

2017

Small Claims Court: A Vehicle for Social Change and the Case for Equitable Relief

Shelly McGill

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/jlsp>



Part of the [Law Commons](#)

Citation Information

McGill, Shelly. "Small Claims Court: A Vehicle for Social Change and the Case for Equitable Relief." *Journal of Law and Social Policy* 26. (2017): 90-111.

<https://digitalcommons.osgoode.yorku.ca/jlsp/vol26/iss1/5>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.

Small Claims Court: A Vehicle for Social Change and the Case for Equitable Relief

SHELLEY MCGILL*

La Cour des petites créances a une longue histoire dans le domaine du recouvrement de dettes et une image populaire en tant que « cour du peuple ». Cet article examine sa fonction émergente et peu connue comme forum où des questions sociales urgentes sont entendues et où la politique sociale est mise en œuvre sur le terrain. La Cour des petites créances de l'Ontario est l'une de ces cours qui a récemment obtenu un mandat de politique sociale. Au cours des quinze dernières années, l'Assemblée législative et la Cour d'appel de l'Ontario ont directement ou indirectement donné à la Cour des petites créances la nouvelle responsabilité de mettre en œuvre une politique sociale moderne dans les domaines de la supervision des enfants, de la discrimination et de la protection de la vie privée. Cet article examine l'étendue de cette nouvelle responsabilité et considère certains des défis liés au fait d'adapter ce processus simplifié au nouveau mandat.

Small Claims Court has a long history in debt collection and a popular image as the “People’s Court.” This article examines a little known emerging function as a forum where pressing social issues are given voice and social policy is implemented on the grassroots level. The Ontario Small Claims Court is a recent recipient of this social policy mandate. Over the past fifteen years, the Ontario Legislature and Court of Appeal have directly or indirectly given the Small Claims Court new responsibility for implementing modern social policy in the areas of child supervision, discrimination, and privacy. This article examines the scope of the new responsibility and considers some of the challenges faced in adapting this simplified process to the new mandate.

TWO DISTINCTLY DIFFERENT VIEWS OF THE ROLE OF SMALL CLAIMS COURT are regularly debated in academic literature and the public forum. In one view, small claims court is the “People’s Court” where personal, small valued disputes are quickly and informally resolved without the need for legal representation;¹ in the other, the court is a debt collection agency where businesses routinely turn bad debts into uncontested judgments and individuals rarely

* Professor, Business Law, Lazaridis School of Business & Economics, Wilfrid Laurier University; Deputy Judge, Ontario Small Claims Court – Central South.

¹ See e.g. *Crouchman v El Dorado Investors*, (1988) 45 Cal 3d 1167 at 1175-1177(Cal S C) [*Crouchman*]; Gerald Lebovits, “Small Claims Courts Offer Prompt Adjudication Based on Substantive Law” (1998) 70(8) NY St Bar J 6 at 8 (noting business claims were processed in a separate commercial claims court in New York State); Tal Finney & Joel Yanovich, “Expanding Justice Through the “People’s Court”” (2006) 39 Loy LA L Rev 769 at 773; Christopher S Axworthy, “Controlling the Abuse of Small Claims Court” (1976) McGill LJ 480 at 480–81.

participate as anything other than defendants.² In practice, the court usually performs both of these contrasting functions and much has been written about how to strike the appropriate balance between the two.³

The forgoing characterizations of small claims court share a common misconception: that small claims court deals with only uncomplicated, routine, and insignificant issues.⁴ This is not the case.⁵ In its third, little known, and somewhat surprising, function, the small claims court can be a vehicle for social change—a forum where pressing social issues are given voice and social policy is implemented on the grassroots level. The Ontario Small Claims Court hosts this expanding and under-acknowledged function. Over the last fifteen years important new legal rights have been given access to Ontario’s most accessible and informal public process. Both the Ontario Legislature and Court of Appeal have directly or indirectly given small claims court new social policy responsibilities for developing substantive standards of behaviour not yet addressed in other courts.

As an introduction to the social policy function of small claims court, this paper reports on the Ontario Small Claims Court’s jurisdiction over three pressing social issues: parental responsibility, discrimination, and privacy. In 2000, the Ontario Small Claims Court became an arbiter of satisfactory child supervision with the enactment of the *Parental Responsibility Act, 2000*.⁶ Next, the court took on human rights and discrimination disputes following the end of the Ontario Human Rights Tribunal’s monopoly in 2006. Most recently, in 2012, the Ontario Court of Appeal positioned small claims court to take the lead in the development of Ontario’s new common law privacy torts. The court’s limited monetary jurisdiction⁷ and reduced evidentiary requirements⁸ make it an accessible forum for the practical application of social policy where the

² See e.g. Christopher R Drahozal & Samantha Zyontz, “Creditor Claims in Arbitration and in Court” (2011) 7 Hastings Bus LJ 77 at 80–81; “Spotlight, Debtors’ Hell, Part 2: A Court System Compromised,” *The Boston Globe* (31 July 2006), online: < archive.boston.com/news/specials/debt/> [https://perma.cc/PZ6F-HEFH] (concluding that smalls claims courts have mutated into a system that ignores individual rights and shows favouritism toward debt collectors and their lawyers); Finney & Yanovich, *supra* note 1 at 776–777; Terence G Ison, “Small Claims” (1972) 35 Modern L Rev 18 at 18; Axworthy, *supra* note 1 at 482.

³ See e.g. Iain Ramsay, “Small Claims Court: A Review,” *Rethinking Civil Justice: Research Studies for the Civil Justice System*, vol 2 (Ontario Law Reform Commission: Toronto, 1996) at 489–544; John Baldwin, “Is There a Limit to Expansion of Small Claims?” (2003) 56 Curr Legal Prob 313 at 335–336; Peter Finkle & David Cohen, “Consumer Redress Through Alternative Dispute Resolution and Small Claims Court” (1993) 13 Windsor YB Access Just 81 at 102–105; Shelley McGill, “Small Claims Court Identity Crisis: A Review of Recent Reform Measures,” (2010) 49 Can Bus LJ 213 at 219–222; Axworthy, *supra* note 1.

⁴ Ramsay, *supra* note 3 at 500.

⁵ Manitoba Law Reform Commission, *Review of the Small Claims Court* (Winnipeg: Law Reform Commission, March 1998) at 31, online: <manitobalawreform.ca/pubs/pdf/archives/99-full_report.pdf> [perma.cc/RR72-CM76], stating “there is nothing inherent in the nature of small claims courts that restricts them to hearing simple or non-complicated matters,” citing *Royal Insurance Co of Canada v Legge* (1996), 36 CCLI (2d) 210 (NSSC), *Stockey v Peel Condominium Corp No 174* (1996), 30 OR (3d) 464 (On Div Ct).

⁶ SO 2000, c 4, s 2(1).

⁷ *Courts of Justice Act*, RSO 1990, c C-43, s 23 (monetary damages up to \$25,000 and transfer of property, no equitable relief).

⁸ *Ibid* at ss 25, 27; *Grover v Hodgins*, 2011 ONCA 72 at para 47 [*Grover*] (acknowledging summary trial and relaxed rules of evidence); *Smith v Galin*, [1956] OWN 432 at 434 (ONCA) (stating that the court is not entitled to disregard principles of law but may “disregard technical defects which would defeat the justice of the claim”).

underlying principle is of great societal importance but damages are minor or difficult to assess. Naturally, there are challenges, such as limited discovery and few reported decisions, which may limit the court's social policy impact. Most notably among these challenges is the inability to grant equitable relief. In Ontario equitable remedies remain outside the scope of the court's authority⁹ and therefore the ability to force immediate behaviour modification is not within the court's power.

To begin, Part I of this paper looks at the evolution of Small Claims Court from its origins in debt collection to its reformation as the "People's Court" and the resulting trivialization of the Court's function by the media. Part II highlights the social policy mandate of Ontario's court by focusing on three new social civil causes of action added to the existing list of Small Claims Court responsibilities. Part III of the paper examines potential challenges for the court and its litigants as they process social change litigation within the simplified system. The paper concludes by recommending an expansion of the range of available remedies.

I. THE EVOLUTION OF SMALL CLAIMS COURT

The pendulum in small claims court design priorities seems to swing back and forth between debt collection and procedural access to justice functions. For decades, system designers have justified reform measures as furthering one or the other of these two functions and commentators have examined the performance of the court from only these two lenses.¹⁰ However, over the last fifteen years of the Ontario court's history its little known social policy dimension has been expanded, adding to its already complex mandate.¹¹ So far, academic literature has paid little attention to this growing and potentially revolutionizing social policy dimension.

⁹ *Courts of Justice Act*, RSO 1990, c C-43 ss 23, 96(3); *Moore v Canadian Newspapers Co.* (1989) 69 OR (2d) 262; *Grover*, *supra* note 8 at paras 44, 47.

