SMALL CLAIMS COURTS

By
F.D. O'Flynn, QC, MP

The Problem

One of the first practical jobs given to a new law clerk in most legal offices, at least until comparatively recently, was the task of drawing up the papers and taking or arranging the necessary procedural steps in actions to recover small sums of money or to defend such claims. The newly qualified clerk, or even an unqualified clerk with a little experience would be given a file usually consisting of the briefest handwritten note of the client's instructions and a letter to the intended defendant or a letter from the intending plaintiff and left to draw up and file a statement of claim, plaint note and summons or a notice of intention to defend as the case might be. He would get a copy of Wily's Magistrates' Court Act, he would pore over the relevant sections and rules and the forms in the appendices and laboriously draw the documents by hand.

At the beginning he would probably have a little trouble in even the simplest cases, but for a young man or woman with a good secondary school education and a little knowledge this would soon become a relatively easy task. Almost as soon, however, he would begin to discover that it was frequently both a fruitless and frustrating one and invariably an unprofitable one for his employer. Even in those far off days when £5 was reckoned a significant sum and costs and wages were quite low those actions were usually unprofitable, although at that time, and even in my own experience up to 20 years ago, most solicitors would accept such instructions. Certainly almost all of us would do so for clients from whom we had any substantial business in the past or expected to get business in the future. Even so there must have been many people with good claims for small sums or good defences who did not consult solicitors, and being unable to handle them themselves, either abandoned their claim or paid the claim against them.

As the population has increased in the post-war years and the volume of commercial business, and especially hire purchase and credit sales has increased, the number of such claims has also greatly increased. The volume of business in the Courts has also increased, thereby rendering it even harder to provide time for the lay litigant in person, whether as plaintiff or defendant. At the same time salaries, even of law clerks, overheads and other costs have increased. Even when I ceased to be concerned with ordinary general practice as a solicitor about 5 years ago I am sure that most legal firms of any size were reluctant to accept instructions to sue for sums less than $100 unless there was a reasonable chance of recovery simply upon the issue of the summons. Similarly, they would be reluctant to become involved in proceedings that were likely to be defended unless they involved sums of at least two or three times that amount.

Generally, I think that even then most solicitors would have been inclined at least to caution their client that the expense of recovery or defence was likely to be out of proportion to the sum involved. The only exception would be larger firms with a considerable commercial practice, one by-product of which is usually a large number of claims for trade debts. These can then be processed and dealt with on a large scale so that the work can at least be done without loss

when looked at on a fee for time basis, and is regarded as part of the service given to commercial clients for whom a considerable volume of much more substantial and profitable business is obtained.

It was this situation too that led to the appearance 40 years or more ago of large commercial debt collecting agencies. These firms were economically viable only because of the very large scale on which the work was carried out. For some years my old firm acted for one of them in Wellington and many of you will be familiar with the way in which the work is done. The agency usually has a well trained staff which carries out the bulk of the clerical work or preparing the Court documents and filing them, employing a solicitor to sign several hundreds of plaint notes each week. The agency then prepares the forms for taking judgment by default where no defences are filed, gets them signed by the solicitor and enters up the judgments. Similarly, it prepares distress warrants or judgment summonses, and presents the application forms to the solicitor for signature but carries out all the rest of the work itself. The staff doing the work become well known to the Court officials and the whole process is closely streamlined. Apart from signing large numbers of plaints or formal applications the work of the solicitors is confined to appearing weekly on a list of judgment summonses on which appropriate instructions are endorsed by the agency, and very rarely, dealing with a few defended cases in some of which the defendant appears in person.

I think that during my time in practice lawyers have become so accustomed to these processes with which they have grown up, first as clerks and later as young solicitors doing the incidental Court work, that they rarely stand back and consider the situation that has arisen, and least of all its social implications. Occasionally a contemporary Mr Haddock brings the evils of the situation to passing notice but little attention has been given to the broad problem. In the last few years however, the Consumers' Institute has begun to consider the matter and has carried out some research into the position in other countries. This has brought to light a wealth of information about methods of dealing with the problem in the other countries. In particular there was a valuable study by the Consumer Council in England the results of which were published in 1970 in a booklet called "Justice out of Reach". As there has been no systematic survey of the position in New Zealand it is useful to examine the results of this English study. Its broad conclusions are set out in a brief introduction from which the following paragraphs are reproduced:

> "We found, in brief, that solicitors do not welcome clients with potential consumer claims; that some solicitors will not accept such clients at all; and that, as a result, people with consumer claims may be shuffled from one solicitor to another. Or else, because of expense, they may be advised that their complaint, however sound, is not worth pursuing. This situation is reflected in the county courts; individuals use the county courts very little for any matter at all, not simply consumer matters; they rarely sue and rarely defend if sued. The county courts are mainly used for collecting debts by firms who sell on credit.
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> Our research was chiefly concerned with claims involving consumer goods and services. But the situation that we found is without doubt as true for other disputed claims involving relatively small sums of money as for consumer claims. Unless he is backed by a trade union or an insurance

company . . . the individual simply does not take his dispute to a court for decision. And rarely would a solicitor advise him to do so.

We therefore envisage that the small claims court that we propose in Chapter 8 would not be simply a consumer court but would have broad jurisdiction, at least covering most of the law of contract and tort up to a maximum claim of $200.

There is a tendency among lawyers to think that it is no bad thing that people do not use the courts to settle disputes over small or mundane matters. They consider that the majesty of the law should be invoked only for matters of grave import and not for disputes involving, for instance, mere household goods. This attitude is ironic when one considers that the purpose for which the courts – or at least the county courts – are in practice principally used is collecting debts owed for those very same household goods. Moreover, the vast majority of actions brought in the county courts are for insignificant sums; in our sample of debt claims, three-quarters were for under $40 and one-fifth for under $10."

Chapter 3 of the report (Justice out of Reach) is devoted to the results of a survey of the court records of six county courts selected to cover different types of community from industrial to predominantly rural. The courts were Leeds, Bolton, Leicester, Cambridge, Guildford and Worcester. The total number of ordinary and default actions in those six courts in 1968 was almost 62,000, and of all of these a random 2 percent, or 1,238 cases, were examined. The resultant statistics are illuminating. 72% of the cases examined were default actions; 90% of the summonses taken out were issued by commercial firms or public utilities, and only 9% by individual plaintiffs. A good proportion of these were thought to be cases of small businesses suing in the proprietor's name. 71.5% of the total summonses, or almost three-quarters, were claims by firms against individuals for debts for goods or services. In contrast not a single case was found of an individual suing a commercial firm about such a matter. In one of the courts studied the researchers were not permitted to note the names of the parties but in the other five the survey showed that mail order firms accounted for 32 percent of the total "trader cases", to use the term adopted by the researchers.

The next biggest groups were public utilities (principally gas or electric authorities) 9%; finance companies 7%; garages and clothing firms 6% each; furniture firms 5%; television and radio firms 4%. 70% of the claims were for less than $40; 45% for less than $20, and 20% for less than $10. A survey of some 634 firms of solicitors by questionnaire and interview (I think this may have been restricted to London and its environs) elicited fairly clearly that few solicitors would advise consumers to bring claims for such small sums as these, and it is not surprising that the survey of the court records disclosed that most of the plaintiffs were big firms who either had staff of their own to carry out the work or employed solicitors with special staffs to carry out a great volume of this work.

