2000

Civil litigants in the local court: a comparative analysis of the clientele using the New South Wales Local Court in the Civil Jurisdiction at the Downing Centre Court Complex in Sydney

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A thesis submitted in fulfilment of the requirements
for the award of the degree

Master of Laws (Honours)

from

University of Wollongong

by

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BA, LLB

Faculty of Law
2000

CIVIL LITIGANTS IN THE LOCAL COURT

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Summary:

The purpose of the research was to identify the clients of the Local Civil Claims Court and to determine what type of cases and monetary amounts were the subject of their claims. The study involved looking at the functions of the court from the viewpoint of the various client groups by following individual cases through the system from filing to judgment and noting the use that different clients groups made of the system. Particular emphasis was placed on the differences in client usage of the registry and adjudicative services provided by the court. Two data sets of 500 cases were collected; one set was a systematic sample of all filed cases and the other set was made up of defended cases. The data revealed that the dominant client group consisted of large, corporate plaintiffs suing small, individual defendants for small amounts of money. The results were used to examine the role of the court and the degree to which the court met the needs of the clients. The Court Set sample indicated that in a significant minority of cases the court performed a dispute resolution/facilitation of compromise role but the Registry Set showed that in the majority of cases filed the court functioned to reinforce normative/dominant values and institutional outcomes indicating a policy implementation function.

CHAPTER ONE

INTRODUCTION

The purpose of this paper was to determine who were the Clients of the civil justice system at the Downing Centre Local Court in 1997 and the relationship between various client groups and the court. Clients were divided into groups of small, medium and large. The characteristics of each group were identified and an analysis made of their relationships with each other and the court. The paper sought to accurately classify the clients, track the progress of their cases through the various parts of the system and determine the extent to which the Local Court was able to accommodate the requirements of each client group.

The New South Wales Local Courts Administration is currently undergoing a period of change. Local Courts are striving to develop a client service focus, to better understand client needs, provide improved facilities and procedures, satisfy the demands of the court clients and the reduce costs and delays that are perceived as an impediment to justice. New South Wales Local Courts are attempting to achieve these goals with very little reliable empirical data about the use or performance of the current system. (Parker,1998. Wright,1998) Without a clear image or accurate description of the client/user/customer/consumer/public that is being served by the Local Court, it is difficult to see how the court can measure its current performance or design and provide a better service. Client satisfaction depends upon an accurate assessment of client needs and the provision of a service that is sensitive and responsive to them. A commitment to provide a better client

service would be well served by an intention to discover who is being served and what use clients are making of the current services.

The court provides a service to a variety of client groups. Lawyers, Government Departments, the judiciary, other courts and tribunals are considered to be internal clients. Litigants (plaintiffs and defendants) are the external clients. This study was undertaken to identify and classify the external clients to explore their use of the court services and facilities. The study examined the Local Court civil jurisdiction from the viewpoint of different client groups and explored the nature of their relationship with the court and the other categories of users. The detailed study of court usage and clients was then examined in order to make observations about the role of the civil court.

1.1 Reform and Empirical Research

The first hurdle encountered in the quest to identify and classify the court clients was the lack of empirical data collected by the courts to describe their client base. As Parker noted:

> In some jurisdictions, the consumer focus has run a little ahead of itself in that measures to demonstrate a commitment to service have preceded clear identification of who is to be served and why. (Parker,1998:48)

The insufficiency of empirical civil data is not confined to Australia or the late twentieth century. Interested parties have been bemoaning the lack of quality civil research for most of this century as it has not been a fertile ground for academic

study. Amos lamented that "very little has been written upon civil procedure of a critical or analytical nature since the days of Bentham."(Amos,1926:340)

Jackson (1940:303) noted a similar disinterest and explained that most academics of the time had not been extensively involved in private practice and so lacked detailed knowledge of the practical workings of the system. The civil area of legal practice, as true then as it is now, was a financially lucrative one for practising lawyers and few who were successful made the transition to lesser paid academic positions. Practising lawyers, occupied with case preparation and court appearances do not, Jackson asserts, have the time or inclination to stand back, analyse, review and teach. He says "the inevitable result is that civil procedural law remains the Cinderella of the legal academic world." (Jackson, 1940:303)

Cranston continued this theme.

> Unfortunately civil justice has been a cinderella (sic) subject and not a great deal of social research has been done. Recently in the United States four directors of leading research institutions into civil justice called for a systematic collection of data so that reasoned and effective policy could be made. (Cranston, 1995:33)

However, the lack of data and research has not deterred policy makers from attempting or suggesting reform. The latter part of this century seems to have spawned a revival of academic interest in civil procedural law. With a focus on the 'twin evils' of cost and delay, there has been an outpouring of articles and papers perhaps prompted by the interest of the judiciary, bureaucrats and politicians to reform the civil system in order to achieve cost savings for litigants, create greater

efficiency in the use of public resources, improve access to justice and increase client satisfaction with the legal process.

Case management, alternative dispute resolution, uniform civil rules, simplification of language and procedures, cost minimisation for parties and the public purse have all been placed on the civil reform agenda.

In the race to improve the civil process, critical evaluation, suggestions and projects for reform have emerged from all over the common law world and quickly outpaced any quality, empirical research. The Woolf Report in the United Kingdom, the RAND Institute for Civil Justice Reform, the Brookings Institute Task Force on Civil Justice Reform in the United States and in Australia, the Justice Research Centre and the New South Wales Attorney General's Strategic Quality Team on Civil Reform are but a few examples of the bodies that have emerged to contribute to and provoke debate in the civil justice reform arena.

However, it is still true to say that despite the revival of interest in reform, there is insufficient empirical research to support or justify many of the proposed changes that have been suggested in the literature. (Salibra,1998. Wright,1998. Parker,1998)

Lord Woolf critically acknowledged the dearth of empirical research in the UK and the ambiguity of the results of studies from other jurisdictions. (Woolf 1995:33) He nonetheless suggested that reform be pushed ahead before conclusive results of comprehensive research were obtained.

> For professionals who place so much importance on 'evidence', 'proof' and 'facts', lawyers have tended to display an astonishing attitude towards empirical research when it comes to law reform. (Wright, 1998:2)

Debate in the United States, stimulated by the RAND Institute paper (Kakalik,1996), has provoked a similar response from members of the judiciary.

> Calls for judicial reform and descriptions of crisis unsupported by sound research should be treated with considerable circumspection...Judicial reform by anecdote...should no longer be viewed as acceptable. (Salibra,1998:22)

It was amid this climate of reform accompanied by a reluctance of lawyers and court administrators to gather or rely upon empirical data that this paper was conceived. The first step towards developing a client focus was to determine who was being served and the second was to ascertain what parts of the supplied services were utilised by the user group. The study fills this identified gap.

> There was still inadequate information about the kinds of people and organisations who "use" the courts in an immediate sense, as plaintiff or defendant and this may hamper policy formulation in the area. (Parker, 1998:36)

This study examines a sample of cases from both the registry and the courtroom in the largest Australian civil court. The data that was available (discussed later) in relation to Australian civil courts largely ignored the lower courts which processed more than 80% of the civil cases. The few studies that had been done ignored the routine administrative work of the court that took place in the registries and

concentrated on the more visible but less numerically significant adjudicative work that took place in the courtrooms.

The client image that emerged caught a snapshot of the whole vista; the identity and characteristics of the litigants, the causes of action, the way the system was used and the way the practices and procedures of the court assist or impede users on their journey to judgment.

1.2 Development of a Client Service Focus

There has been a major cultural shift in court administration (as in many areas of public sector administration) and the relationship of the court to the community it serves. Courts are attempting to adopt a client focussed approach to their business and to be more flexible and open in their dealings with clients. Processes and procedures that have stood the test of time over this century now need to be critically examined and reviewed by a new culture seeking a standard of service delivery demanding excellence and continuous improvement.

With an emphasis on improved client satisfaction, accessibility of information and facilities, public accountability, transparency of fee structures and quality of service, the focus in the Local Courts has shifted from an inward looking organisation concentrating on internal auditing and compliance with mandatory, inflexible rules to a customer focussed business unit providing an accessible and efficient service to clients.

This new interest in clients was evidenced by a study conducted by the University of Wollongong in conjunction with the Local Courts Administration that

attempted to draft and set benchmarks for client service in all areas of court operation. (Condie, Mohr, Gamble & Wright,1996). In early 1999 the New South Wales Attorney General's Department convened a Strategic Quality Team to review civil practice and procedure. The team consisted of senior court staff and the judiciary from the Supreme, District and Local Courts, departmental finance and technology experts and representatives from the Bar Association and the Law Society. The team was given the task of setting the reform agenda, producing a discussion paper and widely consulting the community and interested groups about proposed reforms.

This consultative and discursive approach contrasts starkly with the methods of the past where procedural decisions and directions were made by bureaucrats, court managers, judges and magistrates relying solely on their own subjective knowledge and views gleaned from many years of experience within the narrow confines of a single court or jurisdiction. The past practices resulted in the formation of practice notes, rules and forms which are distinctly different for each jurisdiction.

The increasing emphasis on community involvement and client participation in decision making is an acknowledgment that not all expertise and quality input is to be found with the court itself and that the provision of legal services has a significant impact on the wider community who may never enter the door of a court as well as an impact on the litigation participants.

> The consuming public are not physically before the court as litigants at any particular moment. Only a tiny minority of them will be so situated. Most of

> the court's consumers are virtually invisible to judges and other court officials...(T)he key to resolving many of the present difficulties lies in the adoption of a consumer oriented perspective in all of the relationships of courts and lawyers to the public. (Church,1990:8)

One of the main difficulties for court administrators and policy makers attempting to adopt a client focus is the fact that civil courts serve a wide range of clients. These include internal clients such as the judiciary and other government departments, professionals such as barristers and solicitors, specific interest groups such as community legal centres, financial counsellors and court support workers. External clients are the litigants who range from multi-national corporations, finance institutions, medium sized companies, professionals, small business proprietors and individuals. The viewpoint of each client and the kind of service required is markedly different. All the Client groups have different interests to protect and different uses for the system.

For example, in the civil adversarial arena there are two immediately apparent client groups; the plaintiffs and the defendants. These groups have opposing interests. The plaintiffs are attempting to recover an amount of money and the defendants are the recipients of the claim. Within the two groups, the interests and needs of the parties may also differ depending on their size, knowledge of the processes, available resources and legal representation. Individual plaintiffs make different demands upon court services than a corporate plaintiff. Even within the smaller sub group categories that were created for the purpose of this study there was not necessarily a great deal of homogeneity. Individual litigants were

sometimes identified in the pleadings as qualified lawyers, professionals or business proprietors. Aboriginal and Torres Strait Islanders, physically or mentally disabled persons or migrants with very limited English literacy skills also appeared as litigants. Litigants were identified and classified by the contents of their pleadings or affidavits that accompanied motions to set aside judgment. The educational level, economic resources and knowledge of the law and language (where this information was available) varied considerably.

This illustrates the difficulties facing court administrators attempting to introduce reforms to improve client services and enhance client satisfaction. Which client? Which services? The clients with best access for contribution to rule and policy formulation and review are the institutional clients and their lawyers. It would be fanciful to imagine that they would willingly give up a comfortably powerful position with concrete advantages to help develop a more accessible and client friendly forum for their quarry.

> Insurance companies, manufacturers, retailers, providers of services, sometimes even governments don't like being only equal. It takes away the edge their financial advantage gives them, and they like their edge. (Drivon, 1990:63)

1.3 Seeking User Satisfaction

The services provided to users by the civil courts are largely a monopoly. There are some specialist tribunals that are used as an alternatives to court such as the Community Justice Centre, the Fair Trading Tribunal and the Residential Tenancies Tribunal. These bodies do not compete with courts for civil work. They

were established to divert certain types of cases away from courts in order to reduce court backlogs and to provide a more informal, specialist service for certain common causes of action. All such tribunals lack enforcement procedures. Their orders are enforced by registration in the Local Court. The route to the coercive power of the state in New South Wales is through the Local Court registry.

Given the monopoly nature of civil court enforcement services, it is necessary to explore the reasons courts wish to gauge and improve user satisfaction when often the parties have no other lawful, state sanctioned alternative. One reason is the need as a public service organisation to be accountable to the public for the use of public resources. Another reason is the need as an arm of government to have a degree of public support.

1.4 Accounting for the Use of Public Resources

All public sector organisations in Australia have come under increasing public, political and media scrutiny. In an era of shrinking public sector expenditure, court administrators are under pressure to provide better services using less public resources. Financial accountability and transparency required courts to calculate and assess the costs of all aspects of service delivery and to be able to justify each item of expenditure in terms of benefits to the community, the litigants or the organisation at each step. The client service focus demands that users be treated as consumers and their interests and needs be given primacy in service delivery design.

> It has been recognised that, although individual consumers are a diverse and fragmented group, it is desirable that those responsible for delivering services should try to identify and provide for specific interests of clients as such. So, too, many have now come to see that those who use the (largely monopoly) services provided by the courts - the litigants- can, to some extent at least, be seen as consumers of those services, and, in that capacity, have a legitimate interest in the way the courts perform their various functions. (Thomas,1990:52)

New South Wales Local Courts charge a filing fee at the point of entry into the registry (issue of the claim.) A further fee is paid to file a Certificate of Readiness which facilitates the entry to the courtroom. Filing fees are relatively low (see fee comparisons with other New South Wales courts in Part B) and rate of usage of the adjudicative services is also low. Less than 1% of all filed cases are adjudicated by the court. (Local Court Statistics Unit,1997) This means that the uncontested, unserved, settled and discontinued cases subsidise those that require the whole range of court services for resolution. In terms of money injected into the system by way of filing fees, the largest consumers of court services used the least amount of court facilities. Clients who paid the most fees frequently obtained their judgments by default, rarely used the adjudicative facilities and almost never used the information or document production services. Satisfaction of the largest clients was delivered by providing a cheap, quick, efficient access to default judgment. As the Downing Centre had processes designed and operated for the large clients it would appear that the needs of the dominant users were well considered and largely met despite the fact that their filing fees were used to

partially fund services they rarely required. Therefore, client satisfaction was not related to receiving value-for-money services. The largest clients were being asked to subsidise the smallest in exchange for provision of specialist services that made their in-house processing cheaper.

1.5 Assessment of Dominant User Needs and Satisfaction

Past surveys of court user satisfaction have focussed on individual litigants. Whilst their opinions may be useful in assessing individual confidence in the justice system, the views expressed represented the experiences of a small minority of civil court litigants. The majority of litigants at the Downing Centre Local Court (as discussed in the results chapters) were found to be institutions, corporations and government departments. Their level of satisfaction, to some extent, was able to be assessed by their repeated use of the system although the limited alternatives to court make this an unreliable indicator. Large users took out large numbers of claims against small, infrequent users. They regularly attended the court registry, the courtrooms and contributed most of the revenue raised by court fees. They regularly made submissions and suggestions for service improvement which were always seriously considered and often implemented.

They actively contributed to service delivery process design and, as plaintiffs, brought most of the infrequent users into the system as defendants. Their selective use of the courts (many claims against small defendants for small debts) indicated that this service was the one most needed. They rarely used the court for resolving commercial disputes with one another (or other large organisations.) This suggests that other alternatives to court (negotiation, mediation, expert appraisal, private

settlement) were preferred for those disputes. The low propensity to use the adjudicative services of the court indicated that dispute resolution was not a primary need for the dominant clients.

Galanter (1974) found that institutional, corporate and government users have advantages over smaller users by reason of their size, resources and relationship with the court. Their satisfaction with the court performance is very likely to be related to the position of advantage they enjoy within the system. The inequities work in favour of the large, regular users.

> (M)any small claims, debt and housing cases are in effect, conducted on the basis of inequality between the parties. Unrepresented litigants are unlikely to know what to do or how to get on and do it. (Thomas,1990:58)

Galanter (1974) explains how the legal concept of equality before the law can operate to reinforce the advantages of elite groups.

> The position of advantage is one of the ways in which a legal system formally neutral between the "haves" and the "have nots" may perpetrate and augment the advantages of the former. (Galanter, 1974:95)

The large users like their edge over the their smaller opponents. (Drivon,1990:63) It stands to reason that they would be well satisfied with a system that preserves their position of advantage over their opponents.

1.6 Lawyers and Internal Clients

Client satisfaction amongst lawyers and internal clients (judges, magistrates, judicial officers, court staff has been found to be consistently high. "Judges and

lawyers indicated much higher levels of confidence in the courts."(Church,1990:40)

This is hardly surprising when one considers that one of the common criticisms of court procedure is that the system has been designed by judges, court staff and lawyers and run in accordance with their wishes. The entire legal industry historically regulated itself by a series of professional bodies such as the Law Society and the Bar Association and did not welcome outside or public interference in its deliberations or disciplinary procedures. In recent years, lack of public confidence in the ability of lawyers, magistrates and judges to set and regulate their own standards of conduct has led to the creation of the Legal Services Commissioner to oversee professional performance and standards for the legal profession and the Judicial Commission to educate and investigate the performance of members of the judiciary including Local Court Magistrates. The birth of these bodies could be viewed as further evidence of the erosion of public confidence in the profession or at least evidence of a serious concern by the legislature to improve the perceived negative image of the justice system.

1.7 The Public and the Legal System

One interesting aspect of the client satisfaction surveys is the concern shown by lawyers about their negative public image. Public perception of their performance made them objects of ridicule, satire and mirth.

> Lawyer bashing has become a new national pastime. Ethnic and blonde jokes have been replaced by equally tasteless lawyer jokes. Media polls

> show that the prestige of the legal profession is at an all time low. (Aspen ,1995:115-116)

The main reason for concern about public satisfaction with the legal system and lawyers stems from the fact that courts are an arm of government and depend upon public support and confidence to give legitimacy to their role. (Parker,1998:6) Courts need to be mindful of public opinion and social attitudes and trends if they are to perform their political role effectively. Client satisfaction and public satisfaction (the confidence of the majority of citizens who never physically appear before the courts) is essential to the political performance of the court in contemporary Australia. As Parker states:

> The stakes may be higher than first appear. Legal systems in modern liberal democracies rely ultimately on public confidence and the consent of the governed. That confidence and consent may drain away over apparently small matters which, when accumulated, constitute a predominantly negative image for the courts. (Parker, 1998:6)

There is some research from the United States of America to suggest that public confidence in the court system has been eroded.

> Public confidence in American courts is remarkably low. Even more alarmingly, the data revealed that the more experience people had with the courts as litigants, witnesses or jurors the less confidence they expressed in the legal system.(Church,1990:3)

Similar levels of public dissatisfaction have been recorded by some Australian research. "Some investigators report uncovering a deep vein of popular discontent with legal institutions in Australia." (Church, 1990:4)

Australian research on plaintiff satisfaction with the legal system has found that litigants were able to distinguish between process and outcome. In a study (Matruglio,1994) conducted in the Supreme Court 65% of plaintiffs were satisfied with the outcome whilst only 32% expressed satisfaction with the legal process. Satisfaction levels were related to the proximity of the result to their expectations. Expectations depended largely upon the information supplied to parties by their lawyers. Satisfaction levels were higher in litigants who reported that they felt they had some control over the process, were able to participate and had been provided with accurate information about the progress of their case. (Matruglio,1994:62) This research indicates that the kind of reforms suggested by lawyers, such as reducing delays, simplifying procedure and reducing costs may not be effective, in itself, in improving litigant satisfaction.

The idea that courts are isolated from the community, unresponsive to community needs and held in less than high regard by the public is not the new phenomena that contemporary writers suggest. A perusal of the works of Charles Dickens shows that lawyer bashing was alive and well in his era. Dicken's portrayal of lawyers as unprincipled, money hungry drunks worthy of ridicule and his characterisation of them in The Pickwick Papers and Great Expectations leaves the impression that ordinary folk saw them as objects of fun and humorously satirised their dress, rituals, mannerisms and demeanour. In Oliver Twist, the

status of the legal profession is clearly defined in the lines, "The Law" Mr. Bumble said "is an ass-an idiot." Unflattering references to lawyers also appear in the works of the English playwright and poet William Shakespeare. In Henry VI, the character Dick says "The first thing we'll do, let's kill all the lawyers." The reply is made, "Nay, that's what I mean to do."

Perhaps the most scathingly critical satirical work on lawyers is to be found in the artistic works of Daumier. Between 1832 and 1851, Daumier haunted the courts of Paris and produced hundreds of cartoon caricatures of the eminent lawyers of the day at work. The series of works entitled Lawyers and Justice and Lawyers and Litigants portrayed lawyers as fork-tongued, deceitful defrauders of poor unfortunate who place their misguided trust in their apparent expertise. With burning hatred, Daumier mercilessly sketched the dishonest, impertinent counsel, the mocking, and slumbering judges and the exasperated litigants. The accompanying captions are generally conversations between the lawyers such as the criminal counsel saying "Don't forget to make a reply to my plea, and I shall reply to your reply...That will mean two more speeches for our clients to pay for."(Daumier, 1851) or the family law representatives remarking "At last we have managed to obtain a petition of the wife's and the husband's property.. Just in time, the case has ruined both of them." (Daumier, 1851) The civil law also receives its fair share of his pointed barbs;

> Lawyer - The case is coming along very nicely, we're making rapid strides.
>
> Client - That's what you told me four years ago; if we keep striding on much longer I shall be barefoot before we get there. (Daumier, 1851)

So it would seem that lawyer bashing, jokes and satirical material about lawyers and the legal system have been around for at least several hundred years. However, the current perceived lack of confidence in the legal system has been seriously considered by the New South Wales Attorney General Jeff Shaw. Before the last New South Wales State election in early 1999, he issued several policy statements vowing to address the areas of greatest public concern; accessibility, accountability and complexity of civil practice and procedure. The New South Wales Attorney General's Department included these goals in its mission statement in 1997 and actively pursued a client focussed reform agenda. In Daumier's day, the official reaction to his work was to introduce new press control laws that rewarded him with a prison sentence. That was certainly an effective method for stifling debate and criticism but did nothing to improve the public's perception of the profession.

With such a low level of public confidence in the courts and the legal profession it could be argued that the courts lost their legitimacy in the eyes of ordinary folk several hundred years ago. New South Wales was settled by persons of European descent just over two hundred years ago as a penal colony. Considering the composition of this population it is doubtful whether the early citizens (mostly ex-convicts transported for a minor property offence) held the transported British justice system in high regard. Convicts sailing to Australia regularly held mock trials using patchwork quilts for gowns and mops for wigs. Lawyers, barristers and judges were mimicked and lampooned as a form of amusement. These performances were held on the very ships that transported British law to the

Australian continent and so it entirely true to say that "the English courts quite literally came to Australia as parody." (Mohr, 1999:7)

It is hardly surprising that the individuals who had been on the receiving end of British justice as "victims of the undeclared barbaric civil war between the British landed classes and their underlings" (Hughes, 1987:345) lacked faith in the justice system. The resultant social and political crisis was evident in the rotting hulks on the Thames jammed with condemned felons, the starving masses in the poorhouses, the squalid living conditions and prevalence of disease among the lower classes. (Flannery, 1994:346) Transportation solved the visible signs of social unrest displayed by a system in crisis for the British aristocracy. The colony of New South Wales adopted all the legal practices, trappings and procedures of Britain along with the alienation of the law from ordinary, working class citizens.

1.8 Identifying the Civil Court User in the Literature

There had been no previous studies of the civil client base in New South Wales Local Courts at the time of writing. This presented a difficulty for court administrators attempting to develop a client focussed approach to service delivery. Some research has been done in the New South Wales Supreme Court (Matruglio,1993), the Victorian County Courts (Cranston,1986), the English County Courts (Thomas,1990) the United States State and Federal courts (Galanter,1974) and the Portuguese courts (Santos et al.,1996). An analysis of their findings shows considerable differences in client identification and the characteristics of the litigants.

The literature and studies selected for review were those that looked at the general characteristics of the civil justice system, identified the litigants as plaintiffs or defendants and examined their use of the court in an attempt to draw conclusions about the role the court played in the delivery of civil justice outcomes. The majority of the studies dealt with the higher courts where the cases and the clients are different from the Local Court. The later descriptive section on the New South Wales courts (Chapter 2:2.1-2.4) illustrates these differences and explains why the findings from the Supreme or District Court research do not necessarily apply to cases and parties in the Local Court.

Research from other Australian lower courts in Victoria and the English county courts supports the view that civil courts are "dominated by business litigants who use it as a cheap means of debt collecting."(Clark,1992:2) The study by Wilson and Ford found that "banks, building societies, finance companies and credit card services were all major users."(Wilson & Ford,1992:369)

A study of the County Court in London produced similar results. Private plaintiffs were only a small minority of those who began claims (10.9%) whereas they formed the vast majority of defendants (83.9%). Cranston (Cranston, 1986:129) also discusses a study of the Melbourne Magistrates Court conducted in 1982 that found that only 3.7% of claims were instituted by private citizens with the balance begun by business or corporate entities. An interesting feature of Cranston's research was that it acknowledged a flaw common to almost all civil research looking at the identity of litigants:

> Groups may stand behind some of the individuals who sue or are being sued. It is difficult to uncover in a systematic way the extent to which this occurs. (Cranston, 1986:129)

The doctrine of subrogation allows institutions such as insurance companies to institute actions for the recovery of debts in the name of the insured individuals who have been paid out by the insurer under a contract of insurance. The individual takes no part in the legal proceedings (other than occasionally as a witness) and has assigned all their legal rights to the insurance company. Studies which count these insurance company plaintiffs as individuals (Cranston, 1986 and Matruglio, 1993) inevitably overestimate the degree of participation by individuals in the civil justice system. Difficult indeed though it may be to identify insurance company plaintiffs such a task is an essential requirement in the development of an accurate client profile. With no precise information on how many of Cranston's individual plaintiffs are actually corporations or insurers, the figure of 50% private plaintiffs is suspect. What can be accurately ascertained is that some unknown quantity of these claims are corporations so the individual plaintiff figure is overinflated to some extent. The exact degree of the inaccuracy is unable to be quantified. A significant reduction would bring Cranston's results closer to the other researchers.

In the Melbourne Magistrate's Court in 1982, 96% of issued summonses were default summonses. Only 3.7% of these were initiated by individuals whilst 75.8% of the defendants were individuals. (Cranston 1986:129) In Canada, another common law country, a study of Ontario courts found that 70-80% of civil

plaintiffs were banks, corporations and institutions whilst 50% of defendants were individuals. (Cranston, 1986)

Despite the preponderence of studies (Santos et.al.,1996. Thomas,1990. Galanter,1974) that have found the civil courts to be dominated by corporate plaintiffs and individual defendants pursued for small debts, there have been contrary findings in research done in superior courts. Cranston's study of three Australian courts found that 50% of the plaintiffs were private individuals. (Cranston 1986:128) He explains that if the greater propensity for commercial and property interests to litigate compared to private individuals is correct, it exists as a result of the different transactions entered and the interests to be protected. He claims that whilst individuals are largely absent as plaintiffs in debt matters, they proliferate as plaintiffs in the areas of personal injury and motor vehicle accident litigation. This fact, claims Cranston, provides evidence to disprove the argument that courts function to ratify the legal claims of dominant social groups. (Cranston 1986:143)

However, the Cranston does not explain how he arrived at the conclusion that individuals take out "so many" claims. There is no data to show the percentage of individual claims compared to the total number of issued claims. There appears to be an assumption that the number of corporate plaintiff debt claims are equal to or balanced by the number of claims made by individuals for personal injury matters but there is no cited empirical data in support.

Researcher Rosser (1980) supported Cranston's view. He, like Cranston, found that "a great deal of civil litigation results from people injured in road or industrial

accidents."(Rosser, 1980:17) There is scant detail provided to indicate the source of the data for the conclusion as he provides no statistics to compare numbers of personal injury claims with other types of civil claims.

Research reaching a similar conclusion to Rosser (1980) and Cranston (1986) was conducted by the Civil Justice Research Centre in the New South Wales Supreme Court. (Matruglio, 1993) The work entitled "So Who Does Use the Court ?" found that:

> Most of the defendants were either a business or a company (52%) or a public agency (21%)... Private individuals were least likely to be involved as a defendant (4%). (Matruglio 1993:7)

Private individuals made up 100% of the plaintiffs. Not a single institution, corporation or government agency instituted a single claim. (Matruglio 1993:11) Plaintiffs were discovered to be individuals of modest financial means whose average income was consistent with the average income for New South Wales. The study claims to debunk the 'myth' that only the rich or legally aided poor use the courts. Court usage is dominated by Mr. and Mrs. Average as plaintiffs with Mr. Average more likely to make a claim than his female counterpart. (Matruglio 1993:1)

Thus, there is a large discrepancy between the findings of Cranston (1986), Rosser (1980) and Matruglio (1993) who found that individual plaintiffs made up 50-100% of civil litigants and the research conducted by Santos et al. (1996), Thomas (1990) and Galanter (1974) which put the percentage of private plaintiffs in the range of 3-20% of litigants.

The Matruglio (1993) research can be largely discounted. Like Cranston (1986), the Matruglio study focussed on a higher court, to wit, the Supreme Court; the highest court in the juridiction. The later descriptive section (Chapter 2.2) on the New South Wales courts shows that the Supreme Court handled only about 5% of the New South Wales civil caseload. Supreme Court cases are significantly different from cases in the lower courts because of the much larger monetary amounts involved and the complexity of the cases. Thus, a study of the Supreme Court provides a 'boutique' sample that differs from the majority of civil cases.

Further, the Matruglio research sample was questionable because it was not a represenatative sample of the work in the 'boutique' court. The Supreme Court had eight divisions at the time of the research (Common Law, Equity, Criminal, Administrative, Commercial, Admiralty, Probate, and the Court of Criminal Appeal) and the Matruglio sample was taken from just one; the Common Law Division. Of the cases studied, (1,188 in total) 97% involved personal injury to the defendant's human body. Of these, 74% were industrial accident injuries, 12% motor vehicle accident injuries and 11% were "other" personal injuries predominantly caused by sporting escapades or professional negligence. Only 3% of cases were for damages other than personal injury.

Considering that the research looked at such a narrow range of actions in a specialist jurisdiction of a superior court, it comes as no surprise to find no corporate or institutional plaintiffs were in attendance. Banks, finance companies, multinational corporations and government departments cannot slip on wet floors, be crushed by cranes, loose limbs in industrial accidents or have their bodies

pummelled in vehicle collisions. The study found no corporate personal injury plaintiffs because corporations do not have human bodies to injure. Corporate injury is dealt with in the specialist Commercial Division of the Supreme Court. If a plaintiff headcount was done in the Commercial Division, the figures would be skewed in the other direction and the plaintiffs would be corporations in 100% of the claims. Matruglio found no corporations in the game because she went to wrong stadium.

Both Cranston and Matruglio differed from the contrasting research findings of Santos et al and Galanter largely because they undertook studies of the superior court in a hierarchical system. Personal injury litigation forms a significant proportion of the caseloads in these jurisdictions. As individuals have the bodies to injure, it is understandable that they will be the plaintiffs in personal injury cases.

However, Matruglio and Cranston both failed to identify the corporate bodies and insurers behind the private names on the files. In New South Wales there is compulsory third party personal injury insurance for all motor vehicle registrations and a compulsory workers compensation scheme for all employers. This means that in the vast majority of motor vehicle personal injury cases and work related accident cases, there is an insurer behind at least one of the parties. Thus, in almost all the cases Matruglio and Cranston studied, there would most probably have been an insurer behind one of the parties in many cases and behind both parties in some of the cases. For example, the motor vehicle cases may have involved an insurer for an injured party suing the insurer of the allegedly negligent

driver. The role played by the individual who is named on the claim is minimal. At most, they will be required to give evidence as a witness if the case proceeds to a hearing but they do not conduct the proceedings.

1.9 Use of the Court: Causes of Action

Matruglio (1993), Rosser (1980) and Cranston (1986) all contend that a large proportion of civil cases relate to personal injury or industrial accidents. Whilst these cases may consume more court hearing time than, say, a debt case because they are more likely to be litigated, in the overall civil scheme, personal injury and industrial accident cases are swamped by the vast numbers of cases commenced by corporations for the recovery of small debts.

To concede that personal injury cases consume a lot of court hearing time is very different from saying that there are "so many" (Cranston, 1986:143) or a "great deal" (Rosser, 1980:17) of claims in this category. It is correct that the District Court and the Supreme Court handle a lot more of these cases than the Local Courts largely because the damages sought are in excess of the Local Court jurisdictional limit. Also, there is some resistance amongst the legal profession to commencing personal injury matters in the Local Court. Practitioners are familiar and comfortable with the known procedures and outcomes in the higher courts. Although the Local Court jurisdiction was raised in November 1991, there is a perception in the profession that magistrates are unaccustomed and inexperienced in making awards for general damages and that they may be less generous to plaintiffs than judges.

Whilst conceding that the superior courts see more personal injury claims than Local Courts, it must be taken into account that these courts do only a small percentage of the civil work of the state. The Supreme and District Courts combined process less than 20% of the state's total civil cases. The Local Court determines the remaining 80% of all New South Wales civil cases. The types of cases where individuals are present in significant numbers as plaintiffs make up only a small proportion of the total number of civil cases.

The study undertaken of Portuguese courts (Santos et al,1996) found that the civil courts were predominantly used by corporations to recover debts from individual citizens. "We could observe that among the principle plaintiffs there are, firstly, insurance companies, then banks and consumer credit companies." (Santos et al.,1996:16) The researchers found that "debt collection is the most significant type of civil litigation." (Santos et al., 1996:13)

Galanter (1974), Santos et al. (1996) and Clarke (1992) all found that the frequent users of the court, the large corporations, were selective users. They most commonly used the courts to recover relatively small amounts of money from many different individuals.

> Their demand for the court is very selective, varying according to the action and the parties involved. It concentrates practically on frequent litigation against sporadic partners, that is, on debt collection, mainly when debtors are individuals or less economically powerful firms...In most cases, the value of these actions does not amount to much. (Santos et al.,1996:15-16)

Similarly, Galanter characterised his repeat player as:

> A large unit and the stakes in any given case are smaller...a unit which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case and has resources to pursue its long term interests. (Galanter 1974:98)

There are two other points to be made about the Cranston and Matruglio studies which cast further doubt on the reliability of their conclusions. One is the selective use factor that has been identified as a distinguishing feature of corporate court usage. The other is the absence of default judgment cases from their samples.

The fact that large corporations are selective users of the system was clearly demonstrated by Santos et al. (1996:15) and acknowledged by Cranston:

> Australian surveys suggest that commercial and property interests use the courts little, comparatively speaking for dispute resolution amongst themselves. (Cranston 1986:129)

Where large players have a dispute with each other, litigation is often avoided and alternative methods of resolving the dispute are utilised. Large commercial contracts, for example, commonly contain clauses which make arbitration, mediation or negotiation a prerequisite for commencing legal action in a court. Santos et al. (1996) found that large corporations prefer to take legal action as a matter of first choice against sporadic users of the system or one shotters (Galanter,1974) where their chances of a simple, successful outcome were greater. Large players frequently have valuable, ongoing commercial relationships with each other that may be best preserved by the private airing of differences which

result in a commercially viable, private solution rather than having a public forum explore the intricacies of their relationship.

The concentration of studies in the higher courts have shown a lower number of corporate players because the corporations show a preference for litigating smaller cases against smaller players and the lower jurisdictional limit means that these confrontations take place predominantly in the Local Courts.

The absence of matters that proceeded to default judgment is a common feature of research done by selecting matters from court lists or lists of pending cases. In Local Courts more matters are disposed of by default than adjudication or settlement. Default matters do not appear on court lists. Default judgments are most common in debt collection cases, particularly for breach of loan agreements, and the absence of default cases from studies of court usage underestimates the role of corporations, notably financial institutions.

1.10 The Role of Plaintiff and Defendant

There is a vast difference between the participation rates of plaintiffs and defendants. All civil cases begin by the action of the plaintiff in filing and serving a statement of claim. The plaintiff makes the decision whether, when and where to begin the proceedings subject to the restrictions relating to specialist jurisdictions, the amount of money claimed and the applicable limitation period. The New South Wales Local Court (Civil Claims) Act at section 22 and Local Court (Civil Claims) Rules at Part 3 rule 2 allow plaintiffs to begin an action in any Local Court in the State regardless of where the parties reside or where the cause of action arose. The defendant, on the other hand, must lodge the defence at the

court that issued the claim.(Part 9 rule 1) The defendant may file an affidavit applying to change the venue but only within 28 days of receiving the claim and only if a defence is lodged at the same time.(Part 3 rule 4) It is arguable that practices and procedural rules, such as this, actually deter active defendant participation in the civil justice system by limiting the location and time for response.

> The system seems almost designed to encourage the ostrich syndrome which is so widely recognised amongst private debtors. It does almost nothing constructive to encourage or welcome their participation in debt proceedings, and, as a result (to the benefit of no-one) it operates with very limited information about their circumstances. (Thomas 1990:51)

Thomas is referring to the English system. The system in Australia is modelled on the English system and the level of defendant participation in New South Wales Local Court civil proceedings is similarly very low. (Local Court Statistics Unit, 1997)

Civil clients are acknowledged to have conflicting interests. Their economic and social position may be vastly different. Plaintiffs are, to some extent, voluntary participants in the sense that they have chosen to bring their dispute to a court after having dismissed or exhausted their other options of private settlement, tribunal hearing or alternative dispute resolution. Any participation by the defendant is reactive and the timing of the participation is dictated by the plaintiff according to the rules of the court. Where there are alternative forums for action, for example, the Consumer Claims Tribunal, the legislation confers jurisdiction

upon the tribunal where the action was commenced. Hence, the plaintiff chooses the arena by commencing proceedings in their preferred location.