¹⁰ See e.g. British Columbia Ministry of Attorney General, *2005/06 Annual Service Plan Report:: Highlights of the Year* online: < bcbudget.gov.bc.ca/annual_reports/2005_2006/ag/Highlights_of_the_Year.htm > [perma.cc/44L3-PWK4]; Ontario Ministry of Attorney General, Small Claims Court, *Increase in monetary limit from \$10,000 to \$25,000*, online: < attorneygeneral.jus.gov.on.ca/english/courts/scc/scc_increase_limit.php > [perma.cc/R2A8-SSSK]; John C Ruhnka et al, *Small Claims Courts: A National Examination* (National Center for State Courts, 1978) at 161–69 online: < contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/civil&CISOPTR=0 > [perma.cc/7ME5-78QP]; George Adams, "The Small Claims Court and the Adversary Process: More Problems of Function and Form" (1973) 51 Can Bar Rev 583 at 608–09 (as to Canadian courts); Iain Ramsay, "Lowered Horizons and Broadened Vistas: The Small Claims Court and Access to Justice," Book Review of *Small Claims in the County Courts in England and Wales* by John Baldwin, (1998) 25 JL & Soc'y 438 at 441–2; Jacob Ziegel, "Canadian Consumer Law and Policies 40 Years Later: A Mixed Report Card" (2011) 50 Can Bus LJ 259 at 291–92 (lamenting the failure to serve consumers).

¹¹ Nuisance and defamation causes of action (already part of the Ontario Court's jurisdiction although excluded from other jurisdictions such as British Columbia) could be considered behaviour modification actions. One distinction would be that foundational principles defining these torts have been established in superior courts and merely applied by the small claims court. Privacy and parental supervision standards are being formed in small claims court.

A. FROM DEBT COLLECTION TO PEOPLE'S COURT

The Ontario Small Claims Court began with a distinctly economic purpose. The Court of Requests, formed in 1792, was specifically designed for debt collection purposes, as aptly reflected in the name of the legislation—*An act for the more easy and speedy recovery of small debts*.¹² Like other North American small claims courts,¹³ it evolved from the British “Debtor’s Court” of 1606 to provide the emerging mercantile class with a cost effective manner to collect outstanding accounts.¹⁴ Committing non-paying debtors to goal was a regular occurrence. Debt collection remained the court’s sole purpose even when Ontario changed the court’s name to the Division Court in the 19th century and well into the 20th century when complaints about its cumbersome, expensive process and debtor’s prison triggered calls for change.¹⁵

In the 1960s and 70s consumer advocacy was in the air and that fresh breeze swept through small claims court.¹⁶ Despite its long debt collection history, criticism of small claims court focused on overuse by business, as businesses were suing predominantly individual defendants who rarely defended.¹⁷ Historically, there was fear that easy informal debt collection was leading to questionable business practices in the marketplace and in the court.¹⁸ Empowering the consumer against big business became the priority after the Royal Commission of Inquiry into Civil Rights berated the court as “a debt-collection agency with draconian powers.”¹⁹ Attention of policymakers shifted from aiding business to empowering consumers and creating a user friendly forum for individuals became the priority. Ontario was not alone; by the 1970’s most jurisdictions were reinventing their small claims courts’ missions to focus on access to justice for everyday people, to restrict harsh remedies, and to remove the barrier that expensive legal fees were building.²⁰ System design reflected the new mission.

¹² Grover, *supra* note 8 at para 46; *An act for the more easy and speedy recovery of small debts*, LL UC 1792 (32 GeoG III), c 6.

¹³ John Montague Steadman & Richard Rosenstein, “Small Claims’ Consumer Plaintiffs in the Philadelphia Municipal Court: an Empirical Study” (1973) 121:2 U Pa L Rev 1309 at note 1 (acknowledging US courts stem from old English courts and earliest configurations were in 1600s); Judith Fox, “Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana” (2012) 24 Loy Consumer L Rev 355 at 367 (describing the Indiana Court’s creation in 1799); Crouchman, *supra* note 1 at 1079–81 (connecting California’s court to the English Debtor’s Court of 1606).

¹⁴ Jill Gross, “AT&T Mobility and the Future of Small Claims Arbitration” (2012) 42 Sw L Rev 47 at 56–57 (citing Roscoe Pound, “The Administration of Justice in the Modern City” (1913) 26 Harv L Rev 302 at 315).

¹⁵ Ramsay, *supra* note 3 at 493–497.

¹⁶ Gross, *supra* note 14 at 58.

¹⁷ Barbara Yngvesson & Patricia Hennessey, “Small Claims, Complex Disputes: A Review of Small Claims Literature” (1975) 9:2 Law & Soc’y Rev 219 at 229.

¹⁸ Ison, *supra* note 2 at 18 (describing perjured affidavits of service); Ramsay, *supra* note 3 at 493 (complaints dating back many decades).

¹⁹ Ramsay, *supra* note 33 at 495.

²⁰ Axworthy, *supra* note 1 at 486–87 (listing six possible design modifications to control abuse by business); Gross, *supra* note 14 at 58–59. See generally, Christopher J Whelan, ed, *Small Claims Courts: A Comparative Study*, (Oxford: Clarendon Press, 1990) at 5 (describing courts in the USA, Canada, Australia, New Zealand, England, Wales, Germany, and Japan) reviewed by E Thomas Garman, (1992) 26:1 J Cons Affairs 213–15.

Although specific features vary by jurisdiction, worldwide system re-design during the 1970s produced some new design trends.²¹ The practice of setting a maximum monetary limit for eligible claims continued as before but in addition, some jurisdictions limited the subject matter of claims allowed to be filed, or restricted the type or entity of the litigant, the type of litigant representation, and/or the type of remedies available. Most jurisdictions applied some combination of all five of these strategies, and still regularly tinker with the mix today. Virtually every jurisdiction's legislature sets (and regularly resets) the maximum monetary jurisdiction of the court to ensure only "small" disputes access the court, however, the definition of small varies widely.²² Also commonly applied was a restriction on the subject matter of the claims that could be heard in small claims court;²³ for example family matters, construction liens, and workers compensation claims are examples of Ontario's excluded subject matters.²⁴

Less often, controls applied to divert undesirable claims took the form of restricting the type of litigants based on the assumption that particular litigants commonly bring particular types of claims.²⁵ Quebec, for example, restricts access by large or incorporated businesses and those parties represented by lawyers.²⁶ Some jurisdictions combine or layer strategies, for example setting a lower monetary limit for particular claimants. California sets a lower monetary limit for business claims than for individuals.²⁷ All of these design features were employed in varying degrees to empower the "people" over business.

The focus and design of the Ontario Court similarly evolved from commercial resource for the marketplace to one of access to justice. In the 1970s the mandate was reframed around the now familiar pillars of access to justice—speed, low cost, informality, self-representation, and active adjudication.²⁸ While other jurisdictions attempted to prevent complication of the simplified informal process by banning lawyers, refusing to apply the loser pays rule to costs,

²¹ Gross, *supra* note 14 at 58–59 (describing trends in USA small claims court design after consumer advocacy).

²² See Shelley McGill, "The Evolution of Small Claims Court: Rising Monetary Limits and the Use of Legal Representation" (2015) 31 Windsor YB Acc Just 173 at 180 (across Canada limits range from \$8,000 to \$50,000 CAD; much lower in the USA with median below \$5,000 USD); Gross, *supra* note 14 at 57–58 (concluding USA limits rarely top \$10,000 USD).

²³ Defamation is often excluded: see *e.g.* *Small Claims Court Act*, RSBC 1996, c C430, s 3(2); *The Court of Queen's Bench Small Claims Practices Act*, CCSM, c C285, s 3(4)(e).

²⁴ *Family Law Act*, RSO 1990, c F 3, s1(1) (defining court); *Construction Lien Act*, RSO 1990, c C 30, s 1(1); *Workplace Safety and Insurance Act*, SO 1997, c 16, s 26.

²⁵ Businesses bring debt collection claims: see Shelley McGill, "Business Dominance in the People's Court – An Empirical Assessment of Business Activity in the Toronto Small Claims Court" 33:1 Windsor YB Acc Just [forthcoming in 2017] (Holmes Cardozo Research Award finalist paper presented at 2015 Conference of the Academy of Legal Studies in Business, August 10, 2015 – Philadelphia, U.S.A).

²⁶ *Code of Civil Procedure*, RSQ c C-25, art 953 (limits access of legal persons, partnerships, and associations with more than five employees to small claims court) *New York City Civil Court Act* §1809; Gross, *supra* note 14 at 58.

²⁷ *California Code of Civil Procedure*, Title 1, c 5.5, §§ 116.220, 116.221; BC does the opposite and sets a different process for liquidated debts of higher value: *Small Claims Rules*, BC Reg 261/93, Rules 9.1 & 9.2; Manitoba sets a lower monetary limit for general damages (\$2,000 v \$10,000): *The Court of Queen's Bench Small Claims Practices Act*, CCSM c C285 s 3(1).