As to legal representation, only four defendants had solicitors at the commencement of the proceedings while 535 plaintiffs (or 62%) did so. 127 of the cases surveyed actually went to a hearing and in 113 of them the defendant was neither present nor represented. (No percentage given but it is very high indeed.) In 81 cases (or 64%) the plaintiff was able to make its appearance by

affidavit but in the remainder it was represented by solicitors or employees, presumably people accustomed to doing this work.

Although no actions brought by consumers were turned up by the survey, 50 cases were disclosed in which the defendant had filed a defence or counter claim in trader cases. This represents about 7% of the summonses served. These cases were all examined and the striking fact emerged that in 32 of the 50 cases (or 64%) the action was withdrawn after the defence was filed. Four of these cases actually went to a hearing, and in these the defendant succeeded wholly or in part in two of them and lost in the other two, but in one of those the Judge seems to have been demonstrating disapproval of the plaintiff in ordering the defendant to pay the sum of $140 at the derisory rate of two shillings a month. I can recall myself in the days when I was responsible for the overall supervision of the legal work of a debt collecting firm encountering a Magistrate, now deceased but who had better remain nameless, who regularly treated a door to door bookselling firm somewhat similarly on judgment summonses. There is of course no justification for action of this kind by the courts: what it points to is the need for other methods of dealing with such claims. There is little point in consumer protection legislation such as our Hire Purchase Agreements Act, first passed in 1939, the more recent Door to Door Sales Act 1967 (to which a useful amendment extending it to services as well as goods was proposed in an Opposition Private Member's Bill a few days ago) or even the long standing Sale of Goods Act, unless our Court system provides the means by which the remedies provided can be obtained sufficiently simply and cheaply to make them really effective.

Other Countries

It is therefore appropriate to review briefly information that has been obtained by the New Zealand Consumers Institute about the position in other countries and the measures taken to meet it.

Various studies and enquiries have disclosed that in most developed countries the broad situation has become similar. The ordinary court processes are too complicated and too formal for the layman to conduct his own case and the costs of employing solicitors or attorneys make the prosecution or defence of claims for relatively small sums uneconomic for them and especially for their clients. In many countries it has already been recognised that this situation is not in the public interest. One must agree with the conclusion of the British Consumer Council that "It is a prime duty of a civilised society to provide an easily accessible means of settling disputes".

Without wishing to slander the commercial community generally by suggesting that shoddy goods and poor services are sold to the public on a widespread scale, it is at any rate clear that the inferior or minor courts of the ordinary court system in this country and many others are mainly used to obtain traders to collect trade debts, many of which are of doubtful validity. At the same time defences are discouraged and still more counterclaims or independent claims by consumers. In a number of other countries this overall situation has led to the establishment of special courts or tribunals to deal with small claims cheaply, promptly, and more or less informally.

I do not wish to burden this paper with a lengthy examination of the details of such schemes but propose to examine one of the oldest and best of them, the system established in New York City as long ago as 1934. There is a

separate court for each of the five counties. The jurisdiction is limited to $500 and small courts now handle about 70,000 cases annually. The volume has increased by 40% in the last three years. The procedure is extremely simple.

The court staff prepares a brief and simple form of complaint on the instructions of the complainant and the fee charged is about $2. The courts sit at night except in one county in order to avoid the loss of working time. A judge is in attendance at each sitting but is assisted by a number of arbitrators. These are trained lawyers of about five years' experience and most claims are heard by them. There is no appeal if an arbitrator hears the case and only a very limited right of appeal if the case is heard by the judge. Lawyers are not allowed to appear for either side and only individuals may sue; no firm or corporation is permitted to do so. In other words these are in truth consumer courts.

I have in my hand a small booklet which explains in the very simplest possible language what to do at all stages of the proceedings, including the enforcement of the judgment if necessary. It also includes small maps showing where the various courts are situated and lists of the addresses and telephone numbers of officials. A few examples will show the simplicity of the instruction and indeed of the proceedings themselves.

There are similar courts in many American States. The jurisdiction varies but it is generally limited to about $300. In most of them lawyers are not permitted to appear and the questioning is done by the Judge or arbitrator himself. In some of them, as in New York, corporations cannot sue, but only individuals or unincorporated businesses. The judge is not bound by any rules of procedure or evidence but only by rules of substantive law. He may look at unsworn documents and if necessary examine goods or the scene of an accident or send a court officer to do so. The whole process down to and including judgment is quite informal. Once judgment has been given it is enforceable like any other county court judgment, but here again the procedures are simplified as far as possible to enable the layman to carry them out himself.

One other system is deserving of particular mention. Following the publication by the British Consumer Council of the booklet "Justice out of Reach" that I mentioned earlier, which took place in 1970, a pilot scheme for arbitration of small claims was instituted in Manchester. This has been a qualified success. In essence it is not dissimilar to the system in the New York courts where the case is actually heard by an arbitrator, but the Manchester scheme amounts to voluntary arbitration; there is no compulsion upon the party defending the claim to agree to it. A recent survey of its operation shows that slightly more than 200 people paid the small fee required to make use of the scheme from its commencement in July 1971 until January 1973 but only 30 arbitrations resulted. An equal number of claims were settled to the claimants' satisfaction as a result of negotiations so that about 30 percent of those who sought to use the system were successful in one way or another. More than 60 percent of the respondent parties, however, refused to agree to arbitration. This has prompted the supervisors of the scheme to suggest that it should be made compulsory by setting up a court on the New York model.

Other States in which some special measures have been taken to deal with small claims are New South Wales, where a scheme dating back to 1912 was substantially amended in 1970; Tasmania and Queensland where further

legislation is imminent; Norway, where there are mediation boards; and Scotland.

Overseas studies have shown however, that unless great care is taken in framing the rules under which they are to operate, these small claims courts or tribunals soon become agencies for mass debt collection, just as the ordinary inferior civil courts have done in most developed countries.

A recent issue of "Consumer Reports" the journal of a New York Consumers' Union, had this to say about small claims' courts generally:

> "The gravest defect in many small claims courts is in the perversion of their original purpose as far as poor people are concerned. Whether law without lawyers is a benefit depends on the circumstances. When a housewife sues the dry cleaner or the repairman, lawyers can be superfluous. When a finance company has its experienced courtroom representative arrayed against a low-income consumer, the cards are stacked against the defendant without an attorney.
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> Small claims courts have been in large part a disappointment to those who thought they would serve the poor by creating a forum where costs were low, lawyers were unnecessary, procedures were simple, and justice was nevertheless dispensed. The poor man who is a debtor is likely to stop paying when he discovers the merchandise is defective, the transaction is fraudulent, or the price is excessive. He then becomes a defendant in a case brought by the retailer or the finance company. Then the small claims courts, like other civil courts, become a weapon against poor people. All the trappings intended to serve them will victimize them instead. The speediness of the proceeding takes on the character of railroading. The informal procedures and pressure from the bench in some courts enable the company representative to manoeuvre consumers out of telling their story."