Parties may vary in size from governments and multinational corporations to private individuals. Studies conducted in American courts (Galanter, 1974:95) and English courts (Thomas:1990:51) have found great inequality between the competing litigants. The regular court users, generally the plaintiffs, tend to have access to greater economic resources for the case, benefit from repeat usage and economies of scale, have experts to prepare and present their cases and have a role in rule formulation and changes to practice and procedure. Defendants were found to be more often individuals who were irregular or one time users of the system, were unfamiliar with the processes and paperwork, had less financial resources to expend on litigation and had little or no opportunity or incentive to participate in rule or precedent formulation.

This is entirely consistent with the results of the study conducted in the English County Courts where it was discovered that "the county court - far from being the little man's court - was the place where the little man gets taken to court." (Thomas, 1988:207)

Galanter found a similar picture in the United States. The "one shotter", the small litigant is generally pitted against a "repeat player".

> The unrepresented defendant, engaged in legal action as a "once in a lifetime" experience, is therefore the classic "one shotter" often engaged in a battle against a "repeat player" who will be more powerful, more

> experienced at litigation, less susceptible to delays and more likely to have the benefit of legal advice and representation. (Galanter 1974:95)

The authors who have noted the prevalence of corporate plaintiffs have also commented upon the lack of participation by the individual defendants:

> One of the most striking and damning features of our civil justice system is the vast number of defendants, especially in debt and housing, whose participation is entirely passive. (Thomas 1990:51)

This illuminates the fact that a large proportion of the litigation that is commenced is never adjudicated by a court but is terminated by the imposition of a default judgment against the absent debtor. Many other matters are settled prior to a hearing.

> Relatively few cases which are begun in court are adjudicated. Instead the great majority are discontinued, disposed of by default judgment or settled. (Cranston 1986:132)

> Figures show that only a small percentage of cases where civil proceedings are commenced end up with a full court hearing and judgment. Interestingly, this seems true not only of England and Australia but also of America and only up to about 5% of these cases do end up with a full judgment. (Rosser, 1980:vii)

1.11 The Role of the Court

> Accurately identifying and understanding the court usage of civil clients is a necessary precondition to understanding the role the civil court is playing in society.

As Cranston concedes;

> Beyond any impact on the courts, the nature of litigants may have ramifications for society. For example, if plaintiffs were typically commercial and property interests claiming against individual defendants, the courts would be functioning to re-inforce other institutional outcomes rather than acting as an avenue for redressing the balance. (Cranston 1986:128)

Santos et al (1996), Galanter (1974) and Thomas (1990) found that the most prolific plaintiffs were commercial and property interests claiming against individuals. It also found that few such claims were disputed by defendants. The findings on the court usage question raised the issue of the court function. "(T)he recognition that the lower courts do not "settle disputes" might cause us to reflect on what such courts in fact do." (Ramsay, 1968:7)

Couture (1950) describes the purpose of the civil court as "civilisation's substitute for vengeance." (Couture,1950:1-7) and sees its primary function as resolving contested, private disputes. "A court's most basic and irreducible task: the resolution of individual disputes." (Church, 1990:2) Under the dispute resolution model the court's function is to provide a peaceful resolution of a conflict between two parties. The private interests of the parties were paramount and societal

involvment was minimal being restricted to an interest in maximising the satisfaction of the litigants in order to avoid socially disruptive self-help remedies. (Armstrong, 1995:99)

The prevalence of default judgment and the low rates of defended cases in the lower courts demonstrates that dispute resolution played a minor role in court operations and day to day work. Only 8% of New South Wales Local Court litigants lodged a defence. Less than 1% had their case determined by a Magistrate after a court hearing.(Local Court Statistics Unit, 1997)

The dispute resolution model is flawed because it views the civil litigants as individuals when in fact the vast majority of plaintiffs are finance, retail and insurance corporations or government departments and the vast majority of defendants are private individuals. The "dispute" was most frequently the individual's inability to pay an acknowlegded debt to a corporate creditor.

> Dispute resolution depicts a sociological impoverished universe, one that does not account for social groups and bureaucratic institutions...the world is composed exclusively of individuals. (Fiss, 1982:6)

The dispute resolution model assumes a value neutral process by which conflict is fairly diffused and evenly distributed among equal individuals. Civil litigants are always already social, political and economic entities entering the civil justice system with all their pre-existing attributes and inequalities intact. The civil procedures (as described in Control of the Civil Process section of this paper) are largely designed to accomodate the needs of the plaintiff as a result of clear policy decisions taken by the bureaucracy and the legislature in drafting the legislation

and the rules. "Procedure is not pure form. It is the meeting of conflicts, of policies, of ideas." (Cappelleti, 1971:47)

The fact that New South Wales civil hearings are open to the public, are fully recorded by audio tape or stenography and each decision made in a higher court is binding on lower courts is further evidence that the public interest is given greater priority than the conflict resolution model suggests. Precedent making demonstrates that the importance of an individual case lies in the fact that it is a manifestation of prevailing social, political and economic conditions that make it likely that a similar case will arise in the future involving other private parties.

> Precedent making "necessitates the recognition of the plurality of disputes or, in other words, the fact that the private dispute has occurred concommitantly with other private disputes."(Armstrong, 195:108)

A more accurate model for describing the function of New South Wales civil courts is the "Policy Implementation" model which acknowledges the paramount importance of the public interest in private disputes. "Private conflict becomes an opportunity to clarify and determine the standards by which society governs itself." (Armstrong, 1995:99-100) This explains the multi-faceted functions noted by Parker (1998:5) and the way the civil court operates in different ways for different client groups in order to protect different interests.

Santos et al. (1996) divided the principal functions of the court in contemporary societies into the three categories of instrumental, political and symbolic functions. (Santos et al.,1996:5) The New South Wales civil justice system shows elements of all these functions to some extent. The detailed examination of client

characteristics and behaviour at the Downing Centre Court casts some light on the dominant functions of the court and the degree to which those services match the needs and expectations of its various users.

CHAPTER TWO

METHODOLOGY

2.1 Introduction to the New South Wales Court Structure

The Local Courts of New South Wales lie sprawled at the base of the hierarchical pyramid that forms the legal structure of the state. The District Court occupies the middle level and the Supreme Court perches imposingly upon the summit. The nature and volume of civil litigation in the State reflect this structure with the Local Court handling the greatest volume of all the civil cases.

2.2 The Supreme Court

The Supreme Court consisted of eight divisions in 1997; common law, equity, criminal, administrative, commercial, admiralty, probate and the Court of Criminal Appeal. The New South Wales Department of Courts Administration 1992/93 Annual Report stated that 31,082 new matters commenced in the Supreme Court in that financial year. The majority of those (18,199) were in the probate division. The total number of new civil claims filed in the common law, equity and commercial divisions were 10,989. The report noted that this represented a downward trend that was likely to continue as a result of the increased jurisdiction of the District Court in 1993 from $100,000 to $250,000.

The Supreme Court civil cases involve the largest amounts of money. Unlike the Local and District Courts, the Supreme Court has no upper jurisdictional limit on the amount of money that can be claimed. The Supreme Court also hears and determines civil cases on appeal from both the District and Local Courts. It hears

the longest and most complex cases and decides the most contentious legal issues. The decisions that emanate from the Supreme Court are binding precedents for the lower courts. Recommendations and judgments that contain comments about practice and procedure are highly persuasive in the formulation of the rules, practices and procedures in the lower courts. For example, the Civil Claims Rules Committee of the Local Court pays careful attention to the Supreme Court pronouncements on leave to amend pleadings and interpretation of the principles of natural justice when drafting case management rules. Otherwise, it would soon find its time limits and filing requirements, designed to expedite case preparation and deter delaying tactics, voided by the esteemed body entrusted to ensure that the rules of natural justice are not swept away in a wave of well intentioned but overly stringent bureaucratic rule making.

The Supreme Court bench consists of an elite selection of former senior barristers with the occasional sprinkling of former Attorneys General. The gender balance as at June 1999 was 43 men and 4 women. The Supreme Court attracts the most experienced and expensive legal talent in the cases it hears. Senior members of the bar appear in the majority of cases before the Court. It is rare for a solicitor to act as an advocate in the Supreme Court. The Court has the advantage of taking submissions and pleadings from the best legal talent in the state.

The judges and barristers who frequently grace the Supreme Court are unaccustomed to dealing with litigants in person and experience discomfort, difficulty and reluctance in adapting their time honoured work practices and language in a manner which would make proceedings intelligible to the legally

uninitiated. In a study of litigants in person a lawyer described his experience of opposing an unrepresented person as "like wrestling with smoke." (Gamble and Mohr , 1998:14)

In my own experience as a Chamber Magistrate interviewing and assisting those few intrepid individuals intent on pursuing their legal rights in that forum, I have found that they experience difficulty in understanding the language and procedures. They reported feeling intimidated and unprepared for the experience. The Supreme Court is no place for the feint hearted or legally ignorant.

An individual embarking upon a Supreme Court action is faced with the prospect of incurring considerable expense to hire experienced counsel. Cases are often heard years after the original filing date and the legal costs mount during the waiting period with directions hearings, interlocutory procedures, correspondence and meetings between adversaries, witnesses, counsel and solicitors. For example, in 1997 to file a commercial civil matter in the Supreme Court cost (in Australian dollars) $2,210, in the District Court, $345 and in the Local Court $50- $124. Every step along the litigation route, such as the issue of subpoena or a motion to amend is more expensive in the Supreme Court.

The Supreme Court forms the upper portion of the judicial leg in the Westminster system of government tripod. It rightfully treasures its judicial independence. From its lofty location in Queen's Square, Macquarie Street, Sydney, the impressive stainless steel, concrete and glass monolith towers over New South Wales Parliament House nestled unobtrusively down the road.

The Supreme Court is not a forum frequented by unrepresented common folk. Numerically, very few citizens of New South Wales will ever be involved in the litigation that takes place within its confines. However the persuasive power and legal effects of its judgements have the capacity to shape and influence their lives and social relationships by the interpretation and application of the law of the land. The role of the Supreme Court and its view of itself is markedly different from the lower courts. The New South Wales Chief Justice made a speech on the occasion of the Supreme Court's 175th birthday that succinctly captures the self image and perceived role.

> There is a tendency today to treat the courts as some form of publicly funded dispute resolution service. Such an approach would deny the whole heritage we have gathered here to commemorate. This court does not provide a service to litigants as consumers. This court administers justice in accordance with the law and that is a core form of government.
>
> (Spigelman CJ reported in SMH 18 May 1999)

2.3 The District Court

The District Court occupies the middle level of the court pyramid. It is presided over by judges the majority of who were barristers before their appointment. There are two former Local Court Magistrates now sitting in the District Court as judges. The gender mix is 64 men and 10 women. In the 1992/93 Annual Report, the Department of Courts Administration reported that 10,552 new civil cases began in the District Court. That figure was expected to remain stable despite the influx of matters following the increase in the jurisdictional limit to $250,000. The

Local Court limit had been raised from $10,000 to $40,000 in 1991 and this had caused a decline in numbers that was reversing by 1992/93.

There is a closer physical relationship between the Local and District Courts than exists between the lower courts and the Supreme Court. Local and District Courts often occupy the same buildings and offices. At some locations, for example, the Parramatta Court Complex, the Local Court staff perform the duties of the District Court Civil Registry. In other large suburban and country Local Courts such as Wollongong, Newcastle and Liverpool, the Clerk of the Local Court also acts as Registrar of the District Court.

The District Court enjoys the presence of the middle to higher ranges of legal talent and its scale of fees are moderately priced between the expensive Supreme Court and the less expensive Local Court. The District Court hears appeals from the Local Court in criminal and summons matters but has no appellate function in relation to Local Court civil matters. All civil appeals from the lower courts and tribunals are heard by the Supreme Court.

The physical environment of the District Court rooms, even when located in the same complex as a Local Court, are more impressively imposing, solemn and dignified than the Local Courtrooms. The rooms are larger and more opulent. The figure on the bench wears a wig and robes as do the barristers appearing before the court. Judges' chamber accommodation is of a higher standard than those designed for magistrates and they also have access to improved research facilities such as law libraries, their own support staff and non sitting days for the preparation of reserved judgments.

2.4 The Local Court

The focus of this study is the Local Court which is located at the base of the court pyramid. In 1997, the year of the study, a total of 172,308 new civil cases began in the Local Courts of New South Wales. The civil caseloads for the Supreme and District Courts have remained fairly steady throughout the 1990's at 8,000 to 10,000 annually in each forum. This means that Local Courts handle about 80% of the civil caseload for the State. A similar situation exists in Victoria where it has been estimated that 90% of civil disputes are resolved in the Magistrates Court. (Miles,1990:37) Since these two states together contain more than half the population of Australia and similar arrangements exist in other states, it is fairly safe to assume that for the vast majority of Australian litigants their experience with civil justice is most likely to begin and end in a court at the bottom of the legal hierarchy.

The Local Courts of New South Wales are located in 160 towns and suburbs throughout the State. They exercise jurisdiction under a wide range of statutes dealing with criminal matters commenced by the Police or the Department of Public Prosecutions, civil matters of a monetary value less than $40,000, family law, local government, taxation, fisheries, agriculture, water resources, mining, coronial matters, liquor and gaming licensing, employment issues and juvenile justice, care and protection of children to name but a few. There is some degree of specialisation such as the Coroners Court, Children's Court, Industrial Magistrate's Court, Local Court Family Matters and the Downing Centre Court that separates the administration of the criminal and civil registry functions. The

Downing Centre Civil Claims Court is one such specialised court acting as a single jurisdiction to determine matters brought under the Local Court (Civil Claims) Act 1970. The remainder of the Local Courts perform the entire range of functions.

Local Courts were set up in the early days of the colony. They were presided over by the Governor or his appointees. They were originally called Police Courts and dealt predominantly with criminal offences. They later became known as Courts of Petty Sessions and were finally renamed Local Courts with the passing of the Local Courts Act 1982. During the early years of the nineteenth century, most New South Wales magistrates were unpaid. They were appointed by the governor from the ranks of influential and prominent citizens, notably clergymen, businessmen and graziers. It was considered undesirable that merchants and businessmen be dealing with debt matters so the civil jurisdiction remained vested in the salaried judges of the District Court. Magistrates were first awarded small debts jurisdiction in Sydney in 1870 by the Small Debts Further Extension Act 1879 (42 Vic. No. 15) which was amended to ensure that only salaried magistrates dealt with debt cases in Sydney. (Golder, 1991:960)

In 1859 the Statistical Register of New South Wales began to publish summary jurisdiction statistics. This gives us a glimpse of the historic workings of the Local Court and the nature of the work. The official report concentrates on criminal and summons matters and provides little insight into the administration of civil justice.(Golder, 1991:99) Fortunately, at Newtown Court in the 1880's, the Clerk

of Petty Sessions kept his own records of sitting times. His notes provide some indication of the amount of civil work performed by the court.

> The stipendiary magistrate on 11/11/1886 took 3 ½ hours to hear charges and then spent 2 ½ hours on small debt cases. On 16/2/1886 he disposed of the charge matters in one ½ hour session and devoted the next 3 hours to debt cases. (Golder, 1991:990)

Newtown was an average sized suburban court in a predominantly working class suburb close to the city. There was no indication in the notes that the civil workload recorded was unusual. If other courts of the day were experiencing similar civil caseloads (and there is no evidence to the contrary) it would appear that the Police Courts were spending considerable time hearing civil cases.

Official colonial statistics were recorded from 1893 and show that the magistrates of New South Wales dealt with 40,530 civil cases during that year. In 1919, the number of debt cases was recorded at 38,043. These early figures indicate that the civil jurisdiction occupied a significant amount of court time and judicial resources even in the early days when the Local Courts were called Police Courts. With the steady increase of the courts monetary jurisdiction, civil cases became more numerous and complex leading to the creation of the specialist Downing Centre Civil Claims Court in Sydney. In 1998, the Chief Magistrate, Mr. David Landa, established a specialist civil claims bench by appointing three senior magistrates to sit and determine civil cases during dedicated civil sitting weeks. In 1997, the Downing Centre handled 70,964 civil cases. During 1997, the 160 Local

Courts saw a total of 172,308 claims lodged. The Downing Centre handled 41.18% of the total claims for the State.

The New South Wales Local Court civil jurisdiction is divided into two distinct streams. Claims for amounts under $3000 are processed in the Small Claims Division. This division was created to make the court more accessible and less expensive for individual litigants. Procedures are less complex, costs are restricted to a fixed minimal level and the simple, informal nature of the hearings are designed to make proceedings as easy and final as possible. The rules of evidence do not apply and appeals are only permitted on the narrow grounds of denial of natural justice or lack of jurisdiction. Individual, unrepresented parties are encouraged to run their own cases. Legal practitioners are allowed to appear but the costs they may claim from the unsuccessful parties are restricted to the amount that can be claimed for obtaining a default judgment ($160-$410.)

In the Small Claims Division, witnesses are rarely required to attend or give evidence. The cases proceed by way of written, signed statements tendered to the court by the parties. The presiding judicial officer in the Small Claims Division is an Assessor. Outside the Downing Centre cases are heard by a Local Court Magistrate sitting as an Assessor. Contested Small Claims cases are twice listed before the court. The first appearance is called a Pre-Trial Review. The Assessor or Registrar offers a mixture of mediation, settlement negotiation options and procedural directions to assist parties to resolve or narrow the issues in dispute. If the parties are unable to resolve their dispute, the Assessor provides advice on case preparation and lists the case for hearing. At the second appearance

(Assessment hearing) the Assessor hears the case and immediately delivers an oral judgment giving the reasons for the decision.

The second stream of the Local Court Civil jurisdiction is the General Division. All cases of a monetary value between $3000 and $40,000 are dealt with in this Division. It also includes cases that have been transferred from the Small Claims Division by the Assessor for reasons of complexity, length or necessity to record the evidence. The procedures set out in the Local Court (Civil Claims) Act and the Local Court (Civil Claims)Rules and the common law apply to these cases. Legal costs can be awarded for each documentary step and each court appearance in the General Division. Until 1994, legal costs were allowed under a fixed scale for each step that increased according to the value of the claim. The scale was abolished. There is now greater flexibility and discretion (and correspondingly less certainty) in the quantum of costs awarded in the General Division under Part 31A of the Rules. Although magistrates have the power to award costs after a civil hearing (and in most uncomplicated matters do so) the existence of the costs assessors at the Supreme Court has led to an increasing tendency to leave disputed costs matters to be agreed by the lawyers themselves or resolved by the Supreme Court assessment procedures. This course of action has the approval of the Supreme Court.

> Certainly Magistrates do possess a wide discretion, especially in the average uncomplicated case. However, where, as here, there was a dispute, it seems to me that the safest course was to avail parties of the opportunity of having the costs referred to a costs assessor, rather than make an award without any

guide as to its reasonableness. (Aardvark Security Services Pty Ltd. v. Frank Mirigliani Unreported Supreme Court decision of Murray A.J. 11/9/97)

Matters in the General Division are heard by arbitrators, magistrates or both. The majority of contested civil disputes are referred, at first instance, to arbitration. Arbitrators are senior legal practitioners, appointed by the Attorney General who attend the court periodically on a roster system to preside as arbitrators in rooms provided within the court complex. The Downing Centre runs a Philadelphia style system with four arbitrators sitting each day and cases allocated to a particular arbitrator on the morning of the hearings from the pool of listed cases. Arbitration hearings are conducted in small offices with the parties seated close to one another around a table. Although the same legal rules and procedures adopted in court apply to the hearing, such as oral evidence and cross-examination, the physical environment makes the procedure seem less formal than a court performance and allows the parties greater opportunity to engage in open discussion, negotiation and settlement.

Matters that are deemed unsuitable for arbitration by the Registrar at the directions hearing are listed before a magistrate in court. Matters unsuitable for arbitration are generally long (unable to be heard in one day), contain complex issues of fact or law, contain allegations of fraud by one of the parties or involve legal practitioners as parties. All cases that have been heard by an arbitrator may be re-heard by a court on the application of any party within 28 days of notification of the arbitrator's award.

Cases listed before the court in the General Division are heard by magistrates. The current gender mix of the Local Court bench is 129 men and 24 women. There are currently three specialist civil claims magistrates sitting at the Downing Centre, being Messrs. Roger Dive, Michael Price and Paul Clarion. Magistrates Dive and Price are the authors of the two authoritative loose leaf texts published about the New South Wales Civil Local Court practice and procedure; Butterworth's Local Courts Civil Procedure NSW and The Law Book Company's Civil Claims Practice.

Before 1969 all twentieth century New South Wales Magistrates were appointed from the senior ranks of the Petty Sessions Branch staff. In the last twenty years, Magistrates have predominantly been recruited from outside the Department of Courts Administration. Appointments have been made from solicitors in private practice and from other public service organisations such as the Department of Public Prosecutions, the Police Service, Industrial Relations Commission, Independent Commission Against Corruption and the Legal Aid Commission. The greater diversity of background and larger field for selection has led to a broadening of the skills base and the selection of candidates with superior academic qualifications.

There has also been a corresponding change in the relationship between the Local Court staff and the magistracy; an evolutionary change that is already apparent despite the numerical domination of the bench by former court staff. The majority of magistrates sitting today began their careers as teenagers working in the Local Courts. They studied part time over many years. After obtaining their legal

qualifications and passing exams set by the Department they worked their way to senior positions within the Court and then progressed to the Bench. They came predominantly from working or lower middle class families and tended to be bright youngsters whose families lacked the resources to send them to university. There was also a large percentage from rural areas who took a job in the courts in the hope of gaining employment in a country area where employment opportunities for school leavers were limited.

Senior Magistrates retain a strong bond with current staff having spent a large chunk of their 20-40 years of service working together. Long serving Magistrates know the majority of the court staff personally and have an intimate working knowledge of the registry practices, procedures, culture and local environment since they have performed all the intricate and varied duties at some earlier stage in their careers.

The first appointment of Magistrates from outside the Petty Sessions Branch occurred in 1969. These men were legally qualified senior public servants. One was the Clerk of the Peace and the other was a District Court Registrar. As the recruitment base continues to change and Magistrates are selected from more diverse backgrounds, the standard of academic qualifications has tended to be higher and recruits are more likely to come from the ranks of the urban elite. Consequently, their relationship with registry staff is changing. Whereas appointment to the Magistracy was once viewed as an ascension to the highest rung of a Local Court career it is now viewed by applicants as the lowest rung in a judicial career.

The passing of the Local Courts Act 1982, finally enshrined in legislation the judicial independence from the bureaucracy that magistrates had struggled long and hard to achieve over the course of the twentieth century. Prior to 1982 Magistrates were subject to the same control as any other public servant and were answerable to the Public Service Board. (Golder,1991)

At the Downing Centre Court, the judicial officers (magistrates and assessor) and the quasi-judicial officers (registrars) work together like parts of a well-oiled machine. Information about changes to practices or the law flows in both directions and is freely discussed and circulated. The oil that lubricates the parts is the camaraderie, cultural homogeneity and knowledge of processes and procedures acquired through a shared career long relationship in the unique work environment of the Local Courts. Discussions and decisions about listing procedure, rule formulation and case management take place regularly, efficiently and effectively in a verbal shorthand dialect that would be largely unintelligible to someone from outside Local Courts. They meet frequently for informal discussions and formal meetings such as the Local Court (Civil Claims) Rule Committee and the Court Users Forum.

The physical environment of the court in which a magistrate operates and the very large and varied caseload immediately distinguishes them from the judges of the higher courts. Reserved judgments are the exception rather than the rule with most decisions being made and delivered immediately upon determination of the case. There are no breaks between cases and the magistrate rapidly moves from case to case and jurisdiction to jurisdiction, often jumping between several lengthy cases

to interpose other matters such as urgent bail applications, short matters, pleas and adjournment applications.

Magistrates in suburban and country courts often call through lists, deal with fresh custody cases, sentence persons entering pleas to criminal cases, hear applications for domestic violence orders, family law applications and defended civil, criminal and summons cases on the same day. There is precious little time and even less patience for long, convoluted, obscure legal argument or the niceties of protocol.

There is a tendency to view this scene through contemporary eyes and see it as a result of increased statutory responsibility, increased caseloads and dwindling availability of public resources. Magistrates are coming under increasing pressure to sit longer hours and to handle greater numbers of cases, a larger variety of cases and increasingly complex cases as the law evolves and Parliament churns out an ever growing pile of statutes to be interpreted and applied daily by the courts.

However, a perusal of the historical material indicates that this is not a new phenomenon but rather a basic characteristic of the jurisdiction. It is interesting to note that in 1923 the Under Secretary of Justice commented that magistrates who "want to hear argument and string out their cases"(Public Service Board 15/6/1923 quoted in Daily Guardian 27/11/1925 p.1) were responsible for their own long sitting hours and would be afforded no relief. In 1923, "it seemed that the best magistrate was a quick magistrate ...Magistrates were not immune from contemporary pressure for greater 'productivity' in public employment.

(Golder, 1991:146)

The local courtrooms and facilities available for magistrates vary considerably throughout the state. They are not always sitting in large, comfortable air-conditioned complexes like Parramatta or the Downing Centre. The working life of a typical New South Wales magistrate has been filled with country tours of duty in inhospitable, remote outposts. They have sat in temperatures exceeding 40 degrees Celsius in Narrabri and Lightning Ridge and below zero at Tumut and Guyra; courts that have wood fires in winter and no relief from the stifling heat of summer. Many Local Courts are very old and are classified by the National Trust for their heritage value. This means they cannot be readily modified to fit twentieth century ideas of a comfortable workplace. Some were slapped up as temporary buildings during times of rapid regional population growth during the depression of the 1930's and the post war boom of the 1950's but are still in use today. Magistrates also conduct hearings in hospitals, gaols and psychiatric institutions as the need arises.

Country circuits may require the presiding magistrate to travel many kilometres each day to sit in a different location. On the Gunnedah circuit, the magistrate covers 80-100 kilometres each day to arrive at a different court. These circuits demand many lonely hours of driving, sometimes over unsealed roads dodging semitrailers, wild pigs, kangaroos, wandering stock, bush fires and floods.

The Local Courts serve very diverse local communities. There is a marked difference between the personalities, actions, demeanour and ethnic mix of the clients in the trendy eastern suburbs of Sydney and the occupants of a tiny, remote mining hamlet like Lightning Ridge. Similarly between the sprawling,

economically disadvantaged outer suburbs of western Sydney and the leafy affluence of the harbour side and the North Shore.

The civil parties appearing before magistrates consist of the residents of all these areas represented by Senior Counsel, senior or junior solicitors and barristers, law clerks, authorised officers employed by client companies and business owners. The provision of legal aid to civil applicants has been substantially reduced in recent years leading to a greater number of impecunious individuals representing themselves through the financial inability to employ a lawyer. The cultural and ethnic diversity of New South Wales and the propensity for economic misfortune to cross cultural, age, gender, ethnic and intellectual ability boundaries means that magistrates need to constantly adapt their language and practices to make court proceedings intelligible and meaningful to a complete cross section of the local community.

The hectic pace of proceedings, the crowded, bustling courtrooms and foyers, the frantic rush of practitioners obtaining last minute instructions on the run, the weird juxtaposition of diverse cases from the murder to the parking ticket, the machine gun rapidity of the orders and judgments, the lack of wigs and gowns and pomp and ceremony, at times combine to produce an atmosphere more akin to a Cairo bazaar or a day at the picnic races than a solemn, dignified courtroom.

2.5 The Downing Centre

The data for this project was collected at the Downing Centre Local Court in Sydney. The court is located in the central business district of Sydney and is the largest civil registry in Australia. In 1997, the year which was selected for the study, the Downing Centre Civil Claims Court handled a total of 70,964 claims. This represents 41.18% of the state total of 172,308.(Local Court Statistics Unit, 1997)

Unlike the other metropolitan, suburban and country local courts, this court at the Downing Centre is a single jurisdiction court dealing exclusively with civil cases. It has unique processes and procedures designed to cope with a large volume of claims. It functions as a small claims processing plant with clerks divided into sections who perform a narrow range of tasks in a similar manner to industrial production line workers.

The parties filing the documents at the registry counter range from individual members of the public who find the city court is accessible from their workplace, inner city residents, small, medium and large legal firms, business proprietors and representatives of various sized companies. The court has a fulltime Chamber Magistrate service to assist unrepresented parties with procedural information and document preparation. The free Chamber Magistrate service is available to provide assistance on procedure, practice, court protocol or document preparation to all court clients.

The numerical majority of matters filed are lodged by bulk users. These are legal firms, large corporations or debt collecting firms who issue vast numbers of

claims each year. The number of bulk users is 215 (as at 25/8/98). The smallest of the bulk users issue several hundred claims per year whilst the largest issue several thousand. One firm specialising in debt collection claims to have issued in excess of one million summones in Australia in the past 30 years. (Local Court (Civil Claims) Rule Committee Minutes 14/12/99)

When individual members of the public or "one shotters" file a claim, a file number is allocated at the time of lodgement by the counter staff at the registry. Registry staff often help the client to prepare or type the claim and then enter all the details into the computer system. Bulk users are allocated blocks of numbers in advance of lodgement. They are allocated sufficient numbers annually to cover the annual number of claims they commence. His means that the files of a particular user are relatively easy to locate as they will be filed together in consecutive order. The matters commenced by private individuals or small practitioners and numbered at the registry counter commence 1/97, 2/97 and so forth up to approximately 5000/97. The bulk users are allocated a series of numbers sufficient separated from other users to avoid overlap. For example, a large bank has been given the numbers 10,001/97 to 20,000/97. Another user has been given a series commencing at 35,001/97.

The bulk users prepare all their documents on their own computer systems using the allocated numbers. Whilst prescribed forms are required by the rules, there is sufficient variation in layout, print style, colour, reference numbers and firm and solicitors name to readily identify the documents filed by each bulk user and to determine which internal client of the law firm has initiated the process. For

example, the law firms that act for insurance companies print an internal reference number on the document to indicate which partner or solicitor is handling the matter and which insurer is involved. This form of identifiaction was used to determine who was the true party.

The insurance files are also readily distinguishable from other files because all motor vehicle property damage matters from the same firm or breach of loan agreement from the same bank contain identical pleadings. The details of the names and addresses, the amount of money claimed and the time and place of the collision are the only alterations to their standard pleadings.

The largest of the bulk users file their process by electronic lodgment. They deliver a bundle of several hundred prepared and numbered claims to the court registry with a computer disc containing all the details that are otherwise manually entered into the court computer by court registry staff. The information from the disc is downloaded directly into the court's computer sysytem saving many hours of data entry for court staff and saving time for the bulk client firm since their staff are not required to wait at the counter for the number allocation and data entry work to be performed. In 1997, 26,697 of the claims filed at the Downing Centre were by electronic lodgment. This was 37.62% of the total claims.(Local Court Statistics Unit, 1997) The fact that the Downing Centre was the only local court with this facility at the time of the study meant that it attracted the majority of civil cases commenced by the major banks, credit unions, finance companies, insurers and debt collectors who had the technology to make use of the system. The

Downing Centre was attractive to users who issued large numbers of claims on a regular basis .

The computer data entry is most commonly done by the lowest graded staff and is not checked or balanced to ensure accuracy. Certain results or actions are entered using a code and these can be counted in the statistics. However, a great number of results and entries are made by way of typed words or freehand notes. These are not recorded in the computer generated statistics. The range of data collected is limited. For example, the data shows the total number of claims filed in each division for the month but does not show the lodging party, the cause of action or the progress of an individual matter through the system.

There is no empirical material available in the academic literature on the operation of the New South Wales Local Courts in the civil jurisdiction. The NSW Bureau of Crime Statistics and Research is responsible for compiling data on and monitoring the flow of criminal matters through all New South Wales courts, providing detailed data and analysis for research and policy purposes. The only comparative data currently available in the Local Court civil area is collected and collated by the Local Courts Statistics Unit. The data originates from the Local Courts civil computer system and provides a numerical tally of the number of actions performed by registry staff in given categories. Similarly, the data records the number of defences filed in a given month but not the claims to which they relate. The data will show, for example how many defences were filed in March but not how many of the claims filed in March were eventually defended. Further,

the data on the number of defences overestimates the rate. If a claim has eight defendants it will appear as one claim lodged and eight defences filed.

The data collected for this sample has been obtained from the original paper files rather than the computer records in a unique attempt to accurately identify parties and causes of action. It tracks the individual files through the system from commencement to finality to determine the characteristics of the clients and discover why they are using the Local Court.

2.6 Data Collection

In order to identify the characteristics of Local Court's civil clients and to explain the diverse findings about client identity from earlier research, two separate data sets were collected.

The first set was a group of 500 cases, systematically selected from all the cases commenced at the Downing Centre civil registry during March 1997. This data is referred to as the Registry Set. The second set of data consists of all the general division cases that were listed before the registrar's court for callover between January and March 1997 up to a total of 500 matters. This set is called the Court Set. Thus the Registry Set contains a systematic sample of all matters filed in 1997 including those that proceeded no further than the original claim or were concluded by obtaining a default judgment. The Court Set includes only those matters where the defendant has filed a notice of grounds of defence disputing

liability or quantum and the plaintiff has subsequently filed a certificate of readiness indicating that the matter was ready for judicial determination.

The two different data sets were collected in order to determine whether there was a difference between the clients who used the registry services of the court (for default judgment and enforcement) and those who used the adjudicative functions of arbitration and/or court hearing. All the Court Set matters were in the General Division and were either claims for monetary amounts over $3000 or smaller claims that had been transferred from the Small Claims Division by the Assessor because of their anticipated length, complexity or other special features.

It was anticipated that the Registry Set would contain a low number of defended matters making it impossible to draw any reliable conclusions about the clients in defended matters from that sample alone.

The Court Set contained only cases where there was a real dispute between the parties about liability or quantum in relation to the claim. The Registry Set contained some cases where a dispute existed but many more cases where the defendant did not dispute the amount claimed. In these cases, the defendant may have filed an application to pay by instalments and there may be a dispute about how, when and where payment will be made but there is no issue about liability for the debt.

Matters in the District and Supreme Courts are usually unliquidated with the plaintiff claiming the maximum amount of the jurisdictional limit and in excess of what is realistically likely to be awarded. Therefore, many more claims are defended than in the liquidated cases of the Local Courts. Local Courts see

defences filed in less than 10% of cases whereas the District and Supreme Courts have approximately 90% of their cases defended. (Attorney General's Department Strategic Quality Team, 1999)

In many of the studies mentioned earlier in the paper, researchers looked at cases that were before the court for hearing rather than those which had been filed in the registry. To identify client characteristics and to reconcile the diverse findings of earlier studies in was deemed necessary to collect data that corresponded with the earlier research and included a significant number of matters where there was a genuine dispute between the parties requiring a judicial resolution.

2.7 The Registry Set

The Registry Set was collected from a systematic sample of all the claims filed in March 1997 in both the Small Claims and General Division of the court. A total of 5474 cases were filed during the sample period. The 500 cases studied were chosen by selecting every tenth file number allocated during the period until a total number of 500 was reached.The month of March was chosen because it had an average number of claims filed and was unaffected by seasonal variations such the end of the financial year, Christmas and Easter vacation periods and school holidays when many legal practitioners and city residents spend time away from Sydney and their offices. The year 1997 was selected because the data collection

began in April 1998 and it was thought that a thirteen month period would be sufficient time to ensure that cases had been finalised.

All file numbers allocated to individual and bulk users in March were recorded. Every tenth number from each series was selected from each allocation to ensure that all clients who lodged process in March were included in the sample. Individual files were then extracted (every tenth case in each group) and the selected data gleaned from the original documents. This method was preferable to using the computer record used for data collection by the Attorney General's Department as it was only possible to accurately identify the clients (such as insurance companise and debt collectors) by close examination of the documents, pleadings and references on the original paperwork.

By individually recording the information from each original file, the study was able to track the cases that commenced in March throughout their journey and to determine the results for each client group. Identification of parties from the original files made it possible to uncover the groups behind the individuals named; to discover which claims were made by solicitors on behalf of insurers and which were initiated by debt collectors who had purchased factored debts. It was then possible to calculate the success rate for each client group.

Sixteen items of data were collected from each of the Registry Set files. The categories and a brief description of each follows:

1. Registry file number

2. Monetary amount of the claim

3. Type of plaintiff

4. Size of plaintiff

5. Plaintiff address

6. Type of defendant

7. Size of defendant

8. Defendant address

9. Type of claim/cause of action

10. Number and types of defences filed

11. Applications to change venue

12. Applications to set aside default judgment

13. Type of judgment entered

14. Final results

15. Legal representation of plaintiff

16. Legal representation of defendant

2.7.1 Registry file numbers

The file numbers allocated by the registry or the bulk users were recorded so that the collected data could be checked and any errors or omissions discovered at the collation stage could be rectified. As over 8000 items of data were collected it was considered necessary to be able to relocate and peruse the files to confirm client identity. Every tenth file number was selected so that all files had numbers ending

in zero. ie 10/97, 20/97, 30/97, etc. Where the file ending in zero was unavailable, either through an error in processing (the number was not used) or the file was permanently missing (misfiled in another year or series of numbers) the next file was selected. For example where 17,260/97 was unavailable, 17,261/97 was selected in its place. Some cases were still active when the first collection was made and it was necessary to locate these files at a later stage to obtain the data on the results.

