These questions have assumed more importance in the light of discussions to widen the tribunal's jursidiction or to further increase its monetary limit.[1] It is argued that such extensions may lead to increased legality and go beyond the realms where common sense will suffice. Referees are aware of these possibilities, and a few suggest that further training would need to be provided. Large questions about the balancing of legality with common sense justice, the latter being seen as the purpose of small claims tribunals by many, and of the confidence of the public in their authority with their informality, are involved. The final recommendation on what emphasis should be placed on the legal model must wait until the last chapter because a number of other issues have a bearing on it. The point to make here is, if the current small claims philosophy prevails, that the important qualifications for referees are probably their personal abilities and attitudes, and general experience. This places considerable weight on training referees specifically for the job.

2.5.4 Referee Training

Referee training is a matter often linked with referee qualifications. This section describes the training they receive, referees' views of it, and their suggestions regarding it. Obviously, what their training should be depends very much on what the small claims service is intended to provide and on aspects of the system that are not effective now. Much of this is still to be discussed, so recommendations on training are held over to the final chapter.

Until recently the formal training of referees specifically for the job has been a very ad hoc affair. It may or may not happen before taking up duties. It may

(1) Department of Justice, Report to Statutes Revision Committee, 1976

consist of any or none of: infrequent one or two day seminars with other referees, either regionally or nationally; sitting-in and observing other referees at work.

Researchers observed one two-day seminar for referees. Its programme included sessions on mediation, contemplated legislative changes, the role of the Consumers' Institute in respect to small claims, court administration, and referees. The opportunity to discuss practices amongst themselves was greatly appreciated by the referees. There were obviously plenty of local variations. As the Issues Paper reported, referees were keen to discuss issues relating to consistency. They were interested in specific decisions, how others handled procedures, how decisions were reached, whether they should justify their decisions, whether they should act as devil's advocate when a respondent fails to attend. They were also highly interested in the practical information from the Consumers' Institute on where to go for expert advice.

Referees agree that they should be trained but half of them also expressed reservations about overtraining, especially if this was towards legalism, thus negating what they see to be the purpose/benefits of the present system.

Referees were asked whether they thought they should receive training on several specified topics. There was a definite endorsement of training on mediation, arbitration and law in relation to small claims. There was a positive response, but not so definite, for training in introductory law. There was tentative support for training in report writing, race relations and social psychology. There were also suggestions for training in small claims procedures and practices, including the respective roles and responsiblities of referees and court staff.

There have been some developments in training, but they are still without an overall plan. The Department of Justice is having prepared a correspondence training course on small claims tribunal legislation and procedures, and other law and legislation impinging on small claims. Discussions are underway to develop courses on mediation, and on the most appropriate way to introduce referees to the new work which will come their way once the Fair Trading Bill becomes law.

On the whole, training has been inadequate, too superficial, and undirected. As well as the referees wanting more training, the research has shown up areas where training would enhance performance. These will emerge in the following discussion, and specific recommendations for training are made in the final chapter.

2.6 THE COURT STAFF

In a number of respects the role of court staff in small claims tribunal work is very different from their other court work.

Firstly and most significantly, s38 of the Act requires that the registrar or his staff shall assist persons in completing small claims forms for lodging a claim, applying for a rehearing, appealing or enforcing an order. This involves giving advice and making judgments that staff are not called upon to do, in fact cautioned not to do, in their other work. Secondly, court staff are not present during the hearing of a claim and so are not familiar with that aspect of small claims work.

The number of staff, their seniority and experience, varies from tribunal to tribunal, depending to a large extent on the size of the court. It seems fairly typical for an assistant deputy registrar to have day to day responsibility, with a clerk doing the counter work and preparation of documents.

It is usual practice for court staff to be rotated from one area of court work to another. The time spent working on small claims varies from two months to 14 months. The practice of rotating staff presented problems for half the referees. Most of these referees thought a year to be the minimum time a court clerk should remain on the small claims desk before shifting. More comments from the referees that have a bearing on training arise when considering the question of court staff assistance to the public.

Training for small claims duties is mostly of the "on the job" variety. Staff new to small claims receive help from experienced staff or, if this is not possible, the Act, the regulations and their desk file are their mentors. Only eight courts of the 21 had staff who had received training for small claims in the form of seminars or courses. Given the integral role staff play in the process this is insufficient, and specific recommendations for staff training, as suggested by the evaluation, are given in the last chapter.

2.7 ACCOMMODATION AND PHYSICAL SURROUNDINGS

One remaining, important resource for a service which aims to be informal and private is the actual physical environment.

Thirteen courts reported that the small claims tribunal shared a room used by the family court; five had a special room set aside for small claims hearings; two used ordinary court rooms and one used judge's chambers. The usual layout of the rooms is a desk or table for the referee and two smaller tables facing the referee for the claimant and respondent to sit at. There is usually at least one spare chair for any witnesses. At two courts the parties sat around a large desk or table.

Nearly all referees find the acommodation satisfactory. However, there were still suggestions forthcoming for improvements: signs indicating the hearing room and that parties will be called when ready; a separate, adjacent room to talk to parties alone; a need to retain informality.

A few suggestions were made by disputants about the surroundings: separate waiting rooms; better sign posting; more private and better soundproofed rooms; smaller rooms.

CHAPTER 3

The Disputes

Throughout the brief history of small claims tribunals there has been an upward trend in the number of cases, rising from 919 in 1978 to 7436 in 1985. Coinciding with this trend, and probably its major cause, has been the creation of additional tribunals. What kind of disputes are making it to tribunals and are they being used in the way originally envisaged, that is, for disputes that otherwise would not be resolved because of the costs involved in doing so?

3.1 THE NATURE OF SMALL CLAIMS

3.1.1 Type of Claim

The representative survey of all claims in New Zealand showed that two-thirds (68%) of the claims were for breaches of contract or quasi-contract. The largest sub-group within these was claims relating to unsatisfactory work done or services provided (22% of all claims). Another 27% of all claims related to damage to property caused by a motor vehicle. Included in this figure is 12% which dealt with insurance aspects of motor vehicle damage. Another 9% of the claims were in relation to accommodation matters. In 52% of these the tenant was the claimant, and in 48% the landlord was the claimant.

55% of all claims involved a business matter. Businesses were just as likely to be respondents as claimants in small claims. In 12% both claimant and respondent were businesses; in 24% the claimant only was a business, the respondent being an

individual acting privately; and in 19% the respondent only was a business, the claimant acting in a private capacity. This leaves 45% where both parties were acting as individuals.

Business related claims tended to be of a different type than private ones. Whereas 37% of contract claims were initiated by private persons and 49% by business people, 93% of motor vehicle claims were made by individuals and 7% by businesses.

The disputant survey provided some information about the history of the disputes that come to the tribunals, giving a few glimpses at the magnitude of the problem for the disputants. The majority of disputes were relatively recent, as just under half the claimants had been aware of the dispute three months or less prior to the claim being filed. Only 11% of claimants were aware of the dispute for more than one year. Two-thirds of claimants and just over one-third of respondents had asked for help or advice in settling the dispute before going to the small claims tribunal. Lawyers were most commonly asked (27% of all claimants and 20% of all respondents).

3.1.2 Claims Outside the Jurisdiction of the Act

It appears that a few disputes that are strictly outside the jurisdiction of the Act do make it into the small claims system. 1% of the survey claims were judged to be in this category. This cannot be asserted categorically because, as referees have noted, situations, say involving negligence, can be developed into quasi-contracts. The most usual type of "outside" case that did proceed involved damage to motor vehicles by animals and other seemingly negligent actions causing damage to property. The following table shows the causes of claims which are outside the small claims tribunal jurisdiction but which made it into the system and which turned up in the survey of claims.

Table 3.1 Causes of Claims Outside Small Claims Tribunal Jurisdiction

Claim			Amount of Claim ($)	Result
M V* damaged by :	livestock		1000	decision made
	cattle		85	no jurisdiction
	animal		150	decision made
	dog		239	not served
	dog		50	agreement
	horses		500	no jurisdiction
	bull		239	decision made
M V damaged by person :	on foot		289	no jurisdiction
	standing on car		55	agreement
	negligent contractor		392	settled prior
Damage to :	property by animals		475	refer to district court
	property by neighbour's felling		190	dismissed
	property by water seepage		315	settled prior
	fence by neighbour's contractor		100	decision made
	property by neighbour's contractor		500	no jurisdiction
	property by respondent's demolition contractor		60	dismissed
	trees by spray painting		200	settled prior
	plants by pesticide		126	settled prior
	property by cricket ball		94	agreement
	property by beer flagon		86	decision made
	borrowed surfboard		150	agreement
	borrowed potato digger		495	decision made
Personal property removed			500	settled prior
Negligence in representing wage claim			500	withdrawn

* M V = motor vehicle
(Source: Report 2)

Some referees comment that small claims tribunals do get used as debt collecting agencies. It apparently can be relatively easy to create a dispute over non-payment of a debt. Exactly what constitutes a dispute is discussed in section 3.2.3.

3.1.3 The Amount of the Claim

Small claims are still relatively small. In March 1985, the monetary limit for a claim was increased from $500 to $1000. Before the change, the average claim was $260; since the change, the average has increased substantially to $400. Claims have been as small as $10 and up to the limit of $1000.

We have not been in a position to check how many claims abandon excess value over $1000 since the change. However, the survey of claims, most of which applied to the position prior to the change when the maximum was $500, found that 6% of claims abandoned some excess claim. The amount of excess abandoned averaged $137, but was as much as $1000 in one case.

3.2 JURISDICTION

There is much debate about what the small claims tribunal's jurisdiction should be, and some criticism that it is too restricted. Obviously, jursidiction is a critical element in enabling small claims tribunals to achieve their overall purpose of bringing justice to ordinary people. The original restrictions were aimed at reducing the necessity for rigid legal observance, including rules of evidence. It was acknowledged at the time that experience may reveal demands for extensions.[1] But extending the jurisdiction is not simply a matter of pushing back the limits to a level where it is economic to use lawyers and the district court. As the following discussion shows, there is considerable concern about how this would affect other aspects of the tribunal's concept and operation. Four aspects of jurisdiction are discussed: substantive widening; increasing the monetary limit; disputes versus debts; and although not strictly a matter of jurisdiction, the role of insurance companies.

(1) Smith, M P, 1974

3.2.1 Widening the Jursidiction

In general terms small claims tribunals can hear disputes arising from breaches of contract or quasi-contact or claims for damages to property by a motor vehicle. Although contract or quasi-contract cover a large field of social relationships, the claim survey showed there are other "small" disputes which seem appropriate for the small claims system. The most easily recognised candidates are claims for damages to property caused by something other than a motor vehicle, for example, animals, people, bottles.

How do the various groups respond to the proposition of widening the jurisdiction? All but a few of the referees and the interest groups supported extending the jurisdiction. Court staff were more tentative, half supporting, and half rejecting the proposition.

The reason for not supporting a widening is generally a concern that cases would be too complicated, which in turn would detract from the simple procedures and lead to a need for qualified referees. There was some acknowledgment of this possibility by referees but it was not seen as a real potential problem. Some referees noted they would like to see gradual or limited extension and others recognised there would be a need for training.

If the jurisdiction is extended what should it include? As set out in a review paper by the Law Reform Division of the Department of Justice,[1] there are two main approaches to this. One is the present arrangement with an upper monetary limit with specific inclusions and specific exclusions. This carries with it possible problems with jurisdictional decisions. There have certainly been instances of this under the present system and there are instances of cases getting as far as a hearing before the parties are informed that the tribunal has no jurisdiction. The second

(1) Department of Justice, 1985

approach is to have an upper monetary limit, inclusive of all disputes (some would argue debts too), but with some specific exclusions. This is thought to avoid the consequences of jurisdictional uncertainty, but raises the question of what should be excluded and whether this is a more awkward exercise than listing inclusions.

We asked for views on what should be included if the jurisdiction is widened. Without much hesitation referees and court staff suggest other torts. The general referee opinion is that the current situation is unfair and ridiculous: if your animal is damaged by a car you can bring a claim but not if your car is damaged by an animal. Assessing material damage does not pose problems but most referees balked at assessing damages in relation to anxiety and inconvenience. It is interesting to note that more referees than not (13:10) supported extending the jurisdiction to all types of disputes up to the monetary limit.

Of the submissions from interest groups which specifically covered the issue of whether or not the parameters of the tribunals' jurisdiction should be extended, four out of five proposed some extension. The Consumers' Institute recommended there be no jurisdictional limitation beyond the financial one, and the Housing Corporation suggested that consideration be given to include the hearing of actions for the recovery of land (presently explicitly excluded by s10(3) of the Small Claims Tribunals Act).

3.2.2 Raising the Monetary Limit

The maximum amount of claims was originally set in 1976 at $500 and there it stayed until March 1985 when it was doubled to $1000. There are already calls for this to be increased again. The question is, should it be increased? What maximum amount is consistent with the tribunal's purpose of allowing people an economic way of resolving small claims? When is enough at stake for people to use lawyers and turn to civil litigation?

Before discussing what the various groups think about these issues, we can report

some of the effects of the recent doubling of the limit. Before the increase, we know that 6% of claims had abandoned amounts over and above the maximum, suggesting maybe not such a great demand for an increase. In the event, however, there has been a very substantial increase. The average number of claims per month has increased by 31% and claims over $500 now constitute 30% of all claims. The average amount of claims increased 54% from $260 to $400. The new provisions have certainly met a demand.

The perceptions of most referees and court staff were that the increase had not led to changes in the number of respondents attending hearings. As regards its effect on the number of orders needing enforcement, court staff tended to think it had increased slightly, whereas referees, if they felt qualified to assess, thought the number unchanged.

Raising the limit was one of the more frequent suggestions for improvement made by claimants. There is no clear direction from either the referees or the court staff on whether the limit should be raised. About half support the idea, and half do not. This should be qualified in that many of those who did not favour an increase did suggest that the limit should be regularly adjusted for inflation.

Once again the reasons given for not wanting the limit raised relate to a fear of increased legalism. Court staff offered this as a possible outcome of widening the substantive jurisdiction, though on that issue it was not a prevalent fear of the referees. However, both court staff and referees ventured it in relation to raising the monetary limit, and we encountered it time and again when possible changes were put forward. It no doubt reflects some natural conservatism and reticence, but it also gives the impression of a lack of confidence amongst the referees themselves.

Because it arises time and again, this argument needs further examination. This tension between the informal, for want of an all-encompassing word, and the legal was present when the scheme was first being developed, it is evident in the Act itself, and it is not going to disappear. A typical version of the argument is that if claims become more complicated or more is at stake, legal argument and rules of

evidence will be necessary, legal representation will be demanded and referees will need to be legally qualified. Exactly when small becomes big is not clear. Even if the real issues involved are no more complex than those currently and successfully handled by the tribunals, it seems that the amount at stake makes it worthwhile using legal argument if this can determine the decision. The consequence of this will be the demise of small claims tribunals as we know them - cheap, informal, user-friendly - and consequently they no longer could justify their reason for being, bringing justice to ordinary people. Two associated ideas that arise from time to time are the possibility of losing the confidence of the public and the support of the legal profession.

Because this argument will crop up again in relation to other issues, a final appraisal of its merits is held over to the final chapter and evaluation of small claims tribunals.

The suggested amount of an increased limit varies: $1500, $2000, $3000, $4000, $5000 and even $12,000 have been mentioned. The Consumers' Institute recommends, unequivocally, raising the limit and suggested, in late 1985, $4000 $5000.

One indicator that would be helpful but is difficult to ascertain is how much needs to be at stake to make it worthwhile taking a claim to a lawyer and civil litigation. It is difficult to get estimates of this threshold. We are told it depends on the circumstances and the time involved. Two amounts mentioned in the case studies were $3000 and $5000.

As noted before, many people think the limit should keep apace with inflation. Using the consumer price index, the March 1985 equivalent of the 1976 $500 was $1355. In March 1986 it was $1530.

3.2.3 Disputes versus Debts

In general terms under the current scheme, claims must be in relation to a disputed liability or quantum; debts and liquidated demands are not within the tribunal's jurisdiction. The major exception to this is claims for damage resulting from

negligent use of a motor vehicle. The main reasons[1] for excluding debts were, one, the existing machinery for judgment by default was thought to be adequate to meet the needs of the commercial community; two, debt collection cases would swamp small claims tribunals rendering them ineffective to deal with their real work; and three, the negative public attitude to district courts might be transferred to tribunals.

There is some support for the idea that debts should be included on the grounds that it is unfair to owners of small businesses with genuine debts who cannot afford the legal costs of going to the district court. Referees were fairly evenly divided on supporting the inclusion of debts up to a limit of $200, but by far the most were opposed to debt collection limited only by the general monetary limit. Support came from only a couple of the courts even though staff report that the main reason for rejecting claims (about 70% of all rejections) is that there is no dispute. They say that this rejection does not usually receive an adverse reaction from clients if the reasons for it are explained, though at times would-be claimants express disappointment or can be irate especially if their lawyer or the Consumers' Institute has advised otherwise.

The Consumers' Institute holds a strong position on this issue. It claims that a large number of consumers' complaints are simply ignored by the trader so that even if they fail to obtain redress there is strictly speaking no dispute. Further, that the interpretation by tribunals of whether or not a dispute exists is not consistent, with some courts insisting on a positive denial of redress while others accept a registered letter by an aggrieved party indicating that if no response is received by a certain date the claim is assumed to be in dispute. As regards debts, it suggests including them because written off debts are built into the ultimate cost paid by consumers for products.

3.2.4 The Role of Insurance Companies

At the 1985 seminar for referees it was evident that the role of insurance companies

(1) Department of Justice, Report to Statutes Revision Committee, 20 March 1976.

in motor vehicle claims can be a problem. When one party is uninsured questions have arisen about the rights of insurance companies to file a claim, to appear as a representative of a claimant or respondent by subrogation, or to be accorded the status of a claimant or respondent because their presence is "necessary to enable the tribunal to effectually and completely determine the question in dispute in the claim or to grant the relief which it considers to be due" (s19(3)). This issue involves much legal technicality, but some commentary is available from the research.

Although direct involvement is not common, there appears to be a variety of practice regarding the participation of insurance companies in small claims tribunals. In motor vehicle accident cases insurance companies are rarely allowed to file claims as a representative of a claimant or respondent by subrogation, or accorded the status of claimant or respondent, or joined with their clients as a party to the proceedings. 14% of claimants said it was their insurance company which suggested they use the small claims tribunal.

Referees are clearly divided on this issue: half thought insurance companies should be allowed to appear and half thought not. The conditions under which insurance companies would be permitted at hearings were: when the company has a financial interest in the claim and will be doing the paying; to help reach a settlement when the disputant cannot negotiate on behalf of the company; as a witness but not a representative; when the evidence shows the company has been arbitary; at the discretion of the referee. Reasons for not allowing insurance companies to appear were: it diminishes the possibility of settlements; it is professional advocacy and an unfair advantage; they should remain indemnifiers; the present subrogation rule is adequate.

It is difficult to come to any conclusions about enlarging the jurisdiction without also addressing the implications of this. This becomes a basic policy decision between staying with the current "common sense" approach or deliberately choosing or slipping into a "legal" approach. This basic question is discussed at the end of the evaluation. In the meantime it can be concluded that there is definite support for

widening the jurisdiction to include negligent damage to property and to adjust the monetary limit regularly for inflation. There is no clear indication whether debts should be allowed, nor on what the role of insurance companies should be.

