Access to justice: the English experience with small claims

The simplified procedures of the English small claims system permit legal redress in situations where formal litigation would be too costly. But while the procedures offer access to justice, they also illustrate the difficulties that informal dispute resolution mechanisms can pose.

Small claims procedures provide a mechanism by which legal disputes involving small sums of money can be resolved without disproportionate expense. In most small claims proceedings, hearings are much more informal than in traditional civil court hearings. An “interventionist” adjudicator is expected to help the parties present their cases, and there is little or no legal representation.

These proceedings provide a rough-and-ready brand of justice, where laypersons commonly assume sole responsibility not only for preparing their cases but also for presenting them in court. Adjudicators, meanwhile, have wide latitude in the methods they use. Indeed, in England adjudicators are allowed to use whatever method of proceeding at a hearing they consider to be fair.

England and Wales introduced small claims procedures in 1973. For the first 20 years of small claims, the official approach was decidedly modest. A specialized small claims court, as exists in some other countries, was not established. Instead the procedures were grafted onto the existing county court structure, with proceedings conducted in judges’ chambers rather than in formal courtrooms. The small claims limit was set in 1973 at £75 ($175), a very low level, and raised on four occasions in the next 20 years to keep pace with inflation.

By the mid-1990s the limit stood at £1,000 ($1,600).

But in recent years the position of small claims within the English civil justice system has been transformed. It has moved out of the backwaters and now provides the dominant method by which the courts resolve contested civil actions. This fundamental shift began in 1996, when the limit on small claims was tripled. That decision followed an inquiry into the civil justice system by Lord Woolf, one of England’s most senior judges, who argued that it would enhance access to civil courts. The government agreed, perhaps mindful that this move would also keep in check spending on legal aid. In 1998 the limit was raised again, to £5,000 ($8,300). At this level, England’s small claims limit is among the highest in the world.

England’s experience shows the potential of small claims procedures in expanding access to justice. While such informal mechanisms may not provide the refined procedures one expects in a formal court system, without them many otherwise meritorious claims could go unresolved. Thus policymakers in developing countries may wish to consider whether introducing informal mechanisms like small claims procedures, within or outside the formal court structure, would enhance their citizens’ access to justice.
Most lay litigants favor informal hearings over formal court processes.

Advantages of small claims procedures
Small claims procedures have many advantages over traditional civil litigation. First, losing parties are not required to pay the costs of the winning parties. In England, as in most countries, the prevailing party in a civil lawsuit is generally entitled to reimbursement for expenses incurred during the course of the litigation. Because this includes attorney fees, an award of costs can prove financially ruinous, even when the sums at issue are relatively small. Research in England shows that removing the threat of having to pay costs makes an enormous difference to litigants’ perceptions of legal proceedings.

Second, based on interviews with several hundred litigants, it appears that most lay litigants favor informal hearings over formal court processes in civil courts (table 1). The average litigant in England makes no demand for a refined brand of justice. Instead, people are more likely to be satisfied with court decisions if they can understand them, if they accept that they have been made by an independent and authoritative adjudicator, and if they feel that they have been able to participate effectively in proceedings. In marked contrast to traditional court procedures, the small claims system can be said to score highly on these measures.

Third, most district judges who hear small claims cases appear to be willing and able to adapt to the spirit of informality required at such hearings. Observations of civil courts throughout England and Wales show that most judges know how to intervene effectively, how to put laypersons at ease, and how to encourage them to present their cases intelligibly and to good effect. Most judges seemed to enjoy the immediacy of the occasion and to relish having to deal directly with lay parties.

Problems with small claims procedures
These results suggest that England’s small claims procedures are working remarkably well. They also give the impression that English judges have succeeded in providing a standard of justice acceptable to most litigants. While both points are largely true, the success of small claims courts in England should not obscure some unresolved problems with them.

Inadequate preliminary legal advice
However informal they might be, small claims hearings are still legal proceedings. Although some English judges say that in small claims they will occasionally turn a blind eye to the law in the interests of “doing justice,” there is nonetheless a requirement that legal principles be applied in resolving these claims. That means that small claims litigants need an assurance before the hearing that their cases have legal validity.