2.7.2 Amount of the claim

Claims were divided into six monetary amount categories to obtain this data. The categories were as follows:

1. Claims under $1000
2. $1001-$3000
3. $3001-$5000
4. $5001-$10000
5. $10001-$20000
6. $20001-$40000

It was possible to obtain data for the State of New South Wales that divided Local Court civil claims into four categories; under $3000, $3001-$5000, $5001-$10000 and $10001-$40000. The decision to further subdivide these and add an extra category in the smallest and largest group was made to obtain a more detailed picture of the amount claimed. It was necessary to know how many of the "small claims" under $3000 were actually claims under $1000. Further, it established

how many of the claims in the higher categories were close to the jurisdictional limit. The Department's figures lumped three quarters of the jurisdictional limit into one category of $10,000-$40,000.

2.7.3 Types of plaintiffs and defendants

The civil parties were divided into ten groups as follows;

1. Government

This category consisted of Local, State and Federal Government entities. It included matters involving the Tax Office, Department of Water Resources, City, Shire and Municipal Councils, Victim's Compensation Tribunal, Building Services Corporation and Department of Fair Trading. There were no government entities appearing as defendants so the category is only relevant to the plaintiff material.

2. Debt collector

This category comprised claims made by collection agents. There are two broad types of organisations in this group. The first are those who begin and conduct action as agents for a creditor and who receive a percentage of the amount recovered as payment for their services. The second group are companies that buy debts from creditors for a set fee, have the property in the debt transferred to them and then take action to recover the money on their own behalf. Both groups have been included in the debt collector category.

3. Public companies

This category comprised public companies listed on an Australian Stock Exchange, registered with the Australian Securities Commission . It also includes fully owned subsidiaries of public companies. For example, Australian Iron and Steel Proprietary Limited, a subsidiary of BHP Limited would be placed in this category.

4. Proprietary companies

This category consists of corporate entities whose shares are not publicly available and are held up by the proprietors of the company. They are readily identified by the "Pty Ltd" that appears after the given names. Businesses that have been incorporated are included in this group. For example, the entity Redbank Pty Ltd. trading as Arcadia Bay Real Estate would have placed in this category rather than the small business category.

5. Small businesses

Unincorporated business entities appeared in this group. Where a claim named one or more individuals as proprietors of a business, the case was placed in this category. For example, Gunther Borislitski trading as Borry's Bonzer Boomerangs would have been placed in this category. This category included tradespeople, retailers and restaurateurs.

6. Professionals

This group comprised individuals or partnerships of individuals that provided a service that could be broadly defined as a professional service. It consisted of business people who provide intellectual or documentary services. Parties

included in this category were solicitors, accountants, engineers, architects, doctors and veterinary surgeons.

7. Banks and credit unions

This group consisted of financial institutions trading as banks and credit unions.

8. Finance companies

This group was comprised of finance providers that were not banks or credit unions. The parties in this category were distinguished from category 7 credit providers because the claims were for default under loan agreements secured by Bill of Sale or charge over equipment. The claims were for the balance of the loan after the asset had been sold at auction. The group also contained some claims for unsecured personal loans provided by finance companies to individuals.

9. Insurance companies

This group consisted of claims initiated or defended by solicitors in the names of individuals who are covered by policies of insurance. Where the right of an individual to sue has been subrogated by a contract of insurance, the client has been classified as an insurance company. The category also contains claims that have been commenced or defended by insurance companies in their corporate name.

10. Individuals

This group contained private citizens who sued or responded in a private capacity.

Some claims had multiple plaintiffs and defendants. Where a partnership trading as a business name was a party, the case was placed in the business category. Where a husband and wife were joint parties, they were placed in the individual category as a single individual. Where a claim was taken out against a proprietary company and the directors personally joined as co-defendants, the identity of the first party only was selected and the client classified as a proprietary company.

2.7.4 Size of plaintiff and defendant

This classification grouped together parties from the type of plaintiff and defendant group according to their size. Three categories were created; large, medium and small. The large category consisted of the total number of clients from the government, debt collectors, public companies, finance companies, insurance companies, banks and credit unions. The medium category contained proprietary companies and professionals. Professionals were classified as medium rather than small because some of the partnerships contained many individuals (up to 40 partners). Further, many professionals such as real estate agents and doctors had incorporated and it was preferable to keep occupational groups in the same category. It was considered preferable to move the unincorporated professionals into the medium category rather than move corporate entities into the small category. The small category was made up private individuals and small business people operating as sole traders or in a partnership. The first category contained all large public corporations and branches of government, the medium category was smaller proprietary companies or professionals operating a business or partnership

whilst the third category is composed of individuals suing or being sued in their personal capacity.

2.7.5 Address of the plaintiff and defendant

The addresses of the parties were divided into four categories; Sydney central business district, Sydney metropolitan area, New South Wales country and interstate/overseas.

The Sydney central business district comprises those parties whose address for service is closer to the Downing Centre than any other local court. The Local Courts surrounding the Downing Centre are Newtown, Redfern, Kogarah, North Sydney and Waverley. Suburbs that were closer to these courts than the Downing Centre were classified as metropolitan.

The metropolitan category included most of the residential areas of the Sydney basin. It extended from the inner city courts at the rim of the Downing Centre area to Sutherland in the south, Campbelltown in the south west, the Blue Mountains including Richmond and Windsor in the west and Hornsby to the north. Addresses from suburbs within the municipal or shire areas or court districts for the border courts of Sutherland , Campbelltown, Blue Mountains or Hornsby were placed in the metropolitan category. These categories correspond loosely with the proposed regional boundaries developed by the Local Courts Administration.

Country New South Wales was the category allocated to addresses outside the metropolitan area but within the state of New South Wales.

The fourth category contained all the addresses of parties who resided or had their principal place of business in another Australian state (mainly Queensland and Victoria) or in another country.

Claims that were prepared and filed by solicitors gave the address of the solicitor's office as the address for service. These claims were classified according to the location of the solicitor. Defendants' addresses were taken from the claims and were the residential, business or address at which service was effected. Where a solicitor commenced to act for a party after the claim was filed or served, the location was recorded according to the first address supplied rather than the solicitor's address.

2.7.6 Type of claim

Claims were grouped into ten categories to determine the most common causes of action as follows:

1. Court and Tribunal Orders
2. Motor vehicle negligence
3. Loans
4. Credit card debts
5. Retail store card debts
6. Goods sold and delivered
7. Services provided

8. Rent

9. Personal injury

10. Other

Category 1 consisted of orders of other courts and tribunals that were registered at the Downing Centre for enforcement action. This category includes judgments from interstate courts, costs assessment orders from the New South Wales Supreme Court, Consumer Claims Tribunal Orders, Residential Tenancies Tribunal orders, Motor Vehicle Repair Disputes Committee orders, Strata Title Commission orders and recovery orders from the Victim's Compensation Tribunal.

Category 2, motor vehicle negligence, consisted of claims for property damage caused by a collision with a motor vehicle. It included claims for damage to other motor vehicles, claims for demurrage such as car hire and claims for damage to other inanimate objects such as houses, fences and roadside furniture that had been damaged by the impact of a motor vehicle.

Category 3, loans, consisted of claims for default in payment of personal loan agreements, mortgage contracts for real property, secured loans for the purchase of cars or plant and equipment.

Category 4, credit card debts, were those accrued at a bank, building society or other financial institution.

Category 5, retail store card debts were debts accrued on a credit card issued by a retail organisation.

Category 6, goods sold and delivered, included claims for non payment of an account for the purchase of any chattel or item from a retailer, a wholesaler or by private sale between individuals. The claims also included contracts where labour for installation of the goods was part of the contract. Thus, building claims for the work done and materials provided were placed in the goods category.

Category 7, services provided consisted of claims for equipment hire, telephone accounts, advertising, printing, transport, employment agency hire services and professional services by solicitors, dentists, doctors, architects, engineers and veterinary surgeons.

Category 8, rent, comprised cases claiming outstanding rent from real property. The category also included claims where property damage was claimed along with outstanding rent. Most commonly, claims were for commercial property leases (since residential leases are dealt with in the Residential Tenancies Tribunal) or claims between tenants of shared residential accommodation. Some of these claims contained debts for unpaid bills such as telephone, water or electricity accounts along with the unpaid rent.

Category 9, personal injury, were those cases that involved claims for damages to a human body. Actions related to motor vehicle collisions, occupier's liability, product liability, professional negligence and assault.

Category 10, other, comprised the actions that did not fit into any of the other nine categories and of which there were insufficient claims to create a separate category. Causes of action that were designated "other" were claims for unpaid or overpaid wages and commissions, defective workmanship, negligent damage to

property (unrelated to a motor vehicle), actions in nuisance, unpaid strata levies, unpaid taxation, breach of partnership agreements and damage to companion animals or livestock.

Where a claim disclosed several causes of action, such as for unpaid rent and goods or services, the claim for damages in each category was tallied and the case was allocated to the category that covered the largest monetary amount in the claim.

2.7.7 Type of defence

Defences were divided into three categories; full, quantum and cross-claim. Where the defendant denied liability for the total amount of the claim, the case was classified as a full defence. Where the defence made admissions as to partial or full liability but disputed the amount claimed by the plaintiff , the defence was classified as a quantum defence. Where a defence disputed all or part of the claim and was accompanied by a cross-claim against the plaintiff, it fell into the third category. Defences that were accompanied by a Third Party Notice (claiming indemnity from another entity) and defences which included a set-off diminishing part or all of the claim were placed in the cross-claim category.

2.7.8 Applications to Change Venue or Set Aside Default Judgment

Where a defendant elected to change the venue of the case to another court, this was noted and tallied. Where a default judgment had been entered and subsequently set aside at the request of a party it was recorded in this category.

2.7.9 Type of judgment

The cases that continued to judgment were divided into seven results categories as follows:

1. Default judgments.

In these cases, the claim was served upon the defendant but no defence was filed within the prescribed time and a default judgment was entered against the defendant. Cases were also included here when a defence had been filed but subsequently struck out (for example for the failure to attend a directions hearing) and the plaintiff had then filed for default judgment.

2. Confession.

Cases where the defendant confessed to owing the whole amount of the claim by filing a Notice of Confession were placed in this category. Also included were part confessions that were accepted by the plaintiff and judgment was entered for the lower amount.

3. Court hearing.

This category contained matters where judgment was entered after a full hearing before a magistrate in court. It also included those matters that had been heard and determined by an arbitrator and subsequently re-heard by a magistrate in court.

4. Arbitration hearing.

These cases were heard and determined by an arbitrator. No application was made to re-hear the case so the arbitrator's award became the final judgment. This

category also includes matters where the application for re-hearing was struck out or discontinued and the arbitrator's award was subsequently reinstated.

5. Assessment

This category consists of cases which were heard and determined in the Small Claims Division by the Assessor.

6. Settlement

These were cases where the parties had agreed to settle the case prior to hearing and had filed the terms of the settlement in the registry. The category does not include matters which were settled by discontinuing the claim or on terms which precluded the entry of judgment.

7. Registered order

These were cases where judgment was entered as a result of the plaintiff registering an order of another court or tribunal to enable them to commence enforcement action.

2.7.10 Results

The results data was divided into five categories as follows:

1. Judgment for the Plaintiff (Pwins)

This category was comprised of cases where the plaintiff had successfully obtained a judgment against the defendant for the full amount claimed, including legal fees, interest and issue and service costs.

2. Judgment for the Plaintiff in Part (P-)

Cases were placed in this category where judgment was entered in favour of the plaintiff against the defendant for less than the original amount claimed. It also includes cases where the claim amount was awarded but interest, legal or issue fees were successfully resisted by the defendant.

3. Defendant (D wins)

These cases were those where the plaintiff failed to prove their case and judgment was entered in favour of the defendant. It also includes those cases where a defendant succeeded to prove a cross-claim and obtained a judgment against the plaintiff for a greater amount than that awarded to the plaintiff.

4. Withdrawn/Discontinued (W/D)

These cases had no judgment or result entered. The court had been advised that the matter was discontinued or withdrawn but no terms of settlement were disclosed.

5. No action

These cases had no judgment entered. The cases had languished, lapsed or been stood out of the list generally with liberty to restore for over twelve months indicating little likelihood of further action.

2.7.11 Legal representation

For each case it was recorded whether a lawyer acted for each party or whether the party was self represented. Authorised officers and clerks who were not legally qualified representing corporations were not counted as legal representatives.

Where a lawyer commenced to act for a party but ceased to act or withdrew before the case was determined, the party was considered to be unrepresented. Where an unrepresented party began action and subsequently instructed a solicitor who handled the matter to its conclusion, the party was classified as represented.

2.8 The Court Set

The Court Set of data was also collected at the Downing Centre Local Court in Sydney. This data was obtained from all the civil cases that were listed for directions hearing before the registrar between 5/1/97 and 23/3/97. The 500 cases in the sample were cases where the defendant had lodged a defence to the claim and the plaintiff had filed a Certificate of Readiness indicating that settlement possibilities had been exhausted, case preparation and interlocutory matters had been completed and the case was ready to be listed for hearing.

Cases were identified by obtaining details of the matters from the court files that came before the registrar for directions hearing. All new matters are listed by the computer system in one particular court in a separate list. Cases were selected by obtaining all the lists for the relevant period and then retrieving the files. After extracting the 500 files, 14 items of data were collected from each file making a total of 7000 items. The categories of data are set out below.

2.8.1 Categories of data

1. Registry file number

2. Amount of the claim

3. Size of the plaintiff

4. Plaintiff address

5. Size of defendant

6. Defendant address

7. Cause of Action

8. Legal representation of plaintiff

9. Legal representation of defendant

10. Forum for hearing

11. Number of directions hearings per matter

12. Number of interlocutory motions

13. Timing of settlement

14. Result

Items 1, 3, 4, 5, 6, 7, 8 and 9 were collected in the same manner and for the same reasons as the corresponding data in the Registry Set. Collection began in January 1999 and some of the cases had not been completed in the early months of the year. Pending cases were rechecked at fortnightly intervals to obtain the required information. At the end of the collection process, 13 cases remained unresolved and were still in the directions hearing list or listed for future court or arbitration hearings.

2.8.2 Forum for hearing

Civil matters at the Downing Centre are either listed before a magistrate in court or referred to arbitration. A Philadelphia system of arbitration operates whereby 14 cases are listed before three or four rostered arbitrators on the day of the hearing. For court hearings, ten matters are listed before three magistrates each day. One magistrate conducts a call over, allocates the matters which are to proceed and seeks assistance from the general bench if required. Cases determined by an arbitrator may be re-heard by a magistrate upon the application by any party within the prescribed time (28 days after the registry sends copies of the award to the parties). If no application for re-hearing is made, the arbitrator's award becomes a judgment. The forum for hearing category divided the cases into three classes as set out below:

1. Arbitration

   Cases which were heard by an arbitrator to finality and the award became a judgment were placed in this category.

2. Re-hearing

   Cases that were heard by an arbitrator at first instance and then subsequently re-heard by a magistrate in court were placed in this category.

3. Court

   Cases that were listed and heard before a magistrate in court at first instance were placed in this category.

It should be noted that arbitration re-hearings are not a review of the arbitrator's award or an appeal of the decision. When the matter is re-heard by the magistrate, the arbitrator's award is removed from the file and placed into a sealed envelope. The magistrate hears the case on its merits and only inspects the award after the decision is handed down for the purpose of awarding costs.

2.8.3 Number of directions hearings

This category was created to record how many times each case was listed before the registrar for a directions hearing before it was deemed ready to list for arbitration or court hearing. It included directions hearings before the magistrate after a motion to vacate an allocated hearing date.

2.8.4 Number of motions

This category was created to record how many interlocutory motions were filed . It was also noted which party (plaintiff or defendant) filed the motion. Applications included motions to set aside default judgments, seeking particulars of pleadings, to strike out claims or defences, for early return of subpoena and to amend pleadings. The count included motions dealt with by the registrar in chambers without the parties, the registrar in court with the parties present and the magistrate in court.

2.8.5 Settlement

As cases progressed through the pre-hearing stages of the system, settlement occurred in most before hearing. This category looked at the settled cases from the

sample and classified them into five groups according to the time when the settlement occurred. The cases were classified as follows:

1. Settled at directions hearing before the registrar.

2. Settled after allocation of an arbitration date but before the date of the hearing.

3. Settled on the date fixed for arbitration hearing.

4. Settled after allocation of a court hearing date but before the date of hearing.

5. Settled on the date fixed for a court hearing.

2.8.6 Results

The case results were recorded in the same manner as the Registry Set. They were divided into cases where the plaintiff obtained judgment for the whole amount claimed, the plaintiff obtained judgment for only part of the amount claimed and cases where judgment was entered in favour of the defendant. However, the Court Set included another category entitled "Settled?". Unlike the Registry Set, some of the Court Set were settled on the basis that the terms would not be disclosed. Others notified the court that settlement had occurred but did not file any terms with the court. In these cases, it was impossible to determine from the files which party had been successful so the fact that settlement occurred was recorded but not the result.

2.8.7 Amount of the claim

The amounts of the claims were divided into four categories.

1. $3000-$5000

2. $5001-$10,000

3. $10,001-$20,000

4. $20,001-$40,000

Information was not collected for the two smallest categories in the Court Set (as it was in the Registry Set) because cases that were for monetary amounts under $3,000 were heard in the Small Claims Division by the Assessor and were not listed before the registrar for a directions hearing. No Small Claims matters were found in the Court Set.

To compare the Registry Set with the Court Set for this category, the matters under $3000 in the Registry Set were deducted (285 out of the 500) from the total number of cases. The percentage of the remaining 215 claims that fell in each of the four corresponding categories was then recalculated.

All the data was collected on tally sheets then collated and transferred to a computer system.

CHAPTER THREE

RESULTS FROM THE REGISTRY SET

3.1 The Registry Set Plaintiffs

The plaintiffs were divided into ten groups as shown in Figure 1. These groups were then reduced to the three categories of large, medium and small players that are shown in Figure 2. The large players scored strongly in the plaintiff category. They took out 70.45% of all the filed claims during the sample period. At the top of the individual scores for the large team were the insurance companies with 22.2% narrowly edging out the banks and credit unions that managed a total of 21%. Government followed by contributing 10.2% , debt collection agencies managed to score 7.8%, finance companies 6.4% and public companies produced the balance of 2.8%.The financial institutions (banks, credit unions and finance companies) together accounted for 27.4% of the claims making them the largest joint contributors for a single cause of action (breach of loan agreement.)

The team of medium sized plaintiffs fell well behind the large players but still managed to contribute 24.8% of the total claims filed. The highest performers for the medium team were the proprietary companies with 21.20% with the professionals making up the remaining 3.6% for the medium team. Whilst the medium team only managed to lodge about one quarter of the total claims, the individual score for the proprietary companies at 21.20% was second only by 1% to the insurance companies who were the top individual scorers for the large team.

The medium plaintiffs narrowly held off the banks and credit unions combined, so their total contribution to the civil system was relatively significant.

When the claims filed by government were removed from the large team and the claims filed by professionals removed from the medium team, it was discovered that corporations (large and medium sized corporate entities) filed 81.4% of civil claims. If the claims filed by government entities and professionals are added to the corporate total, it is found that these combined entities account for 95.2% of all plaintiffs issuing claims.

Alas for the small team. In the plaintiff stakes, the small team of private individuals and small business people could only manage to commence 4.8% of the claims. Small business contributed little with 0.4% and the balance were started by individual citizens who initiated 4.4% of the claims.

3.2 Plaintiff Location

The division of the plaintiff population into the four location categories revealed that the vast majority of plaintiffs (81.6%) had an address for service within the Sydney Central Business District closest to the Downing Centre Court. A further 16.8% of plaintiffs had a metropolitan address, 1.2% had a New South Wales country address and the remaining 0.4% initiated their claims from an interstate or overseas location. (See Figure 3)

3.3 Legal Representation of Plaintiffs

Plaintiffs had lawyers acting for them in 403 (80.6%) of the Registry Set cases. In the remaining cases they were represented at court by authorised officers or

directors (if they were a corporate entity) or by themselves if they were private citizens. (See Figure 4)

3.4 Size of the Claims

The data on the claim size revealed that plaintiffs started 24.4% of their claims for amounts less than $1000. The largest percentage of claims were in the $1001-$3000 category that accounted for 32.60% of the total number. The $3001-$5000 range recorded 18.2%, the $5001-$10,000 range contained 14.2%, $10,001-$20,000 produced 6.2% and the largest category of $20,001-$40,000 accounted for only 4.4% of the total number of claims. (See Figure 5)

When the Registry Set figures were converted into the four categories created by the Attorney General's Department for the entire State, it is found that 66.5% of the claims filed at the Downing Centre Civil Claims Court were for amounts under $3000 compared with 57% for the State. The Downing Centre Registry Set sample showed 9.5% more small matters than the State average. The Downing Centre Registry Set sample also showed a corresponding difference in the other three larger categories. The most noticeable deficit was in the $3,001-$5,000 group where the Downing Centre had 5.4% less than the State average. In the $5000-$10,000 category, the Downing Centre was 2.2% less than the State average and in the $10,000-$40,000 category it was 1.5% less than the New South Wales average. A comparison between the two can be seen in figure 6.

3.5 Causes of Action

The claims filed by the registry plaintiffs were divided into the ten categories as shown in Figure 7. The largest individual category for claims were for the provision of services that accounted for 29.4% of the total. These claims comprised actions for recovery of debts for insurance premiums, telephone accounts, legal services, accountancy fees, advertising, vehicle or machinery hire, engineering services, architectural services and medical, dental or veterinary services.

The second largest category was made up of debt recovery for default in payment of credit card contracts (18.8%) followed by goods, work and materials (11.8%), motor vehicle property damage resulting from negligence (10.4%), loan default (9.6%), default in payment for retail store credit cards (8%), unpaid court orders (7.6%), miscellaneous matters (2.4%), real property rent (1.6%) and personal injury (0.4%).

When the categories of credit card, retail store card and loan default were combined, they made up 36.45 of the claims. This made pursuit of defendants for breach of a credit contract the most popular cause of action for plaintiffs. These claims were commenced by credit providers making them the largest users of the civil system.

Motor vehicle negligence cases made up a significant proportion of the remaining cases (10.4%). Of these cases, 52 in total, only 11 were started by a party other than an insurance company. Thus insurance companies issued 8.2% of the 10.4%

of claims in this category making them the dominant plaintiff for this cause of action.

The Court penalty category (7.6%) were claims made by the Victims Compensation Tribunal or orders of other courts and tribunals (from New South Wales and interstate) registered with the Local Court for enforcement.

3.6 The Registry Set Defendants

Every claim had one or more persons named as defendants but only 8% of their number lodged a notice of grounds of defence. In 92% of the Registry Set claims, no defence was filed. In New South Wales as a whole, 11.3% of claims had a defence filed. (See Figure 8)

Of the filed defences (40 in total), 27 were defences to the full amount of the claim, 8 were quantum defences that disputed part of the amount claimed and the remaining 5 were defences accompanied by a cross claim against the plaintiff. This is shown in Figure 8.

Of the 40 defences filed, 6 were filed after the defendant had successfully applied to set aside a default judgment. The Registry Set sample showed that all applications to set aside default judgment were successful.

The large defendants lodged 8 defences, the medium defendants lodged 12 and the small defendants lodged 20.

When the 500 named defendants were classified according to the ten categories used to divide the plaintiffs, it was discovered that three categories, debt collection agencies, banks/credit unions and finance companies scored zero. Figure 9 shows

the distribution for each of the remaining categories. Banks/credit unions, finance companies and debt collectors did not appear as defendants in any of the registry sample cases.

There was only one defendant in the professional category (0.2%). There were four public companies as defendants (0.8%) 4 government agencies (0.8%) 8 insurance companies (1.6%) 65 small business proprietors (13%) and 310 private citizens (62%).

Grouping the defendants into teams revealed that large players accounted for only 2.4% of defendants. The medium sized players made up 22.6% whilst the small team provided 75% of the defendants in the sample. (See Figure 10)

3.7 Defendant Location

The division of the defendant population into the four location categories revealed that only 36 (14.%) of defendants had a recorded address in the area closest to the Downing Centre Civil Claims Court. (See Figure 3) Most were located in the metropolitan area of Sydney with a recorded total of 276 (55.2%) from that region. However, there were a significant number (112) from rural New South Wales forming 22.4% of the defendants. The number of defendants from interstate or overseas totalled 57 (11.4%).

These figures reveal that 445 (89%) of defendants were sued in a local court that was not the closest to their place of residence or the supplied address for service on the claim.

3.8 Applications to Change the Venue

There were only nine cases found in the sample where the defendant had filed an affidavit electing to change the venue to a more appropriate court after service of the claim. In 4 out of the nine, the cases had been transferred to the Downing Centre on the defendant's application from the original court of issue. In the remaining 5 cases, the files were transferred away from the Downing Centre to another metropolitan or country court. Where this occurred a photocopy of the file had been retained at the Downing Centre so information was able to be collected from the file until the time of transfer. The results for these cases were obtained by accessing the computer record at the relevant transferee court.

In the 500 Registry Set cases, the nine successful applications to change venue were the total number filed. No applications to change venue in the sample were refused by the presiding magistrate.

3.9 Legal Representation of Registry Set Defendants

The sample found that only 41 (8.2%) of those named as defendants were represented by a barrister or solicitor. (See Figure 4) This figure was close to the percentage of defences filed (8%) but it was not correct to assume that the parties who filed defences were represented.

Of the 40 defended cases, 22 defendants had a lawyer acting for them whilst 18 defendants prepared and filed their own defences, some with the assistance of the Chamber Magistrate employed at the court, the balance had prepared the

documents themselves. In 19 cases, defendants retained a lawyer but did not lodge a defence.

Defendants had legal representation in 19 cases where no defence was filed. In these cases, the matter was settled without a judgment in 10 cases and proceeded to default judgment in the remaining 9 cases.

The number of lawyers acting for the 1000 parties (500 plaintiffs and 500 defendants) was 444 in total. Representation was spread unevenly between the plaintiff and defendant groups with the plaintiffs being represented in 80.6% of claims and the defendants in 8.2%. Representation was also unevenly distributed among the teams.

The large players (whether appearing as plaintiffs or defendants) were represented by 71% of the lawyers, the medium players attracted 22.8.% of the lawyers and the small players instructed only 6.1% of the lawyers.

Small defendants (375 in total) used lawyers in 15 cases. Medium defendants (113 in the sample) instructed a lawyer in 21 cases and large defendants (12 cases in the sample) were represented by a lawyer in 9 cases.

3.10 Entry of Judgment

Judgments were entered in 277 (55.4%) cases as shown in Figure 11. In the remaining 233 (44.6%) of cases no judgment was entered and the case did not progress any further than the issue of the initiating statement of claim.

Where a judgment was entered, the vast majority of cases obtained a default judgment. Default judgment was entered in 190 cases that represents 38% of the

Registry Set cases and 68.6% of the judgments in that sample. No judgment was entered in 44.6% of the cases.

A judgment was entered after a full confession by the defendant in 13 cases that was 6.6% of the sample and 11.9% of the judgments. A judgment was entered after a court hearing before a magistrate in 1 case (0.2% of the sample and 0.4% of the judgments). Judgment was entered after an arbitration hearing in 3 cases (0.6% of the sample and 1.1% of the judgments). The assessor entered judgments after a hearing in 8 cases (1.6% of the sample and 2.9% of judgments). A further 29 cases had a judgment recorded after a settlement between the parties (5.8% of the sample and 10.4% of the judgments). The remaining 33 cases (6.6% of the sample and 11.9% of the judgments) were judgments or orders from other courts and tribunals registered with the local court to obtain access to enforcement procedures.

There were no cases in the sample where a judgment was entered after a part confession.

3.11 Results of the Registry Set Cases

In the Registry Set, the results were divided into five categories as shown in Figure 12. The most successful litigants were the plaintiffs who obtained a judgment in their favour against the defendants in 250 (50%) of all the claims filed. Plaintiffs obtained a judgment in their favour for part of the amount claimed in 11 cases (2.2%). Defendants were successful in having a judgment entered in their favour in 4 cases (0.8%). Of the remaining cases, 5% were withdrawn and

42% recorded no result. Cases showing "No Result" did not progress beyond issue of the claim.

3.12 Teams: The Draw and the Registry Set Results

Data from the plaintiff and defendant size categories was cross checked to reveal which of the teams (small, medium or large) took the other teams to court. The results data was then analysed to determine the success rate of each plaintiff team against each defendant team.

Figure 14 shows that large players initiated a total of 352 claims. There were 9 claims against other large players, 64 against medium players and 279 against small players. Thus, the large players took each other on in 1.8% of cases, took action against a medium opponent in 12.8% of cases and went after small players in 55.8% of cases.

The medium plaintiffs chose to take on large players in 2 cases (0.4%). They had another medium sized opponent in 44 (8.8%) of actions and a small opponent in 78 (15.6%) of the sampled cases.

The small plaintiffs issued a claim against a large opponent in 1 case (0.2%), had a medium opponent in 5 cases (1%) and someone their own size in 18 (3.6%) cases.

Thus the most popular targets for all plaintiffs were the small defendants who had 75% of all the filed claims issued against them. The medium defendants saw numerous claims from the large team of plaintiffs and from their own group. Large and medium plaintiffs took on an opponent of the same size in 71 cases(14.2%) cases. The least popular group for the plaintiffs to target with a

claim were the large team. They only received 12 (2.4%) of the claims filed in the registry in the sample period.

The team results chart (Figure 14) shows which team managed to obtain a favourable result against each of their opponents. Cases where no judgment was entered or no result declared were not included in the scores.

When large plaintiffs played large defendants the result was 4 wins for the plaintiffs and 4 wins for the defendants. This was an even result of 4 all. When a large plaintiff played a medium defendant the score was 31 wins to the large plaintiff and 2 wins to the medium defendant showing a convincing victory in the series to the large team. When the large plaintiffs played the small defendants, the large plaintiffs won 148 times whilst the small defendants managed to obtain 1 win. This was no contest. It was an annihilation suggestive of a pitifully weak team being outclassed by a formidable opponent.

The cases initiated by the medium plaintiffs showed lower scores because there were fewer matches but the results were no less impressive. When the medium plaintiffs played large defendants the score was a nil all draw. When the medium players met each other, the plaintiffs won 23 times and the defendants won on 2 occasions. This was a similar margin to the result of the large versus medium draw. The medium plaintiffs clashed with small defendants on 41 occasions and recorded a win in 40 cases and a loss to the small defendant on 1 occasion. This indicates that the drop in class by the small defendants from playing large opponents to medium opponents did little to improve their chances of success.

On the one occasion where a small plaintiff played a large defendant, the small player lost. Small plaintiffs took on medium defendants five times but there was only one recorded result and it went in favour of the small plaintiff. When the small players tackled each other, the result was 5 in favour of the plaintiff and 3 for the defendant. The score for the small plaintiff against the small defendant was the only category where the small players recorded a win. However, the margin was less impressive than their medium counterparts for same size contests. The small plaintiffs performed marginally better than the large plaintiffs when taking on an adversary of equal size.

CHAPTER FOUR

RESULTS FROM THE COURT SET

4.1 The Court Set Plaintiffs

When the parties using the adjudicative services of the court were divided into large medium and small players, the results were markedly different from the Registry Set cases (see Figure 15). Large plaintiffs formed 43.2% of the litigants, medium plaintiffs formed 33% and the remaining 23.8% were small plaintiffs. The small and medium groups together accounted for 56.8% of the contested claims. Figure 16 shows the comparison between the Registry Set plaintiffs and the Court Set plaintiffs . It illustrates that whilst the general pattern remained the same (the largest numbers of plaintiffs were part of the large team followed by medium and then small) the differences in numbers had narrowed considerably in the Court Set. For example, in the registry set, the large plaintiffs took out more claims than the small plaintiffs by a ratio of over 14:1 whereas in the Court Set the ratio was reduced to just under 2:1.

A comparison with the Registry Set shows a correlation between the size of the claim and the propensity to lodge a defence. Larger claims are more likely to be defended.

4.2 Plaintiff Location

The service addresses for Court Set plaintiffs indicated that 81.4% were located in the Central Business District of Sydney, 17% in the metropolitan area, 1.6% in

country New South Wales and none were from interstate or overseas (see Figure 17). When the results were compared with the Registry Set, it was revealed that they were almost identical. The largest variation was 0.4% (2 cases) for country New South Wales and interstate/overseas. Metropolitan and local plaintiff numbers varied by only 0.2% (1 case for each category) between the two data sets.

4.3 Legal Representation of the Court Set Plaintiffs

The tally of legally represented plaintiffs in the Court Set was 485 out of 500 cases. This meant 97% of plaintiffs had a lawyer acting for them on the claim as shown in figure 18. This is an increase of 16.4.% on the rate of representation of plaintiffs in the Registry Set.

The increased representation reflected the fact that some plaintiffs engaged a lawyer after a defence had been filed. The plaintiffs had prepared, issued and filed their own claims and employed a solicitor only when it appeared that the case would be litigated. Figure 19 shows the comparison between the Registry and Court Sets for legal representation.

4.4 Size of the Court Set Claims

Claims were divided into the four amount categories shown in Figure 20. The category with the largest number of claims was the $5001-$10,000 group which had 32.2% (161) claims, closely followed by the under $5000 category with 27.8% (139), then $10,001-$20,000 with 21% (105) and the $20,001-$40,000 group which accounted for 19% (95) of the Court Set claims.

The comparison between the Registry Set and the Court Set is shown in Figure 21. The largest discrepancy appeared in the smallest category that contained 42.3% of the Registry Set claims and 27.8% of the Court Set claims. The largest category also showed different results with the Registry Set recording 10.2% of claims of this amount while the Court Set percentage rose to 19% of the sample. The $10,001-$20,000 category showed a significant increase in the Court Set making up 21% of the claims as compared to 14.4% in the Registry Set. The $5001-$10,000 category remained fairly stable across both data sets recording 35% in the Registry Set sample and 32.2% in the Court Set sample.

The data indicated a correlation between the size of the claim and the propensity to lodge a defence. In the lower amount categories there were proportionally fewer defences filed than in the higher amount categories.

4.5 Causes of Action

Cases were divided into the ten categories of actions used for the Registry Set. As shown in Figure 22, the largest numbers of Court Set cases were found to involve a claim for motor vehicle damage resulting from negligence. This cause of action accounted for 39.6% (198) of the Court Set claims. The next largest group of cases were in the provision of services category with 25.4% (127), followed by goods sold and delivered with 17.6% (88), then loan default with 6.4% (32), rent 4.4% (22) and other 4.2% (21). The smallest categories were personal injury with 1.6%, credit card debts with 0.6% (3) and retail store card debts with 0.2% (1).

There were no Court Set cases in the categories claiming for court and tribunal payment orders. This was to be expected as the Local Court has no jurisdiction to hear defences in relation to judgments of other courts and tribunals. Where there was a dispute about liability for an action in this category, the correct procedure for the defendant to follow would have involved making an application to defend in the court or tribunal that made the order. A application for a stay of enforcement in the New South Wales Local Court would normally run concurrently with the interstate or tribunal appeal. No such application had been made in any of the sampled cases.

The results obtained for causes of action in each data set were compared and Figure 23 displays the outcome. The chart shows that in five causes of action categories, the rates of defended matters were proportionally greater than the percentage of claims filed. Motor vehicle negligence, goods sold, rent, personal injury and other were more likely to be defended since these causes of action were represented in greater numbers in the Court Set than in the Registry Set. The most marked difference occurred in the area of motor vehicle property damage and personal injury. Whilst motor vehicle property damage claims comprised 10.4% of the total claims filed in the registry, they accounted for 39.6% of the defended cases. Similarly, personal injury cases showed a propensity to litigate disproportionate to their numbers.

On the other hand, retail store cards and credit cards comprised 26.8% of the Court Set claims (more than a quarter of all claims filed in the registry) all but

disappeared from the Court Set with a combined total of 0.8% of the defended cases.

4.6 The Court Set Defendants

The major difference between the defendants in the two data sets was that all the defendants in the Court Set had filed a defence to the claim indicating the existence of a dispute as to liability for the whole debt or as to quantum. Only 8% of defendants in the Registry Set had defended the claim. Consequently, there were only two default judgments obtained by plaintiffs in the Court Set and these were entered after a defence was struck out by the registrar following the non-appearance of the defendant or their legal representative at a directions hearing.

In the Court Set, the defendants were divided into large, medium and small teams using the same criteria to classify them as for the Registry Set. The large players were defendants in 19.2% (96) cases in the Court Set sample. Medium players formed 29.4% (147) of the defendants and small players were defendants in 51.4% (257) of cases. (See Figure 24)

The pattern that emerged reflected the result (in inverse proportion) of the plaintiff data. Small defendants were found in the greatest numbers, followed by medium players whilst large parties formed the smallest defendant group.