CHAPTER 4

Activities Before the Hearing

The small claims process is intended to be simple, informal and accessible. Compared with other court systems it may be relatively simple, but as the analysis of the process in the claim survey showed it is still a complex system, with several potential obstacles. A judicial system must be a fair and impartial system and this can involve cumbersome procedures. Disputants will not necessarily be aware of these, but if they stumble across them, they know the frustrations. A claim can be eliminated from the small claims process at many stages. This can be considered a successful outcome, for example when the disputants come to a settlement outside the tribunal, or a failure or default, for example when essential documents cannot be served on one of the disputants.

This chapter looks at those aspects of the process, leading up to hearing, which seem to have an impact on the effectiveness of the system and on client satsifaction. Some of these issues arise solely from matters specific to small claims tribunals, for example, the extra responsibilities the system places on the court staff. Because lawyers are not used for legal representation, their role is also diminished in other respects (though a high 43% of claimants and 51% of respondents did seek advice from lawyers). As a consequence, staff have to exercise more judgment than usual in ascertaining whether claims are within the jursidiction and they are obligated by the Act (s38) to assist the public in completing forms relating to small claims tribunals. Other issues relate to procedures common to a number of court activities, not just small claims tribunals, for example, serving documents.

4.1 TRANSFERS FROM THE DISTRICT COURT

A system-related objective of small claims tribunals is to reduce the number of claims in the district court. It is difficult to imagine that many of the claims filed in the small claims tribunal in the first instance would have been pursued in the district court, though 29% of claimants said they would have definitely done so, and another 19% said they probably would have.

The system has developed its own method of pursuing this objective. Proceedings that fall within the small claims jurisdiction but which are initiated in the district court and are being defended can be transferred to the tribunal. This can be requested by either party or done on the initiative of the registrar or judge, and with or without the consent of the plaintiff. Proceedings can be transferred only if the court has a small claims division attached to it. It is a regular practice in some courts to transfer proceedings that qualify.

In 1985 17% of all claims[1] originated as plaints in the district court and were subsequently transferred to the small claims tribunals. This represents only 1% of all plaints in the district court. Because of lack of data, it is difficult to estimate what the impact on the district court would be if all eligible plaints were automatically transferred. The only figures we have relate to Christchurch in 1983. In 1983, approximately 7% of Christchurch's plaints were for $1000 or less and defended.

Although this is a neat procedure from the administration's point of view, there are a few implications for the users that need to be borne in mind. Courts and referees reported that there is usually no or no adverse reaction from plaintiffs following transfers. Any problems that do arise tend to be about not being able to recover costs already incurred. The occasional person would prefer to leave the matter in the hands of their solicitor. According to referees, the most usual appreciative

(1) Quarterly returns to Department of Justice

reaction is that claimants are pleased to have the more expeditious, cheaper and straightforward attention, and wish they had known of the advantages before incurring costs in the district court.

From the referee's point of view, transfers can be a problem because of lack of information about the claim: a claim form is not completed and no comparable papers accompany plaint papers.

There seems to be a consensus amongst referees that it is unfair and/or unacceptable that plaints can be transferred only if there is a tribunal attached to the court where the plaint is filed. Suggestions for overcoming this include transferring to the tribunal nearest to the claimant, referees travelling to other centres, and introducing more tribunals.

One reason for not transferring eligible plaints automatically is suggested from the experience of some tribunals. Notices of intention to defend can be filed as a delaying tactic, and in this event, the cases are unsuitable for small claims tribunals, ie there really is no dispute.

The concept of transferring claims from the district court to a small claims tribunal is generally accepted by plaintiffs and referees. In practice there are two shortcomings. The first is the resentment caused to plaintiffs who have already incurred costs which cannot be recovered. The second is the inequity of being able to transfer plaints down only if the court has its own tribunal. Now that tribunals cover a reasonable amount of the country, the inconveniences of transferring to another locality may not be too great.

4.2 REJECTION AND ACCEPTANCE OF CLAIMS

The main issue under this heading is the suggestion that there is conflict over the interpretation of when a case is "in dispute". This conflict shows up as fundamental disagreement between hopeful claimants and court staff, but also as inconsistencies

in rejection of claims between tribunals, ie they have different definitions of "in dispute".

The point to make in this context is that the difficulty arises partly from the unusual responsibilities exercised by court staff, and it would seem that if the jurisdiction is to stay as it is, there is a need to define what constitutes a dispute more precisely, or at least to train staff so there is more consistency from one tribunal to another.

In respect of rejecting claims on substantive grounds, rather than the existence of a dispute, the impression gained in some of the case study tribunals was that court staff are approaching claims more liberally these days, the main criterion being whether there is a dispute or not. Once again it is evidence of inconsistency.

4.3 ASSISTANCE GIVEN BY COURT STAFF

Section 38 of the Act states that court staff shall assist persons seeking help in completing forms in relation to lodging claims, rehearings, appeals and enforcement. This often involves a large degree of judgment and can certainly entail giving advice - an activity staff are cautioned against in other areas of their work. As well, staff have their normal reponsibilities of providing information and being helpful to the public. The main issue is whether disputants are actually given enough guidance by staff on how to pursue or respond to the claim. A subsidiary issue, given the discrepancy between court staffs' responsibilities in small claims and other areas of work, is whether staff are adequately trained and prepared to do this.

The best measure of this is the disputants themselves. A high proportion of disputants rated court staff as helpful, though more claimants (84%) than respondents (68%) thought so, and claimants tended to rate them "very helpful" whereas respondents were more likely to say "quite helpful". This difference may well reflect the difference in the nature of the contact, for example contact is more

likely to be initiated by claimants whereas respondents are in fact responding, and/or perceptions of the system, for example, the outcome of hearings is more often in the claimant's favour than the respondent's.

Even though most respondents thought the staff helpful, a proportion too large to be ignored (32%) thought they were unhelpful. The main reason cited for this was a general one, they were not given sufficient advice or information as to what was expected of them. There seemed to be two aspects to this: lack of knowledge and lack of manners on the part of court staff. 20% of claimants and 30% of respondents would have liked more help from the staff.

When disputants were asked generally what the weaknesses of small claims tribunals are, "unhelpful staff" was the fourth most frequent complaint from claimants. It did not register highly on the respondents' list. Better information for disputants, which included more helpful staff, was the most frequent suggestion for improvement from both claimants and respondents.

These conclusions were reinforced by the case studies. Observation by researchers of the staff and public at the counter concluded that helpfulness ranged from being prompt and courteous to unenthusiastic and not particularly polite.

Naturally court staff have their own commentary on the assistance question. First of all we sought from them a resume of the aspects where assistance is sought and required (see table 4.1). Court staff nearly always give claimants claim forms and fill out applications for distress warrants when enforcement is required. They often help the claimant fill out claim forms, explain procedures relating to service of documents and what will happen at the hearing to claimants, and explain small claims tribunal procedures to respondents. They never or seldom actually fill out the claim form, advise claimants on how to prepare their case, assist respondents to prepare their defence, assist in preparation of appeal, or arrange for orders to be paid in instalments.

Fifteen of the 21 courts said that the statutory requirement to assist disputants creates problems for them. The main difficulty was said to be that some claimants

Table 4.1 Type and Frequency of Assistance Given by Court Staff

Type of assistance	Never	Seldom	Quite Often	Very Often	Always
(a) Give claimant claim forms	0	0	1	5	15
(b) Fill out the claim form	2	15	2	1	0
(c) Help claimant to fill out the claim form	0	3	12	5	1
(d) Advise claimants on how to prepare their case	1	13	4	2	1
(e) Explain to claimants the procedures relating to the service of documents	0	2	8	7	4
(f) Explain to claimants what will happen at the hearing	0	0	6	9	6
(g) Explain the grounds of appeal	1	10	7	2	1
(h) Assist in the preparation of an appeal when an appeal is lodged	6	9	3	3	0
(i) Fill out distress warrants when enforcement is required	0	0	0	3	18
(j) Explain about small claims tribunals to respondents	0	6	10	2	3
(k) Assist respondents to prepare their defence	5	14	2	0	0
(l) Arrange for orders to be paid in instalments	9	8	4	0	0

(Source: Report 7)

expect the staff to do everything for them. Other problems were that it is time-consuming and it places extra responsibility on the staff, and there is no protection if the wrong advice is given. It was also noted that the claimant comes to court more than the respondent and therefore gets more help.

The case studies confirmed that the amount of time involved in helping disputants was the main problem encountered by staff, especially if they had other duties to perform. Amongst staff at the busier tribunals, there was a feeling that their time would be more profitably spent doing other things, that small claims are a burden.

Referees were also asked to comment on this matter and generally they were not completely satisfied, but qualified this by saying that on most occasions staff assist within the boundaries of their experience, training and working situations. Personality of the individual was also acknowledged as a contributing factor. As one referee suggested, court staff should be trained to approach their work, particularly their dealings with the public, in a professional manner.

The responses from community groups indicate an awareness that a busy and thriving small claims system depends on a good and knowledgeable response from the staff, including assessing the feasibility of claims.

Court staff are at the frontline and the image of small claims tribunals depends on them to a considerable extent. From the staff's account they do a lot to help the public, and most disputants found them helpful. However, there were enough people dissatisfied with the assistance from staff to suggest attention needs to be paid to it. It is important to realise that for the public, the courts and small claims tribunals are usually unfamiliar territory, that the system is complex, and that keeping people informed of progress and possibilities usually has positive returns. However, staff obviously were feeling pressed and that they did not have time to do the job properly. A clearly defined allocation of resources and training is needed for staff to take a professional approach and pride in their work.

4.4 SERVICE OF DOCUMENTS

It will not be news to anyone who is familiar with the administration of courts that the service of court documents is a business fraught with difficulties and that non-service or untimely service can frustrate if not negate the course of justice. Small claims are no exception.

Service of documents was not an issue identified in the issues paper, but it became evident in several of the research projects that it is something that has considerable impact on the efficiency and effectiveness of the system. The document we are most concerned with is the notice to both claimant and respondent which notifies them of the date set for a hearing. This is known as the "notice of hearing". Both claimant and respondent are to be notified of the time and place of hearing (s19). It is at this stage that the respondent is first notified of the existence and details of the claim.

Service of the notice of hearing was effected successfully on both disputants in 81% of cases. In 23% of the cases this involved postponing the date at least once. In 7% only the claimant was served; in 7% only the respondent was served; leaving 4% where neither party was served. The average time between filing and service was 11 days for claimants and 19 days for respondents. 41% of claimants were served personally by a bailiff, 26% by registered mail, and 29% by ordinary mail. 73% of respondents were served by bailiff, 16% by registered mail, and 7% by ordinary mail.

The case studies are an illuminating source on this topic. Disputants, community agencies and referees all mentioned that parties sometimes receive very short notice. The claim survey confirms that 6% of claimants and 8% of respondents received less than a week's notice.

It was very evident that one tribunal was having difficulties with service and the subsequent scheduling of cases. For example, over a five day period, 13 of 23 scheduled hearings could not be held because there was no proof of service, with most claimants receiving very short notice of the postponement. It was not unheard

of for claimants to attend only to be told about the cancellation. In the two other tribunals, only one hearing in 10 was postponed for lack of service.

As the case studies showed, the method of service of notices of hearing varies from court to court. In the difficult case above, both the claimant and respondent were personally served by bailiffs. Staff commented that the bailiffs had a large workload with lots of other documents to serve and that it was difficult to find and identify some of those who need to be served. It is important to sort out whether it is the nature of the metropolitan city or the work organisation of the court that contributes to their problem. The notices of hearing also go to the bailiffs at one of the other courts. They serve the respondents normally, but they ring the claimants and get them to come and collect their notice of hearing. They sometimes had problems when notices had to be sent to the North Island for service, but generally they felt they were keeping within the six week objective. At the third court the notices are sent to both claimant and respondent by registered post. If the letter is unclaimed it is then given to the bailiff for personal service. They had an occasional difficulty with the wrong address being given but generally there were said to be no difficulties.

More generally, in the court staff questionnaire, it was reported that difficulties in service did not really arise with claimants, but there were problems in locating respondents. This was mainly due to lack of information or incorrect addresses.

Three suggestions were offered during the case studies: pre-carbonated claim forms, a copy of which could be used for service; setting the time and place at the time of filing and handing the particulars to the claimant at the counter; and that there should be a minimum time of notice before the hearing.

Service of the notice of hearing will always have problems in locating people, particularly respondents. However, because the disputants do not, and should not have to, rely on legal advice, it is important to work out the most efficacious ways of serving documents quickly and to do so giving the disputants a reasonable period of notice.

4.5 TIME TAKEN TO GET TO THE HEARING

One of the attractions of the small claims system and one of the benefits of its simplified procedures is said to be its relatively expeditious progress and lack of backlogs and delays. This is an important matter for the administration which has set an objective "to schedule all applications to the small claims tribunal for a hearing within six weeks of filing a claim" (Report of the Department of Justice, 1985). The survey of claims found that only 44% of hearings were actually set down for a hearing six weeks or earlier. And setting down cannot be equated with hearing the case: 23% of cases were heard on a date later than first scheduled. 59% of those adjournments were because the respondent had not been served in time, and 9% were because the claimant had not been served. There were numerous cases adjourned at the request of one of the disputants for such reasons as they had already arranged to be out of town or overseas on that date, and sickness. Eventually the average time between filing a claim and the first day it was substantively heard was seven weeks two days. 94% of hearings were completed at the one sitting.

Delays or the time taken to hear cases has not been a problem identified in the various pieces of research.

CHAPTER 5

The Hearing

The hearing is in many ways the crucible for small claims tribunal effectiveness. Amongst the many issues discussed here are the pivotal ones of informality, privacy, and mediation.

5.1 ATTENDANCE

For a small claims system to have the chance to operate fairly, it is preferable for both parties to be present at the hearing; for a small claims system to effect agreed settlements, it is essential that both parties be present at the hearing. Attendance is not always a simple matter, and the consequences of non-attendance can be far-reaching in individual cases.

The survey of claims found that of the cases where both parties were served with a notice of hearing, both parties attended in 77% of the hearings. Only the claimant attended in 16%, only the respondent in 4%, leaving 1% where neither party attended. Not unexpectedly, it was found that the distance a person lived from the tribunal was related to whether he/she attended. This was more exaggerated for respondents where 45% of those who lived more than 100 kilometres away did not attend compared with 15% who lived nearer. The comparable proportions for claimants were 19% and 6%.

Disputants who actually attended hearings were asked about the convenience or otherwise of this. A reasonable proportion of claimants (26%) and respondents (39%)

found some inconvenience, indeed 18% of respondents found it "very inconvenient". For both claimants and respondents the major inconvenience (69%) involved difficulties with work, followed by location of the tribunal. Location was much more of an inconvenience for respondents, as were family arrangements. The inconveniences for respondents were more varied, probably reflecting the fact that respondents have not prepared themselves for inconvenience in the same way claimants would have. Other factors that caused inconvenience were the time of the day, length of the hearing, and transport.

52% of claimants and 49% of respondents stated they took time off work to attend, and half of them lost pay. Very few took annual leave. The time involved was usually two hours or less or between two and four hours.

5% of claimants and 12% of respondents stated they had made special arrangements for looking after children. Once again this was usually for up to two hours or for two to four hours.

Holding hearings in the evenings and on Saturdays has been suggested. Disputants are generally in favour of the idea, though for some these alternatives would be an inconvenience. The suggestion received virtually no support from court staff and support from fewer than half the referees.

Disputants who did not attend were asked why not. The main reason given was business and work commitments, some elaborating on this by saying they would lose more than the claim was worth by not being at work. Travel was another reason given for not attending.

If the claimant does not appear the claim will generally be dismissed or adjourned. If the respondent does not appear the hearing is usually held in their absence, although this means that the aim of an agreed settlement cannot be achieved. In these circumstances, in the case studies, the referees warned the claimants that if a respondent had a good reason for not being at the hearing there might have to be a rehearing of the case. At one of the tribunals, when there was only one party present, the referee put the claimant on oath before hearing the claim. One referee

commented that she did not really like holding hearings when only one party was present. She always tried to ring the absent party and if she found they wanted to attend would give them 10 or 15 minutes to get to the court. This referee also commented that a claim still had to be proved even though the other party was not present.

Observation of hearings where only the claimant attended showed that some claimants were disappointed that the respondent had not appeared and annoyed at the possibility of a rehearing, while others were pleased not to have to face the respondent and the possibility of getting upset.

5.2 INTER-AREA DISPUTES

Closely associated with non-attendance are the problems that arise when one of the parties lives some considerable distance from the tribunal. What are these problems and are the present procedures adequate to alleviate them?

Section 18(2) says that the appropriate tribunal for lodging a claim is that which is nearest, by the most practical route, to where the claimant lives. This is the opposite to filing rules in district court civil actions where generally proceedings are to be commenced closest to where the defendant lives or the cause of action arose.

At the time of the research, when there were only 21 tribunals operating, 90% of claimants and 80% of respondents lived within 20 kilometres of the tribunal, and in 75% of cases both parties lived within this distance. Even so, 3% of claimants and 11% of respondents lived more than 100 kilometres distant and this does cause problems. Since completion of the research 15 more tribunals have opened, which will presumably lessen the problem for claimants, but not necessarily for respondents.

From the disputants' point of view, and especially the respondents', the cost and time involved to travel to defend a small claim is often not justified by the claim.

Yet when an order arrives demanding a payment from him/her, a sense of frustration at the inability to have had a say can still be provoked.

Referees see inter-area disputes as a real problem. They acknowledge that it can be impractical or uneconomic for respondents to travel. A common response from referees, conveying a strong overall impression, was that respondents (being the ones who usually have to travel) are certainly disadvantaged if they do not attend, even if they submit written statements. Simply, they cannot be cross-examined and the claimant's account of events cannot be properly challenged. Other comments were that it prevents reaching a settlement, that written statements may be professionally prepared, and that it can be difficult if the scene of the claim is also distant from the tribunal.

Court staff reiterated these problems, adding a couple particularly pertinent to their work: problems with serving documents, and lack of provision for taking evidence at a distance.

This problem will always exist, so what can be done to minimise its effects?

Most suggestions relate to improving provisions for taking evidence at a distance. At the moment respondents can send written submissions or affidavits, but it is pointed out that to write a clear and concise case is difficult and daunting. The most common suggestion is to use the referee at the tribunal closest to the distant party as a referee in loco. This referee could hear and cross-examine evidence of the party and witnesses and even relay questions from the referee at the original tribunal. This is not considered ideal. It would involve adjournments and would be a slow process, but it may help obviate judgments by default and give distant parties a realistic option to participate. Another suggestion is, in this technological age, to use a tele-conference link between two tribunals.

One suggestion from a court was that these disputes should not be allowed to be dealt with unless both parties consent. The right to use the district court and its provisions for taking evidence at a distance would remain.

A more fundamental suggestion is to alter the statutory place of filing to the tribunal nearest the respondent. It is hard to imagine this would result in greater justice, but rather just swap around the inconveniences and put the disadvantages more often with the claimant. It would no doubt discourage claimants from making claims, including justified ones.

5.3 PREPAREDNESS FOR HEARING

Looking back, 49% of claimants and 33% of respondents thought they had been "very well prepared" for the hearing. 40% and 42% respectively thought they were "quite well prepared". Once again the respondent is in a less favourable position.

An unexpectedly high proportion of disputants who attended a hearing had sought advice from a lawyer: 25% of claimants and 21% of respondents. A high proportion of these thought that this advice was to their advantage: 75% and 71% respectively. Disputants who did not go to a lawyer were asked if, in retrospect, it would have been helpful. Not many thought it would have been, but it is interesting to note that twice as many respondents as claimants answered positively: 26% and 13% respectively.

