Some desirable features of lower court systems to verify and enforce civil obligations

Andrew James Cannon
University of Wollongong
NOTE

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APPENDIX 2.A
Please see print copy for image
Source Court Statistics as interpreted by Richter Czerny 1999.
APPENDIX 3.A

Mediation:
an outlook on the conduct of mediation within South Australia

The survey questionnaire was developed and distributed in conjunction with the author by Matthew Gooley and the results collated by Gavin Ku. They were final year law students.

I. Background

The use of Alternate Dispute Resolutions (ADR) creates a great benefit to the principles of court Case Flow Management. Considering more than 95% of actions instituted in the court system settle before reaching actual litigation, it can be seen that there is much room for ADR to operate. The topic of this project focuses more directly on mediation.

The philosophy behind mediation is simple. While litigation concentrates on the past (past facts, past aggravations, who did what and how), mediation focuses more on the present and future (how to solve the problem). It derives an agreed solution, rather than an imposed solution which litigation can only offer. More importantly, for the purposes of Case Flow Management, mediation redirects actions away from litigation, filtering out those actions which can be readily solved outside the Court system and thus easing the stream of cases headed for trial.

II. Objectives

The purpose of this investigation is to gain a clearer perception of the effectiveness of ADR, particularly mediation, in diverting disputes away from litigation. It is intended by this project to discover:
1. The amount of mediation that is conducted within South Australia
2. The types of disputes most commonly inclined to mediation
3. The most common users of mediation
4. The percentage of mediation that could have gone to litigation.

III. Process

In order to effectively provide a clear perspective on the conduct of mediation within South Australia, data was collected primarily through surveys which were issued to a number of organisations. These organisations were identified as being predominate
participants in the practice of mediation within the state - not including the Magistrates Court. A duplicate copy of the survey which was issued is annexed. The organisations contacted for participation in this survey is also annexed.

These surveys were issued from 2nd April 1998. Many replies were received not long after this date and continued to be received for at least 3 months thereafter. In September 1998, the results from the responses of the survey were tallied up and a preliminary conclusion was attained. This mainly consisted of just numbers and figures. Later, these results were brought together to form a summary analysis which is attached.
**Analysis of Results**

Of the 60 questionnaires sent out to the participants, the following is a break down of results attained.

### I. Responses

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive responses</td>
<td>29</td>
</tr>
<tr>
<td>Negative responses</td>
<td>17</td>
</tr>
<tr>
<td>Not at address</td>
<td>5</td>
</tr>
<tr>
<td>Non-returned responses</td>
<td>9</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>60</strong></td>
</tr>
</tbody>
</table>

1. **Positive responses**: Replies that contained information which could effectively be used for analysis. These 29 positive replies represent a 48.3% positive response rate.

2. **Negative responses**: Replies which have not been properly filled out and could not be effectively used for analysis. Of these 17 negative replies reasons given were -

   - Have not been given referrals to conduct mediation: 10
   - No longer provide mediation service: 4
   - Cannot provide figures for mediation: 1
   - No reason: 2

   **Total**: 17

The following results are taken from the 29 positive replies.

### II. Number of mediation / mediators

1. **Total number of mediators**: **104**

   It should be noted that of these 104 mediators, a large bulk of them come from the:

   - (a) *Family Conference Team (FCT)* of the Magistrates Court: 9
   - (b) *Office of Consumer and Business Affairs (OCBA)*: 26
2. Number of mediations conducted on average per year: **6,336** \( [4,836 \text{ (excluding FCT)}] \)

Note: 

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>FCT</td>
<td>1,500</td>
<td></td>
</tr>
<tr>
<td>OCBA</td>
<td>3,300</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>4,800</td>
<td>(which is more than 75% of the total)</td>
</tr>
</tbody>
</table>

3. Number of mediations conducted per mediator per year: **60.9**

Note: 

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>FCT</td>
<td>166.6</td>
<td></td>
</tr>
<tr>
<td>OCBA</td>
<td>126.9</td>
<td></td>
</tr>
<tr>
<td>Others</td>
<td>22.3</td>
<td></td>
</tr>
</tbody>
</table>

This indicates that the majority of mediation activity is being conducted by only 2 dominant participants - the FCT and the OCBA. The remaining participants fall well below the average rate of mediation conducted per year.

4. Percentage of mediation settled: **69.9%** (average)

5. Percentage of mediation which were possible court litigation matters: **74.6%** (average)

### III. Types of Clients

The following table shows the types of clients using the mediation services.

**Table A**

<table>
<thead>
<tr>
<th>Types of Clients</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private persons</td>
<td>12</td>
</tr>
<tr>
<td>Business persons</td>
<td>12</td>
</tr>
<tr>
<td>Corporations</td>
<td>10</td>
</tr>
<tr>
<td>Lawyers</td>
<td>4</td>
</tr>
<tr>
<td>Local Government Institutions</td>
<td>3</td>
</tr>
<tr>
<td>Referrals based</td>
<td>2</td>
</tr>
<tr>
<td>Universities</td>
<td>2</td>
</tr>
<tr>
<td>Employment organisations</td>
<td>2</td>
</tr>
<tr>
<td>Higher education authorities</td>
<td>2</td>
</tr>
<tr>
<td>Separating couples</td>
<td>2</td>
</tr>
<tr>
<td>Consumers</td>
<td>2</td>
</tr>
<tr>
<td>Accountants</td>
<td>1</td>
</tr>
<tr>
<td>General community</td>
<td>1</td>
</tr>
<tr>
<td>Liquidators / Receivers</td>
<td>1</td>
</tr>
<tr>
<td>Hospitals</td>
<td>1</td>
</tr>
<tr>
<td>Small business traders</td>
<td>1</td>
</tr>
</tbody>
</table>
The following table shows the number of organisations who specified types of mediation disputes settled which were potential court litigation matters.

### Table B

<table>
<thead>
<tr>
<th>Category</th>
<th>Count</th>
<th>Dispute Type</th>
<th>Count</th>
<th>Other Type</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family (property &amp; child)</td>
<td>8</td>
<td>Copyright disputes</td>
<td>2</td>
<td>Administrative</td>
<td>1</td>
</tr>
<tr>
<td>Contract</td>
<td>5</td>
<td>Superannuation disputes</td>
<td>2</td>
<td>Debt claims</td>
<td>1</td>
</tr>
<tr>
<td>Employment disputes</td>
<td>4</td>
<td>Partnerships</td>
<td>2</td>
<td>Workers compensation</td>
<td>1</td>
</tr>
<tr>
<td>Consumer disputes</td>
<td>4</td>
<td>Negligence</td>
<td>2</td>
<td>Defamation</td>
<td>1</td>
</tr>
<tr>
<td>Commercial</td>
<td>3</td>
<td>Equal opportunities</td>
<td>2</td>
<td>Neighbourhood disputes</td>
<td>1</td>
</tr>
<tr>
<td>Child abuse</td>
<td>2</td>
<td>Building disputes</td>
<td>2</td>
<td>Sexual Harassment</td>
<td>1</td>
</tr>
<tr>
<td>Property</td>
<td>2</td>
<td>Environmental</td>
<td>1</td>
<td>Racism</td>
<td>1</td>
</tr>
</tbody>
</table>
V. Areas Practiced by Mediators

Of the positive responses given, the following table shows the main areas in which those participants specialised. It should be noted that all participants gave more than one area of specialisation in their responses.

Table C

<table>
<thead>
<tr>
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<th></th>
<th></th>
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<tbody>
<tr>
<td>Aboriginal issues</td>
<td>1</td>
<td>6</td>
<td>14</td>
<td>7</td>
<td></td>
<td>9</td>
<td>5</td>
<td>6</td>
<td></td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>Accountancy</td>
<td>6</td>
<td>5</td>
<td>3</td>
<td>1</td>
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<td>14</td>
<td>5</td>
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<tr>
<td>Architecture</td>
<td>1</td>
<td>9</td>
<td>7</td>
<td>3</td>
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<td></td>
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</tr>
<tr>
<td>Arts &amp; Entertainment</td>
<td>1</td>
<td>7</td>
<td>8</td>
<td>8</td>
<td></td>
<td>3</td>
<td></td>
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<tr>
<td>Banking</td>
<td>7</td>
<td>11</td>
<td>6</td>
<td>6</td>
<td></td>
<td>3</td>
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<td></td>
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<tr>
<td>Bankruptcy</td>
<td>5</td>
<td>8</td>
<td>4</td>
<td>9</td>
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<td>8</td>
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<td></td>
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<tr>
<td>Building</td>
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<td>4</td>
<td>3</td>
<td>9</td>
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<td></td>
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<td></td>
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</tr>
<tr>
<td>Business Purchase/Sale</td>
<td>9</td>
<td>3</td>
<td>5</td>
<td>5</td>
<td></td>
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<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Civil</td>
<td>11</td>
<td>Industrial Relations</td>
<td>10</td>
<td>Resources</td>
<td>3</td>
<td></td>
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</tr>
<tr>
<td>Commercial</td>
<td>15</td>
<td>Info Technology</td>
<td>4</td>
<td>Securities &amp; Guarantees</td>
<td>6</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Common Law</td>
<td>9</td>
<td>Insolvency</td>
<td>6</td>
<td>Sports Law</td>
<td>4</td>
<td></td>
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<td></td>
<td></td>
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<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Construction</td>
<td>12</td>
<td>Insurance</td>
<td>9</td>
<td>Small Business</td>
<td>12</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consumer/Fair Trading</td>
<td>10</td>
<td>Intellectual Property</td>
<td>7</td>
<td>Succession</td>
<td>6</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contract</td>
<td>11</td>
<td>Landlord/Tenant</td>
<td>10</td>
<td>Superannuation</td>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conveyancing</td>
<td>6</td>
<td>Local Government</td>
<td>5</td>
<td>Taxation</td>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Copyright</td>
<td>3</td>
<td>Maritime</td>
<td>2</td>
<td>Testators Family</td>
<td>8</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corporate</td>
<td>8</td>
<td>Media &amp; Communications</td>
<td>5</td>
<td>Maintenance</td>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Criminal</td>
<td>3</td>
<td>Medical</td>
<td>6</td>
<td>Tort</td>
<td>9</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deceased Estates</td>
<td>8</td>
<td>Medical Negligence</td>
<td>6</td>
<td>Tourism</td>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defamation</td>
<td>4</td>
<td>Medico Legal</td>
<td>8</td>
<td>Trade Practices</td>
<td>9</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discrimination</td>
<td>9</td>
<td>Mining</td>
<td>2</td>
<td>Workers Compensation</td>
<td>8</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
VI. Summary

From this survey conducted, the following conclusions can be drawn:

1. Firstly, it can be seen that a significant portion of mediation conducted per year within the state is contributed by OCBA. Taking their contributions out of the total figure, along with family disputes by the FCT, the remaining number of mediation conducted by the rest of the state only represents 25% of the total.

2. The number of mediations conducted per mediator per year is staggeringly higher in the OCBA and the FCT. This indicates that other mediators within the state do not conduct mediation on a full time basis. A figure of 19.4 conducted mediations per mediator per year represents less than 2 conducted mediations per month.

3. Table A points out that the most common users of mediation are private and business persons. Large corporations also show significant interest in the mediation process. Other users however, do not indicate any real commitment towards the process.
4. Table B suggests that the most prominent form of dispute which is saved from litigation is family disputes over property and children. This, along with contract or debt disputes, show a greater tendency to be successfully negotiated under mediation.

5. Lastly, Table C indicates that the main areas of practice by mediators involves business related disputes. This may include franchising, insolvency, contract, corporate etc. This area of specialisation is closely followed by employment and building disputes.
APPENDIX 4.A

Mahnverfahren

This procedure can be done electronically or by a self-inking form as follows. The translation is for understanding and is not verbatim.

The form is comprised of a covering sheet with instructions to the applicant on how to fill it in (in more detail than translated and recorded next) and then an original and four carbon copies.

The first is the application to the court.

The second is the final notice (Mahnbescheid) with advice by the court to the opponent on the back.

The third is notification of service to the applicant and, if no response is received, is the application for an enforceable payment order (Vollstreckungsbescheid).

The fourth is notification to the applicant that the enforceable payment order has been served.

The fifth is notification to the opponent of the enforceable payment order with a further advice by the court to the opponent on the back.
CHOICE SHEET  

FORM FOR A DEFAULT JUDGMENT AND PAYMENT ORDER

This is for Courts that do not have an automated system.

In default proceedings before a Court it is easy and simple for you to obtain a payment order with regards to a demand for money where no objection to the demand for money from the opposing party is expected. Before you apply for a default judgment you should check whether you have declared your demand to the opposing party in a clear and clearly set out form. Give a prior notice if you have not already, otherwise the other party may be able to object to your default application on the basis that they have not received proper notice of what money is owing for what services or goods.

Just note that there is a distinction between main demands and lesser demands as set out in .5. Examples of main demands are repairs in accordance with invoice of such and such a date, rent for apartment, address given, damages from motor vehicle accident occurring on such and such a date at such and such a place, etceteras. Lesser demands are, for example, interest. In .2 it is pointed out the need to clarify the proper address of the defendant and whether it is a firm or a company.

.8 is the cost of the proceedings

<table>
<thead>
<tr>
<th>Amount of Claim - DM</th>
<th>Court Fee</th>
<th>Amount of Claim - DM</th>
<th>Court Fee</th>
<th>Amount of Claim - DM</th>
<th>Court Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>600</td>
<td>25,-</td>
<td>8000</td>
<td>102,50</td>
<td>30000</td>
<td>237,50</td>
</tr>
<tr>
<td>1200</td>
<td>35,-</td>
<td>9000</td>
<td>110,-</td>
<td>35000</td>
<td>260,-</td>
</tr>
<tr>
<td>1800</td>
<td>45,-</td>
<td>10000</td>
<td>117,50</td>
<td>40000</td>
<td>282,50</td>
</tr>
<tr>
<td>2400</td>
<td>55,-</td>
<td>12000</td>
<td>132,50</td>
<td>45000</td>
<td>305,-</td>
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<td>162,50</td>
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</tr>
<tr>
<td>5000</td>
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<td>18000</td>
<td>177,50</td>
<td>over</td>
<td>over 50000</td>
</tr>
<tr>
<td>6000</td>
<td>87,50</td>
<td>20000</td>
<td>192,50</td>
<td>50000</td>
<td>see the court</td>
</tr>
<tr>
<td>7000</td>
<td>95,-</td>
<td>25000</td>
<td>215,-</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Valid from 1.1.95

Disputes over money amounts of DM10,000 or less, rental disputes for domestic rents and alimony - query whether includes both child and wife are in Amtsgericht. Everything else go to the Landgericht. The court must be the court nearest to the defendant’s residence or place of business.
This application is addressed to the

(Note - There are two copies of this. The second copy is for service. It has the "Advice by Court" on the back of it.)
A copy of this form with warnings to the opponent on the back basically in the terms reproduced on the last page (the warnings on the back of the ‘Vollstreckungsbescheid’ - enforceable payment order) is served on the opponent.

On the third page is a second yellow copy of this form with minor adaptations. This is a notification to the applicant that the Mahnbescheid has been served on the opponent. It advises the applicant of the date when it was sent and tells him or her to check after two weeks whether the payment has been made.

It says:

‘If this is not the case or no objection has been raised, you can apply for the issue of a Vollstreckungsbescheid’ (enforceable payment order).
Please see print copy for images
Please see print copy for images
Editor’s note: Some colour graphs and pie charts have been omitted for ease of printing. The text and tables are Nick Clark’s work. Dollar amounts are in Australian dollars.
The Effectiveness of the Debt Recovery Mechanism in the Magistrates Court

INTRODUCTION

"If the extension of credit is the lifeblood of the dynamic commercial society, the forcible collection of unpaid debts is its backbone"^1

There are literally thousands of summons issued in the Magistrates Court each year by creditors trying to recover money owed to them. Some of these summons are in respect of debts incurred in carrying on a business, while others arise from the extension of credit for individual needs. Whatever the nature of the original transactions there are numerous factors which give rise to serious and prolonged default in payment of debts^2.

It should be borne in mind that although the ultimate recovery rate is high, considerable loss and expense is suffered by creditors in the collection of delinquent accounts, just as public resources are involved in related legal proceedings. A reduction in the rates of debt default would ultimately benefit us all^3.

This essay will consider the effectiveness of the Debt recovery process in the Adelaide Magistrates Court by analysis of 51 cases conducted on the 8th August 1999. This was a relatively "typical" sample class and was arbitrarily chosen. The essay will further endeavour to provide possible improvements to the process currently utilised.

The Process

At the Adelaide Magistrates Court there are 6 main ways in which the Court can require the debtor to pay once judgement has been entered for the creditor.

1. **Investigation and Examination Summons**

   An Investigation Summons requires the debtor to attend court to answer questions about how the debt will be paid, failure to attend this summons leads to

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^2 As above at 4,
^3 Australian Law Reform Commission, "Debt recovery and insolvency" discussion paper 6, 1978 at 4
an issue of warrant for arrest. A witness summons can require a director of a company debtor to explain its affairs. If payment of the debt either in whole or in instalments is ordered but not made upon request by a creditor the court will require the debtor to attend an examination summons to explain why payment has not been forthcoming. Instalment orders have the open purpose of ensuring payment at a rate which can be afforded by the debtor.

2. **Warrant of Sale**

The Magistrates Court has the power to authorise the seizure and sale of the debtor's property, this can encompass real estate and or personal property, but excludes necessary furniture, personal effects or cars valued under $5000.

3. **Garnishee Order**

This is an order to the debtor to directly pay the money to the creditor. Wages can only be used with the consent of the debtor.

4. **Charging Order**

This is an order which is analogous to a mortgage in that it restricts you dealing with your property. The Court can further order the sale of this property to pay the creditor.

5. **Appointment of a Receiver**

The Magistrates Court has the capacity to appoint a receiver to sell the debtor's property or business.

6. **Bankruptcy**

If more than $2000 is owed the creditor can issue bankruptcy proceedings in the Federal Court. This may also be taken voluntarily by the debtor.

Mary Cain identifies four reasons plaintiffs identified for taking cases to court:

1. Point of principle
2. To gain redress in the specific case
3. To get money back insofar as this is cost-effective otherwise to write off
4. To deter other potential debtors

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The general deterrence argument was one of the main reasons plaintiffs took their cases to court. It was fear from large players that if they did not take action word would escalate leading to an increase in defaulting.

The majority of debts are collected outside the courts. If they were all enforced through the courts the legal system would collapse. It is in the interest of the legal system that the bulk of debt recovery work is conducted by creditors themselves or by debt collection agents. Threats to sue are crucial to its operation. Central to the threats is the risk of the secondary punishment which is a consequence of the court based methods of obtaining and enforcement such as the embarrassment and interference with employment. Hazlett argues that debt recovery at present is largely uncontested - the reasons for this include the courts atmosphere and working hours, difficulty in understanding and completing required forms, lack of records of transactions, ignorance of legal rights and the costs of defending a legal action.

The process of obtaining a court judgement that a debt is due is usually automatic. The claimant states the sum due and if the defendant does not defend the claim, judgement is entered for the amount claimed. There is no hearing and the claimant need not attend court.

Case Study
The first case I decided to analyse in determining debt recovery effectiveness was a conflict between the Advertiser Newspapers and a private individual, who for convenience and anonymity will be called X. As with most debt recovery proceedings the Advertiser were legally represented while the debtor, X was unrepresented. The Originating Claim was lodged on the 17th of February 1995 for the value of $1137. As can be seen from figure 1 this is lower than the average originating claim of approximately $2500.

However the figure of $1137 soon increases when the legal proceedings are initiated. A court fee of $45 is added along with $134 for the practitioners fee and $10 for the service fee, this increases the debt to $1326. The first investigation summons was

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6 Hazlett, *The Recovery of small debts* (Monash University) at 813
held on the 4th of May 1995 with the debt rising to $1385 following the addition of issue, service and practitioners fees. X did not attend the Investigation summons so the Court issued a warrant for arrest. Once again execution and practitioners fees were added to the debt increasing it to $1447. On the 17th May 1995 X made a $50 payment to the debt. Following default in payment an examination hearing was set down for the 28th September 1995. Once again there was no appearance by X and a warrant was issued. The debt had now escalated to $1520. On the 18th of October 1995 X appeared in custody and promptly made a $50 payment thus revoking the warrant. Thereafter X made 4 monthly payments of $50 before defaulting once again. An examination summons was set down for 31st May 1996. As occurred on the previous occasions X did not appear and a warrant was issued. This time a $100 payment was made by X, once again this was only forthcoming following the threat of imprisonment. A further warrant was issued on the 10 July 1996, a further $100 was paid before once again defaulting from payment. On the 15 January 1997 an Investigation summons was set however the summons could not be served as X had changed addresses. On the 3rd February the summons was reissued, without success before being re-issued for a second time on 15 April 1997. On the 28 April 1997 the Investigation summons took place and as occurred in every previous instance X did not attend and a warrant was issued. Once again X paid $100 towards the debt before expectantly defaulting. A further examination summons was issued on the 17th November 1997, before being re-issued on 23rd April 1998. The outcome of this proceeding was that X would be committed to prison for 10 days. This had the most profound impact on the repayment of the debt with X making a payment of $760. Again default on the rest of the payment occurred and a further warrant was executed on 8th December 1998. The most recent examination summons occurred on 21 May 1999 where X did not appear and a warrant was issued.

Although this was one of the more severe cases of default in debt repayment it is certainly not an isolated case, and is a relatively common occurrence in the Magistrates Court. Out of the 51 cases I studied there were three other cases in which the Originating Claim was initiated in the same year as this case study or earlier. It seems ludicrous to think that the creditors in these cases are still waiting for the payment of their money for 6 years in the most extreme of cases – this is obviously
not an acceptable result. In analysing the case it seems that X had a flagrant disregard for the process, exhibited by the non-attendance at every investigation or examination summons – 11 in total. These summons play a crucial role in eliciting information from the debtor about his or her assets so as to assist the creditor in deciding how to enforce the debt. It is obvious X did not appreciate the importance of these summons. A mechanism needs to be implemented to instil in debtors the requirement that they must attend court to prevent a warrant being issued.

In the study above it would seem X could be classified as a persistent, elusive ‘hardcore’ professional debtor. Perhaps a program could be established to recognise and target such persistent debtors – ascertained by appearance an arbitrary number of examination or investigation summons, perhaps greater than 5. These people would be suitable for debt counselling and assistance. If X was to be made aware that from his initial debt of $1137 he has paid $1160 – enough to extinguish the debt, he may be less inclined to default in the future. One must note he is still required to pay $795. It seems X is of the opinion if he forgets about the debt it may go away. It must be made blatantly obvious to debtors that as soon as the matter goes to court the size of the debt grows, with every summons and warrant fees are added to the amount claimed, thus X who has paid more than the original amount of the debt still owes nearly 70% of the originating claim. I think X would be surprised to learn that he has already accrued more than the originating claim in fees, some $1230. It needs to be stressed to X and others that it would have been so much easier and more cost-effective to have paid the debt before the matter went to court.