²⁸ Seana McGuire & Roderick MacDonald, "Small Claims Court Cant" (1996) 34:3 Osgoode Hall LJ 509 at 510.

and even shunning the business stakeholder,²⁹ the Ontario court did not shrink from its debt collection responsibility. Unlike some other jurisdictions,³⁰ subject matter restrictions were not incorporated into Ontario's small claims court legislation but rather, any restrictions were introduced in the substantive subject matter specific legislation of the exempt topic by way of assigning exclusive jurisdiction to another court or tribunal.³¹ In this way, Ontario small claims court remained the catch basin for all disputes not expressly directed elsewhere.

Even after the Ontario court was renamed the Small Claims Court in 1970 it did not restrict business access. It continued to permit lawyers to appear,³² to allow costs (although capped),³³ and even acted as debt collector for other government tribunals and courts which lacked their own enforcement processes.³⁴ Still, there was no question that business was no longer the only identified stakeholder. Over the subsequent years measures aimed at assisting individual users were put in place, such as fee waivers,³⁵ fill in the blank forms,³⁶ cost caps, mandatory settlement conferences,³⁷ and even higher frequent user fees.³⁸ The broad remedial power to “grant relief, redress or remedy, or combination of remedies, either absolute or conditional”³⁹ enjoyed up to the 1970s was severely restricted in the 1980s. The power to grant equitable remedies was removed; going forward the Ontario court could order only monetary awards or the transfer of property.⁴⁰

²⁹ Quebec: *Code of Civil Procedure*, CQLR c C-25, art 959; *Tariff of Court Fees applicable to the Recovery of Small Claims*, CQLR c 25, r 16 (higher fees for corporations than natural persons); Gross, *supra* note 14 at 58 (New York City also restricts access of business corporations).

³⁰ See e.g. *The Court of Queen's Bench Small Claims Practices Act*, CCSM c C285, ss 3(2), 3(4) (excluding family, defamation, and landlord-tenant matters).

³¹ See examples *supra* note 24.

³² *Courts of Justice Act*, RSO 1990, c C-43, s 26.

³³ *Ibid* at s 29 (capped at 15% of the amount claimed).

³⁴ See e.g. *Residential Tenancies Act, 2006*, SO 2006, c 17, s 207.

³⁵ *Administration of Justice Act*, RSO 1990, c A 6, ss 4.3, 4.4; O Reg 2/05; O Reg 675/05.

³⁶ *Rules of the Small Claims Court*, O Reg 258/98, Table of Forms.

³⁷ O Reg 78/06, s 27.

³⁸ Ontario Legislative Assembly, Standing Committee on Regulations and Private Bills, “First Report on Regulation 1999”, June 21, 2000, online:

< ontla.on.ca/committee-proceedings/transcripts/files_html/2000-06-21_T016.htm#P8_1163 > [perma.cc/F33W-8ETP].

(Assistant Deputy Attorney General reporting that infrequent users are most commonly individuals or small businesses and the government wanted to provide them with an assurance of access to the court by giving them a smaller fee than frequent users. Frequent users are most commonly larger institutions, and in 1999 they actually formed less than 20% of the claims filed with the Small Claims Court in Ontario. The fees for infrequent users were established at a lower level to effectively increase the level of subsidy by government for individuals and for small businesses.) Grover, *supra* note 8 at para 47. See also Chief Justice Heather Smith, “Access to Justice: Ontario's Overview of Two Approaches to Keeping Litigation Costs in Check” at 9 (Into the Future Conference – May 2006), online: < cfcj-fcjc.org/sites/default/files/docs/2006/smith-en.pdf > [perma.cc/S4FG-99HD].

³⁹ *Small Claims Court Act*, RSO 1980, c 476, s 59 (which continued “including the power to relieve penalties and forfeiture, in as full and ample a manner as might be done in the like case by the Supreme Court”) was repealed by the *Courts of Justice Act, 1984*, SO 1984, c 11, s 109(3) which stated that “[u]nless otherwise provided, only the Supreme Court, the District Court and the Unified Family Court may grant equitable relief”; *Canada v Khimani* (1985), 50 OR (2d) 476 at 481 (Div Ct).

⁴⁰ *Courts of Justice Act*, RSO 1990, c C-43, s 23, 96(3); *Moore v Canadian Newspapers Co.* [1989] OJ No 948 at para 14; at Grover, *supra* note 8 at paras 44, 47.

Small claims court's new consumer mandate attracted public attention and spawned the label "People's Court," as well as a successful TV franchise that would eventually become an entire genre—the original reality TV. The People's Court, with Judge Wapner (1981–1993), became an instant hit and has remained on the air in each of the four decades since.⁴¹ Other courtroom "reality" shows followed, with possibly the most successful incarnation being Judge Judy.⁴² This television "celebrity status" did not help the image of the Court—it was portrayed as a "ridiculous" forum where people bring odd trivial claims and cling to irrational positions. The New York Times described it as "campy, hammed up summary justice... [that] feeds the viewers' vicarious craving for told-you-so retribution,"⁴³ concluding that the TV portrayal "is Michael Moore populism, and the cumulative effect is depressing, a tableau of broken homes, bad luck and desperation snatched from 'Miss Lonelyhearts'."⁴⁴ The harsh reactions of television judges made actual litigants more fearful than familiar with the real small claims court.⁴⁵ In practice the court had little in common with its media made alter ego, and the fictitious rendering effectively trivialized the actual court's function in the eyes of the public.

B. AND BACK AGAIN

Despite all of the access to justice reform measures implemented in the 1970s and 80s the actual work of the small claims court remained the same, primarily debt collection. The limited empirical work completed between the 1970s and the turn of the century consistently reported that business remained the highest volume user, pursuing debt collection against primarily individual debtors.⁴⁶ System designers in Canada were forced to address this necessary function and manage rather than deny it.

Monetary limits became the tool of choice. Consumer friendly limits were originally set quite low (\$400 in the 1970s), so that trivial matters would be the primary work of the court. However, since 2000 limits have risen at an accelerated pace, reaching \$50,000 in Alberta as of

⁴¹ People's Court Website, online: <peoplescourt.com> [perma.cc/2PBH-S9RS].

⁴² With Judge Judy Sheindlin, online: <judgejudy.com> [perma.cc/N6CP-NRDB]. Sarah Palin will soon join the ranks of TV's small claims court judges: Danielle Diaz, "Sarah Palin to host Reality Show as TV Judge" CNN.com, March 22, 2016, online: <cnn.com/2016/03/22/politics/sarah-palin-court-show-judge-judy/> [perma.cc/477N-Z9H6].

⁴³ Alessandra Stanley, "Gavel to Gavel (To Gavel to Gavel) Coverage – TV's Courts of Last Resort Hear Life's Enduring Gripes," *The New York Times* (8 July 2007), A1 at 25.

⁴⁴ *Ibid.*

⁴⁵ Michael Epstein, "Judging Judy, Mablean and Mills: How Courtroom Programs Use Law to Parade Private Lives to Mass Audiences" (2001) 8:2 *UCLA Ent L Rev* 129 at 138 (finding television programs bear little resemblance to actual courtrooms and television judges go out of their way to mock and shout at litigants); Steven Kohm, "The People's Law versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV" (2006) 40:3 *Law & Soc'y Rev* 693 at 694–696; David B Rottman, Randall Hansen, Nicole Mott & Lynn Grimes, *Perceptions of the Courts in Your Community: The Influence of Experience, Race and Ethnicity, Final Report to the National Centre for State Courts*, (2003) at 9-10, online: <ncjrs.gov/pdffiles1/nij/grants/201302.pdf> [perma.cc/DM5V-X94N].

⁴⁶ McGuire & MacDonald, *supra* note 28 at 514–515; Neil Vidmar, "The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation" (1984) 18:4 *Law & Soc'y Rev* 515 at 527–29.

2014.⁴⁷ Non-monetary remedies remain rare in small claims court.⁴⁸ Since the 1980s Ontario has restricted relief to monetary damages or return of property, specifically excluding equitable relief.⁴⁹ The prevailing wisdom about restricted remedies relates to lower jeopardy and support for the proportional justice aspect of the simplified process.⁵⁰ There is a constitutional complication for equitable relief in Ontario small claims courts arising from the nature of a statutory court and the appointment process of small claims court judges⁵¹—neither afford the court or its adjudicators with the inherent constitutional jurisdiction that would naturally flow to federally constituted courts organized under the *Constitution Act 1867*—the remedial power must emanate from the empowering provincial legislation.⁵² To date, the provincial will has been lacking.

