

# Tribunals and Informal Justice

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## Introduction

This article has developed out of an empirical study of the procedures, decision-making processes and outcomes in four different types of informal tribunals dealing with welfare benefits, immigration disputes, employment disputes and detention under mental health legislation.<sup>1</sup> A central objective of the study was to assess the impact of representation on tribunal decision-making and outcomes, and, within this context, to consider whether procedural informality represents a benefit or potential trap for tribunal applicants. The assessment was carried out on the basis of quantitative analysis of 4000 tribunal case files, observation of 500 tribunal hearings, and interviews carried out with tribunal chairs and members, legal and lay representative, presenting officers and appellants to three of the four tribunals.<sup>2</sup> Appellants were interviewed at three stages in the tribunal process: before their hearing; after their hearing and before the decision; and after they had received their decision.

The research details the activities of representatives and their effect on the outcome of informal hearings, the approach of tribunals to procedure and decision-making, and the behaviour of appellants at tribunal hearings. By looking at the dynamics of informal legal procedures, and attempting to understand the needs and competencies of those who bring and those who hear tribunal cases, it is possible to highlight some of the inherent difficulties in designing informal alternatives to traditional courts that satisfy the need for accessibility and simplicity, whilst ensuring the delivery of justice — especially for the poor and disadvantaged.

## Tribunals and Informal Justice

Informal tribunals that review administrative decisions and adjudicate on disputes between individuals have been a part of the British system of civil justice for some time.<sup>3</sup> Their popularity with policy-makers, at least, has led to a remarkable proliferation in the last 50 years, and currently tribunals in the UK hear over a quarter of a million cases annually, representing some six times the number of contested civil cases disposed of at trial before the High Court and County Courts together.<sup>4</sup> New tribunals are being created all the time.<sup>5</sup> Such tribunals have historically been viewed as cheap, non-technical substitutes for the ordinary courts for a wide range of grievances and disputes, in which parties can initiate actions without cost or fuss.

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- 1 H. Genn and Y. Genn, *The Effectiveness of Representation at Tribunals*, Lord Chancellor's Department (1989).
- 2 Interviews were not carried out with patients bringing cases before Mental Health Review Tribunals.
- 3 Although early forms of tribunals were in existence in Tudor times, the origins of the modern tribunal were established at the beginning of the 20th century.
- 4 Council on Tribunals, *The Annual Report of the Council on Tribunals for 1990/91*.
- 5 of the new Disability Appeal Tribunals and the Child Support Appeal Tribunals.

Tribunals in the UK have been largely overlooked by scholars concerned with developments in informal justice, who have tended to focus on small claims procedures, conciliation, mediation and arbitration.<sup>6</sup> This omission may be because the history of tribunals predates the contemporary trend towards informalism,<sup>7</sup> and because tribunals do not represent 'alternatives' to courts, unlike, for example, some small claims procedures and arbitration hearings. Tribunals are the only mechanism provided by Parliament for the resolution of certain grievances against the State, and for some specific disputes between individuals. They are the result of deliberate choice, and in the early days of the Welfare State, at least, it has been argued<sup>8</sup> that this choice was underpinned by philosophical as well as practical considerations. Tribunals ought, however, to be of interest to those who study alternative dispute resolution mechanisms. They display many of the characteristics welcomed by proponents of informalism, and some of the historical and modern justifications for the creation of tribunals rest on presumed advantages over ordinary courts which echo the claims made for ADR and criticisms of conventional court adjudication.

## Defining Tribunals

In the UK there are about 50 different types of tribunals and some 2000 tribunals altogether. Tribunals are supervised on a general basis by the Council on Tribunals, but there is no common procedure followed by these bodies, no general appeal process or appellate body. Some tribunals have lay members, others have specialist qualifications. Some tribunals act in a strictly judicial fashion, while others look more broadly at policy considerations. It is, in fact, impossible to provide a simple definition of a tribunal. The label is given to many different kinds of bodies with widely differing functions, and covering a vast range of subject areas including private as well as public law issues.

The four tribunals included in the study from which this paper has developed are, in effect, court-substitutes.<sup>9</sup> They do not have responsibility for making regulations or devising policy, but are required to act as informal courts, reviewing administrative decisions or adjudicating between disputing parties. There are great differences between tribunals in the degree of informality to be found in proceedings, and in their function. SSATs and hearings before immigration adjudicators, for example, provide a first tier of appeal from administrative decisions. Industrial tribunals, on the other hand, adjudicate at first instance on disputes between employers and employees. They are not concerned with administrative decision-making, but with disputes between private parties. There are also many differences in the composition of tribunals. SSATs and industrial tribunals are composed of a legal

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6 An exception is the work by Lempert and Monsma on Housing Eviction Boards in Hawaii which resemble administrative tribunals. See, for example, R. Lempert, 'The Dynamics of Informal Procedure: The Case of a Public Housing Eviction Board' (1989) 23 *Law & Society Rev* 347; R. Lempert and K. Monsma, 'Lawyers and Informal Justice: The Case of a Public Housing Eviction Board' (1988) 51 *Law & Contemporary Problems* 135; K. Monsma and R. Lempert, 'The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board' (1992) *Law & Society Rev*, vol 26, no 3, p 627.