In the following pages I will discuss the disquiet with many writers stating that imprisoning debtors is out of all proportion to the debt which gives rise to imprisonment and has the effect of making it more difficult for the debtor to meet present or future debts. They further argue that it is self-defeating in that it prevents the debtor from earning income while in jail and can harm long term employment. Despite these arguments the above case study shows just how important imprisonment is as a powerful incentive to ensure that this debt is paid first regardless of the needs of the debtor. X was only forthcoming in making repayments when warrants for arrest were issued. It was obvious that while the summons were
completely ineffectual the threat of imprisonment was the only factor which lead to X complying with orders, if only for a limited time. One can see that the largest payment of $760 was made following an order to be committed to prison for 10 days. When one looks at this case it is difficult to reconcile the arguments raised above about the self-defeating nature of imprisonment. In the majority of cases I would concur that it may be too harsh a remedy however in the more extreme cases it would seem to be paramount, if only for its deterrent effect. However despite this Magistrates seem most reluctant to make any orders which will result in debtors going to prison, making a practice of ignoring summonses, judgements and requirements to attend oral examinations a regular occurrence. Magistrates must evaluate the type of debtor they have before them, are they repeat offenders who regularly fail to attend summons? If so orders for imprisonment may need to be more openly considered as a viable option.

Table 4B.1: One day’s debtors analysed by age and repayment

<table>
<thead>
<tr>
<th>Date of Orig.Claim</th>
<th>Date I-Summons</th>
<th>Amount of Original Debt</th>
<th>Present Value of Debt</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/05/94</td>
<td>4/08/94</td>
<td>$376</td>
<td>$543</td>
</tr>
<tr>
<td>17/02/95</td>
<td>29/03/95</td>
<td>$1,137</td>
<td>$795</td>
</tr>
<tr>
<td>24/09/98</td>
<td>21/05/99</td>
<td>$10,685</td>
<td>$9,391</td>
</tr>
<tr>
<td>9/03/99</td>
<td>21/05/99</td>
<td>$2,074</td>
<td>$2,173</td>
</tr>
<tr>
<td>19/08/97</td>
<td>13/10/97</td>
<td>$376</td>
<td>$683</td>
</tr>
<tr>
<td>24/03/99</td>
<td>21/05/99</td>
<td>$583</td>
<td>$233</td>
</tr>
<tr>
<td>25/11/96</td>
<td>19/03/97</td>
<td>$381</td>
<td>$640</td>
</tr>
<tr>
<td>11/02/98</td>
<td>6/05/98</td>
<td>$5,053</td>
<td>$5,194</td>
</tr>
<tr>
<td>8/04/99</td>
<td>12/05/99</td>
<td>$2,843</td>
<td>$2,843</td>
</tr>
<tr>
<td>30/01/96</td>
<td>4/08/97</td>
<td>$2,600</td>
<td>$3,115</td>
</tr>
<tr>
<td>8/07/98</td>
<td>18/09/98</td>
<td>$3,607</td>
<td>$3,880</td>
</tr>
<tr>
<td>26/02/98</td>
<td>19/06/98</td>
<td>$1,035</td>
<td>$1,410</td>
</tr>
<tr>
<td>9/10/98</td>
<td>21/05/99</td>
<td>$1,520</td>
<td>$1,582</td>
</tr>
<tr>
<td>17/07/95</td>
<td>6/09/96</td>
<td>$5,590</td>
<td>$6,240</td>
</tr>
<tr>
<td>1/04/99</td>
<td>21/05/99</td>
<td>$719</td>
<td>$776</td>
</tr>
<tr>
<td>9/07/98</td>
<td>9/09/98</td>
<td>$4,841</td>
<td>$5,156</td>
</tr>
<tr>
<td>29/03/99</td>
<td>21/05/99</td>
<td>$597</td>
<td>$654</td>
</tr>
<tr>
<td>24/09/98</td>
<td>7/04/99</td>
<td>$1,198</td>
<td>$877</td>
</tr>
<tr>
<td>27/10/94</td>
<td>20/05/99</td>
<td>$1,082</td>
<td>$739</td>
</tr>
<tr>
<td>15/01/99</td>
<td>17/03/99</td>
<td>$366</td>
<td>$366</td>
</tr>
<tr>
<td>18/03/99</td>
<td>21/05/99</td>
<td>$2,688</td>
<td>$2,878</td>
</tr>
<tr>
<td>10/03/99</td>
<td>23/04/99</td>
<td>$1,041</td>
<td>$1,041</td>
</tr>
<tr>
<td>11/12/97</td>
<td>7/04/98</td>
<td>$1,038</td>
<td>$301</td>
</tr>
<tr>
<td>12/05/98</td>
<td>26/06/98</td>
<td>$442</td>
<td>$289</td>
</tr>
<tr>
<td>29/03/99</td>
<td>21/05/99</td>
<td>$423</td>
<td>$475</td>
</tr>
<tr>
<td>Date of Originating Claim</td>
<td>Date of Investigation Summon</td>
<td>Original Debt</td>
<td>Present Debt</td>
</tr>
<tr>
<td>--------------------------</td>
<td>-------------------------------</td>
<td>--------------</td>
<td>--------------</td>
</tr>
<tr>
<td>10/11/98</td>
<td>19/01/99</td>
<td>$2,262</td>
<td>$2,377</td>
</tr>
<tr>
<td>18/09/96</td>
<td>8/11/96</td>
<td>$1,273</td>
<td>$1,010</td>
</tr>
<tr>
<td>12/10/98</td>
<td>18/11/98</td>
<td>$1,071</td>
<td>$1,071</td>
</tr>
<tr>
<td>17/02/99</td>
<td>13/05/99</td>
<td>$2,322</td>
<td>$2,322</td>
</tr>
<tr>
<td>19/06/98</td>
<td>15/02/99</td>
<td>$3,883</td>
<td>$6,213</td>
</tr>
<tr>
<td>16/09/96</td>
<td>4/08/97</td>
<td>$3,305</td>
<td>$3,190</td>
</tr>
<tr>
<td>19/01/99</td>
<td>21/05/99</td>
<td>$579</td>
<td>$640</td>
</tr>
<tr>
<td>28/04/97</td>
<td>21/10/97</td>
<td>$1,492</td>
<td>$1,567</td>
</tr>
<tr>
<td>29/08/97</td>
<td>25/11/97</td>
<td>$9,827</td>
<td>$10,315</td>
</tr>
<tr>
<td>29/03/99</td>
<td>21/05/99</td>
<td>$2,706</td>
<td>$3,009</td>
</tr>
<tr>
<td>17/07/98</td>
<td>25/08/98</td>
<td>$4,712</td>
<td>$5,516</td>
</tr>
<tr>
<td>8/09/98</td>
<td>13/10/98</td>
<td>$136</td>
<td>$432</td>
</tr>
<tr>
<td>9/06/98</td>
<td>29/07/98</td>
<td>$1,148</td>
<td>$896</td>
</tr>
<tr>
<td>16/12/97</td>
<td>15/01/98</td>
<td>$6,851</td>
<td>$7,220</td>
</tr>
<tr>
<td>25/04/97</td>
<td>26/11/97</td>
<td>$431</td>
<td>$241</td>
</tr>
<tr>
<td>8/10/97</td>
<td>29/04/98</td>
<td>$2,650</td>
<td>$2,591</td>
</tr>
<tr>
<td>25/11/98</td>
<td>12/01/99</td>
<td>$6,143</td>
<td>$6,995</td>
</tr>
<tr>
<td>29/03/99</td>
<td>4/05/99</td>
<td>$1,116</td>
<td>$292</td>
</tr>
<tr>
<td>13/02/97</td>
<td>2/07/98</td>
<td>$1,659</td>
<td>$1,017</td>
</tr>
<tr>
<td>25/03/99</td>
<td>25/05/99</td>
<td>$1,531</td>
<td>$1,549</td>
</tr>
<tr>
<td>12/04/99</td>
<td>25/05/99</td>
<td>$7,320</td>
<td>$7,491</td>
</tr>
<tr>
<td>8/12/97</td>
<td>26/10/98</td>
<td>$3,669</td>
<td>$1,234</td>
</tr>
<tr>
<td>24/02/99</td>
<td>24/05/99</td>
<td>$2,372</td>
<td>$2,460</td>
</tr>
<tr>
<td>12/03/99</td>
<td>25/05/99</td>
<td>$904</td>
<td>$978</td>
</tr>
<tr>
<td>20/04/99</td>
<td>24/05/99</td>
<td>$2,766</td>
<td>$3,088</td>
</tr>
<tr>
<td>21/04/99</td>
<td>25/05/99</td>
<td>$655</td>
<td>$871</td>
</tr>
</tbody>
</table>

This table depicts the date of the originating claim followed by the date of the initial investigation summons. In general the summons is held within one and three months of the originating claim. It is obviously expedient for the summons to occur as soon as possible to enable the creditor to receive his or her money, however the sheer number of debt claims issued in the Magistrates Court can preclude expediency.

The table further shows the amount of the original debt. On the day which was studied a total of $127,078 in original debts was before the court. This averaged at $2492 per claim. The present values of the debt as of the 8th August were $126,859 which averaged at $2487 per claim. From this one can see that over the period of time between the originating claim and the debt as it presently stands there has been very little if any head way in repayment of the debt. This statistic more than any other is indicative of a system which is not working to its full potential. Of the 51 claims, in 31 of the cases the value of the debt had increased while in a further 6 cases the debt had remained at the same value thus in 37/51 or 73% of cases the debt had
increased or remained the same from the originating claim. This is a worrying statistic. It must be noted however that this statistic does incorporate the most recent of claims where there may have been only an initial summons such that the debtor has not begun to pay instalments yet.

Table 4B.2: One day’s debtors analysed by year claim was commenced

<table>
<thead>
<tr>
<th>Date of Orig. Claim</th>
<th>No. of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) 1994</td>
<td>2</td>
</tr>
<tr>
<td>2) 1995</td>
<td>2</td>
</tr>
<tr>
<td>3) 1996</td>
<td>4</td>
</tr>
<tr>
<td>4) 1997</td>
<td>9</td>
</tr>
<tr>
<td>5) 1998</td>
<td>15</td>
</tr>
<tr>
<td>6) 1999</td>
<td>19</td>
</tr>
</tbody>
</table>

This table represents the number of claims brought in the calendar years up until 30 June 1999. As one would expect the greatest number of claims were present in 1999 accounting for 37% of the number of cases. Surprisingly there were still 8 cases or 16% in which the originating claim was brought over 3 years ago.

Table 4B.3: One day’s debtors analysed by summons type

<table>
<thead>
<tr>
<th>SUMMONS</th>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Examination</td>
<td>16</td>
</tr>
<tr>
<td>Investigation</td>
<td>30</td>
</tr>
<tr>
<td>Summons to Witnesses</td>
<td>5</td>
</tr>
</tbody>
</table>

This table shows the breakdown of the type of summons for the Magistrates Court on the 8th August 1999. Examination summons for non compliance with an order for payment accounted for 16 or 31% of the total number of cases while there were 30 investigation summons (or 59%) and 5 summons to witnesses, typically company directors (or 10%).
Table 4B.4: One day's debtors analysed by type of plaintiff

<table>
<thead>
<tr>
<th>Type of Plaintiff</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pty Company/Store</td>
<td>16</td>
</tr>
<tr>
<td>TV Rental</td>
<td>3</td>
</tr>
<tr>
<td>Council</td>
<td>7</td>
</tr>
<tr>
<td>School</td>
<td>2</td>
</tr>
<tr>
<td>Private Vs Private</td>
<td>8</td>
</tr>
<tr>
<td>Finance/Insurance Co</td>
<td>5</td>
</tr>
<tr>
<td>Housing Trust</td>
<td>3</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>1</td>
</tr>
<tr>
<td>Electricity Board</td>
<td>1</td>
</tr>
<tr>
<td>Newspaper</td>
<td>1</td>
</tr>
<tr>
<td>Bank</td>
<td>4</td>
</tr>
</tbody>
</table>

This table depicts the type of plaintiff at the summons. Proprietary Companies or stores accounted for the greatest number of creditor, some 31%. Only 16% of the case concerned private individuals seeking to enforce debts. The other plaintiffs included Councils, Banks, Housing Trust, Finance Companies and Schools. Only 3 of the plaintiffs were unrepresented, while only 1 of the defendants had legal representation.

Table 4B.5: One day's debtors analysed by result

<table>
<thead>
<tr>
<th>Result</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Appearance by D</td>
<td>26</td>
</tr>
<tr>
<td>Adjournment</td>
<td>9</td>
</tr>
<tr>
<td>Consent to Payment</td>
<td>8</td>
</tr>
<tr>
<td>No Order</td>
<td>5</td>
</tr>
<tr>
<td>Order Rescinded</td>
<td>1</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>2</td>
</tr>
</tbody>
</table>
This table depicts the result of the summons for the 8th August 1999. The majority of cases involved no appearance by the defendants leading to warrants being issued, these case accounted for 51% of the total number of cases. A disappointingly low 16% of cases were resolved, momentarily at least with consent to payment being made.

**The Issues**

**Non-Attendance**

There is a problem faced in getting debtors to attend court for examination. It is paramount that attendance rates must be improved. The law has dealt with the problem by issuing warrants for arrest which allows the debtor to be apprehended and brought before court for examination. The rate of non-attendance could perhaps be reduced by abandoning the system whereby people are required to attend court for resolution of their debt problems during a time when they are supposed to be at work. The Magistrates Court already has implemented a process whereby debtors who cannot attend court for a legitimate reason can send notification to the court requesting an adjournment, following this the person must subsequently attend in person. This may go some way to alleviating the problem of non-attendance but it will not provide a long-term solution.

**Imprisonment**

The Magistrates Court has the capacity to jail individuals for failing to pay their debts, further it has the power to imprison for up to 40 days for disobeying orders, such as refusing to attend court.

The ALRC report is of the opinion that imprisonment proceedings should be abolished. Imprisonment can result where the debtor has refused or neglected to pay the debt or any instalment thereof despite having, or having had the means and ability to pay the debt or instalment in question. As imprisonment can be avoided by
payment of the debt the ALRC suggest that it is generally the poor and ignorant who go to jail.⁷

While making instalments the debtor has the threat of imprisonment hanging over him/her. Hazlett states that imprisoning debtors is out of all proportion to the debt which gives rise to imprisonment and has the effect of making it more difficult for the debtor to meet present or future debts. Imprisonment, he suggests is uneconomic, debtors in prison are not engaged in productive work and the cost to the community as a whole is high⁸.

Imprisonment is both punitive and coercive by punishing the debtor for an offence and providing for an end to the punishment if the debt is paid. Kercher argues that it is self-defeating in that it prevents the debtor from earning income while in jail and can harm long term employment. It is however a powerful incentive to ensure that this debt is paid first regardless of the needs of the debtor.

The remedy of imprisonment has a hidden purpose— it is designed to coerce as well as punish. Payment of the debt releases the debtor from jail. It is so painful to debtors that a threat of its use can itself lead to judgement. This is vehemently illustrated in the case study. Overall it is important to be able to strike a balance between sending the appropriate message to the community that default on debt repayment will not be tolerated and providing the correct response from the court which one must remember is not the most deleterious of offences.

CONCLUSION

The law should recognise a creditors right to be compensated for loss which he suffers and expenses which he reasonably incurs as a consequence of the debtor’s default. An ideal recovery system should not concentrate on the enforcement of individual debts. Rather it should focus on the reason for the debtors default and provide recovery procedures which are appropriate to the circumstances of the

⁷ Kercher, Australian debt recovery law (The federation press, 1990) at 22
⁸ Hazlett The Recovery of small debts (Monash University) at 814
individual circumstances of the debtor and fair to all his creditors. The law must recognise that there are numerous reasons for debt default – including unemployment, illness and innocent miscalculation, which involve no suggestion of dishonesty.\(^9\)

Studies conducted in German have shown that the major cause of default from payments leading to debt is overwhelmingly caused by unforeseen loss of income, with the fraudulent or swindling debtor not being particularly representative\(^10\). This is likely to be mirrored in Australia. Reforms should be implemented to achieve a balance between the interests of the creditor and the debtor. They should take into account the distinction between the persistent, elusive “hardcore” professional debtor and the “well-meaning” debtor, to identify those suitable for debt counselling and assistance. The former, knowing that Magistrates are most reluctant to make any orders which will result in debtors going to prison, makes a practice of ignoring summonses, judgements and requirements to attend oral examinations and all fines. The latter is prevented from honouring his/her contractual obligations by circumstances which could include illness, unemployment, housing problems. The “well meaning” debtor needs fair safe-guards and assistance towards rehabilitation to gain a dignified means of discharging his obligations. He or she would benefit from advice for preventing future indebtedness.

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\(^9\) Australian Law Reform Commission, “Debt recovery and insolvency” discussion paper 6, 1978 at 9

APPENDIX 4.C
The Enforcement of Judgments Office

Much of this material is from an interview with Master Napier, an independent judicial officer who determines appeals from debtors and creditors about decisions of the EJO. I am also indebted to the assistance of the CEO of the EJO, Chris Heatley and his deputy Harry Stewart.

The Enforcement of Judgments Office was established in 1969, but unfortunately at about that time the 'troubles' heightened. In 1971 emergency legislation was brought in to deal with the troubles, including some fairly draconian debt collecting provisions, which rather muddied the water for the Enforcement of Judgments Office. However, it has developed into an effective and well-accepted means of debt enforcement. Prior to 1969 the enforcement of debt was entirely creditor-driven, using a county bailiff system. This was endemic with corruption, with bailiffs taking bribes from debtors and creditors, as to priority. Once the new system was introduced, the Undersheriff of Antrim went bankrupt and then another Undersheriff went bankrupt revealing evidence of improper use and application of funds. Under the new system the Sheriffs are salaried civil servants, typically ex-police officers with pension rights, etceteras, to protect and save, and they have enough at stake to be relatively corruption-free. There have been little or no allegations of corruption under the new system.

The creditor pays a fee of £5 to have a search of the debtor's name to see if the EJO has any information on the debtor. The creditor can than pay a further fee, still a small amount of perhaps £15, and for this the Office will issue a Notice of Intention to the debtor, advising the debtor that they have received registration of the decree or judgment and will be enforcing it. This resolves about half of the claims. If it does not, the debtor can pay an enforcement fee. This is calculated on an advalorem basis at 30% for a debt of 100 Pounds down to 6% at 10,000 pounds. Then the EJO commences enforcement procedures. These will initially be a visit to the debtor by a Sheriff's Officer. During that visit, the Sheriff's Officer will obtain complete information about the debtor's salary, means, etc.. That information is returned by
the Sheriff’s Officer to the EJO and assessment officer then decides on the most appropriate order to enforce the judgment according to the debtor’s means. Here are profiles of the work of the EJO and of enforcement orders made:

Table 4C.1: Applications to EJO 1998

Table 4C.2: EJO profile of orders 1998

Source: lecture notes Chris Heatley CEO.

If the debtor is uncooperative he can be summonsed to appear in court and, if he does not cooperate with that, a warrant of arrest and commitment issues, upon which he is brought before the court by the police, not by the Sheriff’s Officers.

The Sheriff’s Officers are paid as executive officers, and they receive some £16,000 per year plus a mileage allowance and a meal allowance where they are required to be on duty for more than four hours.

Once the creditor has paid the enforcement fee he does not have to pay any more. The Office has quite substantial powers. Third parties can be summonsed to give evidence. The Office can require a person’s lawyer/accountant to attend to give evidence about their affairs and may seek information from hire purchase companies and Lands Titles Office registers.

Note that lawyers cannot claim privilege from the EJO. The EJO can also obtain address information from police, although except in the case of criminals, that is of limited use. The EJO also has responsibility for all recovery of premises warrants. There is no distress for rent allowed in Northern Ireland. According to Master Napier, the success rate is about a 50% return on a judgment rate of about £8-10
millions per year. Note that a judgment lasts forever. This is something of a legislative quirk. A judgment used to last for six years and could be renewed for a further six years but could not be renewed another time. According to Master Napier, under this legislation, once it is given to the EJO it is, theoretically, being continuously enforced and then it does not go stale.

There is an interesting provision that allows the High Court to set aside a transfer of property if that occurred to defeat creditors.

The EJO has the power to made administrative orders. In practice, these have never been popular in Northern Ireland. They are a type of defacto bankruptcy allowed in the UK but were not used because the limits were too low, namely set at £10,000, and they were too expensive for the Office because it would have involved massive administrative expense.

Lawyers are not often involved with the EJO because they do not get cost orders. If, after the EJO’s investigations it finds that a person has no assets or income, it can issue a Certificate of Unenforceability which, in effect, closes its file. This certificate is an act of bankruptcy, but that usually matters little to the debtor. That is because bankruptcy is only worth the candle if the trustee or ‘assignee’, as they are called, can obtain sufficient funds from the bankrupt estate to pay the fee, otherwise the creditors must pay the assignee’s fees.

There are some 15 Sheriff’s Officers and they receive about 8,000 new cases per year, although that is not necessarily 8,000 new debtors. The priority between debtors is from the date of their paying the fee for enforcement of the debt, that is first in gets all the money. There is no notion of defacto distribution between creditors.

The EJO is expected to conduct its operation on cost neutral basis to government.
APPENDIX 4.D
Please see print copy for images
This is a diary of a civil case involving a motor vehicle accident one morning in April 1999 in the Amtsgericht in Stuttgart. This is the equivalent of a magistrates court in Australia. I had the assistance of an interpreter. I have deleted the names of the judge and the parties. The judge specialises in motor vehicle accidents. This was a first date of hearing for the case. The plaintiff appeared with her lawyer. An independent witness who was tending flowers outside his shop was in attendance. The defendant was unable to attend due to residing in another country, but a lawyer appeared for the defendant. The defendant was insured for the liability of this claim. The Plaintiff had legal cost insurance.

The Judge, who wore a plain black robe, came to the foyer outside the court, met the parties and took them into the court. There was no separate access for the Judge. The hearing was conducted in a relatively small room with everyone sitting at the same level. The room was without adornment with no coat of arms or other insignia of authority. The tables were arranged in a U-shape with the Judge and a court expert sitting at the bottom of the U, and the parties and their lawyers sitting on either side. There were some seats across the back of the court, where members of the public could sit, but it is obvious that these hearings, in practice, are generally conducted in private. The Judge had no staff but used a dictaphone. The witness was asked to wait outside and the Judge was equipped with a buzzer to tell the witness to come in. The Judge had a file with a detailed statement from both sides in it and some photographs.

In Australian terms, this was both a first directions hearing and a trial. The case proceeded through the following stages.

- The Judge addressed the parties and their lawyers, setting out her understanding of the matter gleaned from the statements in supporting documentary material on the file. She then turned, firstly, to the issue of the arithmetic of the quantum of the
claim and, in a general discussion with the parties’ legal advisers, clarified that arithmetic.