Over the last decade the court has returned to its economic and commercial roots. Canadian provinces, including Ontario, are revitalizing small claims court's debt collection function. Rather than restricting access, they are offering new and more efficient ways to process debt collection claims. British Columbia was the first to provide a liquidated damage track in 2007, where financial debts could be proven in a fast tracked process.⁵³ Ontario expedited debt collection claims by allowing clerks to sign judgment for undefended liquidated damage claims⁵⁴ without judicial oversight, and in 2015 Ontario introduced online filing and electronic default judgments for only liquidated debts.⁵⁵

Reform of debt collection processes is not the only change that has taken place in Ontario's Small Claims Court since the turn of the century. Although little in the court's forgoing history suggests a pre-planned adoption of a substantive social policy mandate, over time more and more causes of action with social policy aspects have been added to the court's existing jurisdiction by both the legislature and the courts. The addition of privacy, discrimination, and parental responsibility to existing causes of action⁵⁶ make the court's social policy mandate

⁴⁷ A Reg 139/14. Ontario's limit history: *Small Claims Court Act* RSO 1970, c 439, s 5 (\$400); *Small Claims Court Amendment Act*, SO 1977, c 52 (increasing to \$1000 in 1977); *Small Claims Court Jurisdiction Regulation (Courts of Justice Act)* O Reg 92/93 (increasing limit to \$6000 in 1993); *Small Claims Court Jurisdiction and Appeal Limit Regulation*, O Reg 626/00 as amended O Reg 439/08 (raising limit to \$10,000 in 2001 and to \$25,000 effective 1 January 2010).

⁴⁸ Manitoba Law Reform Commission, *supra* note 5 at 31, 34–35, recommending the Manitoba Court be empowered to grant equitable relief but acknowledging potential conflict with *Constitution Act, 1867*, s 96; British Columbia allows the equitable remedy of specific performance: *Small Claims Court Act*, RSBC 1996, c C430, s 3(1).

⁴⁹ *Supra* note 39; *Courts of Justice Act*, RSO 1990, c C43, ss 11(2), 23, 96(3).

⁵⁰ O Reg 258/98, *supra* note 36, Rule 1.03(1) (articulates the proportional justice aspect of the rules by requiring their interpretation “to secure the just, most expeditious and least expensive determination of every proceeding on its merits”).

⁵¹ Almost all small claims court adjudication is done by part-time deputy judges who are appointed to successive three year terms, pursuant to the *Courts of Justice Act*, RSO 1990, c 34, s 32.

⁵² *Grover*, *supra* note 8 at paras 15–16; *Courts of Justice Act*, RSO 1990, c C43, s 11(2).

⁵³ *Small Claims Rules*, BC Reg 261/93 as amended by BC Reg 360/07 (enacting Rule 9.2, Summary Trial for Financial Debt).

⁵⁴ O Reg 258/98, Rule 11.02.

⁵⁵ *Ibid*, Rule 7.02 (e-filing just applied to debt collection when introduced and has since been expanded).

⁵⁶ *Supra* note 11.

undeniable. The overwhelming proportion of debt collection claims⁵⁷ and the trivialization of the court's image by the media have hidden this expanding social purpose from view.

At first glance, given its simplified procedure and lack of authority to grant declaratory or injunctive relief, the small claims court appears ill-suited for litigation of social issues where behaviour modification remedies are often ordered.⁵⁸ However, the expanding availability of damages as a remedy to address social issues through civil causes of action has reduced small claims court's apparent remedial obstacle and opened its doors to emerging social issues. Small claims court's informality and small monetary jeopardy create a low risk vehicle to implement social policy at the grassroots level, as demonstrated in the following examples of civil causes of action involving parental responsibility, discrimination, and privacy.

II. THE SOCIAL POLICY MANDATE

Social policy is society's response to need and discontent—most typically in the form of government policy designed to maximize people's wellbeing and address the social ills of the time.⁵⁹ The word “policy” refers to the principles that drive action towards a particular end; it relates to both the means and the ends and necessarily implies changing situations, systems, practices, or behaviours.⁶⁰ The goal of social policy is to directly impact and improve the welfare of citizens.⁶¹

Although family services, child protection, and human rights have long been social policy priorities, with the new millennium, personal, informational, and territorial privacy⁶² have also become high societal priorities under serious threat from the digital world. Child protection, human rights, and privacy are the subject of federal and/or provincial government regulation in the form of legislation and administrative agencies charged with the responsibility for enforcement and oversight.⁶³ However, social change may also be affected by empowering those disadvantaged by the social ill and allowing them to take action themselves.⁶⁴ The benefit of

⁵⁷ McGill, *supra* note 25.

⁵⁸ Effectiveness of the remedy has been a barrier to cases under the *Charter of Rights and Freedoms*: see *R v Dunn* (1996) 31 OR (3d) 540; *Parkin v Peel (Regional Municipality) Police Service Board*, [2012] OJ No 3170.

⁵⁹ José G Vargas-Hernández, Mohammad Reza Noruzi, Farhad Nezhad Haj Ali Irani, “What is Policy, Social Policy and Social Policy Changing?” (2011) 2:10 Intl J Business & Social Science 287.

⁶⁰ Richard M Titmuss, “What is Social Policy?” in Stephen Leibfried & Steffen Mau, eds, *Welfare States: Construction, Deconstruction and Reconstruction*, vol 1 (Northampton, MA: Edward Elgar Publishing, Inc. 2008) 89 at 137.

⁶¹ *Ibid* at 144 (includes some element of moral progress).

⁶² Three aspects of privacy (although not mutually exclusive) are discussed in *R v Dymont*, [1988] 2 SCR 417; *R v Tessling*, [2004] 3 SCR 432; *R v Gamboc*, 2010 SCJ No 55; *R v Spence*, 2014 SCC 43.

⁶³ As to child protection see *Child and Family Services Act*, RSO 1990, c C 11, ss 15–20.2 (establishing Children's Aid Societies); as to human rights see *Human Rights Code*, RSO 1990, c H 19, ss 27–31.7 (establishing the Ontario Human Rights Commission); as to privacy see *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 18, s 4 (establishing the Information and Privacy Commissioner of Ontario).

⁶⁴ Duncan Green, “The Role of the State in Empowering Poor and Excluded Groups and Individuals” (Paper delivered at the Expert Group Meeting on Policies and Strategies to Promote Empowerment of People in Achieving Poverty Eradication, Social Integration and Full Employment and Decent Work For All organized by the Division

individual empowerment is twofold—at the same time, affected individuals are “enhancing their own sense of agency and making the structural changes to institutions and policies that are needed for their emancipation.”⁶⁵ In this light, the small claims court has an obvious social policy contribution to make as a venue that empowers self-represented litigants to take action on their own in a way that higher level courts do not. The civil cause of action is an ideal tool to achieve social change through individual empowerment by authorizing the injured party to take action against the social ill that has harmed him or her, rather than depending upon (or waiting for) a government agency to act on a complaint. The following three examples of civil causes of action with social policy implications expressly or implicitly identify the Ontario Small Claims Court as the forum of choice.

Of course, social policy is at the heart of the procedural access to justice mission of the court—making quick, easy, affordable dispute resolution more available to the general public, particularly poor and disenfranchised members of society, is itself a social purpose targeting procedural barriers. But this access to justice policy is distinguishable as a procedural, rather than substantive, application of social policy goals. The failure to displace either the dominant business plaintiff or the trivialized media image makes the court’s access to justice context a poor example of social policy in action. One can hope for better in the substantive context.

A. PARENTAL RESPONSIBILITY

What could be more fundamental to a healthy society and the welfare of citizens than the safety of its children?⁶⁶ Child protection necessarily invokes the responsibility of a parent to supervise their child. “It’s 11:00 o’clock. Do you know where your children are?” Many Ontarians recognize this question as one that a Buffalo TV station⁶⁷ asks each night at the beginning of its late news broadcast but few Ontarians realize that it is also a question asked in Ontario Small Claims Court.

Historically, Ontario parents have not been held vicariously (or strictly) liable for torts committed by their children.⁶⁸ Some form of negligence on the parents’ part is typically required to be proven before parents are responsible for compensating those damaged by actions of their children and the burden of proof in negligence actions is usually on the plaintiff.⁶⁹ In 2000 this changed for Ontario parents when the *Parental Responsibility Act, 2000* (PRA) was proclaimed

for Social Policy and Development of the United Nations Department of Economic and Social Affairs, New York City, 10—11 September 2013), online:

<un.org/esa/socdev/egms/docs/2013/EmpowermentPolicies/Background%20Paper.pdf> [perma.cc/Q385-YEDZ].

⁶⁵ *Ibid* at 1.

⁶⁶ *Family Law Act*, RSO 1990, c F 3, Preamble (acknowledging the important role of family in society).