Abolition of Claims for Small Debts

The novel suggestion that the bringing of court proceedings to recover small debts arising out of retail transactions should be abolished altogether is made in an article in last year's Modern Law Review (Volume 35 page 80) by Professor Ison, Professor of Law at Queen's University in Ontario and a Barrister of the Middle Temple. The principal reasons he gives for this at first sight startling suggestion are:

(1) By enforcing the claims of credit grantors without enquiring into their legitimacy the courts are promoting marketing of goods on credit and thus encouraging the abuses that take place in that field, especially high pressure sales techniques and also the use of deceptive or even fraudulent representations, and in some cases the deliberate sale of defective goods.

He points out that it is difficult to prevent these abuses by legislation and the policing of selling behaviour and he suggests they would be made unprofitable by ensuring that claims arising from sales obtained in this way are not enforced by the courts. He further points out that there are other sanctions against non-payment of such debts which provide adquate remedies for protection for credit sellers, namely repossession and the adverse credit reports that will arise from non-payment. Virtually limiting the seller to re-possession would make him more dependent on the

security in the goods and thus reduce the incentive to sell shoddy or defective goods, at least on credit.

(2) He points out that there is a correlation between the strength of creditors' remedies and the perimeters of consumer credit, and that while most governments have been seeking to control consumer credit as part of the fight against inflation, the courts have been expanding it by systematic enforcement of such debts. In the absence of small debt enforcement much greater care would be taken in the granting of credit.

(3) Such reduction in credit facilities would have a number of social advantages. First there would be no incentive to push credit on to those who cannot afford it, and secondly, in marginal cases, there would be a reduction in credit sales and some diversion to loan finance. This diversion would mean that the customer would be under no illusion about the cost of the credit, as he so often is in seller financed transactions. He would also have a brief period available for considering the proposed purchase in the absence of the salesman. Indeed, he would probably get an independent view of the matter from any lender he approached.

(4) Apart from the social and economic advantages it can reasonably be said that if it is too difficult or too expensive to develop a system that will give full effect to buyers' rights, we ought not to be enforcing sellers' claims regardless of their merits, as the present system does.

No doubt the suggestion is a counsel of despair, at least if taken to extremes, and the article does go on to restrict the scope of the suggestion to very small debt claims for the price of goods sold at retail and cash loans for such purposes made by arrangement with or in the presence of the retailer; claims for ordinary cash loans and for payment for services would remain enforceable.

The writer goes on to point out that his suggested reform would make such a substantial cut in the volume of small claims that it should be possible to institute a satisfactory system for the just disposal of the remainder. He then suggests principles on which small claims courts might be introduced in the United Kingdom. I do not propose to traverse these but it is worth noting that he begins by firmly rejecting a scheme confined to simple reform and adjustment of the county court system.

Essentials of Reform

A consideration of all the published material available to me on the need for small courts or the functioning of such a system elsewhere, and my own experience of our own courts in practice, from the point of view of both buyer and seller, or plaintiff and defendant, and including experience of the working of a large debt collecting agency leads me to offer the following suggestions as to features that are essential to the institution of a successful small claims court.

(1) It must be limited to actions by individuals and in grading cases to claims by the customer, not the business firm.
The only relaxation of this that could reasonably be considered would be permitting small unincorporated businesses, largely one-man traders, to sue, perhaps with a limitation on the number of claims that might be brought over a given period. This would enable such firms to sue the occasional customer who did not pay but would not allow the court to

become an instrument of wholesale debt collection. It seems clear that this is what has happened to the small claims court in many American States where business firms are allowed to sue. For example, in Washington DC, 75% of small claims are brought by business firms and in Oakland, California, 65% of plaintiffs are firms or government agencies, according to the researches of a team from the British Consumer Council that visited the United States some years ago.

(2) The adversary procedure of our courts should be entirely abandoned in favour of informal eliciting of the facts by the Judge himself. It is fundamental to this that the responsibility for reaching a just conclusion should rest on the court, not on the litigant, and that there should be no onus of proof at all, in the accepted sense. The Judge should be allowed to proceed in any way he thinks fit in the particular case, including informal discussions with either party in the absence of the other, even by telephone, informal inspection of documents, goods or the results of work and services, and so on.

(3) Even a claim in writing should not be necessary, so that an inarticulate claimant can explain his claim orally to the Judge or court clerk.

(4) No default judgments should be available and it should not be left entirely to a defendant to take the initial steps to raise a defence. The Clerk or Judge should make sufficient enquiry into the facts to satisfy himself as to whether or not there is any available defence.

(5) The appearance of lawyers or trained advocates on either side should be prohibited. This is not simply because of the cost or the likelihood of promoting formalities. The principal reason is that the presence of a lawyer would result in a constant if unconscious pressure on the Judge (also almost certainly a trained lawyer) to slip back into the old adversary system with which he and counsel would be so familiar.

(6) Such courts should regularly sit in the evenings or at least should arrange evening hearings as a matter of normal routine, not as a privilege, where either party to the proceeding is a worker or requires leave from some form of employment or duty.

(7) In a limited but important number of cases there should be provision for instant justice.

A good example is the arguments that frequently arise between landlord and tenant when a tenant leaves a flat. The landlord claims there has been some structural damage and the tenant says there has only been fair wear and tear.

It is always difficult to settle such an argument on the testimony of the parties even if it is given fairly soon after the event. The satisfactory resolution of such disputes usually depends on an inspection, and this is of little or no value unless made at the time.

There are other examples, and the system must provide for prompt if not immediate attendance of judges or adjudicators in such cases, perhaps even in response to a simple phone call from one or other of the contending parties.

There are already processes for short service and immediate execution but they are little used simply because they are of little use.

Small claims courts should also go on circuit, sitting regularly in poorer suburbs and in any areas that justify it.

Justice may be blind but, as has been said, it is not lame.

(8) There should either be no right of appeal at all or a very limited right of appeal when really inportant questions of law arise, and this would be an infrequent occurrence in the nature of things.

(9) The informal procedure must also enable the judge or adjudicator to obtain expert help in an informal way. He must be able to obtain reports or opinions from either tradesmen or skilled persons without regard to formal rules about hearsay evidence or producing the maker of the report for questioning.

Many other suggestions have been made as to necessary or fundamental rules, and yet others will no doubt emerge from practical experience of any such scheme, but I think the foregoing are the essential or really important requirements for a successful small claims court system.

Possible Reform in New Zealand

I mentioned that in his article in the "Modern Law Review" Professor Ison said that he was against amendment of the English county courts to deal with small claims, and he went on to favour the establishment of separate new small claims courts.

On the other hand the Consumer Council study (Justice out of Reach) recommends that small claims court should be run by the Registrar of every English county court as a branch of that court.

I think the latter solution is the correct one to follow in New Zealand, but I think the proper way to start is to begin with a pilot scheme confined to one of the cities.

I will come back to that aspect of the matter in a moment but let us first consider how the scheme could be fitted into the Magistrate's Court system. The advantages of doing so if we can are manifest: there are Magistrate's Court buildings all over the country and they are usually situated in a convenient central position; they are well administered and competently staffed, and the staff could be augmented to deal with the extra work if necessary; they have an experienced body of judicial officers who could take some active part in the new courts and give some overall supervision to their working; above all, they have established enforcement procedures that would be available to give effect to the judgments of the new courts so far as necessary when they have been given.