- **Liability**
  The Judge turned to liability. She described the factual allegations which, in broad brush, were that there were two lanes (bear in mind that they drive on the opposite side of the road to Australia). The plaintiff was proceeding down the right-hand lane nearest the kerb, slowed, on her version indicated, and commenced a U-turn. The defendant, who had been following her, had moved into the left-hand lane to overtake her at the moment when she commenced the U-turn, and the collision occurred. In the Judge’s mind, there was some controversy as to whether the left-hand lane which the defendant moved into was a legitimate lane for him to use to pass the other vehicle.

- **Plaintiff’s Version**
  In Germany, parties are not competent to give evidence in their own cause (it is assumed they are unreliable). However the Judge asked the plaintiff to give her version without formally making her a witness, and she did so. She acknowledged that sometimes the left lane was used for vehicles going in her direction. She said she went very slowly and indicated her intention to turn left. She had looked back earlier and seen the plaintiff, but she did not see him when she looked again at the time of commencing her turn. She thought he must have come very quickly. She indicated for some time and he had ample opportunity to avoid the accident. After the accident he said that he was guilty; he had been going too fast.

The Judge asked some questions of the plaintiff about her version. Up to this point the Judge had made all the statements in the proceedings, apart from those statements made by the plaintiff in person. The lawyers had contributed only some comments on the arithmetic. At this point the Judge summarised the position on the facts, both in relation to the arithmetic and the plaintiff’s version, into a dictaphone.
The plaintiff was claiming for an injury to her neck in the accident, loss of use of her vehicle and the cost of replacing the wheels of the vehicle. She was also claiming the costs of repair to the vehicle, but there was no contest about the quantum of that cost. In relation to her neck, she said that she had had some physiotherapy; she had had some headaches, but she did not have a medical certificate. The reason she did not have a medical certificate was that she worked for herself and so it had been unnecessary for her to obtain one.

At this point in the proceedings the Judge suggested that the parties should think about settling the action. She pointed out that the plaintiff bears the onus of proof. The lawyers engaged in discussion with the Judge. There was a discussion about whether the other driver was prosecuted. It appeared as if he was not, but the plaintiff said that the attending police said that he would be. The defendant’s lawyer pointed out that the proceedings would not be able to be completed today unless they were settled, because his client was absent. The Judge said it looked like the plaintiff was more at fault than the defendant, but she agreed that she could not complete it on that day unless it settled. The defendant’s lawyer said that, as his client did not speak German very well, the police took the plaintiff’s version on face value, and so their intimation at the scene could not be held against his client. The Judge said that this was emotional and left that topic.

- **Oral Evidence**

The Judge then summoned the witness with a buzzer. The witness sat in a chair at the head of the U. He was not sworn in, but the Judge went through a quite careful procedure, advising him that he should tell the truth, that if he did not know something, he should say so, and he should only say what he saw, heard or experienced himself. It was made clear to him that if he gave false evidence he could be seriously punished. (Under the ZPO it is an offence to give false evidence. Swearing a witness on the bible is unusual but if an oath is administered, false evidence attracts a potentially larger penalty) The Judge examined the witness and ascertained that he was a gardener who was married and he gave his date of birth and address. She then dictated those details into a dictaphone. She then asked him for his version. He did not see the accident. He
was watering some plants outside his shop when he heard the loud noise of the accident and turned around and saw that the indicator of the vehicle that had done the U-turn was on when he saw it straight after the accident. The drivers were still in their cars. The plaintiff came over and saw him and asked him if he had seen the accident. About 15 minutes later the police arrived and also interviewed him. He was in the shop by then. After the accident the drivers talked normally. It was his view that if you are doing a U-turn at that point, and he has occasion to do so, it is better to do it from the middle or left-hand lane rather than the right-hand lane to avoid people who are trying to pass you. At that point a telephone in the court rang, the Judge answered it and had a short conversation. This had no relevance to the case.

After the telephone conversation some animated discussion broke out about whether there were blue arrows, which indicate traffic directions in Stuttgart. The defendant’s lawyer went around behind the Judge and pointed to a photograph in the court file and had a discussion with the Judge. The plaintiff crossed the U and had an animated discussion with the defendant’s lawyer. Someone - I think it was the witness - suggested that trucks sometimes knock down these blue arrows. Everyone resumed their seats and the Judge summarised the evidence of the witness into the dictaphone. She then asked the witness if the summary was accurate. He agreed it was. He said he was not asking for a witness fee and left the court to go about his normal business.

- The Expert

At this point the expert, who was sitting alongside the Judge, gave a detailed summary of his view of the circumstances of the accident. He produced a plan and suggested that the angle between the vehicles at the point of impact was about 30 degrees. He concluded that the plaintiff and the defendant both came from the right-hand lane and made the obvious assertion that the defendant was going faster than the plaintiff but was unable to suggest that he was exceeding the 50 kph speed limit at that point on the road. He was unable to point to any fault on the defendant’s part. There was no suggestion that he was exceeding the speed limit nor that his reaction time had been slow. He believed that he had braked before
the accident. The plaintiff expressed disbelief at his findings. The expert went on
to say that, if there was indication by the plaintiff, the defendant might have been
able to avoid the accident if he had responded to the indication. The plaintiff then
argued that the defendant should have been able to avoid the accident and had
contributory negligence to it. I note that the defendant’s lawyer was not active in
this discussion. The expert responded to the plaintiff, saying that this is a matter
for the court and he could not make any conclusion as to the law. The plaintiff
then asked the Judge for her view on this point. The Judge did not immediately
respond. The expert continued and said that the wheels could not have been
damaged in the accident and rejected them as a component of the plaintiff’s
legitimate claim. At this point the plaintiff complained that she could not
concentrate because of the sotto voce interpreting that was assisting me in this
quite intimate room. By arrangement, she then went and sat on the other side of
the U next to the defendant’s lawyer. The defendant’s lawyer made a joke that he
was quite happy to have her sitting there, but he did not want to take her place on
the court file, i.e. swap sides.

- Settlement discussions

The Judge then explained that there was a difference between contributory
negligence and an inability to avoid an accident. She went on to assert that if the
defendant cannot prove that the accident was for him unavoidable, he could be
liable for 25%. At this point the defendant offered 30%. The plaintiff left the
court with her lawyer to discuss this proposal. She returned to agree with the offer
of 30%. Pain and suffering for her neck was assessed at DM1,000; in other
words, she received DM300 for that, and the cost of repairs and other costs gave
her a total of DM1,923. The defendant offered to round that to DM2,000. He said
that there was no counterclaim because there was no damage to his vehicle. The
matter was settled on the basis of a payment of DM2,000. The settlement was
subject to a two weeks embargo to give the defendant’s lawyer the opportunity of
confirming his instructions to settle on that basis. It was adjourned for a mention
date without the parties, for confirmation of the settlement or to bring it back on if
the settlement was not agreed to.
• *Cost Implications*

On the BRAGO scale each lawyer is entitled to costs on the amount of the claim, which was for about DM6,000. The BRAGO fee for that is DM1,125. The court fees were DM525. The expert, who was probably an engineer, would have cost about DM1,000. The parties pay this in the same proportion as the settlement. Of course, the BRAGO fee for lawyers is an entitlement to each of them. Therefore, the total fees and legal costs was about DM4,000. As between the parties, all these fees and disbursements were split in the same percentage as the settlement, namely 70/30. That is, the defendant would pay 30% of approximately 4,000DM, about 1,200DM and the plaintiff 70%, about 2,800DM. The plaintiff received a judgment of 2,000DM and had a notional liability in costs and disbursements of 2,800DM. It can be seen that were it not for cost insurance this litigation would not have been economically worthwhile.

Afterwards I interviewed the plaintiff. She was quite cheerful about the result. Her car had already been repaired by her insurance company. She had legal costs insurance so that her liability to costs for the other side would be discharged by her insurance company and it would also pay her costs to her own lawyer. On her understanding, the defendant was insured for the third party cost, so he would not have to pay anything for the claim or costs. Although the lawyer had said there was no counterclaim, in fact it was the plaintiff’s understanding that there was a small counterclaim and now, based on this judgment, the defendant would probably pursue her insurer for 70% of that claim. It was pointed out by her lawyer that a separate claim on that would potentially be litigated separately and may even achieve a different result. Apparently they do not follow principles of issue estoppel on these cases.
APPENDIX 5.C
Interrogatories and answers

IN THE DISTRICT COURT
AT ADELAIDE
No. Of 199

BETWEEN
MR R
Plaintiff, and

MR S
Defendant

INTERROGATORIES ADMINISTERED ON BEHALF OF THE
ABOVENAMED PLAINTIFF FOR THE EXAMINATION OF THE
ABOVENAMED DEFENDANT AND THE DEFENDANT'S ANSWERS
THERETO

I, ,

in answer to the Interrogatories administered for my examination MAKE OATH
AND SAY as follows:-

In answering these Interrogatories the defendant is to assume that Pulteney Street
at Adelaide in the State of South Australia runs in a north/south direction and that
Grenfell Street at Adelaide in the said State runs in an east/west direction.

In these Interrogatories “the collision” means the collision referred to in the
Particulars of Claim.

1  (a) Were you immediately prior to the collision driving a motor vehicle
in a northerly direction along Pulteney Street?

YES

(b) If your answer to part (a) hereof is no, in which direction and upon which
road were you travelling?

NOT APPLICABLE

2  Identify the position on the roadway (in this and in subsequent
Interrogatories referred to as “the point of impact”) where the collision occurred,
and in particular state how far and in what direction the point of impact was
from:-

(a) the northern kerbing alignment of Grenfell Street or the imaginary prolongation
thereof across Pulteney Street (in this and in subsequent Interrogatories referred to as “the northern kerbing alignment”);

**APPROXIMATELY 2-3 METRES NORTH**

(b) the southern kerbing alignment of Grenfell Street or the imaginary prolongation thereof across Pulteney Street, (in this and in subsequent Interrogatories referred to as “the southern kerbing alignment”);

**APPROXIMATELY 26-27 METRES NORTH**

(c) the centre line or imaginary centre line of Grenfell Street (hereinafter referred to as “the centre line”)’

**APPROXIMATELY 14-15 METRES NORTH TO THE CENTRE OF GRENFELL STREET**

(d) the western kerbing alignment of Pulteney Street or the imaginary prolongation thereof across Grenfell Street (in this and in subsequent Interrogatories referred to as “the western kerbing alignment”);

**APPROXIMATELY 9 METRES EAST**

(e) the eastern kerbing alignment of Pulteney Street or the imaginary prolongation thereof across Grenfell Street (in this and in subsequent Interrogatories referred to as “the eastern kerbing alignment”).

**APPROXIMATELY 14 METRES WEST**

3 Describe with reference to the locality of the collision and to the time at which the same occurred:-

(a) The state of natural lighting conditions;

**NIL**

(b) The state of visibility conditions;

**FAIRLY GOOD**

(c) The state of weather conditions;

**VERY LIGHT RAIN**

(d) The state of the road surface;

**WET BITUMEN**

(e) Traffic conditions on Pulteney Street within 100 metres of the point of impact;

**MODERATE TO HEAVY IN DENSITY**
(f) The state of artificial lighting conditions.

THE INTERSECTION WAS ADEQUATELY LIT BY STREET LIGHTS AND MY VEHICLE'S HEADLIGHTS WERE OPERATING

(g) The distance and the direction from the point of impact of any street lamps operating at the time of the collision within a radius of 100 metres from the point of impact.

SAVE TO SAY THAT I BELIEVE THE INTERSECTION WAS REASONABLY WELL LIT BY STREET LAMPS, I AM UNABLE TO MORE ACCURATELY ANSWER THIS INTERROGATORY

4 (a) Did you see the plaintiff at any time prior to the collision?

SAVE TO SAY THAT I OBSERVED A SHADOW IN FRONT OF MY VEHICLE AT OR VIRTUALLY AT IMPACT, I DID NOT OBSERVE THE DEFENDANT PRIOR TO COLLISION

(b) If yes to part (a) hereof: -

NOT APPLICABLE

(A) For what period of time prior to the collision?
(B) State the position of your vehicle at the time you first saw the plaintiff and in particular:
   (i) the distance between the nearest and which part of your vehicle and the northern kerbing alignment and its direction therefrom;
   (ii) the distance between the nearest and which part of your vehicle and the southern kerbing alignment and its direction therefrom;
   (iii) the distance between the nearest and which part of your vehicle and the western kerbing alignment and its direction therefrom;
   (iv) the direction in which your vehicle was then travelling;
   (v) the distance between the nearest and which part of your vehicle and the plaintiff and the direction of the latter from you;
   (vi) the distance between the nearest and which part of your vehicle from the point of impact;
   (vii) the speed of your vehicle.
(C) State the position of the plaintiff at the time that you first saw it and in particular:-
(i) the distance between the nearest and which part of the plaintiff and the
western kerbing alignment and its direction therefrom;
(ii) the distance between the nearest and which part of the plaintiff and the
eastern kerbing alignment and its direction therefrom;
(iii) the distance between the nearest and which part of the plaintiff and the
southern kerbing alignment and its direction therefrom;
(iv) the direction in which the plaintiff was then travelling;
(v) the distance between the nearest and which part of the plaintiff from the
point of impact;

5 (a) Was there any object, configuration or condition which wholly or partially
obscured your view of the plaintiff prior to the collision?

MY VIEW OF THE PLAINTIFF MAY HAVE BEEN OBSCURED BY
VEHICLES FACING SOUTH ON PULTENEY STREET WAITING TO
TURN RIGHT INTO GRENFELL STREET, AND VEHICLES TRAVELLING
SOUTH ON PULTENEY STREET.

(b) If yes to part (a) hereof, describe the nature and extent of that obstruction.

I REFER TO MY ANSWER TO PART (a) HEREOF AND REPEAT THE
SAME.. I AM UNABLE TO BE MORE SPECIFIC IN ANSWER TO THIS
INTERROGATORY.

6 Describe as well as you can each and every alteration in your speed and
direction of travel from the time when you first saw the plaintiff until the moment
of collision and indicate:-

(a) the approximate distance (in metres); and

(b) the direction of your vehicle
from the point of impact when each such alteration took place?

NOT APPLICABLE

7 Describe as well as you can each and every alteration in the speed and
direction of travel of the plaintiff from the time when you first saw it until the
moment of collision and indicate:-

(a) the approximate distance (in metres); and

(b) the direction
of the plaintiff from the point of impact when each such alteration took place?

NOT APPLICABLE

8 At the moment of collision what was the speed and direction of travel of your vehicle?

MY VEHICLE WAS TRAVELLING AT APPROXIMATELY 45-50KPH IN A NORTHERLY DIRECTION

9 State which part of your vehicle first collided with which part of the plaintiff.

THE FRONT OF MY VEHICLE ON THE RIGHT HAND SIDE COLLIDED WITH AN UNKNOWN PART OF THE PLAINTIFF'S BODY

10 (a) Was your vehicle damaged as a result of the collision?

YES

(b) If yes to part (a) hereof, describe the damage and identify the location thereof on your vehicle.

THE FRONT OF MY VEHICLE WAS DENTED ON THE RIGHT HAND SIDE AND THE WINDSCREEN WAS SHATTERED

11 (a) Did your vehicle become stationary after the collision?

YES

(b) If yes to part (a) hereof:

(i) how long after the collision did it become stationary?

WITHIN 1 SECOND

(ii) describe the movement of your vehicle between the moment of collision and the time at which it first became stationary after the collision.

MY VEHICLE CONTINUED TO TRAVEL IN A NORTHERLY DIRECTION AND SLOWED RAPIDLY UNTIL COMING TO A HALT

(iii) describe the position in which your vehicle so became stationary in relation to the distance and direction of the nearest and which part thereof from:

(A) the northern kerbing alignment;

THE REAR OF MY VEHICLE WAS APPROXIMATELY 8-9 METRES NORTH
(B) the southern kerbing alignment;

THE REAR OF MY VEHICLE WAS APPROXIMATELY 32-33 METRES NORTH

(C) the western kerbing alignment;

THE LEFT HAND SIDE OF MY VEHICLE WAS APPROXIMATELY 7.5 METRES EAST

(D) the point of impact.

THE REAR OF MY VEHICLE WAS APPROXIMATELY 6 METRES NORTH

12 (a) Shortly prior to the collision did you apply the brakes of your vehicle?

NO

(b) If yes to part (a) hereof state:-

NOT APPLICABLE

(i) which brakes you applied;

(ii) approximately how far (in metres) and in which direction was your vehicle from the point of impact when each such application was made.

(iii) the effect of the application of brakes on the speed and course of your vehicle.

(iv) with which brakes operating on which wheels is your vehicle fitted and what was the condition of such brakes?

13 (a) Subsequent to the collision, did you see any skid marks or other marks and debris on the road left by your vehicle or by the plaintiff?

NO

(b) If yes to part (a) hereof describe all such marks and/or debris and the position of each of them with relation to the respective directions and distances from:-

NOT APPLICABLE

(i) the point of impact;

(ii) the northern kerbing alignment;

(iii) the southern kerbing alignment;

(iv) the western kerbing alignment.
14 (a) Did you activate any signal or warning device fitted to your vehicle during the period of one minute preceding the happening of the collision?

NO

(b) If yes to part (a) hereof state:-

NOT APPLICABLE

(i) the nature of each such signal or warning;
(ii) the approximate duration of each such signal (in seconds);
(iii) the distance and direction from the nearest and which part of your vehicle from the point of impact when each such signal commenced to operate;
(iv) the distance and direction of the nearest and which part of yr vehicle from the pt of impact when each such signal ceased to operate.

15 Did you at any time within the period of 60 seconds prior to the collision appreciate the danger of a collision?

SAVE TO SAY THAT I OBSERVED A SHADOW IN FRONT OF MY VEHICLE EITHER AT OR VIRTUALLY AT THE MOMENT OF IMPACT, I DID NOT APPRECIATE THE DANGER OF COLLISION PRIOR TO THE IMPACT

(b) If yes to part (a) hereof, when you first appreciated such danger state:-

NOT APPLICABLE

(i) your distance and direction from the point of impact and the speed at which yr vehicle was then travelling;
(ii) the distance and direction of the nearest and which part of the plaintiff from the point of impact and the speed at which it was then travelling.

16 Describe what action you took to avoid a collision between the time that you first saw the plaintiff and the moment of collision

NOT APPLICABLE

17 (a) Were there any street signs applicable to traffic travelling in a northbound carriageway of Pulteney Street and the intersection of that street with Grenfell Street?

NO
(b) If yes to part (a) hereof, state the nature of the street sign and whether you complied with the same immediately prior to entering the said intersection; NOT APPLICABLE

(c) Immediately prior to the collision, did your vehicle become stationary at the entrance to the said intersection and if so, state for how long and where in relation to the western kerbing alignment your vehicle became so stationary.

NO

18 I know the facts deposed to herein of my own knowledge except where otherwise appears.

SWORN at by the)

............................................................
said )
this day of )
1999. Before me: )

............................................................

THESE ANSWERS TO INTERROGATORIES are filed and delivered this day of 1999 by of Solicitors for the Defendant.
APPENDIX 5.D
Form No 22

SOUTH AUSTRALIA
MAGISTRATES COURT (CIVIL DIVISION)
PERSONAL INJURY PARTICULARS

Trial Court: Action No.:
Address:
Telephone: Fax No.:

BETWEEN

(Plaintiff)
and

(Defendant)

PLAINTIFF’S DETAILS
Name:
Date of Birth: (Present Age: )
Address:
Marital Status: Dependant Children:
Occupation:
Educational, trade or other occupational Qualifications:

ACCIDENT/INCIDENT DETAILS
Date of Accident/Incident:
Place of Accident/Incident:
Type of Accident/Incident (e.g. motor vehicle, assault, work injury etc.):
If the accident was a motor vehicle accident, was the plaintiff (please tick where appropriate):
a driver/motor cyclist a passenger/pillion
a cyclist a pedestrian
or other (specify)
GENERAL DAMAGES

Part of body injured:

Describe nature of the injury (e.g. broken bone, sprain, bruising, ligamentous etc.):

Describe any scars:

Describe any parts of body lost (e.g. tooth, eye, finger, leg etc.):

Dates of period spent in hospital (if more than one period, please particularise):

Period off Work (please give dates, name and address of employer):

Describe any loss of ability to perform:
(a) Domestic task, type of task and for how long:

(b) Recreational activity - type of activity and how long (e.g. sport, gardening etc.):

Describe any symptoms still being experienced:

State the highest permanent disability stated by your medical advisers:
Do your medical advisers state that you have any psychiatric problems caused by the accident (delete as appropriate): Yes/No

OTHER INJURY

If you have suffered any other injury before or after the accident/incident, give the following details:
Date of other injury, where and how it occurred:

Nature of other injury:

Any ongoing effects or disabilities from that injury:

Any compensation received for or in relation to the other injury. If court proceedings were started with respect to that other injury identify the court, the court action number and the result (you may get this information from the court that you used):

State any WorkCover payments received for or in relation to the other injury and the period/s for which payments were made:

MEDICAL TREATMENT AND EXPENSES

Give details of the names and addresses of all medical practitioners, dentists, physiotherapists, chiropractors, psychologist and other health professionals whom the plaintiff has consulted in relation to the injury caused by the accident/incident with the dates of each consultation. If a claim is being made for the cost of any consultation fill in the last two columns and be prepared to produce receipts for each amount claimed.
(IMPORTANT NOTICE - If you intend to call any medical or similar witnesses at the trial, you must obtain a written report from the proposed witness and supply a copy of that report within 21 days of receiving the report to the court and the defendant.)

LOSS OF INCOME (Please give the following details)

Name and address of employer on the date of the accident/incident:

Approximate date of commencement of the employment held at the date of the accident/incident:

Period off work as a result of the injury (if more than one period give details):

Describe any change of duties resulting in a loss of income as a result of the injury, the loss of income after tax and the period during which the loss occurred:

Describe any money received from WorkCover, Department of Social Security, insurance or other compensation received with respect to loss of income and give details of the periods to which it related:

Give your gross annual taxable income and the total income tax paid with respect to that income for the 3 financial years immediately prior to the accident/incident:
Give your gross annual taxable income and the total income tax paid with respect to that income in relation to the financial years in respect of which any loss of income is claimed:

Describe attempts made by you to obtain alternative employment since the accident/incident:

FUTURE LOSS OF INCOME
Give details of any disability arising from the accident/incident which will in the future affect your ability to earn income and the expected effect:

CLAIM FOR DOMESTIC HELP
Describe the help given to you since the accident/ incident by your parent, spouse or child and the periods during which the services were given by each:

If the accident/incident was not a motor vehicle accident describe the periods in respect of which any other domestic help was obtained and the person supplying the help and any money paid to them:

THRESHOLD TEST
If the accident was a motor vehicle accident, give details of how your ability to lead a normal life was significantly impaired by the injury and the periods of such impairment. (Note: Damages for pain and suffering cannot be given unless it lasted for more than 7 days.)
SUMMARY OF MONETARY CLAIMS

For each of the following heads, state the amount claimed and how you worked it out.