⁶⁷ The campaign has been attributed to Mel Epstein, Director of On-Air Promotions at New York’s WNEW-TV by Kovalchik, Kara. “The Origin of “It’s 10 PM. Do You Know Where Your Children Are?” online: <mentalfloss.com/article/30945/origin-its-10-pm-do-you-know-where-your-children-are> [perma.cc/7DER-8RSX] TIME Magazine, Top Ten Public Service Announcements, online:

<content.time.com/time/specials/packages/article/0,28804,1920454_1920455_1920452,00.html> [perma.cc/W2MV-TZ5J] (Number 7 of 10).

⁶⁸ *Causey et al v McCarron et al*, [1968] 67 DLR (2d) 707 at para 6 (BCCA).

⁶⁹ *Ibid*. See also *Gu (Litigation Guardian of) v Friesen*, [2013] BCJ No 686 at para 29 (BCSC).

in force, introducing a new statutory civil cause of action against parents for property damaged caused by their children. The PRA expressly designated the Small Claims Court as the forum.⁷⁰

This statute shifted the burden of proof from plaintiffs to defendants and imposed liability on parents for intentional property damage or loss caused by their children. The parents could avoid liability if they proved that they had *not* been negligent in the supervision of their children.⁷¹ This was a monumental change in the Ontario government's expectation of parents—essentially requiring proof of “satisfactory parenting” to avoid liability for intentional property damage by children thereby potentially promoting greater parental supervision of their children.

Theoretically, the PRA's shifted burden of proof should make it far easier to find parents liable for children's actions. The legislation provides a list of factors relevant to the determination of reasonable supervision to aid deputy judges when deciding if parents have met their societal duty of reasonable supervision; this is among the few statutory definitions of good parenting to be attempted by a legislature. The court's monetary cap on damages of \$25,000 and the cause of action's application to only intentional property damage confine the court's potential impact on social change. Still, the deliberate customization of a statutory cause of action for Small Claims Court demonstrates a legislative intent to implement social policy (and change) through the simplified process of small claims court.

To date there are no reported cases⁷² from small claims court that impose liability on parents under the PRA's statutory cause of action; indeed all attempts to do so have failed. The reported cases deal with property damage arising from motor vehicle accidents involving unlicensed minor drivers. In both *Shannon v TW*⁷³ and *Cinnirella v CC*⁷⁴ the court found that the parent defendants met the burden of establishing reasonable supervision when leaving supervision of teenage children to older siblings—the reasonableness, not perfection, of the parenting standard was emphasized. It should be noted that both of these reported cases involved parties represented by counsel,⁷⁵ who would be more familiar with the available causes of action and likely more prepared for a shifted burden of proof than a self-represented litigant. For the purposes of this paper the outcome of any reported case is less important than the availability of the cause of action, as it signals the Ontario Legislature's expanded view of the court's role in implementing social policy.

⁷⁰ *Parental Responsibility Act, 2000*, SO 2000, c 4, s 2 (proclaimed in force 15 August 2000).

⁷¹ *Ibid* at s 2(2) (the parent must prove reasonable supervision and reasonable effort to prevent or discourage the activity).

⁷² This does not mean liability has never been imposed; only written judgments are eligible for reporting and written reserve judgments are uncommon in Ontario Small Claims Court. One other reported case considered the *Meadowlarke Stables v Lucas*, [2008] OJ No 5565 (finding that the *Parental Responsibility Act* did not apply to a breach of contract action for expenses arising from a lease of a horse by a parent for a child).

⁷³ [2002] OJ No 2339.

⁷⁴ [2004] OJ No 3007.

⁷⁵ Motor vehicle accidents typically involve subrogated claims by insurance companies who have counsel, as was the situation in both of these cases.

B. DISCRIMINATION

The Canadian common law does not yet recognize an independent tort of discrimination.⁷⁶ Human rights violations in the private sector are managed under provincial human rights codes and the Supreme Court of Canada has held that victims of discrimination must find their relief in the statutory remedies available under the respective provincial human rights legislation.⁷⁷ Up until 2006, this meant that the Ontario Human Rights Tribunal (OHRT) was the exclusive forum for those Ontarians seeking damages for discrimination in housing, employment, and other private sector activities included in the Code. The Ontario Small Claims Court dismissed claims brought before it when plaintiffs sought remedies for only discrimination.⁷⁸

All this changed when the Ontario Legislature enacted section 46.1 of the Ontario *Human Rights Code* (OHRC) in 2006.⁷⁹ This section allows damages for discrimination and harassment to be claimed in any court action provided that they are combined with an existing common law cause of action. Natural contenders for combination are defamation and wrongful dismissal, both relatively popular small claims court topics.⁸⁰ The introduction of section 46.1 effectively ended the OHRT's monopoly on private sector discrimination relief and opened all courtroom doors.

The important aspect of section 46.1 for the Small Claims Court is the expanded type of compensable damages that may be ordered; these are much wider than typical mental distress damages⁸¹ previously acknowledged in tort or wrongful dismissal claims. Small claims court litigants rarely submit the type of expert medical evidence needed to satisfy mental distress requirements,⁸² but less expert evidence of humiliation and hurt feelings, now compensable under section 46.1, is widely available to small claims court litigants.⁸³ Injury to dignity and self-respect are also compensable under section 46.1, not typically considered medical injuries and valuation may be in the same range of the non-pecuniary privacy damages that are discussed in the next section of this paper. The outrageousness of the defendant's conduct is also relevant to the assessment of section 46.1 damages.

To date, in the Small Claims Court, breach of the *Code* damages are most often attached to wrongful dismissal cases. This was even attempted (with some success) before the section 46.1 amendment. In *Fanous v Total Credit Recovery Ltd.*⁸⁴ a constructive dismissal action

⁷⁶ *Bhadauria v Seneca College of Applied Arts & Technology* (1981), 124 DLR (3d) 193 (SCC).

⁷⁷ *Ibid*; *Honda v Keays* [2008] 2 SCR 362 at paras 62–67.

⁷⁸ See e.g. *Rosic v Mayer* [2005] OJ No 3539 (dismissing discrimination claims as outside the jurisdiction and proceeding with defamation and trespass to chattels claims); *Stangret v Toronto Transit Commission*, [1998] OJ No 2971.

⁷⁹ *Human Rights Code*, RSO 1990, c H-19, s 46.1.

⁸⁰ McGill, *supra* note 25, at Tables SM 1–9.

⁸¹ Requiring proof of some kind of psychological harm: see *Honda v Keays* 2008 SCC 39 at paras 36–7 (as to wrongful dismissal).

⁸² *Healey v Lakeridge Health Corporation*, 2011 ONCA 55 at para 60 (noting that persons claiming psychological injury “are required to show that they suffer from a recognizable psychiatric illness”); See e.g. *Holtzman v Suite Collections Canada*, 2013 ONSC 4240 (on appeal the small claims court mental distress damage award was set aside for lack of evidence; the punitive damage award was also set aside).

⁸³ *Courts of Justice Act*, RSO 1990, c C43, s 27 (describing the more relaxed evidentiary standard). See also *The Court of Queen's Bench Small Claims Practices Act*, CCSM, c C285, s 8(4)(1).

⁸⁴ [2006] OJ No 30363.

including damages for sexual harassment was successful because the plaintiff proved that compliance with the *Human Rights Code* was a term of the contract, breach of which triggered the right to traditional breach of contract damages. Following the introduction of section 46.1 the damage claims have proceeded more easily. In *Bray v Canadian College of Massage and Hydrotherapy*,⁸⁵ the court allowed \$20,000 of damages under section 46.1 for “hurt feelings” after the plaintiff was constructively dismissed after a maternity leave. Damages of \$15,000 were requested and allowed after another discriminatory constructive dismissal in *Berkhout v 2138316 Ontario Inc.*⁸⁶

Breach of *Code* damages are also being attached to small claims court housing related cases. A landlord and tenant dispute and even an aborted real estate purchase have successfully attached breach of *Code* damages.⁸⁷ In *Friman v Toledo Estates Ltd.* breach of *Code* damages were awarded as part of a misrepresentation claim associated with the purchase of a condominium unit. The availability of handicapped parking spaces required by the plaintiff was misrepresented and triggered damages for failure to accommodate. It seems there is overlap of subject matters between small claims court and human rights code cases, making the court a valuable partner for implementation of human rights policy.

C. PRIVACY

In the age of social media, electronic surveillance, and Edward Snowden,⁸⁸ privacy may be the most challenging social issue of our time. In Canada, it is a fundamental human right protected from unreasonable government intrusion by the *Charter of Rights and Freedoms*.⁸⁹ For private sector intrusion, legislation has been enacted across the country,⁹⁰ including the *Personal Information Protection and Electronic Documents Act* (PIPEDA) which is the primary piece of federal legislation regulating privacy standards in the private sector.⁹¹ However, the Canadian common law has been slow to recognize an independent tort of invasion of privacy.⁹² It took until 2012 for the Ontario Court of Appeal to create the first invasion of privacy tort, intrusion

⁸⁵ 2015 CANLII 3452.