7 cf R.E. Wraith and P.G. Hutchesson, *Administrative Tribunals* (London: Allen & Unwin, 1973) for a detailed history of the development of tribunals.

8 eg Wraith and Hutchesson, *op cit*; B. Abel-Smith and R. Stevens, *In Search of Justice* (London: Allen Lane, 1968).

9 cf Abel-Smith and Stevens, *op cit*, for a useful classification of tribunals.

chairman and two lay members. Immigration cases, on the other hand, are heard before a single legally trained Adjudicator. Although in each of the four tribunals the right to apply for a hearing before a tribunal without incurring cost is virtually automatic, the procedures in each tribunal thereafter are very different. Procedures in SSATs are very informal and defined inaccurately as being 'inquisitorial' with proceedings being conducted around a large table. Immigration hearings and industrial tribunals are considerably more formal and more obviously adversarial, with raised platforms and evidence often given on oath.

Such similarities as there are between tribunals tend to reside in the *absence* of certain features of courts. For example, the absence of strict rules of evidence; the absence of court robes; the frequent absence of representatives appearing for applicants, etc. Indeed, it might be argued that the *only* common, unifying aspects of adjudicative institutions that bear the label 'tribunal' concern their superficially distinctive procedures and personnel. Since it is in the presumed *procedural* advantages over conventional courts that the most compelling arguments for establishing tribunals have been made, it seems appropriate that an analysis of the activities of tribunals should concentrate on the benefit conferred by this procedural innovation on those whose cases are decided by tribunals.

### Procedural Advantages: Tribunals as the 'Preferred Option'

The arguments for establishing tribunals to deal with certain categories of dispute rather than giving jurisdiction to the ordinary courts have variously been based on constitutional arguments; allegations of class bias in the courts; practical arguments concerning lack of resources in the courts to handle new and potentially huge caseloads; and finally, the positive benefits of tribunals over ordinary courts in terms of their speed, cheapness, informality and expertise.<sup>10</sup>

The spreading jurisdiction which has been conferred on tribunals by Parliament might have been conferred on the courts, but the statistics demonstrate that the existing courts would have been totally engulfed by the flood of cases. But Parliament's choice of a tribunal in preference to a court has been based on more than a desire to spare the courts from an unsupportable burden. The intention has been that tribunals should be cheap and accessible.<sup>11</sup>

In the early days of the modern tribunal system, the intention was that tribunals should provide easy access to specialist adjudicators at no cost to applicants. There was no charge for the initiation of applications to tribunals and no cost for applicants if they lost. The hearings were to be 'informal' and there was an assumption that the informality of proceedings would make it possible for applicants to represent themselves at hearings. Tribunal chairmen would take a relatively active role in hearings and adopt flexible procedures. The process was intended to be swift, not bogged down in 'technicality' and not bound by strict rules of evidence. Since there was perceived to be no need for highly trained judges, the system could be operated relatively inexpensively. Although tribunal chairmen would not be of the same calibre as judges, their concentration on specific subject areas would lead to expertise and,

10 cf Wraith and Hutchesson, *op cit*; P. Craig, *Administrative Law* (London: Sweet & Maxwell, 2nd ed, 1989); Abel-Smith and Stevens, *op cit*; H. Street, *Justice in the Welfare State* (London: Stevens, 2nd ed, 1975); Franks, *Report of the Committee on Administrative Tribunals and Enquiries* (1957) Cmnd 218; P. Cane, *An Introduction to Administrative Law* (Oxford: Clarendon Law Series, 1992); JUSTICE, *Report on Administrative Justice* (1988).

11 JUSTICE Report, *op cit* p 212.

presumably, good quality decision-making. Tribunals were therefore presented as being 'good' for applicants who would often be from among the most disadvantaged groups in society and who, it was assumed, would be overawed and dismayed at the prospect of bringing their case to a court.

These attributes of tribunals had evidently already been sufficiently established by 1957 for the Franks Committee to set them out as descriptive characteristics rather than as a set of objectives to be attained by tribunals:

tribunals have certain characteristics which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject.<sup>12</sup>

This well-worn formulation has been repeated countless times throughout the literature on tribunals since the publication of the Franks Report. The confident assertions about the advantages of tribunals have not always been borne out by empirical studies of the operation of tribunals in practice.<sup>13</sup> Nonetheless, some of the most up-to-date analyses of tribunals by public lawyers continue to repeat the description. For example:

The[se] differences between tribunals and courts are usually seen as being advantages of tribunals, and as reasons for establishing a tribunal rather than a court; both because cheapness, speed, and so on, are good in themselves; and because, in some areas at least, many applicants before tribunals are poor and ill-educated, and so would find a traditional court very intimidating. Tribunals can be seen, therefore, as having both technical and social advantages over courts.<sup>14</sup>