Special damages, medical and other treatment expenses: $ 

Loss of past income: $ 

I, (full name) 
of (address) 

MAKE OATH AND SAY that the information contained in this form is true and correct to the best of my knowledge and belief.

SWORN at the day of 19 .

Before me: ...........................................

Justice of the Peace.
APPENDIX 6.A
CASE STUDY 2: Landgericht, Stuttgart, Germany, April 1999

This is a diary of a civil case involving a commercial lease dispute on afternoon in April 1999 in the Landgericht in Stuttgart. This is the equivalent of a Supreme or District Court in South Australia. I had the assistance of an interpreter. I have deleted the names of the judge and the parties.

I met the judge before the hearing. He had read the file. He told me that he can give legal advice to the parties and legal rulings at these first hearings, but he has to be very careful to not prejudge the facts.

This was a first oral hearing. The parties attended with lawyers. A witness also attended but was asked to leave the court and was, in fact, not used as a witness. The Judge summarised the facts from his file. The landlords were complaining in relation to occupational tenancy that the tenant had not paid the rent in time and, further, that the landlords had goods on the premises that had been taken from the previous tenant in lieu of rent. The new tenant had illegally sold those goods and converted the funds to its own use. The landlords had purported to terminate the lease on three occasions and were now seeking a court order for termination. Another issue was that the tenant had not paid the services tax on the rental.

After the Judge had summarised the facts, discussion between the Judge and the lawyers occurred about some issues. The first was whether rent had to be paid in advance or arrears and whether a bond could be required by the landlord. The Judge intimated that the rent could be paid at the end of the month, and the consequence of this was that previous terminations by the landlords were invalid because, under German law, in commercial tenancies of this type, rent must be in arrears for at least two months before a termination can be given.

The next issue that was identified was whether tax was payable. The Judge ruled that the tax was payable and the tenant had to reimburse the landlords for it.
The issue which caused heat, was the alleged taking by the tenant of goods, which belonged to the landlords as the result of a deal with the previous tenant, and selling them and pocketing the proceeds. The plaintiffs’ (landlords’) lawyer, and also the plaintiffs themselves (there were three present and sitting at the front), intervened and said that the tenant had destroyed all the records so that they were unable to prove the exact extent of these goods.

During a break I asked the Judge whether a German court would require the defendant to make discovery of its sales to track down whether these goods were sold. It was suggested to me that this would be beyond power.

At this stage of the proceedings the parties were themselves contributing in a quite animated way. As a result of these discussions, the next issue that arose was who was actually the tenant. A female defendant was purporting to be the tenant and this, in the plaintiffs’ view, amounted to a misrepresentation from the original transaction.

At this point the Judge intimated to the plaintiffs that they had a big risk in this litigation. If they did not settle it and the defendant had no money, then if the defendant appealed from any order he made, this could drag out for about a year. During that time they might not receive actual payment of rent and, although they might win in court, they might effectively end up having no rent for that period and a cost order which they might not be able to enforce effectively. As a result of this statement, the parties began negotiating in open court. The lawyers contributed little to this. The landlords expressed anger at the seizing of the goods and demanded DM20,000 as the value of the goods, plus arrears of rent and termination of the lease by 30 June. Meanwhile, in a theatrical gesture, the plaintiffs’ lawyer gave the Judge a new handwritten notice of termination, relying on the fact that the rent for March was not paid. The Judge read it and passed it to the defendant, and it caused some consternation. Negotiations then focussed on an agreed date for termination. The defendants said they needed six months, that is until October. The Judge suggested that the plaintiff might sensibly compromise the claim for what I would call the conversion of the previous tenant’s goods at DM10,000 plus any rent outstanding and leave at the end of August, with the defendant having a right to leave earlier. There
was then some discussion about legal fees. The plaintiffs said they wanted to pay no cost to their lawyer. The Judge said that it was normal for court fees to be split 50/50 and for each party to pay their own costs. At this point the court fee was DM1,150.

There was a break in the proceedings and the parties went out to hold private conferences with their lawyers. They came back and the defendant offered DM5,000 for the goods, rather than DM10,000. Heated argument broke out between the parties. There was another adjournment. After that the plaintiff returned and offered to accept DM7,500 for the goods or, as an alternative, an increase in the monthly rental back-dated to 1 March. The defendant counter-offered DM7,500 payable at the end of the tenancy, that would be 30 August. The plaintiffs said ‘No’, that they wanted the DM7,500 now. It was acknowledged that the rent payable was DM7,300 plus 16% tax, a total of some DM8,700 per month.

There was then another break. Settlement was agreed in these terms:

- The tenancy would end at 31 August 1999, subject to possible earlier termination below.
- The tenant would pay DM12,700 by 16 April 1999, being outstanding rent and rent to the end of April 1999.
- Monthly rent would then be payable in May and each successive month at the rate of DM8,700 per month.
- The defendant was to pay DM7,500 for the converted goods.
- The defendant had the right to leave earlier if it wanted, with the rent to cease on departure.
- Each party to pay its own costs with the court fee being split 50/50.

The judge recorded the settlement into a dictaphone. He replayed it to the parties. The Judge had omitted to prescribe when the DM7,500 would be paid. If not prescribed, it would have been implied it was payable forthwith. The defendant’s lawyer picked this up and the settlement terms were amended to reflect the intention that the DM7,500 was payable upon departure.
In relation to the legal fees, the Judge fixed the amount upon which the BRAGO fees were to be calculated at DM125,356. This is fixed under the BRAGO on the basis of 12 months rental for a claim for termination of a lease plus the various other claims. The consequence of this order was that each party had to pay its own lawyer the relevant BRAGO fee, which was DM2,285.
APPENDIX 6.B

An evaluation of a mediation trial in the Adelaide Magistrates Court

This paper was prepared by John Wright of the Corporate Services Unit of the Courts Administration Authority. At the time of its preparation interviews of parties who had gone to trial were incomplete. Those interviews have now been completed and I have included those results and edited the paper to reflect that additional information. The interviewers were Carole Faulkner, Tiffany Burgess, Martina Connolly and John Wright. Thanks to all of them for their efforts.

INTRODUCTION AND BACKGROUND

In 1996 the Civil Registry of the Adelaide Magistrates Court (AMC) introduced the option of court-annexed mediation for the resolution of general and minor civil actions, also called small claims (endnote 1). Mediation is provided free of charge to litigants and takes place within the court precinct under the direction of a professional mediator who is an employee of the court.

Mediation is offered in a number of other courts in Australia. For example, the Melbourne Magistrates Court offers court-annexed mediation through the Portals scheme, as does the Federal Court and the Supreme Courts of Victoria and New South Wales. None of these programs have been evaluated.

Mediation was introduced in the AMC as the recommendation of the court’s Supervising Magistrate who was concerned that the existing procedures:

i concentrated on preparing parties for trial rather than offering the opportunity to resolve disputes at an earlier stage by alternative means;

ii provided litigants with very little direct involvement in the resolution of their dispute or the determination of the terms of the settlement (i.e., parties to a dispute predominantly went to trial and the presiding magistrate
determined the 'winner' and the 'loser' and the conditions or terms of the settlement);

iii were limited to determining outcomes on the basis of the parties' legal rights rather than consensual agreement;

iv were time consuming for litigants and the court;

v were expensive for litigants (and the court).

The reasons for implementing mediation and the anticipated benefits are summarised in the following quotation from a background paper prepared by the AMC's Supervising Stipendiary Magistrate:

With continuing pressure to make better use of resources, improve caseflow, reducing waiting times for trials and provide better service to clients, the introduction of alternative dispute resolution process into our current system would seem to be an excellent initiative, which will help achieve these outcomes with minimum increased resources (Cannon undated, p.2).

To assess whether mediation was achieving its anticipated goals and allow a determination regarding its introduction in other Magistrates Courts, qualitative interview data and quantitative caseflow data were collected at the request of the Supervising Stipendiary Magistrate by the Corporate Services Unit of the Courts Administration Authority. This paper presents qualitative data that were obtained from telephone interviews with a random sample of small and general claims litigants who lodged defences and had their disputes settled in the three month period following the introduction of mediation. As part of on-going monitoring, it is expected that further evaluations will be done to assess the effectiveness of mediation.
DEFINITION AND ESSENTIAL ELEMENTS OF MEDIATION

Folberg and Taylor (1984, p.7) provide the following accepted (Astor and Chinkin, 1992) definition of mediation:

[meditation] can be defined as the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.

Consistent with this definition, mediation in the AMC the following characteristics:

- The mediator does not decide the outcome but acts as an umpire who assists the disputants towards an agreed outcome
- It is non-adversary - the objective being to resolve a dispute rather than establish a winner and a loser by legal or any other criteria
- The resolution is achieved cooperatively by the disputants themselves, with the third party assisting them but not imposing a solution
- There is a process, agreed in advance by all parties, which defines roles and guides the negotiation
- The proceedings are confidential, can be broken off at any time and occur without prejudice to subsequent litigation
- The agreement reach is not in itself binding although it can be made so, if the parties agree, through the recording of the agreed terms as a court judgement (Pears 1989 and Kelly and Co. undated).
PROCEDURAL CHANGES IN THE AMC ASSOCIATED WITH THE INTRODUCTION OF MEDIATION

At the same time that mediation was introduced in the AMC, a new procedural step was added for minor civil actions.

Prior to the introduction of mediation, once the plaintiff and defendant in a minor civil action had lodged their respective claims with the court the matter was automatically set down for trial. The court contacted each party in writing, notifying them when to attend court for the trial.

Following the implementation of mediation, 'directions hearings' were introduced for minor civil actions. The directions hearing is the first point of court contact between disputants once court proceedings have been initiated. They take place three to four weeks after the defendant has filed a defence. The parties are required to attend the directions hearing in person. In general claims the existing directions hearings were changed by requiring the parties to attend and magistrates rather than court officers conducted them.

The directions hearing has two main functions. The first is so that the litigation process and options available to parties for settling the dispute can be explained. It is at the directions hearing that litigants decide whether to take their matter to mediation or trial. The second function of the directions hearing is to provide the parties with an opportunity to discuss the dispute between themselves (ie without the involvement of a third party) to see if they can resolve the matter there and then. A room is provided where parties can discuss the dispute and try to reach a settlement.

Owing to the introduction of directions hearings for minor civil actions, the Supervising Magistrate decided that in addition to evaluating mediation, the evaluation should include feedback from small claims litigants settling their disputes at the directions hearing stage.
AIMS

The central objective underlying the introduction of mediation and directions hearings was to enhance litigants’ level of satisfaction with court settlements by providing the opportunity for consensual decision making. It was hoped that giving disputing parties greater control of settlements would enable them to arrive at more varied and flexible solutions than possible by traditional, adversarial, trial based litigation. It was further hoped that the changes would reduce the number of matters proceeding to trial thereby providing parties with faster and less expensive access to justice.

Following discussions with the Supervising Magistrate and based on these objectives, four key evaluation aims were identified:

i To compare litigant satisfaction with the settlement obtained according to the mode of finalisation (ie directions hearing, mediation, trial)

ii To compare litigant satisfaction with the time taken to finalise disputes according to the mode of finalisation

iii To compare litigant satisfaction with the cost of finalising disputes according to the mode of finalisation

iv To compare litigant satisfaction with their level of participation in deciding the terms of the settlement.

DATA COLLECTION METHOD AND CHARACTERISTICS OF SAMPLE

Sample Selection

Following discussions with Mr Cannon, SSM it was resolved to collect qualitative data from four litigant groups:
i. small claim parties who settled at a directions hearing

ii. small claims parties who did not settle at a directions, declined mediation and had their matters determined at a trial

iii. general and small claim parties who settled their cases at mediation, and

iv. general claims parties who declined mediation and had their matters determined at trial.

To meet required time-lines and to minimise costs, it was decided to collect the data by way of telephone interviews with a random sample of plaintiffs and defendants. A target of 10 interviews for each litigant group was set. It was believed that this number would be sufficient to identify trends in respondents' comments (MacFarlane 1995).

Respondents were selected at random from the Adelaide Civil Registry's computerised case records. Each was sent a letter stating:

- the purpose of the research,
- that their name had been randomly selected from court records,
- that participation in the survey was voluntary,
- that the information collected would only be used for research purposes and written up in such a way that the individuals providing it would not be identifiable, and
- that they would be telephoned in the near future and asked if they would be willing to participate in the study.

Respondents were encouraged to contact the Courts Administration Authority beforehand if they wanted more information about the research and/or the interview process.
Parties who were unwilling to participate in the study or who could not be contacted were replaced until the interview quota for each litigant group had been achieved. As most of the Court files did not include litigants’ business or home telephone numbers, obtaining this information and making contact with them was a laborious and time consuming task that involved a considerable amount of trial and error. Interviews were conducted with 40 respondents (see Table 6.A.1).

Table 6.A.1 shows respondent characteristics with respect to claim type and the nature of the dispute. Indicative of the type of disputes most commonly dealt with by the Adelaide Civil Registry, slightly more than half of the respondents (n=23) were debt-related matters. The remainder of the small claims were mostly damages claims, particularly in respect of motor vehicle accidents. There was greater variety in the general claims. Category ‘Other’ included enforcing a deed of settlement of a de facto relationship, personal injury, misrepresentation, consultancy and a commercial tenancy disputes

<table>
<thead>
<tr>
<th>Claim type</th>
<th>Debt</th>
<th>Damages-property: motor vehicle</th>
<th>Damages-other</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small claim</td>
<td>19</td>
<td>5</td>
<td>4</td>
<td>-</td>
<td>28</td>
</tr>
<tr>
<td>General claim</td>
<td>4</td>
<td>-</td>
<td>1</td>
<td>7</td>
<td>12</td>
</tr>
<tr>
<td>Total</td>
<td>23</td>
<td>5</td>
<td>5</td>
<td>7</td>
<td>40</td>
</tr>
</tbody>
</table>

Although efforts were made to include equal numbers of plaintiffs and defendants in the sample, plaintiffs were more willing to be interviewed; as a consequence the interview findings are biased towards the views of plaintiffs. The plaintiff/defendant distribution for each litigant type is shown in Table 6.A.2.
TABLE 6.A.2: Number of plaintiffs and defendants in each mode of finalisation litigant group

<table>
<thead>
<tr>
<th>Mode of finalisation</th>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small claims settled at Directions Hearing</td>
<td>8</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Small claims judgment at trial</td>
<td>7</td>
<td>3</td>
<td>10</td>
</tr>
<tr>
<td>General and small claims settled at mediation</td>
<td>9</td>
<td>1</td>
<td>10</td>
</tr>
<tr>
<td>General claims judgment at trial</td>
<td>4</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>28</strong></td>
<td><strong>12</strong></td>
<td><strong>40</strong></td>
</tr>
</tbody>
</table>

Questionnaires

Questionnaires were developed following discussions with the Adelaide Civil Registry’s senior Magistrate, the Registrar, and the mediator. The aim of the questionnaires was to assess litigants’ level of satisfaction with the methods available for finalising disputes. In particular, the purpose was to compare the relative satisfaction levels of litigants whose matters were finalised at trial versus those whose matters were finalised by mediation or at the directions hearing stage.

In addition to collecting general background information (e.g. action number, action type, claim type, whether the respondent was a defendant or plaintiff), the questionnaires explored the following:

1. level of satisfaction with outcome
2. level of satisfaction with time taken to resolve matter
3. satisfaction with monetary cost of resolving dispute, and
4. satisfaction with level of participation in deciding the outcome/settlement.
Litigants who had resolved their matters at mediation were also asked about the:

1. reasons for choosing mediation
2. competency and proficiency of the mediator
3. even-handedness of the mediator
4. quality and helpfulness of information provided about mediation at the directions hearing, and
5. whether in retrospect electing to have the dispute mediated was the correct decision.

These litigants were also asked whether they had lodged a Magistrates Court civil claim before the introduction of mediation. Litigants who said they had were asked whether the availability of mediation was an improvement over the previous system. A similar question was asked of litigants who had settled their dispute at the directions hearing stage.

Litigants who had not opted for mediation and gone to trial were asked their reasons for not choosing mediation and whether in retrospect going to trial was the correct decision.

The questionnaires used a combination of closed and open-ended questions. The usual format was for respondents to be first asked a closed question that required them to provide a satisfaction rating (e.g. ‘How satisfied were you with the time it took for your matter to be resolved?’). The rating scale used was a four point semantic differential that ranged from ‘very satisfied’ to ‘very unsatisfied’. This was followed by an open-ended question that asked them explain the reasons for the satisfaction rating given (e.g. ‘Please explain what factors contributed to your satisfaction or dissatisfaction with the time it took to resolve your case?’). Interviewers were instructed to use the open-ended questions to probe respondents and explore the reasons for the satisfaction rating scores that they gave.

One of the questionnaires used is attached. All of them followed this structure with suitable modification to accommodate the stage of the process they were involved in.
Owing to time constraints, there was no in-field pilot testing of the questionnaires. There was, however, in-house pre-testing. This proved sufficient to identify and rectify problems with question wording and the overall structure of the questionnaire.

The first set of interviews were carried out between September and November 1996 by three staff of the Corporate Services Unit, two of whom had previous experience conducting telephone interviews. The third person, a student on a vocational placement with the Corporate Services Unit, was provided with training and interview practice before she commenced telephoning respondents. The last interviews of parties involved in general claims that went to trial could not be undertaken until later because of longer trial delay with those cases. They were conducted by an experienced member of court registry staff.

In general, interviews took between 20 and 30 minutes to complete. A typed transcription of each interview was prepared. To ensure that as much detail as possible was retained, the transcripts were completed as soon as possible after each interview.

LIMITATIONS OF THE EVALUATION

The evaluation has a number of limitations owing to the relatively short amount of time available in which to select the sample and carry out the telephone interviews, the recent introduction of mediation and directions hearings at the time of interviewing and resource constraints generally. The limitations affect the conclusions that it is possible to draw from the data and should be borne in mind when reading the results section. They are summarised below:

1. In the time available it was only possible to interview 40 litigants exposed to the new alternative dispute resolution procedures - 10 small claims litigants settling at the directions hearing stage, 10 small and general claims litigants settling at mediation, 10 small claims litigants whose dispute was determined at trial and 10 general claims litigant whose dispute was determined at trial. The
small sample sizes mean that it is impossible to exclude the possibility that the differences between groups are an artifact of sampling variation.

2 The sample was biased towards plaintiffs. The intention at the outset had been to include equal numbers of plaintiffs and defendants in each mode of settlement group. Plaintiffs, who are the parties that initiate court proceedings, were considerably more willing to be interviewed than defendants. Subsequent evaluations must allow enough time to permit more equal numbers of plaintiffs and defendants to be obtained. Unless this is done the results will only ever be telling one side of the story.

3 For reasons of expediency, simple random sample was used to select respondents. In terms of sample representativeness and the ability to generalise the results it would have been preferable to have used a proportional sampling technique according to claim type (debt matter, damages claims). In the time available, however, this was not feasible.

4 Under the new procedures introduced in the AMC, litigants opting for mediation but not finalising the dispute by this means must go to trial. Due to resource and time constraints this case type was not included in the sample. Follow up evaluations should include this litigant group.

5 As directions hearings were a new procedural step in minor civil actions and in view of the time and resource constraints, the decision was made to only get feedback about directions hearings from small claims litigants. Any subsequent data collection should include interviews with general claims litigants settling at the directions hearing stage.

In spite of the limitations described above, the data collected still provide useful indicative findings. Furthermore, this was only ever intended to be the first of several evaluations of the introduction of alternative dispute resolution mechanisms in the AMC. By identifying the limitations with the current method it has indicated how subsequent evaluations should be improved to provide more definitive results.
RESULTS OF TELEPHONE INTERVIEWS

Level of satisfaction with outcome

Table 6.A.3 compares litigants' level of satisfaction with the outcome of their case according to the mode of finalisation.

TABLE 6.A.3: Litigants’ level of satisfaction with case outcome according to the mode of finalisation

<table>
<thead>
<tr>
<th>Satisfaction</th>
<th>Mediation</th>
<th>Directions hearing</th>
<th>Small Claim Trial</th>
<th>General Claim Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very satisfied</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Satisfied</td>
<td>5</td>
<td>5</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Unsatisfied</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Very unsatisfied</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td>2</td>
</tr>
</tbody>
</table>

Mediated settlements

It is apparent from Table 6.A.3 that nearly all the respondents who settled their matters by mediation were satisfied with the outcomes achieved. Eight of the respondents who finalised their matters by mediation reported being either satisfied (n=5) or very satisfied (n=3) with the mediated outcome.

Comments by these respondents were that mediation offered disputing parties the opportunity to talk through the dispute in a relaxed, informal and non-confrontational environment with the assistance of a neutral third person. One said how he:

liked the fact that it was possible to sit around in a non-threatening room, drinking coffee and working through the dispute.
Some respondents said that the mediation conference was the first time that they had sat down with the other party and properly discussed the dispute. They also stated that the relaxed atmosphere offered by mediation contrasted with the adversarial contest of a trial, and that mediation therefore was more likely to produce settlements that all parties in a dispute were satisfied with. That is, it was less likely than a trial to result in ‘winners and losers’. It was also believed that as the mediation environment did not have the same charged atmosphere as a courtroom, parties were more willing to be conciliatory and compromise.

The only reservations expressed by the respondents satisfied with the mediated outcomes were from two plaintiffs who said that the defendants in their cases had not fully complied with the conditions of the settlement agreed to at the mediation. In the first of these, which was a debt matter, the respondent said that the defendant had made only the first of the repayments agreed to at settlement. In the second matter, which was a fence dispute, the respondent said that the agreed time for the other party to meet the conditions of the settlement had expired without all the agreed conditions had been met.

Both respondents were concerned that they would have to take their matters back to court to have the settlement enforced. One of these respondents suggested that the reason the defendant in his dispute had not complied with the mediated agreement was that he did not perceive it to be equally as binding as a judgment given at trial. That is, there was the perception that failing to fulfil the conditions of a mediated agreement did not have the same ramifications as failing to fulfil a trial judgment. This is incorrect; furthermore there is a procedure available to convert mediated agreements into judgments.

The non-fulfilment of settlements of disputes in the civil jurisdiction of the Magistrates Court is not unique to mediation.

Only two respondents reported being unsatisfied with the outcome achieved by mediation. The first of these, who said he was very unsatisfied with the outcome, had not wanted to have his dispute mediated and believed that he had been pressured at
the directions hearing into choosing mediation. This person, who was the plaintiff in a debt matter, also claimed that he had been pressured by the mediator into accepting a settlement that he was not happy with. He said that during the mediation the mediator had explained how much it could cost him if he took the matter to trial; he said that he was alarmed by the likely cost and therefore agreed to the settlement being offered. He said, after being presented with information about the possible cost of a trial, 'I found this intimidating and it influenced my decision to accept the offer at the mediation'.