⁸⁶ [2013] OJ No 1125.

⁸⁷ *Li v Symphony Square Ltd.* (2007), 221 OAC 271 (Div Ct); *Friman v Toledo Estates Ltd.*, [2013] OJ No 1908.

⁸⁸ Edward Snowden is the subject of an Academy Award winning documentary called *Citizenfour* about the NSA contractor who was so outraged by the level of surveillance being undertaken by the NSA that he leaked documents to the press and was forced to seek asylum outside the United States. *Citizenfour*, Praxis Films, Participant Media & HBO Documentary Films, 2014.

⁸⁹ *Hunter v Southam Inc.*, [1984] 2 SCR 145. See also *Privacy Act*, RSC 1985, c P-21.

⁹⁰ See e.g. provincial legislation: *Personal Information Protection Act*, SA 2003, c P- 6.5; *Personal Information Protection Act*, SBC 2003, c 63; *An Act Respecting the Protection of Personal Information in the Private*, RSQ, c P-39.1; *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A; *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05; *Personal Health Information Act*, SNL 2008, c P-7.01.

⁹¹ SC 2000, c 5.

⁹² Compensation has been awarded under torts of private nuisance and defamation torts. See e.g. *Provincial Partitions Inc v Ashcor Implant Structures Ltd.*, [1993] OJ No 4685 (awarding damages for harassing telephone calls under private nuisance). Some provinces have created statutory causes of action: *Privacy Act*, RSBC 1996, c 373, s 1; *The Privacy Act*, CCSM, c P125, s 2; *Privacy Act*, RSS 1978, c P-24, s 2; *Privacy Act*, RSNL 1990, c P-22, s 3.

upon seclusion.⁹³ When it did, the small claims court figured prominently in its configuration. Intrusion on seclusion occurs when reckless or intentional conduct of the defendant invades the private affairs or concerns of the plaintiff without legal justification and a reasonable person would find the invasion “highly offensive causing distress, humiliation or anguish.”⁹⁴ When establishing this tort in *Jones v Tsige*, Justice Robert Sharpe acknowledged its social policy implications:

Recognition of such a cause of action [intrusion upon seclusion] would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society.⁹⁵

The small claims court’s role is pivotal in this new tort because proof of actual harm is not an element of the tort. Given the intangible nature of the privacy interest, damages will typically be for a “modest conventional sum.”⁹⁶ Small claims court is by definition the forum for modest sums. Justice Sharpe goes further and expressly sets a range for non-pecuniary damages which is below the \$25,000 limit of the Ontario Small Claims Court:

In my view, damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done. I would fix the range at up to \$20,000.... absent truly exceptional circumstances, plaintiffs should be held to the range I have identified.⁹⁷

In effect, Sharpe JA implicitly assigns small claims court the delicate responsibility of valuing the intangible loss of privacy when no pecuniary loss occurs.⁹⁸ In practice, typical damage awards for minor cases involving the new tort are around \$7500,⁹⁹ well below the small claims limit.¹⁰⁰ This reality will direct privacy breaches into small claims court as there are negative cost consequences for parties who bring claims in superior court that ultimately net judgment within the small claims court monetary jurisdiction.¹⁰¹

⁹³ *Jones v Tsige*, 2012 ONCA 32 [*Jones*]; followed by *Hopkins v Kay*, 2014 ONSC 321 *affirmed* 2015 ONCA 112 [*Hopkins*]. See also *Jane Doe 464533 v ND*, 2016 ONSC 541 [*Jane Doe 464533*] (expanding the invasion of privacy causes of action).

⁹⁴ *Ibid* at para 71.

⁹⁵ *Ibid* at para 65.

⁹⁶ *Ibid* at para 71.

⁹⁷ *Ibid* at paras 87–88.

⁹⁸ *Ibid* at para 87 (describing the factors described in the *Manitoba Privacy Act* as those to be considered in valuing the damages in the new tort).

⁹⁹ Glenn Kauth, “Legal aid employee to pay \$7,500 for intrusion upon seclusion,” *Canadian Lawyer Magazine* (10 November 2014), online: <canadianlawyermag.com/legalfeeds/2373/legal-aid-employee-to-pay-7-500-for-intrusion-upon-seclusion.html> [perma.cc/5ZRY-9BFS]. See e.g. *McIntosh v Legal Aid Ontario*, 2014 ONSC 6136 at paras 33–35, [*McIntosh*].

¹⁰⁰ *Ibid* (quoting Lawyer Mark Hayes of Hayes eLaw LLP: “there is a real possibility that future intrusion upon seclusion cases will be before the Small Claims Court, which makes sense in view of the damages limits placed on such claims by the Court of Appeal”).

¹⁰¹ *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 57.05.

The high volume of debt collection matters in small claims court is an obvious opportunity for the new invasion of privacy torts. An overwhelming majority of small claims court cases involve unpaid contractual debts, where impoverished debtors have few legal defences but their financial inability to pay the debt does not deter the aggressive creditor.¹⁰² Aggressive debt collection practices were brought into issue by the defendant in a defaulted motor vehicle lease claim when the defendant countered with an intrusion upon seclusion action arising from collection phone messages. In *Action Auto Leasing & Gallery Inc. v Gray*, the defendants were allowed a nominal \$100 for intrusion upon seclusion.¹⁰³ In *Connolly v Telus Communications Co.*,¹⁰⁴ the alleged misuse of the plaintiff's credit information was in issue although the evidence did not establish the elements of the tort. Intrusive debt collection calls were also at issue in *Yim v Rogers Communication Partnership*.¹⁰⁵ It seems savvy debtors are beginning to claim intrusion on seclusion when sued for outstanding debts, which has the potential to transform the court's primary debt collection function into one of consumer protection.¹⁰⁶

Importantly, the court has also been asked to weigh in on cases where privacy is at the core of the dispute. In *Vertolli v You Tube LLC*,¹⁰⁷ the plaintiff commenced an action claiming damages arising from the posting of a video on You Tube, both the poster and the host (You Tube) were named as defendants. You Tube's motion to dismiss the claim was denied and the action was allowed to proceed. In *Halley v McCann*, the disclosure of health care information to those outside the plaintiff's circle of care was the issue in dispute between the parties.¹⁰⁸

By setting the range of non-pecuniary damages below the maximum small claims court limit, the Court of Appeal has indirectly designated the small claims court as the forum for quantifying societal discontent with privacy violations. But this is not too suggest that invasion of privacy is within the exclusion jurisdiction of the Small Claims Court. In the latest case advancing Ontario privacy law,¹⁰⁹ the Ontario Superior Court expanded on the range for non-pecuniary damages. Justice David Stinson commented on Justice Sharpe's earlier direction on valuation when awarding \$50,000 saying,

¹⁰² McGill *supra* note 25, Table SM1 (as to high volume of debt collection cases in Toronto Small Claims Court); Peter A Holland, "Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers" (2014) 26 Loy Consumer L Rev 179 at 183 at 187 (as to high volume of default judgments in debt collection cases); Rick Jurgens & Robert J Hobbs, *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts* (Boston: National Consumer Law Center, 2010) at 1, online: < nclc.org/images/pdf/pr-reports/debt-machine.pdf> [perma.cc/F5Z9-QTAZ] (stating harassment, threats and even jail are tools of the collection trade).

¹⁰³ [2013] OJ No 898.

¹⁰⁴ [2012] OJ No 464.

¹⁰⁵ [2016] OJ No 1884.

¹⁰⁶ Debt collection agencies must be registered and anyone may file a complaint about a collection agency on the Ministry of Consumer Services website; *Collection Agencies Act*, RSO 1990, c C-14, ss 12–16.2.

¹⁰⁷ [2012] OJ No 4275.

¹⁰⁸ [2016] OJ No 4672.

¹⁰⁹ *Doe 464533 v N D*, 2016 ONSC 541. The case established a second invasion of privacy tort for public disclosure of private facts and also going well over Justice Sharpe's range with the addition of aggravated and punitive damages.

I am alert to the relatively modest (\$10,000) award in *Jones v. Tsige*, and the cautionary comments of the Court of Appeal concerning claims for intrusion on privacy of the sort that formed the basis for the plaintiff's claim in that case. That was a much different situation, however: while it, too, was a case involving "invasion of privacy," the privacy right offended and the consequences to the plaintiff there were vastly less serious and offensive than the present case. For the reasons previously mentioned, this case involves much more than an invasion of a right to informational privacy; as I have observed, in many ways it is analogous to a sexual assault. Given the circumstances of this case, and in particular the impact of the defendant's actions, a substantially higher award is warranted here.¹¹⁰

It is unlikely that this expanded range will deter small claims court cases; small claims litigants are known to abandon modest excess over the monetary limit in order to remain within the low cost, simplified process.