Other writers, however, argue that decisions to establish rights of appeal to tribunals rather than courts have been based primarily on political and cost considerations, not in the belief that tribunals will provide greater access to justice:

The tribunals were not established to make up for defects in the judicial system. The choice was never between appeal to tribunals and appeal to the courts, but between appeal to tribunals and no appeal. Their introduction did not represent an incorporation of the idea of legality into new areas of society for its own sake. The provision of a formal right of appeal . . . was introduced as a counter-measure to political protest and as a means of making oppressive changes in the relief of poverty more palatable by giving a symbolic appearance of legality whilst ensuring that this had no real effect.<sup>15</sup>

The doubts expressed about the political objectives driving the growth of tribunals in the UK during the twentieth century are also to be found in modern criticisms of small claims procedures in this country and other forms of ADR abroad. Theoretical and empirical studies of tribunals, small claims courts, mediation and arbitration contain consistent themes questioning the stimulus for their creation and the extent to which they achieve the benefits claimed for them.

The most commonly stated reasons for establishing informal dispute mechanisms outside of the administrative law field have been either that the courts are over-

<sup>12</sup> Franks, *op cit* p 9.

<sup>13</sup> See, for example, K. Bell, P. Collison, S. Turner and S. Webber, 'National Insurance Local Tribunals' (1974) 3 *Journal of Social Policy* 289, and (1975) 4 *Journal of Social Policy* 1; R. Lawrence, 'Solicitors and Tribunals' (1980) *Journal of Social Welfare Law* 13; A. Frost and C. Howard, *Representation and Administrative Tribunals* (London: Routledge, 1977); M. Adler and A. Bradley (eds), *Justice, Discretion and Poverty: Supplementary Benefit Appeal Tribunals in Britain* (London: Professional Books, 1975); L. Dickens, M. Jones, B. Weekes and M. Hart, *Dismissed* (Oxford: Blackwell, 1985); J. Peay, *Tribunals on Trial* (Oxford: Clarendon Press, 1989).

<sup>14</sup> Cane, *op cit* p 335.

<sup>15</sup> T. Prosser, 'Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and their Predecessors' (1977) *British Journal of Law and Society* 44.

burdened, or that the ordinary courts are in some way inappropriate for dealing with certain classes of dispute because their procedures and the cost of bringing cases before them represent an obstacle to free access to justice. There is, however, a critical strand in the literature on informal justice sceptical of these explanations. Abel<sup>16</sup> has argued that in the civil justice field at least, the modern trend towards informalism, based in efficiency arguments, represents a 'downgrading' of the problems of the poor and a relegation of their disputes to second-class forms of justice. In Abel's analysis, 'informal' tends to be synonymous with 'inferior.' Similar arguments have been made more recently in this country in relation to changes in court jurisdiction designed to reallocate cases down the court hierarchy. Sedley<sup>17</sup> argues that the recent reorganisation has been driven by a desire to free the courts for the resolution of international commercial disputes and in so doing individual rights have been trivialised and diverted to courts of 'poorer' quality.

The suggestion that the problems of the poor have been relegated to inferior adjudicative institutions in order to free the courts for the problems of businessmen may be true. It must be acknowledged, however, that the business community has itself criticised the cost, paraphernalia and lack of speed involved in court litigation. Business is experimenting with alternative methods of settling commercial disputes. In recent years, the rapid growth of arbitration and other innovative forms of ADR in the commercial field in this country and abroad represents a reaction against the disadvantages of attempting to resolve business disputes through the courts. The value of ADR for businesses in long-term relationships has been recognised, in this country, by the establishment of a Centre for Dispute Resolution which provides a mechanism that will spare businesses 'the expensive, time consuming and costly process of litigation.'<sup>18</sup>

The *desire* to establish simplified methods of resolving disputes, and to improve access to justice for *all* sections of society, is a rational response to the perceived shortcomings of the civil courts. However, although there may be a common desire to search for court-alternatives for the problems of the poor and for the problems of commercial men alike, it is highly improbable that the solution for one group will necessarily be appropriate for another. In order to devise court-alternatives which serve the legal needs of the poor and disadvantaged, it is necessary to have a clear understanding of the nature of those needs, and second to appreciate how formal and informal legal institutions operate in practice, rather than in theory. It is possible that some of the shortcomings identified by critics of informal courts and tribunals may lie less in the *principle* than in the *practice* of informal justice.

## Tribunals in Practice

Analysis of the procedures and outcomes of informal tribunal and court hearings<sup>19</sup>

16 R.L. Abel, 'The Contradictions of Informal Justice' in R. Abel (ed), *The Politics of Informal Justice* (New York: Academic Press, 1982).

