

Automating Consumer Remedy: Access to Justice and Free-market Regulation

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Abstract. Modern societies tend to exclude victims of injustice from access to the Courts. ICT offers new pathways to facilitate access to justice by citizens who cannot afford legal representation. ICT also offers a potential breakthrough in the sterile debate between inefficient regulation by government, and inefficient self-regulation by industry. In the context of consumer law in England and Wales, the author has developed a case study: claim drafting software that may support both of these possibilities. As a free service it may help consumers who cannot afford legal assistance, or where the cost is greater than the remedy. It may relieve the pressure on the judiciary by structuring consumer claims in a way that is legally comprehensible to the Courts. Finally, if taken up on a large scale, it may provide boards of directors with something new: a business reason to comply with the law.

Keywords: ICT, justice, software, drafting, consumer, remedy, self-service, regulation.

1 Introduction

Modern systems of justice tend to be increasingly expensive for users to access, especially in terms of costs. At the same time governments are becoming increasingly poor, a trend that was apparent even before the recent financial “crisis”. This trend looks like it will accelerate despite, or perhaps even because of, the public spending reaction of governments to those events. All this creates a double pressure on access to justice. On the one hand, fewer people can afford to access the Courts on their own finances, as they risk their livelihood and assets. On the other hand, governments are providing less and less in public funding to compensate for these risks.

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2 Policy in England and Wales – Small Claims

Many governments, encouraged by their judiciaries, established “small claims” courts, or litigation “tracks”, many decades ago² as part of a multi-tier procedure for processing various types of dispute. England and Wales has its own “small claims” track. As might be expected, this offers a number of significant advantages and disadvantages over traditional litigation. The advantages include:

- Costs awards against the claimant are extremely limited;
- The Court fee charged for filing the claim will be quite low;
- The matter will be heard relatively quickly - typically there will be a single main hearing, without any interlocutory hearings, and minimal case management – and sometimes the judge is able to rule on the papers alone;
- There is no expectation that legal representatives will be present or will have prepared the documents. This means that legal fees are technically unnecessary.

The disadvantages include:

- Costs awards for the claimant are extremely limited;
- Limitation of the maximum sum that may be claimed – typically £5,000, reduced to £1,000 for certain types of dispute;
- There is no expectation that legal representatives will be present, or will have prepared the documents. This means that the judge – for example a County Court District Judge - will spend a disproportionate amount of time performing legal conference tasks with one or both sides, trying to work out what documents are relevant and why.
- While the later “track allocation” form N149³ is fairly simple to understand and complete, on the initial form N1⁴ claimants are required to attach (or follow up with) “particulars of claim” when filing. As the drafting of particulars of claim is a highly specialist legal skill few claimants will have the knowledge to do a proper job on this. This makes it more difficult for defendants, and the Court, to understand the nature of the dispute. Again, the judges have to do double duty, trying to discover what the parties’ cases in law might be.
- Claimants are not excused from the requirement, common to all litigation, of writing a “Letter of Claim” to the defendant prior to taking action. This is not quite as simple as it sounds, as these letters must comply with the appropriate “pre-action protocol”⁵, again designed to make the case understandable to defendants and the Court.

² For example, New York has had “small claims” provision since 1934:
<http://www.nycourts.gov/courts/nyc/smallclaims/civilhistory.shtml>

³ <http://www.hmcourts-service.gov.uk/courtfinder/forms/n149.pdf>

⁴ http://www.hmcourts-service.gov.uk/courtfinder/forms/n1_0102.pdf

⁵ http://www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm

As might be expected, small claims duty is likely to be highly unpopular with the English judiciary⁶, especially because of the disproportionate time it consumes and the difficulty of dispensing satisfactory justice. It is also clear that many of the listed advantages also may be, depending on context, disadvantages.

3 ICT responses

As could be expected, there has been some level of ICT take-up of these problems. Some of these have been provided by government, others by commerce. Naturally, all have been focused on the interest of the providers. The two most relevant examples are discussed briefly.

3.2 the Office of Fair Trading's Template Letters⁷

The Office of Fair Trading ("OFT") has a number of template letters available for consumers with fairly simple disputes. They include letters before legal action⁸. These are intended as a first step rather than a full solution. Should a more complicated matter arise OFT may refer the matter to local government "trading standards" officers.

3.1 HM Court Service's web service Money Claim Online⁹

Money Claim Online gives consumers and other litigants a cheap, fast, and effective way of filing a claim with the Court. To assist the Court certain basic items are taken care of by the web service, such as identifying parties to the contract and formation of the contract. However when it comes to Particulars of Claim litigants are left with a single box.

⁶ The author is unaware of formal research for or against this proposition. However, the author has discussed small claims with a variety of English judges. All report less than satisfactory experiences with small claims.

⁷ http://www.consumerdirect.gov.uk/after_you_buy/making-complaint/template-letters/

⁸ http://www.consumerdirect.gov.uk/after_you_buy/making-complaint/template-letters/letter_before_action/

⁹ <https://www.moneyclaim.gov.uk/csmco2/index.jsp>

4 Small claim drafting software

In 2008 the author began designing, then building, software intended to fill a number of gaps in the available offerings for consumer remedy. Specifically, the software:

- Conducts what amounts to a virtual legal conference;
- Drafts a formal Letter of Claim fully compliant with PD Protocols;
- Drafts formal Particulars of Claim suitable for presentation to a Court (optional but ordinarily included, as draft, in the Letter of Claim), which
 - Pleads to a professional standard parties, formation, and terms;
 - Pleads breach of contract, with or without misrepresentation and negligence as appropriate;
 - Pleads multiple joint and alternative remedies, ordered by client preference - including specific performance, rescission, total failure of consideration, damages under appropriate heads, and costs and interest under appropriate heads;
 - Manages issues of evidence identification for legal disclosure;
 - Binds together evidence, with loss/damages, with breaches, with terms;
- Consequently discourages apparently unfounded pleadings;
- Provides a document to assist the lay client by explaining exactly why each paragraph/subparagraph of the Particulars is drafted in the form it takes;
- Nominally structures a witness statement (which optionally may be included, as draft, in the Letter of Claim);

The deliverable documents are provided to consumers in the form of non-editable PDF files, alternatively to registered charitable or government help centres (for example in England and Wales, “Citizens Advice Bureaux”) and pro bono legal advice clinics, in the form of word-processed documents.