Punitive damages, designed to punish and deter bad behaviour of defendants, sometimes have a role to play in privacy and discrimination cases.¹¹¹ They are available in small claims court although they are rare.¹¹² They may have been the remedy applied to harassing debt collectors or in malicious defamation before intrusion on seclusion provided a more exacting head of damage that requires less proof of malicious, deliberately wrongful conduct. In this way, the new invasion of privacy tort with its expanded range of damage extends the existing remedies available to small claims court litigants. However, apologies and injunctions that would directly address the subject behaviour and require immediate modification have been and remain outside the reach of the Ontario Small Claims Court.

III. CHALLENGES

The forgoing social policy examples demonstrate judicial and legislative intent to use small claims court to effect social change. However, there are challenges that may limit the court's effectiveness and most of these involve the core tenets of access to justice—low, quick, easy, and summary dispute resolution. Only modest changes can be implemented without compromising the simplified process itself.

A. PUBLIC AWARENESS

The most obvious challenge to fulfilling the social policy mandate is a lack of public awareness. Few stakeholders seem familiar with this function of the court. The court's stereotype as a forum for the trivial and ridiculous perpetuated in the media is a distraction for those seeking a venue to

¹¹⁰ *Ibid* at para 58 (creating a second privacy tort for public disclosure of public facts; it seems both torts can be collectively referred to as invasion of privacy).

¹¹¹ *Ibid* at paras 60-62; see also *Jones*, *supra* note 93 at para 88.

¹¹² See e.g. *Nolan v Toronto Police Force*, [1996] OJ No 1764 at paras 88-93; *Holtzman v Suite Collections Canada*, 2013 ONSC 4240 at paras 63-77 (on appeal punitive damage award also set aside as collection conduct not malicious; *Halley*, *supra* note 108 paras 46-49 (awarding punitive damages for privacy tort).

address serious societal ills. Very few reported cases¹¹³ on the *Parental Responsibility Act*—enacted 15 years ago—may reflect the lack of awareness of both the existence of the statutory cause of action and the availability of small claims court to hear such disputes. The much higher proportion of intrusion upon seclusion decisions reported in the three years¹¹⁴ following its creation could signal progress in this regard and growing awareness of the broader social policy role of the court. But reported cases are a poor indicator of actual usage when dealing with Small Claims Court because most never go to trial¹¹⁵ and only a small percentage of cases that actually go to trial result in reported reasons.

The proportion of issued claims (rather than reported decisions) would present a much more reliable picture of actual awareness. Available statistics on subject matter do not isolate these specific causes of actions but do reveal that over 85% of all claims issued deal with some type of contract dispute;¹¹⁶ only 10% of all issued claims involve tort claims,¹¹⁷ almost equally divided between personal injury claims and those claiming property damage only. It seems obvious that invasion of privacy torts would make up only a very small percentage of the personal injury claims and negligent parental supervision would contribute an even smaller number to property damage claims.

Party entity statistics reporting the very pronounced dominance of the business plaintiff¹¹⁸ suggest that small claims court may have already lost touch with the individual plaintiffs targeted by these social policy types of civil causes of action. Efforts to re-engage this constituency have done little to alter this reality over recent years.¹¹⁹ Currently the court's image as debt collector for business plaintiffs overshadows all other aspects of its work.

B. SIMPLIFIED PROCESS

The court's simplified process, praised by access to justice advocates, offers natural advantages including speedy trials and reduced formality; however, this same simplified process presents obstacles to fulfilling the social policy mandate. Discovery does not exist—a party need only produce documents that the party intends to rely upon, and no discovery of witnesses is available.¹²⁰ Therefore, finding the evidence to prove a small claims court case can be a problem. As well and as noted above, summary trials are typically decided by oral reasons from the bench that go no further than the parties themselves and remain unreported. Even when written reasons are reported there is little precedential value to a reported decision from small claims court. Class

¹¹³ *Supra* notes 73, 74 (2 cases).

¹¹⁴ *Supra* notes 103–105; *supra* note 107 (already more than 6).

¹¹⁵ McGill *supra* note 25, at n 104, Table SM 8 & 9 (trials are set for defended actions only; the vast majority of claims are undefended and a high proportion of defended claims settle before trial).

¹¹⁶ McGill *supra* note 25, Table SM1.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid* at Table PE1.

¹¹⁹ Initiatives such as user friendly forms, fee waivers, etc. No increase in individual parties 2008, 2011 as compared with statistics reported in the 1990s: see McGill *supra* note 25, Table PE1.

¹²⁰ O Reg 258/98, Rule 13.03(2); *Riddell v Apple Canada Inc.*, 2016 ONSC 6014 at paras 9-11 (Div Ct) (subject to some exceptions in special circumstances).

actions do not exist in small claims court,¹²¹ so individual plaintiffs must process their own claims no matter how many similar claims exist or how minor the damages. In sum, a small claims court decision has (at least initially) individual rather than mass application.

The self-representation aspect of the court is a core tenet of the simplified process but for social policy purposes it may be a liability. Even if a potential litigant is aware of the cause of action, preparing cases involving these three areas of the law takes particular legal knowledge. For example, the reverse onus of the parental responsibility cause of action means that the parent must bring their own evidence of supervision and that of the objective reasonable standard. It would be logical for parent defendants to believe the plaintiff would have to prove they did something “wrong.” Similarly, the nuances of the invasion of privacy torts require specific evidence.

The failure of a plaintiff to expressly label the cause of action or defence is not fatal in small claims court. Under the interventionist judicial style¹²² common in small claims court, judges can attach the proper label to facts proven as was done in *Vertolli v You Tube*.¹²³ However, there is a limit.¹²⁴ Judicial activism cannot find evidence where none is offered. Success or failure may turn more frequently in small claims court on a lack of evidence and the placement of the burden of proof (as opposed to substantive assessment on the merits) than it does in other forums where lawyers are common.¹²⁵

The small claims court adjudicator is a part-time generalist.¹²⁶ Traditional forums for privacy, discrimination, and parental responsibility disputes involve full time specialist decision makers through the privacy commissioner office, the human rights tribunal, and the provincial family court respectively. Lack of substantive familiarity may limit the small claims court judge’s ability to fill in the gaps for the unrepresented litigant.

It is beyond the scope of this paper to debate the effectiveness of changing social behaviour through civil litigation generally; however it is acknowledged that there are limits to any court’s effectiveness in this area, not to mention small claims court. Litigation is reactive rather than proactive. Preventative avenues such as educational campaigns must be maintained. As well, courts are public forums, the details of discrimination and invasion of privacy are often sensitive and the victims may be among the most vulnerable and disadvantaged members of society. Victims may not want a public resolution, preferring a private dispute resolution

¹²¹ Class Proceedings Act, 1992, SO 1992, c 6 s 1.

¹²² *Grande National Leasing Inc. v Vaccarello*, 2015 ONSC 5463 at paras 36, 39, 74 (acknowledging on appeal from small claims court that leeway must be given for small claims court judges to intervene more frequently than would be the case if both parties are represented by counsel to explain the process to lay litigants and to clarify points of law and the relevance of evidence, but it can go too far).

¹²³ *Supra* note 107; see also *Hydro One Networks Inc. v Yakeley*, 2010 ONSC 4770 at paras 18–19 (on appeal Divisional Court approved on the application of the principle of set off although not specifically plead); *Brighton Heating & Air Conditioning Ltd. v Savoia* (2006), 79 OR (3d) 386 (SCJ) at para 40 (stating in the Small Claims Court, a liberal, non-technical approach should be taken to pleadings).

¹²⁴ See *e.g. supra* note 122 at para 74 (too much intervention can reflect bias and is grounds for appeal).

¹²⁵ *Supra* notes 72–74, 84–87, 103–108 (showing most reported cases discussed in Part III involved lawyers on at least one side).

¹²⁶ *Courts of Justice Act*, RSO 1990, c 34, s 24.

forum.¹²⁷ Litigation is expensive; even small claims court applies the loser pays rule in Ontario.¹²⁸ Cost awards (although capped and discretionary)¹²⁹ are a real concern for impoverished litigants. Even though waivers of court fees are available for qualifying parties,¹³⁰ this does not protect a losing party from adverse cost awards.

Most of the forgoing limitations are offset by the multi-faceted approach to social policy implementation—as long as small claims court is only one of multiple avenues used to promote social change, the simplified process adds value to the overall social policy strategy.¹³¹ Nothing in the small claims court’s social policy mandate excludes access to the more specialized forums if preferred by the victim and it is not recommended that the core tenets of the simplified process be unraveled to better accommodate the social policy function.