It should not be forgotten that the original aim when our Magistrates Courts were re-established on their present basis and the earlier District Courts abolished, was to provide what was called a People's Court, and that is what the Magistrate's Court was intended to be. That indeed may be one reason why the term Magistrate was chosen rather than Judge, although the jurisdiction of New Zealand Magistrates has for many years been wider and more estensive than that of English county court judges.

I think the difficulty of the Magistrate's Court in fulfilling their original role of people's courts, or in fulfilling the functions of small claims courts as is now envisaged has been that they have grown more formal over the years. This has been due partly to the increasing complexity of the law, partly to the increasing volume of work, and partly to the increasing importance of these courts in the eyes of the legal profession. The unrepresented litigant has become

almost as rare in the Magistrate's Court as in the Supreme Court, and almost as unwelcome.

Also modern ideas would regard the buildings and the layout of the courtrooms in particular as too formal and not conducive to the simple intimate procedures that should prevail in small claims courts. I think a small panel of practising lawyers of some, but not too much experience, could readily be found to assist in the work of these courts by sitting as arbitrators in appropriate cases.

I think too that the Citizens Legal Advice Bureaux that have been established in some parts of Auckland, and at Wellington in Porirua and at Newtown, could easily assist in getting these courts going. After all, the primary purpose of these Bureaux is to give advice to the very class of people who are most likely to wish to become plaintiffs in these courts or to defend claims made against them under hire purchase agreements or other credit sales.

Much of the sifting of claims should be done by advisers at the Bureaux and they can also give assistance in the commencement of the claim, although I think it is an essential feature of the system that the court staff itself should be prepared to do this work and able to do it willingly and well.

I return for a moment to the idea of a pilot scheme. To a limited extent a pilot experiment has already taken place at the Magistrates' Court in Dunedin where simplified forms for small claims have been in use with the approval of the Magistrate for some time. This however does not go far enough. It may be that a pilot scheme involving a small claims court to be conducted by the Registrar of the Magistrate's Court, and with claimants and defendants assisted in preparing claims, defences and counter claims by the court staff, should be tried in some moderate sized provincial centre like Napier or Wanganui rather than in a large city like Auckland. At all events I think that before a detailed scheme is instituted based on legislation and detailed regulations and court rules a pilot scheme should be tried. The difficulty is that it would almost certainly have to be a voluntary scheme, as is the experimental arbitration scheme in Manchester. Nevertheless, much valuable information would be obtained as the result of the cases that were taken before such a court which would be of great assistance in framing legislation and deciding upon the administrative changes necessary to set up permanent courts in all the cities and major towns of the country.

I do not think it can seriously be questioned that some wholesale reform along these lines is very much needed.

Real life does not turn up very many people with the persistence and ability of Mr Haddock but it turns up a great number with his keen sense of injustice when they are unfairly treated or wrong is done to them. Before we can boast, as we always have, that all men are equal before the law we must set up a court system that ensures that this equality is real, not theatrical, and that those able to pay for skilled legal assistance do not have an advantage in everyday transactions over those who cannot.

COMMENTARY ON MR O'FLYNN'S PAPER

By
R.I. Barker Esq. Q.C.

When I was asked to comment on Mr O'Flynn's paper my immediate reaction to the question of Small Claims Courts was one of approval. I saw superficially that there could be many advantages in these Courts which in the true sense could be people's Courts where palm tree justice could be speedily dispensed and that sort of thing.

But having heard Mr O'Flynn's paper my reaction must be somewhat qualified.

I consider that something better than the present set-up is required: that is why, on balance, I still prefer some sort of Small Claims Court in principle, but I wonder if we are in a position to have one instituted at the moment.

Mr O'Flynn's paper mentions research having been carried out in several English County Courts where analyses of litigation have been carried out under a number of headings. None of this type of research has been done in New Zealand. I suggest we would find additional areas of claim in New Zealand such as —

(i) claims by insurers against uninsured motorists for property damage,
(ii) claims for possession of dwelling houses,
(iii) claims against tenants,
(iv) claims against married women for their husband's debts. (Some years ago Magistrates refused to make Judgment Summons Orders against women: I understand Women's Lib. has not sought to upset this approach.)

This sort of research could be carried out in New Zealand and I suggest as sample Courts places like an urban Court, a country Court, a provincial city Court. I suggest further that statistics done by the Justice Department for civil litigation could be considerably amended.

Justice Statistics (latest edition for 1971) contain quite encyclopedic statistics for Magistrate's and Supreme Court criminal cases yet in civil litigation they are quite miniscule: e.g. we are told that in all the Magistrate's Courts throughout the country during the year, only one conviction was recorded in a Magistrate's Court under housing.

All sorts of information which is no doubt useful to psychiatrists or social workers is in this booklet. But the only one on civil cases information is the total number of cases filed. The civil statistics given for the Supreme Court are equally meaningless: one is told. Civil statistics occupy about 1% of the information in this booklet. This is apparently not only a New Zealand problem, as Professor Ison mentions in his article quoted by Mr O'Flynn.

I venture to suggest that better civil litigation statistics would be a very fruitful topic for some research student or even the Legal Research Foundation.

Mainly for the reasons stated by Mr O'Flynn (and I think his was a judgment on balance) I would say — yes, Small Claims Courts should be part of the existing Magistrate's Court administration: they would have to be prepared to sit at night and use the existing plant: more courtrooms would probably be needed at Auckland. The problems:—

Who is going to be the judge or arbitrator in these Courts? Mr O'Flynn

touched on it. It was considered in more detail by Ison where he said "In some small districts . . . " May I just briefly look at the possible alternatives.

First, a special magistrate **ad hoc** in this job.

For someone to have to do this job full time year after year would be fairly soul destroying and you would be unlikely to get anybody to do it.

Secondly, normal magistrates having this as an additional jurisdiction.

They would be unlikely to be interested because of the soul-destroying aspects. Probably there would be a need for more magistrates than exist at the moment.

Thirdly, justices.

J.Ps are frequently conservative people, often elderly and perhaps out of touch with the type of person likely to have a consumer problem. That sort of person is inarticulate, not a good planner, lives from day to day, whereas the J.P. could possibly not be the type of person in sympathy with such a person.

Fourthly, a court official such as Registrars in County Courts in England: this could have the disadvantage of over much rigidity.

My suggestion is a panel of Arbitrators who would be lawyers: on balance, a lawyer is probably a better type of person to decide these things. A panel of lawyers of some experience, integrity and judgment. Because this is an area in which lawyers, particularly young lawyers, are showing more of a social conscience than they did 15-20 years ago, and it should be possible in the big university cities to establish a panel of young lawyers. Panels of lawyers already operate Citizens Advice Bureaux. And I suggest these people be paid: if there are sufficient numbers of them, then the burden would not be so great: the experience of overseas countries implies if there is some filter process, then the volume of work need not be so great, e.g. senior law students could play their part and bring peace between landlord and tenant at the site.