5.4 WITNESSES

There is some concern that disputants either do not know they can bring witnesses to a hearing or that they do not know how to use them well. The new information pamphlet does mention that witnesses can be used and how to get them to a hearing, but does not advise on how to use them.

Most disputants knew they could have a witness, but once again there was a

substantial difference between claimants and respondents: 83% and 67% respectively knew.

Almost a third of both claimants and respondents did actually call a witness, and a high proportion of these, 81% and 87% respectively, thought they used their witness to their advantage.

Disputants seldom knew ahead of the hearing whether the other disputant was going to bring a witness or not.

The case studies report that some disputants seemed uncertain of what to say when asked to question the witness but that the referee usually helped by asking the questions, and that evidence given by a witness seemed to carry a lot of weight, whereas written statements from witnesses did not seem to be accorded as much weight.

Referees were divided about whether disputants have adequate knowledge in relation to using and questioning witnesses. Some think they do, others think more information is necessary. Some commented that it is the referee's responsibility to help disputants use witnesses properly.

The Consumers' Institute and the Citizens Advice Bureaux assert that there is widespread ignorance on the part of disputants as to their right to call witnesses and the Citizens Advice Bureaux suggested that it should be notified on the claim forms.

Given that referees are not legally trained, independent expert advisors were originally considered an important adjunct to the system. It would seem from observation of a national referees' seminar that they are not used very frequently, and 3% of the claims in the claim survey had expert witnesses involved.

The Consumers' Institute considered it important that tribunals have information about and ready access to a body of independent expert advisors, and the Citizens Advice Bureaux also recommended the compilation of a list of institutions and individuals available to assist. The referees themselves would appreciate identification of areas and lists of available experts.

Two weaknesses of the system identified frequently by disputants, especially respondents, were that the referee was not technically qualified and that not all the evidence was taken into account or sorted out. It seems, therefore, that witnesses, both expert and those for the disputants, are part of the process that could be used more, and more effectively, in order to help the disputants and the referee evaluate the facts.

5.5 INFORMALITY

Like so many of the ideals incorporated into the small claims system, informality is both a desired end in itself, and a consequence of other attributes of the scheme. Informality was originally advocated on the grounds that it encourages use: it would "actively help parties assert or secure their rights"[1]. At the same time the deformalised procedures are a necessary consequence of keeping the service cheap for users. Procedures have been deformalised by the absence of legal representation, strict rules of evidence, court room protocol and public attendance, and by the presence of lay referees, conciliation, less formal physical surroundings, and generally the approach to conducting the hearing.

In the survey, disputants were asked for their views on informality. 63% of claimants and 65% of respondents assessed their small claims court experience as "informal". They tended to grade it as "quite informal" rather than "very informal". Only 12% of claimants and 17% of respondents thought the hearing was "formal". They were also asked if informality was important to them or not. For the large majority it was, and more so for respondents, 72% as opposed to 64% of claimants. 20% of the disputants for whom informality was very important, did not think the hearing was informal at all.

(1) Smith, M P, 1974, p8

The referees had a lot to contribute on this subject. Their general and consensus opinion was that from both the claimant's and respondent's point of view, informality is essential for the effective running of hearings:

> The informality is the tribunal's greatest weapon. To formalise the hearing would scare off the very simple ordinary person we are trying to encourage. Unless the parties can 'talk it out' they are unlikely to agree and this is hampered if strict procedural methods are used.

Several of the referees stressed, however, that informality does not mean chaos and that "it is occasionally necessary to tighten the reins as disputants appear to see the informality as a lack of standing of the Tribunals". Some also noted that disputants expect a degree of formality and dignity.

The observation of small claims hearings in the case studies placed the researchers in a unique position of observing hearings without being participants. Consequently, the case studies are a rich source of information on what informality is in practice.

At each tribunal the participants sat separately and remained seated when speaking. The referees conducted the hearings in a relaxed manner and encouraged the disputants to feel at ease. Slightly more formality was introduced at times by the referees in order to establish their control over proceedings. It generally appeared that although the disputants were nervous to start with they gradually relaxed as a hearing progressed and this meant that they were able to speak more freely about the claim. Holding the hearings in private seemed to help put the parties at ease.

A variety of suggestions was forthcoming when referees were asked how to achieve informality. Their replies fell into four general categories: conduct of the hearing; the referee's attitudes and communication skills; physical environment; the non-legal approach.

5.5.1 Conduct of the Hearing

The single largest vehicle for encouraging informality was said to be the introductory remarks at the hearing. At all three case study tribunals, all the

referees began by explaining the purpose of small claims tribunals and how the hearing would be conducted. Naturally introductory statements varied considerably, with some going into more details than others. The conclusion of the case studies seems to be that some were found wanting more than others, particularly in describing how an agreement might be reached.

The time it takes to hear cases varies considerably from case to case. If only one party attends it can be as short as 15 minutes. If both parties have a lot to say, they can last as long as two and a half hours. Generally an hour is sufficient. Two of the three case study courts routinely scheduled one hour, and the other scheduled one hour 15 minutes, so at least some of the time people were waiting. A few disputants made suggestions that the amount of time in the tribunal could be "better". Some wanted more time, saying not enough was scheduled for them to have their full say, while others felt there should be a maximum and it took too long. It is known that some tribunals schedule as little as 30 minutes. From observation in the case studies it is concluded that half an hour is not enough.

One comment arising from the case studies and reinforced by disputants in their survey was the effect of interference and delays caused by referee's note taking. Tape recording was suggested for speeding up proceedings.

Not having court staff present was seen by some as a contribution to informality.

Other factors mentioned by referees, though not necessarily with any weight of numbers, included letting the parties conduct it their own way; having a free exchange after the opening; a dignified ending. It was also noted that the referee must keep control of the hearing, which does not necessarily preclude friendliness and latitude.

Two unorthodox techniques have been observed or commented on. One referee said he/she will go and sit with the parties if they are making good progress. Another referee suggested that deliberately leaving the parties alone to get them talking can

help achieve a settlement. However, this must be used with sensitivity and judgment. It is possible that one party could use the opportunity to harrass or pressure the other party. In one of the observed hearings, the claimant was obviously nervous of the respondent even when other people were present. It should be borne in mind that in some cases it would be inappropriate to leave the disputants alone together.

5.5.2 Referee's Attitude and Communication Skills

The case studies commented that some of the referees used fairly formal language during their introductory remarks. This can have the advantage of establishing the referee's control over proceedings and making the disputants aware that a tribunal is part of the court system. However, as the disputants represent themselves at these hearings, it is vital that they understand what is being said to them. Unless this is achieved, the objectives of providing justice for the ordinary person and common sense justice will not be achieved.

Other than as has been noted above, the referees generally spoke clearly and used everyday language. However, sometimes jargon such as "the bench" or legal language was used. In one hearing the refereee tended to use difficult language. For instance, the word "unequivocal" was used several times and the respondent clearly did not understand.

The following list of suggestions under the general hearing of attitude and communication is derived from answers to the referees' questionnaire. The referee needs to be relaxed and attentive; to speak slowly, and softly; to smile; to observe courtesies such as removing coats and introducing parties; to appreciate the stresses the parties are under; not to interrupt unnecessarily; to understand cultures and people; and to use first names if it is assessed that this is acceptable.

5.5.3 Physical Environment

Aspects of physical surroundings that some referees saw as important for informality included: pleasant and comfortable surroundings; hearings held in private; seating arrangements, eg being seated, being seated at the same level as referee, being seated so one can make eye contact.

Two community groups suggested holding hearings away from court buildings, one of them suggesting a marae for some cases.

5.5.4 The Non-Legal Approach

The most obvious example of this is not allowing representation of disputants by lawyers. A large majority of both claimants and disputants endorsed this and thought that lawyers should not be able to represent disputants at hearing. Half said "definitely not" and another quarter said "probably not". The non-legal nature of small claims tribunals was the fourth most frequent strength of small claims tribunals mentioned by claimants, though it was not so high on the list for respondents. It was also noted as an occasional weakness but with nothing like the frequency that it was noted as a strength.

A view which shifts the emphasis of the representation question was expressed by a Kokiri Management Group. They proposed that disputants be permitted to bring a support group or whanau if they wished. Some Citizens Advice Bureaux also endorsed the presence of support persons.

Apart from not using lawyers and avoiding legal language, an important non-legal element is not using strict rules of evidence in presenting cases. This places a considerable burden on referees to investigate and balance conflicting evidence. It was originally a concern[1] that they would not have the necessary experience and it still arises as a serious criticism.

The case studies reported that all the observed hearings appeared to be conducted in an impartial manner. Although there was some variation from referee to referee, disputants were given every opportunity to put forward their point of view. Some hearings were very long but it did mean that the disputants had been allowed to "have their say". Some referees were more active than others in eliciting information from the disputants, and balancing one side against the other. For

(1) New Zealand Law Society, Submissions on Small Claims Tribunal (No. 2) Bill to Statutes Revision Committee, 1975.

example, one referee asked the disputants and witnesses quite a lot of questions in order to obtain both sides of the dispute, to clarify points and to check on any possible inconsistencies. All referees examined the documents tendered in support of a case, and if disputants forgot to bring a receipt, orders were made at times subject to providing proof to the tribunal.

The vast majority of both claimants and respondents in the case studies were satisfied with the result and felt that the hearings had been fair and well conducted.

This aspect was also canvassed in the disputant survey. On the question of how fair disputants considered the referee was in the way he/she controlled the hearing, there was a high level of satisfaction - a total of 82% of claimants and 72% of respondents thought he/she was fair. Or in the words of disputants in the case studies:

> It was in a good businesslike manner, he was very unbiased of course, he put his mind to all aspects of it, both sides, and carried it out in a friendly sort of manner. (Respondent)
>
> It was good reasoned, clear, he answered alright when asked. Basically I feel good about it. (Claimant)
>
> I thought she was really good. She sorted out the facts between both of us and making sure that she got all of them. (Respondent)

A minority felt that they had been unfairly treated and had not been listened to. With regard to the general conduct of the hearings, some disputants commented that they would have liked the referee to be more active and to ask more questions.

> I think he could have possibly asked more questions to clarify points. You know I am not a lawyer. If I have got to sit there and question their witness and say vice versa and then question my witness. You know I am not in a position to do that, whereas he knows what the situation is, he knows how to ask people about those sort of things.

The second and third most prevalent weaknesses of the system reported by respondents were, one, that the referee was biased and, two, that not all the evidence was taken into account. The first could refer to many matters, but the

referee's skill in hearing evidence is an important component. The second weakness is directly relevant to this question of balancing the evidence.

The main concern of community groups was that some of their clients are disadvantaged. One group said that the system was good for articulate Europeans but they would not send any of their other clients because they would be at a disadvantage. Another group described the system as being "rough justice":

> What it really means is that the most aggressive of the two parties has the best say and the referee has to be very careful to pick out from the evidence who is actually right .... the person that's the more aggressive of the two may have an unfair advantage.

Referees have the difficult job of having to be seen to be impartial and at the same time keeping the balance of power between the two parties so that one party is not at a disadvantage if they are not as articulate or confident as the other party.

Evidence is not usually given on oath, and this is generally done only if one party is absent. It was a matter raised by several of the dissatisfied disputants who think evidence should be on oath.

The above findings show that small claims tribunal hearings are and should remain informal. One of the main elements in this is its non-legal character, which was appreciated by disputants, particularly claimants, by referees and by court staff. One aspect of this which requires considerable care is the absence of strict rules of evidence. It is important that referees be practised at eliciting and evaluating evidence. Simple language is another area which needs constant vigilance.

5.6 PRIVACY

An element of the small claims tribunal system which is closely allied to

informality (indeed it can be seen as an integral party of informality) and with similar considerations is privacy. However, it also has implications of its own: questions of accountability. Unlike other courts, small claims hearings are held in private (s25). It was originally argued that tribunals are not a "court" but a convenient way to settle a private difference[1] and it is assumed that privacy is necessary firstly to encourage people to use the tribunal, and secondly, to permit the kind of exhange necessary to encourage settlements.

First of all, how private are hearings? Disputants were asked how many people were present at their hearing, and this averaged four. So it was not unusual for one person other than the two parties and the referee to be present for some of the time. It seems that disputants had their own witness in about one-third of the cases and the other party had one in one-quarter of the cases. Witnesses are usually present only for the introduction and while giving evidence.. In only a few cases were court staff, expert witnesses or investigators, or persons supporting the disputant present. The survey of claims found that 3% of files recorded the use of an expert investigator. These data reassure us that the public have not slipped in through the back door.

Hearings were quite clearly considered to be private by the disputants. 75% of claimants and 69% of respondents thought they were "very private" and another 22% and 23% respectively thought they were "quite private". As regards the importance of privacy, again a large proportion thought it important: 71% of claimants and 76% of respondents. 89% of claimants and 85% of respondents who thought privacy to be "very important" rated the hearings as "very private".

Nearly all referees maintain that privacy is essential, particularly in encouraging inarticulate disputants and frank discussion.

(1) Smith, M P, 1974

It is generally agreed that privacy is important, and we can conclude that tribunals succeed on these grounds. But in the context of privacy, the idea of publishing results of hearings has been raised. When this was put to disputants in the case studies, their general reaction was that the matter is private and not the business of anyone other than the disputants. Suggestions from public responses were to publish without names, and to have records publicly available for inspection, though publication need go no further as this might deter prospective claimants.

5.7 MEDIATION

Informality and privacy seem to be conducive to getting people to talk together, but what else do referees actually do in their attempts to get the parties to agree.

"Conciliation" was one of the issues that emerged as important from the preliminary exercise. At that stage it presented itself as a question of, firstly whether the concepts of conciliation, arbitration and mediation are clearly understood and consistently practised by referees, and secondly, how do clients react to the conciliatory approach and do they ever feel unfairly compromised? As the research progressed, the questions became more directed: are agreed settlements always appropriate and how hard should referees try to achieve an agreed settlement? These latter questions are discussed in chapter 6 in relation to the outcomes of hearings. Here we discuss the earlier question of what "mediation" is in practice.

There are four preliminary observations to start with. First, as the next chapter will demonstrate, there is no generally accepted and applied definition of "agreed settlement" within the small claims operation. This lack is unhelpful.

Secondly, training in how to bring parties to a settlement has been minimal: a limited number of training sessions on mediation as a technique have been given by a

judge experienced in conducting mediation conferences in the family court. Consequently, referees are relying on their natural abilities and experiences in other fields - what is known as the "common sense" approach.

Thirdly, mediation is the technique that has been "sold" to referees as the way to bring about agreements. There is considerable debate over exactly what mediation is compared with conciliation and arbitration. It is not necessary to settle the debate over definition here, but it is important to realise that, within the small claims setting, the referee does hold a final power to determine the dispute, which he/she will exercise if an agreement is not forthcoming. One view is that this scenario is not mediation, that in mediation the resolution finally rests with the disputants. However, because "mediation" is the word widely used throughout small claims tribunal operation in New Zealand, for the meantime, we continue to use it to describe the earlier phase of the small claims process. In the final chapter we develop the contention that further thought must be given to where small claims tribunals come in dispute resolution theory, and that the concepts and accompanying techniques need thorough discussion by those in charge of the policy and by referees.

Fourthly, more disputants go to hearings wanting the referee to make a decision for them, rather than wanting to come to an agreement with the other party. Claimants (35%) were more inclined towards agreements than respondents (29%).

So how does mediation work in practice? A common sense approach is to encourage the disputants to talk. The case studies report:

> All the referees generally gave the disputants ample opportunity to tell their side of the story. Some of them mentioned that they actively tried to elicit all the information that they could. They encouraged disputants to "talk themselves out" as a technique for arriving at a settlement. This technique was commented on favourably by a number of disputants who were pleased that they had been encouraged to tell their side of the story. As has previously been mentioned some referees suggested that leaving disputants alone together helped to achieve an agreed settlement.

It is difficult to divorce the processes involved from the outcome, and the following

material in some ways anticipates the next chapter which discusses "agreed settlements" as an outcome. But on the process side, the case studies' report was severe in its observations on how hearings can be conducted in the attempt to reach agreements. Detail is needed to illustrate these points and several pages of the case studies report are reproduced:

> We observed 17 cases where both parties were present and in theory an agreed settlement could be arrived at. In six of these cases an "agreed" settlement was arrived at. However, in each of these cases the "agreed" settlement had some unsatisfactory element to it. These settlements will be described in some detail to illustrate the way in which agreed settlements were achieved.
>
> One of the disputants was not happy with the settlement in five of the six cases where the outcome was recorded as an "agreed" settlement, and in the sixth case there was confusion over the content of the agreement.
>
> One of the difficulties seemed to be that disputants actually wanted the referee to make the decision. They wanted an outside opinion on what was a fair conclusion to the case. This occurred in two of the cases where there was an agreed settlement.
>
> In the first hearing which resulted in an agreed settlement the respondent said that he wanted to leave the decision up to the referee. After the hearing he still said that he would have preferred the referee to make the decision.
>
> The second case concerned a traffic accident. The respondent did not deny that he had driven into the back of the car but thought that the damage had been less than the amount his insurance company had been billed for and less than the excess which was being claimed.
>
> After the claimant and respondent had each outlined their side of the story and before any discussion the hearing progressed as follows:
>
> Referee — Before we go any further, don't you think that we could say - "yes I owe $300" and wrap it up without having to go any further in the case now - and er - I'm talking now of an agreed settlement?
>
> Respondent — Yes, fine, I'm happy if you're happy.
>
> Referee — Well, now I'm quite sure Miss R is quite happy if she gets $300 - I'm quite happy and its a matter of how you'd like to do that. Would you like to pay her $300 now or shall we do it through the court?

Respondent — No, I can do that as long as you're happy with way - happy in your mind that I'm not being "fitted".

Referee — Well, I can't see that these people would be turning around and setting you up - and I think your point - but no insurance company from my knowledge would be trying to set you up.

(The respondent then gave an example of when he felt this had happened and said how frustrated he had been in this case in trying to get to see the car or get information from the insurance companies involved.)

Referee — Well, okay, you've got a problem there but how would you like to pay this, would you like me to say you're going to pay through the district court, or how would you like to do it?

Respondent — I'll pay right now.

Referee — Alright, well we'll say an agreed settlement.....

When the respondent was interviewed afterwards he said he was disappointed and he still felt that he had been "fitted" (charged for damage he did not cause). With regard to whether he should pay for damage he said,

> Now I left it entirely up to him (the referee) to make that decision, not me, but he's obviously a busy man, so he's again not that interested, really.

In my opinion this respondent would have been much happier with the system if more time had been spent on the case and then a decision made by the referee.

In two other hearings where there was an agreed settlement this "agreement" was obtained by the referee telling the disputants what he thought the solution should be and then asking them to agree to it. Whether this should be called "agreed settlement" is open to discussion. Quite lengthy quotes from the hearings are used so that the reader can see how the settlement was achieved.

The first case was concerned with a bill for panelbeating. After both sides had finished discussing the referee suggested a solution:

Referee — Do you think you would be prepared to pay, say, a couple of hundred dollars now and say, "well, alright we'll call it quits at that" ..... originally you were prepared to pay half of whatever the figure was - it would be more than 400 - he acknowledges now that he was prepared to help you on the drip feed - we could even make the $200 or so, if he's prepared to accept it on a kind of time payment.

Respondent Even if the agreement was between his wife and my son (other people) I should do it?