A comparison between the Court Set and Registry Set defendant size (Figure 25) revealed that the same step pattern was evident for both data sets but the Court Set had less variation in the numbers at each step. Whilst small defendants

outnumbered the large and medium categories combined in the court data, their score of 51.4% means they formed just over half of the total number of defendants. In the Registry Set, the small players formed three quarters of the defendant population. (See Figure 25)

In the Court Set, the medium and large groups showed a correspondingly increased presence as defendants. The medium group moved from 22.6% of the Registry Set defendants to form 29.4% of the Court Set defendants. The large category showed a proportionally large leap from 2.4% in the Registry Set to 19.2% in the Court Set.

4.7 Defendant Location

The Court Set data on defendant location revealed that 20.4% (102) defendants had an address for service in the Downing Centre Local Court region, 61% (305) in the metropolitan area of Sydney, 10.6% (53) resided in country New South Wales and the remaining 8% (40) were from interstate or overseas. (See Figure 26.)

The comparison between the defendant location in the two data sets revealed an interesting phenomenon (see Figure 26). Local and metropolitan defendants appeared in greater proportional numbers in the Court Set than in the Registry Set. Country and interstate defendants lodged defences less frequently, proportional to their numbers, than their urban counterparts.

In the first three categories, the propensity to lodge a defence decreases with distance from the court. The interstate or overseas defendants lodged

proportionally more defences than the country dwelling defendants. However, the majority of interstate parties came from Melbourne or Brisbane and the residents of those cities could be closer to Sydney than some New South Wales residents. Brisbane and Melbourne are approximately 800 kilometres from Sydney whereas Broken Hill in western New South Wales is approximately 1200 kilometres from Sydney.

4.8 Legal Representation of the Court Set Defendants

The Court Set revealed that defendants were represented in 78%(390) of cases by a lawyer. This is almost a tenfold increase in their rate of representation in the Registry Set (8.2%.) Unrepresented defendants at 22% (110) outnumbered unrepresented plaintiffs (3% or 15 cases) but the inequity of representation present in the Court Set was a great deal less than in the Registry Set.

When the numbers of lawyers in the Court Set were collated, it revealed that 55% of the lawyers acted for plaintiffs and 45% for defendants.

4.9 Number of Court Appearances

All the Court Set cases were listed before the court for at least one directions hearing before obtaining a court or arbitration hearing date. The court data showed that 26.6% (133) of parties attended at only one directions hearing. (See Figure 27) In 30.2% (151) of cases, a second directions hearing was conducted. In 14.6% (73) of the cases, three directions hearings were required, in 11.4%(57) there were for four, in 6% (30) there were five and in the remaining 11.2% (56) the parties or their representatives appeared for six or more directions hearings. The record

number of appearances in the sample was seventeen directions hearings for one case.

The average number of directions hearings was 2.7. The median was two.

4.10 Interlocutory Motions

A further pre-hearing activity conducted by parties is the filing, service and resolution of motions. Over two fifths of defended cases (40.4%) had at least one motion filed and determined before hearing or settlement.

The plaintiff's initiated 38.9% (126) of these motions whilst the defendants took out the remaining 61.1% (198). There were 324 motions filed in 202 different cases. A single motion was filed in 134 cases. The remaining 190 motions were shared between 68 files. The maximum number of motions filed in any one case was five. There were two cases with five motions filed in each.

4.11 Timing of Court Set Settlement

Although all matters in the Court Set were listed for a directions hearing as a preliminary step to setting a hearing date, the data revealed that 63.4% (317) of these cases were settled before hearing on terms agreed by the parties. There were five stages to measure when settlement occurred.

As Figure 28 indicates, the greatest number of settlements occurred at the directions hearing stage (first or subsequent directions hearing) with 39.4% (125) of cases being finalised by agreement at that stage. A further 3.25% (10) cases settled after the directions hearing but before the allocated arbitration date. On the date of the arbitration hearing, parties reached a settlement in 29.7% (94) of the

settled, defended cases. Settlement occurred before the court hearing date in 5% (16) of cases. The remaining cases, 22.7% (72), settled on the day of the court hearing.

The most popular settlement times were the day of the appearance before the registrar or the day the matter was due for judicial determination.

4.12 Results of Court Set Settled Cases

The results of the settled cases (317) show that the plaintiffs recorded a settlement judgment for the full amount of the claim in 30% (95) of cases. (See Figure 29) Plaintiffs agreed to settle for a figure lower than the original amount claimed in 28% (89) cases. Defendants had a consent judgment entered, in their favour, in 21.5% (68) cases. In the remaining 20.5 (65) cases, the parties did not disclose the terms on which they settled to the court so it was not possible to determine which party was successful.

4.13 Results of Court Set Adjudicated Cases

By the process of attrition, by settlement or striking out, only 181 cases of the original 500 Court Set matters required a hearing before a magistrate or arbitrator.

Of these adjudicated cases, 47% (85) had the final judgment entered as a result of an arbitrator's award, 11% (20) had judgment entered by a magistrate after hearing (at first instance) and 42% (76) had judgment entered by a magistrate after re-hearing a case that had been previously heard by an arbitrator. (See Figure 30)

Thus 42% of matters requiring a judicial determination were fully adjudicated twice; once before an arbitrator and then finally by a magistrate.

The results of the adjudicated cases are shown in Figure 29. Cases were determined in favour of the plaintiff for the full amount claimed in 54.2% (98) cases, in favour of the plaintiff for less than the amount claimed in 12.1% (22) of cases and in favour of the defendant in 25.4% of cases. There were thirteen cases that were awaiting re-hearing, stood out of the list or apparently discontinued with no final recorded result at the final date of data collection.

The results from the Registry Set were compared with the results for the corresponding party in the Court Set (see Figure 29). In the registry sample plaintiffs won the full amount claimed in 49.6% of all filed cases whilst the defendants had a judgment entered in their favour in 1.6% of cases. In the adjudicated cases, plaintiffs slightly improved their success rate to reach 54.2% whilst the defendants improved dramatically to be successful in 25.4% of determined cases.

In the settlement area, defendants in the Court Set fared better than those in the Registry Set winning in 21.5% of the Court Set settled cases while the plaintiffs were successful in 30%. If the plaintiff in part results are added to the defendants score (remembering that plaintiff in part is the best possible result available to a defendant with a quantum defence) then the respective scores for each category are as set out in the Table below.

	Registry Set	Settled (Court Set)	Adjudicated
Plaintiff	49.6%	30%	54.2%
Defendant	5.2%	49.5%	37.5%

The comparison shows that the enormous difference between the plaintiff and defendant success rate that was apparent in the Registry Set is not reflected in the Court Set or the adjudicated data. When the settled and adjudicated cases from the Court Set are added together it was discovered that the plaintiffs won in 38.7% (193) of cases whilst the defendants won in 45.18%(225).

4.14 The Draw and the Court Set Team Results

The data for the plaintiff and defendant size was analysed to determine which teams met each other most frequently. Results data was incorporated to find the success rate of each team.

Figure 31 shows that the large players initiated 43.2% (216) of the defended claims. That figure was made up of 14.4%(72) claims against other large players, 3.4% (17) claims against a medium player and 25.4% (127) of claims against a small defendant.

The medium plaintiffs started 33% (165) claims. They initiated 1.2% (6) against large players, 18.8% (94) against other medium players and 13% (65) against small players.

The small plaintiffs took out 23.8% (119) of the court set claims. They sued large players in 3.6% (18) cases, medium players in 7.2% (36) of the cases and other small players in 13% (65) of the defended cases.

As in the registry sample, small players were the favoured defendants for all size categories of plaintiff. Large players were the most frequent plaintiffs. The pattern is the same for both sets of data but the differences are more marked in the registry set. (See Figure 32)

The results for the teams were collated for each of the size categories. In the large -v- large category, the results were 33 wins to the plaintiff and 32 to the defendant. When large players litigated against medium players the results were plaintiffs 7 to defendants 7. When large players took on small players, the large plaintiffs won in 56 cases whilst the small defendants won 18.

When medium played large the score was one all. When medium played medium the plaintiffs won in 31 cases and the defendants won in 43. When medium played small, the medium plaintiffs won 16 cases to the small defendants 27.

Small plaintiffs won against large defendants on 5 occasions and lost on 10 others. Small plaintiffs were successful against medium defendants in 10 cases and were unsuccessful in 16 cases. When small played small, the plaintiffs won 17 and lost 31 cases.

A comparison between the team results on both data sets reveals that the large plaintiffs outperform both their smaller opponents in both data sets but their winning margin is considerably reduced in the Court Set cases.

The medium players, who almost rivalled their large adversaries for good results in the registry set, performed less impressively in the Court Set where they

actually lost more cases (61.1%)than they won against medium and small defendants.

The small plaintiffs performed marginally worse than the medium plaintiffs losing 64% of the cases they initiated in the court set. Small players lost more cases than they won against all size categories. In contrast, the large players won more cases than they lost in all size categories.

The Court Set and the Registry Set show a difference in the performance of the small and medium defendants. The small and medium defendants were more successful than the medium or small plaintiffs when taking on an opponent of the same size. Even when they tackled larger opponents, the medium and small defendants greatly improved their chances of success in the Court Set compared to the small defendants in the Registry Set.

4.15 Team Legal Representation

The Court Set showed 97% of the plaintiffs were legally represented compared to 78% of the defendants. The spread of legal representation throughout the size categories was uneven.

All large plaintiffs were represented in each of the 216 claims they started. Medium plaintiffs appeared unrepresented in 4 out of 165 cases: 1 against a large defendant, 2 against a medium defendant and 1 against a small defendant. Small plaintiffs were unrepresented in 11 out of 119 cases; 3 times against a large defendant, 3 times against a medium defendant and 5 times against a small defendant.

Large defendants were unrepresented on only one occasion against another large opponent. Medium defendants were unrepresented in 25 cases; twice against large plaintiffs, 17 times against medium plaintiffs and in 6 cases against small plaintiffs. Small defendants had the lowest rate of representation. They appeared for themselves in 84 cases; 56 times against a large opponent, 17 times against a medium plaintiff and 11 times when facing a small plaintiff.

CHAPTER FIVE

CONCLUSIONS

5.1 The Civil Parties

The results of the study at the Downing Centre were consistent with the findings of Santos et al (1996), Galanter (1974) and Thomas (1990) who all found the civil courts to be dominated by corporate plaintiffs suing individual debtors for the recovery of small debts. The data on plaintiffs and defendants in both the Registry Set and the Court Set showed two dominant client groups; large plaintiffs and small defendants. In the Registry Set large plaintiffs took out 70.45% of the claims and in the Court Set large plaintiffs took out 43.2% of the claims. Small defendants made up 75% of the Registry Set defendants and 51.4% of the Court Set defendants. In total (both data sets combined,) large plaintiffs made up 568 (56.8%) of the 1000 plaintiffs studied and small defendants made up 632 (63.2%) of all the defendants. Corporations, professionals and government (large and medium plaintiffs combined) issued 95.2% of all claims filed in the Downing Centre civil registry during early 1997.. The team data revealed that the most frequent contests were between large plaintiffs and small defendants which accounted for 40.6% of the Court Set contested hearings and 55.8% of the Registry Set cases.

The amounts in dispute were frequently small. In the Court Set 60% of claims were under $10,000 and in the Registry Set 89.4% of claims were under $10,000. In the Registry Set the $10,001-$20,000 category accounted for 6.2% of the claims

and the largest category of $20,001-$40,000 accounted for 4.4% of the claims. In the Court Set the $10,001-$20,000 category contained 21% of the claims and the $20,001-$40,000 category contained 19% of the claims.

This data supports the proposition propounded by Thomas (1990), Galanter (1974) and Santos et al (1996) that civil proceedings are predominantly commenced by large, corporate creditors suing small, individual debtors for small amounts of money. The data showed no evidence of the large numbers of individual litigants found by Matruglio (1993), Cranston (1986) and Rosser (1980.)

A more detailed analysis of how these parties interact with the system on their journey to judgment reveals that control of the process is left largely in the hands of the plaintiff creditors. In civil cases the plaintiff determines whether an action will be commenced, the forum and venue for the contest as well as the timing of the various procedural steps along the journey to judgement.

5.2 Characteristics of the Plaintiff

5.2.1 High rate of default judgment

The largest plaintiff groups in the Registry Set were the financial institutions. Default in payment for consumer credit loans, credit card debts and retail store card debts accounted for 36.4% of cases in the Registry Set. This result is consistent with the findings of Santos et al who discovered that "debt collection is the most significant type of civil litigation." (Santos et al.,1996:13)

Most of the consumer debt cases were undefended and judgment was obtained by default. The financial institutions used the court predominantly to obtain a quick

default judgment and to access enforcement procedures. They rarely used the adjudicative function because the clients they sued rarely defended the claims.

The Government (Local, State and Federal) appeared as plaintiff in 10.2% of the registry data but did not appear at all in the court data. All judgments involving government plaintiffs were obtained by default.

Insurance companies were the largest plaintiff group to increase their representation in the Court Set data. This reflected the fact that motor vehicle negligence (property damage) cases were the dominant cause of action for insurance plaintiffs and made up 10.4% of the registry sample and 39.6% of the court sample. Insurance plaintiffs differed from the other large plaintiffs in that their use of the adjudicative services of the court was much higher. The causes of action in which they are involved (motor vehicle property damage due to negligence) have a greater likelihood of proceeding to a defended hearing than consumer debt cases.

However, an estimate of the total number of claims issued by insurers in 1997 was 17,920. This figure was 10.45% of all the claims filed in the Local Courts of New South Wales. Only 2.4 % of all claims end with a judgment after an adjudicated hearing (Figure 11). Even if motor vehicle negligence cases are four times more likely to be adjudicated than consumer debt claims (as the data suggests) the estimated number of insurance claims to go before a court is about 1720 per annum or approximately 9.6% of the total number of motor vehicle negligence claims lodged by insurers. This calculation demonstrates that whilst insurance plaintiffs and their defendants did make greater use of the adjudicative process

than other large plaintiffs, they obtained default judgment or settled in over 90% of the cases they commenced.

The large percentage of insurance plaintiffs (10.4% of Registry Set and 39.6% of the Court Set) illustrates why the studies which did not recognise insurance plaintiffs as such and classified them as private individuals (Matruglio, 1993 and Cranston,1986) cannot be relied upon to accurately identify the size or characteristics of the true litigants. It is interesting to note that if the classification system of civil litigants used by Cranston and Matruglio was adopted for this study and the 39.6% of the Court Set insurance plaintiffs were reclassified and considered to be individual plaintiffs the result of this study would largely

support Cranston's conclusion that individuals made up 50% of the plaintiffs in civil cases.(Cranston, 1986:128) In fact, if the 39.6% of insurance plaintiffs in the Court Set were added to the 23.8% of small plaintiffs, individuals would be responsible for issuing 63.4% of the claims in the Court Set. This demonstrates the importance of looking behind the individual and uncovering the identity of the true party. Insurance companies were accurately identified in this study and thus placed in the large corporate category where they belong.

Another characteristic of large plaintiffs is the speed of obtaining the judgment. The average time from service of the claim to judgment in the Registry Set was 2.2 months. The average time from service of the claim to judgement in the Court Set (where government representation was nil, financial institution representation was low and default judgments were few) was 14.8 months. This shows the correlation between the speed of judgment and the stage of entry. The 2.2 month

time frame from service to judgment reflects the fact that most judgments in the Registry Set were entered by default (38%.) The journey to judgment was very quick with only two short steps taken by the majority of plaintiffs and none by the majority of defendants.

The high rate of default judgment found in the Registry Set and made possible by the low rate of defendant participation (8% of claims were defended) supports the proposition propounded by Thomas(1990) that "one of the most striking and damning features of our civil justice system is the vast number of defendants...whose participation is entirely passive." (Thomas, 1990:51)

The court judgment had other uses apart from providing access to enforcement procedures. Non payment of the judgment was an act that allowed creditors to begin bankruptcy proceedings against individuals and liquidation proceedings against companies. Bankruptcy could be voluntarily sought by debtors to discharge debts and allow eventual re-entry to the credit market thus spreading the losses across the whole market. (Ramsay, 1986:12)

To facilitate commerce, bad debts were written off by corporations and businesses as uncollectable and deducted from taxable income. The costs and fees of attempted recovery were also tax deductible and so there was a public subsidy to the unsuccessful creditor in the form of reduced tax payments. (Schumann, 1986:293) Debts were also sold at a discount to companies specialising in the field of collecting old debts. Judgments were frequently reported by financial institutions to creditor watchdog agencies such as the Credit Reference

Association so that other corporations were alerted to the indebtedness of individuals seeking further credit.

Thus, Local Court judgments were multi-functional orders that could be used to secure payment of the debt, access enforcement procedures (or threat thereof) reduce tax payments, deter other potential debtors, prevent further losses through notification, instigate bankruptcy proceedings or liquidate a company.

5.2.2 Large volume of claims filed

A very distinctive characteristic of the large plaintiff was the large volume of claims that they commenced. This behaviour is consistent with the research of Santos et al (1996) who found that corporations concentrated on "frequent litigation against sporadic partners" (Santos et al., 1996:16) and Galanter (1974) who characterised his repeat players as "a unit which has had and anticipates repeated litigation" (Galanter,1974:98) All the court documents filed by large players in both samples had been produced in-house in their own offices rather than by the staff at the court registry. They were printed by their own computer systems using employed staff or a solicitors firm that specialised in serving the one large client. For these plaintiffs, using the Local Court is a regular and routine part of their business operations. Claim data is stored in information systems that produce all necessary documents from claim through to enforcement. Court document production is a simple data entry task requiring little skill and no legal

or procedural knowledge. All mathematical calculations including professional costs, court fees and interest are automatically calculated and added at each step.

Banks, finance companies and insurance companies predominantly use employed solicitors. Their names appear on the claims generated by the computer systems. This allows them to claim professional costs. Only one large plaintiff, a bank, did not use legally qualified staff and thus did not add professional costs to the claim.

Characteristically, the large players produce many claims at a relatively low cost per item. Very little time or skill is required compared to an individual litigant or individual practitioner who would need to obtain a form, draft pleadings for one specific case, perform legal research or obtain advice, complete the form, photocopy sufficient copies for service, file the claim and pay the fee.

5.2.3 Similarity of actions

A careful examination of the pleadings filed by large players revealed that although their actions covered a range of causes of action (breach of contract, negligence, res ipsa loquitur etc.) each large player tended to specialise in one narrow area of law. This was true even within categories. For example, large financial institutions had credit card collection sections which exclusively dealt with credit card payment default and did not pursue matters such as personal loan or mortgage default. Large retail stores referred their store card debts to an agency which specialises in Australia wide collection of retail debts. Similarly, credit

union debts for the whole of New South Wales are collected by a central agency created for that purpose.

Even debt collection agencies tended to specialise allowing them to take advantage of the economies of scale made possible by the production of large volumes of similar or identical claims. For example, one company issued claims for assigned debts which were close to (or past) the limitation period for the action. Another specialised in recovering money for goods sold and delivered by manufacturers. Others dealt exclusively with unpaid mobile telephone accounts, internet services or professional entities such as medical centres.

A clear advantage of specialisation is that one set of draft pleadings is suitable for use in thousands of cases. Identical documents were produced for each case with only the names, addresses and dates altered to suit the individual claim. A further advantage is that the specialist lawyers and clerks need only research and study a small amount of material from very narrow area of law to keep appraised of the latest developments in their field. This knowledge allowed the large defendants to make an accurate assessment of the likely outcome of the proceedings before commencement.

Such specialisation makes document production cost effective. The economies of scale available to a large organisation concentrating on a narrow range of processes means that the courts can be used " as a cheap means of debt collecting." (Clarke,1992:369)

5.2.4 Propensity to sue small defendants

The data displayed at Figure 32 shows the propensity of the large players to sue smaller opponents. The New South Wales Local Court, like the English County Court, is indeed the forum where "the little man gets taken to court." (Thomas, 1998:208) The data (team data and defendant size data) showed that the large plaintiffs most often used the Local Court civil system to sue smaller players. This result is consistent with Galanter's description of the small litigant most frequently engaged in litigation with the repeat player. (Galanter,1974:95) Similarly, Santos et al. found that corporate litigants concentrated their litigation on "debt collection, mainly when debtors are individuals or less economically powerful firms." (Santos et al., 1996:16)

The number of large players engaging in litigation with each other was very small compared to the number of claims they made against individuals. This result was consistent with Cranston's conclusion that "commercial and property interests use the courts little...for dispute resolution amongst themselves.(Cranston, 1986:129)

There was no evidence from the files of any serious attempts to engage in settlement negotiations with unrepresented small players (files adjourned at call-over are commonly noted with the reasons eg. "settlement negotiations", "parties to discuss payment options" etc). The short time from service to judgment in debt cases also indicates that discussions or correspondence may not have taken place.

The court documents showed that alternative dispute resolution or mediation had not been attempted or considered as the time frames between the cause of action,

letter of demand and claim were too short. The team data indicates that the large players had greater success at recovering their claim in full against small opponents. The team data also indicates that they were more likely to settle against an opponent of the same size. In the 1000 cases sampled the large plaintiffs settled in 7 cases (out of 279) against small opponents. Against large opponents, they settled 3 (out of 9) and withdrew in 1 other.

The team results for large players against large players (a draw) might account for their reluctance to sue one another. They were more likely to engage in litigation only when there was a genuine dispute (propensity to lodge a defence against each other was high) and when a significant amount of money was involved. Their success rate against large adversaries was only about 50%. The high rate of legal representation for large players (in the court data set all large litigants were legally represented) meant the certainty of a substantial monetary order against the unsuccessful party for the legal costs incurred by the winner.

There may be other reasons why large players use the court predominantly for suing small players. Large players most often come into conflict with each other as a result of an agreement or transaction entered in the course of an ongoing business relationship. The relevant files indicate that the cases had arisen as a result of a dispute about a much larger contractual relationship. For example, one case involved the non receipt or defective nature of a portion of goods ordered and delivered over a period of several years. Other cases related to disputes about terms of written contracts which had been orally varied over the course of the transaction. These cases were settled. Once the large parties had exchanged

sufficient details and information about the case, they preferred to settle so as to preserve their on-going commercial relationships.

Conversely, large parties occasionally used the adjudicative function of the court (discussed in the later "Setting a Precedent" section) in order to clarify and redefine their on-going commercial relationship. This occurred in one case where the court was called upon to interpret the meaning of a clause in a franchise agreement.

5.2.5 Close relationship with the court staff

Representatives of the large users frequently attended the court registry. Many visited the court every day to lodge documents, collect mail from their private boxes, move or defend motions, attend call-overs or to conduct assessment, arbitration or court hearings. Consequently, the lawyers and clerks employed by large players were well known to all levels of court staff from the inquiry clerks to the judiciary.

Over the years a number of Downing Centre staff have left the Public Service to pursue careers with large plaintiffs. The skills and knowledge of procedures acquired in the registry assisted them to move into this sphere of private sector employment. Senior court staff have had long term relationships with many of the senior staff from large organisations. Many of the senior civil solicitors were well known to the Assessor, Registrar or Magistrates having met many years earlier as juniors and moved together through the ranks of their respective organisations.

The close relationship between the large plaintiffs and the court staff allowed information to be easily and freely shared in an atmosphere of mutual understanding and knowledge of the system. Large players frequently aired their opinions and grievances orally and in writing to the court staff. The daily attendance meant that large plaintiffs received timely notification of proposed procedural changes and had the opportunity to discuss and plan for the impact of the changes on their work.

5.2.6 Symbiotic processing relationship

The regular contact and flow of information between the court and the large plaintiffs led to the development of a symbiotic relationship. The Downing Centre Civil Claims Court has altered its processes to suit the large players because the modifications are mutually beneficial leading to time and cost savings for both organisations. The claims lodged by large plaintiffs did not need to be checked for mathematical accuracy as they were computer generated and the costs, fees and additions were consistently correct. The correct number of copies were filed and details such as names and addresses were clear and in the proper location for placing in window faced envelopes. Large players used collection boxes provided by the court at the registry for all correspondence saving both parties the cost of postage.

Claims made by large plaintiffs are not prepared by court staff. To avoid multiple counter attendances large players have developed mutually beneficial lodgment arrangements. They were issued blocks of claim numbers by making a telephone call. The large plaintiffs prepared their claims on their own computer systems and

transferred the data onto a disc compatible with the court computer system. The numbered and dated claims and the computer disc were delivered to the court at a pre-arranged time avoiding the busy lodgment periods. At a time convenient to court staff the disc was down-loaded, the claims were sealed, the service copies detached and the client's copy placed in the collection box provided by the court. Thousands of dollars worth of claims were processed by one clerk in few minutes.

By way of comparison, small plaintiffs who issued process at the same time needed to queue up at the counter, obtain procedural advice and information from a clerk, make an appointment with the Chamber Magistrate and attend again with the required documents and fees to have the claim prepared. After the Chamber Magistrate typed and printed the document, the small plaintiff queued up at the counter to have it numbered, dated, sealed and dispatched for service. Later, a data entry clerk entered all the information from the document into the computer. The Chamber Magistrates do not have access to the bulk user system and cannot electronically lodge documents. To issue this process required the involvement of 3-4 court staff for approximately 30-60 minutes. The revenue collected was $50-$124.

Clearly, the streamlined, large plaintiff lodgment process creates enormous time and cost savings for court and ultimately the public who pay for the court.

5.2.7 Familiarity with processes and procedures

The large plaintiffs were familiar with the practices and procedures of many different court registries. They became a conduit for best practice as they were able to compare and contrast methods used in other Australian states and other

jurisdictions and registries within the state. Minor changes such as listing times, staggered listings and streamlined processing methods were implemented during the period of the study as a result of suggestions from large plaintiffs gleaned from other registries and transplanted to the Downing Centre. Likewise, other Local Court Registries adopted practices developed at the Downing Centre and frequently sought procedural guidance after prompting by a large plaintiff.

The familiarity with the processes is largely the result of the close relationship between the large plaintiff and the court staff described above. The large plaintiffs were intimately aware of the technological, legislative and financial constraints and limitations facing the courts. The suggested improvements were capable of implementation because the large plaintiffs were able to tailor their requests to meet both the resources and needs of the court.

5.2.8 Technological compatibility

The court, like the large plaintiff, is a large organisation. Labour costs consume a large portion of the budget expenditure which comes from the public purse. In recent years there has been an increasing emphasis in all New South Wales public sector organisations to improve client service and to transparently account for the cost of those services to the public. The role of the large plaintiff in assisting the court to meet these challenges is crucial. They are the largest clients of the system and the parties with the resources and incentive to develop technological solutions for cheaper and faster processing of bulk work.

The claim issuing process (outlined above) demonstrated one way large clients assisted the court. The process is technology dependant, non labour intensive,

cheap, quick and efficient for the court and the client. The alternative method provided for and used by small clients is labour intensive, time consuming and expensive for the court. Proposed future developments which are purported to lead to cost savings all require knowledge of and access to computer technology. This includes expansion of electronic lodgment (to cover default judgment and enforcement,) and e-mail or internet communication to replace face-to-face and written communication. Such improvements provide most benefit to the large clients who have the financial resources and economic incentive to develop systems in partnership (or at least compatible) with the court.

5.2.9 Ability to Influence Rule Change

The ability to influence the formulation of rules has been identified by Galanter (1974:95) as one of the characteristics of the repeat player. Galanter is referring to rules in the broader sense (a body of authoritative normative learning) and includes common law, precedent, legislation and rules made by bureaucrats.

The New South Wales Local Court (Civil Claims) Act 1970 set the legislative basis for the system. More extensive instructions and procedures were to be found in the Local Court (Civil Claims) Rules. There were no substantive changes made to the civil statute law during the period of the study. An examination of the workings of the Local Court (Civil Claims) Rule Committee was undertaken to determine the level of Plaintiff influence. The Local Court (Civil Claims) Rule Committee was made up of the Chief Magistrate, three other Magistrates with specialist civil expertise, a solicitor nominated by the Law Society, a barrister nominated by the Bar Association, The Registrar of the Downing Centre Civil

Claims Court, the Deputy Director of Local Courts, a lawyer from Redfern Legal Centre and an a public servant representing the Attorney General from the Legislation and Policy Division of the Department. The Committee meets several times each year to discuss, design, draft and approve new rules changes.

A perusal of the minutes from 1997 to 1999 showed that the Committee considered rule changes in the following areas:

1. Powers of the Downing Centre Registrar to set aside subpoena

2. Powers of suburban Registrars to refer cases to arbitration

3. Raising the monetary limit of Small Claims Rules to conform with corresponding changes to the Local Courts (Civil Claims) Act

4. Nomination of a party to serve civil process on Lord Howe Island

5. Raising the amount of costs recoverable by parties in Small Claims cases

The influence of the large plaintiffs on the Committee deliberations and decisions appeared to be minimal. The first item was raised by the Deputy Registrar (Court) at the Downing Centre who hears and determines the matters under review. The second originated from the Registrar at Newtown Local Court. The third was referred by the Legislation and Policy Division of the Attorney General's Department following the passing of the Courts Legislation Amendment Act, 1999. The fourth was raised by the New South Wales Sheriff. Only the last item was brought to the attention of the Committee by a large plaintiff's representative.

Items 1-4 were recommended, drafted, approved and gazetted. Item 5 was considered and rejected. Similar overtures by large plaintiffs over a period of four

years covered by the available minutes met with a similar fate. Matters raised by Registrars, Magistrates and senior public servants usually referred to frequently encountered problems that had highlighted a deficiency or conflict in the rules. The suggested changes were frequently adopted. Large plaintiffs regularly raised matters in written correspondence. Large plaintiffs regularly expressed a desire to attend and address the Committee. The submissions were considered and discussed (and occasionally mentioned in later related discussions) but their is no evidence to suggest they were adopted. The offers to attend meetings were declined.

The domination of the Rule Committee by bureaucrats and Magistrates ensured that the rules considered and approved were adopted for the benefit of the court and registries rather than the large plaintiffs or any other parties to proceedings. However, the symbiotic nature of the relationship between the large players and the registries means that their interests (large players and large registries) may coincide. The judiciary, in particular, often made reference to the interests and effects of changes upon unrepresented litigants. Although the large players made frequent written submissions they were not acceded to during the period studied. The most that could be said about their rule making contribution is that they knew how to go about making suggestions through the proper channels (some requests were directed to the Secretary whilst others were referred via the Attorney General's Office) and their submissions covered a wide range of subject matter. Their views often entered into the discussion and were well known to members. The views of the large plaintiffs had also come to the attention of the Law Society would had received submissions to their Civil Law Committee. One piece of

correspondence came from the Young Lawyers Association and it was noted that the President was a member of a firm that represented a large insurance company and frequently appeared in the Downing Centre Civil Claims Court. In contrast, the views of unrepresented parties and small players were generally expressed by Magistrates, Registrars and the Community Legal Centre representative. Six members of the Committee had been Chamber Magistrates at an earlier stage of their careers and thus each had several years of experience providing assistance to individual litigants.

5.2.10 Setting a precedent

Characteristically the large plaintiffs demonstrated the ability to effectively improve the their chances of success by setting favourable precedents. This is an important part of the rule making power discussed by Galanter (1974.) Large plaintiffs took out so many similar claims that a favourable result in one case set a precedent for multiple cases waiting in the litigation line. The sample threw up several examples of cases where a large plaintiff expended more than the value of a claim, briefed experienced counsel and devoted a disproportionate amount of research time to run a claim as a test case in order to set a precedent for other similar cases.

One example from the Court Set was a case run by the Australian Customs Service for an amount less than $10,000. It was run in the Local Court and an appeal was subsequently lodged in the Supreme Court. The case involved the interpretation of a new section of the Customs Act and the amount of duty payable for a certain class of imported goods. The case was heard in the Local Court

within 6 months of filing and confirmed by the Supreme Court four months later. The positive result for the Australian Customs Service meant that millions of dollars of disputed revenue was demanded and collected on the basis of the decision. The Australian Customs Service had many similar cases at the time outside the monetary jurisdiction of the Local Court but chose to run this case against a medium sized defendant in the Local Court rather than engage a large defendant in the Supreme Court. A Supreme Court case would have been more expensive but the most important factor in choosing the venue was the speed of resolution. The Local Court appeal procedure meant the case was determined quickly. The selected opponent had one case, no interest in setting precedents or playing the odds and no economic incentive to hire Senior Counsel. On the strength of the favourable Supreme Court decision, the Australian Customs Service took action against some large players for large amounts of money in the Supreme Court.

Another advantage of the early resolution was that an unfavourable decision would have prompted legislative change to plug the alleged loophole and minimise the loss of revenue.

5.2.11 Structure of the Plaintiff/Defendant Legal Relationship

A common characteristic of the large plaintiffs in the sample was the nature of their relationship with the defendant at the time the contract was entered which gave rise to the proceedings. Banks, building societies, credit unions, finance companies and insurance companies prepare and set the terms of the contracts they entered with individuals. The individual had no part in setting or negotiating

the terms and entered on a 'take it or leave it' basis. At the outset of the relationship (eg. loan application, insurance proposal, credit card application) the large plaintiff collected all the personal and financial details from the defendant that were required to successfully prosecute and enforce the action for default. Contracts were written to cover the possibility of default and future litigation. Preparation of the claim and pleadings were simplified because of the detail in the original contract. This had the effect of transforming a complex relationship into a simple legal case for debt recovery where the numerous, complex terms and conditions had previously been defined by superior courts.

5.3 Characteristics of the Defendant

Small defendants made up 75% of the Registry Set defendants and 51.4% of the Court Set defendants. In the 1000 cases studied there were 632 small defendants. Most frequently, small defendants were sued by a large plaintiff for failing to make loan or credit card repayments or failing to pay for goods and services. A significant proportion of the court cases (39.6% of defended matters) involved insurance companies suing uninsured individuals for motor vehicle property damage resulting from a collision. These results are consistent with the findings of defendant identity made by Galanter (1974), Santos et al.(1996) and Thomas(1990).

All the small defendants in both data sets appeared in only one case. This fits the description of the "one shotter" advanced by Galanter (1974) and the "sporadic user" referred to by Santos et al. (1996.)

5.3.1 Lack of participation in proceedings

The Registry Set showed that 92% of defendants did not defend the claim and 2.6% confessed to the debt. Judgment was most often entered against small defendants by default. Of the 40 defences filed in the registry sample, 6 were filed after a successful application to set aside a default judgment. Motions to set aside a default judgment were filed in 24.2% of cases in the court sample indicating that almost a quarter of the defendants did not lodge their defences within the period prescribed by the rules ie. 28 days after service of the claim or prior to the entry default judgment.

This situation shows that a large proportion of default judgments are entered against defendants who have a bona fide defence to the claim. As a result of failing to lodge a defence within the prescribed time these defendants had to prepare and file a motion seeking to set aside the judgment. This meant an appearance before the court for both parties with the onus on the defendant to convince the court that there was sufficient cause to grant the application. One of the most important considerations for the judicial officer hearing the application is to determine whether the defendant has an arguable or triable defence to put before the court. All the applications in the sample were successful indicating that all the applicant/defendants had a bona fide defence. However, all the respondent plaintiffs that appeared at court sought costs orders and these were either granted or deferred as costs in the cause. The failure to file within time usually meant the defendant had to pay the plaintiff's costs either as a condition of the set aside or when the proceedings were finalised. Costs in the cause (costs of the motion

awarded to the winning party at the conclusion of the case) are paid to the successful litigants and only 25.4% of defendants were successful in adjudicated cases and 21.5% had a settlement recorded in their favour. Legal costs can only be claimed by legal practitioners. As more plaintiffs than defendants were represented by lawyers the costs claimed by plaintiffs exceeded the costs claimed by defendants even when orders were made in favour of the defendant..

5.3.2 Inability to play the odds

All the small defendants in the sample were involved in only one case at the court at the time of the study. They were not corporate entities and thus were personally liable for the judgment amount and legal costs. An unpaid judgment exposed their personal assets to seizure by the Sheriff or meant a garnishee order attached to their wages or bank account. For the small litigant, engaging in litigation meant a sacrifice of their time, personal financial resources and caused non-financial pressures as their ordinary life was disrupted (put on hold) during the course of the proceedings. A Writ for sale of property could have issued for a judgment debt exceeding $3,000. Such a relatively small unpaid sum could place the small litigant in the position of losing the family home. Any unpaid judgment amount could result in the sale of all personal assets, goods and chattels up to the value of the debt.

The small defendants, with one case each, could not play the odds. The stakes in the individual cases were too high and the outcomes had the potential to affect the credit rating, employment, family life and personal circumstances of the defendants. Unlike the large players for whom " the stakes in any given case are

smaller", (Galanter,1974:98) one large debt had the ability to threaten the financial viability of the small business, family or individual concerned.

On the other, if the claim was small, the small player was faced with the choice of expending time and money to defend a matter. Legal representation for such a case would have cost more than the value of the claim. Costs may have been a factor in the low defence rate and low representation rate of small defendants in the sample.

5.3.3 Lack of Legal and Procedural Knowledge

A perusal of the Affidavits filed by defendants in applications to set aside default judgments showed that most small defendants had very limited or no knowledge of their legal rights and the way to enforce them. In the applications the defendants were required to explain why they did not comply with the rules and lodge their defence. In all the applications they stated that they were unaware of the requirement to file their defence in the prescribed form within the prescribed time and the legal jargon information provided on the claim had been of no assistance. Unrepresented defendants seeking to overturn a judgment often did not know that they had a defence until they received legal and procedural advice and assistance (usually from a Chamber Magistrate). They generally obtained assistance after a visit from the Sheriff attempting to seize goods under a Writ of Execution who informed them of the help available free of charge at the court. In the defended cases from the Court Set, 24.2% of the defendants had to set aside a default judgment and incur the extra costs of that motion principally because they were unsure how to lodge a defence and did not know where to go for help until the

Sheriff's Officer (executing a writ to seize property) informed them about the services available at the courthouse.