The other point in favour of lawyers is this: we have seen in other jurisdictions where lawyers are either excluded, such as the Arbitration Court, or where laymen lawyers are able to appeal, such as in transport licensing, there does arise the lay advocate who often has the disadvantages of the advocate without the objectivity-training of the barrister. And there is that danger possible in Small Claims Courts.

On the balance I am in favour, but I do feel that there are very real difficulties and I say "Please let us assess the situation before we take precipitate action".

COMMENTARY ON MR O'FLYNN'S PAPER

by
R.H. Ludbrook

I am opposed to the concept of a small claims court. I feel changes in the present system are necessary but consider the introduction of a new tier of courts undesirable in principle and unworkable in practice.

At present, the number of consumer claims coming before the courts is negligible. It may be that people are frightened to bring such claims to court. But would they bring them to a small claims court? New Zealanders hate to complain. If a person buys a pop-up toaster which fails to pop, he may grumble but he is unlikely to do anything about it. I suspect that even if a small claims court were introduced, there would not be a sudden blossoming of claims brought before the court.

The benefit of a small claims court is far from established. Look at the examples given by Mr O'Flynn in his paper. He describes the Manchester Arbitration scheme as a qualified success but surely it must be judged a qualified failure. In 18 months they have dealt with 30 arbitrations. The scheme was experimental and was funded by a grant from the Nuffield Foundation. Thirty arbitrations in 18 months in a city the size of Manchester give nothing to shout about. Manufacturers and retailers are unlikely to agree to a case being sent to voluntary arbitration unless they are fairly confident of the result. Mr O'Flynn quotes the Consumer Council of New York as saying that in a large part, the New York Small Claims Court has been a disappointment. Surely we should be somewhat cautious in starting a small claims court ourselves until we are at least confident that these courts are working overseas and are fulfilling a real need.

Advocates of a small claims court fall into the error which has plagued our judicial system for a long time. If there is dissatisfaction with a particular court or tribunal instead of changing it, we set up a new tribunal, and give it a different name, to perform the function that the old Court was intended to perform. It took Lord Beeching to cut away the dead wood in England and simplify and rationalise the court structure.

At the moment there are proposals for two new types of court – the first is a Crown court which will fall somewhere between Magistrate's Court and the Supreme Court and will deal with matters too serious for the magistrates to be allowed to handle and not serious enought to justify the time and energy of Judges of the Supreme Court. The other is the proposal for a new tier below the Magistrate's Court to deal with small claims. I am opposed to the idea of adding new tiers to the court system. They only cause juridictional difficulties, a duplication of effort and increase the possibility of bureaucratic muddle.

Really, what we are complaining about is that the Magistrate's Courts are failing in the performance of their true function as "people's courts". We should be concentrating on the Magistrate's Courts, examining whether they are fulfilling their true function and if not, finding out why they are failing.

I wish to suggest how the Magistrate's Courts could be helped to fulfil more effectively the role of a people's court – of a small claims court.

1. Selection of Magistrates

It is strange that magistrates are chosen without any attempt to assess their ability at handling and dealing with members of the public. They perform a public duty and their suitability for the job should be ascertained by psychological testing or assessment of ability at dealing with people. Some magistrates are quite inept at dealing with people. They may be good lawyers and possess other admirable qualities but they are not good at dealing with people – and we are talking about people's courts.

2. Training of Magistrates

A lawyer is often elevated to the Magistracy from a rural practice. He is put on the Bench without any job training. His Court experience will have been as an advocate and the role of decision maker, arbiter and commentator on public morality will be new to him. It would be very easy to introduce a training programme. The course would include tuition in such basic topics as the role of the magistrate in the community, a close study of penal institutions, courses in psychology and understanding cultural differences. I would like to see some training programme for new magistrates instituted immediately and regular ongoing training.

3. Court lists

At present everyone is called to Court at 10 a.m. The public and their lawyers wait round until their case is called. This is ridiculous. A business run on these lines would soon be bankrupt. There is so much dead time. A client who is paying his lawyer $16.00 per hour to wait for his case to come on is getting no value for money. The present system is wasteful in human terms; wasteful in economic terms. Court lists are arranged for the convenience of the magistrate and the citizen waits until the court has time to deal with his case. Some organisation and methods research would soon show that the social cost of having people waiting round and paying lawyers quite heavy fees for doing nothing against the cost of appointing more magistrates and running an appointments system that it would be cheaper to have more magistrates.

4. Rules of Evidence

So often small claims are rendered uneconomic because of the technical rules of evidence. How simple it would be to pass an amendment to the Magistrate's Court Rules that in claims under $500 the court could admit any evidence whether it is admissable in a court of law or not (we already have such provisions in the Domestic Proceedings Act 1968 and the Workers Compensation Act 1956).

5. Equity and Good Conscience

The equity and good conscience jurisdiction of the Magistrate's Court Act could be extended. I have some reservations about this but it could easily be done. The limit of the jurisdiction was £50 when the Magistrate's Court Act was first passed in 1928 and $500 today would be on a par with that original figure. The object of the section was to move away from a strictly legalistic approach to small claims.

6. Representation

If it is uneconomic for lawyers to take small claims cases why not allow *accredited* representatives of interest groups e.g. consumer organisations, Citizen's Advice Bureaux, Tenants Protection Association a right of audience. Law students could be given a right of audience on small cases. If lawyers say to their clients, "It is not worth my while appearing for you in Court on your case" it is hardly fair for them to add "but no-one else can appear for you because we lawyers have a monopoly".

7. Procedure

Court procedures can be made less formal. In the Otahuhu Court some magistrates ask lawyers to remain seated during the hearing of domestic cases. There is no loss of dignity and elimination of formalities of this type serves to reduce the distance between the court on the one hand and the citizen on the other hand. Most people find a visit to a Magistrate's Court a rather awe-inspiring business. In many small ways, procedures could be simplified to make a visit to court less of an ordeal.

8. Pleadings

When the Magistrates' Court Rules were formulated, Appendix 3 contained fifty-six model statements of claim. These were tailored to the needs of a rural economy and are now mostly out of date. But the idea is a good one – standard forms of claims which the lay litigant can adapt need not necessarily be included in a Schedule to the Act but could be made available through Court offices and consumer organisations. Mr O'Flynn has shown us an American booklet which explains in simple language how to bring proceedings and sets out the procedure step by step. An excellent idea. Such a booklet could be put out by the Law Society or Consumer Institute.

9 Expert's Reports

Magistrates should have the power to call for a report from an independent expert. In consumer cases, a great deal of the expense is due to the cost of obtaining expert technical evidence. If a new T.V. set does not perform satisfactorily, the Registrar of the small claims court is likely to be in no better position than a magistrate to say whether the fault lies with the manufacturer, wholesaler, retailer or purchaser. The manufacturer may claim that the client must have damaged the set. How is the Registrar to know without expert advice whether the workmanship is shoddy or whether the set was in fact damaged in the purchaser's home.

The magistrate should have power to call for an expert's report and to direct that the cost be met by either party.