Referee Well the thing is, he's claiming as the panelbeater and you're the vehicle.....
(Discussion between the claimant and respondent about the respondent's son)

Referee Well anyway, whatever your son did it's a claim between you two at the moment. That's what we've got to look at - if you want to talk to your son about it afterwards that's over to you - but I think that you would be advised to look at some compromise in view of long standing between you - er business and friendship I would say - to resolve this rather than let it go on - would you be interested in 200?

Claimant Yes.

Referee Would you come to the aid of the party with 200?

Respondent (Grudgingly) Yes.

Referee How would you like to pay that?

After the hearing the respondent said that she was not happy with the result and that there had been pressure for her to agree to the amount named.

The second case concerned $1000 which the claimant said was a loan that had not been repaid whilst the respondent said it had been a gift. After both sides had put their points of view and there had been some dicussion the referee stated what he thought about the case.

Referee ..... so I don't think there is enough to sustain a claim that it is a gift - the claimant has indicated that he would be quite happy to accept payment over six months .....(long pause) ..... how would you pay it over six months, how would you pay it, direct or would you pay it through the court - would you pay it by weeks, by months, by fortnights?

Respondent Er.

Claimant By payday?

Referee Payday's a good way - what days are your paydays?

Respondent Friday.

Referee You get paid weekly do you?

Respondent Yes.

Referee That would be about $40 a week. Can you manage that?

Respondent Yes.

Referee When could you make the first one?

Respondent Next week.

Referee Next Friday?

Respondent Next Friday.

Referee Today is the ninth, next Friday is the 18th ..... supposing I said the 22nd as the first one. That gives you the Monday and Tuesday to get it to him - payday being the previous Friday - is that right? And then every week after that. How would that be?

Respondent Fine.

Referee Can we agree on that .... that that's the way you'll pay it .... do you agree with making the payment?

Respondent No.

Referee You don't?

Claimant Do you feel you shouldn't pay that?

Respondent No, I still say that you let me have that money, but I just want to get it finished with.

Claimant That's what I wanted to do right from the word go.

Respondent What's that?

Claimant Get it finished with.

Respondent No, you discussed it with your wife and said that I could have that money.

Referee At this stage - I think we've covered the ground haven't we?

Respondent & Claimant Yes.

Referee Do you want - are you prepared to say we'll make this as an agreement? Twenty-five payments at $40 a week starting in October, or do you want me to make an order on it?

Respondent No, let it go at that.

Referee It's recorded that you agree to make payments in that way. Is that okay ..... are you happy with that?

Respondent Yes.

The respondent in this case said afterwards that he still felt that the money had been a gift.

The fifth case where an agreed settlement was recorded was regarding a motor accident. At the hearing a 50-50 split of costs was agreed to. In the interview after the hearing the respondent said,

> ....I thought there was quite a lot of pressure to come to his solution really. His solution was more or less what we were coming to anyway, but I felt a lot of pressure by him for that solution anyway.

This respondent also commented that at times he was not sure whether the referee was speaking as a mediator or giving his opinion as a referee.

In the sixth and final case an agreed settlement seemed to have been arrived at because of confusion over what was being agreed to. This dispute was over how much was to be paid for some work that had been done. The referee suggested a figure of $50 and both parties readily agreed. On speaking to them separately after the hearing it became clear that one party felt that the $50 had been taken off the bill and the other party believed that they had to pay only $50. The fact that the content of the agreement was not set out on the order they were given meant that neither realised that one of them was in error. On checking later with the claimant we found that there had been problems over the interpretation of the agreement. He said that he would have liked to have had a written ruling from the court.

Disputants who had not agreed to settlements were also asked whether they felt that there had been any pressure to come to a compromise. A few of these disputants had felt that they had been under pressure and that the referee wanted an agreed settlement rather than have to make a decision. One of these instances involved the disputants being left outside together whilst the referee considered his decision. When he went to call them back he found them talking and left them to continue as he felt they might come to an agreement. In fact the claimant was trying to pressure the respondent. The respondent said afterwards that she had found it difficult to keep saying no and that disputants should be kept separate so that one cannot put pressure on the other.

We also observed several cases where the claimant was encouraged by the referee to come to a compromise, and when they refused they were awarded the full amount by the referee. Had they been less strong willed they may have agreed to a compromise and received less than the referee evidently felt was just.

From these observations of hearings, the case studies concluded:

> There was no clear cut break between when referees were acting as a mediator and when they were acting as judge arbitrators. Nor was there any explanation to the disputants about what mediation consists of, either in the introductory statement or during the hearing. In some cases it was difficult to tell whether a suggestion made by a referee was just an option or whether it was actually the referee's opinion about what the solution to the claim should be.
>
> The technique of mediation can mean that the stronger willed party has an advantage as they will tend not to compromise if they do not wish to, whilst a person of a less determined disposition may be more susceptible to the referee's coaxing and may be pressured into agreeing to a compromise when they do not wish to. It is also questionable whether methods used by referees are actually mediation at all, even though they are referred to as mediation.

Another source of information on this important aspect is the disputants themselves. They give a healthier report. They were asked to rate how good they thought the referee was at trying to get themselves and the other disputant to come to an agreement. Not surprisingly, claimants were more favourable than respondents. 40% of claimants and 28% of respondents thought the referee was "very good", and another 41% of each thought he/she was "quite good".

The minority of disputants who thought the referee was not good at this made a number of diverse comments as to why, but a few common themes emerged. Most commonly it was said that the referee was one-sided and would not listen to their side of the story. This was cited by both claimants and respondents but more frequently by respondents; secondly, that the referee did not understand what was involved in the dispute, a lack of technical knowledge; and thirdly, some claimants and respondents commented that the referee did not actually attempt to bring about an agreement.

An associated question which was reported in section 5.5.4, found that a high proportion of both claimants and respondents thought the referee had conducted the hearing in a fair manner.

5.8 COMPROMISE

Although compromise is really one aspect of the larger conciliation/arbitration process that has been discussed, we consider it has assumed the position of an issue in its own right. This is partly because the issues paper suggested it by stating "in some instances, conciliation appears to be interpreted as compromise" and by asking the question, "do people feel unfairly compromised and if so are the methods of conciliation/arbitration responsible?" Responses to the research have justifified the identification of compromise as an issue.

A series of questions were put to disputants about compromising. Admittedly it presupposed the existence of compromise, but the results are revealing.

A large proportion, 39% of claimants and 47% of respondents, had decided before the hearing how much they were prepared to compromise by. Of these, 35% of claimants and 55% of respondents stated they actually compromised more than they had intended. All disputants who attended a hearing, whether they had previously decided how much to compromise by or not, were asked if they thought they compromised more than was fair. 42% of claimants and 52% of respondents thought they had. In the freer atmosphere of listing weaknesses of small claims tribunals and suggestions for improvement, the idea that there was too much compromise involved or that the referee should make a decision was one of the more frequent points made by the disputants, particularly by claimants.

It is by no means conclusive, but the claims survey found that the average proportion of the claim that was ordered to be paid was significantly more at 93% in cases decided by the tribunal than in agreed settlements at 66%. The significant difference remained when motor vehicle accident claims, which are not necessarily in dispute and which tend to be decided rather than settled, were excluded; 80% and 60% respectively.

These conclusions must be appreciated in their context: we are dealing with people who have been disputing and with a situation where there is generally a winner and a loser. It is also true that the majority of disputants think the final outcome is fair. However, given the sometimes directive nature of the hearings observed in the case studies, these results must lead us to think about when agreements are appropriate and how best to conduct the hearing. The case studies concluded:

> The appropriateness of trying to achieve an agreed settlement in all cases is questionable. The claimant may in some cases be 100% in the right or claims arising for damage caused in a motor accident do not necessarily involve a dispute. If the referee has decided that a claim is fully justified, should they continue to encourage the claimant to compromise?
>
> The question of how much emphasis should be placed on obtaining agreement is really one of degree. When does helping the disputants to come to an agreement become placing pressure on the disputants? The referee is after all in a position of power and the disputants know that a referee can make a binding order. If the referee tells the disputant what they think the solution should be, it takes a fairly strong person to disagree, or it may be seen as pointless to disagree as the referee can make an order anyway.

The conclusion of these two sections on mediation and compromise is that these techniques can be used at inappropriate times and can be badly applied. A theoretical appreciation of mediation as a concept, and training in when and how to use it is needed.

CHAPTER 6

Agreed Settlements

6.1 HOW MANY CLAIMS ARE SETTLED?

It cannot be repeated too often that attempting to bring the parties to an agreed settlement is central to the small claims operation. As an example of a positive approach to dispute resolution, it is a principle in its own right. It is also a consequence of eschewing strict legal argument and procedures. It is emphasised in the Act which states categorically that the primary function of the tribunal is to bring the parties to an agreed settlement. This is stressed in referee training. Consequently, it has an important part in the model of the small claims process: it is the intended immediate outcome of the small claims inputs and activities. The evaluation question to answer at this stage is whether agreed settlements are being reached.

The question is deceptively simple. Early in the evaluation we became sceptical about the statistics on the proportion of claims settled, which led us to posit that there is no given or generally accepted definition of "agreed settlement", central though it is to the whole scheme. When we were first investigating the issue, we were using 1984 figures and the settlement rate ranged from 2% in New Plymouth to 41% in Hastngs. The national average was 16%. It did not ring true.

These figures represent the number of claims, settled by agreement, as stated by referees on the file, as a rate of all claims filed. The survey of claims was also set the task of presenting a settlement rate. This survey relied on the same source for a judgment as to whether a claim was settled or not, but was in a better position to calculate a rate over a more appropriate base. Taking only those cases where both

disputants attended the hearing and so an agreed settlement was still a viable option, 24% were settled by agreement, according to the referee's notation.

Yet another rate, and arguably a truer reflection of the influence of the small claims process, should probably include claims settled prior to the hearing, it being reasonable to suggest that the onset of the small claims process may well have prompted discussions and subsequent settlement. The difficulty with this is to know what the most appropriate base is, and so we resort to that used for the official statistics: all claims filed. Thus the total number of settlements (prior to and as a result of a hearing) as a rate of all claims is 23%.

We also investigated this by asking disputants who attended a hearing to indicate which of two statements best described the outcome of their hearing. The options were, "You and the respondent/claimant reached an agreement" or "the referee made a decision". 84% of both claimants and respondents thought the referee decided, and 12% of claimants and 14% of respondents thought they had come to an agreement. There was a high degree of agreement (92%) between the two parties of one dispute over the outcome.

Another avenue was to see how closely the disputant's view and the referee's notation on the file coincided. Generally there was agreement, but the discrepancy in one-fifth of the cases is instructive. Most of the discrepancy related to "agreements" rather than "decisions". 60% of the cases settled by agreement according to the referee were rated by the claimants to be a decision; and 53% of the cases settled by agreement according to the referee were rated by the respondents to be a decision. Obviously it is easier to know when a decision is a decision, than when an agreement is an agreement.

Referees are very conscious of the emphasis placed on attempting to reach agreed settlements and most agree that it is a very important part of the process. However, many referees also recognised that undue emphasis can and does lead to unfair agreements, that agreement must be balanced against the facts, and that the referee has the responsibility, power and skills to prevent unfair agreements. A contrary

position was taken by a few referees. That is, that "fairness" is not a concept that applies to agreements; that agreements are a matter for the parties to decide without any element of compulsion involved.

It was found that claims relating to contracts or quasi-contracts were more likely to settle. Whether it was a business-related claim or not, and the amount of the claim did not relate significantly to settlement rate.

These results plus the situation described in the previous chapter on how hearings can be steered towards an "agreement" are disturbing. Guidelines on what an "agreement" is are needed and should be based on an appreciation of the disputants' point of view.

6.2 THE DETAILS OF TRIBUNAL ORDERS

Despite the uncertainty over what constitutes an agreed settlement, most settlements and all decisions are expressed as an order of the tribunal. Even if not written as an order, the details of a settlement are nearly always recorded. The claim survey is a reliable source about the details of these outcomes.

Settlements and decisions are not the only possible outcomes of a hearing. Table 6.1 shows the outcomes for all hearings. It is interesting to note that 11% were dismissed, 2% were referred to the district court, and 1% were outside the tribunal's jurisdiction.

81% of orders were in favour of the claimant. 97% of orders against respondents were for a monetary payment to be made, compared with 59% against the claimant being to supply goods.

Table 6.1 Result of Hearing by Attendance

Result	Both attended No.	%	Only one party attended No.	%	Total No.	%
Settled and withdrawn, agreed that there is no claim	19	2	-	-	19	2
Settled by agreement	192	24	-	-	192*	19
Decision made	447	56	173	79	620	61
Claimant not liable	5	1	-	-	5	--
Dismissed	91	11	19	8	110	11
Struck out	12	2	17	8	29	3
Referred to district court	18	2	-	-	18	2
No jurisdiction	5	1	-	-	5	--
Adjourned sine die	11	1	9	4	20	2
No information	-	-	2	1	2	excl.
Total	800	100	220	100	1020	100

-- less than 0.5%
* Includes two cases where there were two respondents, one of whom reached an agreement and the other had a decision made.

For most of the claims in this survey, the monetary limit that prevailed was $500. Acknowledging this, the amount of the money orders reinforces the conclusion that small clams are small: the average claim was $242 amd the average order was $161.[1] Half the orders were for 80% or more of the claim. Cases decided by the tribunal rather than agreements, and motor vehicle accident claims rather than claims based on contract, resulted in orders representing a significantly higher proportion of the original claim. Nearly all orders were given a time within which to pay; 42% were stipulated to make the payment through the court.

(1) Since the monetary limit has been raised to $1000, the average amount of claims has increased by 54%. It is not known, but presumably the amount of orders has increased commensurately.

6.3 REASONS FOR DECISIONS

It is said that lack of reasons, whether written or otherwise, at the time of the decision causes dissatisfaction.

More claimants than respondents said that reasons for a decision were given: 77% and 57% respectively said full reasons were given and 13% and 22% said partial reasons were given. The majority thought the reasons were explained well, once again claimants rating it more favourably than respondents: 89% claimants and 77% respondents. 10% of claimants and 9% of respondents said the reasons were given in writing.

Nearly all the referees thought that reasons should be given, but the majority said they should not be given in writing. Reasons proffered for this were that it would take too much time, it would create precedent which is considered inappropriate in a conciliation situation, and they would soon be subject to the scrutiny of experts who had not heard the evidence.

All submissions to the issue paper thought reasons should always be given, but only three stated that they should always be in writing.

6.4 WRITING UP AN ORDER

On occasions the order form sent to disputants following agreed settlements simply notes this fact rather than records the terms of the agreement. All referees but one said that they always specify the terms of the payment or work. Most of them determine the terms of agreements in discussion with the disputants, though a few leave it to the disputants alone. Disputants can have different interpretations of what was agreed and the details should always be recorded and forwarded to the parties.

CHAPTER 7

A Low Cost, Speedy, and Fair Resolution

At the beginning of this paper, a model of the small claims tribunal system was constructed. The preceding chapters have presented data on and discussed the implications of the inputs, activities and the immediate outcome of the process, ie the result of hearings. This chapter will investigate the assumption that these outcomes, and in particular settled agreements, represent low cost, speedy, and fair resolution of disputes.

In the first instance, we ask the question whether the outcomes actually are low cost, speedy, fair, and indeed a resolution. Secondly, how did the preceding small claims process promote or discourage these objectives?

7.1 A LOW COST RESOLUTION

One of the very basic premises of the system is that if resolving a small dispute through an official system is to be a realistic proposition for ordinary people, then the cost of doing so must be kept down. Obviously it is a big disincentive to claim if it costs more to pursue a claim than the claim is worth.

To summarise briefly, the main features of the scheme designed to keep the system a low cost one are: a $5 filing fee; disputants are not represented by lawyers; court staff have a statutory responsibility to assist disputants; and there are restricted grounds of appeal.

Procedural costs for disputants have been kept to a minimum. Apart from claims

that are transferred from the district court, it costs only $5 to get a claim on the road. It was originally $4 but this was increased to $5 in 1981. The filing fee for enforcement proceedings is not paid by the person seeking to enforce the order, but is recoverable from the opposite party. If witnesses are summoned by the tribunal, the tribunal pays expenses. Any other witness is paid by the person on whose behalf they appear, but even then the referee can order they be paid by the tribunal.

One other area of costs is if one disputant is ordered to pay the costs of the opposing party. There are not many opportunities for this but it has emerged as an issue in cases which are transferred from the district court. Some plaintiffs, if they did not request or consent to the transfer, feel aggrieved that they have paid filing fees and incurred the costs of legal advice only to have the continued benefit of this denied them. They suggest the other party should reimburse these costs. The Act (s23) states that a district court judge or a registrar may award costs in this situation. A referee can award costs only if a claim is frivolous or vexatious (s29), a provision rarely used. It seems reasonable that if a plaint is transferred by the court in pursuance of their operational objective to reduce work for the district court, that the filing fees, except for $5, should be reimbursed to the plaintiff.

One further suggestion has been that claimants should be able to recover the $5 filing fee from the respondent if the order is in the claimant's favour, but this has received very little support.

What other costs are involved for disputants? The most obvious are time, loss of earnings, and travel expenses. As was reported earlier, these expenses can be considerable for inter-area disputes and more than the value of the claim. In these circumstances, it is difficult to see how an equally fair, low cost hearing can be achieved, though some suggestions for improvement were made in section 5.2.

Some specific costs were also reported in section 5.1. Of the disputants who actually attended a hearing, 25% of claimants and 25% of respondents said they lost pay to come to the hearing, usually up to two hours or two to four hours were taken off. 5% of claimants and 12% of respondents made special arrangements for looking

after children. We do not know if this cost money, or time and effort in kind. It is interesting to note that 25% of claimants and 21% of respondents sought advice from lawyers about their claim. Presumably some costs were involved in many of these instances.

The main reason stated by disputants who would not go to the district court if no small claims tribunal existed was because the costs were too high. 76% said this explicitly with it being implicit in the reasons of another 13% who said the claim was not large or serious enough.

It seems their faith in the inexpensive nature of small claims tribunals is rewarded. When disputants were asked to list the strengths of the scheme, its cheapness was the strength mentioned most often. It was appreciated by 42% of the claimants and 32% of the respondents. Apart from inherent difficulties in inter-area disputes and considerations of awarding costs in transferred cases, there is no suggestion that the scheme is expensive or prohibitive because of cost.

Small claims tribunals do provide a low cost avenue for resolving small disputes. There is no doubt that the mechanisms deliberately incorporated into the scheme have prevented the expenses that usually accompany pursuing a case in court and have encouraged people to use the scheme.

7.2 A SPEEDY RESOLUTION

One of the disadvantages of the district court civil system which the small claims tribunal system tries to avoid is the backlog of defended cases and delays in having them heard. The absence of legal representation, the simpler procedures, and shortened periods of time within which to initiate the next step are the mechanisms incorporated to achieve this. Has it come off and are time periods between certain activities appropriate?

The survey of claims was able to check out the time it takes to do things in small claims. The more relevant ones are listed in table 7.1:

Table 7.1 Time Between Significant Events in the Small Claims Process

			Average	Minimum	Maximum
(i)	Filing claim and serving notice of hearing[1]	Claimants:	11 days	same day	1 year
		Respondents:	19 days	same day	1 year, 1 month
(ii)	Service and first date set down for hearing	Claimants:	4 weeks	same day	6 months
		Respondents:	4 weeks	same day	3 months
(iii)	Filing claim and first date set down for hearing		6 weeks 3 days	same day	7 months
(iv)	Filing claim and first date substantively heard		7 weeks 2 days	same day	1 year 1 1/2 months
(v)	First hearing and rehearing		9 weeks	4 days	4 1/2 months
(vi)	First hearing and appeal		2 1/2 months	6 weeks	7 1/2 months
(vii)	Order and payment[2]		1 month	same day	1 year 3 months

(1) In the case of service by ordinary mail, the second date is the date posted rather than received.
(2) This refers only to payments made through the court.