In the Registry Set 8.2% of defendants had a solicitor acting for them and a similar number (8%) were successful in obtaining a verdict or settlement in their favour. The 41 defendants who had legal representation enjoyed more favourable results than the average defendants as the table on the next page illustrates.

CASE RESULTS %

	P wins in full	P- wins in part	D wins	Withdrawn or Settled	
Represented defendants	34.0	21.0	7.0	38 .0	100%
Registry cases	50.0	2.2	0.8	47.0	100%
Adjudicated cases	54.2	12.1	25.4	8.3	100%
Settled cases	30.0	28.0	21.5	20.5	100%

Where the cases proceeded to judgment, defendants with legal representatives fared much better than unrepresented defendants. In the court sample, the representation rate for defendants was much higher than the registry sample (78% had lawyers in the court sample compared to 8.2% in the registry sample) and the data shows a corresponding improvement in the defendants results. Those defendants who took advantage of the legal and procedural knowledge supplied by their lawyers had a greater success rate than their unrepresented counterparts.

5.3.4 Rule formulation and precedent

The small defendants consistently stated in their affidavits to set aside judgment that they had no knowledge of the rules, the procedures and the law in the civil area. They were unaware of the time limits for filing documents (further evidenced by their failure to comply). They did know where or how to get assistance. That they did not know how to change the venue was demonstrated by the small number of applications compared to the large number of cases where grounds existed based on the defendant's residential address. Defences prepared by the litigants themselves (as opposed to those prepared by Chamber Magistrates or lawyers) often contained defects in form and were filed unsigned, unsworn or with the wrong party names and file number. They frequently contained legal defects such as pleading the general issue and included statements which were inadmissible on the grounds of hearsay, opinion and irrelevance.

Given the limited knowledge of the rules possessed by small defendants and the fact that they were engaged in one case it follows that they would not show any interest in rule formulation. Each defendant had no personal advantage in setting a precedent since they were unlikely to be involved in further litigation of a similar nature.

There were some organisations in existence at the time of the study capable of defending small players and taking representative actions. Groups such as the Legal Aid Commission, the Public Interest Advocacy Centre, Community Legal Centres, Consumer Credit Legal Centre and the Pro Bono Solicitors and Barristers Scheme occasionally represented or assisted civil litigants in the Local Courts.

However all these organisations shared the common problem of limited resources to be allocated to a huge pool of applicants. They were necessarily selective about the type of cases and clients they chose to represent. None of the cases in the sample were represented by these groups. According to the Minutes of the Rule Committee meetings no representations for rule changes had been made to the Local Court (Civil Claims) Rule Committee by or on behalf of individual litigants in the two years prior to the study.

5.3.5 Costs of civil litigation

The small defendants found that their first encounter with the civil system (receiving the statement of claim or a visit from the Sheriff) cost them money and the longer the contact endured, the more money it cost. Court issue fees, professional costs for preparation of the claim, service fees and interest had already been added to the amount due before they were aware of the action. The small defendants found themselves, at the outset, in the unenviable position of confessing to the debt with all the added costs, allowing a default judgment to be entered and incurring the further costs of that step or mounting a defence with resultant risk of even greater costs.

The small defendant was forced to select one of these alternatives with very little information or knowledge of the law or procedures for guidance. They had no way of accurately assessing the likelihood of success, the potential costs of litigation, the length of time to hearing or the chances of recovering their costs if they won the case. Most of the available options (confession, payment, default judgment, unsuccessful defence) left the small defendant in a worse financial situation than

the one which prompted the claim. The only positive result available, a judgment in favour of the defendant, was the result that they were statistically least likely to achieve.

The decision to defend exposed the defendant to the risk of having to pay the legal costs of the plaintiff because plaintiffs were legally represented in 81% of the Registry Set and 97% of the Court Set cases.

5.4 Control of the Civil Process

The most striking feature of the New South Wales Local Court civil justice system to emerge from the study was the degree of control and choice offered to plaintiffs by the Local Court (Civil Claims) Act and the Rules. The defendants played a passive or reactive role. Defendant participation was contained within a field of limited choices and limit time for election. The New South Wales civil procedures mirrored the procedures in England discussed by Thomas (1990) who found that the system "does almost nothing to encourage or welcome their (defendant) participation in debt proceedings." (Thomas, 199:51) At each stage of the process, from the decision to commence legal action to the final enforcement of the judgment, the plaintiff determines the direction the case will take and the length of time for the journey.

5.4.1 To litigate or not to litigate

The decision to issue the Statement of Claim is made by the plaintiff. The Limitations Act, 1969 s.14(1) allows the plaintiff to initiate a claim within a time period of six years from the date the cause of action first accrued. The limitation is

extended by an act of the debtor acknowledging the debt such as a small instalment payment. The plaintiffs in the study had a considerable amount of time to plan the action, to get legal and procedural advice and, if necessary, to save the funds required to pay a lawyer.

The Local Court (Civil Claims) Act, 1970 and the Local Court (Civil Claims) Rules, 1988 appear to be based on the assumption that plaintiffs would take action as soon as possible to recover their money and there was thus no need to change the general limitation period for Local Court matters. Delay, it seems to assume, would be disadvantageous to plaintiffs but could be used by debtors to slow the repayment process. Plaintiffs who delayed issuing proceedings risked the disappearance or bankruptcy of the debtor and may have incurred financial hardship from the loss involved in the debt transaction.

However, the sample data showed that the majority of cases were commenced well after the cause of action arose. One particular large collection agency commenced all their actions just within the six year limitation period. The sample showed that most of the claims were for small monetary debts owed to large institutions. None of the institutions or companies in the sample risked financial ruin from the non payment of any particular small debt. In 1997 all the banks and insurance companies in the sample cases returned dividends to shareholders and made a profit despite the combined national total of their outstanding debts. Banks and finance providers are in the business of incurring debts and loan default is factored into their operations by the varying amounts of interest they charge their customers.

In cases that involved personal loans, credit cards, finance agreements and retail store cards plaintiffs received a financial advantage from delayed legal action. These contract debts incurred interest at rates of between 14% and 25% before the legal action commenced. Once the claim was filed and issued interest accrued at the rate set by the Act (Local Court(Civil Claims)Act s.39A) which was 10% at the time of the study. The longer the court action was delayed, the more interest the plaintiff accrued to add to the debt. Since the professional costs recoverable for issue of the claim and each subsequent step are based on a sliding scale according to the amount of the debt, it was advantageous to the plaintiff to have a larger claim. The table on the following page sets out the fees for some of the steps to illustrate the financial advantage to plaintiffs of delaying a claim near the upper limit of one category until it slips into the higher scale.

SCALE OF COSTS ALLOWED UNDER Pt 31 R 10

	Over $5000 Under $15000	Over $2000 Under $5000	Over $1000 Under $2000	Does not exceed $1000
Filing a claim	$314	$283	$173	$110
Default judgement	$456	$410	$251	$160
Examination summons	$188	$169	$103	$66
Motion to set aside judgment	$360	$324	$198	$126

The plaintiff's control over the decision to take legal action also gave them control over the alternative methods of dispute resolution. Negotiation, Community Justice Centre mediation, instalment payment arrangements and communication

between the parties were removed from the equation or took on a different flavour when the legal claim was issued. In disputes between same sized litigants commencement of legal proceedings provided a place to meet on neutral ground, a time frame for settlement negotiations and an opportunity to meet face-to-face or with legal representatives to narrow the issues in the dispute. Settlements between equal sized parties most commonly occurred on the day scheduled for a court appearance; the callover, the arbitration day or the hearing day.

In the contests between large plaintiffs and small defendants, issue of the claim was a sign that negotiations had ended. Some of the defences and affidavits to set aside judgment filed by small defendants contained statements in which defendants claimed that plaintiffs did not want to discuss the matter. One said in his affidavit supporting an application to set aside a judgment "the man from the insurance company told me that once the lawyers were involved, he couldn't discuss it with me any more". The data showed that in the 127 large-v-small contests in the court sample the settlement rate was 14.1% whilst the average settlement rate was 63.4%. This indicated that when a large player decided to take action against a small player, they usually obtained a full judgment rather than a negotiated settlement.

The six year period allowed to the plaintiff to file the claim (and further two years to serve the claim) appeared rather generous in contrast to the 28 day period allowed for the defendant to file the defence. The defendant had no control over the commencement of the time period which began to run when the claim was served by the plaintiff. The defendants lacked knowledge of the law and

procedures, the language and forms and usually had no legal representation. Defendants failed to comply with the prescribed period in 25% of the defended cases. In the registry sample, 92% of the defendants did not lodge a defence at all.

5.4.2 Timing: issue of the claim

The decision to prepare and file the claim was the first step in a series of timing decisions made by the plaintiff. The previous section discussed the advantages of delayed action for finance providers but there were other advantages for the party who determined when the action would commence.

Large plaintiffs have an interest in precedent and law making. As shown in the Australian Customs Service example, filing or hearing was delayed until a test case had been favourably decided or the appropriate amendments made to the relevant Act. Large plaintiffs were all corporations or government departments. Debt collection action was staggered, delayed or accelerated to suit staff availability and commercial interests. The bulk users of the court tended to issue approximately the same number of claims every month. The lodgments appeared to be based on their capacity to manage and create files rather than the timing of incoming customer defaults.

5.4.3 Timing: service of the claim

The next step after issue was service of the claim upon the defendant. The rules allowed the plaintiff two years to serve the claim after issue (Pt 5 r 5). This period could be extended if the plaintiff applied to the Registrar and showed sufficient cause for the grant of the application. There was nothing in the rules to prevent a

plaintiff taking out a fresh claim after the two year period had expired. A debtor who had not received a claim within six years of the cause of action could not be sure that the action had lapsed because the plaintiff may have issued a claim. The only way for the debtor to be sure that an action had not been commenced would be to contact each of the 110 Local Courts with a computerised system and have a name search performed by a clerk. The courts without computers (50 small country registries) would have to manually inspect all the files to provide this information.

5.4.4 Timing: entry of judgment

The timing of the entry of judgment was in the control of the plaintiff. This was a powerful weapon providing plaintiffs with a bargaining tool to set time and rates of repayment. When a judgment was entered, the plaintiff was at liberty to notify the Credit Reference Association and the defendant's credit rating was immediately at risk. Entry of default judgment allowed the plaintiff to immediately enforce the debt with either a Writ of Execution or a Garnishee Order for the seizure of funds from wages or bank accounts. The threat of the Sheriff arriving at the residential address of the defendant to seize furniture and assets was a useful bargaining tool as the debtors often wished to avoid the embarrassment and distress of family and neighbours being made aware of their financial distress.

A Garnishee Order on wages was an inconvenience to the defendant's employer as they were required to make the payment amount calculations correctly and send the money to the creditor or risk being liable for the debt. Defendants were often

embarrassed when their employers and other staff (payroll clerks etc.) became of aware of their inability to pay their debts after service of the order.

Many of the filed settlement agreements made after service of the claim stipulated that judgment would not be entered if the agreed payments were made to the plaintiff. The entry of default judgment was clearly something that some debtors sought to avoid.

In the area of entering default judgment, the rules were generous to the plaintiff. The plaintiff was allowed a period of twelve months and 28 days after service to lodge an Affidavit of Debt and to apply for default judgment (Pt.11 r 1.) The rules also allowed plaintiffs to apply ex parte to the Registrar in chambers to have the time limit extended. The discretion to extend time under Pt.4 r 2 was wide and unfettered and could be exercised if there is some material produced to justify the extension. By way of contrast, when the defendants failed to meet their 28 day time limit for filing a defence the large plaintiffs quickly applied for default judgment. To obtain an extension of time to lodge their late defences, the defaulting defendants were required to prepare a motion to set aside judgment. The motions were served upon the plaintiff, the matter was listed before the court and the applicant needed to appear to move the motion. The onus was on the defendants to satisfy the court that they had provided "sufficient cause" to allow the court to exercise its discretion. The plaintiffs always sought to recover their costs of appearance from the defendant. Costs orders were most often made as "costs in the cause" or in favour of the plaintiffs. As the results in defended

matters favoured the plaintiffs, they tended to most frequently receive the benefit of costs in the cause.

As discussed, the 28 day time period for lodging a defence ran from the date of deemed service under the Rules (Pt.7) and not from the date the defendant actually received the claim. If a claim was served by post from the court (Pt.7 r 20,) the claim was deemed served on the fourth working day after postage. If the claim was served on a person over the age of 16 apparently residing at the defendant's residence, it was deemed served upon delivery to that person. It did not matter whether the defendant actually received the claim. If the defendant was absent from the residence because of work, holidays, illness or other reasons, the time continued to run even though they had never seen the claim.

5.4.5 Timing: the callover (directions hearing)

When the defendant filed the defence a copy was sent to the plaintiff by the registry. If the case was to proceed to hearing it was listed only after the plaintiff filed a Certificate of Readiness (with the prescribed fee) indicating that case preparation had been completed. There was no time limit imposed on the plaintiff for filing the Certificate of Readiness. A defendant who wanted the case heard had one option if the plaintiff did not file the Certificate. The defendant could file a motion seeking to strike out the claim for want of prosecution. In the sample cases where this action was taken (4 cases) the plaintiff filed the Certificate of Readiness on or before the date the motion was heard. The motions were then either withdrawn or dismissed. Either result saw the defendants incur costs for preparation of the motion or the court appearance. There was also a considerable

delay between service of the claim and the defendants motion since one of the most cogent factors in determining whether the plaintiff had failed to prosecute the claim was the length of the delay.

5.4.6 Timing: the hearing

Once the case was listed for callover before a Magistrate or Registrar, the court case management procedures came into play and control of the process moved from the plaintiff to the court to a large extent. The Plaintiff could only control the result, at this late stage, by forging a favourable settlement with the defendant. The data showed that 63.4% of the defended cases settled at or after the first callover. Nearly two thirds of plaintiffs opted out of an adjudicated hearing in favour of settlement. A comparison of the results of defended cases which settled and those which were determined by a judicial officer shows that the plaintiffs received a more favourable result at the adjudicated hearings.

	P wins in full	P wins in part	D wins	No Terms/ Withdrawn
Settled (100%)	30.0	28.0	21.5	20.5
Adjudicated (100%)	54.2	12.1	25.4	8.3

It was earlier noted that the large plaintiffs have the ability to play the odds. The data indicates that the odds at hearing are in favour of the plaintiff. Yet plaintiffs choose to settle more cases than they litigate. One possible explanation for the behaviour is that the plaintiffs choose to settle those cases that they assessed as

having a lower likelihood of a successful result. They litigated cases with a higher likelihood of winning and cut their losses in the more doubtful matters by agreeing to a reduced settlement amount. This illustrates that even at the door of the court or arbitration room (where most cases settled), the plaintiff was able to exercise some degree of control over the outcome. It appeared that the plaintiff preferred to take a lesser amount than the claim (the P wins in part) rather than submit to the uncertainty and added costs of an adjudicated hearing.

Another method of controlling the timing of the hearing was by delaying case preparation. Cases were not allocated a date for hearing until all preparation (including amendments to pleadings, service of notices to admit facts, service and reply to expert reports) had been completed. Parties wishing to delay the date of hearing could seek to amend pleadings, seek further particulars from the other side, arrange settlement negotiations or fail to adequately prepare their cases. Costs were sometimes awarded against the party using these tactics but most commonly costs were reserved to be determined at the end of the proceedings.

5.4.7 Selecting the venue

The plaintiff had a great deal of control over the venue for the dispute. Since each court jurisdiction in the New South Wales hierarchy is determined by the amount of the claim, the plaintiff was able to select the court by issuing a claim for a particular sum. The plaintiff was also able to deny the defendant access to alternative dispute resolution or an alternative tribunal. Tribunals that operate under the umbrella of the Fair Trading Tribunal (formerly Consumer Claims Tribunal, Motor Vehicle Repair Disputes Tribunal, Building Disputes Tribunal

and Commercial Tribunal) cease to have jurisdiction in a case once a claim has been filed at the court. Conversely, if the plaintiff had decided to commence the action at a tribunal, the court would have no jurisdiction.

Access to alternative dispute resolution such as mediation, counselling or the services of the Community Justice Centre was severely curtailed when a court action was commenced. The 28 day time limit from service of the claim to the filing of the defence left little time for the defendant to get the appropriate specific procedural advice. There was no time to explore the alternatives to court without the acquiescence of the plaintiff.

The Local Court civil jurisdiction differs significantly from the criminal jurisdiction in relation to of venues for cases. All criminal matters were commenced and determined in the court closest to the place where the alleged criminal act was committed. Matters were only transferred out of the area in unusual circumstances and for compelling reasons. The decision to transfer was made by the presiding Magistrate rather than the parties.

The Local Court(Civil Claims) Act 1970 allowed the civil plaintiffs to take out their claims in any Local Court in the state that exercised civil jurisdiction. There did not need to be any relationship between the location of the court, the place where the cause of action arose or the location of any of the parties or witnesses. It came as no surprise to find that the plaintiffs predominantly commenced their claims in the court most suitable and accessible to them and not in the court closest to the defendant. This is a significant factor influencing the defendants' participation in the civil system because of the default nature of the proceedings.

When the defendant did not respond to the claim by lodging a defence or a confession, the defendant lost by default. The defendant location in the Court data showed a strong relationship between distance of the defendants residence from the court of issue and propensity to lodge a defence. The further the defendant lived from the court, the further away the appropriate assistance, procedural advice, forms and filing facilities and thus the greater likelihood of a default judgment.

The legislation and rules made provision for the defendant to apply for a change of venue. To exercise this right, the defendant was required to file an affidavit in the prescribed form at the court of issue within 28 days of receiving the claim. The defendant was required to list all the appropriate courts on the document and nominate the preferred court from the list. An "appropriate court" is one defined in the rules under Pt.3 r 4(1) as

(a) the district in which the defendant is resident;

(b) the district in which the defendant was resident at the time the cause of action arose;

(c) the district in which the defendant has his or her place of business;

(d) the district in which the defendant had his or her place of business at the time the cause of action arose;

(e) the district in which the defendant has his or her place of employment

(f) the district in which the defendant had his or her place of employment at the time the cause of action arose;

(g) the district in which the cause of action arose.

The defendant was required to seek specialist procedural advice in order to correctly complete the affidavit. Failure by the defendant to nominate all the appropriate courts was grounds for the plaintiff to object to the transfer under Pt.3 r 4 (b). Nomination of any court which was not an appropriate court was also grounds for an objection by the plaintiff. Where the defendant nominated all the appropriate courts, the plaintiff was allowed to select the preferred court and transfer to that court was automatic. For example, one defendant lived at Hornsby. This was in the Northern Metropolitan Region. The plaintiff's solicitor was located in the Sydney Central Business District and commenced the claim in the Downing Centre. The defendants affidavit correctly stated the appropriate courts as Ryde, Hornsby and North Sydney. Of these courts, Hornsby was the preferred venue. However, the plaintiff opted for North Sydney (approximately 30 kilometres from Hornsby and adjacent to Sydney City) in the full knowledge that North Sydney cases were always heard at the Downing Centre. The result for the defendant was that after a successful attempt to change the venue to a more convenient court, he ended up in a hearing at the inappropriate court where the plaintiff commenced the claim.

Thus the transfer provisions are not as generous to the defendant as they superficially appear to be. The defendant has less choice than the plaintiff. The plaintiff could choose initially from 160 courts whereas the defendant was restricted to the "appropriate courts". These courts were divided into regions and

the plaintiff was then allowed to select any court in the appropriate region. The case was transferred to the court selected by the plaintiff.

The transfer provisions of Pt 3 r 4(1) are further restricted by Pt.3 r 4(2) which insisted that the application to change the venue could only be made within 28 days of service of the claim on the defendant and only if the defendant filed a defence. Contrast this with the rules relating to filing a defence. A defence may be filed at any time prior to the entry of default judgment. Thus a defence filed 29 days after service of the claim was acceptable (providing no application for default judgment had been made) but an application to change venue filed with it would have been rejected.

There does not appear to be any valid procedural reason to prohibit a change of venue when a defence is properly filed after the 28 day period. Similarly, it is difficult to see why the plaintiff is permitted to commence proceeding in an inappropriate court and continue those proceedings through to enforcement in a venue inaccessible to the defendant. For example, in default judgment cases, many defendants were later directed to appear at court for applications to pay by instalments. These applications were listed in the court where the claim commenced. The Registry Set data on defendant location showed that this court was often some distance from the defendant's abode as only 14.4% of defendants lived in the area closest to the Downing Centre Local Court. It was significant that 27.6% of defendants (16.8% country defendants combined with 10.8% of interstate/overseas defendants) did not live in the same city, state or country as the court that issued the claim.

The limitations on the defendant's access to an appropriate court illustrates the difference between the "nobility of the principles we purport to cherish and the meanness of the proceedings we permit to continue" (Church 1990:2) The defendant was denied access to an appropriate court when the application was not received by the originating court within 28 days of service of the claim. The court, according to the essential requirements of the defendant's affidavit, was inaccessible, inappropriate or located away from the defendants home or place of employment. Consider also that the defendant was most likely to be an individual being sued by a large institution for a small debt in a court convenient to the plaintiff. The cost of travel and accommodation within New South Wales is not cheap and many rural areas do not have public transport. The cost of travel to respond to the claim may exceed the amount of the small unpaid debt. The rules make no allowance for the defendant's distance from the issuing court. Some country debtors lived over a thousand kilometres from the issuing court and hundreds of kilometres from the closest court where forms and advice could be obtained.

The discouragement of defendant participation is embedded in the venue rules. The short time limits actively prevent and discourage a response. They help to create and encourage the "ostrich syndrome" (Thomas,1990) whereby the majority of debtors ignore the claim and have a default judgment entered against them. A large majority of defendants have grounds to transfer a case but are prevented by failing to file a defence or missing the time limit. Only 1.8% of defendants sought a transfer whereas 79.6% had at least one ground (defendant's place of residence) to do so. From the distant perspective of the small rural debtor the noble principle

expounded by Sir Samuel Griffiths in Rowe-v- Australian United Steam Navigation Co. Ltd (1909) 9 CLR 6 which states "the right of every man to a fair hearing lies at the root of the tree of justice" had been poisoned by the tyranny of distance, paucity of procedural and legal knowledge and the harshness of the rules.

5.5 Image of the Civil Local Court Client

The perspective and venue from which one views the civil justice system alters the perceptions and conclusions one draws about the clients and the role played by the justice system in assisting them to enforce their legal rights.

The most numerous client groups in the Local Court were the large, corporate plaintiffs and the small, individual defendants who were most likely to be opposing one another over a small unpaid debt. Most defendants were ordinary individuals summoned to a court convenient to the plaintiff corporation. Of these unrepresented defendants, the small percentage who lodged a defence faced an unfamiliar, bewildering array of procedures, forms and time limits. Their opponents were experienced lawyers with extensive, specialised knowledge of the labyrinthine intricacies of the civil law and the procedures and the ability to use the system to their best advantage having developed highly specialised practices and a symbiotic relationship with the registry.

The vast differences between the parties' legal knowledge, procedural expertise, financial resources and choices about using the court system ensure that the client viewpoint is as varied as the clients themselves. The scene changes as the viewer steps into the shoes of each of the players. The view of the court from the small defendants perspective is a place of harsh, uncompromising rules, unintelligible

forms and mounting costs. From the perspective of the large plaintiff and the professionals in the system, the view is markedly improved. From the large players' perspective, the Local Courts provide an efficient and effective forum for obtaining a quick judgment as a platform for the launch of enforcement proceedings. Their use of the system is selective in that they prefer to take on small parties for small debts. Financial institutions, governments and debt collectors dominated the registry client group .The government and financial institutions vanished from the court sample indicating that they prefer to use the Local Court for uncontested debt collection. The court sample was dominated by insurance plaintiffs and providers of goods and services who showed a greater propensity to settle than submit to the uncertainty of an adjudicated hearing.

The plaintiff had control of proceedings from the start to the date of the hearing. The plaintiff decided whether to commence proceedings, the forum for the case, the venue for the case, the date of commencement and the timing of the judgment or callover and settlement. The defendant was bound by strict time limits imposed by the rules and the actions of the plaintiff. Most defendants failed to respond to the claim and quickly became judgment debtors by default.

5.6 Functions of the Civil Court

Courts serve a diverse group of publics and perform their instrumental, political and symbolic functions as multifaceted organisations in a way that maximises the satisfaction of the dominant plaintiffs without alienating the minority users. Sufficient resources are provided for a satisfactory service to individual litigants (counter assistance, telephone information, Chamber Magistrate interviews, forms,

brochures, typing and photocopying facilities) whilst the processes are designed and improved for the corporate and government users in order to provide them with the required efficient, cheap and quick debt collection or judgment service.

The individual litigant received the benefits of the symbolic functions of the court (procedural fairness, impartiality, guaranteed rights, process values, the rule of law, protection from arbitrary power) while using the instrumental function (dispute resolution, facilitation of compromises, determination of rights, provision of specific redress) to resolve conflict and affirm their legal rights against other small individuals. Although individuals (small plaintiff group) appeared in only a small percentage of Local Court cases (23.8% of the Court Set and 4.8% of the Registry Set) these figures represent a significant number of litigants because of the large volume of cases (172,308) filed in the Local Courts. Further, it is interesting to note that the small litigants (as plaintiffs) were much more likely than large corporate plaintiffs to use the adjudicative function of the court. The small litigants also made more use of the information and assistance services provided by the court registry. Almost all the claims and defences filed by unrepresented small litigants had been prepared and typed by the court counter staff or the Chamber Magistrate at a Local Court registry. All the applications to set aside judgment lodged by small litigants had been prepared with the advice and assistance of court staff. A number of these applications contained affidavits which stated the applicant had first been made aware of the procedure for lodging a defence when the Sheriff had arrived to seize property under a Writ of Execution.

The court inquiry and counter staff, the Chamber Magistrates and the Sheriff's Officers provided a vital and well used source of information and practical assistance to small litigants seeking to enforce their legal rights. The forms, assistance, typing and photocopying facilities were provided free of charge to individual, sporadic litigants at the public counter of the Downing Centre. By way of contrast, clients served at the professional counter (used by lawyers and bulk users) were expected to file prepared documents with sufficient service copies and inadequately prepared documents were rejected. Court staff at the Downing Centre and most other busy suburban courts do not prepare process for regular users (a maximum of three claims were prepared by the court staff.)

The use of the court by small and medium sized plaintiffs to determine and protect their rights, to facilitate compromises and to resolve disputes demonstrated a minor, yet symbolically significant role played by the court for the minority consuming public. These minority users were able to access the public facilities for adjudication and enforcement at a fraction of the real cost because the services were subsidised by the filing fees paid by the dominant users and the contribution by the State Government. Where the interests of the individual coincided with the interests of the dominant plaintiffs (debt recovery, reinforcement of normative values) the outcomes were predominantly positive for all plaintiff groups. Where the interests of the individual or medium sized players was contrary to the interests of the large players (either small/medium plaintiff-v-large defendant or large plaintiff -v- small/medium defendant contests) the results favoured the large players. It appears that the civil justice system reflects, accommodates and

supports the inequities that are present in the social and political system of which it is an integral part.

> (The civil justice system) provides a way of accommodating cultural heterogeneity and social diversity while propounding universalism and unity; of accommodating vast concentrations of private power while upholding the supremacy of public authority; of accommodating inequality in fact while establishing equality of law; of facilitating action by great collective combines while celebrating individualism. (Galanter, 1974:148)

When the civil court functioned to reinforce normative or dominant values and institutional outcomes, to allocate resources or discourage economically inefficient behaviour, it was predominantly functioning to uphold the interests of the dominant plaintiff client group. This client group consisted of financial, insurance, retail and government institutions collectively using the court to protect their financial interests against individual debtors.

The corporate creditors were the satisfied dominant consumers of the courts' services and the individual debtors were the largely invisible recipients of creditor's claims. The court assisted and supervised the creditor to use it's instrumental functions and ensured, symbolically, that the process occurred according to set rules, without fear or favour, affection or ill-will.

> The court it seems exists and always has done to serve the purposes of the plaintiffs who have always predominantly been capital in one or other of its forms...the court depends on capital for its work and therefore its raison

> d'etre. It would not exist, therefore, if it did not meet the requirements of its majority users. (Cain 1986:129)

Individual defendants (the few that lodged a defence or sought assistance) were provided with the minimum amount of resources necessary to lodge a defence if they chose to contest the claim. The facilities provided to individual litigants were largely subsidised by the filing fees paid by corporate plaintiffs. A small percentage of individual litigants beat the odds and won their cases. The vast majority did not. Those few sporadic users who won against the odds reinforced the symbolic functions of the court and helped to maintain a sufficient minimum level of confidence in the courts by the non-using public. However, the individuals did not win in sufficient numbers (particularly against large litigants) to demonstrate any redistribution function or to significantly interfere with the reinforcement of the established interests of the dominant plaintiff groups.

The results of the contests where large plaintiffs and small defendants engaged in litigation against one another strongly supported this view. The low rate of defendant participation (default judgments) and the low success rate for small defendants when they were sued by a large plaintiff indicated that the courts were performing as efficient debt collecting mechanisms for large corporate creditors.

However, the numerous contests between small and medium plaintiffs and small and medium defendants cannot be entirely discounted. The fact that these parties showed a greater propensity to use adjudicative court services than the corporate institutions indicate that the dispute resolution role, determination of rights and facilitation of compromise role of the court is a significant factor in court usage

for these clients. The court data set showed that parties of the same size showed a tendency to use the court for genuine disputes rather than for the collection of uncontested debts. The small -v- small contests numbered 65 (out of 500) in the court sample and 14 in the registry sample. The medium -v- medium contests numbered 94 in the court sample and 44 in the registry sample (See Figure 32.) This meant that the court sample was dominated by same size contests (231 out of 500) rather than large plaintiffs suing small defendants (127 out of 500.) These same size contests to resolve disputed claims happened too frequently to be dismissed as token contests to maintain the confidence of the non-using public. The Local Courts were frequently used by parties of similar size (though more small and medium litigants than large) to resolve disputes. More often than not, settlement occurred prior to the hearing (Figure 28) so the court predominantly functioned as a forum where parties came together and reached a settlement.

This dispute resolution or settlement facilitation role was only apparent in those cases which progressed through the registry and entered the Courtroom (by lodgment of a defence and a Certificate of Readiness.) This happened to less than 10% of the Local Court claims filed in the state. The majority of judgements were obtained by default. In these matters, the civil court functioned predominantly to provide quick judgments for corporate creditors in uncontested debt cases.

The court managed to provide a general level of service apparently satisfactory to meet the needs all the plaintiffs but provided a specialised, streamlined service which particularly suited large plaintiffs. Corporate plaintiffs were provided with a particularly good service for efficient debt collection of non-contested claims. The

court functioned predominantly to reinforce institutional outcomes and normative values when it so effectively met corporate requirements. This political function was most visible in the Registry Set where large corporate plaintiffs suing individual small defendants dominated the claim landscape.

Perhaps further research is required to determine whether the service provided to defendants was adequate to meet their needs. This study did not look beyond the filed pleadings to discover whether the defendants who did not appear actually had a triable defence to the claim. The conclusions about the role of the court have come from looking at the litigants before the court and the use they made of the various services provided. It might be interesting to perform further research determine the level of disputes that are not litigated and the characteristics of the parties and disputes that do not come before the Local Courts i.e. disputes which are settled outside the court system, dealt with by tribunals or not resolved at all.

In the Court Set, the dispute resolution and facilitation of compromise function of the court was more apparent as the number of large corporate plaintiffs diminished and more contests occurred between litigants of the similar size. However, it must be remembered that the Court Set (comprised of defended matters) comprised only a small proportion of the total number of cases commenced (8% were defended) and thus the dispute resolution function was only visible in a small minority of Local Court civil cases.

The predominant role of the New South Wales Local Court in the civil jurisdiction, most clearly seen in the Registry Set, was the reinforcement of

normative values and institutional outcomes with the court facilitating the efficient collection of corporate debts from individual citizens.