10. Power to refer to a conciliator

Some cases which come before the Courts have their origins in a private feud or arise out of some personal animosity between the parties. Family quarrels and neighbours' disputes are good examples. Litigation only exacerbates the antagonism. A suitably qualified conciliator might succeed in getting the parties together at an early stage to prevent the quarrel getting out of hand.

11. A Chambers Magistrate or Duty legal adviser

In some Australian states, there is attached to the Courts an official known as a Chambers Magistrate. This person is accesssible to the public and is willing to advise and help people in the preparation of court documents.

I believe in the adage "It is in the public interest that there should be an end to litigation". One advantage of the court system is that you do come away with a decision whether or not you like it. Imagine the difficulties of a peripatetic small claims court sitting in Ponsonby on Monday evening, Remuera on Tuesday, Otara on Wednesday and so on. If it were presided over by a solicitor on a voluntary basis the possibilities of muddle and confusion are greatly increased. The idea of sittings held at night is superficially attractive but experience at Citizens' Advice Bureaux has shown that people in the outer suburbs are reluctant to go out in the evenings particularly when there is a good programme on T.V. The idea of the small claims Registrar using the phone sounds fine except that the sort of people who might be phoned by the Registrar — manufacturers, experts, retailers — might be hard to contact at night. Cases could drag on with hearings having to be adjourned several times.

To summarise, I believe that if one takes a cold hard look at the idea of a "small claims court", one soon realises that it would create more problems than it would solve. The consumer who tries to take on a huge corporation will always be at a disadvantage but the answer lies not in a small claims court but in a strong and energetic consumer movement and effective consumer legislation.

COMMENTARY ON MR O'FLYNN'S PAPER

by
P. Osborne

For the past two years I have beeen in Winnipeg and have had the opportunity of studying first hand the Small Claims procedure operating there. The Winnipeg experience is perhaps of greater value to us in New Zealand than similar institutions in the U.S.A. as Winnipeg is a city of similar size to Auckland and is not faced with the problems of racial tensions and ghettos so pressing in the large cities of the U.S.A. I will therefore preface my comments by giving a brief account of the Winnipeg Court and the way in which it operates.

The small claims procedure in Winnipeg was set up in 1971[1] to achieve dual objectives. It was hoped to provide a speedy, inexpensive and informal procedure under which small businessmen could recover trade debts and secondly to provide the consumer with a procedure whereby he could simply and cheaply pursue claims without the assistance of a lawyer. The court operates generally in the following manner —

The plaintiff goes to the court office and is given the standard form statement of claim which must be filled out. If the plaintiff needs assistance in completeing the form the court officials at the filing office are willing to help. Copies of the statement of claim must be served on all defendants by the plaintiff. This is usually done by means of registered mail. The claim must be one within the jurisdiction of the County Court and must be under $500. The filing charge is $3, and a date of hearing must be set no later than thirty days from the filing date.

The hearing is held not in the traditional courtroom but in a large office situated in the County Court building and is presided over usually by the County Court clerk. The judge sits behind a desk at one end of the room and the litigants wait for their case to be called at the other.

The judge calls the case and the plaintiff is asked to step forward. The judge assures himself that the defendant has been served with the statement of claim and the judge then questions the plaintiff and any witnesses. The defendant is then asked to come forward and the judge examines him. The rules of evidence are not enforced and there is no fixed procedure for dealing with the case.

Finally the registrar makes his decision.

While the procedure on paper appeared to be an answer to the small claims problem in practice it has been a disappointment. In the main the problem is that the procedure has been monopolised by business plaintiffs to the exclusion of the individual. In an analysis of 1500 claims[2] filed between November 1971 and July 1972 it was found that claims for outstanding bills, unpaid rent and outstanding loans amounted to 84% of the total. Consumer claims amounted to 2%. Rather than the individual being the plaintiff the individual was the defendant in almost 90% of the claims. On the basis of these and other statistics the researchers concluded:

> "While the procedure was initially established to provide a simple inexpensive court procedure for both businesses and individuals, the result is that small businesses in particular have up to now virtually monopolised

the Small Claims Court. The court is presently being used mainly as a bill collection agency.[3]

One reaction to this state of affairs might be that the procedure is available to the individual and if he chooses not to use it there is little else that can or should be done. In attending the court however one finds that the problem is deeper. As soon as the court district becomes dominated by business plaintiffs the court becomes geared to business. The judge usually knows the business representative by repeated claims. They are of similar socio and economic class as the judge, they speak the same jargon. The businessman is organised and is litigating the simplest claim — liquidating trade debts. The court procedure falls into a businesslike routine where the individual is the exception and who may be made to feel that the court has neither the time nor the patience for his claim.

I now come more specifically to my comment on Mr O'Flynn's paper. Mindful of the difficulties of having a small claims procedure open to business plaintiffs Mr O'Flynn suggests that incorporated plaintiffs should be prohibited from suing in a small claims court. Such a solution was adopted in New York.[4]

There seems to me however to be only one possible solution. Perhaps it would be a better arrangement to have separate courts for the business plaintiff on the one hand and the individual plaintiff on the other. If two courts were not feasible the different plaintiffs could be heard on different days. The division of plaintiffs could be on the basis used in New York — between corporations partnerships and assignees on the one hand and one man unincorporated traders and individual consumers on the other.

Although individuals have not taken advantage of the Winnipeg system the procedure as used by business is not without merit. It certainly relieves the County Court of a great volume of claims for trade debts which do not warrant the time and expertise of a lower court judge or magistrate and there are advantages for the individual defendant in being sued in Small Claims Court rather than the Magistrate's Court. Costs are minimal. The defendant does not need counsel to represent him and he has the advantage of less strict evidentiary and procedural rules. It appears from the Winnipeg experience that an individual defendant is less likely to allow a default judgment to be registered against him. He is more likely to attend Small Claims Court and be examined by the judge as to possible defences.

Finally a defendant is also probably better off being sued in small claims court than being badgered by one of the less reputable collection agencies. In our desire to protect the consumer we should not overlook the plight of the one man company. There seems to be no good reason why such a plaintiff should be prohibited from using the informal and inexpensive small claims procedure. To prohibit recourse to the small claims court would force the company to commence an action in the Magistrate's Court. Such obligation may prove to be totally uneconomic and will also be disadvantageous to the individual defendant.

Even if one accepts Ison's view that debt claims arising out of retail transactions should be abolished there are still many small claims a company may wish to litigate — claims over repossession, claims for rent, claims for outstanding loans and claims for unpaid services.

To return to my main point it is not absolutely necessary to prohibit companies from being plaintiffs in order to get this procedure off the ground. Clearly you cannot deal with the incorporated plaintiff and the individual

plaintiff in the same room but I see no reason why you cannot separate your plaintiffs out.

I have two further points to make – the real informality that is possible under such a procedure and the absolute necessity for the judge to have a legal training. Perhaps I may be permitted to make these points by way of an illustration. I was attending the Winnipeg Small Claims Court about two months ago and a woman made a claim for damage done to her son's raincoat by the defendant's dog. The plaintiff having explained what happened the judge asked the defendant to come forward. The defendant came forward with the dog which proved to be a compelling witness. The plaintiff's allegation was that the dog had leapt at her son and knocked him down. The judge had some difficulty in accepting the ferocity of the dog when it immediately curled up around his feet and went to sleep. That illustrates the informality. My second point is a much more serious one. The judge who had no legal training could not decide the merits of the plaintiff's case with any degree of confidence. He plainly did not know the law relating to the situation. He finally gave judgment for $25. When the defendant vociferously objected he reduced the claim to $10.