Some conclusions on each of the time periods in the table have already been discussed. These plus any relevant new material are summarised here:

(i) Serving the notice of hearing on both disputants is a critical step, and a hearing cannot proceed without it. The average time taken is very reasonable. Yet it can be difficult to do. Several methods of service are employed around New Zealand and it seems some effort to work out which are more efficacious could be made. Particularly, it is necessary to decide whether Otahuhu's bad record with service, which relies solely on service by bailiffs, is a consequence of the nature of the community or of work management.

(ii) The case studies reported that some respondents did not receive sufficient notice of the claim and hearing date. The average times between service and hearing date are reasonable, but it was also shown that 6% of claimants and 8% of respondents served prior to the first date set down received less than one week's notice. There is some support for the criticism, but it is not a prevalent shortcoming.

(iii) Presumably the first date set down for a hearing is when the court is in a position to hear the case and all being well this is when it will go ahead. The average time is longer than the objective period of six weeks; in other words more than half of the cases took longer than six weeks.

(iv) And then not all cases are heard on the first date set, almost a quarter get a further date and this is usually because a notice of hearing has not been served. Thus the hearing date gets further behind the objective.

(v&vi) The Act allows a person 14 days from the tribunal's order to apply for a rehearing or to lodge an appeal. These periods are shorter than those that apply in some other jurisdictions, so presumably this was a deliberate move to expedite the process. There is a real problem though, mentioned particularly by court staff: in some tribunals it can

take a good part of the 14 days for the disputant to receive a copy of the order, which allows very little, if enough, time for them to consider and make application. However, as these two average times show, it can take months to have the rehearing or appeal as it is, and perhaps another couple of weeks in the process would not delay things too much. Another possibility is to give the referee and/or registrar the discretion to extend the period. However, in the first instance, ways to speed up fullproof service of orders should be investigated. Some people contend that appeals can be used solely as a delaying tactic.

(vii) The time taken to pay can only be calculated on cases where the money was paid through the court, about 40% of all orders. Unless enforcement action is taken in other cases, there is no way the system knows whether payment has been made or not. Nearly all orders included a time within which the payment was to be made. The most usual period stated was within four weeks, and as the figure in table 7.1 shows this was the norm.

Despite this, however, problems with the length of time it takes to get paid was the most frequent weakness mentioned by claimants, and there is further discussion of this in section 7.6.

As well as these figures, the quickness of the system was acknowledged and appreciated by the disputants. It was the third most frequent strength identified by claimants and respondents. So despite the unsatisfactory aspect for disputants about the amount of notice given, and the unsatisfactory aspect for the administration of not getting hearings heard within the six week objective, the time it takes to hear a small claim is acceptable. These two shortcomings can be worked on to improve performance, and it may even be realistic to reset the objective for hearing claims without affecting the overall aim of speedy justice This must not be an excuse for slippage though.

The fact that no extended legal preparations can be involved is a factor in ensuring

that delays do not accumulate. One aspect, which is really external to the scheme's operation, is that the number of claims is not so great that it puts pressure on waiting lists. The dissatisfactions about how long it takes to get paid involve matters apart from pure time and these are discussed below.

7.3 A FAIR RESOLUTION

In a report such as this it is easy to dwell on the unsatisfactory aspects of the system. They should certainly be recognised and some, for example the case study observation about the processes involved in drawing out agreements, are worrying. These criticisms must be put in perspective of the total system. The best people to judge the overall fairness and satisfaction of the system are the disputants, and a number of questions were put to them about this.

Disputants who attended a hearing were asked how fair they thought the agreement or decision was. Most disputants responded positively, but only just in the case of respondents. Whereas 73% of claimants thought it was fair, only 55% of respondents did, and whereas claimants tended to rate it "very fair", respondents more often said "quite fair". On the negative side, both claimants and respondents tended towards "not very fair" rather than the ultimate "not at all fair".

As one might expect, it transpires that an assessment of fairness is closely associated with whether one judges the outcome to be in one's favour or not. 95% of claimants with decisions in their favour thought the decision was fair. In contrast to this 66% with decisions not in their favour thought the decision was not fair. The comparable figures for respondents were 96% fair and 70% unfair.

Another important perspective on this question is perceptions of fairness in relation to whether the outcome was an agreement or a decision. Even using the disputants' own judgments as to whether outcomes were agreements or decisions, 18% of claimants and 39% of respondents who said they had reached an agreement did not

think the outcome was fair. One would hope that more often than this agreements were based on a feeling of rightness and fairness.

Although not related specifically to outcome, a related aspect that can be rated as fair or not is the "process" of resolution, as opposed to "outcome". As reported previously, disputants were more satisfied in this regard with 82% of claimants and 72% of respondents saying that the hearing had been controlled fairly.

There is yet another level of satisfaction which goes beyond the actual result of the hearing and whether it is fair or not. It is to do with an appreciation of the opportunity and the whole process. This is discussed in next chapter.

In conclusion, most disputants thought the outcome was fair, but too large a proportion to ignore did not think it fair. This particularly applied to respondents. Some of the unfairness is undoubtedly inherent in a dispute situation and the inevitable decision favouring one party more than the other. However, the results on how hearings can be steered towards agreements suggest that some of the unfairness is also a result of the small claims tribunal process.

Two specific indicators of fairness are the incidence of rehearings and appeals, recourses provided within the system if a disputant is dissatisfied with the tribunal's determination of a dispute. These redresses are not available if the dispute was settled by agreement. 10% of the tribunal's decisions resulted in a rehearing or an appeal.

7.4 REHEARINGS

The claim survey showed that 6% of decisions were reheard. The Act is very non-specific about when rehearings should be allowed (s33). The survey did record the reasons for rehearings, however, and the most common by far was that one of the disputants, usually the respondent, did not attend, presumably with good reason.

However, almost a fifth could be described as based on a contention that the evidence was incorrect, incomplete or even wrongly interpreted. One referee suggested that rehearings could be used by dissatisfied parties as an appeal, and it did seem that this happened on occasion. In the words of disputants who applied for rehearings, they did so because the outcome was not fair, due mainly to the fact that one party failed to attend. There were also claims that it was because the opposing party lied and the referee's decision was wrong. There was also one instance based on the fact that the claimant threatened the respondent when the referee left the room.

Some disputants had considered applying for a rehearing but did not, usually because they were not prepared for the hassles.

Rehearings more often than not resulted in changes to the order. Some changes were radical. For example, in the claims survey only two of the original 10 dismissals remained dismissals and five of them became orders or referrals to the district court. Most changes to decisions reduced the amount to be paid.

So although most of the rehearings do not result from a dissatisfaction with the way the referee operated, it is evident that tribunals are in a position to deliver potentially unfair results through no fault of their own, for example, non-attendance of disputant, and latitude is needed to correct this.

While on the topic of rehearings we will report the views of referees, although not all of them are relevant to the question of fairness. For most referees, rehearings do present some problems. Referees are mindful that rehearings cause inconvenience and/or cost and resentment for the party who originally attended. Other comments or suggestions offered, though not necessarily in any great number, included: rehearings should not be granted lightly and there should be firm policy as to when they should be granted; the time allowed for applying for a rehearing should be able to be extended at the discretion of the referee; parties should not attend at the hearing of the application for a rehearing; an independent referee should be available from time to time to hear rehearings; reasons for changing decisions must be very

clearly explained; applicants could pay the costs of rehearings; rehearings can be used to delay payment.

7.5 APPEALS

Small claims tribunal decisions can be appealed only on the grounds that the proceedings or inquiries were carried out in a manner unfair to the appellant and prejudicially affected the result. The unfairness of the substantive decision, as opposed to the manner conducted, is not a ground for appealing. The reason for this restriction was that it was thought inappropriate to have a general appeal when the decision is based on "equity and good conscience", the substantial merits and justice of the case, as opposed to law.[1] As with rehearings, only decisions, not agreements, can be appealed against.

4% of the decisions in the claim survey were appealed against. Unlike rehearings, few appeals (13%) alter the outcome of a tribunal's decision.

The disputants' survey covered only six disputants who were actually involved in an appeal. The reason given for appealing was that they considered they were in the right and the decision was ridiculous. All these appeals were dismissed.

The main reason given by disputants who considered appealing but did not was that they could not be bothered with the hassle.

The main issue for the evaluation relating to appeals is whether the grounds should be wider to encompass decisions unfair on the evidence.

Because the question of appeal does not arise often, it was not something we gained much feedback on from disputants themselves. That there was no appeal or narrow appeal was mentioned by two claimants and five respondents in the disputants' survey as a weakness of the system. Nothing emerged from disputants in the case studies. Other groups do have opinions though.

(1) Department of Justice, Report to Statutes Revision Committee, 1976

The majority of court staff thought disputants are disappointed when the grounds of appeal are explained to them, whereas referees divided fairly evenly between those who thought reactions are accepting and those who thought disputants consider the grounds of appeal too narrow.

Twenty-five of the 28 referees thought the grounds for appeal should not be widened. The most frequent reason why not was that it would undermine the spirit of small claims tribunals, ie, the common sense justice and emphasis on agreement. This view is consistent with the original reason for restricting appeals. More specific reasons included: it would cause delays; no longer be cheap; put more emphasis on legal argument; undermine simplicity; and lead to "professionals" cluttering up the tribunals. There were some replies along the lines that parties would appeal solely because the decision went against them and that there would be too many appeals. These last points seem inherent possibilities with the concept of appeals and ones that apply in other jurisdictions. They also seem to and suggest that it is inconceivable that decisions are wrong.

The few who preferred expansion did so because they thought the grounds should include unfairness on the facts, though they acknowledged it might be at the expense of informality.

Other matters relating to appeals that were raised by referees included: most referees think appeals should be heard as they now are: in the district court by a judge; appellants should have to show their grounds when lodging an appeal; and the time limit for lodging an appeal should be extended or the referee have the discretion to extend it.

The feeling amongst court staff seemed to be that the grounds should be extended. Two public submissions, including the Consumers' Institute, thought the grounds should be wider to include decisions that are unfair on the facts.

In summary, the views on extending appeals were mixed. There is an acknowledgment that the limitations may result in unfair decisions, but for some, and particularly the referees, the implications of extending the grounds overrode this. Once again it quickly becomes the fundamental question of how much "legalness" can

the system stand before small claims tribunals lose their essential nature; and once again discussion of this is deferred to the final chapter.

7.6 A FINAL RESOLUTION - PAYMENT AND ENFORCEMENT

Agreements and decisions from a tribunal hearing have the potential for being a resolution to a dispute, but this is not always the case. Particularly, from the point of view of the disputants in whose favour the order was made, a resolution probably means payment. Having said this, there was a thread coming through the case studies that some disputants are contesting a principle and pleased to be able to have their say. But on the whole, the winner wants the money.

About 40% of payments are ordered to be paid through the court rather than directly from one disputant to another. In these cases we were able to check out the rate of payment. 70% were paid in full, 8% paid in part, leaving 22% where nothing had been paid, at least through the court. The amount paid did not relate significantly to the amount of the order, nor to whether it was an agreed settlement or a decision. As noted earlier, orders were usually paid within one month.

Despite this fairly high rate of payment, the fact that it takes too long to be paid or payment cannot be successfully enforced remains a strong criticism of the system. It was the most frequent weakness of small claims tribunals mentioned by claimants, who are after all the ones usually being paid. The impression given to court staff is that disputants think that payment is automatic once an order has been made. But the truth is that small claims is a civil system, and enforcement procedures have to be initiated by the unpaid person. Staff do however have an obligation to assist disputants and it is apparently the area of assistance that involves most work for staff. The case study also reported that it seems to be an area that causes aggravation for both staff and the party seeking enforcement.

Enforcement procedures were initiated in 22% of the money orders. In all but a few cases, a distress warrant is the first avenue tried. Enforcement was commenced significantly less often for claims that were settled than those subject to a referee's decision.

The chances of enforcement by distress warrant being successful are uncertain. 44% resulted in complete payment, 7% in partial payment, 18% returned nulla bona (ie no goods to seize) and 32% were stalled at the start because the warrant could not be executed.

If resolution is not effected until payment is complete, a fair proportion of claims are not resolved. Small claims tribunals go further than usual in helping enforcement in that staff nearly always do the mechanics of enforcement proceedings. It would certainly be a new departure for a civil court/tribunal, but perhaps tribunals could even take the initiative in enforcing payment. At the very least, more could be done in the way of ordering the payment to be made through the court and in informing disputants how and when to initiate enforcement.

CHAPTER 8

Justice for the Ordinary Person

The purpose of this chapter is first to summarise the important contributions and shortcomings of the inputs and activities in achieving resolutions, and secondly to examine the validity of the assumed links between agreed settlements, fair resolution and justice for the ordinary person. Before setting out the conclusions of the evaluation and listing recommendations, it is necessary to deal with the argument, or some might say the fear, that has haunted this evaluation. This in fact raises the question of a theoretical context for small claims tribunals. It is suggested that if this is reaffirmed, some of the more difficult choices for small claims' future will be easier to make.

8.1 COMMON SENSE VS LEGALISM: THE ARBITRATION MODEL

The tension is between keeping the current informal procedures of the scheme and introducing changes, which, although aimed at increasing or improving the system, might lead to stricter adherence to procedure and the law. Possible changes that provoke this fear are widening the substantive jursidiction, increasing the monetary limit, widening the grounds for appeal to include unfairness on the facts, and having legally qualified referees.

A typical and simple version of the argument is that if claims become more complicated (eg by including torts) or more is at stake in monetary terms, legal argument and strict rules of evidence will be necessary, referees will need to be legally qualified, and legal representation may even be demanded. Even if the real issues involved are no more complex than those currently and successfully handled by the tribunals, it is argued that the amount at stake makes it worthwhile using and

depending on legal argument in order to determine the decision. The consequence of this is said to be the demise of small claims tribunals as we know them - cheap, informal, user-friendly - and consequently they no longer could justify their reason for being, bringing justice to ordinary people.

As was pointed out earlier, this tension was there when the scheme was first mooted, it is manifest in the Act, and it will probably always remain.

On an empirical level there is not much evidence to help us assess whether these fears have any foundation. What we can say is that they did not come to fruition when the scheme was introduced or when the monetary limit was raised from $500 to $1000. Obviously the threshold, if there is one, is somewhat higher than that.

It is also useful to approach the problem from a theoretical point of view. It is a choice between two models. To use the words which cropped up throughout the evaluation, we have on the one hand a "common sense" model, and on the other a "legal" model. Both claim to produce fair decisions, but they employ very different procedures and standards to arrive at their definition of "fairness". Both are valid processes, the question is which is more appropriate for small claims.

It is not, of course, as simple as this dichotomy suggests. Rather there is a continuum of approaches to dispute resolution, about which much has been written. For our present purposes we can portray the continuum as -

mediation- - - - -arbitration- - - -adjudication.

In 1976 the New Zealand small claims tribunal scheme deliberately opted for a middle, arbitration position, befitting the fact that it is part of an official, institutional system. In doing this it rejected some fundamental elements of the adjudication model (eg strict adherence to legal rights and obligations, strict rules of evidence, adversarial legal representation). However, it did maintain some of its control elements, (eg attendance is not voluntary in the sense that orders can be made in the disputant's absence, enforcement of orders).

At the same time, the scheme took on board elements of mediation, in particular the concept that the parties should come to their own agreement with the guiding hand of an independent person. However, the referee does have the power, indeed obligation, to make a final decision if agreement is not forthcoming and this moves small claims tribunals from the mediation position into arbitration.

An important point to make about New Zealand's small claim tribunal scheme is that, as an institutional programme, in 1976 it went further than most small claims tribunals in other countries in embracing elements of mediation and rejecting elements of adjudication, in particular by allowing non-legally trained referees and excluding legal representation. As the following conclusions will demonstrate, I believe this has been to the benefit of the scheme in encouraging justice for the ordinary person.

What this evaluation calls for is a conscious reassessment of where New Zealand's small claims tribunal system stands in relation to other dispute resolution models. This should be done in the light of the progress made since 1976 on the theory and evaluation of dispute resolution and also from observations and conclusions about other experiments in New Zealand, for example mediation conferences in the family court and the Christchurch Community Mediation Service. The evaluation indicates that it is necessary at this stage to reaffirm consciously the present common sense stance. If, however, a more adjudicatory position is adopted, it is necessary to acknowledge the implications of this for people's access to the justice system.

8.2 EXTENDING THE PARAMETERS

The goal of small claims tribunals is to provide justice for the ordinary person. The theory of small claims tribunals is that this can be done by providing low cost, speedy and fair resolution of small disputes, and that the best way to do this is to have the parties settle the dispute by agreeing amongst themselves. Following the schema of the small claims tribunal model, this final chapter looks at how the inputs and

processes contribute to this.

First of all the inputs, or the parameters within which the system works and the resources devoted to it.

The evaluation has shown that the prescriptions and restrictions originally set out for small claims tribunals have been instrumental in creating a system which continues to be low cost for disputants, speedy, informal and, for the greater part, fair. It has also shown that now, with almost 10 years experience behind it, the scheme could be extended and improved in order to increase its usefulness in terms of quantity and quality. This section looks at the more significant inputs and their impact on the system.

8.2.1 The Users and Publicity

Many users of small claims tribunals are ordinary people. The problem is that they are not representative of the New Zealand population, and that significant groups are not making use of the service as much as others. These are women, the young and elderly, low socio-economic groups and, when it comes to making claims but not responding, Maori and Pacific Islanders . There is no reason to believe these people do not have disputes, nor that they manage to resolve them through other avenues.

The lesson of the evaluation is that publicity of small claims tribunals has been inadequate. Not only are there not enough people aware of and using tribunals, but it seems the knowledge of them is skewed, that there is not a real appreciation of how simple, inexpensive and informal they can be. Publicity must aim at making small claims tribunals better understood.

8.2.2 Jurisdiction

The extent to which small claims tribunals can offer justice is limited by its jurisdiction. Results of this evaluation suggest there are grounds for enlarging it in some ways but not others:

Substantive Extension

There is no logical reason why the original common sense rationale cannot apply to more areas of substantive law than it does at present. Some types of disputes are not inherently more complex nor more legal. At the very least it seems that actions in tort for negligent damage to property should be allowed. Other torts should be seriously considered. Referees want and should receive training in relation to new areas of substantive jurisdiction.

Whether jurisdiction should be framed in the legislation as a list of inclusions with specified exclusions, or as all inclusive with a more extensive list of exclusions is mainly a legal drafting problem, but it should be noted that court staff and referees have had problems deciding whether a claim is within jurisdiction or not, and the latter course is seen as one way of avoiding some of this.

Debts

There are two arguments for bringing debts into the small claims purview. The first is that the "in dispute" requirement leads to inconsistent practice which would be avoided if all claims, liquidated or not, were allowed. This is no reason for including debt, but rather a very good argument for, first, defining "in dispute", and secondly, training court staff in its application.

The second argument is more compelling because it argues from the position of the goal of the scheme. That is, that people, including small traders, are denied justice because they cannot afford to pursue debts in the district court. However, if there is a commitment to the "common sense" justice model, it is inappropriate to use the structures set up to deal with disputes for undisputed claims. Undefended debts do not have the legal expenses of defended claims and defended cases can be transferred to a small claims tribunal.