It is intended that the software will be made available pro bono as a web service. . At the time of writing the drafting business logic is implemented for England and Wales pleadings and the software is in a demonstrable state.

In terms of product “placement” the software provides a detailed Letter of Claim suitable for anything more complex than the templates provided by the Office of Fair Trading. It also provides a level of detail for Particulars of Claim offered by neither the OFT nor HMCS’ Money Claim Online. Again I stress that these should not be considered deficiencies in the OFT or HMCS offerings, whose objectives are different from mine, though compatible.

5 Extension of Scope

5.1 Heads of Claim

From time to time other possibilities may present themselves. The author has one immediately in mind. This is non-financial remedies under “Privacy” Directive 95/46/EC, whose UK implementation arguably is significantly weaker than it ought to be¹⁰. Further, the penalties are very small and government policy, as expressed in funding, keeps enforcement at a minimum. The net effect of this is that a number of companies with whom the author has worked find a policy of non-compliance both convenient and economically efficient, while such policies are perfectly acceptable in company law. With some companies this may result technically in tens of millions of criminal offences per year. By way of an unusually well-publicised example, consider the airline data privacy policy disputes between the EU and USA, and the arguably criminal activities of all airlines flying into the USA¹¹ until the recent extension of the US online visa programme.

5.2 Jurisdiction

At the time of writing the documents generated are applicable only to England and Wales. However with assistance from interested lawyers qualified in other jurisdictions, the author hopes to extend the software to those jurisdictions, where compatible.

Clearly this task may be harder for jurisdictions not descended from the English model, as the differences will be relatively greater, and the author speaks only English.

¹⁰ For instance, s 10 Data Protection Act 1998 substantially implements remedies available under articles 12(b) (rectification of processing) and 14(a) (objection to processing) of the Directive. However, finding remedies in domestic law for failure to comply with articles 11(1)(c) (informing the subject of recipients of the information on demand) and 12(c) (notification to third parties of rectification) seems more difficult.

¹¹ Asinari, M. & Poulet, Y., ‘The airline passenger data disclosure case and the EU-US debate’, (2004), *CLSR*, vol. 20, no. 2, pp 98-116

6 Opportunities presented by expanding “free-market” litigation

For reasons of both relevance and space, the author will not argue this here in any detail – treat the following as suggestions for future research.

Traditionally there are two models of regulation: by government; and by industry. Regulation by government could be regarded as economically inefficient because it costs substantial money to achieve effectiveness, especially given the possibility that regulators can be taken captive by the industry they regulate. On the other hand, industry self-regulation can be said to be socially inefficient on the basis it is, as Adam Smith observed, unlikely to be effective:

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”¹²

Likewise Milton Friedman reminds us that:

“There's a real distinction between being in favor of free markets and being in favor of whatever business does. Those don't go together at all and that distinction was recognized from the very beginning of economics as a science.”¹³

Due to the consequences of the financial “crisis” decisions made by most governments in 2008-2009, it is likely that those governments will seek to reduce, rather than increase, expenditures in all categories including regulation. At the same time companies, for whom decisions to comply with the law can never be driven by anything other than cost-benefit analysis, naturally will seek to bypass any controls that do exist, where it is cost-effective to do so.

If victims of unlawful behaviours (in this instance, consumers) are granted increased litigation opportunities, a third alternative may appear – “self-service”, or “free-market” regulation. Where there is an increased chance that breach of contract will lead to litigation, companies will re-assess their legal and financial risk as much higher than before. Eventually this may lead to companies scrapping their policies of unlawful behaviour, in those cases where the cost/benefit analysis of non-compliant versus compliant behaviour is reversed. In turn this may reduce the need, and thus the cost, of government regulation.

¹² Adam Smith, *Wealth of Nations*, 5th ed. 1789, compiled Edwin Cannan, London, Methuen 1904, I.10.82.

¹³ Milton Friedman, *The Suicidal Impulse of the Business Community* (Adam Smith Address to the Association of Business Economists), Business Economics, January 1, 1990; repeated with an invaluable Q&A session November 21, 1998.

7 Conclusion

In any area of law, it is likely to be more efficient, as well as more satisfactory socially, where victims of injustice are able to seek remedy themselves, than if others, such as governments, do so on their behalf. However, individuals cannot gain access to justice where the costs of legal action, as is often the case, exceed the gains. This economic reality can be, and routinely is, exploited by potential defendants (in this paper, businesses) to the great detriment of potential claimants (in this paper, consumers). A proper and effective response is to look at ways of lowering the cost of effective legal action.

The more opportunities given to potential litigants to enforce laws, the more often, and the more likely, those laws will be observed by potential defendants. This is a virtuous circle. The author is hopeful that this paper's approach to consumer litigation can help extend access to justice to consumers, improve Court understanding of impoverished claimants' cases, improve business compliance, and cut the costs of government regulation.