17 S. Sedley, 'Improving Civil Justice' (1990) *Civil Justice Quarterly* 348.

18 Law Society's Gazette No 42, 21/11/90, p 4.

19 There have been a number of empirical studies of various types of tribunals and informal courts in this country and abroad in the last few years. Good examples are C. Whelan (ed), *Small Claims Courts: A Comparative Study* (Oxford: Clarendon Press, 1990); B. Yngvesson and P. Hennessey, 'Small Claims, Complex Disputes: A Review of the Small Claims Literature' (1975) 9 *Law & Society Rev* 219 provides a useful summary of research on small claims courts. See also Lempert (1989) *op cit*; Lempert and Monsma (1988) *op cit*; Adler and Bradley, *op cit*; J.C. Ruhnka, S. Weller and J. Martin, *Small Claims Courts: A National Examination* (Williamsburg, Va: National Centre for State Courts, 1978); C. Blake and J. Gillespie, 'The Immigration Appeal Process — A Study of Legal Ritual' (unpublished, 1979); Frost and Howard, *op cit*; Bell, *op cit*.

suggest that, despite procedural informality, the matters to be decided at hearings often involve highly complex rules and case law; that procedures remain inherently 'adversarial' and often legalistic; that the adjudicative function has not always adapted well to new forums; that those who appear unrepresented before informal courts and tribunals are unable sufficiently to understand the proceedings to participate effectively; and that decision-making processes for many types of problem remain traditional. The result of these shortcomings is that, in the absence of the conventional 'protections' of formality, such as representation, and the rules of evidence, the cases of those appearing before informal tribunals and courts may not be properly ventilated, the law may not be accurately applied, and ultimately justice may not be done.

A common characteristic of tribunals and informal courts is the relative infrequency with which one or both parties are represented. This absence of representation, especially for the weakest party, may be a deliberate design feature of the tribunal or informal court, and is generally justified on the grounds that the simplified procedures, absence of formality and, sometimes, interventionist role permitted to the judge or tribunal renders representation either unnecessary or inimical to the spirit of the hearings. All of these arguments can be found in literature concerning tribunals in England and Wales and in studies from abroad. For example:

Although the point has been cogently — many would say persuasively — disputed . . . informality is commonly thought to be not only a strength of, but also a reason for creating, tribunals that are not bound by the usual rules of legal procedure. One of the purported virtues of informal tribunals is that they are thought to allow litigants who cannot afford, or would be unwise to invest in, legal counsel to comprehend what is occurring and to present meaningful arguments to the decisionmaker.<sup>20</sup>

Arguments about the lack of necessity for representation in tribunals and small claims courts come in many different guises, but at bottom the rationale is simply one of resources. As Lempert and Monsma point out in a footnote: 'There is nothing natural about people lacking counsel when they cannot afford it or when the cost would be greater than the amount at stake. Society could, as it does for many misdemeanours, subsidize counsel for everyone facing informal hearings. Such a decision might soon transform the informal character of such tribunals while at the same time making informality less necessary.'<sup>21</sup> Informality is therefore only *necessary* when a prior decision has been taken that representation will not be subsidised. The resources issue that often underpins decisions to opt for 'informal,' 'non-technical' proceedings should not, therefore, be obscured in debates about the drawbacks of conventional courts. The two issues are separate.

Despite the frequent absence of representatives from informal court and tribunal hearings, evidence from empirical research carried out in some tribunals and small claims courts consistently indicates that when present, representation can give an advantage to the represented party.<sup>22</sup> Empirical studies in the UK on the contribution of representation to tribunals generally suggests that represented tribunal applicants are more likely to achieve a favourable outcome to their hearing than unrepresented applicants.<sup>23</sup> However, some of the findings have been criticised for

20 Lempert (1989) *op cit* p 136.

21 Lempert and Monsma (1988) *op cit*.

22 Popkin, 'The Effect of Representation in Non-Adversary Hearings' (1977) 62 Cornell L Rev 989; Ruhnka, *op cit*.

23 Bell, *op cit*; Adler and Bradley, *op cit*; R. Sainsbury and T. Eardley, *Housing Benefit Reviews* (DSS Research Reports Series No 3, 1991); Frost and Howard, *op cit*; Dickens, *op cit*.

failing to take account of the possibility that representatives select the strongest cases.

The research by Lempert and Monsma on Housing Eviction Boards in Hawaii similarly concludes that legal representation makes a difference to the outcome before informal tribunals.<sup>24</sup> In a study of alternatives in dispute processing procedures in the US, Sarat found that inequality in legal representation worked to the advantage of the party with legal counsel, enabling represented defendants to escape without suffering any loss. He concludes that: 'Of all the steps in the process by which disputes develop and settlement activity occurs, none is more significant than the decision to retain an attorney.'<sup>25</sup> The reasons for the apparent advantage bestowed by representation have not received much close scrutiny by researchers. Indeed, policy-makers and researchers have appeared reluctant to elaborate on such evidence, and the question of what it is that representatives *do* in hearings has received remarkably little attention in the literature on tribunals, informal justice or, on traditional court adjudication.