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APPENDIX

TABLE OF ACTS

FIGURE 1

REGISTRY SET WHO ARE THE PLAINTIFFS?	
Government	10.20%
Public Companies	2.80%
Banks/Credit Unions	21.00%
Finance Companies	6.40%
Insurance Companies	22.20%
Debt Collection Agencies	7.80%
Proprietary Companies	21.20%
Professionals	3.60%
Small Businesses	0.60%
Individuals	4.40%

THE PLAINTIFFS

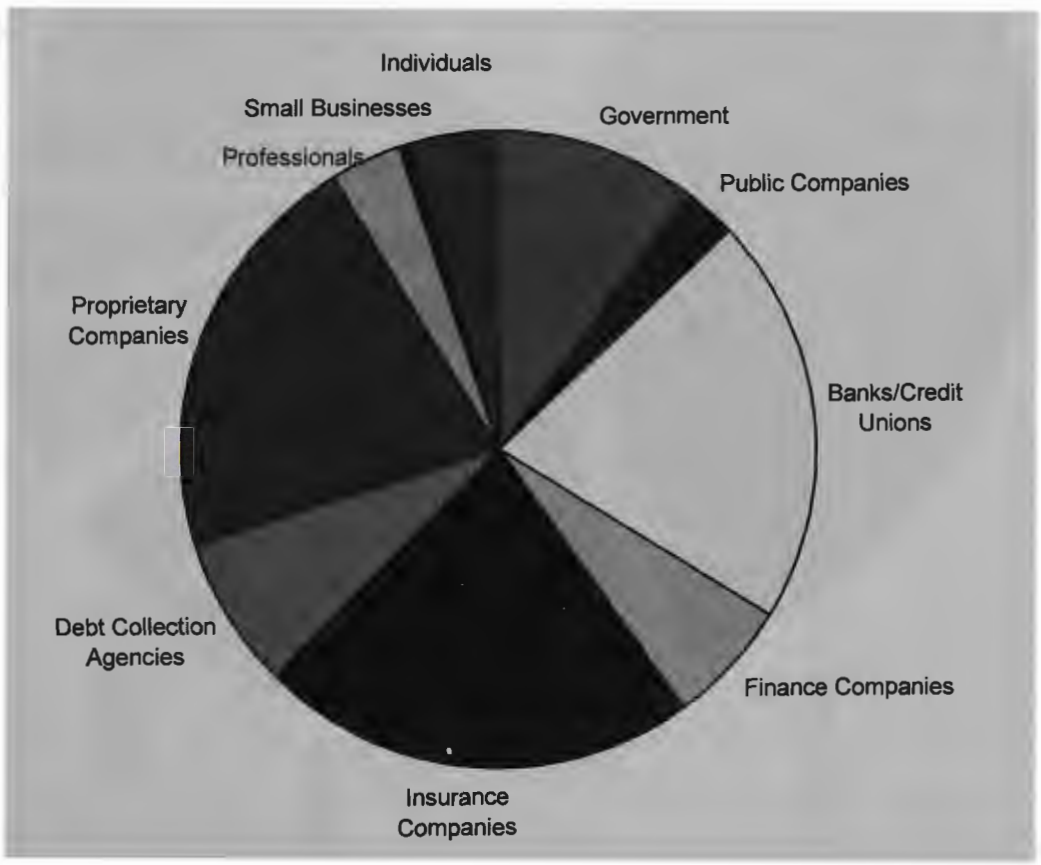


FIGURE 2

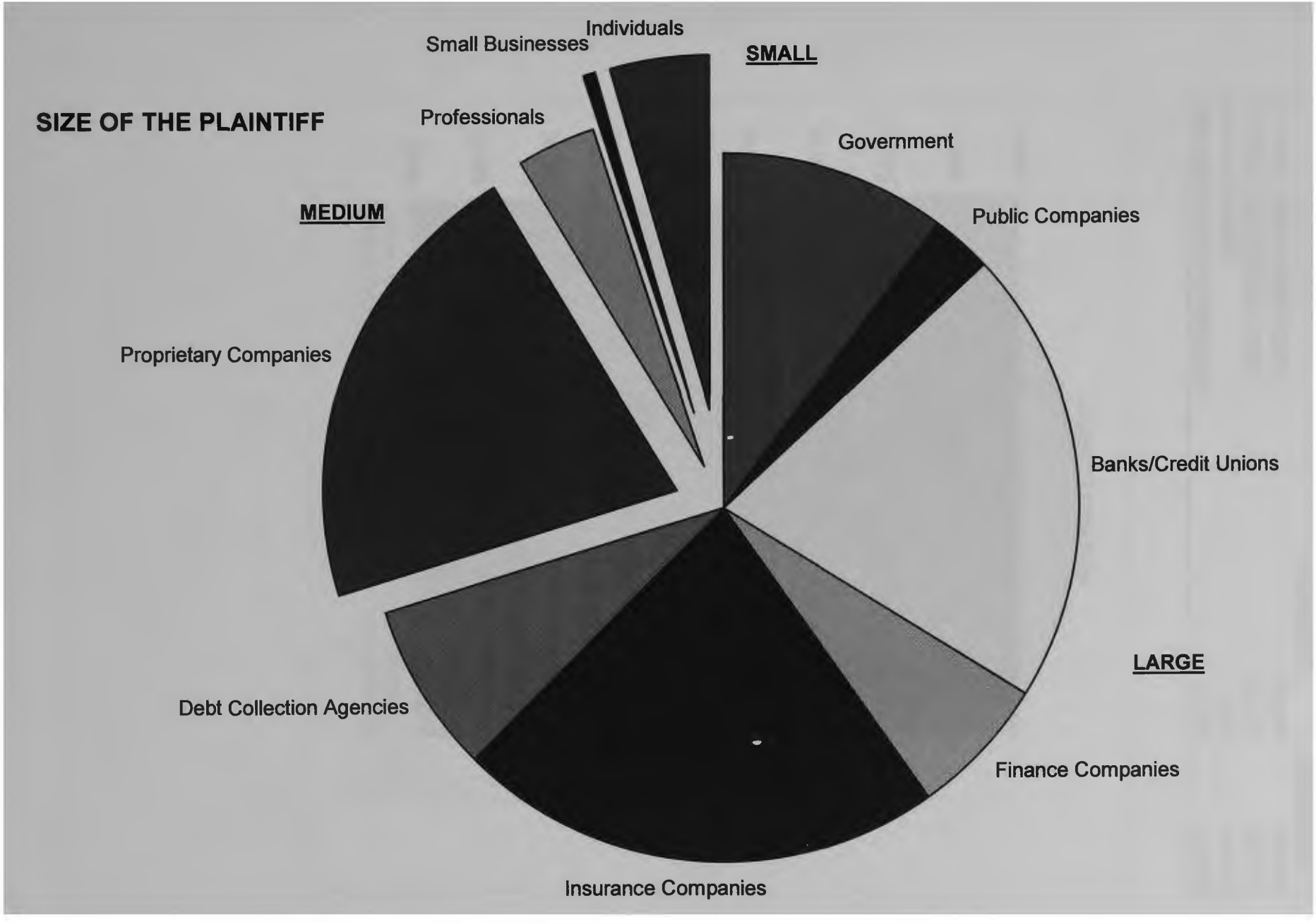

SIZE OF THE PLAINTIFF
Individuals
Small Businesses
SMALL
Professionals
Government
MEDIUM
Public Companies
Proprietary Companies
Banks/Credit Unions
LARGE
Debt Collection Agencies
Finance Companies
Insurance Companies

FIGURE 3

SERVICE ADDRESS OF REGISTRY CLIENTS

	PLAINTIFF	*DEFENDANT*
LOCAL: CBD & INNER CITY	81.60%	14.40%
SYDNEY SUBURBAN AREA	16.80%	58.00%
NSW COUNTRY	1.20%	16.80%
INTERSTATE OR OVERSEAS	0.40%	10.80%

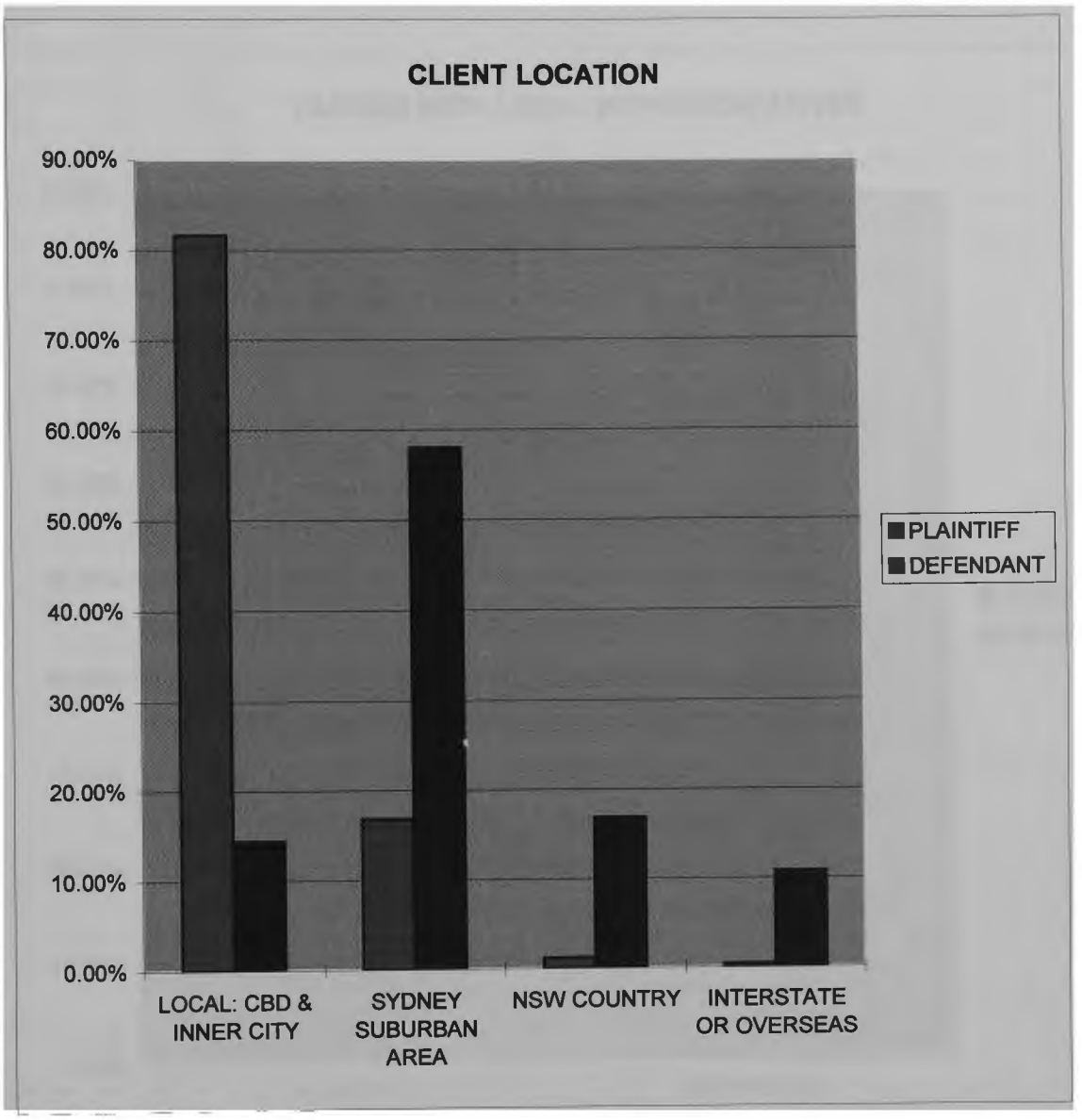


FIGURE 4

REGISTRY SET
LEGAL REPRESENTATION

44.4% of parties had legal representation

	Percentage with legal representative
PLAINTIFF	80.60%
DEFENDANT	8.20%

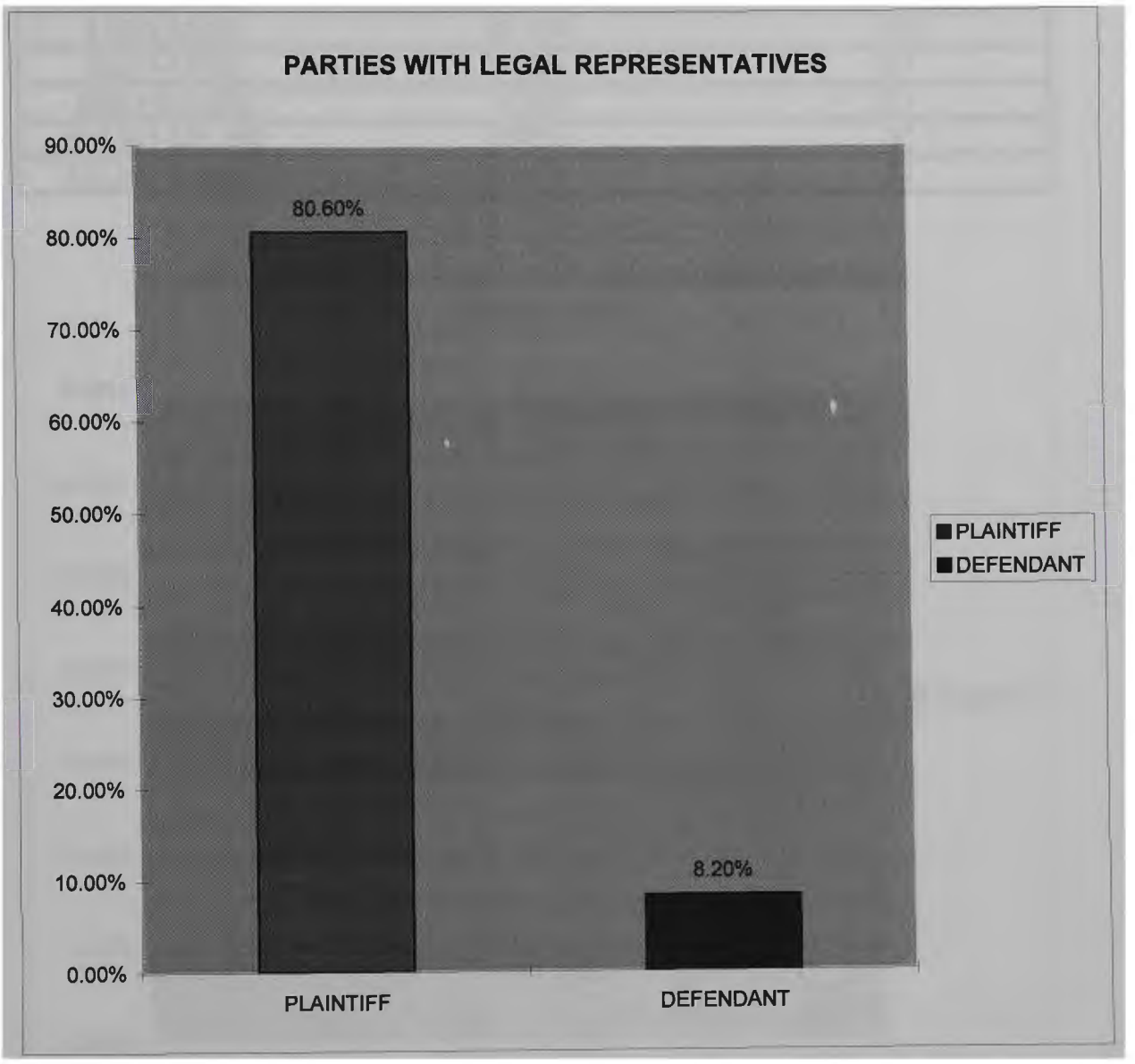
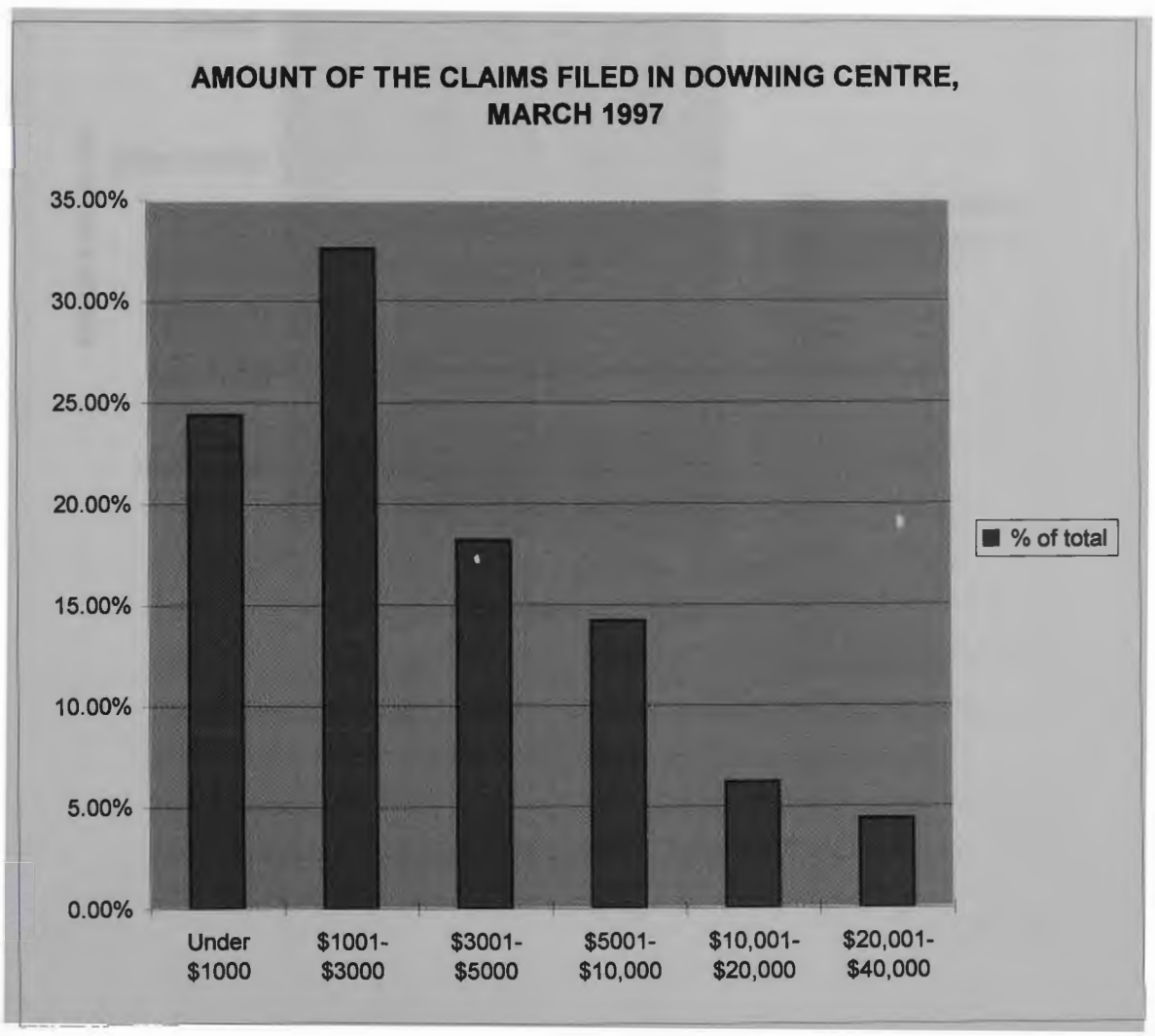


FIGURE 5

AMOUNT OF CLAIM: DOWNING CENTRE, MARCH 1997 REGISTRY SET

	% of total	*No. of claims*
Under $1000	24.40%	122
$1001-$3000	32.60%	163
$3001-$5000	18.20%	91
$5001-$10,000	14.20%	71
$10,001-$20,000	6.20%	31
$20,001-$40,000	4.40%	22



REGISTRY SET
AMOUNT OF THE CLAIM

FIGURE 6

	Under $3000	*$3001-5000*	*$5001-$10,000*	*$10,000-$40,000*
Downing Centre	66.50%	12.80%	12%	9.10%
New South Wales	57.00%	18.20%	14.20%	10.60%

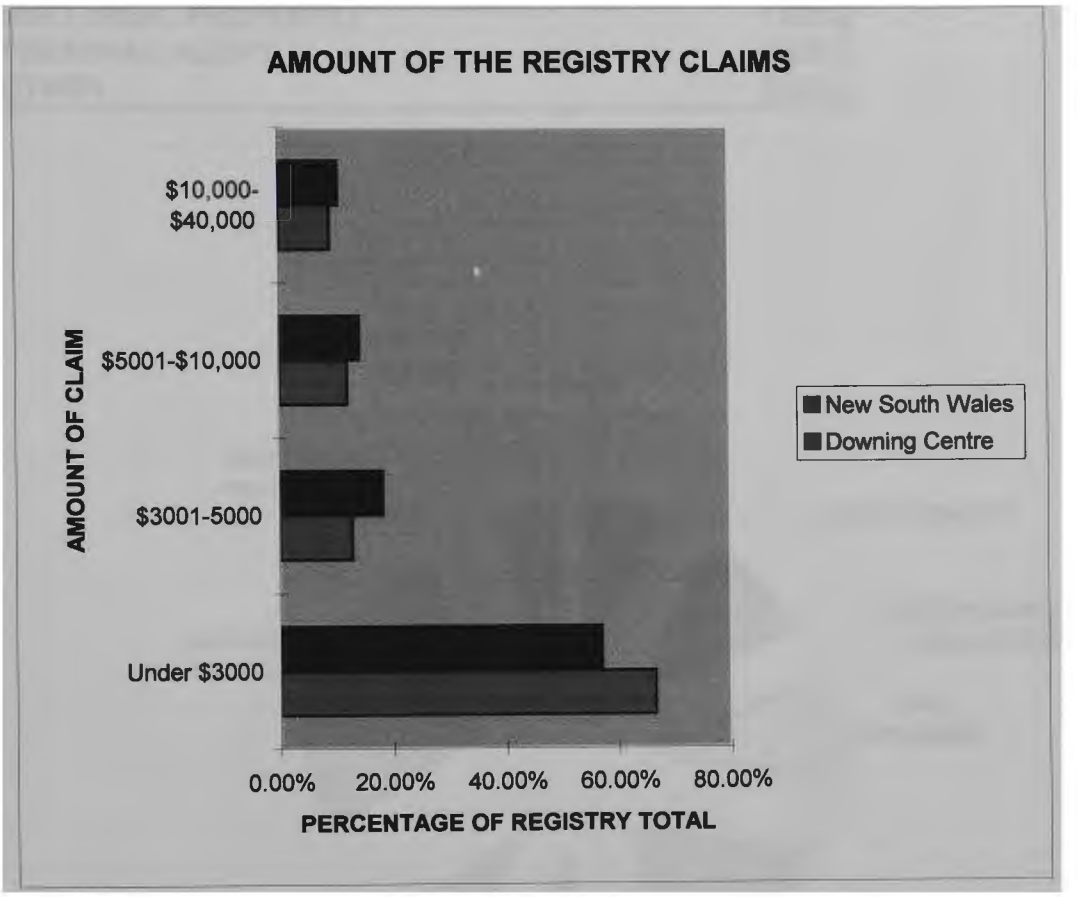


FIGURE 7

REGISTRY SET
CAUSE OF ACTION

	Percentage of cases filed
COURT PENALTY	7.60%
MOTOR VEHICLE NEGLIGENCE	10.40%
LOAN AGREEMENT	9.60%
CREDIT CARD	18.80%
RETAIL STORE CARD	8.00%
GOODS SOLD & DELIVERED	11.80%
SERVICES PROVIDED	29.40%
RENT (REAL PROPERTY)	1.60%
PERSONAL INJURY	0.40%
OTHER	2.40%

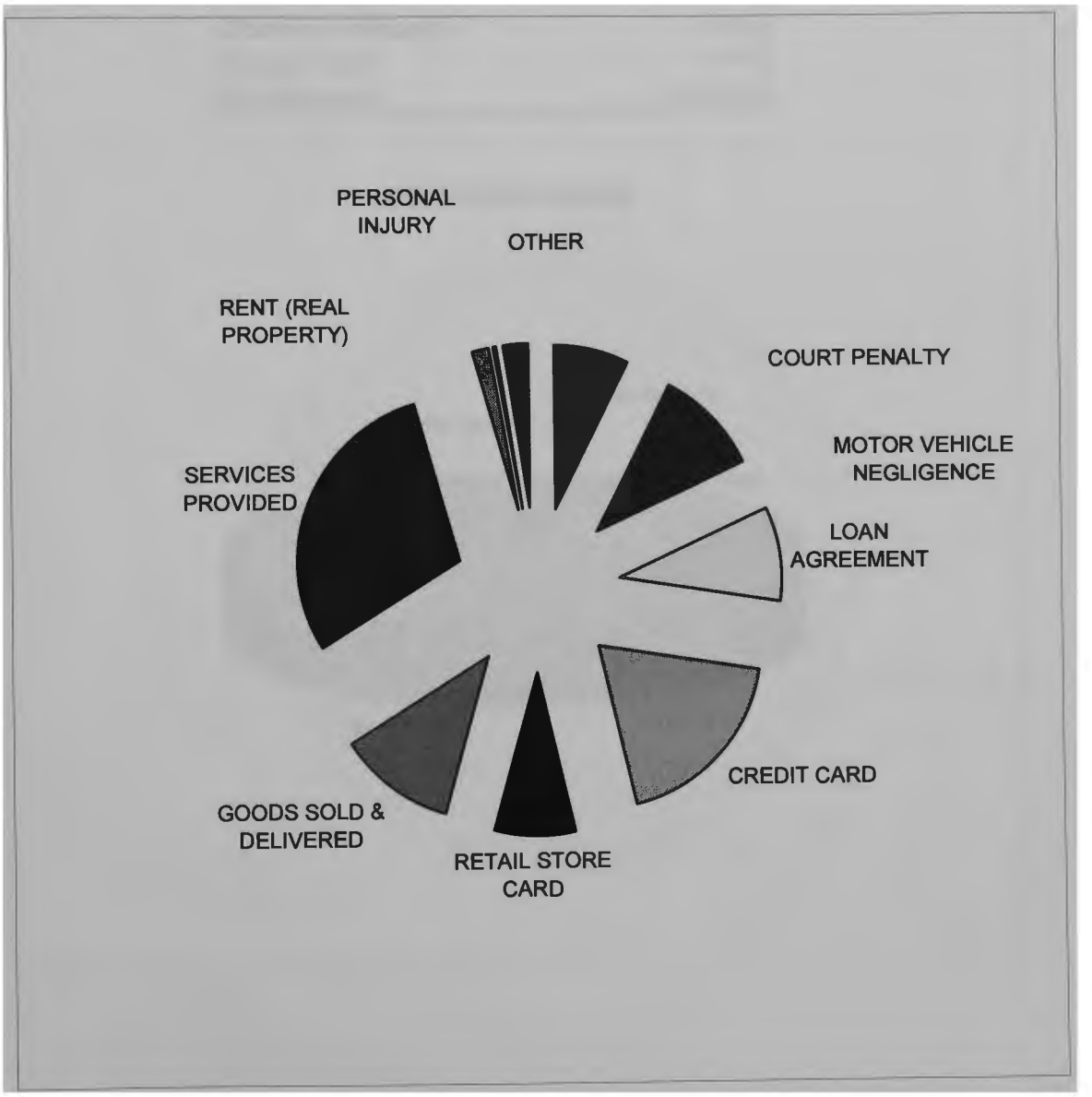


FIGURE 8

REGISTRY SET
TYPE OF DEFENCES LODGED

Registry Data Sample
92% of claims are undefended
8% of claims are defended

Downing Centre 1997(total)
9.45% of claims are defended

Nsw 1997 (total)
11.3% of claims are defended

	Defences
Full defence	5.40%
Quantum defence	1.60%
Cross claim	1.00%
No defence	92.00%

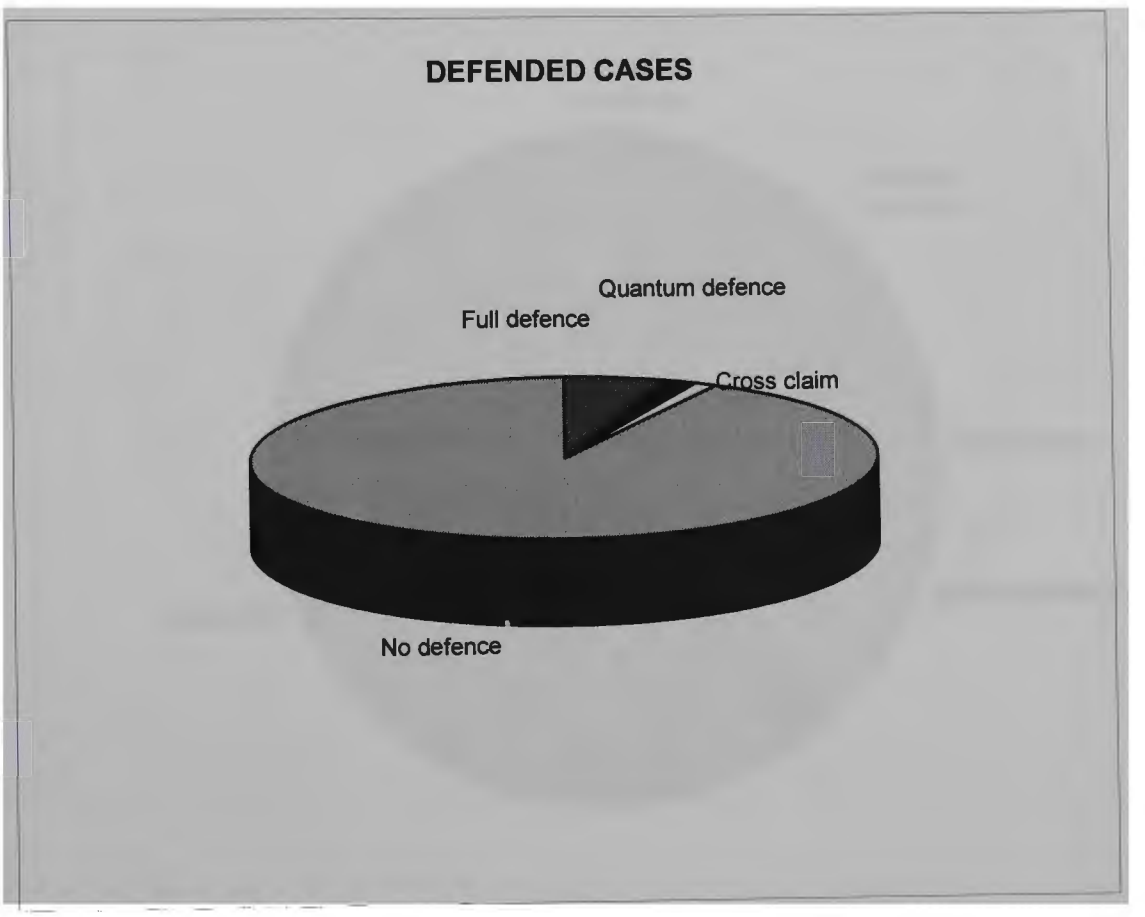
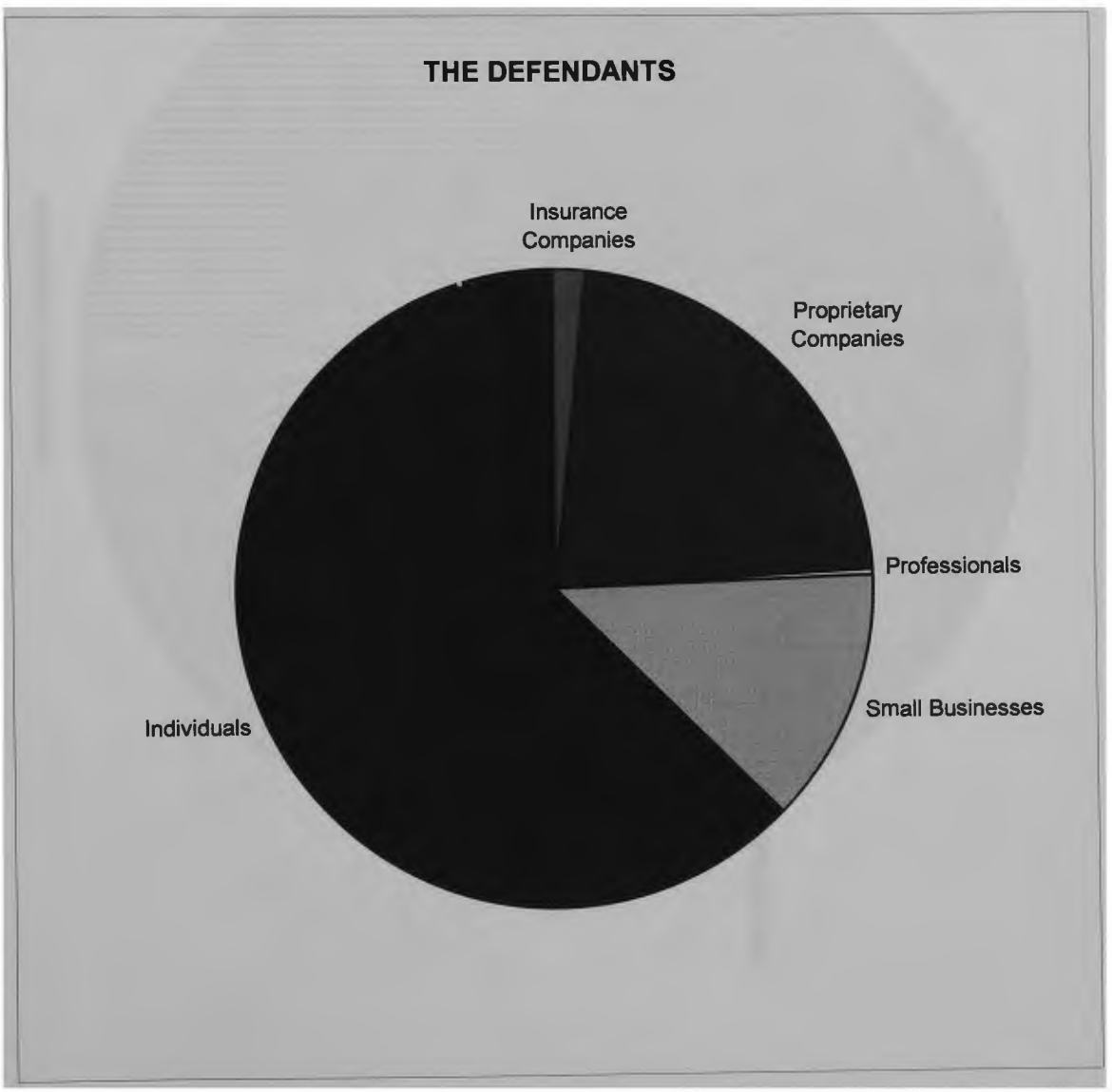


FIGURE 9

REGISTRY SET
WHO ARE THE DEFENDANTS?

Government	0.80%
Debt Collection Agencies	-
Public Companies	0.80%
Banks/Credit Unions	-
Finance Companies	-
Insurance Companies	1.60%
Proprietary Companies	22.40%
Professionals	0.20%
Small Businesses	13.00%
Individuals	62.00%



SIZE OF DEFENDANTS

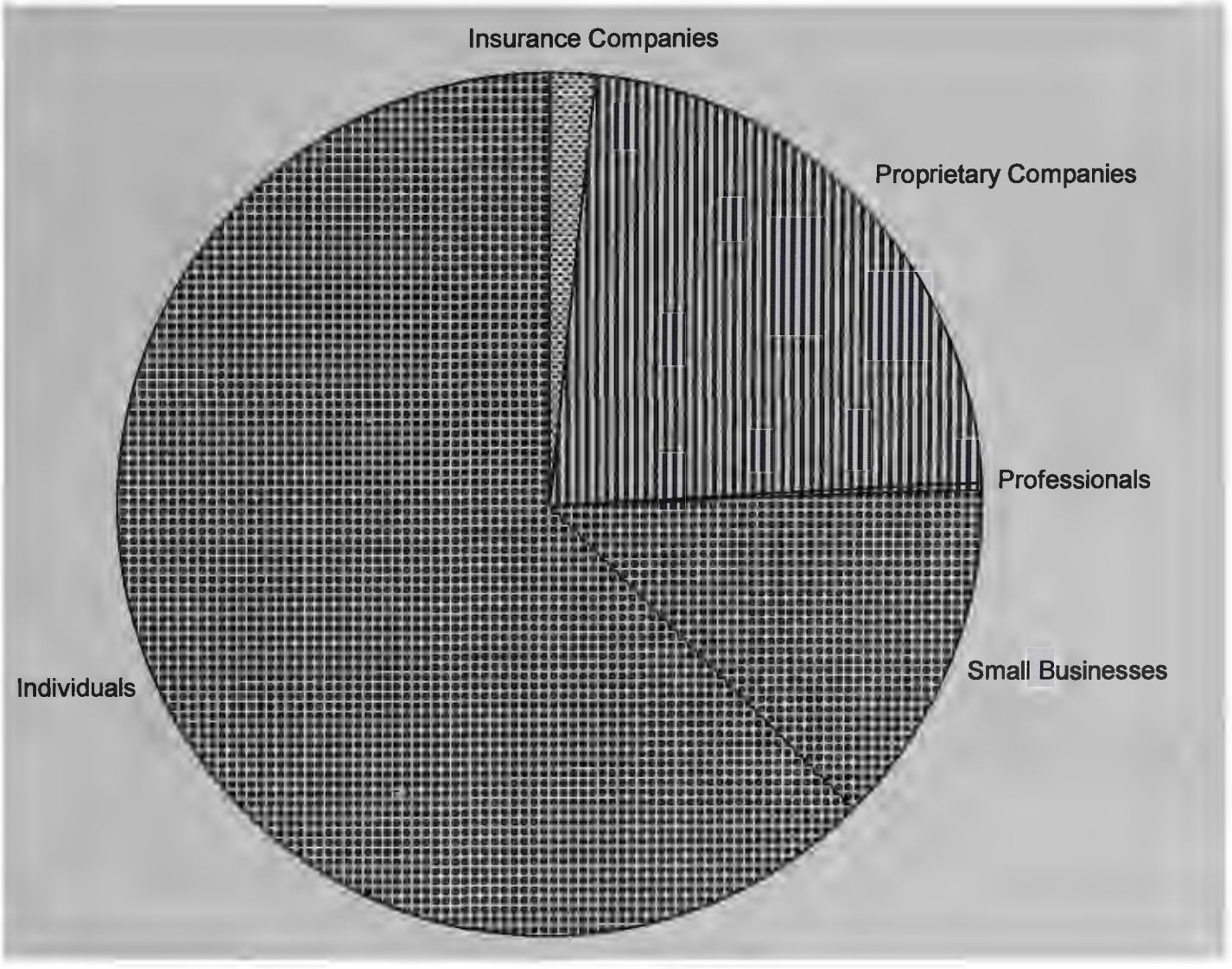


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FIGURE 11

REGISTRY SET
JUDGMENT

	Percentage of cases
DEFAULT	38.00%
CONFESSION	2.60%
REGISTERED ORDER	6.60%
COURT HEARING	0.20%
ARBITRATION HEARING	0.60%
SMALL CLAIMS HEARING	1.60%
SETTLEMENT	5.80%
NO JUDGMENT	44.60%

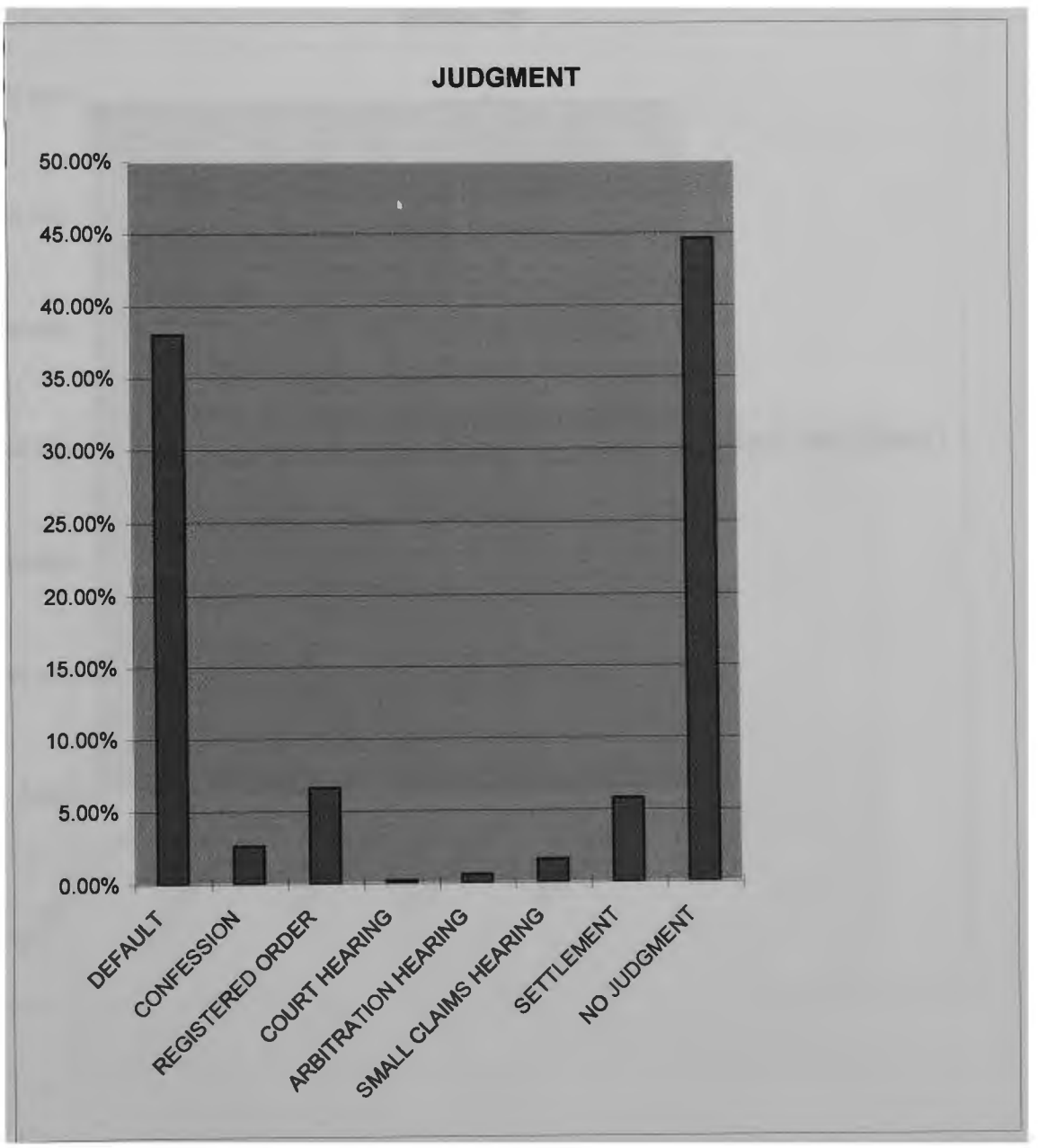

FIGURE 12

REGISTRY SET
RESULTS

	Percentage of cases
PLAINTIFF (in full)	50.00%
PLAINTIFF (in part)	2.20%
DEFENDANT	0.80%
WITHDRAWN	5.00%
NO RESULT	42.00%

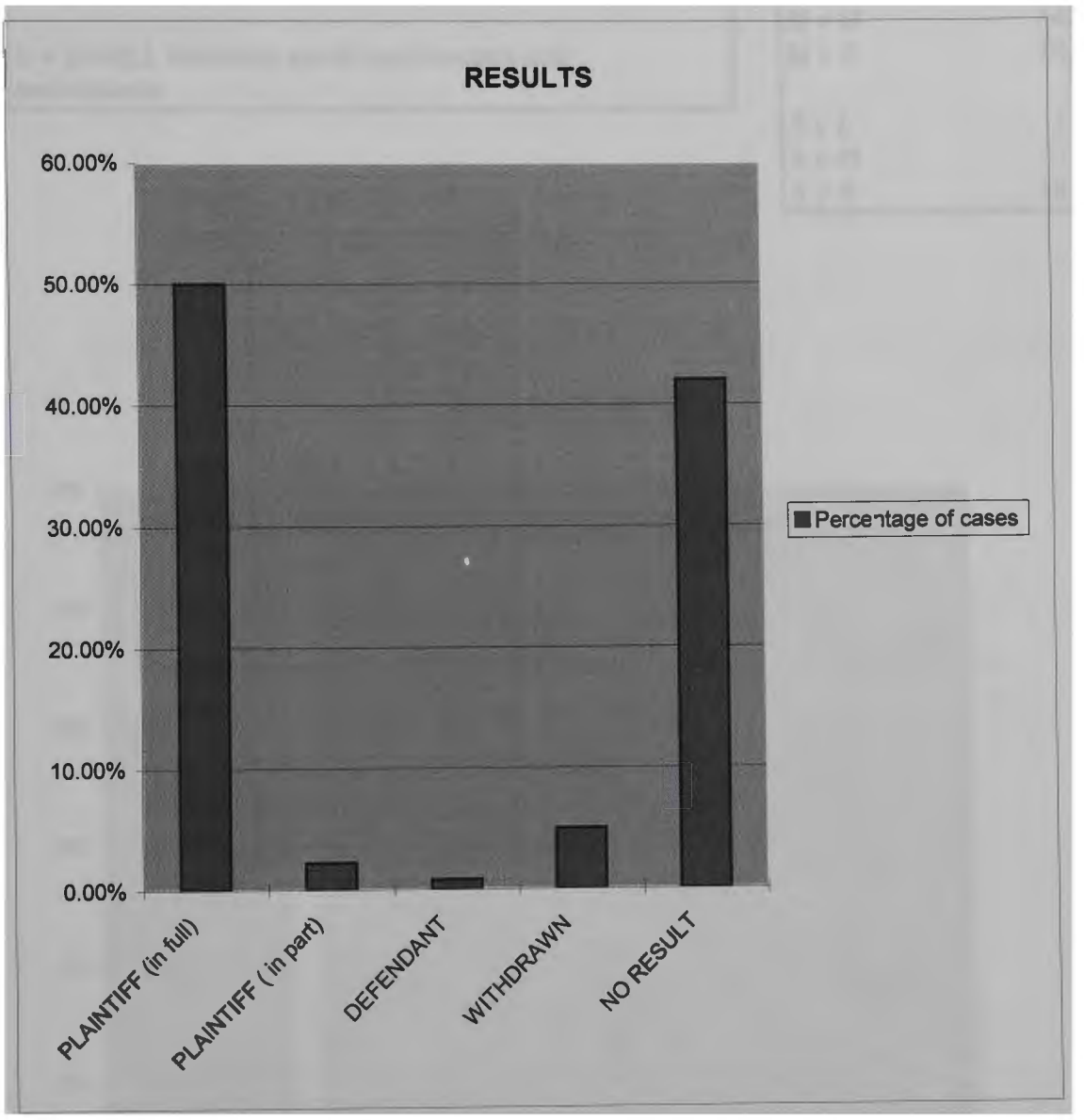

FIGURE 13

REGISTRY SET: THE TEAMS

L= LARGE includes government, public companies, banks, credit unions,finance companies, insurers and debt collection agencies.