It is estimated that there were approximately 8500 defended debts of $1000 or less filed in district courts in 1985. After deducting the 1347 already transferred to small claims tribunals, the remainder would almost double the current small claims tribunal caseload.

Monetary Limit

It seems that there is a gap at the moment between the $1000 small claims limit and the value of a claim which is economic to defend in the district court with the advice and representation of a lawyer. It is difficult to establish the threshold. Claims for more money need not be more complex. This suggests that it is not that the public do not have confidence in the referees' present abilities, but that wielding other weapons, say technical and legal ones, may produce a more favourable outcome than reliance on common sense and the substantial merits of justice of the case can.

We have not been able to estimate when too much is at stake to use the small claims tribunal or enough is at stake for it to be economic to use the district court.

We know the increase from $500 to $1000 has been readily accepted without damage to the public's confidence in the tribunals. On the other hand, a fair proportion of claimants (13%) and respondents (26%) did criticise referees for lack of knowledge or qualifications and for not taking account of all the evidence, and criticised tribunals for not being legally correct or oriented.

It is interesting that the feelings of lack of confidence came mostly from the referees themselves, whereas community groups were far more readily inclined to suggest raising the limit in order to increase the tribunals' outreach. Training and practice for referees, particularly in evaluating evidence, may well overcome some of the fears.

Without reservation the conclusion from the evaluation is, whether the more general issue of monetary level is resolved or not, that the monetary limit should keep pace with inflation. $500 in December 1976 is worth $1530 in March 1986.[1]

(1) Department of Statistics, Consumer Price Index

8.2.3 Referees

Greater attempts should be made to appoint referees so they represent a broader cross-section of the community. It is suggested that if common sense is a critical standard in the system, then referees need to be able to appreciate and understand a wide range of values of New Zealanders. It is difficult for one person to encapsulate all these values, but a greater range of referees would help spread an understanding. It is also argued that a broader base of referees would help engender public confidence in the tribunals' operations and so encourage their use. With this in mind, tribunals need more women, younger people, more Maori and Pacific Islanders, and more people from the lower socio-economic groups as referees.

Having said this, it is also critical that referees be mature and can demonstrate experience and skills in understanding people, communications, and assessing information and fact.

It is time to try different techniques, innovative for a judicial system, in selecting referees, eg advertising and interviewing. This would take the selection beyond criticisms of old boy networks, whether these be political or court administration ones.

On the assumption that small claims tribunals will remain grounded in the arbitration model, the conclusion of this evaluation is that referees do not need to be legally qualified and that too many legally qualified referees could destroy the strengths of the non-legal and informal approach, which was greatly appreciated by disputants.

Training of referees has been too haphazard and needs considerable boosting and direction. A sense of justice, in individual cases and on a social level, demands a professional approach and resolving disputes is not an easy task. There are not many tasks of this magnitude and impact where the main actors are untrained except for a vague thing called "experience". Many conclusions in this evaluation point to areas where training is required and specific training recommendations are listed at the end.

8.3 IMPROVING THE PROCESSES

Once the disputes and disputant are brought into the system, important processes involving court staff and referees are brought to bear. The most important processes are peculiar to the small claims tribunals. These, plus some that occur in other court work, are discussed here with a view to improving the quality of the outcomes.

8.3.1 Assistance by Court Staff

The original scheme recognised the importance of non-legal assistance for disputants and incorporated into the Act a responsibility for staff to help disputants. This assistance is essential if the public are to feel they can operate the system and so have access to low cost justice.

Although the staff do assist with many aspects of pursuing a claim, there was a strong impression that the help was either not enough, was not knowledgeable enough or was not courteous enough. An associated criticism was that disputants often felt that they were not being kept informed of developments. It was obvious that staff felt they did not have the time to be as helpful as expected. The ethos of small claims tribunals must be taken into account in the distribution of the court staff's resources and must be stressed in staff training. Staff should approach this work more professionally.

8.3.2 Service of the Notice of Hearing

Serving documents is a perennial problem for courts. However, I am sure that a closer examination of the different practices throughout the tribunals would provide lessons on the most effective way to do it. On the face of it, there seems to be no good reason why more use could not be made of setting dates and serving them on claimants at the time of filing (if this is done in person). A minimum number of days notice should be instituted. Time is needed for respondents to prepare their case and their confidence. In a situation where people have few options to appearing at the tribunal to defend their claim, it is unfair to expect people to reorganise their life at the last moment.

8.3.3 Informality and Privacy

The original idea that informality and privacy are necessary to make small claims tribunals accessible to the public is vindicated by this evaluation. Small claims tribunals are successful in this regard. On the whole disputants think informality and privacy are important and also thought they prevailed. The more frequently cited strengths of the scheme related to these principles, eg simple, friendly, non-legal, private, accessible, and, less directly, their cheapness. Referees consider the informal nature of the proceedings essential to its operating in line with the small claim's concept. The evaluation confirms that the informal aspects are instrumental in maintaining a low cost, speedy and less alienating system.

The non-legal proceedings emerge as extremely important. Part of this is the opportunity for disputants to have their say. However, given the absence of strict rules of evidence, eliciting and evaluating evidence is very important and needs to be done expertly. There is room for improvement and it is a skill which referee training should address.

8.3.4 Mediation and Agreed Settlements

To attempt to bring the parties to an agreed settlement is the primary function of small claims tribunals. This primacy has in practice produced problems.

There is no definition of what an "agreed settlement" is and there is considerable lack of agreement between the referee's and the disputant's assessment of whether a dispute was agreed upon between the disputants or decided by the referee. The case studies showed that pressure can be put on disputants to agree. These observations were corroborated by the disputants' survey. Two results show that compromise was not always appreciated, and that often it was a decision that was wanted; that parties compromised more than they considered fair; and that agreements were for far less of the original claim than decisions were. Referees acknowledged that agreements can be unfair to one party. However, over and above this the majority of disputants thought the referee was good at trying to get them to agree.

Although this aspect of hearings is satisfactory more often than not, it is the primary aim of the process, and there are enough reservations for the emphasis to be seriously reconsidered. The one area we are prepared to say small claims tribunals do not succeed in often enough, is in coming to agreements to the satisfaction of the disputants.

The research involved in this evaluation has led us to conclude that the present emphasis in agreed settlements is overstated and indiscriminate, and that agreed settlement should be one of the aims of small claims tribunals, but not necessarily the primary one. This puts a responsibility on referees to assess when agreement is or is not appropriate. This in turn should entail training for referees on how to recognise when it is appropriate. We also conclude that in-depth training on the philosophy and techniques of arbitration is necesssary. It is unfair to both the referees and the disputants if sufficient training is not supplied.

8.4 DO SMALL CLAIMS TRIBUNALS PROVIDE JUSTICE FOR THE ORDINARY PERSON?

Whether a hearing results in an agreement or a decision by a referee, the process can be assessed according to its objectives of being low cost, speedy and fair.

8.4.1 Low Cost and Speedy Justice

The evaluation concludes that small claims tribunals do produce low cost and speedy resolution to disputes, and that this is due to elements specific to the scheme: low filing fees, no strict adherence to rules of evidence, no legal representation, referees not necessarily legally qualified, and restricted grounds for appeal.

On the assumption that small claims tribunals will stay with the arbitration model, contemplated changes and extensions to the scheme must protect these elements. This is not to say that changes should not be contemplated or that they will

necessarily have adverse effects, but it is as well to be aware of the parts of the scheme that contribute to its success.

Widening the jurisdiction, raising the monetary limit, and more effective publicity will increase workloads which could, in time, lead to backlogs and delays. In the future, if speedy justice remains an important attribute of the system, avoiding delays may well mean paying for more referees.

8.4.2 Fair Resolutions

There are a number of levels of fairness to be considered: the outcome of the hearing, the conduct of the hearing, and the overall satisfaction with the system.

The outcome is the aspect that is considered unfair most often and to a considerable extent. This is mitigated when it is realised that much of it is inherent in a dispute situation and attaches to an outcome which is not in the favour of the disputant making the assessment. This is also confirmed by the fact that the proportions who thought the hearing was controlled in an unfair manner, or thought the referee was not good at attempting to get a settlement, are smaller.

The indicator we used for overall satisfaction was whether the disputant would use the tribunal again for a similar dispute. 84% of claimants and 75% of respondents would, and they were inclined to say so even if the outcome was not in their favour or if they considered it "not very fair". However, those who thought the outcome "not at all fair" were more inclined not to use small claims tribunals again.

The degrees of unfairness as evidenced by these various indicators could all be ameliorated if the processes of mediation and evaluation of evidence were handled more effectively. Once again it is a matter for training.

It is tempting to think of more liberal grounds of appeal as an answer to assertions of unfairness. Apart from the fact that this is remedial rather than preventative, this

evaluation has not provided an easy answer to this question. Referees were against the proposition while courts staff and community groups favoured it. The incidence of appeals, as they now stand, is not negligible - 4%. Once again it is necessary to consider the question in light of where the New Zealand scheme sits on the dispute resolution continuum. Appeals can be expensive and they can delay final outcomes. Is it appropriate to have appeals heard in courts which are grounded in legal principles and adjudication practices when the original decision used standards of fairness other than legal ones? Would referees enter into so much documentation, in case of an appeal, that the informal nature of the hearing would suffer? Is it possible to devise a compromise between rehearings and appeals that would look after the objections? If such a rehearing system were to remain low cost, would the system be inundated with applications?

8.4.3 Availability of Justice

As the authors of the small claims tribunal scheme appreciated in the 1970s, justice cannot be delivered unless ordinary people have access to its services and benefits. In the case of small disputes, the district court was outside the bounds of most people for various reasons - mainly expense and alienation. So "justice for the ordinary person" becomes an issue of availability and access.

The practice bears out the theory, and the New Zealand small claims tribunal system does provide access to justice that is not prohibitively expensive. Overall, small claims tribunals work, but there is room for improvement.

First of all it can be improved by increasing its outreach: by extending its jurisdiction and by better publicity about its benefits so that it reaches the groups who are not using it so much at present.

Secondly, much improvement will emerge from a re-orienting of the first link in the small claims tribunal theory. At present, it is virtually expressed as agreed settlements a priori leading to fair decisions. This research has shown that, depending on the disposition and relationship of the disputants and the nature and

history of the dispute, an agreement is not necessarily the most appropriate option. This does not mean that agreements should become a less important option, but that they are an option.

What it does mean is that referees should be equipped with specific techniques to guide agreements, or if a decision is called for, the skills necessary to assess evidence.

There is no doubt that users and referees really appreciate the alternative that small claims tribunals offer to adjudication. This could be further enhanced by realigning the emphasis on agreed settlements and providing training for referees in mediation and evaluating evidence.

8.5 RECOMMENDATIONS

The results presented and discussed in this report suggest the following recommendations. It is not a complete list of possible changes for small claims tribunals, but it covers the more important issues:

Philosophy

1 The present arbitration model with its emphasis on common sense justice as the basis for fairness should be reaffirmed. (Section 8.1)

2 The emphasis on "bringing the parties to an agreed settlement" should be realigned, maybe by not stating it as the primary function of the tribunals. (Section 8.3.4)

3 Some attempt at defining "agreed settlement" should be made. This may flow from better mediation techniques. (Sections 6.1 and 8.3.4)

Outreach and Publicity

4 The outreach of small claims tribunals should be extended to a wider

cross-section of the community by directing publicity, widening the jurisdiction, and employing a wider range of referees. (Sections 2.2 and 8.2.1)

5 Publicity should target the groups under-represented amongst users of small claims tribunals: women, the young and the elderly, low socio-economic groups, Maori and Pacific Islanders. Publicity should aim at making the workings of tribunals better understood: they are simple, inexpensive, private and informal. (Sections 2.3 and 8.2.1)

Jurisdiction

6 The jurisdiction of tribunals should

(i) be extended to include at least torts relating to damaged property and other possible areas;

(ii) be raised regularly to keep pace with inflation;

(iii) not include claims for debts. (Sections 3.2 and 8.2.2)

7 "In dispute" should be defined and training on this given to court staff and referees. (Sections 3.2.3 and 8.2.2)

Referees

8 A broader cross-section of referees is needed. This means more women, younger people, Maori and Pacific Islanders, and people from lower socio-economic groups as referees. (Sections 2.5.1 and 8.2.3)

9 New methods for selecting referees should be tried, eg advertise for applicants. Maori and Pacific Island groups should be consulted for nominations. (Sections 2.5.2 and 8.2.3)

10 The policy that referees need not necessarily be legally qualified should be reafffirmed. (Sections 2.5.3 and 8.2.3)

11 A coordinated and comprehensive training programme for all referees should be introduced. All new referees and some of the current ones need training on

(i) the philosophy of small claims tribunals and dispute resolution concepts such as mediation and arbitration;

(ii) indepth training and practice of mediation techniques that are applicable to an arbitration setting;

(iii) in-depth training and practice of skills used in eliciting and evaluating facts;

(iv) the respective roles and relationships of referees and court staff;

(v) small claims tribunal law and procedures;

(vi) introductory law in areas small claims tribunal handles, particularly relevant consumer law;

(vii) Maori and Pacific Island cultures.
(Sections 2.5.4 and 8.2.3)

Court Staff

12 Court staff should receive training specific to doing small claims work. It should include:

(i) the philosophy of small claims tribunal and how the tribunals differ from other court work;

(ii) the definition of "in dispute";

(iii) the rationale for and their role in assisting disputants;

(iv) techniques for giving advice constructively;

(v) the need to keep people informed of developments;

(vi) technical aspects of small claim's work.

(vii) Maori and Pacific Island cultures.
(Sections 4.3 and 8.3.1)

Information

13 More specific information for disputants on how to make the most of the small claims tribunal is needed, including use of witnesses and enforcement procedures. (Section 4.3)

14 Forms should be professionally designed so they are easier to use. (Section 4.3)

Procedural Points

15 The most effective methods for serving notices of hearing should be investigated and encouraged. (Sections 4.4 and 8.3.2)

16 A minimum number of days for notice before a hearing should be set. (Sections 4.4 and 8.3.2)

17 Techniques for taking evidence at a distance need introducing. (Section 5.2)

18 The practice relating to costs in cases transferred from the district court should be standardised. (Section 4.1)

19 The time allowed between when an order is made and applying for a rehearing or lodging an appeal needs attention. Suggestions are: speeding up fullproof service; investing a discretion in the referee to extend the time; extending the statutory time limit beyond 14 days. (Section 7.2)

20 Lists of expert advisors and investigators should be readily available for referees. (Section 5.4)

Rehearings

21 Guidelines to assist referees decide when rehearings are to be permitted should be considered. (Section 7.4)

Appeals

22 Alternatives which allow appeals on the facts should be investigated, but these alternatives should be consistent with the goals of small claims tribunals. (Sections 7.5 and 8.4.2)

Enforcement

23 Discussions on improving enforcement of orders should include whether it is appropriate and possible for the court to initiate enforcement proceedings. (Section 7.6)

24 More use should be made of payments being paid through the court. (Section 7.6)

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APPENDIX 1

LOCATION OF SMALL CLAIMS TRIBUNALS AS AT OCTOBER 1985

Ashburton
Auckland
Blenheim
Christchurch
Dunedin
Gisborne
Gore
Greymouth
Hamilton
Hastings
Hawera
Henderson
Invercargill
Kaikohe
Levin
Lower Hutt
Masterton
Napier
Nelson
New Plymouth
North Shore
Oamaru
Otahuhu
Palmerston North
Papakura
Rotorua
Taihape
Taumarunui
Taupo
Tauranga
Thames
Timaru
Wanganui
Wellington
Whangarei
Whakatane

APPENDIX 2

COMPARATIVE DEMOGRAPHIC PROFILE OF VARIOUS GROUPS

		NZ population; 18 years and over %	NZ population aware of SCT[1] %	SCT claimants %	SCT respondents %	SCT referees %
Sex:	male	49	57	69	68	71
	female	51	43	31	28	29
	n.a.	-	-	x	4	-
	total	100 [2]	100	100	100	100
Age:	18-19	6	10			-
	20-24	13				-
	25-29	11	25			-
	30-34	11				-
	35-39	9	27			4
	40-44	8		NA	NA	7
	45-49	7	16			10
	50-54	7				7

cont'd:

		NZ population; 18 years and over %	NZ population aware of SCT[1] %	SCT claimants %	SCT respondents %	SCT referees %
Age:						
	55-59	7	14			25
	60-64	6				43
	65-69	5	8			4
	70 +	10				-
	total	100 [2]				100
Race:	Pakeha	89		91	83	
	Maori	6	NA	3	7	NA
	Pacific Islander	2		0	4	
	other	3		6	6	
	total	100 [2]		100	100	
Employment:						
	employed	47	68	49	48	64[4]
	self-employed	8		32	34	

cont'd:

	NZ population; 18 years and over %	NZ population aware of SCT[1] %	SCT claimants %	SCT respondents %	SCT referees %
retired	13	11	8	7	36
household duties	21	18	7	3	-
other	11	3	4	8	-
total	100 [2]	100	100	100	100
Socio-economic level:[3]					
1	8	17	12	9	30
2	11	21	17	16	48
3	23	36	26	20	15
4	33	16	27	27	7
5	17	9	12	24	-
6	8	1	6	4	-
total	100	100	100	100	100

cont'd:

	NZ population; 18 years and over %	NZ population aware of SCT[1] %	SCT claimants %	SCT respondents %	SCT referees %
Median income:	NA	NA	$10,000-16,000	$16,000-20,000	$20,000-25,000
Education level:					
no secondary	18		5	7	3
secondary	59	NA	53	54	32
post secondary	23		40	35	65
other	-		2	4	-
total	100 [2]		100	100	100

(1) Report 1, Public Awareness Survey
(2) Department of Statistics, New Zealand Census of Population and Dwellings, 1981
(3) Elley, W B and J C Irving, 1981
(4) Includes those partially retired
NA = not available
n.a. = not applicable

APPENDIX 3

ANALYSIS

1976, No. 35

An Act to make provision for the establishment of tribunals to hear and determine certain small claims; to provide for the jurisdiction, powers, and procedures of those tribunals; and for purposes connected therewith [*1 November 1976*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Small Claims Tribunals Act 1976.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Claim" means a small claim lodged with a Tribunal under section 18 or transferred to a Tribunal under section 23 of this Act:

"Claimant" means a person who lodges a claim with a Tribunal or who claims relief in any proceedings transferred to a Tribunal under section 23 of this Act, and includes any person who becomes a party to proceedings on any claim in the capacity of a claimant:

"Investigator" means a person appointed under section 27 (1) of this Act to inquire into, and report to a Tribunal upon, any matter of fact:

"Magistrate" means a Stipendiary Magistrate appointed under the Magistrates' Courts Act 1947:

"Minister" means the Minister of Justice:

"Motor vehicle" has the same meaning as in the Transport Act 1962:

"Prescribed" means prescribed by rules made under this Act:

"Referee" means a person appointed as such under section 7 of this Act; and includes a Magistrate where he is exercising the jurisdiction of a Tribunal:

"Registrar" means the Registrar of the Magistrate's Court of which the Tribunal is a division pursuant to section 4 (4) of this Act; and includes any Deputy Registrar of that Court:

"Respondent" means any person against whom a claim is made and any person who becomes a party to the proceedings on that claim in the capacity of a respondent:

"Small claim" means a claim in respect of which a Tribunal has jurisdiction under sections 9 and 10 of this Act:

"Tribunal" means a Small Claims Tribunal established under section 4 of this Act:

"Work order" means an order to make good a defect in chattels, or a deficiency in the performance of services, by doing such work or attending to such matters (including the replacement of chattels) as may be specified in the order.