One of the chief results of the official view of tribunals in this country is their virtual exclusion from the Legal Aid scheme, although legal or lay representation is permitted in all tribunals.<sup>26</sup> The absence of legal aid is generally explained or defended on the ground that tribunal procedures have been so designed that applicants should be able to bring their cases in person and without legal representation. Tribunal procedures are generally flexible; strict rules of evidence do not apply; applicants are permitted to tell their story in their own words; and tribunal chairs are free to take a more interventionist role than judges in court. Indeed, it is argued not only that legal representation is unnecessary in tribunals, but that the presence of lawyers might undermine the speed and informality that are the hallmarks of tribunal procedures. Despite the absence of legal aid for representation, however, some of those who bring their cases before tribunals pay for legal representation or obtain free representation from law centres, tribunal representation units, the Free Representation Unit and a host of specialist advice agencies across the country who provide a limited representation service.<sup>27</sup> Repeated calls for the extension of legal aid to tribunals have fallen on deaf ears, although the research upon which this paper is based was commissioned specifically by the Lord Chancellor's Department to address some of the arguments made about the need for representation to be available to tribunal applicants.

The research looked at two broad questions: does representation increase the likelihood of winning at a tribunal hearing, holding other factors constant? If so, why? What is it about tribunal procedures, about the behaviour of tribunals, about the activities of representatives or the inadequacies of unrepresented appellants that gives represented applicants an advantage, and what, if anything, does this tell us about informal procedures generally?

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24 Monsma and Lempert, *op cit*.

25 A. Sarat, 'Alternatives in Dispute Processing: Litigation in a Small Claims Court' (1976) 10 *Law & Society Review* 339. See also Bloch, 'Representation and Advocacy at Non-Adversary Hearings: The Need for Non-Adversary Representatives at Social Security Disability Hearings' (1982) 59 *Washington U Law Quarterly* 349; Popkin, *op cit*; Yngvesson and Hennessey, *op cit*: 'Most small claims hearings follow the adversary model. Although the process is speedy and inexpensive, it remains too complex for many litigants to handle on their own.'

26 Exceptions are the ABWOR scheme for Mental Health Review Tribunals, the Employment Appeal Tribunal (but not Industrial Tribunals) and the Lands Tribunal.

27 Genn and Genn, *op cit* Ch 2; J. Baldwin, N. Wikeley and R. Young, *Judging Social Security* (Oxford: Clarendon Press, 1992).

## The Effect of Representation on the Outcome of Tribunal Hearings

An analysis of the effect of representation on the outcome of hearings established that, in all four tribunals, the presence of a skilled representative significantly and independently increased the probability that a case would succeed.<sup>28</sup> In social security appeals tribunals, the presence of a skilled representative increased the likelihood of success from 30 to 48 per cent. In hearings before immigration adjudicators, the overall likelihood of success was increased by the presence of a representative from 20 to 38 per cent. In mental health review tribunals, the likelihood of a favourable change in conditions rose from 20 to 35 per cent as a result of representation. The effect of representation on the outcome of industrial tribunal hearings is more complicated to state since both parties to hearings are able to appear with a representative. If the respondent was not represented and the applicant was represented by a lawyer, the applicant's success figure was increased from 30 to 48 per cent. Where the respondent was legally represented and the applicant was unrepresented, the applicant's probability of success fell to 10 per cent.

The research indicated clearly that the presence of a representative influences the *substantive* outcome of hearings, irrespective of the process value that representation may provide. It also showed that the type of representation used by appellants was very important, and that specialist representatives exerted the greatest influence on the outcome of hearings. In seeking to understand why representation appeared to have such a significant effect on the outcome of hearings that are intended to be 'informal,' the research raises questions about a number of assumptions and possible misconceptions concerning informal procedures in general. These can be summarised as:

- (a) the 'small equals simple' fallacy
- (b) the mismatch between informal procedure and decision-making in informal tribunals
- (c) the ability of appellants to prepare and advocate their own cases
- (d) the ability of tribunals to assist appellants in the absence of representation.

### (a) The Problem of Complexity — 'Small' is not Necessarily 'Simple'

Much of the justification for establishing small claims courts or informal machinery for resolving low value claims rests on the reasonable assumption that such claims do not warrant a large investment by the claimant and, in any case, most claimants would not have the necessary resources to invest. It does not follow, however, that claims of small value are always, or ever, legally and factually simple, amenable to conveyor-belt resolution that would deliver substantively just outcomes.<sup>29</sup> Indeed, it is generally accepted that specialist tribunals are necessary because the regulations concerning, for example, social security benefits and immigration cases are so complex that generalist judges in the county court would be unlikely to be able to provide a high enough standard of decision-making.

Many of the views expressed by tribunal chairs and representatives during interviews were prefaced with complaints about the technicality and complexity of the legal framework within which the tribunals operated. Although most tribunal hearings

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28 The detailed results of a multiple regression analysis are presented in Genn and Genn, *op cit* Ch 3.

29 Yngvesson and Hennessey, *op cit*; Whelan, *op cit*.

are more informal and procedurally more flexible than courts, such informality has been wrongly assumed to extend to all aspects of tribunal processes. The fact that hearings are conducted across a table and that an appellant may choose whether he puts his case first are positive characteristics that should be protected and perhaps extended. However, none of the procedural informality of tribunals can overcome or alter the need for applicants to bring their cases within the regulations or statute, and prove their factual situation with evidence. Nor do informal procedures relieve tribunals from the obligation to make reasoned and consistent decisions.