The other dissatisfied respondent complained that because of an administrative misunderstanding, his lawyer had not been notified of the mediation date and had not attended the conference. The other party's lawyer had been present at the conference, which he believed disadvantaged him and resulting in his achieving a less favourable settlement.

It is interesting to note that both the respondents who reported that they were dissatisfied with the mediated settlements said that their dissatisfaction was not a criticism of the mediator or the mediation process itself:

My dissatisfaction with the mediated outcome was no reflection on the mediator. The mediation was an awkward situation for both the parties, which did not offer an appropriate solution to my dispute.

That is, their dissatisfaction was only with the outcome and not the process by which the outcome was achieved.

Directions Hearings

One of the procedural changes associated with the introduction of mediation is that the parties in defended minor civil claims matters must attend a directions hearing conference. Previously, defended minor civil claims were automatically listed for trial without there being any preliminary hearing. At the conference, the disputing
parties are given the opportunity to go off into a meeting room to try to resolve the matter. If a resolution cannot be achieved, the matter is set down for trial.

Directions hearings are held one to two weeks after the defence has been filed, which compares with approximately ten weeks for a trial. The reason for introducing directions hearings for small claims was to reduce the time taken to reach a settlement and to reduce the number of small claims going to trial. It was envisaged that where a settlement could not be reached at the directions hearing, the fact that the dispute had been to a directions hearing would streamline the trial process because the key issues in the dispute would have already been identified and discussed.

Table 6.A.3 shows respondents’ level of satisfaction with settlements that were finalised at the directions hearing. The majority of respondents (n=7) who settled their matters at the directions hearing were either satisfied (n=5) or very satisfied (n=2) with the outcomes achieved. When asked to explain the factors underlying their level of satisfaction with the settlement reached, the most frequent comment was that they were pleased to have been able to resolve the matter without going to trial. Respondents believed that settling at the directions hearing saved them money and time, and was less stressful than attending a trial. Respondents defined monetary savings as both the direct cost of getting legal advice and assistance with the preparation of their case and earnings foregone from their own time spent pursuing the claim. There was also a belief that the outcome achieved was much the same as that which would have been achieved at a trial. Below is a selection of respondents’ comments:

[I] saved money by resolving the case at the directions hearing [as] no more court costs were incurred or lawyer costs.

If I had had to go to trial that would have cost more time and money.

... the case was resolved on the day of the directions hearing and there was no more time wasted.
... resolving it quickly at the directions hearing meant that there was not as much time lost as compared with going to trial which takes longer and requires a lot more preparation.

At the directions hearing, disputing parties are encouraged to work out a resolution to the dispute themselves. A meeting room is provided where they can talk through the issues in the dispute and attempt to negotiate a settlement. There was widespread support for this approach:

... directions hearings [are] definitely useful in assisting the resolution of small claims. This is because they offer an impartial environment for parties to discuss their case ...

... its a chance for parties to get together and try to work out a solution before going to trial.

Directions hearings provide a much more relaxed environment that going to trial ... it provided room for compromise and is generally the first time the parties have got together to discuss the case and a way of resolving it. I did not like it at first because I thought matters would not get resolved at the directions hearing and it was just adding another step that would make the whole process take longer ... This has not been the case, with matters now seeming to settle at the directions hearing and not go to trial.

The directions hearing provided a non-threatening environment for each party to get together to discuss the case properly and reach a resolution. [This was] better than going to trial as it was less formal/threatening and more amicable.

The directions hearing is in a very relaxed environment and enables people to discuss their cases and come up with a solution.
Three of the 10 respondents interviewed said that they were not satisfied with the settlements that they agreed to at the directions hearing. As there was no obligation for these respondents (all plaintiffs) to accept these settlements, (ie the offers could have been rejected and the matters set down for trial), they were asked to explain why they settled at the directions hearing. All three indicated that although they were not particularly happy with the directions hearing settlement, they recognised that there was no guarantee they would achieve a better outcome at trial. They believed that it was preferable to accept a less than ideal offer than incur the additional expense of going to trial and running the risk of getting an even less favourable outcome. For example, one respondent, who was attempting to recover his motor vehicle insurance excess, commented that as he was unsure how a magistrate at trial would view his claim, he decided to accept the defendant’s offer. Another respondent, who was involved in a debt dispute, said that the defendant had declared himself bankrupt, therefore he ‘... felt anything he received [from the defendant] was a bonus’.

It should be noted that two of the respondents who reported they were dissatisfied with their settlements said that their dissatisfaction was not a criticism of directions hearings per se. Both these people believed directions hearings were worthwhile as they offered cost and time savings compared with going to trial.

Small Claim matters finalised at trial

It has been shown above that the majority of the respondents who settled either by mediation or at the directions hearing stage were satisfied with the outcomes achieved. Perhaps more significantly, only one of the respondents who was unhappy with the outcome was also unhappy with the process. All the other respondents said that mediation/directions hearings provided a useful means of settling disputes. These findings, and in particular the level of satisfaction with the settlement process, contrast with the comments from those respondents who went to trial.

Compared with the majority of respondents settling at mediation or the directions hearing being satisfied with the outcome, Table 6.A.3 shows that half the respondents
who went to trial were satisfied with the magistrates’ determination and half were not. Owing to the relatively small numbers of respondents, it is not possible to draw any conclusions about the significance of this result vis-a-vis respondents settling at mediation and the directions hearing.

Those satisfied with the outcome made comments such as ‘... the full amount we were claiming was awarded to us ...’, ‘... we won our claim without compromise...’ and ‘... we won the case because we did not have to pay the [plaintiff’s] ridiculous claim’.

The respondents dissatisfied with the trial outcome comprised four plaintiff’s and one defendant. All of these plaintiff’s ‘won’ their cases, however they believed either that they did not receive the full amount that was due to them or that the terms of the settlement set by the magistrate were unsatisfactory. For example, one plaintiff complained that the magistrate had ordered the defendant to repay a debt owed to the plaintiff at the rate of $20 a month, which the plaintiff believed was ‘ridiculous’. Another plaintiff said that owing to damage from a tree belonging to the defendant (his neighbour), it had been necessary for him to replace his driveway at a cost of $3,000. The magistrate had awarded him only $500 and had not required the removal of the offending tree. The plaintiff said that not only did the amount awarded not go anywhere near the cost of replacing his driveway, but by not requiring the removal of the tree, the problem would recur.

In addition to being dissatisfied with the trial outcome, none of these respondents were happy with the process. For instance, one respondent said that while he was not very happy with the terms of the judgment, he was particularly dissatisfied with the manner in which the trial proceeded. This is in direct contrast with the respondents who settled at mediation/directions hearing, only one of who was unhappy with the process. All were critical of the conduct and demeanour of the magistrate who presided over the trial. There were complaints that magistrates seemed disinterested in the matters before them, that they arrived late for trials, that they made inappropriate comments, that they showed bias and that they were aloof and
unhelpful. One plaintiff said that he was so disillusioned with the whole process that he would ‘think long and hard’ about every taking a dispute to trial again.

It is not possible to know to what extent these comments are simply sour grapes on the part of litigants unhappy with the outcomes given at trial. They do, however, contrast with the findings in relation to respondents who settled their matters either by mediation or at the directions hearing stage. Several respondents mistakenly thought the directions hearing was conducted by a magistrate even though the registrar conducted them informally and not on the bench, although sometimes in a courtroom.

These findings seem to suggest that providing litigants with greater participation in the process of determining the conditions of a settlement increases their level of satisfaction with the process, even when they are not particularly happy with the outcome. This issue will be examined in more detail below where respondents satisfaction with their level of participation in determining the settlement is considered.

*General Claims finalised at trial*

In this sample satisfaction with the outcome followed whether the result was favourable with one exception, a case where both parties were interviewed and each felt they had won. The judgment was apparently for part, not all of the plaintiff’s claim. Those two commented:

The plaintiff was satisfied that the judgment had been awarded in her favour, but she said that during the trial, whilst she was in the witness box, she would have liked to have a chance to explain her answers when questioned, instead of being limited to “yes” and “no” answers. In other words she didn’t get a chance to ‘have her say’ on her day in court.
The defendant said he felt his “stance in the matter had been vindicated”. He said there was a definite “personality clash” and a lot of “angst” between the parties and he saw no chance of compromise, so he had decided to “slug it out” and “make the lawyers earn their money” and he was happy with the result of this.

Some praise here for the bench. A defendant who won said,

He had a lot of praise for the Magistrate. He described the Magistrate as “excellent”, “professional” and “logical”. He was impressed that the Magistrate researched the case out of working hours. By this he meant that the magistrate took video evidence home and said he had watched the video about ten times. The defendant was appreciative that the magistrate had put in the effort to make sure he made the right decision.

Some praise also for the legal profession (but not the simplicity of the process) implicit in this response,

The defendant said he was very happy with the outcome of the trial, but he felt somewhat bewildered by the court process. He said he was “lost” amid the legal jargon and ceremony, but he was happy for his barrister to take the reigns and pleased that the outcome was in his favour.

It is reported below that satisfaction with the outcome did not always correlate with satisfaction with the process.

**Level of satisfaction with time taken to settle dispute**

A key objective of the changes associated with the introduction of directions hearings and mediation was to reduce the time taken to resolve disputes.
AMC caseflow data from before the implementation of directions hearings and mediation showed that for minor civil actions the average length of time between a defence being filed and a trial was 12 weeks.

Caseflow data following the introduction of directions hearings and mediation show that there has been a significant reduction in the time taken to finalise minor civil actions, in large part because many disputes are being finalised at the directions hearing stage (Cannon 1997).

As already described, directions hearings are the first point of court contact between disputing parties once court proceedings have been initiated. They take place three to four weeks after the defendant in a dispute has lodged his/her defence to the plaintiff’s claim. At the directions hearings the disputing parties are given the opportunity to discuss the dispute between themselves to see if they can resolve it there and then. It has been found that as a result of this procedure approximately a third of minor civil actions are being settled at the directions hearing stage. This and the availability of mediation has meant that there are many fewer matters proceeding to trial. As a result, trial waiting times have reduced from 12 weeks to seven weeks after the filing of the defence (i.e. four weeks after the directions hearing). It is noted that in 1999 the delay had reverted to 12 weeks although extra listings have been arranged to bring this back to seven weeks in the new millenium.

For parties not settling at the directions hearing and choosing to have the dispute mediated, the mediation conference is usually held four weeks after the directions hearing. This means that in minor civil actions, mediation conferences and trials both take place approximately four weeks after the directions hearing.

The improvements in the time taken to finalise minor civil actions and the fact that mediation conferences and trials are occurring about the same length of time after the directions hearings are evident in the answers respondents gave to a question about their level of satisfaction with the time taken to finalise their disputes.
Table 6.A.4 shows that regardless of the method of finalisation, the majority of litigants were satisfied with the length of time taken to have their matter finalised: eight of the ten respondents who finalised their disputes at mediation were either satisfied or very satisfied with the time taken to finalisation as were nine of those respondents who settled at the directions hearing stage and eight who settled at trial. In general claims which went to trial the delay was six months or more and although most accepted that the level satisfied reduced to n=6 out of ten.

<table>
<thead>
<tr>
<th>Satisfaction</th>
<th>Means of finalisation</th>
<th>Mediation</th>
<th>Directions hearing</th>
<th>Small Claim Trial</th>
<th>General Claim Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very satisfied</td>
<td></td>
<td>2</td>
<td>7</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Satisfied</td>
<td></td>
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<td>2</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Unsatisfied</td>
<td></td>
<td>2</td>
<td>1</td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>Very unsatisfied</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
</tbody>
</table>

The major difference in respondents' satisfaction ratings was that considerably more of the litigants settling at the directions hearing stage were 'very satisfied' with the time taken to finalisation. Seven of the respondents finalising at the directions hearing said they were 'very satisfied' with the time taken compared with only two respondents who finalised at mediation and one who finalised at trial. The high level of satisfaction of respondents settling at the directions hearing with the time taken to finalisation is shown in the following quotations:

[I was] pleased that the case was resolved on the day at the directions hearing and there was no more time wasted.

Very pleased that [we were] able to resolve the matter quickly at the directions hearing. Able to reach a resolution quickly.
Very pleased the case was resolved so quickly.

Happy that no time was wasted and the administrative procedures were very efficient.

Very satisfied. ... Resolving it quickly at the directions hearing meant that there was not as much time lost as compared to going to trial which takes longer and requires a lot more preparation time.

Very quick to settlement.

As the directions hearing is the first point of contact between disputing parties once court proceedings have been initiated, it is not surprising that respondents settling at this early stage would report a higher level of satisfaction with the time taken to finalisation than respondents settling at either mediation or at trial.

There was one respondent who settled at the directions hearing who reported being unhappy with the length of time to finalisation. An examination of this respondent's reasons for dissatisfaction revealed that he was disgruntled with the court process in general and not with the time taken to finalise his matter in particular, as indicated in his following comment to the interviewer, 'I believe that I wasted my time even lodging the original claim'.

It can be seen from Table 6.A.4 that there was little difference between respondents finalising at mediation and those finalising at trial with their level of satisfaction with the time taken. As described above, mediation conferences and trials both take place about four weeks after the directions hearing, which would explain the similar satisfaction ratings.
Cost of settlement - Do directions hearings and mediation provide monetary savings for litigants settling at these stages?

The monetary cost of litigation and hence its affordability is one of the most important issues for the court and justice systems. The prime determinant of costs to a litigant is the stage in the court proceedings at which the matter is finalised (Cannon, undated, a). The further down the legal path a case proceeds the more legal work that must be done and hence the greater the cost (eg payment of disbursements, document discovery, experts’ reports, witness’ statements and parties own expenses gathering information) (Williams and others 1992).

Central to the introduction of directions hearings and mediation was a desire to reduce the costs to parties of civil litigation by providing them with an opportunity to settle disputes earlier in the court process and, in particular, before trial. To see whether this was the case, the respondents finalising their disputes at the directions hearing stage and at mediation were asked whether they believed they saved money by not having to go to trial.

<table>
<thead>
<tr>
<th>Yes</th>
<th>Directions hearing</th>
<th>Mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10</td>
<td>8</td>
</tr>
<tr>
<td>No</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Don’t know</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>10</td>
<td>10</td>
</tr>
</tbody>
</table>

It can be seen from Table 6.A.5 that the respondents settling at the directions hearing were unanimous in their belief that they saved costs by settling at this early stage of the court process. Most were full of praise for the opportunity that directions hearings provided for early dispute settlement because of the cost savings:
I saved money by settling at the directions hearing as no more court costs were incurred or lawyer costs.

Yes I saved money as I did not have to engage a solicitor and [there were] no trial costs.

Yes I believe I save money - no solicitor fees. Going to trial would have cost more.

As described above, all the respondents who settled at the directions hearing were small claims litigants. Section 38 of the *Magistrate Courts Act 1991* prohibits legal practitioners from representing litigants in small claims matters. The rationale for this is to reduce costs for small claims litigants. It is surprising therefore that many of the respondents settling at the directions hearing mentioned that they saved solicitors’ fees by settling at this early stage in the court process. When asked about this the respondents said that although they could not have a legal practitioner represent them in court, they nevertheless consulted solicitors to get information about their rights, for advice about how to proceed with the matter and, in some instances, write letters to the other party in the dispute.

Litigants involved in general claims are permitted to have legal representation in court. It would have been interesting to have interviewed a sample of these litigants settling at the directions hearing stage and to compare their comments regarding cost savings with those of the small claims litigants.

Table 6.A.5 shows that nearly all the respondents settling at mediation also believed that they saved money by not having to go to trial (n=8). Those stating that they saved costs said they avoided paying solicitors’ fees, witness fees and further court costs by settling before trial:

Yes I believe I saved money by settling at mediation. If the case had gone further witness and court fees would have been extra.
I believe we would have incurred further costs if we had proceeded to trial. The money involved in the case was not a great deal and it made sense to choose mediation so that no further costs were incurred.

... it would have cost more to go to trial.

Two of the respondents settling at mediation were general claims litigants; both were of the view that they reduced their costs quite considerably by not having to go to trial.

Table 6.A.5 shows that one respondent did not believe he made any cost savings by settling at mediation and another respondent said that he did not know. The person who believed he did not save any money was dissatisfied with everything to do with the court process (discussed above) and this negativity was repeated in nearly all his answers. The respondent who did not know whether he saved money by settling at mediation had not been to court before and was not aware of the costs associated with taking a dispute to trial. (When asked if he believed there would have been additional costs to finalise the matter by trial, he said did not know and then proceeded to ask what the additional costs would have been.)

Respondents settling at mediation were asked if cost was a factor in their decision to mediate the dispute. All but two said that cost was a consideration, with four volunteering that it was a very important factor. The two respondents who said that cost was not an issue were the same two who said respectively that they did not believe they saved money by finalising at mediation and that they did not know.

Interestingly, several respondents remarked that although cost was a reason for choosing mediation, it was not the only or most important reason. These respondents commented variously that mediation seemed a more informal and less terrifying way of dealing with the dispute than going to trial and that it was more conciliatory and less antagonistic method of dispute resolution. A respondent who had his own business and was the plaintiff in a debt matter said that while he recognised the cost
advantages of finalising at mediation, he chose mediation primarily because it was good for his business to be seen to be flexible and conciliatory.

In addition to asking respondents who settled their disputes at the directions hearing and mediation stages whether they saved money by settling early in the court process, respondents who went to trial were asked if they believed it had cost them more by going to trial. All the respondents answering this question were small claims litigants whose trial costs would have been considerably less than those of general claims litigants because, as mentioned, they are not permitted to be represented by a legal practitioner.

The question brought an insightful response as to the reason these parties had gone to trial. Eight of the ten respondents agreed that in theory settling earlier might have reduced their costs, however the question was a hypothetical one because the other party in the dispute was not prepared to settle by any means other than at trial. That is, they wanted their day in court. The two respondents who did not believe that they would have saved money by settling before trial were cases in point. Each believed that they were in the right in the dispute and were not prepared to compromise or negotiate a settlement with the other party; they would only accept a magistrate adjudicated ruling:

I did not believe that I was at all in the wrong in the vehicle accident. I was the innocent party. I was not prepared to go to mediation as it would have been admitting guilt.

Several respondents believed that the parties only willing to settle at trial were actually worse off as a result of their intransigence (ie they received less favourable outcomes at trial compared with what could have been obtained through negotiation at the directions hearing or mediation).

All eight respondents who believed that they might have saved costs by not having to go to trial said that they would have been willing to try to settle the matter pre-trial by negotiation. The comment was made that it was too easy for one dissenting party in a
dispute to over-rule the option of trying to settle the matter other than at trial. It was
believed that it should be possible to bring more pressure to bear at the directions
hearing to get reluctant parties to at least try mediation:

... there should be more of an obligation on the parties to try mediation ... the
decision of the person not prepared to mediate has too much sway ... the
person running the directions hearing should have more authority to direct
people to go to mediation. ...

One successful plaintiff in a general jurisdiction case that went to trial stated that he
thought that:

mediation should made “a legal requirement”, and preferably introduced as
the first course of action to maximise savings in time and money.

There was also an unelaborated suggestion that, in recognition of the costs associated
with going to trial, there could be a cost penalty imposed on those parties refusing to
countenance a pre-trial settlement.

The issue that one party can veto attempts to reach a settlement by pre-trial
negotiation should be examined further.

In the general claims that went to trial represented parties had been advised of the
likely costs although one had not been advised of the risk of paying the other side’s
costs if he lost and he felt that this forced him into an unfavourable settlement. The
predicted costs were fairly accurate and successful parties found they recovered most
of these from the other side. Costs ranged from $2,500 to $10,000

Litigants’ satisfaction with the opportunity provided to present their case

Table 6.A.6 shows that there were obvious differences with respect to respondents’
satisfaction with the opportunity afforded them to present their side of the dispute
according to the method of settlement.
TABLE 6.A.6: Litigants' level of satisfaction with the opportunity provided to present their side of the dispute according to settlement method

<table>
<thead>
<tr>
<th>Satisfaction</th>
<th>Means of finalisation</th>
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<tbody>
<tr>
<td></td>
<td>Directions hearing</td>
</tr>
<tr>
<td>Very satisfied</td>
<td>5</td>
</tr>
<tr>
<td>Satisfied</td>
<td>5</td>
</tr>
<tr>
<td>Unsatisfied</td>
<td>0</td>
</tr>
<tr>
<td>Very unsatisfied</td>
<td>0</td>
</tr>
</tbody>
</table>

All the respondents settling at either the directions hearing stage or mediation believed that they received a fair hearing and were given ample opportunity to present their case. In each of these two groups five respondents reported being ‘very satisfied’ with the opportunity provided to present their side of the dispute and five were ‘satisfied’. That is, even the few respondents settling at the directions hearing and mediation stages who were unhappy with the terms of the settlement believed that they received a fair hearing.

Some examples of comments made by parties settling at the directions hearing are presented below:

The practice of encouraging parties to leave the room to discuss the matter between themselves allowed maximum input ... it offers and impartial environment for parties to discuss their cases.

I was very satisfied [with my level of input] because I was able to go off into a room with the defendant and in a one-to-one situation work out a resolution that was agreeable to both of us ... we worked out a solution and not some third party.
Both parties sat down and discussed the case like adults. Everyone got their chance to get their point across.

Similar positive comments were made by respondents settling at mediation:

The mediator set the ground rules at the beginning of the session so that both parties were aware of how the session would run and what was appropriate and what was not. The mediator controlled the discussion but did not dominate, he allowed both parties the opportunity to have their say.

The level of input was good in that I was able to present my case and identify what issues were important for me.

Each party was able to put their side of the argument. The parties were not rushed or pushed by the mediator and the mediator made sure each party clearly explained their side of the dispute.

In contrast, only five of the ten respondents whose small claim was determined at trial believed that they received a fair hearing. All those who believed that they were not given sufficient opportunity to present their case at the trial were outspoken in their criticism of the magistrate presiding over the trial:

... the magistrate just took over and was over bearing ... I was not given the opportunity to put my case properly and when I tried to the magistrate said not to interrupt ... the magistrate demonstrated a particular antipathy towards me.

Every time I queried what the defendant was saying the magistrate put me back in my place and told me not to interrupt ... . The magistrate would not listen to my side of the argument.
... during the trial I put my hand up to speak and the magistrate said ‘Just wait your turn’. I did not get my turn with the defendant doing 75% of the talking.

The magistrate did not give me a fair chance to put my case at the trial. [I] had gone to the trial with questions that my solicitor had prepared for me to ask the defendant however the magistrate did not give me the opportunity to ask the questions ... the magistrate was biased against me.