M = MEDIUM includes proprietary companies and professionals.

S = SMALL includes small businesses and individuals.

P v D	No. of cases
L v L	9
L v M	64
L v S	279
M v L	2
M v M	44
M v S	78
S v L	1
S v M	5
S v S	18

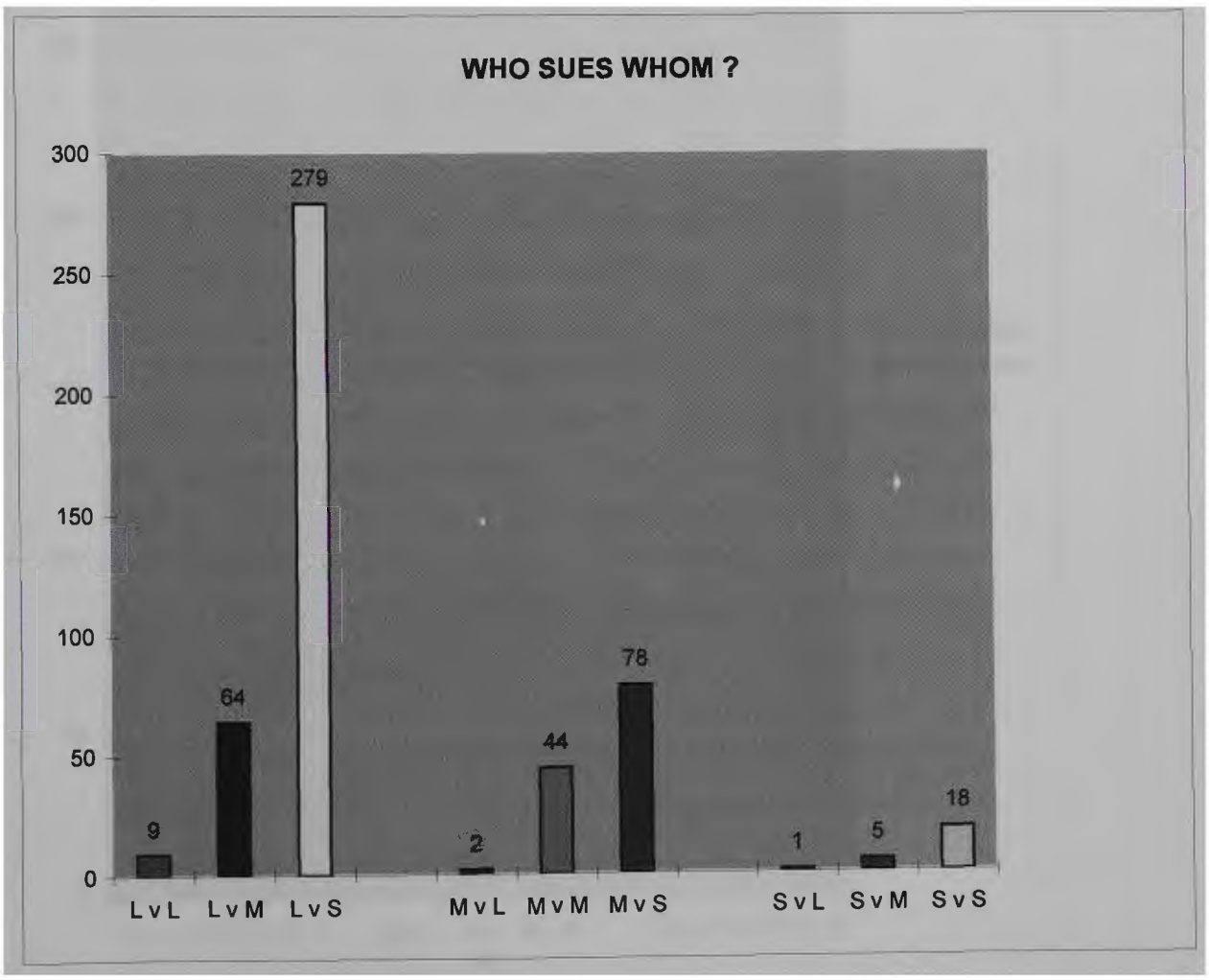

FIGURE 14

REGISTRY SET: TEAM RESULTS

P v D	No. of cases	Plaintiff w	Deft. wins
L v L	9	4	4
L v M	64	31	2
L v S	279	148	1
M v L	2	0	0
M v M	44	23	2
M v S	78	40	1
S v L	1	0	1
S v M	5	1	0
S v S	18	5	3

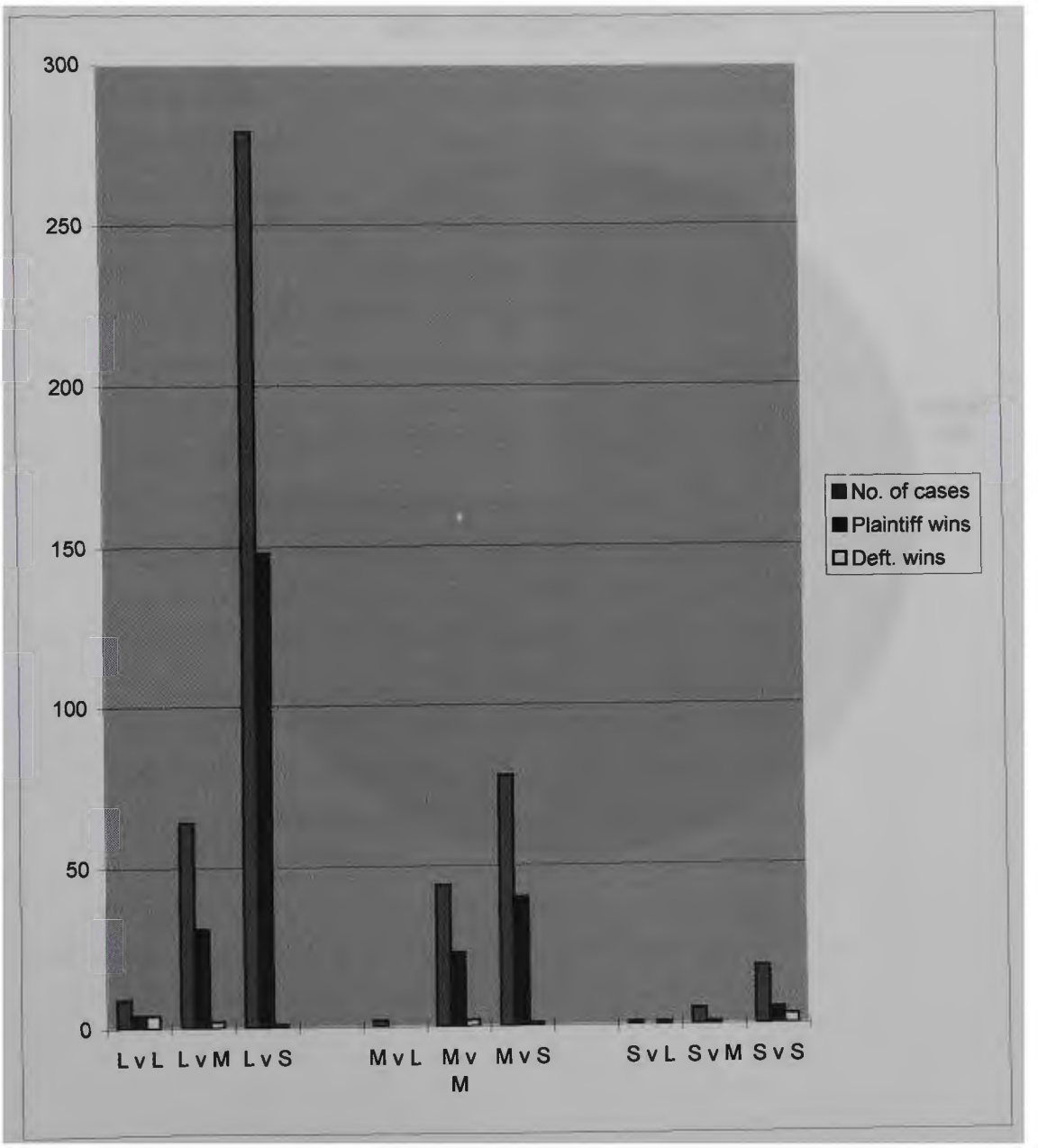

FIGURE 15

COURT SET
SIZE OF THE PLAINTIFF

LARGE	43.20%
MEDIUM	33%
SMALL	23.80%

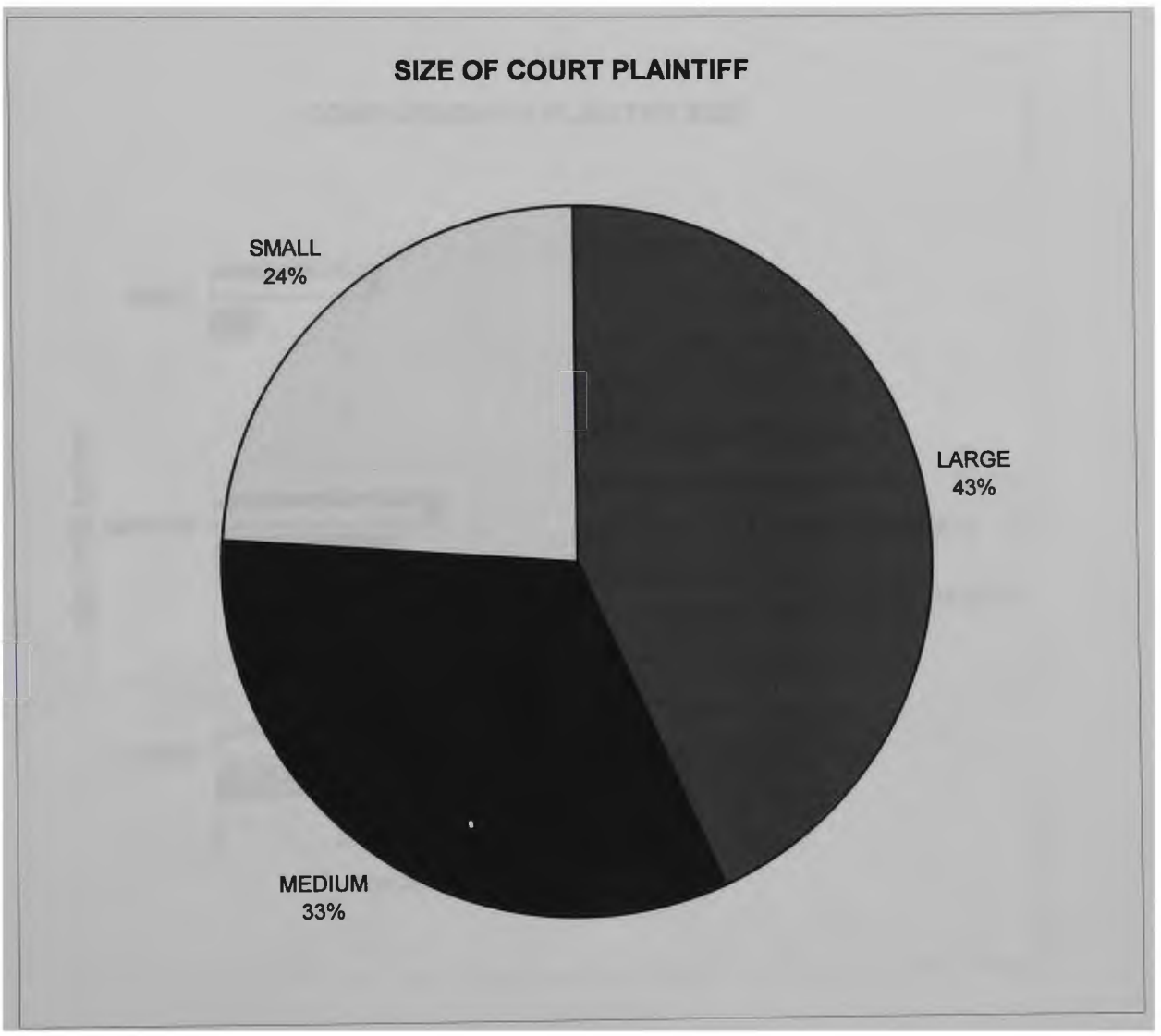

FIGURE 16

PLAINTIFF SIZE

	REGISTRY DATA %	COURT DATA %
LARGE	70.4	43.2
MEDIUM	24.8	33
SMALL	4.8	23.8

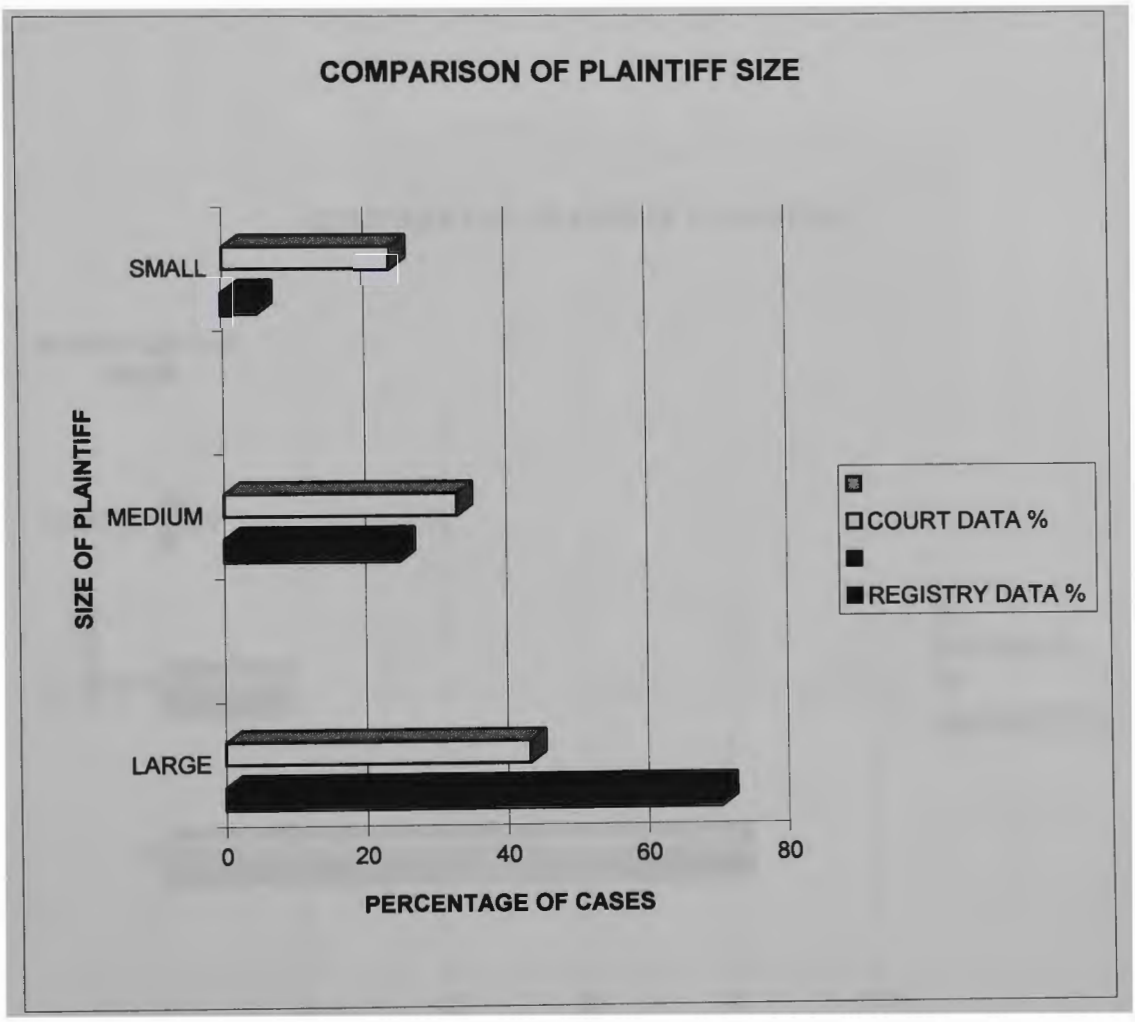

FIGURE 17

LOCATION OF PLAINTIFF

	REGISTRY %	COURT %
LOCAL	81.6	81.4
METROPOLITAN	16.8	17
COUNTRY NSW	1.2	1.6
INTERSTATE/OVERSEAS	0.4	0

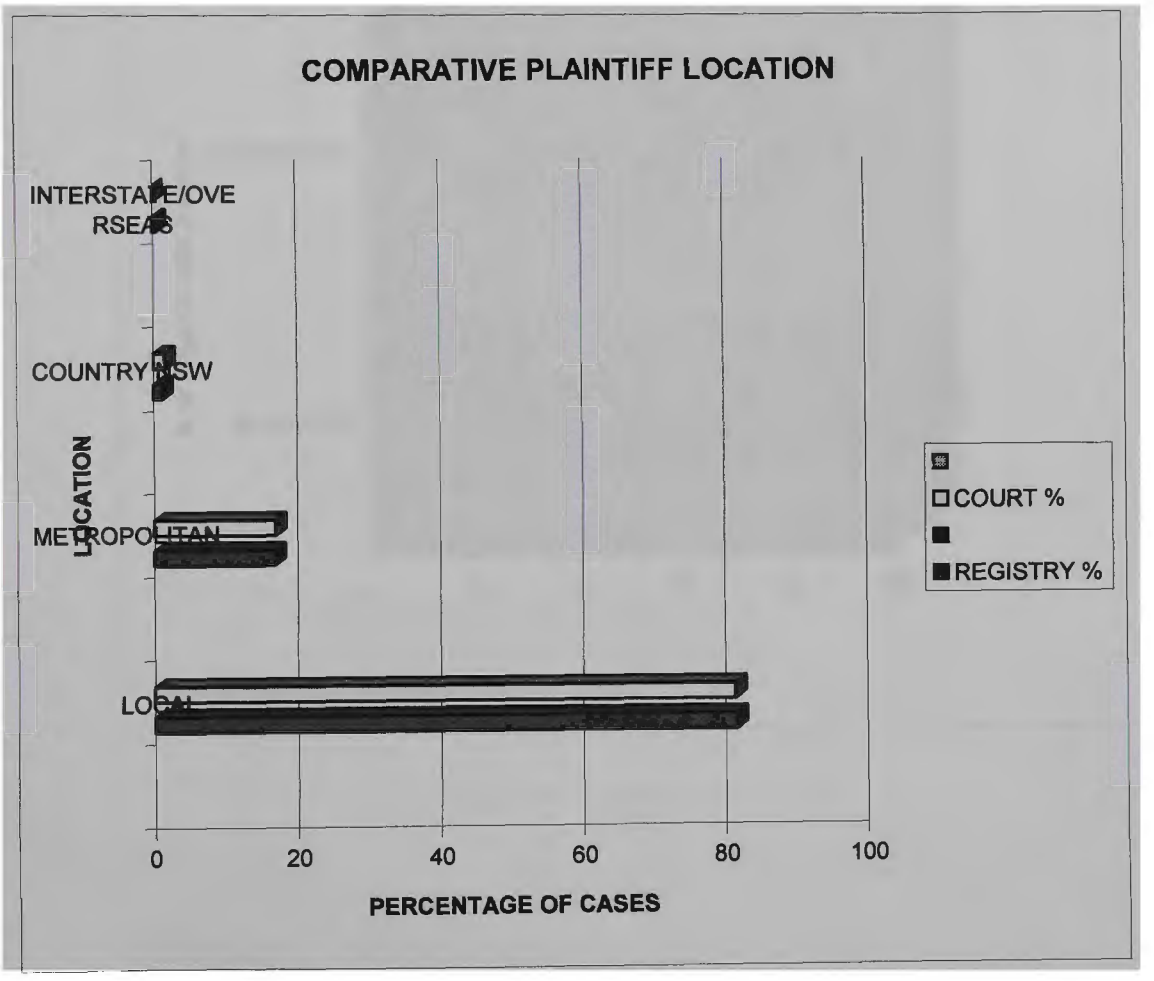

FIGURE 18

COURT SET: LEGAL REPRESENTATION

	%
PLAINTIFF	97
DEFENDANT	78

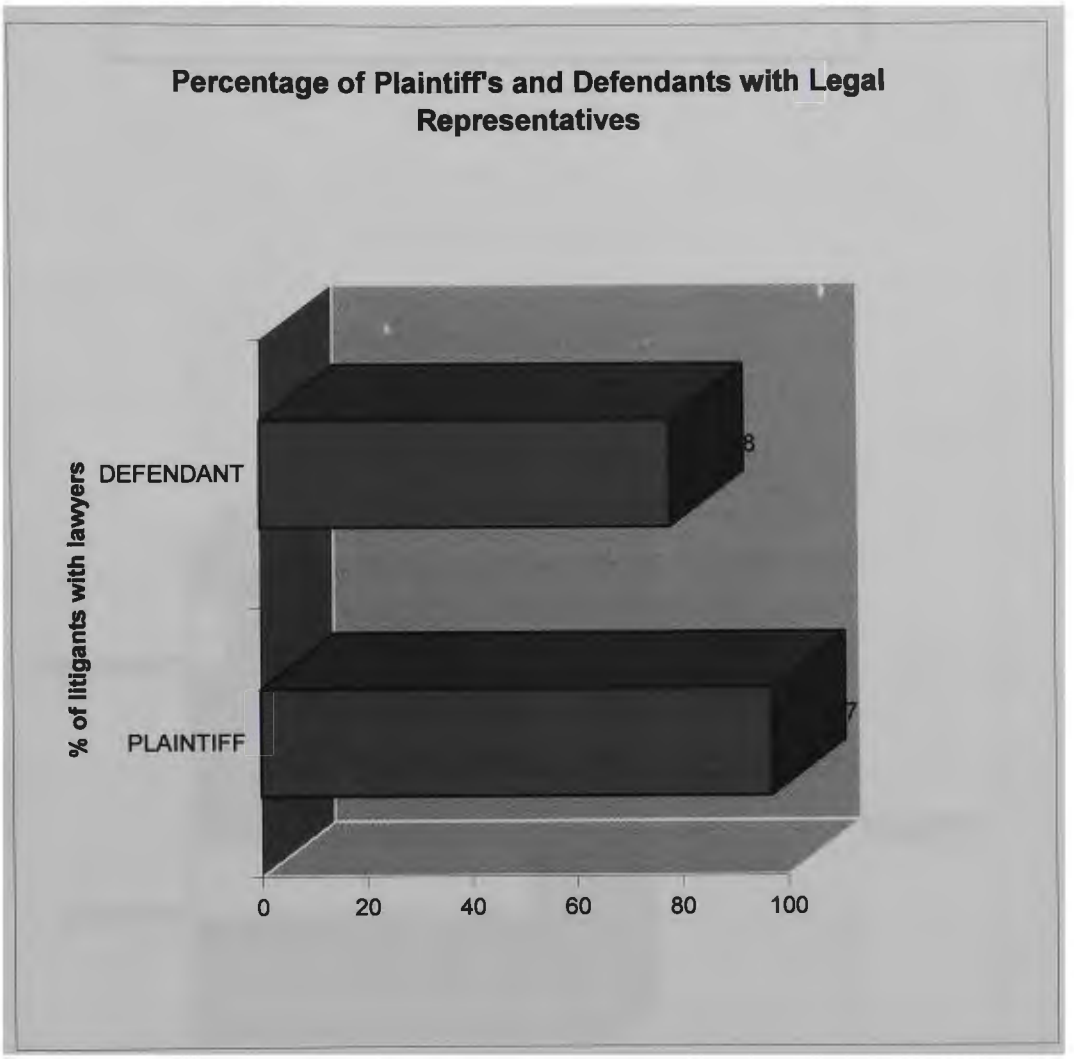

FIGURE 19

COMPARATIVE LEGAL REPRESENTATION

	REGISTRY	COURT
PLAINTIFF	80.60%	97%
DEFENDANT	8.20%	78%

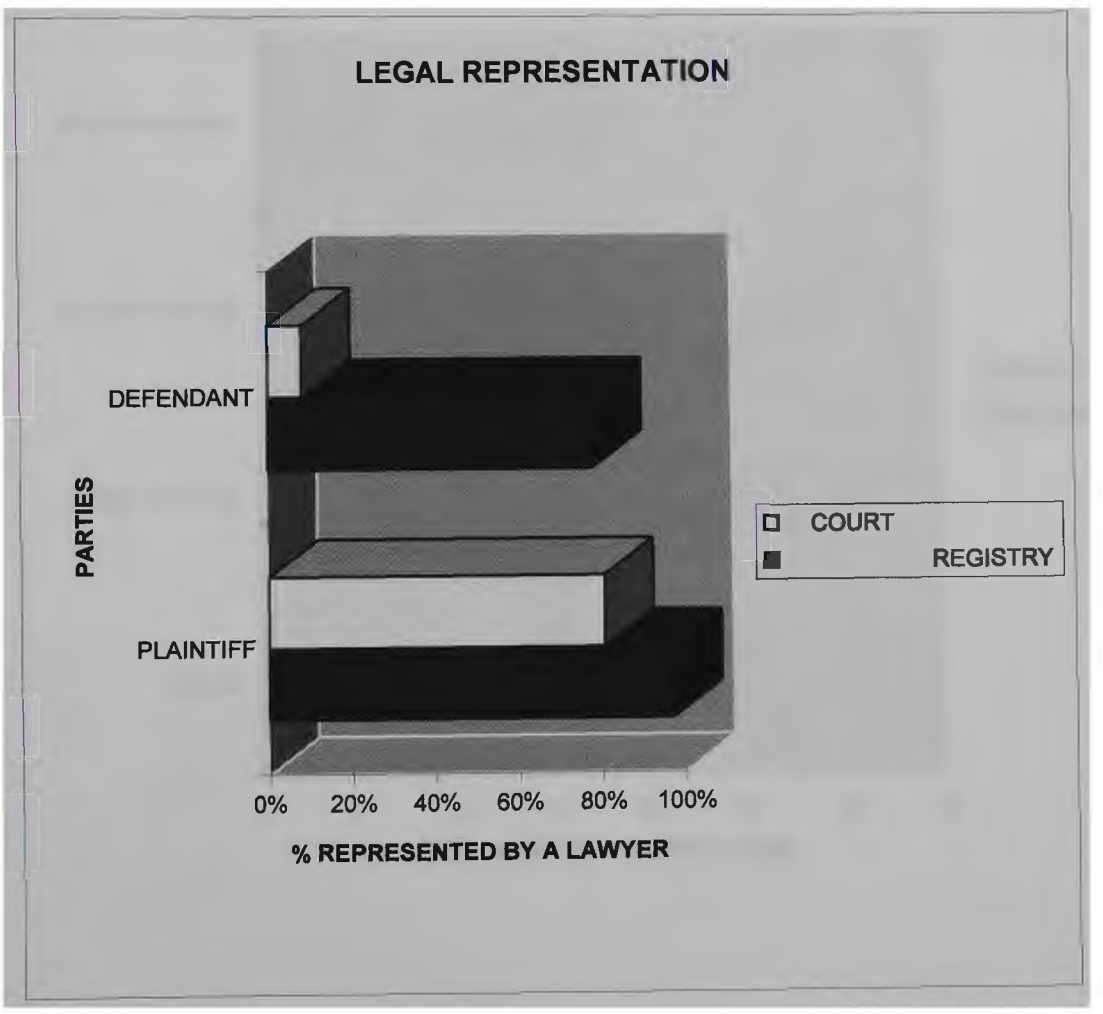

FIGURE 20

COURT SET
AMOUNT OF CLAIM

	%
<$5000	27.8
$5001-$10,000	32.2
$10,001-$20,000	21
$20,001-$40,000	19

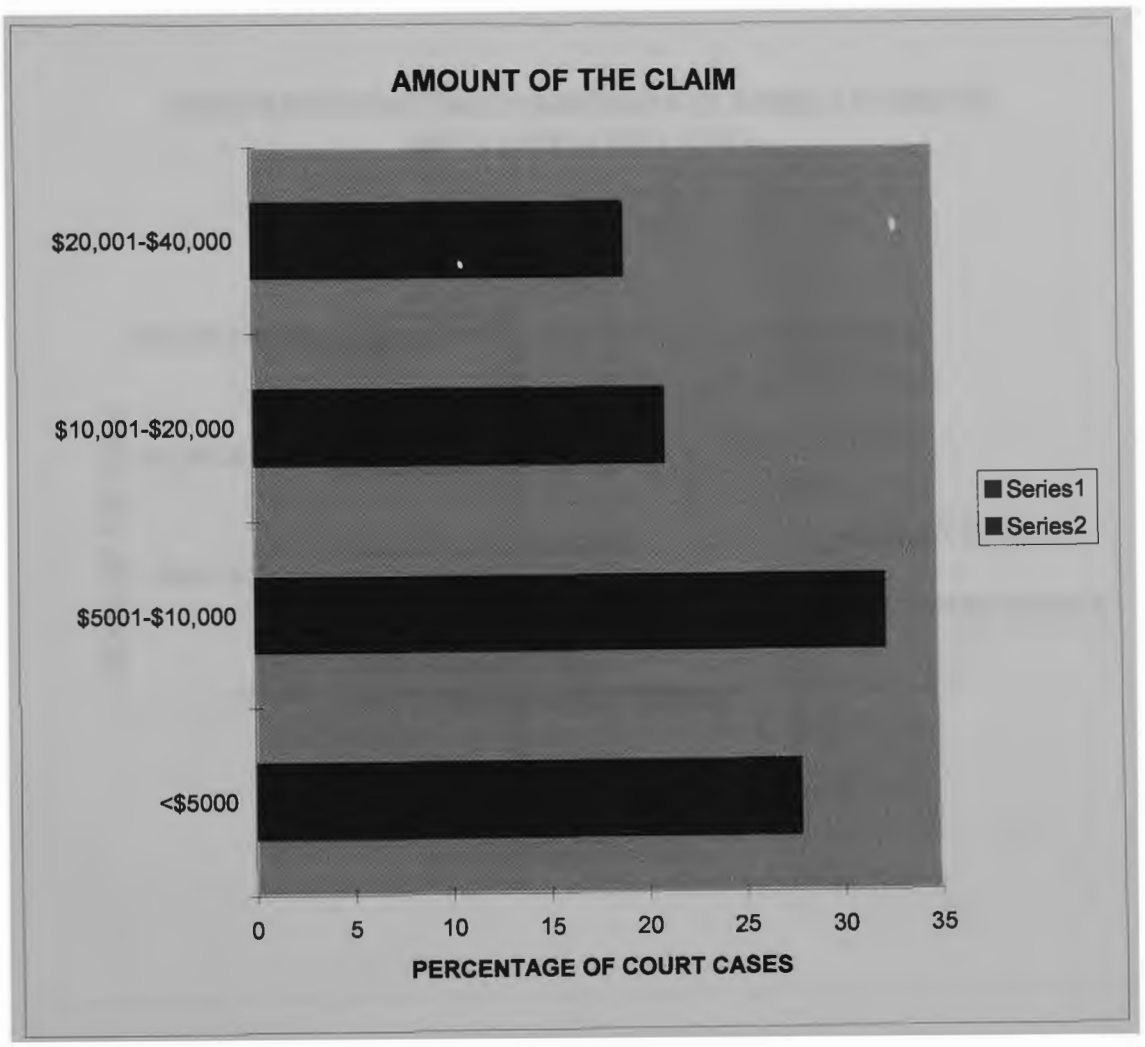

FIGURE 21

AMOUNT OF THE CLAIM

	REGISTRY CASES %	*COURT CASES %*
<$5,000	42.3	27.8
$5001-$10,000	33	32.2
$10,001-$20,000	14.4	21
$20,000-$40,000	10.2	19

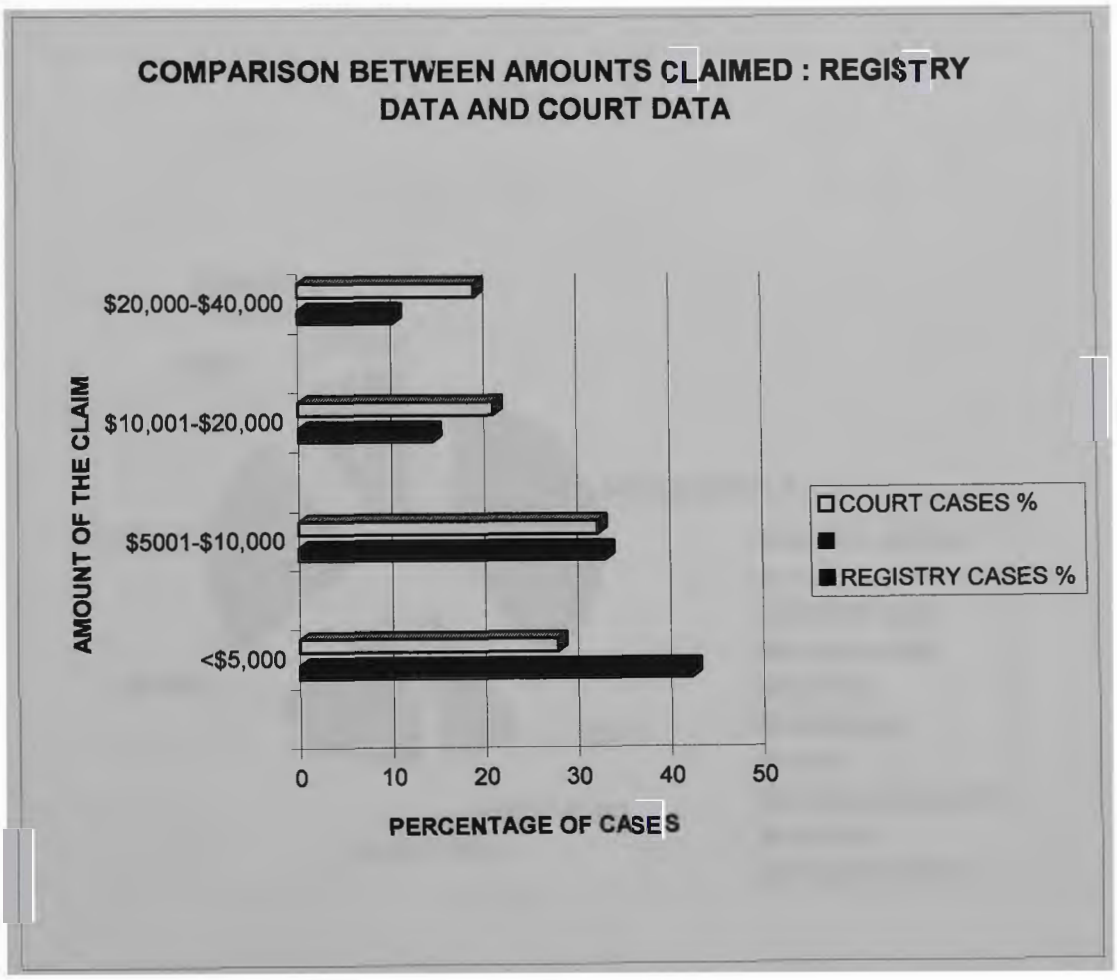

FIGURE 22

COURT SET
CAUSE OF ACTION

	%
MOTOR VEHICLE	39.6
LOAN	6.4
CREDIT CARD	0.6
STORE CARD	0.2
GOODS	17.6
SERVICES	25.4
RENT	4.4
PERSONAL INJURY	1.6
OTHER	4.2
COURT PENALTY	0