Interviews with tribunal chairs and representatives revealed repeatedly a perception of, and concern about, the complexity of the law with which tribunals were required to deal:

The process is very complex. I have problems understanding it all, so I don't know how the appellants manage — and I am legally trained. [SSAT Chair]

Social security law is very underrated, but it is very finicky and these are people that need help more than any. [SSAT Chair]

There are so many precedents and anyone who didn't know the ins and outs of the law would think 'Ah, I can go along to an adjudicator and I can put my case.' But unless you know all the pitfalls you are liable to fall flat on your face. [Immigration Adjudicator]

Industrial law is so complex now. Joe Bloggs is not going to distinguish between whether we think he nicked something or whether we are looking at the employer acting reasonably. People just don't appreciate these distinctions. The law has become silted up. We have unhappily got ourselves into a situation of high technicality. [Industrial Tribunal Chair]

The 'small is simple' fallacy conveniently supports some of the justifications for establishing tribunals in which ordinary people might present their own cases, but the weakness in the argument was exposed in the statements of those whose job it is to decide such cases. It has also been challenged by other evaluations of procedures in small claims courts and tribunals.<sup>30</sup>

## (b) Decision-making and the Limits of Informality

Analyses of procedures in small claims courts and tribunal hearings suggest that the benefit of relative informality of proceedings at the hearing stage may be overestimated. Indeed, some have argued that informality can constitute a trap for those bringing or defending their cases by conveying the false impression that the tribunal's decision-making processes can be carried out with the same lack of formality and relaxation of rules as the hearing. Almost twenty years ago in a study of tribunals, Farmer<sup>31</sup> clearly identified the problem of the relationship between procedure and decision-making:

[P]roceedings (in National Insurance tribunals) are fairly informal though the decision-making process itself is very formal as far as tribunals generally go. This is partly because of the emphasis which is put on the written case which is submitted by the insurance officer beforehand, partly because of the effect which the precedent decisions of the Commissioners have and partly because of the detail of the legal rules of the jurisdiction itself. The apparent

30 See, for example, Yngvesson and Hennessey, *op cit*: 'The mistaken premise that small claims are simple was basic to a model for court procedure in which counsel was deemed to be unnecessary.'

31 J. Farmer, *Tribunals and Government* (London: Sweet & Maxwell, 1974).

casualness of the hearing itself has to some extent diverted attention away from this formality of decision.<sup>32</sup>

An understanding of the meaning of the 'formality of decision' to which Farmer refers is, arguably, crucial to an appreciation of why and how informal tribunal and court hearings may constitute a trap for applicants and thus result in decisions that may not do justice to an applicant's case.

Decision-making in tribunals is accomplished within the context of rules and case law which determine the existence of entitlements, or the limits of 'reasonableness.' The task of SSATs and immigration adjudicators is to scrutinise administrative decisions and to check that they have been made in accordance with regulations. Industrial tribunals are required to adjudicate between employers and employees on questions governed by statute and case law. MHRTs are intended to give effect to statutory provisions, although in practice they regard their role to be rather wider than this.<sup>33</sup> SSATs, industrial tribunals and immigration hearings all have appellate tiers whose decisions affect future determinations, and the decisions of all tribunals are subject to judicial review. To succeed before such a tribunal an applicant must bring his case within the regulations or statute and prove his factual situation with evidence. Applicants do not succeed with cases for social security benefits because they cannot manage on their money; immigrants are not permitted to stay in the country because they want to; debtors are not permitted to avoid their debts in small claims courts because they cannot afford to pay. All must assert and establish a legal right, entitlement or defence: 'the assertion of a right is a form of moral criticism: besides the expression of a demand, it involves an appeal to the authority of principle in support of one's claims.'<sup>34</sup> This represents the 'limit' of informality.

The decisions of judges and tribunals are taken on the basis of what has been heard or presented in relation to the relevant law. The crucial link between the process of receiving and evaluating information and reaching a decision ought not to be overlooked.<sup>35</sup> It is via this linkage that procedure influences decision-making.

Lempert in his study of housing eviction tribunals in Hawaii clearly, and persuasively, identifies the limits of procedural informality and the way in which those appearing before tribunals can be deceived by the appearance of informality. He distinguishes between 'procedural' and 'substantive' informality and derives a set of principles that identify the circumstances which lead to the 'trap of hidden legalism':

Whenever a party's participation is procedurally and substantively informal and the court's stance is procedurally informal and substantively legalistic, the party will believe her case is being heard in an informal tribunal, but we will in fact have a situation of hidden legalism. If one party and the judge are procedurally informal and substantively legalistic while the other party proceeds informally in both respects, the latter is seriously disadvantaged, for only her opponent in addressing the normative issues that concern the court. This is essentially the situation of non-payment tenants before the eviction board today. They may respond

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32 pp 108–109.

