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Suggested Reforms in the Procedure in Small Claims Courts

SUGGESTED REFORMS IN THE PROCEDURE IN SMALL CLAIMS COURTS

By JUDGE A. M. CARTER*

One of the areas of study in which the Ontario Law Reform Commission is presently engaged is the structure of the Small Claims Courts. There can be no doubt that substantial change is needed with a view to the provision of (to use the language in the terms of reference of the overall study by the Commission) "more convenient, economic and efficient disposal of civil business"¹ in the approximately 200 Small Claims Courts that presently exist in Ontario. Undoubtedly a large number of these Courts could be closed or consolidated with some considerable saving of expense in the total administration costs of maintaining these Courts. The purpose of this article is, however, to suggest changes in practice and procedure, rather than to concern itself with the strictly administrative or management side of the matter.

First of all, the Courts are presided over, as required by the governing statute,² by County Court Judges federally appointed, and it is worthy of note that only one other province in Canada, New Brunswick, follows this practice. In Ontario there is one provincially appointed Small Claims Court Judge,³ and something less than ten retired County Court Judges who act as part-time Judges in these Courts, chiefly in the larger areas. The practice of appointing solicitors in isolated cases, although still resorted to in some counties, is becoming less frequent for a number of reasons, but chiefly one of economics. There is no provision for paying solicitors who act as delegates of the ordinarily presiding County Judge, and in any event it does entail a considerable sacrifice of time and money for a solicitor to accept such responsibility with any frequency. On the other hand, it is only with frequency of experience that a solicitor can render efficient and effective service in this capacity. From another viewpoint, the feeling that once may have existed that it was an honour to be asked to undertake this duty, even on a single occasion, has largely been dissipated by the mood of the times. At the same time, the very considerable increase in jurisdiction now possessed by the County Court in its own right has also made it increasingly difficult for the greater number of County Judges who preside over Small Claims Courts to spare the time required to properly meet the convenience of the public and preserve the general feeling of a fair and full hearing

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¹ Terms of Reference issued by the Minister of Justice and the Attorney General for Ontario to the Law Reform Commission engaged in reviewing the present system of Courts.

² B.N.A. Act 1867, 30 & 31 Victoria c. 3 s. 96(U.K.).

³ The Province of Ontario has concurrent jurisdiction with the Federal Government to appoint Small Claims Court Judges, see *The Small Claims Court Act R.S.O. 1970*, c. 439, s. 11.

that is the chief desire of the litigant who wants to have his day in Court, with little concern for others with whom he must compete at the same Sittings of the Court. The Presiding Judge at a Small Claims Court (i.e. the larger Courts, approximately 100 or one-half of the total number) is, and has been for several years past, in a continuing dilemma, torn between allowing cases to run their full length, particularly where counsel represent one or both parties, thereby causing many cases to be put over month after month without being heard, or deliberately shortening the time allotted for each case in order to dispose of as many cases as possible on the usually single day allotted per month for trials. In the latter course of action, both litigants and their counsel, if any, are quite often aggravated at not having been given their inherent right of a full day in Court.

To meet the first problem of providing more time where needed for more complete hearings and less inconvenience caused by delayed trials, it is suggested that consideration be given to the appointment, at least in the counties where need can be shown to exist, of duly qualified solicitors, preferably with experience in litigation and of at least ten years standing at the Bar, as part-time Judges with jurisdiction exclusive to the Small Claims Courts in their respective municipality or county at most, at a per diem allowance of a reasonable nature, perhaps \$50 - \$100, and within certain limitations, power to set additional days for Sittings where required, in order to give at least a fairer proportion of time to each case than currently is possible under the present system. At the same time, such a system would free the County Judge so relieved for more important duties at his own Court level and would provide excellent training and experience for lawyers who might later be considered for a full-time judicial appointment.

The next area which warrants the application of a different and yet old concept is the non-appealable division. A generation ago, when the pressures were not nearly so great, or the case lists so long, the concept of the "Poor Man's Court" or the Layman's Court" was recognized much more visibly than it is today, and the format was understandably different in non-appealable cases in that lawyers seldom participated, and the parties simply told their "story" to the Judge who applied his mind, without over-concern about the rules of either procedure or evidence, to the equities of the matter, and gave quick judgments based on common sense and the guiding principle of Division Courts (as they were known then), namely, that they were Courts of equity and good conscience. Today there are many cases in which parties are represented by counsel or agents, and more and more motor negligence cases being contested by insurance companies who, much more frequently of late, refuse to settle, and are quite content to spend more money on legal representation than on the claim itself. Surely, at least in cases involving not more than \$100, a return to the old custom of the parties relating their respective sides of the case to the Judge, without assistance from any representation, professional or otherwise, could save considerable time and expense, and be much more convenient to the persons involved. In such a category, the proposal here is that parties would not be allowed representation. While it is true that the majority of cases under \$100 seldom have counsel engaged, there are some that do, and in several Courts, credit bureau agents are acting in the capacity of agent for one party, usually the plaintiff. In the writer's personal view, the ban on representation

might very well be imposed on cases up to the present non-appealable limit of \$200, but at least it should clearly be warranted in cases up to \$100.