They cannot, however, be expected to know this unaided—or indeed, to know how they should go about establishing a legal claim (or a defense) or arguing a legal case in court. Lay litigants frequently arrive in court empty-handed and fail to bring relevant evidence and witnesses (or indeed, anything at all) to hearings. Litigants need preliminary advice, provided at reasonable cost, about whether their case is likely to stand up in court.

Wide variations in judges’ approaches
Given the great latitude granted to judges in resolving small claims, it is no surprise that judges adopt very different approaches and methods. Some judges say that they “go for the jugular” at hearings, requiring the parties to restrict themselves to the key legal issues. Other judges allow the parties to present their cases in any way they wish. Still others seek mediated settlements between the parties.

Judges interviewed also expressed different attitudes about how much they felt bound to apply the ordinary law in small claims. Yet if consistency and certainty are fundamental requirements in a civilized system of judicial administration, it cannot be right that judges, sometimes in adjacent courtrooms, adopt such disparate approaches.
Undefined role of lawyers
The appropriate role for lawyers in informal hearings like small claims is unclear in England and remains problematic. Many judges do not welcome the participation of legal representatives because it inhibits them from playing an interventionist role. This is particularly so in cases where one of the parties is represented and the other is not.

Again, the approach of judges varies widely. Some allow lawyers to play a full part in hearings, while others sideline them, addressing questions directly to the parties. With the dramatic rise in the small claims limit in England, legal representation is becoming more common. Thus further thought needs to be given to defining the role of lawyers.

Ineffective enforcement of judgments
Many jurisdictions have experienced serious problems in the enforcement of civil judgments—and small claims in England are no exception. Only about one-third of successful small claims plaintiffs received the payment ordered by the court on time. Most had to take further action (and incur additional expense) to secure payment. One-third received nothing at all.

Plaintiffs in civil actions involving more formal court procedures fared little better. Although a committee has been appointed in England to examine these problems, they will not be easy to overcome. More than any other factor, ineffective enforcement procedures undermine the credibility and integrity of civil courts.

Access to justice
The litmus test of any civil justice system is whether it provides the average citizen, facing simple everyday legal disputes, with mechanisms through which he or she is able to secure redress. Considerable progress has been made in England and Wales, and in many other countries, in providing access to civil courts to those involved in such disputes. Adaptations to traditional litigation procedures seem largely to have succeeded in allowing laypersons to present their cases in a satisfactory and competent manner.

But small claims procedures are not infinitely elastic, and their use should not be hastily expanded in place of formal court proceedings. Small claims procedures, entailing do-it-yourself representation, provide “bargain basement” justice. Although this might be appropriate and acceptable for a limited range of disputes involving small sums of money, applying the procedures in inappropriate circumstances—as where large sums of money are at stake or complex legal points arise—runs the serious risk of producing unjust results.

If greater access to justice is the objective, the key is to design a civil justice system that provides costs and procedures that are realistic and proportionate to the issue in dispute. Calls from legal purists for an unrealistic level of legal refinement should be ignored, as they will restrict access to the courts to the wealthy. For most lay litigants, the alternative to cut-price solutions is not Rolls Royce justice: it is no access to justice at all.

The use of small claims procedures should not be hastily expanded

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Table 1 Responses of English litigants involved in formal trials to possibility of more informal procedures

<table>
<thead>
<tr>
<th>Response to the suggestion</th>
<th>Number</th>
<th>Percentage</th>
</tr>
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<tbody>
<tr>
<td>Enthusiastic</td>
<td>86</td>
<td>52</td>
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<tr>
<td>Sympathetic</td>
<td>43</td>
<td>26</td>
</tr>
<tr>
<td>Lukewarm or equivocal</td>
<td>18</td>
<td>11</td>
</tr>
<tr>
<td>Opposed</td>
<td>17</td>
<td>10</td>
</tr>
<tr>
<td>Unknown or no view expressed</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>178</td>
<td></td>
</tr>
</tbody>
</table>

a. Percentage of those with an opinion.

Source: Baldwin 1997a.
Further reading


This note was written by John Baldwin (Director, Institute of Judicial Administration, University of Birmingham, England).

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