33 Peay, *op cit*.

34 P. Nonet, *Administrative Justice: Advocacy and Change in Government Agencies* (New York: Russell Sage, 1969) p 91.

35 R. Baldwin and K. Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570: 'Lawyers and legal scholars have often fallen into the trap of employing a limited conception of decision-making that does violence to the inherent complexity of decisions which are made in a wide variety of legal settings.'

expansively when the board asks them why they could not pay their rent, but they soon learn their responses do not matter.<sup>36</sup>

A similar situation faces appellants in tribunals who have no representation or who come with an unskilled representative. The relative simplicity with which proceedings can be initiated, the literature from tribunals stressing their informality, the physical appearance of hearings and the approach of the tribunal to the conduct of hearings can convey the impression that decision-making processes are carried out in a rather relaxed and informal manner. This impression is misleading. In interviews with tribunals, chairs stressed the need for those appearing before them to 'make their case' by providing legally relevant factual information and evidence of those facts. The following statements provide typical examples of the way in which tribunal chairs perceive the difficulty in their own tribunals:

People often have a generalised sense of injustice in the breakdown of relationships. They find it hard to appreciate that we are not concerned with a generalised sense of injustice. When applicants are unrepresented we get a lot of irrelevant information. It may be important to the applicant, but it is not important to us. We are in the business of applying the facts to the law. [Industrial Tribunal Chair]

Some people feel that this is just a matter of where they are going to tell their story and that's all that is necessary. They think that their story is good enough . . . but without expert knowledge of the law, it is unwise. . . . When they are not represented, either they give a lot of evidence which is quite irrelevant or they don't produce the most relevant evidence to us. [Immigration Adjudicator]

The importance of representation is to set the case within its legal context with a view to submissions on the law, and that is what patients and social workers don't always perceive. [MHRT Judicial Member]

You are dealing with rules and regulations and a person who is a lawyer or somebody who deals in that field will be able to know what is required; what evidence is required before the tribunal. It takes a long time for someone who isn't associated with the tribunals or who isn't a lawyer to understand what the regulations mean, what the words mean and what are the conditions under one regulation or another. [SSAT Chair]

Thus, although unrepresented appellants are free to 'speak for themselves' before tribunals, and many value this freedom,<sup>37</sup> it has hidden dangers. As the extracts from tribunal chairs suggest, decision-making processes in tribunals require legally relevant and sufficient accounts. Applicants tell stories which may or may not be relevant. The result is often that they may feel satisfied with the process but ultimately lose their case.

Interesting linguistic research carried out in the US describes in detail the difficulties facing parties to hearings in small claims courts. Although these informal courts allow the parties to give accounts of their case in a relatively unconstrained manner, problems arise when plaintiffs fail to give accounts that adequately deal with issues in the way that the court can test against evidence presented. O'Barr and Conley argue that although the freedom to speak without the assistance of representation and without being constrained by formal rules of evidence was welcomed by many

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36 Lempert (1989) *op cit* p 393.

37 Interviews carried out with applicants at the end of their hearing, but before they had received their decision, often indicated relatively high degrees of satisfaction with the hearing and felt pleased at having been given the opportunity to tell their story in their own words.

litigants, 'this may be the mechanism by which informal procedures substitute expressive satisfaction for the enforcement of rights.'<sup>38</sup>

Although appellants who come before tribunals may not appreciate the importance of sifting and selecting material relevant to the law, representatives do. Analysis of the activities of representatives before hearings as well as during hearings points to the importance of case preparation in the outcome of hearings. The most significant pre-hearing function is the construction of winnable cases. Unrepresented applicants have difficulty in identifying the facts which are relevant to their case and they therefore may fail to produce the evidence necessary to prove their case. In these situations, it becomes the responsibility of the tribunal to elicit relevant information from those who appear at tribunal hearings, and even when this can be accomplished to the satisfaction of the tribunal, the necessary evidence may not be immediately available.

Representatives, on the other hand, can conduct a careful examination of the facts of the appellant's situation, and then, within the context of the regulations or the statute, marshal such evidence as is necessary to convince a tribunal of the truth of those facts. In social security appeals this might involve provision of medical certificates, evidence of attempts to find work, or availability of work in the area, etc. In immigration cases, evidence may be required of resources or of family connections. In addition to documentary evidence, representatives can also arrange for witnesses to provide verbal evidence at an appeal hearing.<sup>39</sup> Expert case construction requires a thorough knowledge of the law or regulations and the ability to sift the factual information given by the appellant in order to isolate those facts that will establish the appellants entitlement or case. This requires patience and sensitivity to the problems of anxious, inarticulate and occasionally illiterate applicants.

Unrepresented appellants are disadvantaged in this respect because they cannot, without advice, know what facts they must prove, nor what items of evidence might constitute sufficient proof to establish their case.