Several of these dissatisfied respondents accused the magistrates of being biased against them. By comparison, none of the respondents settling at mediation said that the mediator showed bias, in fact all said the mediator treated each party fairly and impartially. This may reflect the different process between mediation where the mediator does not express an opinion compared to determination where the Magistrate tells the loser they have lost and why.

Consistent with that explanation all the respondents who said that they did not get a fair hearing at a small claims trial were also unhappy with the terms of the trial outcome. Therefore it is not possible know to what extent their comments were coloured by their dissatisfaction with the result. However, their comments do contrast with those respondents settling at the directions hearing and mediation stages because even the respondents settling by these means who were unhappy with the settlement still believed they received a fair hearing.

In general claims the balance between plaintiffs and defendants was better (n=4, n=6). In this sample two who were satisfied with the outcome were not satisfied with their participation in the outcome, although one of these said that was his own, rather than the court’s fault. This comment is quoted below and it still implies that he found the process alienating. One who was unhappy with the outcome was however very satisfied with the participation he had into the process. Some comments were:

The plaintiff reported above who was unhappy with being limited to answer just “yes” or “no” repeated that complaint about the process and added that
certain facts weren't reported correctly by the solicitors and she believed that the parties themselves should be given the chance to make their own statement and say what they really think. She was one who was satisfied with the outcome but not the process.

Her opponent was satisfied with both the outcome and the process.

He was satisfied on this point because he believes he was given every opportunity to put forward his case.

Another plaintiff who was satisfied with the trial outcome was not satisfied with his participation in the process.

The plaintiff said this was not the fault of the court but his own. He was very disappointed with his own response in court. He was nervous and although he knew the magistrate was trying to guide him (an alarming perception-editor) he couldn't understand and kept focusing on one area. He said he would have liked the magistrate to let him stop and collect his thoughts, after which he might have performed better. He said the other party's evidence was "full of lies" but he was so nervous he was unable to take notes.

In contrast a defendant who lost was satisfied with the process.

He represented the company and he had a witness who gave the vehicle to the other party, they both had plenty of time to present their case.

Further criticism of the evidence process came from a very disgruntled "I went on a chicken run" loser.

The defendant said that "the truth, the whole truth and nothing but the truth" was not a matter of simple "yes" and "no" answers. He said he magistrate got impatient with him when he tried to explain his answers. In fairness to
the magistrate the interviewer encountered a similar problem. She noted: his responses ‘to this and other questions during the interview sometimes escalated into generalised, emotion charged statements, rather than providing specific answers.’

Two defendants who was satisfied with the outcome said of the participation:

“Everything went fine in this regard.” It was his first time in court and he was satisfied with the court process. In any case, he said his lawyer handled most of it, and he himself was only on the stand for about an hour, which he said went well.

He said he briefly gave his barrister some instructions and “he took it from there”.

There was little criticism of the magistrates (in contrast to the small claims trials noted above). One who lost said

“When it got to my side, the magistrate had already decided. He was not interested in what I had to say. If I talked for another hour it would have been the same outcome. She conceded that greater input wouldn’t have done any good because she realises now that legally the magistrate had to rule the way he did. She wasn’t happy about it but “that’s the law”.

It is interesting to note here that the participation of lawyers in the adversary process of general trials seems to protect the magistrate from the blame of losing that was apparent in the sample of small claims trials. Although the role of lawyers was not the focus of this research it came in for some gratuitous praise. This was not universal.

CONCLUSIONS
The dangers of any generalised conclusions have been noted above. However even given those reservations and the fact that parties who have settled is itself a bias for
reasonable people the mediation and directions hearing processes delivered a satisfactory result to most litigants and importantly they were universally satisfied with their opportunity to present their side in those processes.

As one might expect in a determinative process the satisfaction with trial processes tends to follow the result but the fact that even some winners were unhappy with the process is indicative that the process does not always appear dignified and careful to the parties. It seems that in small claims where parties are unrepresented and the method adopted by the magistrate is necessarily more ‘hands on’ the magistrate is much more likely to be criticised than in the traditional more remote role in an adversary trial with lawyers.

Unless very clear signals are given the parties tend to assume that court registrars are magistrates.

People who declined mediation did so because they believed they were entitled to succeed in full and saw no reason to compromise or their assessment was that the other side were unreasonable, obsessive or it had become a matter of principle (about half). The rest said they were willing to mediate but the other side was not. It is noted that some parties who wanted to try mediation were frustrated that their opponents would not and suggested it could be made compulsory. Those who chose mediation did so because they saw it as less terrifying, less antagonistic, good business to be seen as flexible, amicable, honest and several also because it saved time and the cost of preparing for trial which they had discussed with their lawyers. It is clear that some were very pleased to have the opportunity to resolve the dispute outside the trial process. Those who settled their case were not only satisfied but generally full of praise for the directions hearing and mediation process.

However some of those who did settle at mediation had found that the other party had reneged on the agreement and were worried about the difficulty of then enforcing it. In these the mediator apparently had not put in train a procedure to monitor the agreement. Procedures exist to readily convert such an agreement into a judgment but those interviewed were not aware of this. If the system is to work a simple procedure to
ensure the agreement can be enforced is essential. Subject to this, the clear impression is that for some mediation is a process with which they are far more comfortable and which offers flexibility and other advantages over the trial process.

ENDNOTES
1. General claims are matters where the dollar amounts being claimed by the plaintiff (the aggrieved party initiating the action) are between $5,001 and $30,000 or, if the claim is for personal injury (e.g., injuries sustained in a motor vehicle accident), up to $60,000. Minor civil actions are for claims up to $5,000.

2. A number of legal firms in Adelaide also offer mediation, however litigants must pay for this service, which is prohibitively expensive.

REFERENCES


Cannon, A.J. “An Evaluation of the Mediation Trial in the Adelaide Civil Registry” (August 1997) 7 JJA 1 p.50.


QUESTIONNAIRES

SAMPLE 1 - Those who attended mediation and settled (small or general) -

Name of Interviewer
Call Date
Call Time (am/pm)
Could the respondent be contacted [ ] Yes [ ] No
If no, Callback 1 Date Time
Callback 2 Date Time
Callback 3 Date Time

Survey
Hello my name is..............., I work for the Courts Administration Authority and we are currently conducting a telephone survey about the option of mediation for resolving minor civil claims and general claims in the Civil Division of the Adelaide Magistrates Court. You should have recently received a letter about the evaluation and that you would be contacted.

Do you have approximately 30 minutes that I can talk to you about this matter?
(If yes continue, if no arrange time to callback.)
Callback Date Time

I understand that you were recently involved in a small/general claim action. We believe that your feedback about your experiences would be of great assistance to the Authority in providing a higher standard of service. Your feedback will also assist in evaluating any additional services that may be required to meet the future needs of the courts consumers.

All information you provide will be treated confidentially.

Would you like to participate in this survey?
1. INFORMATION TO BE COLLECTED PRIOR TO CONTACT WITH RESPONDENT

Name of, Plaintiff [ ] Defendant [ ]

Action Number

Action: [ ]
1. Minor Civil [ ]
2. General [ ]
3. Other (please describe) [ ]

4. Type of Claim:
   [ ] Motor vehicle accident
   [ ] Property
   [ ] Building
   [ ] Personal injury
   [ ] WorkCover
   [ ] Defamation
   [ ] Contract
   [ ] Other

5. Date Defence was lodged [ ]
6. Date of Directions Hearing [ ]
7. Date of mediation [ ]
8. Name of mediator [ ]

2. OUTCOME

9. Could you please tell me the terms of the settlement reached at mediation?

10. How satisfied were you with the mediated outcome?
    [ ] 1. very satisfied
    [ ] 2. satisfied
    [ ] 3. unsatisfied
    [ ] 4. very unsatisfied

11. Please explain what factors contributed to your satisfaction or dissatisfaction with the mediated outcome?
3. CASE DURATION

12. How satisfied were you with the time it took for your matter to be resolved?
   [ ] 1. very satisfied
   [ ] 2. satisfied
   [ ] 3. unsatisfied
   [ ] 4. very unsatisfied

13. Please explain what factors contributed to your satisfaction or dissatisfaction with the time it took for your case to resolve?

4. CASE COST

14. Was one of the reasons you chose mediation because you thought it would cost you less than having the matter settled at a trial? Please explain.

15. How important was cost in your decision to choose mediation?

16. Do you believe that you saved money by resolving your claim through mediation? Please explain.

5. OUTCOME PARTICIPATION

17. How satisfied are you with the level of input you were able to have in deciding on the mediated outcome?
   [ ] 1. very satisfied
   [ ] 2. satisfied
   [ ] 3. unsatisfied
   [ ] 4. very unsatisfied

Please explain

6. USE OF LEGAL REPRESENTATION (for general claims only)

18. Did you have legal representation at the mediation hearing?
7. OPERATION OF THE MEDIATION PROCESS

19. Why did you choose mediation? (prompt for more than one answer, “Was there any other reason that you chose mediation?”)

20. At what stage of your claim were you made aware of the option of mediation?

21. Do you have any comments on the information provided about mediation at the directions hearing? (E.g. Was the information detailed enough to assist you to make an informed decision?)

22. How convenient was the location and time that the mediation was held? (E.g. Would it have been helpful if the mediation had been held outside normal office hours or at a suburban Magistrates Court - Christies Beach, Elizabeth, Holden Hill, Mt Barker, Port Adelaide?).

8. MANNER IN WHICH THE MEDIATION WAS CONDUCTED

23. During the mediation did you feel that the mediator treated both sides equally or favoured one side more than the other? Please explain.

24. Do you have any comments about the proficiency of the mediator?

25. In retrospect, do you believe that choosing the mediation path was the right or wrong decision? (Eg. If you were involved in a similar dispute, would you choose mediation?) Explain.

26. Would you like to make any additional comments on the use of mediation for dispute resolution?

9. PREVIOUS LODGEMENT - The next few questions are about previous experience with civil claims in the Magistrates Court. This is to see whether people think that the new system is an improvement over the previous system.
27. Have you previously been involved in another civil claim within the Adelaide Magistrates Court Civil Division?

28. Action:
   [ ] 1. Minor Civil
   [ ] 2. General
   [ ] 3. Other (please describe)

29. Type of Claim:
   [ ] 1. Motor vehicle accident
   [ ] 2. Property
   [ ] 3. Building
   [ ] 4. Personal injury
   [ ] 5. WorkCover
   [ ] 6. Defamation
   [ ] 7. Contract
   [ ] 8. Other

30. How long ago was the claim?

31. Do you think that the new system where parties are offered mediation is better than the previous system were mediation was not available? Please explain?

Thank you for your time and assistance
SAMPLE 2 - Small Claims settled at Directions Hearing

The same preliminary matters set out in the first sample were attended to.

1. INFORMATION TO BE COLLECTED PRIOR TO CONTACT WITH RESPONDENT

1. Name of, Plaintiff [ ] Defendant [ ]
2. Action Number
3. Type of Claim:
   [ ] 1. Motor vehicle accident
   [ ] 2. Property
   [ ] 3. Building
   [ ] 4. Personal injury
   [ ] 5. WorkCover
   [ ] 6. Defamation
   [ ] 7. Contract
   [ ] 8. Other
4. Date Defence was lodged
5. Date of Directions Hearing

2. OUTCOME

6. Could you please tell me the terms of the settlement reached at the directions hearing?

7. How satisfied were you with the outcome of the directions hearing?
   [ ] 1. very satisfied
   [ ] 2. satisfied
   [ ] 3. unsatisfied
   [ ] 4. very unsatisfied

8. Please explain what factors contributed to your level of satisfaction with the outcome from the directions hearing?

3. CASE DURATION

9. How satisfied were you with the length of time it took for your case to be resolved?
10. Please explain what factors contributed to your satisfaction or dissatisfaction with the time it took for your case to be resolved?

4. CASE COST

11. Do you believe you saved money by resolving your case at the directions hearing?

12. How satisfied were you with the costs of resolving your case at the directions hearing?
   [ ] 1. very satisfied
   [ ] 2. satisfied
   [ ] 3. unsatisfied
   [ ] 4. very unsatisfied
   Please explain.

5. OUTCOME PARTICIPATION

13. How satisfied were you with the level of input you were able to have in the settlement reached at the directions?
   [ ] 1. very satisfied
   [ ] 2. satisfied
   [ ] 3. unsatisfied
   [ ] 4. very unsatisfied
   Please Explain.

6. USE OF LEGAL REPRESENTATION

14. During the course of your case, did consult a lawyer or some kind of legal aid?
If so, which one?

15. Did your legal representative advise you to settle at the directions hearing?

16. Please explain your reason for settling at the directions hearing?

7. OPERATION OF THE DIRECTIONS HEARING

17. Previously, directions hearings were not offered for minor civil claims. Do you believe that directions hearings assist the resolution of small claims? Why/why not?

18. Would you say the directions hearing was
   [ ] very useful
   [ ] useful
   [ ] not useful, for the resolution of small claims?

8. PREVIOUS LODGEMENT - The next few questions are about previous experience with civil claims in the Magistrates Court. This is to see whether people think that the new system is an improvement over the previous system.

19. Have you previously been involved in another civil claim within the Adelaide Magistrates Court Civil Division?

20. Action:
   [ ] 1. Minor Civil
   [ ] 2. General
   [ ] 3. Other (please describe)

21. Type of Claim:
   [ ] 1. Motor vehicle accident
   [ ] 2. Property
   [ ] 3. Building
   [ ] 4. Personal injury
   [ ] 5. WorkCover
   [ ] 6. Defamation
[ ] 7. Contract
[ ] 8. Other

22. How long ago was the claim?

23. Do you think that the new system where parties attend a direction hearing before proceeding to trial is better process? Please Explain.

24. Are there any other comments you would like to make?

Thank you for your time and assistance.
SAMPLE 3 - Small claims, declined mediation, judgment given at trial-

The same preliminary matters set out in the first sample were attended to.

1. INFORMATION TO BE COLLECTED PRIOR TO CONTACT WITH RESPONDENT

1. Name of, Plaintiff [ ] Respondent [ ]
2. Action Number
3. Type of Claim:
   [ ] 1. Motor vehicle accident
   [ ] 2. Property
   [ ] 3. Building
   [ ] 4. Personal injury
   [ ] 5. WorkCover
   [ ] 6. Defamation
   [ ] 7. Contract
   [ ] 8. Other
4. Date Defence was lodged
5. Date of Directions Hearing
6. Date of trial

2. OUTCOME

7. Could you please tell me the terms of the trial outcome?

8. How satisfied were you with the outcome of your case at trial?
   [ ] 1. very satisfied
   [ ] 2. satisfied
   [ ] 3. unsatisfied
   [ ] 4. very unsatisfied

9. Please explain what factors contributed to your satisfaction or dissatisfaction with the trial outcome?

3. CASE DURATION

10. How satisfied were you with the length of time it took from when the
defence was lodged and when judgment was given at trial?

[ ] 1. very satisfied
[ ] 2. satisfied
[ ] 3. unsatisfied
[ ] 4. very unsatisfied

11. Please explain what factors contributed to your satisfaction or dissatisfaction with the time it took for your case to be resolved?

4. CASE COST

12. Prior to trial, did you know the likely costs involved in pursuing a small claim in the Adelaide Magistrates Court Civil Division?

13. In retrospect, do you believe you would have saved money by opting for mediation and attempting to resolve the matter at an earlier stage of the litigation process? Please explain.

5. OUTCOME PARTICIPATION

14. How satisfied were you with the level of input you were able to have in the judgment given at trial?

[ ] 1. very satisfied
[ ] 2. satisfied
[ ] 3. unsatisfied
[ ] 4. very unsatisfied

Please explain

15. Would you like to have had greater input into the outcome of your case. Why/why not?

6. REASON FOR DECLINING MEDIATION

16. Can you tell me what you understand by the term mediation?
17. At what stage of your claim were you made aware of the option of mediation?

18. Do you have any comment on the information provided about mediation at the directions hearing? (E.g., Was the information detailed enough to assist you to make an informed decision?)

19. Why didn’t you choose mediation?

20. Are there any other comments you would like to make?

7. DIRECTIONS HEARING

21. As part of the process of resolving your dispute, you had to attend a directions hearing before you could proceed to trial. How useful was the directions hearing?

[ ] very useful

[ ] useful

[ ] not useful

Please explain.

22. Do you think it would be better if the matter had gone straight to trial? (in which case your matter would probably have been resolved earlier) Please explain.

Thankyou for your time and assistance.
SAMPLE 4 - General claims, declined mediation, judgement given at trial-

The same preliminary matters set out in the first sample were attended to.

1. INFORMATION TO BE COLLECTED PRIOR TO CONTACT WITH RESPONDENT

1. Name of, Plaintiff [ ] Respondent [ ]

2. Action Number

3. Type of Claim:
   - [ ] 1. Motor vehicle accident
   - [ ] 2. Property
   - [ ] 3. Building
   - [ ] 4. Personal injury
   - [ ] 5. WorkCover
   - [ ] 6. Defamation
   - [ ] 7. Contract
   - [ ] 8. Other

4. Date Defence was lodged

5. Date of Directions Hearing

6. Date of Conciliation Conference

7. Date of trial

2. OUTCOME

8. Could you please tell me the terms of the trial outcome?

9. How satisfied were you with the outcome of your case at trial?
   - [ ] 1. very satisfied
   - [ ] 2. satisfied
   - [ ] 3. unsatisfied
   - [ ] 4. very unsatisfied

10. Please explain what factors contributed to your satisfaction or dissatisfaction with the trial outcome?
3. CASE DURATION

11. How satisfied were you with the length of time it took from when the defence was lodged and when judgment was given at trial?

[ ] 1. very satisfied
[ ] 2. satisfied
[ ] 3. unsatisfied
[ ] 4. very unsatisfied

12. Please explain what factors contributed to your satisfaction or dissatisfaction with the time it took for your case to be resolved?

4. CASE COST

13. Before going to trial, had anyone (e.g. your solicitor) explained how much it was likely to cost you?

14. Are you able to estimate how much this claim cost you (including solicitors fees, witness fees, lodgement fees; try to entice response)?

15. Did the case cost you more, less, about the same as you expected?

16. In retrospect, do you believe you would have saved money by opting for mediation and attempting to resolve the matter at an earlier stage of the litigation process? Please explain.

5. OUTCOME PARTICIPATION

17. How satisfied were you with the level of input you were able to have in the outcome of your case at trial? (i.e. did the respondent believe they received a fair hearing and did they believe they received sufficient opportunity to present their case?)

[ ] 1. very satisfied
[ ] 2. satisfied
[ ] 3. unsatisfied
412

[ ] 4. very unsatisfied

Please explain

18. Would you like to have had greater input into the outcome of your case?
   (ie greater opportunity to present case?)
   Why/why not?

REASON FOR DECLINING MEDIATION

19. Can you tell me what you understand by the term mediation?

20. At what stage of your claim were you made aware of the option of
    mediation?

21. Do you have any comment on the information provided about mediation at
    the directions hearing? (E.g. Was the information detailed enough to assist
    you to make an informed decision?)

22. Why didn’t you choose mediation?

23. Are there any other comments you would like to make?

Thank you for your time and assistance
### APPENDIX 7.A

#### German court fees and the BRAGO

<table>
<thead>
<tr>
<th>Amount of claim DM</th>
<th>Court fee one unit</th>
<th>Brago one unit</th>
</tr>
</thead>
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<tr>
<td>600</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>1 200</td>
<td>70</td>
<td>90</td>
</tr>
<tr>
<td>1 800</td>
<td>90</td>
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<td>170</td>
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<td>3 000</td>
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<td>325</td>
<td>805</td>
</tr>
<tr>
<td>18 000</td>
<td>355</td>
<td>875</td>
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<tr>
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<td>25 000</td>
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</tr>
<tr>
<td>40 000</td>
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<td>50 000</td>
<td>655</td>
<td>1 425</td>
</tr>
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<td>Amount of claim DM</td>
<td>Court fee one unit</td>
<td>Brago one unit</td>
</tr>
<tr>
<td>-------------------</td>
<td>-------------------</td>
<td>----------------</td>
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<tr>
<td>60 000</td>
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<td>775</td>
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</tr>
<tr>
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<td>1 355</td>
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<td>3 085</td>
</tr>
<tr>
<td>310 000</td>
<td>2 355</td>
<td>3 245</td>
</tr>
<tr>
<td>340 000</td>
<td>2 555</td>
<td>3 405</td>
</tr>
<tr>
<td>370 000</td>
<td>2 755</td>
<td>3 565</td>
</tr>
<tr>
<td>400 000</td>
<td>2 955</td>
<td>3 725</td>
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<td>3 250</td>
<td>3 975</td>
</tr>
<tr>
<td>520 000</td>
<td>3 545</td>
<td>4 225</td>
</tr>
<tr>
<td>580 000</td>
<td>3 840</td>
<td>4 475</td>
</tr>
<tr>
<td>640 000</td>
<td>4 135</td>
<td>4 725</td>
</tr>
<tr>
<td>700 000</td>
<td>4 430</td>
<td>4 975</td>
</tr>
<tr>
<td>760 000</td>
<td>4 725</td>
<td>5 225</td>
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<td>820 000</td>
<td>5 020</td>
<td>5 475</td>
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<tr>
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<td>5 725</td>
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<td>5 610</td>
<td>5 975</td>
</tr>
<tr>
<td>1 000 000</td>
<td>5 905</td>
<td>6 225</td>
</tr>
</tbody>
</table>
APPENDIX 7.B
Northern Ireland Cost scales.

Table 1 and Table 2 each have two scales, one for solicitors and one for counsel (barristers). Table 3 is for uncontested cases and hence no counsel is required, nor allowed for. The same amount is payable regardless of the stage at which the case is finalised. A ‘Civil Bill’ is a civil claim.