[1]County Court Act. R.S.M. 1970 c C260 ss 80-93 (Brought into force by proclamation from Nov. 1 1971, (1971) 100 Man. Gaz. 1208.

[2]Gerbrandt J.R, Hague T. Hague A. The Small Claims Court Procedure in Manitoba (Unpublished).

[3]Supra, 21.

[4]New York City Civ. Ct. Act. Sec. 1809. (McKinney 1963 as amended L. 1966 c 785 S.3)

Small Claims Court to get his money back, and a consumer being sued in a Magistrate's Court for refusing to part with it in the first place.

(2) I wholeheartedly agree that there is a place for the legal profession in the scheme – paid by the State on an hourly basis and exercising its professional judgment. I believe, too, that practitioners involved would benefit from the experience and that their performance might help in the selection of judicial officers.

(3) There are acute difficulties in a voluntary pilot scheme – for example, the compulsion of witnesses and the taking of evidence on oath where an arbitrator feels he needs it. I don't know whether Mr O'Flynn envisages that the Registrar in his pilot scheme or in his final scheme should have any powers in a Small Claims Court. My own view is that he should not. He should be compelled to accept any and every scheme so that none could suggest that they were shooed away from what must be an always open door.

(4) I agree, too, that there should be provision for instant justice and would suggest that there might also be a form of interim injunction available – even if it only has the effect of freezing the situation until a superior Court would look at it. Last Easter in London an elderly woman was unlawfully evicted from her bedroom by a landlord bent on letting it more profitably to a new tenant. It took a friend of hers, an articulate woman familiar with legal services, 2 hours and 12 telephone calls to find a solicitor willing to act for her. Instead of immediately applying for an ex parte injunction enjoining the landlord to reinstate the tenant, the solicitor followed the more leisurely pace of many in private practice; he wrote a letter to the landlord and applied for legal aid. In the meantime, the landlord let the bedroom to a couple with 2 children and consequently the chances of a Court granting an injunction were sharply reduced. In the event, nearly 3 months later, that woman is still sleeping on a chair in her sitting room while she waits for a hearing of a possession action.

Again I would like to congratulate Mr O'Flynn on his paper and look forward with interest to learning of the matters raised in your discussion this morning.

COMMENTARY ON MR O'FLYNN'S PAPER

by
R.V. Rutter

I think it was Richard Seldon who said "He that goeth to a Court of Law taketh a wolf by the ears." Mr O'Flynn's paper seems to me to be reaching towards the time when the wolf of the law will be replaced by a faithful watchdog, whom no honest man need fear to approach; but perhaps it is my own conservative nature, or the cautious mould into which all lawyers are poured that makes me hesitant about endorsing his views wholeheartedly. Wolves and watchdogs could get confused at times, as the ghost of Gellaert might testify.

For every person who wins a case in Court there must be a loser, and it is a fact of nature that a man's ego will rarely allow him to blame himself for losing, so what is more natural than that he should blame his lawyer? Now as a result of the resentment of generations of losers, there is a gentle antagonism to our profession that is impossible to combat. It is almost as old as the law itself — look in the Bible and you will find it there. The point I make here is that under our present adversary system this distrust or antipathy is channelled towards a litigant's own counsel. Remove the counsel and it will be directed at the judge. At present, the judge or magistrate is protected to a considerable degree by the majesty, and formality of the law, the stiffness and the dignity of which it is now fashionable to complain. If all these things are abolished there is no doubt in my mind that perjury and contempt of Court will increase, and men of unusual personality and ability will be needed to control it in the Courts that are envisaged.

A bigger problem, in my view, is the danger of introducing a kind of class distinction into our happily egalitarian society. I have even encountered this in our present two-tiered system "I was found guilty of idolatry with her, Mr Rutter, but it was only the Magistrate's Court." In North America last year I examined this aspect, and found that there was a definite attitude towards small debts courts of "cheap justice for cheapskates" amongst the population at large. We have already been the target of suggestions that Maoris do not obtain as much justice as pakehas in our courts. How much fuel will be added to these sparks by courts in which inarticulate artisans or language-handicapped Islanders are worsted by glib quick thinking Europeans? In our anxiety to make all men equal before the law, we must be especially careful not to appear to make some more equal than others. Second class courts for second class citizens are not on.

The biggest problem is one which has exercised my mind for many years. Debtors fall sharply into two categories, the good ones, who really intend to pay their debts, and the bad ones who don't. They are readily distinguishable by the extent of the co-operation they are prepared to give, but to draft legislation that is suitable to both is a near impossibility. The bad ones you see, are very bad. They dodge, they argue, they procrastinate. They confuse the accounts with lots of small payments fancied or real and gleefully point to tiny insolvent companies as scapegoats. Some ride on the backs of their creditors to the tune of tens of thousands of dollars. It is not an exaggeration to say that, like crime, a large proportion of debt is caused by a very small percentage of debtors. How

can the law distinguish between such people and the honest man who is pestered for a sum which is more than he can pay?

I have, of course, minor reservations, too, but of little importance. As an English lawyer, I shrink from facile comparison of our Magistrate's Court with the County Courts in England. I am not sure that the volume of cases justifies special legislation — 70,000 cases a year is not a very big percentage for a place the size of New York. I need hardly remind you that small claims are not necessarily easy claims — a long chain of cases from the Case of Thorns to the matter of ***Robinson v The Balmain New Ferry Co. Ltd.*** testify to that. And I sincerely hope that "store day" as it is called in the United States, with credit managers of big businesses getting hundreds of judgments by default, is never seen here.

Mr O'Flynn has however, done us all a very great service today. Whereas he has perhaps seemed to say "Let us get rid of lawyers, abolish the Court Rules and not worry too much about the law," he is really saying "Let us stand back and take a fresh look, not just at the law itself, nor even our system of justice, but at the whole pattern by which we regulate disputes between citizens. Let us produce new ideas if we can, rather than just rest easily upon the ideas handed down by our ancestors.

I am sorry that I have no new ideas of my own to offer — I have only one quite good old one. The ancient Romans who went to law were made to choose their own judge, and then accept his decision. Why cannot we do the same in trivial matters? We have an excellent panel of arbiters ready to hand in the Justices of the Peace. A litigant could go to the Court Office, fill in a form nominating any handy J.P. and send it to the defendant. A date and place could be arranged, at a private home or the site of the dispute, and the J.P.'s decision could be sent to the Magistrate's Court as a simple certificate. Enforcement could follow in the normal way unless further proceedings were taken. Such a system would avoid all the difficulties that I have enumerated. The man who appoints his own judge can hardly complain at that judge's decision. Class distinction could not enter into such a system: A Maori could insist on a Maori arbiter, a tradesman someone in his own trade. Best of all, the professional debtor would, for once, be placed at a heavy disadvantage. Every allegation he made could be examined on the spot, and he would be robbed of all excuse for absenting himself from the Court with a view to protracting the proceedings. Such a system would barely increase the present work load of our Magistrate's Courts, and might even decrease it. The system would be cheap, simple and I suggest, workable requiring a minimum of alteration to our present system. Whatever new system is introduced, it must, of course, fulfil these criteria as far as possible.