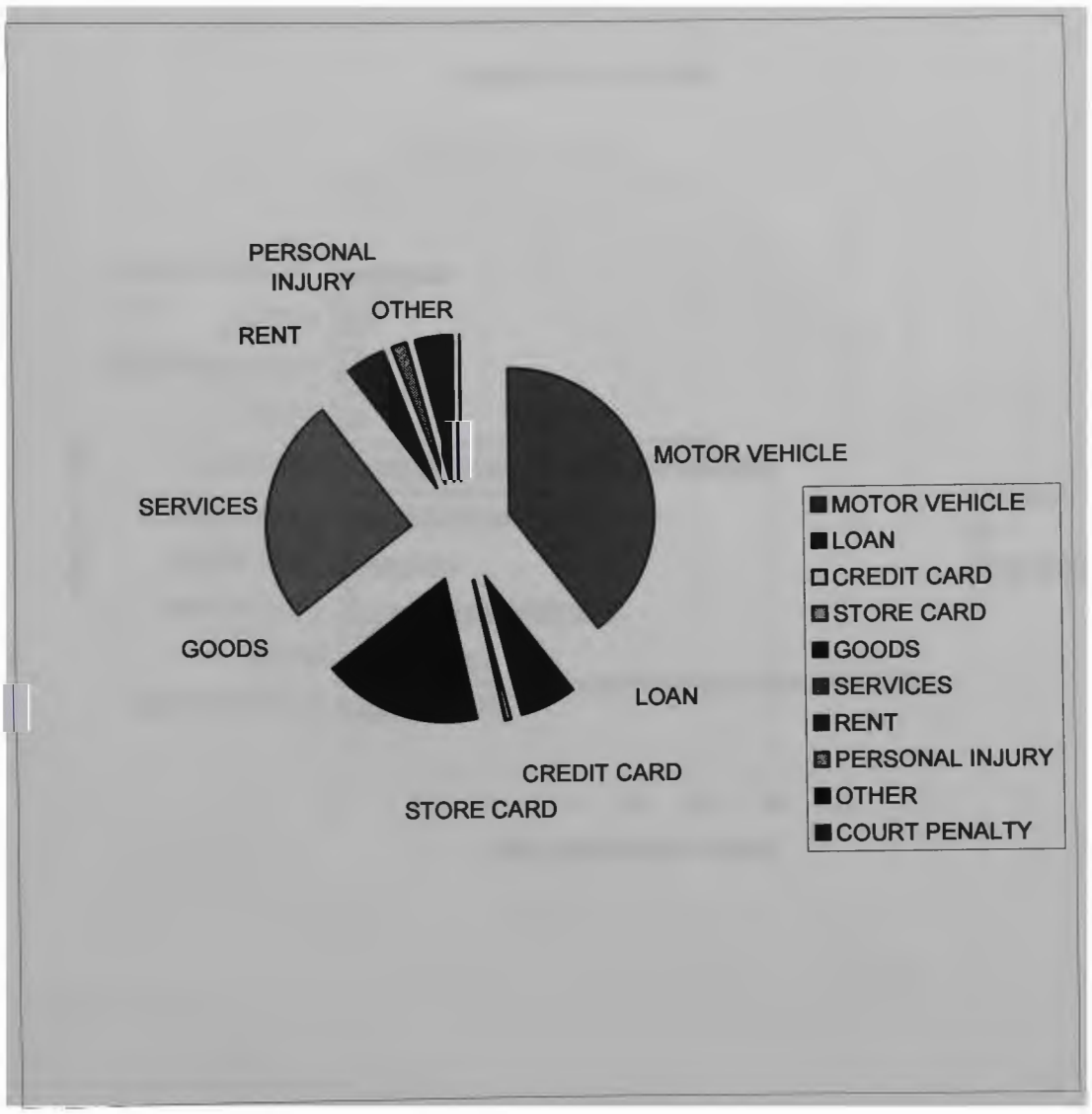

FIGURE 23

CAUSE OF ACTION

	REGISTRY %	COURT %
MOTOR VEHICLE	10.4	39.6
LOAN	9.6	6.4
CREDIT CARD	18.8	0.6
STORE CARD	8	0.2
GOODS SOLD	11.8	17.6
SERVICES	29.4	25.4
RENT	1.6	4.4
PERSONAL INJURY	0.4	1.6
OTHER	2.4	4.2
COURT PENALTY	7.6	0

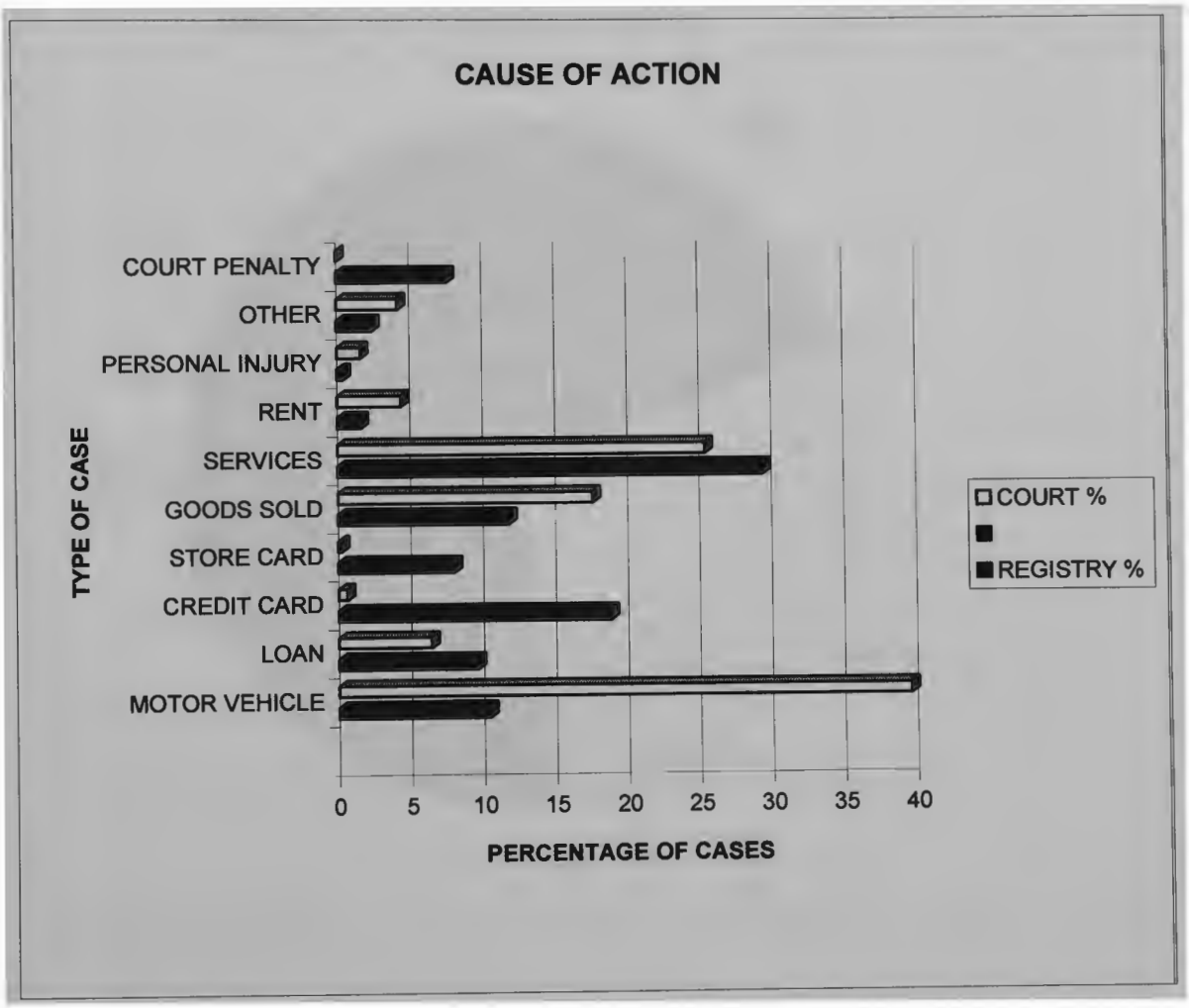

FIGURE 24

COURT SET
SIZE OF DEFENDANT

	%
LARGE	19.2
MEDIUM	29.4
SMALL	51.4

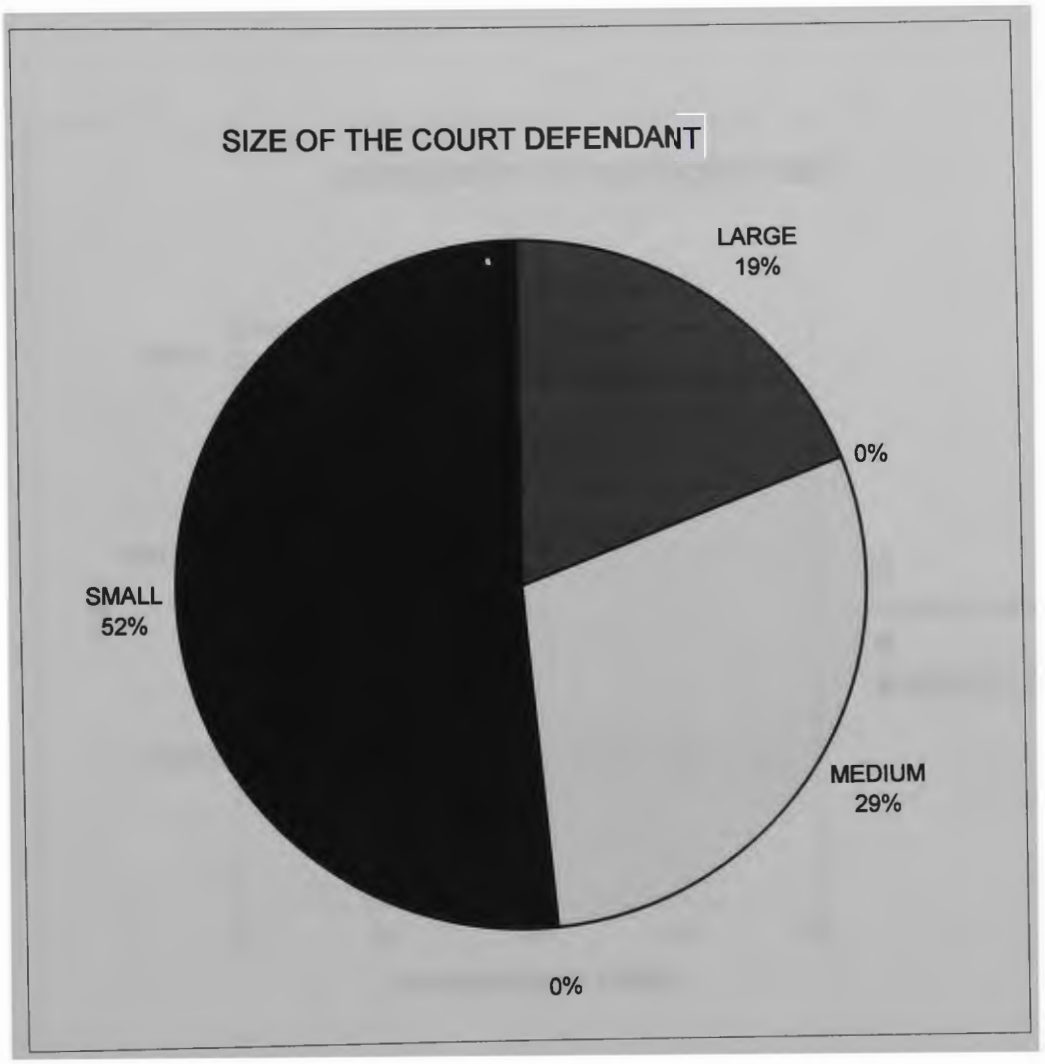

FIGURE 25

SIZE OF DEFENDANT

	REGISTRY DATA %	COURT DATA %
LARGE	2.4	19.2
MEDIUM	22.6	29.4
SMALL	75	51.4

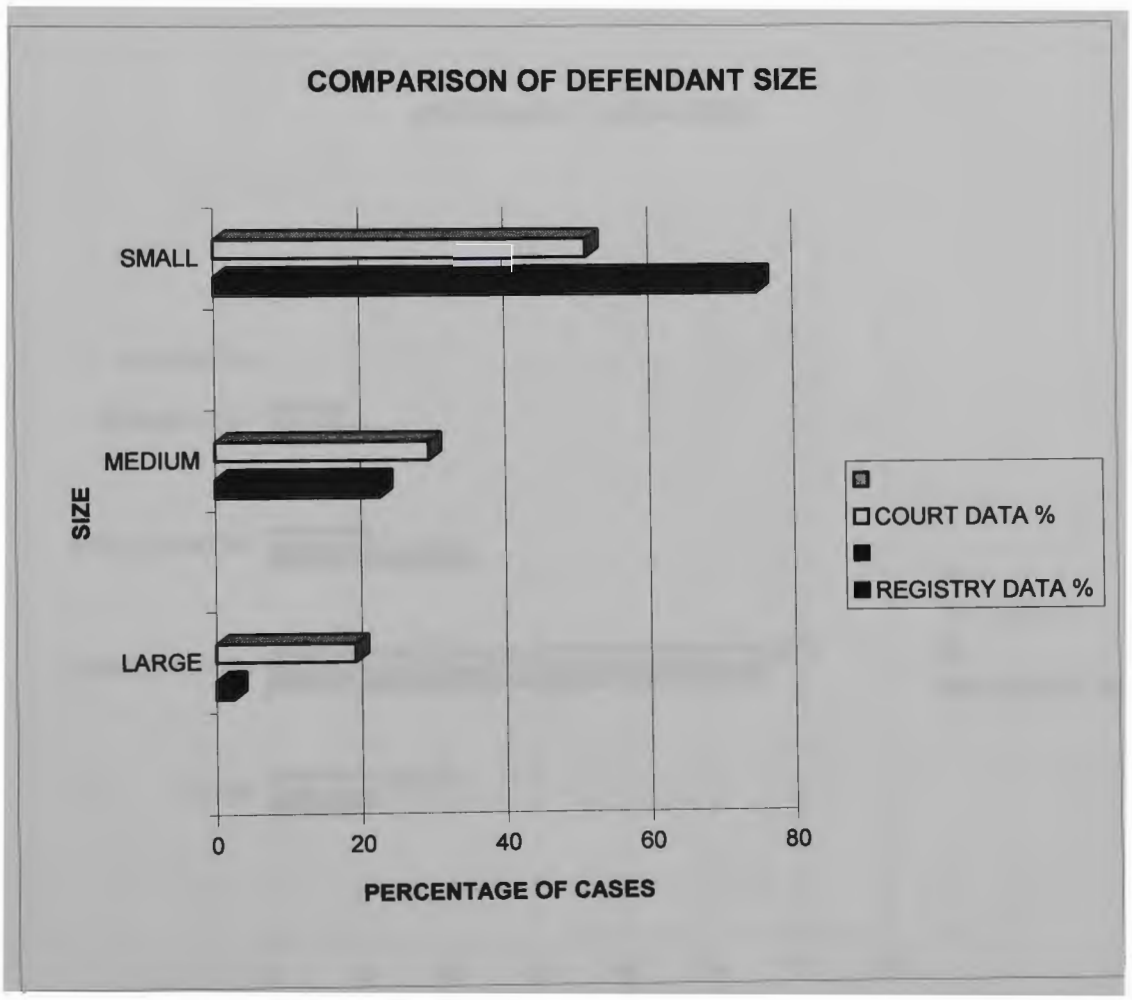

FIGURE 26

DEFENDANT LOCATION

	REGISTRY %	COURT %
LOCAL	11	20.4
METROPOLITAN	55.2	61
NSW COUNTRY	22.4	10.6
INTERSTATE/ OVERSEAS	11.4	8

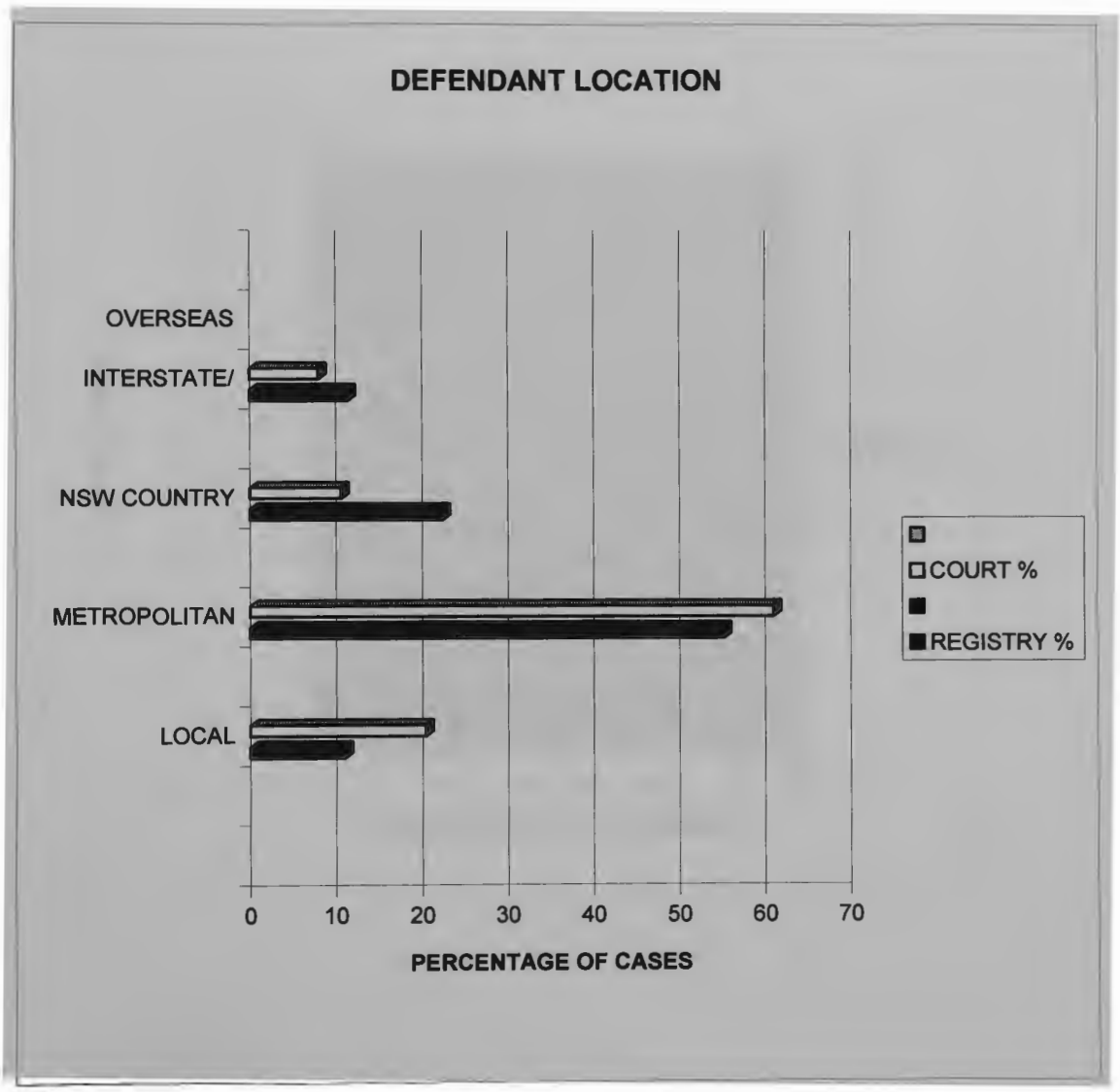

FIGURE 27

COURT SET: CALLOVERS

NO. OF CALLOVERS PER CASE	%
1	26.6
2	30.2
3	14.6
4	11.4
5	6
	11.2

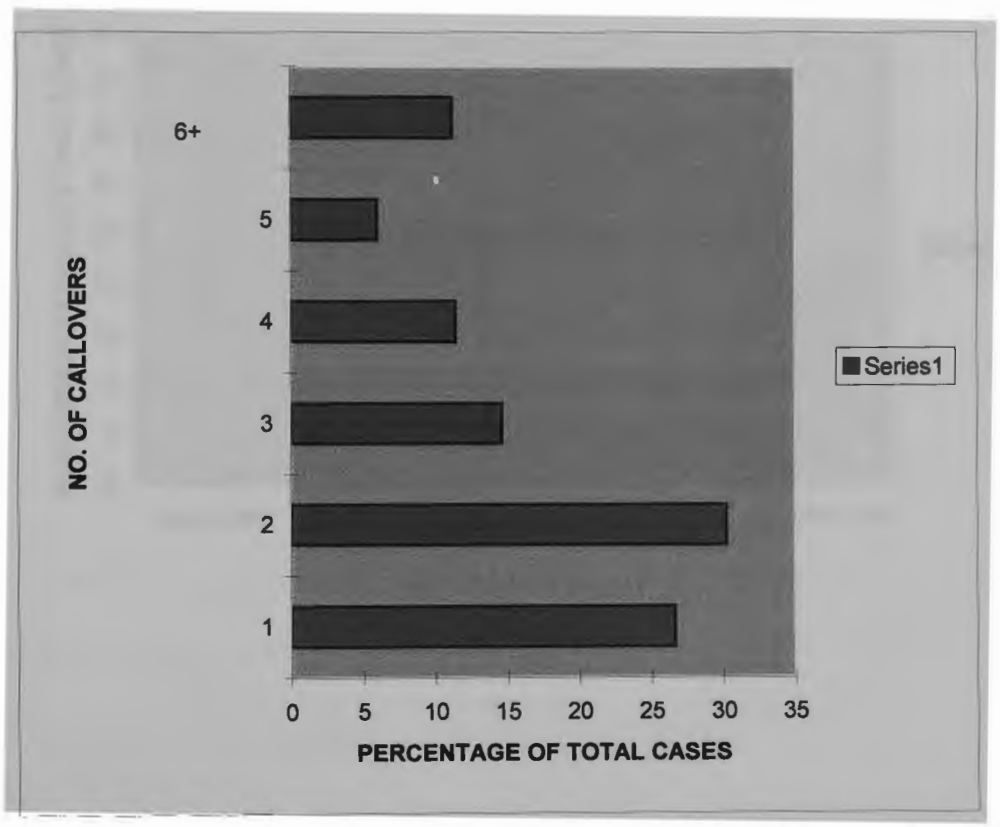

FIGURE 28

COURT SET: SETTLEMENT

CALLOVER	39.4
BEFORE ARB	3.2
AT ARB	29.7
BEFORE CRT HRG	5
AT CRT HRG	22.7

63.4% OF CASES SETTLE AFTER THE FILING OF THE CERTIFICATE OF READINESS

FIGURE 29

COURT SET: RESULTS

	TOTAL COURT DATA %	SETTLED %	ADJUDICATED %
PLAINTIFF (full)	49.6	30	54.2
PLAINTIFF(part)	3.6	28	12.1
DEFENDANT	1.6	21.5	25.4
WITHDRAWN	8	0	0
NO RESULT	37.2	20.5	8.3

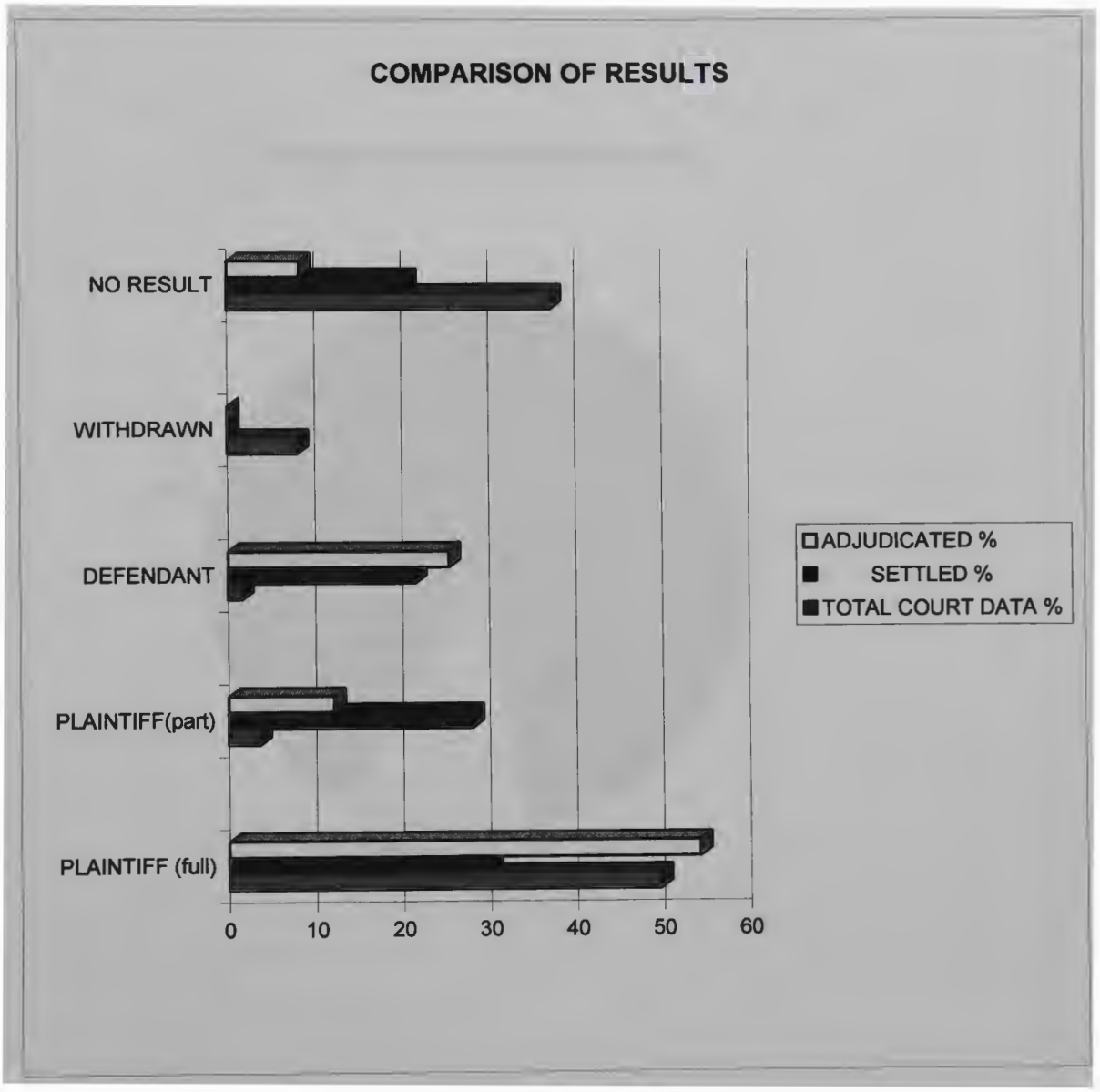

FIGURE 30

COURT SET
ADJUDICATED CASES: GENERAL DIVISION

	%
ARBITRATION	47
COURT HEARING	11
BOTH	42

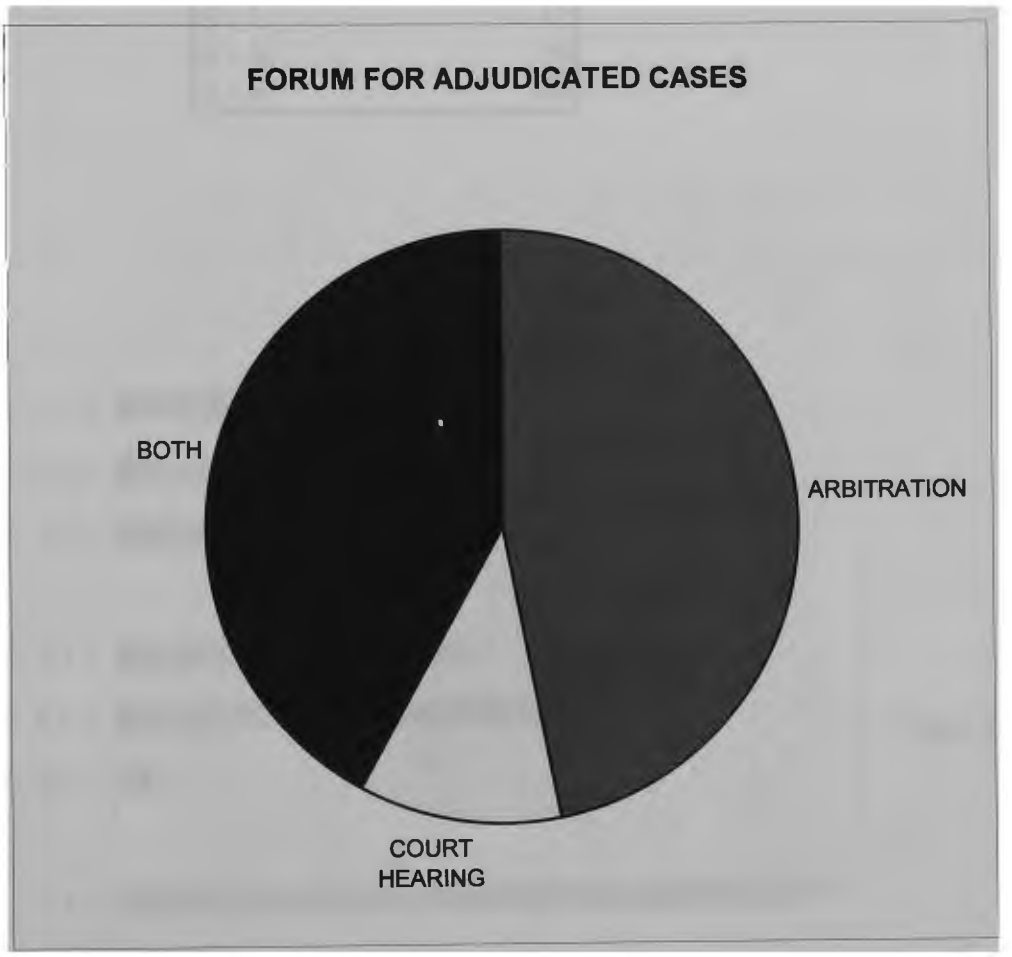

FIGURE 31

COURT SET
WHO LITIGATES IN COURT?

PARTIES	*NO. OF CASES*
L v L	72
L v M	17
L v S	127
M v L	6
M v M	94
M v S	65
S v L	18
S v M	36
S v S	65

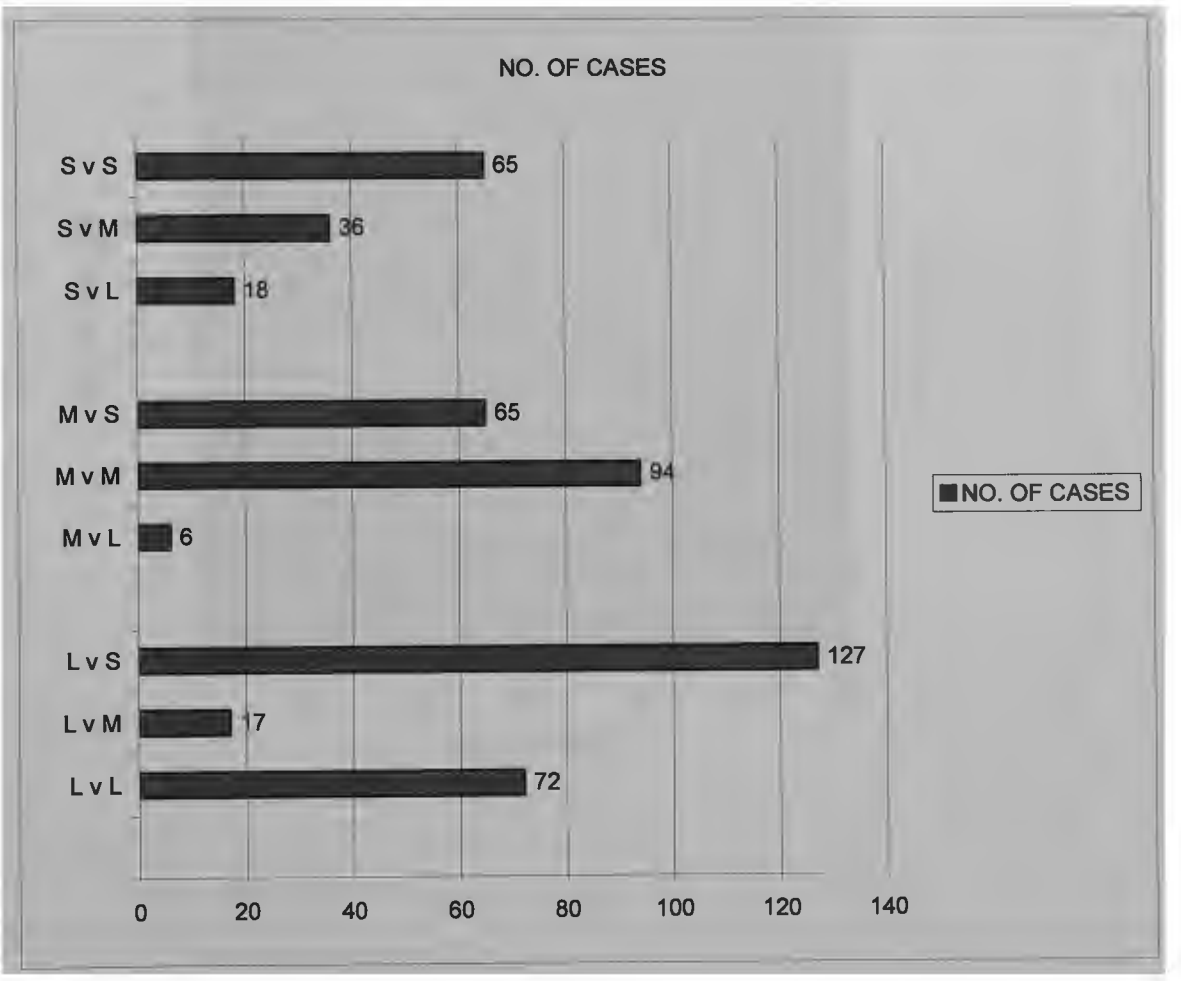

FIGURE 32

COURT AND REGISTRY SET
WHO LITIGATES?

PARTIES	REGISTRY	COURT
L v L	9	72
L v M	64	17
L v S	279	127
M v L	2	6
M v M	44	94
M v S	78	65
S v L	1	18
S v M	5	36
S v S	18	65