**Ordinary Civil Bills**
(other than those provided for in table 3)

**TABLE 1: PLAINTIFF’S COSTS**

<table>
<thead>
<tr>
<th>In Actions where the amount decreed- (in £ sterling)</th>
<th>Solicitor’s costs in £ sterling</th>
<th>Range in $A (x 2.5)</th>
<th>Solicitor’s costs in $A</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) does not exceed 500</td>
<td>156</td>
<td>0-1,250</td>
<td>390.00</td>
</tr>
<tr>
<td>(ii) exceeds 500 but does not exceed 1,000</td>
<td>384</td>
<td>1,251-2,500</td>
<td>960.00</td>
</tr>
<tr>
<td>(iii) exceeds 1,000 but does not exceed 2,000</td>
<td>613</td>
<td>2,501-5,000</td>
<td>1,532.50</td>
</tr>
<tr>
<td>(iv) exceeds 2,000 but does not exceed 3,000</td>
<td>841</td>
<td>5,001-7,500</td>
<td>2,102.50</td>
</tr>
<tr>
<td>(v) exceeds 3,000 but does not exceed 4,000</td>
<td>1,033</td>
<td>7,501-10,000</td>
<td>2,582.50</td>
</tr>
<tr>
<td>(vi) exceeds 4,000 but does not exceed 5,000</td>
<td>1,168</td>
<td>10,001-12,500</td>
<td>2,920.00</td>
</tr>
<tr>
<td>(vii) exceeds 5,000 but does not exceed 6,000</td>
<td>1,302</td>
<td>12,501-15,000</td>
<td>3,255.00</td>
</tr>
<tr>
<td>(viii) exceeds 6,000 but does not exceed 7,000</td>
<td>1,424</td>
<td>15,001-17,500</td>
<td>3,560.00</td>
</tr>
<tr>
<td>(ix) exceeds 7,000 but does not exceed 8,000</td>
<td>1,535</td>
<td>17,501-20,000</td>
<td>3,837.50</td>
</tr>
<tr>
<td>(x) exceeds 8,000 but does not exceed 9,000</td>
<td>1,635</td>
<td>20,001-22,500</td>
<td>4,087.50</td>
</tr>
<tr>
<td>(xi) exceeds 9,000 but does not exceed 10,000</td>
<td>1,724</td>
<td>22,501-25,000</td>
<td>4,310.00</td>
</tr>
<tr>
<td>(xii) exceeds 10,000 but does not exceed 12,500</td>
<td>1,870</td>
<td>25,001-31,250</td>
<td>4,675.00</td>
</tr>
<tr>
<td>(xiii) exceeds 12,500 but does not exceed 15,000</td>
<td>2,055</td>
<td>31,251-37,500</td>
<td>5,137.50</td>
</tr>
<tr>
<td>In actions where the amount decreed-(in £ sterling)</td>
<td>Counsel’s fee in £ sterling</td>
<td>Range in $A</td>
<td>Counsel’s fee in $A</td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>-----------------------------</td>
<td>-------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>(i) does not exceed 500</td>
<td>48</td>
<td>0-1,250</td>
<td>120.00</td>
</tr>
<tr>
<td>(ii) exceeds 500 but does not exceed 1,000</td>
<td>100</td>
<td>1,251-2,500</td>
<td>250.00</td>
</tr>
<tr>
<td>(iii) exceeds 1,000 but does not exceed 2,000</td>
<td>140</td>
<td>2,501-5,000</td>
<td>350.00</td>
</tr>
<tr>
<td>(iv) exceeds 2,000 but does not exceed 3,000</td>
<td>186</td>
<td>5,001-7,500</td>
<td>465.00</td>
</tr>
<tr>
<td>(v) exceeds 3,000 but does not exceed 4,000</td>
<td>218</td>
<td>7,501-10,000</td>
<td>545.00</td>
</tr>
<tr>
<td>(vi) exceeds 4,000 but does not exceed 5,000</td>
<td>247</td>
<td>10,001-12,500</td>
<td>617.50</td>
</tr>
<tr>
<td>(vii) exceeds 5,000 but does not exceed 7,500</td>
<td>344</td>
<td>12,501-18,750</td>
<td>860.00</td>
</tr>
<tr>
<td>(viii) exceeds 7,500 but does not exceed 10,000</td>
<td>401</td>
<td>18,751-25,000</td>
<td>1,002.50</td>
</tr>
<tr>
<td>(ix) exceeds 10,000 but does not exceed 12,500</td>
<td>458</td>
<td>25,001-31,250</td>
<td>1,145.00</td>
</tr>
<tr>
<td>(x) exceeds 12,500 but does not exceed 15,000</td>
<td>516</td>
<td>31,251-37,500</td>
<td>1,290.00</td>
</tr>
</tbody>
</table>

1. This table does not apply to actions for defamation.

2. Counsel travelling to attend a court—
   (a) 20 to 50 miles from the Head Post Office, Belfast, is entitled to an additional sum of £16,
   (b) More than 50 miles from the Head Post Office, Belfast, is entitled to an additional sum of £33.24.

5. For drafting a reply to a notice for further particulars, the solicitor or counsel, as the case may be, is entitled to an additional sum of £19.47. This item is only to be allowed against the other party in actions where the amount claimed exceeds £2,000 and the allowance is recorded in the court minute book.

6. For each day or part of a day on which a trial or hearing is continued after the first day—
   (a) counsel is entitled to an additional sum equivalent to one third of the scale fee;
   (b) a solicitor in attendance is entitled to an additional sum equivalent to one third of counsel’s scale fee.

...
### TABLE 2: DEFENDANT’S COSTS

<table>
<thead>
<tr>
<th>In Actions where the amount claimed-(in £ sterling)</th>
<th>Solicitor’s costs in £ sterling</th>
<th>Range in $A (x 2.5)</th>
<th>Solicitor’s fee in $A (x2.5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) does not exceed 500</td>
<td>148</td>
<td>0-1,250</td>
<td>370.00</td>
</tr>
<tr>
<td>(ii) exceeds 500 but does not exceed 1,000</td>
<td>366</td>
<td>1,251-2,500</td>
<td>900.00</td>
</tr>
<tr>
<td>(iii) exceeds 1,000 but does not exceed 2,000</td>
<td>584</td>
<td>2,501-5,000</td>
<td>1,460.00</td>
</tr>
<tr>
<td>(iv) exceeds 2,000 but does not exceed 3,000</td>
<td>799</td>
<td>5,001-7,500</td>
<td>1,997.50</td>
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<tr>
<td>(v) exceeds 3,000 but does not exceed 4,000</td>
<td>982</td>
<td>7,501-10,000</td>
<td>2,455.00</td>
</tr>
<tr>
<td>(vi) exceeds 4,000 but does not exceed 5,000</td>
<td>1,109</td>
<td>10,001-12,500</td>
<td>2,772.50</td>
</tr>
<tr>
<td>(vii) exceeds 5,000 but does not exceed 6,000</td>
<td>1,236</td>
<td>12,501-15,000</td>
<td>3,090.00</td>
</tr>
<tr>
<td>(viii) exceeds 6,000 but does not exceed 7,000</td>
<td>1,353</td>
<td>15,001-17,500</td>
<td>3,382.50</td>
</tr>
<tr>
<td>(ix) exceeds 7,000 but does not exceed 8,000</td>
<td>1,458</td>
<td>17,501-20,000</td>
<td>3,645.00</td>
</tr>
<tr>
<td>(x) exceeds 8,000 but does not exceed 9,000</td>
<td>1,553</td>
<td>20,001-22,500</td>
<td>3,882.50</td>
</tr>
<tr>
<td>(xi) exceeds 9,000 but does not exceed 10,000</td>
<td>1,638</td>
<td>22,501-25,000</td>
<td>4,095.00</td>
</tr>
<tr>
<td>(xii) exceeds 10,000 but does not exceed 12,500</td>
<td>1,807</td>
<td>25,001-31,250</td>
<td>4,517.50</td>
</tr>
<tr>
<td>(xiii) exceeds 12,500 but does not exceed 15,000</td>
<td>1,952</td>
<td>31,251-37,500</td>
<td>4,880.00</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>In actions where the amount claimed-(in £ sterling)</th>
<th>Counsel’s fee in £ sterling</th>
<th>Range in $A</th>
<th>Counsel’s fee in $A</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) does not exceed 500</td>
<td>48</td>
<td>0-1,250</td>
<td>120.00</td>
</tr>
<tr>
<td>(ii) exceeds 500 but does not exceed 1,000</td>
<td>100</td>
<td>1,251-2,500</td>
<td>250.00</td>
</tr>
<tr>
<td>(iii) exceeds 1,000 but does not exceed 2,000</td>
<td>140</td>
<td>2,501-5,000</td>
<td>350.00</td>
</tr>
<tr>
<td>(iv) exceeds 2,000 but does not exceed 3,000</td>
<td>186</td>
<td>5,001-7,500</td>
<td>465.00</td>
</tr>
<tr>
<td>(v) exceeds 3,000 but does not exceed 4,000</td>
<td>218</td>
<td>7,501-10,000</td>
<td>545.00</td>
</tr>
</tbody>
</table>
(vi) exceeds 4,000 but does not exceed 5,000 & 247 & 10,001-12,500 & 617.50 \\
(vii) exceeds 5,000 but does not exceed 7,500 & 344 & 12,501-18,750 & 860.00 \\
(viii) exceeds 7,500 but does not exceed 10,000 & 401 & 18,751-25,000 & 1,002.50 \\
(ix) exceeds 10,000 but does not exceed 12,500 & 458 & 25,001-31,250 & 1,145.00 \\
(x) exceeds 12,500 but does not exceed 15,000 & 516 & 31,251-37,500 & 1,290.00 \\

Similar notes as above apply.

Costs where no notice of intention to defend is served and judgment is marked under Order 12

TABLE 3: PLAINTIFF’S COSTS

<table>
<thead>
<tr>
<th>In Actions where the amount decreed-(in £ sterling)</th>
<th>Where sum claimed and costs specified in civil bill not paid within 21 days of service; in £ sterling</th>
<th>Range in $A (x 2.5)</th>
<th>Costs in $A</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) does not exceed 500</td>
<td>57</td>
<td>0-1,250</td>
<td>142.50</td>
</tr>
<tr>
<td>(ii) exceeds 500 but does not exceed 1,000</td>
<td>90</td>
<td>1,251-2,500</td>
<td>225.00</td>
</tr>
<tr>
<td>(iii) exceeds 1,000 but does not exceed 2,000</td>
<td>113</td>
<td>2,501-5,000</td>
<td>282.50</td>
</tr>
<tr>
<td>(iv) exceeds 2,000 but does not exceed 3,000</td>
<td>129</td>
<td>5,001-7,500</td>
<td>322.50</td>
</tr>
<tr>
<td>(v) exceeds 3,000 but does not exceed 4,000</td>
<td>142</td>
<td>7,501-10,000</td>
<td>355.00</td>
</tr>
<tr>
<td>(vi) exceeds 4,000 but does not exceed 5,000</td>
<td>157</td>
<td>10,001-12,500</td>
<td>392.50</td>
</tr>
<tr>
<td>(vii) exceeds 5,000 but does not exceed 6,000</td>
<td>175</td>
<td>12,501-15,000</td>
<td>437.50</td>
</tr>
<tr>
<td>(viii) exceeds 6,000 but does not exceed 7,000</td>
<td>191</td>
<td>15,001-17,500</td>
<td>477.50</td>
</tr>
<tr>
<td>(ix) exceeds 7,000 but does not exceed 8,000</td>
<td>206</td>
<td>17,501-20,000</td>
<td>515.00</td>
</tr>
</tbody>
</table>
1. Where the sum claimed is paid within 21 days of service of civil bill the sum for costs specified in column 2 to be reduced by 50%.

| (x) exceeds 8,000 but does not exceed 9,000 | 219 | 20,001-22,500 | 547.50 |
| (xi) exceeds 9,000 but does not exceed 10,000 | 231 | 22,501-25,000 | 577.50 |
| (xii) exceeds 10,000 but does not exceed 12,500 | 251 | 25,001-31,250 | 627.50 |
| (xiii) exceeds 12,500 but does not exceed 15,000 | 277 | 31,251-37,500 | 692.50 |
## SOLICITOR'S FEES

<table>
<thead>
<tr>
<th>ITEM</th>
<th>$1 - $10,000</th>
<th>$10,001 - $20,000</th>
<th>$20,001 - $60,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Application in the nature of an application for an interim injunction.</td>
<td>70% of Supreme Court Scale</td>
<td>80% of Supreme Court Scale</td>
<td>90% of Supreme Court Scale</td>
</tr>
<tr>
<td>2 Pre-action Application.</td>
<td>80</td>
<td>120</td>
<td>150</td>
</tr>
<tr>
<td>3 a. Notice of Demand and registration of Lien and registration and Notice of Demand under the <em>Workers Liens Act 1893</em> and other notices of a like nature.</td>
<td>100</td>
<td>150</td>
<td>200</td>
</tr>
<tr>
<td>b. Notice of withdrawal/satisfaction of Lien and registration.</td>
<td>50</td>
<td>75</td>
<td>100</td>
</tr>
<tr>
<td>4 Filing an action (other than under Rules 37 and 38) provided that a defence and counterclaim will only be allowed as one item on the higher scale applicable.</td>
<td>4% of the judgment sum</td>
<td>4% of the judgment sum</td>
<td>4% of the judgment sum up to a maximum of $1200</td>
</tr>
<tr>
<td>5 Filing an action under Rules 37 and 38.</td>
<td>As allowed by the Court</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 Routine request (of the nature of request for discovery, inspection). Item includes costs for perusal of reply.</td>
<td>40</td>
<td>70</td>
<td>100</td>
</tr>
<tr>
<td>7 Request requiring drafting (of the nature of particulars, interrogatories). Item includes costs for perusal of reply.</td>
<td>100</td>
<td>150</td>
<td>200</td>
</tr>
<tr>
<td>8 Notice to admit facts, filed</td>
<td>200</td>
<td>300</td>
<td>400</td>
</tr>
<tr>
<td>ITEM</td>
<td>$1 - $10,000</td>
<td>$10,001 - $20,000</td>
<td>$20,001 - $60,000</td>
</tr>
<tr>
<td>------</td>
<td>--------------</td>
<td>------------------</td>
<td>------------------</td>
</tr>
<tr>
<td>offer, payment into court or other notice requiring particular instructions. Item includes costs for perusal of reply.</td>
<td>100</td>
<td>150</td>
<td>200</td>
</tr>
<tr>
<td>9 Reply to Request under item 6 and 7 response to notice under item 8 and Personal Injury particulars (Rule 68 Form 22). Making discovery (where required) for each.</td>
<td>50</td>
<td>100</td>
<td>150</td>
</tr>
<tr>
<td>10 Preparing filing and serving an Application including proof of service.</td>
<td>30</td>
<td>40</td>
<td>50</td>
</tr>
<tr>
<td>11 Simple affidavit.</td>
<td>80</td>
<td>100</td>
<td>150</td>
</tr>
<tr>
<td>12 Lengthy affidavit where it was required.</td>
<td>10% of the judgment sum</td>
<td>10% of the judgment sum</td>
<td>10% of the judgment sum up to a maximum of $3,000</td>
</tr>
<tr>
<td>13 All aspects not otherwise specified of and incidental to preparing for trial including proofing witnesses, advice on evidence and law (solicitor and counsel) and delivering brief to counsel.</td>
<td>30</td>
<td>40</td>
<td>50</td>
</tr>
<tr>
<td>14 Arranging witnesses for trial - per witness (includes obtaining and filing and serving expert reports).</td>
<td>30</td>
<td>40</td>
<td>50</td>
</tr>
<tr>
<td>15 Issuing and serving summons to witness.</td>
<td>30</td>
<td>40</td>
<td>50</td>
</tr>
<tr>
<td>16 Filing request (Form 18) not otherwise provided for.</td>
<td>30</td>
<td>30</td>
<td>30</td>
</tr>
<tr>
<td>17 Request for Investigation or Examination Summons including attendance at the hearing.</td>
<td>50</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>18 Service of any document which is not in the usual course served by the Court and is not otherwise specified:</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### ATTENDANCE AND COUNSEL FEES

<table>
<thead>
<tr>
<th>ITEM</th>
<th>$1 - $10,000</th>
<th>$10,001 - $20,000</th>
<th>$20,001 - $60,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Personal where required</td>
<td>60</td>
<td>60</td>
<td>60</td>
</tr>
<tr>
<td>b. Other</td>
<td>30</td>
<td>30</td>
<td>30</td>
</tr>
<tr>
<td>19 Preparing bill for taxation (includes attendance)</td>
<td>150</td>
<td>175</td>
<td>200</td>
</tr>
</tbody>
</table>

#### ATTENDANCE AND COUNSEL FEES

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 Attendance for inspection - any party.</td>
<td>80 - 100 - 120</td>
</tr>
<tr>
<td>21 Attendance at Listing Conference, Directions Hearing or routine Application.</td>
<td>40 - 60 - 80</td>
</tr>
<tr>
<td>22 Attendance at Application requiring special argument or at conciliation conference.</td>
<td>80 - 120 - 150</td>
</tr>
<tr>
<td>23 To advise on compromise or settlement for a person under disability.</td>
<td></td>
</tr>
<tr>
<td>(a) Where quantum only is in dispute</td>
<td>150 - 230 - 300</td>
</tr>
<tr>
<td>(b) Where quantum and liability are in dispute</td>
<td>200 - 300 - 400</td>
</tr>
<tr>
<td>24 Attendance as counsel at trial (includes fee on brief and refreshers):</td>
<td></td>
</tr>
<tr>
<td>FIRST DAY</td>
<td>500 - 600 - 800</td>
</tr>
<tr>
<td>SUBSEQUENT DAY</td>
<td>300 - 400 - 500</td>
</tr>
<tr>
<td>FOR JUDGMENT</td>
<td>50 - 80 - 100</td>
</tr>
<tr>
<td>25 Attendance on an application to set aside a warrant.</td>
<td>20 - 20 - 20</td>
</tr>
</tbody>
</table>

#### NOTES

A The Court may allow any larger or lesser amount for any item and any amount in respect of any other matter that the Court allowed at the time of making any order.
B All the above items are all inclusive of all costs for all incidental and necessary activity and advice for each item to the intent that no costs will be allowed in addition to the costs set forth for each item nor for anything not itemised.

C For the purposes of items 4 and 13, the costs calculated must be rounded to the nearest $10.

D For the purpose of determining the applicable scale, any cents must be rounded up to the next dollar.

E Subject to any directions to the contrary given by the court on a directions hearing or conciliation conference, the court must allow no more than two attendance fees on directions hearings or conciliation conferences.

WITNESS FEES AND DISBURSEMENTS

1. Witness Fees

   Same allowed $1 - $60,000

   (i) Professional scientific or other expert witnesses per day. $350 or such amount ordered by the Court 

   (ii) Other adult person per day. $150 

   (iii) Persons under 18 years of age per day. $50 

   If the witness is released before or is required to attend after the luncheon break on any day, half a day will be allowed.

   (iv) A witness will in addition be allowed:

   (a) Travel expenses: Where the witness is normally resident more than 50 km from the trial court at the rate of 45 cents per km or the least expensive return air fare whichever is the lesser or the cheapest combination of both.

   (b) Accommodation expenses: In the discretion of the taxing officer where the witness is required to be absent from his or her normal place of residence overnight
for accommodation and sustenance per night $120 or such larger amounts allowed by the court at the time of or before judgment.

2. **Photocopying**
   - 50 cents per page

3. **STD calls**
   - Actual cost

4. All Court Fees and other fees and payments to the extent to which they have been properly and reasonably incurred and paid. But excluding the usual and incidental expenses and overheads of a legal practice and in particular excluding postage, Telecom charges (non STD), courier expenses.

5. **Expert Reports**
   - $300 or such other amount ordered by the Court.
### THIRD SCHEDULE

**COSTS**

**SCALE 2: COMPLEX ACTIONS**

**SOLICITOR’S FEES**

<table>
<thead>
<tr>
<th>ITEM</th>
<th>$1 - $10,000</th>
<th>$10,001 - $20,000</th>
<th>$20,001 - $60,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Application in the nature of an application for an interim injunction.</td>
<td>70% of Supreme Court Scale</td>
<td>80% of Supreme Court Scale</td>
</tr>
<tr>
<td>2</td>
<td>Pre-action Application.</td>
<td>80</td>
<td>150</td>
</tr>
<tr>
<td>3</td>
<td>a. Notice of Demand and registration of Lien and Notice of Demand under the <em>Workers Liens Act 1893</em> and other notices of a like nature.</td>
<td>100</td>
<td>150</td>
</tr>
<tr>
<td>3</td>
<td>b. Notice of withdrawal/satisfaction of Lien and registration.</td>
<td>50</td>
<td>75</td>
</tr>
<tr>
<td>4</td>
<td>Filing an action (other than under Rules 37 and 38) provided that a defence and counterclaim will only be allowed as one item on the higher scale applicable.</td>
<td>6% of the judgment sum</td>
<td>6% of the judgment sum</td>
</tr>
<tr>
<td>5</td>
<td>Filing an action under Rules 37 and 38.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Routine request (of the nature of request for discovery, inspection). Item includes costs for perusal of reply.</td>
<td>40</td>
<td>70</td>
</tr>
<tr>
<td>7</td>
<td>Request requiring drafting (of the nature of particulars,</td>
<td>100</td>
<td>150</td>
</tr>
<tr>
<td>ITEM</td>
<td>$1 - $10,000</td>
<td>$10,001 - $20,000</td>
<td>$20,001 - $60,000</td>
</tr>
<tr>
<td>------</td>
<td>--------------</td>
<td>------------------</td>
<td>------------------</td>
</tr>
<tr>
<td>Item</td>
<td>150</td>
<td>225</td>
<td></td>
</tr>
<tr>
<td>8 Notice to admit facts, filed offer, payment into court or other notice requiring particular instructions. Item includes costs for perusal of reply.</td>
<td>300</td>
<td>400</td>
<td></td>
</tr>
<tr>
<td>9 Reply to Request under item 6 and 7 response to notice under item 8 and Personal Injury particulars (Rule 68 Form 22). Making discovery (where required) for each.</td>
<td>150</td>
<td>225</td>
<td></td>
</tr>
<tr>
<td>10 Preparing filing and serving an Application including proof of service.</td>
<td>50</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>11 Simple affidavit.</td>
<td>30</td>
<td>40</td>
<td></td>
</tr>
<tr>
<td>12 Lengthy affidavit where it was required.</td>
<td>80</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>13 All aspects not otherwise specified of and incidental to preparing for trial including proofing witnesses, advice on evidence and law (solicitor and counsel) and delivering brief to counsel.</td>
<td>15% of the judgment sum</td>
<td>15% of the judgment sum</td>
<td></td>
</tr>
<tr>
<td>14 Arranging witnesses for trial - per witness (includes obtaining and filing and serving expert reports).</td>
<td>30</td>
<td>40</td>
<td></td>
</tr>
<tr>
<td>15 Issuing and serving summons to witness.</td>
<td>30</td>
<td>40</td>
<td></td>
</tr>
<tr>
<td>16 Filing request (Form 18) not otherwise provided for.</td>
<td>30</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>17 Request for Investigation or Examination Summons including attendance at the hearing.</td>
<td>50</td>
<td>50</td>
<td></td>
</tr>
<tr>
<td>18 Service of any document</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### ITEM

which is not in the usual course served by the Court and is not otherwise specified:

<table>
<thead>
<tr>
<th>a. Personal where required</th>
<th>$1 - $10,000</th>
<th>$10,001 - $20,000</th>
<th>$20,001 - $60,000</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>60</td>
<td>60</td>
<td></td>
</tr>
<tr>
<td>b. Other</td>
<td>30</td>
<td>30</td>
<td></td>
</tr>
</tbody>
</table>

| 19 Preparing bill for taxation (includes attendance on taxation). | 150 | 175 |

### ATTENDANCE AND COUNSEL FEES

| 20 Attendance for inspection - any party. | 110 | 160 |
| 21 Attendance at Listing Conference, Directions Hearing or routine Application. | 40 | 60 |
| 22 Attendance at Application requiring special argument or at conciliation conference. | 150 | 200 |
| 23 To advise on compromise or settlement for a person under disability. (a) Where quantum only is in dispute | 150 | 230 |
| (b) Where quantum and liability are in dispute | 200 | 300 |
| 24 Attendance as counsel at trial (includes fee on brief and refreshers): FIRST DAY | 600 | 700 |
| SUBSEQUENT DAY | 400 | 500 |
| FOR JUDGMENT | 50 | 80 |
| 25 Attendance on an application to set aside a warrant. | 20 | 20 |
NOTES

A The Court may allow any larger or lesser amount for any item and any amount in respect of any other matter that the Court allowed at the time of making any order.