This, of course, is only an old idea, but you will all appreciate that once we can divorce our minds from existing patterns of thought a flood of new ideas will arrive. This country has always had the reputation of leading the world in social legislation, and it would be a sad thing for us to slavishly follow ideas which have not so far proved very successful in other countries. I sincerely hope that we will indeed think of something really new now that the need in this area seems to have been established.

I think that whatever new court or system is provided by the legislature, an avenue of appeal will have to be provided as well. In my experience, people

can get just as emotional, just as concerned and just as determined over small issues as over big ones. In any case, the average member of the community will not placidly accept a situation in which he is convinced that a mistake has been made and he is denied any chance of getting the matter put right; and the more informal the tribunal, the more there is a possibility of this sort of situation arising. All this is quite apart from the fact that the smallness of the stake does not necessarily govern the importance of the issue, as I mentioned before.

Lastly, I hope that whatever is done will achieve the general support of both our profession and the country at large. Much well-intentioned legislation has landed in this bunker. Just as the statute of uses became five words in a conveyance I submit that the well known "equity and good conscience" rule, the predecessor of the present propositions has fallen short here. Every practitioner knows that when a magistrate says "I will deal with this as a matter of equity and good conscience" he is really only saying "there will be no appeal from my decision" and the circumstances have usually said that for him, in that no-one in his right mind will push a $40 claim into the Supreme Court.

In Conclusion:

My thanks are due to Mr O'Flynn for an interesting informative and thought provoking paper which I sincerely hope will be the forerunner of something much more effective than a paper read before an audience and then forgotten.

COMMENTARY ON MR F.D. O'FLYNN'S PAPER

by
R.J. Smithies

I agree very largely with the paper by Mr O'Flynn and this is to be expected I think. Mr O'Flynn indicated he has read a good deal of the source material which has been collected by us. I believe anyone who reads that material will be drawn inevitably to the conclusion that we have come to, that small claims courts must lie in the future of all New Zealanders.

Mr Barker called for more statistics on the New Zealand situation. We at Consumers' Institute can give an answer on this point. We have nearly completed research into Magistrate's Court records in Auckland, Palmerston North, Christchurch, Wellington and Dunedin. This is a sample survey of about one in three small claims heard during 1971 in these courts. Small claims were defined as involving no more than $300. We are just beginning computer runs on the figures but the preliminary indications are that a relatively large number of small claims in the courts are taken by traders, institutions and professional people against individuals. It is a debt collecting operation.

Indications therefore are that consumers in New Zealand are not using the courts for the settlement of small claims. The question must then be asked: Does this simply mean they have no small claims? The answer must be a resounding "No". We at Consumers' Institute have been handling complaints for 14 years – many trivial or unjustified, but also many of them justified. A good many of the complaints which we feel are justified come to no conclusion because the trader will not meet what we believe are reasonable claims.

The indications are quite clear that New Zealanders do have small claims which deserve some remedy and that they are deterred from taking them through the courts, partly for economic reasons but also through nervousness about what is involved.

We handle thousands of complaints per year, but I do not want you to think a small claims court would be overburdened. At the beginning of last month we began a formal Complaints Advisory Service which we would expect to act as a screening procedure for small claims courts and to provide a referral system – in other words, the most difficult problems would be referred to the small claims courts.

We would continue to act in a mediatory way and sort out all of the complaints that can be resolved by getting the parties together and proposing a solution. Legal advice bureaux and welfare organisations could do something similar – handling the more straightforward complaints and referring more intractable ones to the small claims courts.

Another important point is this. A good deal of consumer legislation which is brought down is not properly enforced. Government Departments charged with administering certain legislation are not able to administer it more than passively. This is particularly so in outlying areas. They do not have the staff or even in some areas a district office. This means that in many quite straightforward matters where it should be simple to have the matter sorted

out, a complainant is told he should see a solicitor, and may have to go to court.

In such straightforward matters as interpreting (say) the repossession procedures in the Hire Purchase Act a consumer should not have to go to a solicitor. Here is another example of justice out of reach. Good legisaltion is on the books but it is not administered actively and we consider a small claims court would have an important role in spelling out clearly what is stated in legislation and getting the trader to fulfil his obligations.

Replying to Mr O'Flynn's Paper

1. That a small claims court must be limited to actions by individuals. We agree.
2. That the above principles must be relaxed for the small business man. There is merit in this, but there would be difficulty in deciding what sort of "small" businessman should be allowed to use the system,
3. That the advisory procedure be abandoned in favour of informal eliciting of the facts by the judge himself. We would strongly agree. The judge should be given wide powers to obtain whatever information he feels he needs.
4. That provision be made for informal inspection of documents, informal discussions, etc. We strongly agree – especially that the judge could have a preliminary chat with a timid or confused person rather than place that person immediately alongside a salesman who had overborne him in a sales situation.
5. There is probably a case also to allow a friend or relative or next door neighbour to appear even when he does not have the status of a witness to reassure a particularly timid or elderly complainant.
6. That there should be no default judgments. In Queensland if the trader doesn't appear judgment is given against him; if the complainant doesn't appear the case is dismissed. In either situation there is provision for a re-hearing if a good explanation is given for non-appearance.
7. That in a limited number of cases there be provision for instant justice. We would hope there would be instant justice wherever possible.
8. That the small claims courts should go on circuit. We would agree. We would envisage four, operating from the main centres.
9. That there should be no right of appeal or a very limited right of appeal when really important questions of law arise. We think the rider is important. Because there may be a queue of complaints, a firm could go out of business on a fine legal point if there is no right of appeal.
10. That the informal procedure should allow the judge to obtain expert help. Yes, we would agree. We would favour the obtaining of a written opinion by an independent expert and the presentation of this before the judge. We do this quite frequently ourselves. In the work that we do we often get a second opinion. We might get the opinion of a skin specialist to comment on the scalp of someone complaining about the ineffectiveness of $180 worth of baldness treatment. Or a motor expert re faults in a motor car. Or a building expert in the case of failure with a relatively new house. The question of who pays for the expert opinion will need a lot of consideration.

We would not go along with Mr O'Flynn's suggestion that existing Magistrate's Court rooms should be used, because we think the set-up should be as informal as possible. An office would be a better bet.

There's been a lot of discussion about who should be the judge (or referee) in the small claims court. We wouldn't necessarily envisage someone stepping down off the bench to do the job. Rather, the small claims courts might be a training ground for the magistracy. This might cover one of the points raised by Mr Ludbrook.

We would be adamant that the judge should be a legally trained person. It is our experience that by far the great majority of complaints that come to us in Consumers' Institute involve legal points. We think the judge must have legal experience.

Finally, I would hope that there would be a great deal of talk and discussion in the community on this subject. It's important not to be inflexible in our views. We should consider all possible variations of the basic idea. But in general we at Consumers' Institute would agree with the picture as laid down by Mr O'Flynn.