3. Act to bind the Crown—This Act shall bind the Crown.

PART I

Establishment of Tribunals

4. Establishment of Tribunals—(1) The Minister may from time to time, by notice in the *Gazette*, establish in accordance with this section such number of tribunals as he thinks fit to exercise the jurisdiction in respect of small claims created by this Act.

(2) The tribunals established under subsection (1) of this section shall be known as Small Claims Tribunals.

(3) Each Small Claims Tribunal shall be a division of a Magistrate's Court.

(4) A notice under subsection (1) of this section establishing a Small Claims Tribunal shall specify the Magistrate's Court of which the Tribunal is to be a division.

(5) The Minister may at any time, by notice in the *Gazette*,—

(a) Disestablish a Small Claims Tribunal; and

(b) Direct how the records of that Tribunal shall be dealt with.

5. Exercise of Tribunal's jurisdiction—(1) The jurisdiction of a Tribunal shall be exercised by a Referee appointed under section 7 of this Act, or by a Magistrate.

(2) If the Referee or Magistrate hearing any proceedings in respect of a claim dies, or becomes incapacitated, or is for any other reason unable or unavailable to complete the hearing or dispose of the proceedings, they shall be heard afresh by another Referee or Magistrate, unless the parties agree that the proceedings be otherwise disposed of.

amended 1979

6. Times and places of sittings—The days, times, and places of the regular sittings of a Tribunal shall be determined by the Magistrate ~~who is for the time being responsible for the work of the Magistrate's Court of which the Tribunal is a division or, where more than one Magistrate is for the time being responsible therefor, by the Magistrate who is senior by length of service.~~

7. Appointment of Referees—(1) The Governor-General may, from time to time, by warrant under his hand appoint qualified persons to be Referees for the purposes of this Act.

(2) A person is qualified to be so appointed if—

(a) He is a barrister or solicitor of the Supreme Court of not less than 3 years' practice; or

(b) He is otherwise capable by reason of his special knowledge or experience of performing the functions of a Referee.

(3) Subject to subsection (4) of this section, every person appointed as a Referee shall hold office for a term of 3 years and may, from time to time, be reappointed for a like term by the Governor-General.

(4) A Referee may at any time be removed from office by the Governor-General for disability, bankruptcy, neglect of duty, or misconduct, proved to the satisfaction of the Governor-General, or may at any time resign his office by writing addressed to the Minister.

(5) A Referee may hold any other office or engage in any other employment or calling unless the Governor-General considers that the proper discharge of the functions of a Referee will be impaired thereby.

8. Salary and allowances—There shall be paid to every Referee (other than a Magistrate), out of money appropriated by Parliament for the purpose, remuneration by way of fees, salary, and allowances (including travelling allowances and expenses) in accordance with the Fees and Travelling Allowances Act 1951, and the provisions of that Act shall apply accordingly as if a Referee were a member of a statutory Board within the meaning of that Act.

PART II

Jurisdiction, Functions, and Orders of Tribunals

9. Jurisdiction of Tribunals—(1) Subject to this section and to section 10 of this Act, a Tribunal shall have jurisdiction in respect of—

(a) A claim founded on contract or quasi-contract; and

(b) A claim for a declaration that a person is not liable to another person in respect of a claim or demand, founded on contract or quasi-contract, made against him by that other person; and

(c) A claim in tort for damage to property resulting from negligence in the use, care, or control of a motor vehicle.

(2) A Tribunal shall have such other jurisdiction as is conferred upon it by any other enactment.

(3) For the purposes of subsection (1) of this section, a claim is within the jurisdiction of a Tribunal only if the total amount in respect of which an order of the Tribunal is sought does not exceed $1000 including—

amended 1985

(a) Where a claim is made for the recovery of chattels, the value of those chattels; and

(b) Where a claim is made for a work order, the value of the work sought to be included therein.

(4) If it is necessary for the purposes of this Act to ascertain the value of any chattels or work or to resolve any dispute as to such value (whether for the purposes of subsection (3) of this section or otherwise), that value shall be determined by the Tribunal in such manner as it thinks fit, and the Tribunal may for that purpose appoint an investigator to report to it under section 27 of this Act.

(5) Subject to this Act and the Limitation Act 1950, the jurisdiction of a Tribunal shall extend to a claim based on a cause of action which accrued before the commencement of this Act.

10. Further limitation of jurisdiction—(1) A debt or liquidated demand may be the subject of a declaration under section 9 (1) (b) of this Act but, subject to subsection (2) of this section, a claim for a debt or liquidated demand is not within the jurisdiction conferred by section 9 (1) (a) of this Act unless—

(a) The claimant satisfies the Registrar, before the claim is lodged in a Tribunal, that the claim, or a part thereof, is in dispute; or

(b) The claimant either—

(i) Satisfies the Registrar before the claim is lodged in a Tribunal; or

(ii) Not having lodged or attempted to lodge the claim pursuant to subparagraph (i) of this paragraph, satisfies the Tribunal at a hearing—

that the claim is in the nature of a counterclaim by a respondent against a claimant; or

(c) The claim is transferred to a Tribunal pursuant to section 23 of this Act.

amended 1985 -not changed here

(2) Notwithstanding subsection (1) of this section, a Tribunal may—

(a) Where a respondent raises a debt or liquidated demand as a defence by way of set-off, give effect to that defence:

(b) Where it dismisses a claim for a declaration under section 9 (1) (b) of this Act in respect of a debt or liquidated demand, make an order under section 16 (1) (a) of this Act requiring the claimant to pay the debt or liquidated demand, or part thereof, to the respondent.

(3) Except as provided in an enactment referred to in section 9 (2) of this Act, a Tribunal shall have no jurisdiction in respect of any claim—

(a) For the recovery of land or any estate or interest therein:

(b) In which the title to any land, or any estate or interest therein, or to any franchise is in question:

(c) In which there is a dispute concerning the entitlement of any person under a will, or settlement, or on any intestacy (including a partial intestacy).

(4) Without limiting subsection (2) of section 9 of this Act, nothing in subsection (1) of that section in so far as it confers jurisdiction in quasi-contract on a Tribunal shall be construed as authorising a claim in respect of money due under any enactment.

(5) In subsection (4) of this section "enactment" means a provision of any Act or of any other instrument which has legislative effect and which is authorised by or pursuant to any Act.

(6) A Tribunal may hear and determine a claim in the nature of a counterclaim to which subsection (1) (b) of this section applies notwithstanding that the original claim is withdrawn, abandoned, or struck out.

amended 1985

11. Abandonment to bring within jurisdiction—A person may abandon so much of a claim as exceeds $1000 in order to bring the claim within the jurisdiction of a Tribunal; and in that event an order of the Tribunal under this Act or any other enactment, in relation to the claim, shall operate to

discharge from liability in respect of the amount so abandoned any person against whom the claim and the subsequent order is made.

12. Cause of action not to be divided—A cause of action shall not be divided into 2 or more claims for the purpose of bringing it within the jurisdiction of a Tribunal.

13. Contracting out prohibited—(1) A provision in any agreement (including one made before the commencement of this Act) to exclude or limit—

(a) The jurisdiction of a Tribunal; or

(b) The right of any person to invoke that jurisdiction—

shall be of no effect.

(2) Without limiting the generality of subsection (1) of this section, a Tribunal shall have jurisdiction in respect of a claim notwithstanding any agreement relating thereto which provides for—

(a) The submission to arbitration of any dispute or difference; or

(b) The making of an award upon such a submission to be a condition precedent to any cause of action accruing to a party to the agreement.

(3) Subsection (1) of this section does not apply where a cause of action has accrued, or is believed to have accrued, to a person and he has agreed to the settlement or compromise of the claim based on that cause of action.

14. Exclusion of other jurisdictions—(1) Where a claim is lodged with or transferred to a Tribunal and is within its jurisdiction, the issues in dispute in that claim (whether as shown in the initial claim or as emerging in the course of the hearing) shall not be the subject of proceedings between the same parties in any other Court or tribunal unless—

(a) An order is made under subsection (2) or (3) of section 22 or section 36 (1) (c) of this Act; or

(b) The proceedings before that other Court or tribunal were commenced before the claim was lodged with or transferred to the Tribunal; or

(c) The claim before the Tribunal is withdrawn, abandoned, or struck out.

(2) Where subsection (1) (b) of this section applies to proceedings before another Court or tribunal, the issues in dispute in the claim to which those proceedings relate

Inset 2

(whether as shown in the initial claim or emerging in the course of the hearing) shall not be the subject of proceedings between the same parties in a Tribunal unless the proceedings are transferred to a Tribunal under section 23 of this Act or the claim before the other Court or tribunal is withdrawn, abandoned, or struck out.

15. Functions of Tribunal—(1) The primary function of a Tribunal is to attempt to bring the parties to a dispute to an agreed settlement.

(2) Where an agreed settlement is reached, the Tribunal may make one or more of the orders which it is empowered to make under section 16 of this Act or under any other enactment, but shall not be bound by the monetary restrictions provided for by subsections (3) and (4) of section 16.

(3) If it appears to the Tribunal to be impossible to reach a settlement under subsection (1) of this section within a reasonable time, the Tribunal shall proceed to determine the dispute.

(4) The Tribunal shall determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

(5) Without limiting the generality of subsection (4) of this section, a Tribunal may, in respect of any agreement or document which directly or indirectly bears upon the dispute between the parties, disregard any provision therein which excludes or limits—

(a) Conditions, warranties, or undertakings; or

(b) Any right, duty, liability, or remedy which would arise or accrue in the circumstances of the dispute if there were no such exclusion or limitation.

(6) To give effect to its determination of the dispute under subsection (3) of this section, or in granting relief in respect of any claim which is not disputed (except where subsection (2) of this section applies), the Tribunal shall make one or more of the orders which it is empowered to make under section 16 of this Act or under any other enactment.

16. Orders of Tribunal—(1) A Tribunal may, as regards any claim within its jurisdiction, make one or more of the following orders and may include therein such stipulations and conditions (whether as to the time for, or mode of, compliance or otherwise) as it thinks fit:

(a) The Tribunal may order a party to the proceedings to pay money to any other party:

(b) The Tribunal may make an order declaring that a person is not liable to another in respect of a claim or demand described in section 9 (1) (b) of this Act:

(c) The Tribunal may order a party to deliver specific chattels to another party to the proceedings:

(d) The Tribunal may make a work order against any party to the proceedings:

(e) Where it appears to the Tribunal that an agreement between the parties, or any term thereof, is harsh or unconscionable, or that any power conferred by an agreement between them has been exercised in a harsh or unconscionable manner, the Tribunal may make an order varying the agreement, or setting it aside (either wholly or in part):

(f) Where it appears to the Tribunal that an agreement between the parties has been induced by fraud, misrepresentation, or mistake, or any writing purporting to express the agreement between the parties does not accord with their true agreement, the Tribunal may make an order varying, or setting aside, the agreement or the writing (either wholly or in part):

(g) The Tribunal may make an order dismissing the claim.

(2) Where a Tribunal makes a work order against a party it—

(a) Shall, where the order is made under section 15 (6) or 32 (2) of this Act; and

(b) May, where the order is made under section 15 (2) of this Act,—

at the same time make an order under subsection (1) (a) of this section to be complied with as an alternative to compliance with the work order.

(3) A Tribunal shall not make an order under this Act which exceeds the monetary restriction hereunder which is applicable to that order and any order which does exceed that restriction shall be entirely of no effect. The monetary restrictions are—

(a) An order under subsection (1) (a) of this section shall not require payment of money exceeding $1000: amended 1985

(b) A declaration under subsection (1) (b) of this section shall not relate to a claim or demand exceeding $1000:

Amended 1985

(c) An order under subsection (1) (c) of this section shall not relate to chattels exceeding $1000 in value:

(d) The work to be done or matters to be attended to under a work order shall not exceed $1000 in value:

(e) An order under paragraph (e) or (f) of subsection (1) of this section shall not be made in respect of an agreement if the value of the consideration for the promise or act of any party to the agreement exceeds $1000.

(4) Except as provided in subsection (2) of this section, a Tribunal shall not, in respect of a claim, make more than one of the orders authorised by subsections (1) (a) to (1) (d) of this section, or by any other enactment, if the aggregate amount or value of those orders exceeds $1000; every order so made contrary to this subsection shall be entirely of no effect.

(5) Nothing in subsection (1) of this section shall restrict the making by a Tribunal of any order which it is authorised to make by any other enactment.

17. Orders of Tribunal to be final—An order made by a Tribunal shall be final and binding on all parties to the proceedings in which the order is made, and, except as provided in section 34 of this Act, no appeal shall lie in respect thereof.

PART III

PROCEEDINGS OF TRIBUNALS

Claims

18. Lodging of claims—(1) Proceedings shall be commenced by the lodging of a claim in the prescribed form, together with the prescribed fee, with the appropriate Tribunal.

(2) The appropriate Tribunal for the purpose of subsection (1) of this section is that which is nearest by the most practicable route to the place where the claimant resides.

19. Notice of claim and of hearing—(1) When a claim is lodged in accordance with section 18 of this Act, the Registrar shall—

(a) Fix a time and place of hearing and give notice thereof in the prescribed form to the claimant; and

(b) As soon as is reasonably practicable, give notice of the claim and of the time and place of hearing in the prescribed form to—

(i) The respondent; and

(ii) Every other person who appears to the Registrar to have a sufficient connection with the proceedings on the claim in the capacity of a claimant or respondent.

(2) Where a Tribunal finds that a person who appears to it to have a sufficient connection with the proceedings on a claim in the capacity of a claimant or respondent has not been given notice of the proceedings, it may direct the Registrar to give, and the Registrar shall give, to such person notice of the claim, and of the time and place for hearing.

(3) For the purposes of this section, a person has a sufficient connection with the proceedings on a claim if his presence as a claimant or respondent is necessary to enable the Tribunal to effectually and completely determine the questions in dispute in the claim or to grant the relief which it considers to be due.

(4) Where a claim to which section 10 (1) (b) (ii) of this Act applies is made at a hearing, the Tribunal may, in relation to that claim, dispense with the requirements of this section and of section 18 (2) of this Act, or any of those requirements, if it appears to the Tribunal that neither the respondent in the claim nor any other person will be prejudiced thereby.

20. Parties—(1) Subject to subsection (2) of this section, the claimant, the respondent, and every person to whom notice of a claim has been given under section 19 (1) (b) (ii) or section 19 (2) of this Act shall be the parties to the proceedings on that claim.

(2) A Tribunal may, at any time, order that the name of a person who appears to it to have been improperly joined as a party be struck out from the proceedings.

21. Minors and persons under disability—(1) Subject to this section, a minor may be a party to, and shall be bound by, proceedings in a Tribunal as if he were a person of full age and capacity.

(2) Where a minor who has not attained the age of 18 years is a party to any proceedings in a Tribunal, the Tribunal may, if it considers that it would be in the interests of the minor to do so,—

(a) At any time appoint to represent the minor a person who is willing to do so and who is not disqualified by section 24 (5) of this Act, and authorise that person to control the conduct of the minor's case; or

(b) When approving a representative under section 24 (3) of this Act, or at any time thereafter, authorise that representative to control the conduct of the minor's case.

(3) In any proceedings in a Tribunal—

(a) The manager of the estate of a protected patient under the Mental Health Act 1969 shall, subject to that Act, control the conduct of the protected patient's case:

(b) The manager of the estate of a protected person under the Aged and Infirm Persons Protection Act 1912 shall, subject to that Act, control the conduct of the protected person's case (so far as the proceedings relate to the protected estate).

(4) A person empowered by or under this section to control the conduct of the case of another person may do all such things in the proceedings as he could do if he himself were a party to the proceedings in place of that other person.

(5) Nothing in this section shall restrict the application of section 12 of the Minors' Contracts Act 1969 to a—

(a) Settlement agreed to by or on behalf of a minor; or

(b) Payment made or proposed to be made by, or on behalf of, or to, or for the benefit of, a minor—

after proceedings have been commenced in a Tribunal.

(6) In this section "proceedings in a Tribunal" means—

(a) Proceedings in a Tribunal or on appeal from a Tribunal:

(b) A settlement agreed to in the course of proceedings referred to in paragraph (a) of this subsection:

(c) Proceedings under section 31 (1) of this Act for enforcement of an order—

and includes any order made in proceedings as so defined.

22. Transfer of proceedings to Magistrate's Court, etc.—(1) Where any proceedings have been commenced in a Tribunal which it has no jurisdiction to hear and determine, the Tribunal may, instead of striking out the proceedings, order that they be transferred to a Magistrate's Court in its ordinary civil jurisdiction.

(2) Where any proceedings have been commenced in a Tribunal which in the opinion of the Tribunal would more properly be determined in a Magistrate's Court, the Tribunal may, on the application of a party or of its own motion, order that the proceedings be transferred to a Magistrate's Court in its ordinary civil jurisdiction.

(3) Where any proceedings have been commenced in a Tribunal and those proceedings—

(a) Relate to a dispute described in section 96 (1) of the Motor Vehicle Dealers Act 1975; and

(b) Are within the jurisdiction of a Disputes Tribunal constituted under section 97 of that Act; and

(c) Would, in the opinion of the Small Claims Tribunal, more properly be determined by a Disputes Tribunal—

the Small Claims Tribunal may, on the application of a party or of its own motion, order that the proceedings be transferred to a Disputes Tribunal specified by it; and any such order shall be deemed to be a reference to a Disputes Tribunal for the purposes of section 96 (4) of the said Act.

(4) The Tribunal shall not make an order under subsection (1) or (2) of this section in respect of a claim if any agreement of a kind described in section 13 (2) of this Act requires that the claim be submitted to arbitration.

23. Transfer of proceedings from Magistrate's Court, etc.—(1) The provisions of this subsection apply where proceedings within the jurisdiction of a Tribunal have been commenced in a Magistrate's Court, which has a Tribunal as a division of it, before a claim in respect of the same issues between the same parties has been lodged in, or transferred to, a Tribunal:

(a) If the defendant, within the number of days specified by rules made under the Magistrates' Courts Act 1947, files a notice of intention to defend the claim and requests in that notice that the proceedings be transferred to the Tribunal, the Registrar shall transfer the proceedings accordingly:

(b) In every other case a Magistrate or Registrar may, on the application of either party or of his own motion, order that the proceedings be transferred to the Tribunal, subject to such provision (if any) as to payment of costs as he thinks fit.

(2) Where proceedings within the jurisdiction of a Tribunal have been commenced in the Supreme Court before a claim in respect of the same issues between the same parties has been lodged in, or transferred to, a Tribunal, that Court or a Judge thereof may, on the application of either party or of its or his own motion, order that the proceedings be transferred to a Tribunal subject to such provision (if any) as to payment of costs as the Court or Judge thinks fit.

(3) A Tribunal to which proceedings are transferred under subsection (1) or (2) of this section may have regard to any notes of evidence transmitted to it and it shall not be necessary for that evidence to be given again in the Tribunal unless the Tribunal so requires.

Hearings

24. Right of audience—(1) At the hearing of a claim every party shall be entitled to attend and be heard.

(2) Subject to subsection (3) of this section, no party shall appear by a representative unless it appears to the Tribunal to be proper in all the circumstances to so allow, and the Tribunal approves such representative.