C. REMEDIES – THE CASE FOR EQUITABLE RELIEF

The one area where change could be made without detracting from the access to justice mission of the court is remedies. Equitable remedies would enhance the social policy mandate, particularly for invasion of privacy and discrimination actions. Currently the court is only able to award damages or transfer property, not grant equitable remedies such as injunctions or declarations, despite calls for expansion.¹³² The court lacks the power to order the defendant to apologize, to stop the offending behaviour, or to stop distributing the private facts or information.¹³³ Imagine the dismay of a plaintiff who wins an invasion of privacy action arising from an offensive picture on a website and still cannot obtain a court order requiring the defendant to take it off his or her site. These are limitations already encountered in managing defamation remedies. The age old justifications relating to equitable remedies can be debated here¹³⁴ but the reality is that the court’s impact on social change is limited without the power to alter behaviour.

¹²⁷ See the extensive literature on the benefits of alternative dispute resolution forums such as mediation and arbitration even for none commercial disputes. See e.g. Andrew D. Little, “Canadian Arbitration Law After *Dell Computer Corp v Union des Consommateurs*” (2007) 45 Can Bus Law J 356.

¹²⁸ *Supra* notes 32 & 33; O Reg 258/98, Rule 19.01 as amended by O Reg 78/06.

¹²⁹ *Ibid.*

¹³⁰ O Reg 2/05.

¹³¹ *Hopkins*, *supra* note 93 at paras 59, 69, 73 (specifically addressing the multiple forums available for privacy disputes and finding that either commission complaint or court action may be used by a victim and noting that complaints through the privacy commissioner were more suited to systemic rather than individual breaches).

¹³² *Grover*, *supra* note 8 at paras 44, 49. See Coulter Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto, Ministry of the Attorney General, 2007 at text surrounding n13 online: <attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/050_scc.php> [perma.cc/9N93-W966] (concluding that an expansion of equitable remedies should accompany any monetary increase, and that restriction does not make sense in cases where the equitable relief relates to matters within the monetary jurisdiction of the court. Further noting that Alberta, under its Provincial Court Act, provincial judges who preside over Small Claims Court matters have a limited power to grant equitable remedies in respect of a claim for debt, damages, return of personal property, and specific performance where the value of the claim is within the monetary jurisdiction of the court).

¹³³ Failure to apologize may trigger punitive damages: see *Jane Doe 464533*, *supra* note 93 at para 60; *Halley v McCann*, [2016] OJ No 4672 at para 49.

¹³⁴ Age-old arguments include constitutional barrier and conflict with goals of the court. As to constitutional argument see *Reference Re Adoption Act (Ontario)* [1938] SCR 398 at 413-414 (holding that only s 96 judges have

Perhaps modified equitable relief tied to the damage award is the answer. Authority for the court to increase damages if the offending action (or inaction) is not modified could incentivize a change in behaviour. This type of remedy exists for the Ontario Landlord and Tenant Board—the specialized tribunal for residential landlord and tenant disputes with exactly the same monetary jurisdiction as the Ontario Small Claims Court.¹³⁵ The Board has the authority to terminate a tenancy on a particular date and order compensation to the landlord.¹³⁶ The Board also routinely sets a per diem to be added to the compensation for every day that the tenant remains in occupation after the ordered termination date.¹³⁷ Why not allow a small claims court judgment to include the same type of per diem? It could set damages for an invasion of privacy or defamation up to the date of the judgment and then assign a per diem amount for every day the conduct continues after release of the judgment. This would save the plaintiff from having to bring a second action for the additional damages suffered after trial and incentivize behaviour modification.

Critics may be concerned that such a post judgment per diem could cause the value of the judgment to rise above the monetary limit of the court. However, this already occurs with the accrual of post judgment interest. Many small claims court judgments are worth more than \$25,000 when post judgment interest is included. Debt collection actions that set a contractual rate of interest exceeding 20% per annum are common for credit card debts and the court allows post judgment interest to run indefinitely.¹³⁸ A \$20,000 judgment quickly exceeds \$25,000 when a 29.9% per annum post judgment interest rate runs for a few years. If the critics insist, the post judgment accrual could be capped at the monetary limit.

Therefore, the current remedial challenge could be overcome with the following amendment to the rules:

- (1) If the court finds that a party will continue to suffer damage after judgment as a result of ongoing behaviour of the at fault party, a post judgment per diem amount may be awarded to compensate for the continuing damage.*
- (2) Unless an earlier date is identified in the judgment, post judgment per diem compensation shall continue to accrue until the at fault party discontinues the identified behaviour or the total judgment damage award plus the post judgment accrued per diem amount, exclusive of interest, reaches the maximum monetary jurisdiction of the court, whichever shall first occur.*

inherent power to grant equitable relief and “a province is not empowered to usurp the authority vested exclusively in the Dominion in respect of the appointment of judges who, by the true intendment of the section, fall within the ambit of s 96, or to enact legislation repugnant to that section”); Manitoba Law Reform Commission, *supra* note 5, at 31, 34–35, recommending the Manitoba Court be empowered to grant equitable relief but acknowledging conflict with Constitution Act, 1867, s 96. As to goals of the court see McGill, *supra* note 3 at 243 (noting limited remedies advance the goals of simplicity and finality and facilitates a streamlined enforcement process); Grover, *supra* note 8 at paras 15–44.

¹³⁵ *Residential Tenancies Act*, SO 2006, c 17, s 207. Small Claims Court and the Tribunal each have some responsibility for residential landlord tenant disputes; *Efrach v Cherishome Living*, 2015 ONSC 472 at paras 4–16.

¹³⁶ *Ibid* at s 74(3)(ii).

¹³⁷ *Ibid* at ss 86, 87.

¹³⁸ See e.g. *Capital One Bank v Toogood*, 2013 ONSC 5440 (Div Crt) (an appeal imposing a 21.7% credit card rate as post judgment rate after Deputy Judge refused to allow it).

Other jurisdictions have granted their small claims courts limited authority to grant equitable relief. British Columbia and New York City both allow the specific performance remedy.¹³⁹ California allows equitable relief in limited circumstances when “a statute expressly authorizes the small claims court to grant equitable relief.”¹⁴⁰ There are a range of available solutions that would not amount to unfettered authority to grant equitable relief in all cases and yet remove the current moratorium.

D. ADDRESSING CHALLENGES

To have a meaningful social change impact, the small claims court forum requires some minor modifications and the expansion of remedies may be the easiest one. It involves only a rules change. Awareness and preparedness will require more nuanced efforts. It is highly unlikely that the television media will reform its presentation of the court to include this more serious side. Although increased involvement of lawyers and to some extent paralegals could reduce both the awareness and preparedness obstacles, increased legal representation is not the recommendation of this paper. To depart from one of the fundamental pillars of the simplified process by encouraging legal representation would undermine the primary functions of the court. Therefore, litigants must be able to find the necessary information and support within the existing process. The solution may be the settlement conference. Ontario’s process incorporates a mandatory settlement conference prior to trial for all defended actions and this presents an opportunity. The settlement conference could be the resource to supply necessary information with its interactive and less evaluative environment. Judges holding these informal sessions could take an instructive approach to advising litigants about the elements of the social policy causes of action and the required evidence. Again critics may fear the loss of neutrality or impartiality that may occur if a judge advises a litigant to add an unknown cause of action thereby worsening the position of the opposing party. However, settlement conference judges do not hear any eventual trial and already comment on the strength of the evidence and instruct parties to amend pleadings in order to assist parties in effective preparation for trial¹⁴¹—the recommended approach to the social policy mandate would be in keeping with the existing role.

Going forward, the primary challenges can be overcome by equipping the court with necessary remedial power and incorporating awareness initiatives into the settlement conference in the hope that the public will widen its view of the court and the social policy mandate will form a meaningful part of the court’s work.

IV. CONCLUSION

Individually, the introduction of parental responsibility, privacy and discrimination, to the jurisdiction of the Ontario Small Claims Court went virtually unnoticed. Even viewed collectively, they amount to a negligible proportion of the court’s caseload. Still their addition to

¹³⁹ *Small Claims Act*, RSBC 1996, c 430, s 3(1)(c) (specific performance); *N Y City Civil Court Act*, §1805 (declaration).

¹⁴⁰ *California Code of Civil Procedure*, Title 1, c 5.5, §116.220(5).

¹⁴¹ O Reg 258/98, Rules 13.03(1) & 13.04.

the range of topics considered in small claims court marks a profound shift in the mandate of the court. The court's reach and influence now extends to key social issues of the day and is no longer confined to the mercantile, trivial or insignificant. The expanded mandate developed by a combination of legislative design and judicial activism is a reality and the simplified process must adapt to fulfil its potential.

Unfortunately, this little known aspect of the Court's work is underutilized and the existing process is ill-prepared to meet its ever expanding social change responsibility. Authority to grant limited equitable relief would improve the Court's ability to deal with the social change aspects of the new civil causes of action. As long as the Small Claims Court remains trapped between the stereotypes of debt collection and media reality show, few will benefit from the practical application of emerging social policy.