It is difficult to suggest any real change in procedure or practice in the appealable case division of the Small Claims Courts. It may be that the monetary jurisdiction of \$400 (except in the Districts where it is \$800) has become too limiting in terms of the number of cases to be dealt with, in most Courts throughout the province, in a single day. Certainly in motor negligence cases, unless a completely separate Court or tribunal is established solely for the trial or hearing in such cases, it is impossible to reconcile the advantage, other than costs, of bringing a \$400 repair bill into Small Claims Court and getting a rushed trial in the less than sufficient time likely to be allotted for any individual case, being only one of several to be heard the same day, over the alternative, for any case over \$400, of having at least half a day for trial in the County Court, without the risks inherent in the Small Claims practice, dictated by the system of administration. The truth is that the amount of damages involved does not have any relationship to the amount of time required for a proper trial, and yet more and more of these cases are being contested in Small Claims Courts, often with a slight excess in damages over the jurisdiction being abandoned, with legal representation on both sides, with considerable extra cost and inconvenience to all persons involved as parties, witnesses or counsel, due to the lack of adequate time available for the disposition of so much business. In some counties, counsel who are involved in cases where the issues are complicated, or there are many witnesses (such as in Third Party proceedings) have been asking for special dates for trial so that they will be ensured of a fixed time for hearing and not exposed to the risk of several adjournments on regular or statutory Sittings days. There are are very few counties now where the County Judge (or Judges) has any additional time to devote to extra Sittings for Small Claims cases. The answer seems to be in the creation of special part-time Judges who can devote the necessary time to ensure fair and full hearings in appealable cases to the same extent and virtually the same procedure as in County Court, and possibly as well to increase the monetary jurisdiction to \$700 - \$800.

There is one area or division of the Small Claims Court jurisdiction that has greatly changed, and indeed lost most of its effectiveness in the past three years due to the removal from the Small Claims Courts Act of the power of the Court to deal meaningfully with show cause summonses or to enforce default orders of the Court. In 1968-9 Statutes of Ontario, c. 30, Sections 131 and 132 of the Division Courts Act (as it then was) were amended whereby the Court can no longer consider whether there is any wilful default under a previous Court Order for payment, and can no longer commit a debtor to jail for such act of wilful default. The apparent intention of the legislature in passing this amendment was to remove the objection that the Courts were still putting people in jail for non-payment of debts and that, even in these enlightened times, there did indeed still exist a "debtor's prison". Until this amendment, it was within the power of the Judge to imprison persons shown to have wilfully defaulted in paying off judgments as directed by a previously issued Order of the Court after such persons had been given the opportunity to show cause for not having complied with a previous Order of the Court respecting payment of the judg-

ment. It would be interesting to study the figures, if they are available, as to how many times imprisonment for this reason has occurred in the decade preceding the amendment in question. It is submitted here that it was a power very sparingly exercised, and only in cases of flagrant and repeated violations of this kind. The fact that such power existed, however, was the means whereby many judgments were recovered at least in part, from debtors who would otherwise have never paid or even made any real effort to satisfy such debts. However commendable the deprivation of this power may be in terms of social advancement, the results since have clearly rendered the Court impotent in terms of enforcing orders that it still has the power to make and the exercise of which power is still the main purpose of such proceedings. The purpose of a show cause summons, still in use notwithstanding the amendment, is quite meaningless and ineffective in execution, unless it is thought to have some psychological influence on a debtor who might not be aware that the Court does not in fact have the power to enforce orders for payment on account of judgments outstanding. The Court may still provide, to the extent permitted in the discretion of the Presiding Judge, for an inquiry into other means of relief or potential income available to the judgment creditor against the debtor being examined, but such an inquiry is nothing more or less than an examination and does not surely require the presence or supervision of a Judge for such limited purpose. If the Court does make an order for payment against the debtor, and the debtor fails to pay or becomes in default, as the case may be, there is absolutely nothing the Court can do about such situation, and which in many cases would amount to clear contempt of Court, for which no punishment at all exists. The effectiveness of an order now made for payment, whether on consent or by the Court's own volition, depends entirely on the conscience of the debtor who knows or is likely to know that the order cannot be enforced.

Creditors, through their agents and/or solicitors, are becoming increasingly aware of this situation, and the number of judgment summonses issued is in rapid decline throughout much of the province. In point of fact, the sole function of the Court in this respect is now solely to put some semblance of judicial authority on a consent order for payment often on terms volunteered by the debtor, and of a minimal amount, with the creditor being quite dissatisfied, the debtor knowing the order means nothing, and the Court thoroughly frustrated at the ineffectiveness of such procedure. Surely if such a procedure is to become effective in any way, it is by way of assuring the debtor that so long as he meets the terms of a voluntary settlement, other legal remedies will not be used against him for the recovery of the same debt. Such consent orders as are sought could be arranged under the supervision of the Clerk of the Court who should have the power to effectively subpoena parties to an action for the purpose of requiring their attendance and discussion. County Court Judges being relieved from having any part to play in this process, could expend the time saved quite usefully to the conduct of trials in their respective Small Claims Courts and also be spared the potential humiliation which threatens them at the present time of having to acknowledge that they do not possess the power to enforce any order for payment made by them in these proceedings. Alternatively, it surely is unreasonable that Judges should ignore the limitation on their powers in this respect and be any longer required to make orders other than on a strictly consent basis, with a clear indication being given at the time of making

such orders to both the debtor and the creditor of the inability to enforce such orders in the event of default.

In summary, the recommendations for the reform in some areas of Small Claims Courts are these:

1. The appointment of lawyers as part-time Judges to relieve the workload in the busier counties and districts.
2. The creation of a separate division of non-appealable cases involving up to \$100 wherein only the parties to the action personally may appear in Court, i.e. without legal or other representation.
3. An increase in monetary jurisdiction for motor negligence cases, but only in the event special Courts presided over by part-time Judges are made available for this purpose.
4. The removal of judgment summonses from the Judge's responsibility, with the provision for consent orders only being within the jurisdiction of the Clerk of the Court who should be given the power to subpoena necessary parties.