(3) The following parties may appear by a representative who is approved by the Tribunal—

(a) The Crown, if the representative is a servant of the Crown:

(b) A corporation or an unincorporated body of persons, if the representative is an employee or member thereof:

(c) A person jointly liable or entitled with another or others, if the representative is one of the persons jointly liable or entitled or, in the case of a partnership, is an employee of those persons:

(d) A minor, or other person under a disability.

(4) A Tribunal shall, where a representative of a party is proposed for its approval, satisfy itself that the person proposed has sufficient personal knowledge of the case and sufficient authority to bind the party.

(5) A Tribunal shall not appoint under section 21 (2) (a), or approve as a representative under section 24 (2) or (3) of this Act, a person who is, or has been, enrolled as a barrister or solicitor or who, in the opinion of the Tribunal is, or has been, regularly engaged in advocacy work before other tribunals; but this prohibition does not apply where the person proposed for approval under section 24 (3) is a person or one of the persons jointly liable or entitled with another or others.

25. Proceedings to be held in private—(1) All proceedings before a Tribunal shall be held in private.

(2) Nothing in subsection (1) of this section shall prevent a Tribunal from hearing 2 or more claims together if it appears to the Tribunal that it would be convenient to the Tribunal and the parties to do so.

(3) Notwithstanding subsection (1) of this section, a Tribunal may permit to be present at any proceedings a person who has a genuine and proper interest either in those proceedings or in the proceedings of Tribunals generally.

26. Evidence—(1) Evidence tendered to a Tribunal by or on behalf of a party to any proceedings need not be given on oath, but the Tribunal may at any stage of the proceedings require that such evidence, or any specified part thereof, be given on oath whether orally or in writing.

(2) A Tribunal may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it thinks fit. All evidence and information so received or ascertained shall be disclosed to every party.

(3) A Tribunal may receive and take into account any relevant evidence or information, whether or not the same would normally be admissible in a Court of law.

27. Investigator may be appointed—(1) A Tribunal may, if it thinks fit, appoint a person to inquire into, and report to it upon, any matter of fact having a bearing on any proceedings and may give such directions as to the nature, scope, and conduct of the inquiry as it thinks fit.

(2) A person appointed under subsection (1) of this section shall be paid, out of money appropriated by Parliament for the purpose, such fees and expenses as are fixed by the Tribunal in accordance with a scale approved by the Secretary for Justice.

28. Tribunal may act on evidence available—(1) Where the case of any party is not presented to the Tribunal, after reasonable opportunity has been given to him to do so, the issues in dispute in the proceedings may be resolved by the Tribunal, or relief in respect of an undisputed claim may be granted by it, on such evidence or information as is before it, including evidence or information obtained pursuant to section 26 (2) of this Act.

(2) An order made by the Tribunal in the circumstances described in subsection (1) of this section shall not be challenged on the ground that the case of the party was not presented to the Tribunal, but the party may apply for a rehearing under section 33 of this Act on the ground that there was sufficient reason for his failure to present his case.

29. **No costs allowable**—Costs shall not be awarded against a party unless, in the opinion of the Tribunal, a claim made by that party is frivolous or vexatious, in which case it may order that party to pay—

(a) To the Crown, the fees and expenses of any witness, or of an Investigator, which have been paid by the Crown:

(b) To a party, the reasonable costs of that party in connection with the proceedings.

30. **Procedure where no provision made**—Subject to this Act and any rules made thereunder, a Tribunal shall adopt such procedure as it thinks best suited to the ends of justice.

Enforcement of Orders

31. **Enforcement of orders except work orders**—(1) Every order made by a Tribunal requiring a party to pay money or deliver specific chattels to another party shall be deemed to be an order of the Magistrate's Court of which the Tribunal is a division, and, subject to this section, may be enforced accordingly.

(2) Where application is made to a Magistrate's Court for the issue of any process to enforce an order provided for by section 16 (2) of this Act (requiring a party to pay money to another as an alternative to compliance with a work order), the Registrar shall give notice of the application to the party against whom enforcement is sought.

(3) If that party does not file in the Court, within the period prescribed for so doing, a notice of objection in the prescribed form, the order may, after the expiry of that period, be enforced pursuant to subsection (1) of this section.

(4) The notice referred to in subsection (3) of this section may only be given on the ground that it is the belief of the party that the order of the Tribunal has been fully complied with and that he therefore disputes the entitlement of the applicant to enforce it.

(5) If the party against whom enforcement is sought files the notice referred to in subsection (3) of this section within the prescribed time, the Registrar shall refer the matter to the Tribunal to be heard and determined under section 32 (2) of this Act.

(6) Notwithstanding section 113 of the Magistrates' Courts Act 1947, no filing fee shall be payable by a person who seeks to enforce an order pursuant to subsection (1) of this section, but any fee which would otherwise be payable therefor shall be recoverable from the opposite party for the credit of the Consolidated Revenue Account.

32. **Enforcement of work orders**—(1) Where—

(a) A party in whose favour a work order has been made considers that the work order has not been complied with by the other party; and

(b) That other party has not complied with the alternative money order provided for by section 16 (2) of this Act—

the party in whose favour the work order was made may, instead of applying to the Magistrate's Court for the issue of a process for enforcement pursuant to section 31 (1) of this Act, lodge in the Tribunal a request in the prescribed form that the work order be enforced.

(2) Subsequent proceedings shall be taken on a request for enforcement under subsection (1) of this section and on a notice under section 31 (5) of this Act as if such request or notice were a claim lodged under section 18 of this Act; and upon the hearing of the matter the Tribunal may—

(a) Vary the work order, or make a further work order, or any other order which is authorised by section 16 of this Act:

(b) Grant leave to the party in whose favour the work order was made to enforce the alternative money order provided for by section 16 (2) of this Act, or so much thereof as the Tribunal may allow, and either subject to or without compliance with the provisions of section 31 (2) of this Act:

(c) Discharge any order previously made by the Tribunal.

(3) After the expiration of 12 months from the date of a work order, it shall not be enforced without the leave of the Tribunal.

PART IV

REHEARING AND APPEALS

33. Rehearing—(1) Subject to subsection (2) of this section, a Tribunal may, upon the application of a party to any proceedings, order the rehearing of a claim, to be had upon such terms as it thinks fit.

(2) A rehearing may be ordered under subsection (1) of this section only where an order has been made under section 15 (6) or 32 (2) of this Act and, in the latter case, shall be limited to rehearing the enforcement proceedings taken under that section.

(3) Every application for a rehearing shall be made within 14 days after the Tribunal's order and shall be served upon the other parties to the proceedings.

(4) Upon a rehearing being granted—

(a) The Registrar shall notify all parties to the proceedings of the making of the order and of the time and place appointed for the rehearing; and

(b) The order of the Tribunal made upon the first hearing shall cease to have effect.

(5) Notwithstanding subsection (4) (b) of this section, if the party on whose application a rehearing is ordered does not appear at the time and place for the rehearing or at any time and place to which the rehearing is adjourned, the Tribunal may, without rehearing or further rehearing the claim, direct that the original order be restored to full force and effect.

(6) This Act shall apply to a rehearing in all respects as it applies to an original hearing.

34. Appeals—(1) Any party to proceedings before a Tribunal may appeal to a Magistrate's Court against an order made by the Tribunal under section 15 (6) or 32 (2) of this Act on the grounds that—

(a) The proceedings were conducted by the Referee (not being a Magistrate); or

(b) An inquiry was carried out by an Investigator—

in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings.

(2) An appeal shall be brought by a party by the filing of a notice of appeal, in the prescribed form, in the Magistrate's Court of which the Tribunal is a division, within 14 days of the Tribunal's order.

(3) As soon as practicable after such notice of appeal has been filed, the Registrar shall lodge a copy thereof in the Tribunal's records relating to the proceedings.

(4) The Registrar shall fix the time and place for the hearing of the appeal and shall notify the appellant.

(5) A copy of every notice of appeal together with a notice of the time and place for hearing the appeal shall be served by the Registrar on every other party to the proceedings before the Tribunal, and each such party may appear and be heard.

(6) The filing of a notice of appeal against an order shall operate as a stay of any process for the enforcement of that order, but the Tribunal may at any time, on the application of a party to the proceedings, order that any process may be resumed or commenced or, the process having been resumed or commenced, order that it be further stayed.

35. Referee or Investigator to furnish report—(1) Within 14 days after a notice of appeal has been lodged in the Tribunal's records under section 34 (3) of this Act, the Referee who heard the proceedings and, where applicable, the Investigator, shall furnish to the Registrar a report on the manner in which the proceedings were, or where applicable the inquiry was, conducted and the reasons therefor.

(2) A Referee shall keep a record of the proceedings of a Tribunal sufficient to enable him, if required, to furnish a report under subsection (1) of this section, and an Investigator shall do likewise in relation to an inquiry conducted by him.

(3) Where, for any reason, the Referee who heard the proceedings or, where applicable, the Investigator, is unavailable to furnish the report, the same shall be compiled by the Registrar from such information as he is able to collect from the records of the Tribunal or otherwise.

36. Powers of Magistrate on appeal—(1) On the hearing of the appeal a Magistrate may—

(a) Quash the order of the Tribunal and order a rehearing of the claim in the Tribunal on such terms as he thinks fit; or

(b) Quash the order and invoke his authority under section 5 of this Act to exercise the jurisdiction of a Tribunal; or

(c) Quash the order and transfer the proceedings to a Magistrate's Court for hearing; or

(d) Dismiss the appeal.

(2) In ordering a rehearing under subsection (1) (a) of this section, the Magistrate may give to the Tribunal such directions as he thinks fit as to the conduct of the rehearing.

(3) An appeal under this section shall be heard by a Magistrate in chambers and, subject to this Act and any rules made thereunder, the procedure thereat shall be such as he may determine.

PART V

Miscellaneous Provisions

37. Want of form—No proceedings of a Tribunal, or order, or other document thereof shall be set aside or quashed for want of form.

38. Registrar to provide assistance—A Registrar shall ensure that assistance is reasonably available from himself or his staff to any person who seeks it in completing the forms required by this Act, or any rules made thereunder, in relation to the lodging of a claim in a Tribunal, an application for a rehearing, an appeal against an order of a Tribunal, or the enforcement of an order in the Tribunal or in a Magistrate's Court.

39. Contempt of Tribunal—(1) Any person who—

(a) Wilfully assaults, insults, or obstructs a Referee, or any witness or any officer of a Tribunal during a sitting of a Tribunal or while a Referee, a witness, or an officer is going to or returning from a sitting of a Tribunal; or

(b) Wilfully assaults, insults, or obstructs any person in attendance at a sitting of a Tribunal; or

(c) Wilfully interrupts, or otherwise misbehaves at, a sitting of a Tribunal; or

(d) Wilfully and without lawful excuse disobeys any order or direction of a Tribunal (other than an order mentioned in section 15 (2), 15 (6) or 32 (2) of this Act) in the course of the hearing of any proceedings,—

commits an offence and is liable on summary conviction to a fine not exceeding $100.

(2) A Referee may order the exclusion from a sitting of a Tribunal of any person whose behaviour, in the opinion of the Referee, constitutes an offence against subsection (1) of this section, whether or not such person is charged with the offence; and any Registrar, or officer under his control, or constable may take such steps as are reasonably necessary to enforce such exclusion.

40. Publication of orders—The Registrar shall cause to be published, in such manner as the Minister from time to time directs, such particulars relating to proceedings in Tribunals as the Minister specifies in the direction.

41. Protection of Referees, Investigators, etc.—(1) A Referee shall have and enjoy the same protection as a Magistrate has and enjoys under the Magistrates' Courts Act 1947.

Amended 1979 – not changed here

(2) For the avoidance of doubt as to the privileges and immunities of Referees, parties, representatives, and witnesses in the proceedings of a Tribunal it is declared that such proceedings are judicial proceedings.

(3) The privileges and immunities referred to in subsection (2) of this section shall extend and apply to—

(a) A Tribunal acting under section 26 (2) of this Act; and

(b) An Investigator acting under section 27 of this Act; and

(c) A person who gives information, or makes any statement, to the Investigator or Tribunal on any such occasion.

42. Referee to be employee for accident compensation purposes—A Referee, while acting as such, is an employee employed by the Crown for the purposes of the Accident Compensation Act 1972.

43. Rules—(1) The Governor-General may from time to time, by Order in Council, make rules—

(a) Regulating the practice and procedure of Tribunals:

(b) Prescribing such things (including fees) as are required by this Act to be prescribed:

(c) Prescribing such matters as are necessary for carrying out the provisions of this Act.

(2) Without limiting the generality of subsection (1) of this section, rules may be made providing for the following:

(a) The keeping of records by Tribunals and the form thereof:

(b) The form of documents to be issued by Tribunals and the sealing of its documents:
(c) The form and content of documents to be used by parties and intending parties, and the service of documents and the giving of notices by such persons:
(d) The functions, powers, and duties of Tribunals and Registrars in relation to—
(i) The service of documents and giving of notices:
(ii) The enlargement of dates of hearing:
(iii) The adjournment of proceedings:
(iv) The reports of Investigators:
(e) The withdrawal and amendment of claims:
(f) The summonsing of witnesses, and the payment of witnesses from public funds or otherwise:
(g) The commission of offences by, and punishment of, persons who refuse to give evidence or obey a summons to witness:
(h) The functions, powers, and duties of Investigators:
(i) The transfer of proceedings—
(i) From a Magistrate's Court or the Supreme Court to a Tribunal:
(ii) From a Tribunal to a Magistrate's Court or a Disputes Tribunal referred to in section 22 (3) of this Act:
(iii) From one Tribunal to another:
(j) The removal of orders of Tribunals into a Magistrate's Court for enforcement:
(k) The searching of the records of Tribunals.

(3) Notwithstanding section 44 of this Act, rules made under this section may make particular provision for—
(a) The giving of notices to, and service of documents on, the Crown; and
(b) The length of the notice to be given to the Crown before proceedings to which the Crown is a party may be heard.

44. Crown Proceedings Act 1950 not restricted—Nothing in this Act shall limit or restrict the operation of the Crown Proceedings Act 1950.

45. Consequential amendments—The enactments specified in the Schedule to this Act are hereby consequentially amended in the manner indicated in that Schedule.

SCHEDULE

Section 45

CONSEQUENTIAL AMENDMENTS

Enactment Amended	Amendment
1909, No. 13—The Inferior Courts Procedure Act 1909 (1957 Reprint, Vol. 6, p. 617)	By repealing section 2, and substituting the following section: "2. Interpretation—In this Act the term 'inferior Court' means— "(a) A Magistrate's Court: "(b) A Small Claims Tribunal: "(c) A Magistrate, Justice of the Peace, Coroner, or Referee of a Small Claims Tribunal in respect of the exercise of any judicial authority conferred upon him by any Act."
1947, No. 16—The Magistrates' Courts Act 1947	By inserting, after section 4A (as inserted by section 2 of the Magistrates' Courts Amendment Act 1974), the following section: "4B. Small Claims Tribunals—(1) A Magistrate's Court constituted under section 4 of this Act shall have a division for the hearing and determination of small claims within the meaning of the Small Claims Tribunals Act 1976 where, under section 4 (4) of that Act, the notice establishing a Small Claims Tribunal so provides. "(2) Notwithstanding subsection (1) of this section, the jurisdiction of a Small Claims Tribunal shall be limited to such as is conferred on it by the Small Claims Tribunals Act 1976, or by any other enactment, and except as provided in that Act, or in any other enactment, no provision of this Act or of any rules or regulations made under this Act shall apply to a Small Claims Tribunal."
1950, No. 54—The Crown Proceedings Act 1950 (1957 Reprint, Vol. 3, p. 517)	By inserting in section 2 (1) in the definition of the term "Court", after the words "the Magistrates' Courts Act 1947,", the words "a Small Claims Tribunal constituted under the Small Claims Tribunals Act 1976,".
1957, No. 88—The Oaths and Declarations Act 1957 (1957 Reprint, Vol. 11, p. 381)	By adding to the Second Schedule, the item "Referees of Small Claims Tribunals."

SCHEDULE—*continued*

CONSEQUENTIAL AMENDMENTS—*continued*

Enactment Amended	Amendment
1969, No. 41—The Minors' Contracts Act 1969	By inserting in the definition of "Court" in section 2, after the words "of this Act", the words "or a Small Claims Tribunal which has jurisdiction under section 14A of this Act": By inserting in section 12 (7), after the words "means a Court", the words "(other than a Small Claims Tribunal)": By inserting, after section 14, the following section— "14A. Jurisdiction of Small Claims Tribunals—(1) A Small Claims Tribunal established under the Small Claims Tribunals Act 1976 shall have jurisdiction to exercise the powers conferred by any of the provisions of sections 5 to 7 of this Act in any case where— (a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and (b) The value of the consideration for the promise or act of any minor under the contract is not more than $500. "(2) An order of a Small Claims Tribunal under section 7 of this Act shall not— (a) Require a person to pay money exceeding $500: (b) Declare a person not liable to another for a sum exceeding that figure: (c) Vest any property exceeding $500 in value in any person: (d) Direct the transfer or assignment of any such property— and an order of a Tribunal which exceeds any such restriction shall be entirely of no effect."
1970, No. 129—The Illegal Contracts Act 1970	By inserting in the definition of "Court" in section 2, after the words "of this Act", the words "or a Small Claims Tribunal which has jurisdiction under section 9A of this Act": By inserting, after section 9, the following section—

SCHEDULE—*continued*

CONSEQUENTIAL AMENDMENTS—*continued*

Enactment Amended	Amendment
1970, No. 129—The Illegal Contracts Act 1970—*continued*	"9A. Jurisdiction of Small Claims Tribunals—(1) A Small Claims Tribunal established under the Small Claims Tribunals Act 1976 shall have jurisdiction to exercise the powers conferred by any of the provisions of section 7 of this Act in any case where— (a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and (b) The value of the consideration for the promise or act of any party to the contract is not more than $500. "(2) An order of a Small Claims Tribunal under section 7 of this Act shall not— (a) Require a person to pay money exceeding $500: (b) Declare a person not liable to another for a sum exceeding that figure: (c) Vest any property exceeding $500 in value in any person: (d) Direct the transfer or assignment of any such property— and an order of a Tribunal which exceeds any such restriction shall be entirely of no effect."
1971, No. 147—The Hire Purchase Act 1971	By inserting in the definition of "Court" in section 2, after the words "of this Act", the words "or a Small Claims Tribunal which has jurisdiction under section 47A of this Act": By inserting, after section 47, the following section— "47A. Jurisdiction of Small Claims Tribunals—(1) A Small Claims Tribunal established under the Small Claims Tribunals Act 1976 shall have jurisdiction to exercise the powers conferred by any of the provisions of sections 10 (1), 26 (2), and 37 of this Act in any case where— (a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and

SCHEDULE—*continued*

CONSEQUENTIAL AMENDMENTS—*continued*

Enactment Amended	Amendment
1971, No. 147—The Hire Purchase Act 1971—*continued*	(b) The cash price of the goods comprised in the hire purchase agreement is not more than $500. "(2) An order of a Small Claims Tribunal under any of the provisions of sections 10 (1), 26 (2), and 37 of this Act shall not— (a) Require a person to pay money exceeding $500: (b) Declare a person not liable to another for a sum exceeding that figure: (c) Direct the transfer, assignment, or delivery of goods the cash price of which exceeds $500— and an order of a Tribunal which exceeds any such restriction shall be entirely of no effect."

'This Act is administered in the Department of Justice.

WELLINGTON, NEW ZEALAND: Printed under the authority of the New Zealand Government, by E. C. KEATING, Government Printer—1976

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