B All the above items are all inclusive of all costs for all incidental and necessary activity and advice for each item to the intent that no costs will be allowed in addition to the costs set forth for each item nor for anything not itemised.

C For the purposes of items 4 & 13, the costs calculated must be rounded to the nearest $10.

D For the purpose of determining the applicable scale, any cents must be rounded up to the next dollar.

E Subject to any directions to the contrary given by the court on a directions hearing or conciliation conference, the court must allow no more than two attendance fees on directions hearings or conciliation conferences.

WITNESS FEES AND DISBURSEMENTS

1. Witness Fees Same allowed $1 - $60,000

   (i) Professional scientific or other expert witnesses per day $350 or such other amount ordered by the Court

   (ii) Other adult person per day. $150

   (iii) Persons under 18 years of age per day. $50

   If the witness is released before or is required to attend after the luncheon break on any day, half a day will be allowed.
(iv) A witness will in addition be allowed:

(a) Travel expenses: Where the witness is normally resident more than 50 km from the trial court at the rate of 45 cents per km or the least expensive return air fare whichever is the lesser or the cheapest combination of both.

(b) Accommodation expenses: In the discretion of the taxing officer where the place of residence overnight for accommodation and sustenance per night $120 or such larger amounts allowed by the court at the time witness is required to be absent from his or her normal of or before judgment.

2. Photocopying 50 cents per page

3. STD calls Actual cost

4. All Court Fees and other fees and payments to the extent to which they have been properly and reasonably incurred and paid. But excluding the usual and incidental expenses and overheads of a legal practice and in particular excluding postage, Telecom charges (non STD), courier expenses.

5. Expert Reports $300 or such other amount ordered by the Court.
### SCALE 3: MINOR CIVIL ACTIONS

<table>
<thead>
<tr>
<th>ITEM</th>
<th>$0-$500</th>
<th>$501-$1,000</th>
<th>$1,001-$2,000</th>
<th>$2,001-$5,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Filing an action (if prepared and filed by a solicitor)</td>
<td>$20 plus 10% of the claim up to a maximum of $200</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 P1 particulars</td>
<td>NIL</td>
<td>$30</td>
<td>$50</td>
<td>$80</td>
</tr>
<tr>
<td>3 Any attendance at Court by party or solicitor (where solicitor is entitled to attend)</td>
<td>$30</td>
<td>$30</td>
<td>$35</td>
<td>$40</td>
</tr>
<tr>
<td>4 Witness fees</td>
<td>$30</td>
<td>$30</td>
<td>$35</td>
<td>$40</td>
</tr>
<tr>
<td>[or actual charge by witness if allowed by Court]</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 Summons to witness</td>
<td>$30</td>
<td>$30</td>
<td>$30</td>
<td>$30</td>
</tr>
<tr>
<td>6 Request for and attendance on Investigation/Examination hearing</td>
<td>$25</td>
<td>$30</td>
<td>$35</td>
<td>$40</td>
</tr>
<tr>
<td>7 Any other request (Form 18) for enforcement of judgment</td>
<td>$20</td>
<td>$20</td>
<td>$20</td>
<td>$30</td>
</tr>
<tr>
<td>8 All other court fees</td>
<td>as charged</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9 Other disbursements</td>
<td>to the extent allowed by the Court</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10 To advise on a compromise or settlement for a person under disability</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Quantum only</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>(b) Where quantum and liability are in dispute</td>
<td>150</td>
<td>150</td>
<td>200</td>
<td>200</td>
</tr>
</tbody>
</table>

(Debt collecting fees in addition to the above amounts are not allowed.)

**NOTE**  For the purpose of item 1 the costs calculated must be rounded up to the nearest dollar.

### COST RULES

106(1) Unless the Court orders otherwise, a successful party in an action (other than a minor civil action) is entitled on judgment to costs against an unsuccessful party, or any other party that the Court may order, in accordance with the following principles:
(a) where judgment is in respect of an action for a sum of money -
   (i) a successful plaintiff is entitled to costs on the relevant scale in the
       Third Schedule applicable to the sum actually recovered;
   (ii) a successful defendant is entitled to costs on the relevant scale in the
       Third Schedule applicable to the sum claimed;
(b) where judgment is in respect of any other action - a successful party is
     entitled to costs on the scale in the Third Schedule specified by the Court;
     or
(c) where the action involved unusual difficulty or intricacy, or other proper
   cause exists - a successful party is entitled to costs on such percentage of
   the Supreme Court scale as the Court specifies.

(2) In a minor civil action, a successful party is entitled on judgment to costs
    against an unsuccessful party, or any other party that the Court may order, in
    accordance with the relevant scale in the Third Schedule.

(3) If, on the hearing of an action (other than a minor civil action), a successful
    party recovers a sum of money being $2500 or less, that party is, unless for
    special reasons the Court orders otherwise, entitled to costs only as if it were a
    minor civil action.

(4) Where proper cause exists, the Court may order that a successful party is
    entitled to costs on a solicitor and client basis.

(5) Unless the Court orders otherwise, a party is not entitled to costs on both a
    claim and counterclaim in the same action.

(6) Where there is no scale of costs applicable to an action or proceeding, the
    Court may fix the appropriate scale of costs on application of the successful
    party or at the request of the Registrar.

(7)(a) A party may, by notice in writing served on all other parties, certify that
    the nature of an action entitles the parties to costs on the relevant scale in
    the Third Schedule as a complex action and, unless any other party by
    notice in writing objects (including detailed reasons for the objection)
    within 21 days of the service of the notice, a party entitled to costs in the
    action is entitled to costs on the relevant scale as a complex action.

(b) If a party so objects, the relevant scale may be determined by the judicial
    officer hearing the trial of the action.
(c) In any other case, unless the Court orders otherwise, the relevant scale for a complex action will not apply.

107(1) Unless the Court orders otherwise, where costs of proceedings are reserved, such costs will abide the event.

(2) The Court may make it a condition of an action proceeding any further that a party, against whom an order for costs is made, must make payment of the costs within a time fixed by the Court.

108(1) The Court may tax costs and allow costs in respect of the taxation.

(2) If costs cannot be agreed, the successful party may file and serve on the unsuccessful party a Bill of Costs in taxable form.

(3) If the unsuccessful party does not file and serve a written notice of objection to an item of the Bill of Costs (including detailed reasons for the objection) within 21 days of the service of the Bill of Costs, he or she will be taken to admit the item.

(4) Where a written notice of objection is filed, the Registrar will fix, and give notice in writing to the parties of, a date, time and place for the taxation, which may proceed in the absence of any party.

(5) Where costs taxed off represent 10%, or more, of the costs allowed and certified on a taxation, the successful party is not entitled to any costs in respect of the taxation.

109 The Court may award costs in respect of the exercise of its jurisdiction under the Enforcement of Judgments Act 1991.

110 The Court, notwithstanding that it has no jurisdiction to hear an action or proceeding, may award costs as if it had jurisdiction.
COST PENALTIES

52 (1) This rule applies to an action (other than a minor civil action) in which a party obtains a final judgment (other than by consent) for a sum of money being less than 50% of the amount claimed by the party at either:

(a) the expiration of 21 days from the date of issue of a notice of trial;
or
(b) the date of a conciliation conference,

whichever is earlier ("the operative date").

(2) The costs to which the party is finally entitled will, unless at the time of giving judgment the Court orders otherwise, be calculated in accordance with the formula:

\[ CE = \frac{(2 \times C \times SJ)}{SC} \]

where CE is the costs to which the party is finally entitled,
C is the costs of the party (as agreed or taxed),
SJ is the sum of money awarded by the judgment (exclusive of costs and interest), and
SC is the amount claimed at the operative date.

(3) Where leave is granted to a party at a conciliation conference to amend the amount claimed by the party to a specified sum, such amendment will, for the purposes of this rule, be taken to be effective forthwith.

53 (1) This rule applies to an action (other than a minor civil action) in which a party obtains a final judgment (other than by consent) for a sum of money being 200%, or more than 200%, the amount contained in -

(a) an offer to consent to judgment filed in the Court;
or
(b) a payment of a sum of money to the Registrar,
made before or at either -
(c) the expiration of 21 days from the date of issue of a notice of trial;
or
(d) the date of a conciliation conference,

whichever is earlier ("the operative date").

(2) The costs to which a party is finally entitled will, unless at the time of giving judgment the Court orders otherwise, be calculated in accordance with the formula

\[
CE = \frac{2 \times C \times (SJ-FO)}{SJ}
\]

where \( CE \) is the costs to which the party is finally entitled, provided that \( CE \) does not exceed the actual costs of the party on a solicitor and client basis,

\( C \) is the costs of the party (as agreed or taxed),

\( SJ \) is the sum of money awarded by the judgment (exclusive of costs and interest), and

\( FO \) is the amount contained in
(a) the offer;
or
(b) the payment

and where in any case no offer or payment is filed or made then, for the purposes of this rule, \( FO \) will be zero.

54 (1) If the Court adjourns a conciliation conference, the operative date under rules 52 and 53 is postponed to the adjourned date.
(2) Rules 52 and 53 are subject to rule 59.

(3) If both rules 52 and 53 apply to the same action, neither will have effect.

(4) In rules 52 and 53 the word “costs” means party and party costs (including
counsel fees) only and does not include disbursements, witness fees, experts’
charges and other expenses of and incidental to the conduct of the action.

OFFERS TO CONSENT AND PAYMENTS TO REGISTRAR

55  (1) At any time before final judgment, a party may file and serve on any other
    party an offer to consent to judgment.

(2) The offer may be made subject to specified conditions.

(3) An offer may relate to liability, quantum, matters in issue in the action or any
    order, remedy or relief sought.

(4) A party may file and serve a notice of withdrawal or variation of an offer
    which has not been accepted.

(5) A party may file and serve an acceptance of an offer.

(6) A party may request the Registrar to enter judgment in the terms of an
    accepted offer and the Registrar must enter it accordingly.

56  (1) At any time before final judgment, a party may pay (with or without an
    admission of liability) to the Registrar such sum of money as he or she thinks
    sufficient to satisfy the claim against that party, together with the costs of the
    other party and interest up to the time of such payment.

(2) At the time of making any such payment, the party so paying must give
    notice in writing to the other party of the payment.

(3) The other party may file and serve a notice in writing accepting the sum of
    money, and such notice will operate as full satisfaction of that other party’s
    claim.

(4) If no notice of acceptance is filed the sum of money must abide the event.

(5) The Registrar must pay the sum of money to the party entitled to it in
    accordance either with the notice of acceptance or the outcome of the event.
An offer to consent to judgment must specify whether the offer is inclusive of costs and interest, or if the offer is not so inclusive it must specify what is offered for the costs of the other party and what is offered for interest up to the date of such offer.

If there is a failure to comply with sub-rule (1) the party accepting the offer is entitled to costs and interest or whichever of costs and interest is not specified up to the expiration of 14 days from the date of service of the offer in addition to the sum offered.

The extent of an offer to consent to judgment or payment of a sum of money to the Registrar must not be communicated to the judicial officer hearing the trial of the action until final judgment is given.

In making an order as to costs at the trial of an action, the Court will take into account any offer to consent to judgment, or any payment of a sum of money to the Registrar, and any refusal or failure to accept such offer or payment.

Unless the Court for special reasons orders otherwise -

(a) a plaintiff who obtains final judgment for a sum of money equal to or less than the amount of any such offer or payment by the defendant, if the offer has not been withdrawn before the time of judgment, is not entitled to costs after the expiration of 14 days from the date the notice of the offer was served or the payment was made and thereafter the defendant is entitled to costs on the scale applicable to the amount claimed by the plaintiff;

and

(b) a plaintiff who obtains final judgment for a sum of money equal to or more than the amount of any such offer by the plaintiff, if the offer has not been withdrawn before the time of judgment, is entitled to costs on a solicitor and client basis for the whole action.
Hermine

Contract for the Legal Protection of the Individual

General conditions

Summary

1. Scope of your contract

- Article 1 - Object of the contract
- Article 2 - Territorial scope of the guarantees
- Article 3 - Period of validity
- Article 4 - What is covered
- Article 5 - What is not covered

2. In case of claim

- Article 6 - How to make a claim
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- Article 9 - Commencement of your contract
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- Article 14 - Revision of tariff
- Article 15 - Other dispositions
GENERAL CONDITIONS

This contract of legal protection is the subject of a Code of Assurance. This is composed:

- of the present document called "the general conditions" which define the field of application and the rules of the guarantee
- there are some particular conditions which personalise your contract

Who is assured?

- Yourself as the subscriber as well as any person who usually lives at your house, your children and the children of your spouse and de facto, if they are single and less than 25 years of age who does not usually live at your home, when they study and are not in a job.

Who is the Assurer?

- The Assurance of Crédit Mutuel IARD S.A.

Who are the Third Parties?

- The third parties are physical people or legal bodies who are not a party to the contract.

THE SCOPE OF YOUR CONTRACT

Article 1 - Object of the contract

In case of litigation with a third party, we assure in the conditions set out in this contract the defence of your interest when you are making a claim or a claim is made against you by amicable settlement or legal means.

We take charge of the necessary lawyers' cost to conclude the litigation to the limits set out in Article 7.

Article 2 - Territorial scope of the warranty

We cover courts in France as well as adjacent countries where you have activities if you are a border worker. (e.g. living in France but working in Switzerland –author’s note) This will also apply in the case of a holiday of less than three month's duration for litigation related to the holiday for all countries that are members of the European
Union as well as Switzerland to the exclusion of execution of legal judgments if they must be the object of a procedure "d'exequatur" *(cannot translate this)*.

**Article 3 - Period of validity**

Subject to the waiting period prescribed in clause 4.4, after the payment of the premium the warranty is acquired for the litigation which results arising from events happening between the date of effect of the contract and the date of ending of the contract which litigation is declared to the assurer during the same period.

**Article 4 - What is covered?**

Subject to the exclusions in Article 5, we guarantee:

4.1 All litigation arising from your private life -

- Litigation relating to your principal place of residence and your secondary place of residence;

- Litigation relating to fraud, hidden vices and, more generally, any claims arising from your consumer rights.

- Your defence of claims against you for unintentional offences that are capable of being defended including being called before an administrative commission for cancellation of your driver's licence.

This warranty is not given for:

- hit and run accidents

- problems related to taxation:

- income tax of physical persons

- local tax

- stamp duty

Litigation not related to your professional activities where your opponent in the litigation is a person who you employ:

- as a housemaid

- as a nanny

- as a gardener
on condition that the employment is regularly declared to relevant government authorities.

4.2 If you are employed:

litigation relating to your contract of employment.

4.3 All litigation from your participation in a non-profit-making association.

4.4 Litigation arising after the expiration of the waiting period of two years starting from the day of the commencement of the contract when:

- it is of the nature of a neighbourhood dispute or boundary dispute
- you have an inheritance from your father or mother which is disputed by other members of the family in line.
- the waiting period does not apply in relation to an inheritance consequent upon an accidental death.
- you and your spouse demand a divorce by mutual agreement but in this case our responsibility is limited to the fees of only one lawyer who is common to both of you to undertake the procedure.

Article 5 - That which is not covered?

Litigation resulting from:

5.1 An offence arising from the existence of a prejudice of which you were aware before the commencement of the contract.

5.2 Intentional acts of deception for which you can be accused.

5.3 For an expression of opinion in politics or a union.

5.4 With the exception of the matter raised in Article 4.4:

- family disputes, marriage, separation, divorce, affiliation, alimony, etc.
- other types of matrimonial disputes
- the right of inheritance
dissolution of de facto relationships

5.5 Civil responsibilities covered by another insurance contract:
in cases where the other insurer will not indemnify you, we guarantee to intervene on your behalf against that insurance company.

5.6 In situations where you have infringed the legal obligations of insurance for damage to your motor vehicle or of your building.

5.7 A collective conflict at work or your activities of association unless subject to the exceptions in clauses 4.2 or 4.3.

5.8 Disputes with customs, protection of copyright and rights as an author

5.9 Also excluded is litigation:

- related to rental contracts for land, buildings, parts of buildings of which you are the owner or beneficiary (i.e. landlord - my note).
- relating to profit-making real estate
- issues relating to construction, restoration and rehabilitation of real estate in progress or completed within the last 10 years
- arising from share investments

IN CASE OF A CLAIM

Article 6 - How to make a claim:

6.1 Declaration and preparation of a dossier.
You must respect the obligations set out after this. A default will deny you the benefit of the guarantees of your contract if this causes the assurer prejudice.

- You must declare the litigation as soon as possible after you find out about it and in writing with all relevant information to establish the truth of the litigation and your prejudice
- you should not take any initiative to engage in the action nor instruct your lawyer without our agreement
• you must communicate to your counsel or to us at the demand of the lawyer all details and justifications necessary to represent your interests. We are not responsible for any delay which is caused by your failure to communicate.

• Throughout the action any proposed settlement must preserve our rights of subrogation

6.2 Choice of your lawyer

If to settle your difference a court action must be taken, you are able to choose a lawyer with a current practising certificate in the tribunal in which the action is taken or, if you prefer, you can ask us to recommend one.

If several of our insureds have a common interest in one conflict against the same opponent, we reserve the right to designate a single lawyer amongst the ones chosen. In any case the fees of one lawyer per procedure will be paid by us.

6.3 Conduct of the procedure

You and your lawyer have control of the process and decide the means to adopt in the procedure necessary to develop to help your interest (protective measures, referrals, appeals).

6.4 Conflict of interest

In case of a conflict of interest arising between us, you have liberty to choose a lawyer or, if you prefer, a qualified person to assist you.

Article 7 - How claims are settled

7.1 To start with we inform you of your rights and obligations. If a settlement is possible, we will search for a quick settlement of your litigation. If that is not successful, we will examine to possibilities to engage in a procedure. For litigation of a value of less than 2,000 francs, we limit our intervention to research of settlements.

7.2 If the opportunity exists, we will invite you to engage the appropriate procedure in accordance with the conditions set out in Articles 6.2 and 6.3. We shall pay directly the fees of the lawyer who you have chosen and the limit of the amount agreed between him and us by reference to the normal lawyer's charges for similar litigation by practicing lawyers. This disposition applies also to the litigation judge in France and in the country mentioned in Article 2. A contingency fee is not part of what we will pay. In case of disagreement on the amount of fees taken in consideration, we shall submit our difference to arbitration of the Lawyers' Society. In any case, the
maximum amount which can be charged for the same litigation, all procedures taken into account, is fixed at 100,000 francs.

7.3 Taken into consideration are, in addition to the fees, court fees as well as expert witnesses, which you have to pay in advance.

7.4 What is not guaranteed:

- expenditure made to verify the reality of your prejudice or to prove your prejudice.
- Fines
- The sum you have to pay after a decision of the court of a transaction to the benefit to the principal and of the accessories (what is covered by accessories is unclear)
- The fees and expenses advanced by your opponent (i.e. the other side's costs)

Article 8 - Arbitration

When you demand to engage or maintain in an action in justice or seek a recourse against a court's decision and we decide this procedure has no prospect of success or it is inopportune, we choose a common arbitrator and seek his advice.

In case of a disagreement of the choice of this arbitrator, he will be named by the President of Tribunal de Grande Instance of your district. (Court)

The expenses of this arbitration are at our expense unless a contrary decision of the President of Tribunal de Grande Instance. (Court)

If against the advice of the arbitrator you exercise the legal action yourself in the limit of our warranty and you gain a more favourable result, we will reimburse you on the justification of the expense incurred by you and which has not been reimbursed by your opponent.

THE LIFE OF THE CONTRACT

Article 9 - Period of the Contract

The date of commencement is set out in the particular conditions and at the latest is the date of the payment of the first premium.

Article 10 - Duration of the contract

The contract is in place for a year and is renewable automatically annually.
Article 11 - Cancellation of the contract

The contract can be cancelled under the following events:

(a) by you or us:

- at the end of each annual period of insurance, upon two month's notice by the company or one month's notice by the assured.

- in the case of a change of your profession, your matrimonial situation or your matrimonial regime, when these changes may invoke the benefits of Articles L113-16 of the Code of Assurance.

(b) by you:

- in case we cancel another of your insurance contracts after a claim within the scope of Article R113-10 of the Code of Assurance.

- in case of diminution of risk if we do not accept the reduction in your premium.

(c) by us:

- in case of non-payment of premium

- in case of aggravation of risk if you refuse the increase in premium

- in the case of failure to declare details affecting the risk after a claim

Article 12 - Form of cancellation of contract

Where the cause exists, you can cancel the contract at your choice by registered letter with a signed receipt and other means are specified so that the notice will definitely come to the insurer's attention. Notices by the company are permitted to the last known address of the insured.

Article 13 - Payment of Premiums

13.1 Premiums with the addition of tax must be paid at the head office or offices of agents.

14.1 (More on payment, not of immediate relevance)

Article 14 - Revision of tariff

If out of any variation of the general price of service we modify the tariff applicable to the risk guaranteed by this present contract, the premium will be modified in the same proportion: A renewal notice showing the new premium will be given to you.
You can, in the case of an increase in premium, cancel your contract 30 days after we have given you the notice. Cancellation will take effect a month after your notification to the head office of the society. The company retains the right to collect premiums from the date of renewal of the contract until the date of cancellation.

Article 15  -  Other arrangements

15.1 Subrogation

We are subrogated in the conditions set out in Article L121-12 of the Code of Assurances in the rights and actions that you have against third parties in reimbursement of your legal fees including expert fees and other disbursements.

15.2 Prescription

All actions derived from the present contract are limited for two years. This limitation is interrupted by one of the ordinary interruptions of the limitation and by a designation of experts following a claim.

The interruption of a limitation of the action can also result by the sending of a letter by registered mail sent by the assurer to the insured in what concerns the action in payment of the premium and by the insured to the insurer in what concerns the payment of the indemnity.

15.3 Assurances compounding

When you have more than once insurance contract for the same interest against the same risk you must give immediately to every insurer knowledge of the other insurance. The insured, upon communication of this information, must give the name of his insurer with whom the other insurance has been contracted and state the amount of the insurance. When several insurances against the same risk are contracted in there are special sanctions to prevent fraudulent claims and claiming the same thing more than once. (The contract spells out the relevant code to prevent, in effect, double dipping.)
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