Different cases demand different things. In this tribunal we are very much concerned with fact. Cases are won or lost on fact and so really a representative can help us most by marshalling the facts and seeing that we get proved the facts that we need. [SSAT Chair]

It's the preparation of the appeal which is the most important thing. The representative has the opportunity which no one else has to marshal the facts: to elicit from his client all the facts of the case. Then the representative has to decide for himself what is relevant to the issues and what is not, and the manner in which to present the case. [Immigration Adjudicator]

Case preparation and the provision of evidence is fundamental to the outcome of tribunal hearings. Tribunals and representatives are well aware of this fact. Appellants, on the other hand, are not.

### (c) Advocating the Case

Interviews with appellants carried out while they waited for their hearing to commence revealed that many were vague about what was likely to happen during the course of the hearing. This was especially so with appellants in SSATs who often had almost

38 W.M. O'Barr and J.M. Conley, 'Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives' (1985) 19 *Law & Society Review* 661.

39 Our analysis of factors influencing the outcome of tribunal hearings indicated that the presence of witnesses significantly increased the likelihood of success; cf Genn and Genn, *op cit* Ch 3.

no idea about what 'appealing' actually meant. Many of those who bring their cases before tribunals have no accurate knowledge about the powers of tribunals or what the possible outcome of their hearing could be. Although tribunals issue information about appeals, this does little to explain what hearings will be like in practical terms. Most importantly, appellants are not informed in advance about their own role in the hearing and what they will have to do in order to persuade a tribunal to allow their case.

Tribunal information tends to stress the informality of proceedings. The danger of this is that, in the absence of direct experience, appellants develop misconceptions about the nature of the hearing and the way in which decisions are likely to be reached. Some may presume that informality is synonymous with a quiet chat or, at worst, an interview. They may also take the word 'independent' to mean 'on their side.' These problems were found to be particularly pronounced with appellants attending SSATs, which are the most informal of the tribunals studied. For example:

I'm just going to tell them the truth.

You only need someone to speak for you if you are telling lies.

It's an open and shut case. It will only take me a few minutes.

It's the law that makes it difficult, and my case isn't in law.

Most of those interviewed during the course of the research were experiencing their first tribunal hearing. Applicants therefore have no direct experience on which to base their expectations of the hearing. Although a substantial number of those interviewed felt confident whilst waiting for their hearing, many others expressed anxiety and concern about what they were going to face. In the event, some found the experience less difficult than they had expected, but many found the process traumatic. Apart from an inability to understand the law and the procedure, many unrepresented appellants said that they found difficulty in simply explaining the details of their case. This was confirmed in observation when applicants who had been reasonably confident and articulate in the waiting room became confused and hesitant once inside the hearing room. Their conviction about the merit of their claim withered under close questioning which was often interpreted as hostile (even though in practice the purpose of the questioning was merely clarification). This was true of unrepresented appellants in SSATs, and even more so of unrepresented applicants in industrial tribunals who are cross-examined on their evidence and offered the opportunity to carry out cross-examination themselves.

A common complaint amongst those interviewed was that they had not known how they should have put their case and had not been prepared for what was required of them at the hearing. In SSATs particularly, many appellants seemed unprepared for the importance of law:

They said there was a clause for this and a clause for that, and that I didn't come into such and such clause. What are all these clauses anyway?

Many were dismayed at the binding nature of regulations and did not understand why they had to be rigidly followed. Many appellants had believed that the tribunal were capable of looking at the case in a different manner from the DSS, at least with 'humanity and sympathy,' and were frustrated that decisions were being made in accordance with regulations:

They don't look at you as a person. They have got the rule book there and they have got to go by the book.

They should bring a bit of humanity or common sense into the thing. All I have heard up until now is section this and subsection that, which are very rigid.

I couldn't understand what they were talking about at all because everything was schedule such and such, you know, different numbers, but not saying to me *why*. It's hard, it's confusing. I'd sooner be told point blank. It's too complicated for me.

Given that there is such a high level of confusion about the law and how it operates, it is not surprising that appellants do not comprehend the significance of case law and precedent:

I just don't understand. That Chairman kept going on about this other bloke's case all those years back, and not looking at mine. I mean, I don't care what happened to a bloke down a quarry however many years ago it was. [SSAT Appellant, confused by a leading case on industrial injuries introduced during his hearing]

Even in SSATs, appellants found the language of the tribunal formal and difficult to follow, despite the efforts of tribunal chairmen to 'enable' appellants to put their case. Appellants were often inarticulate, and some had literacy problems, which meant that they were easily intimidated by the fluency of the DSS Presenting Officer's submission and the jargon of the tribunal.

Unrepresented appellants were often successful but, in spite of winning appeals, there were still complaints about the difficulties of the hearing. Those who were successful were more likely than those who lost their case to say that they would go through the process again, but only if there was no alternative:

If you are entitled, you should get it and shouldn't be put through a hearing.

Even though I won, I wouldn't like to do it again.

Observation of hearings revealed that, despite the relative informality of surroundings and procedure, and despite the fact that many chairs are at some pains to put unrepresented appellants at ease, they are frequently at a disadvantage.

#### (d) The Role of Tribunals in Informal Proceedings

Most of the accounts of tribunals and informal courts make claims for the special role of judges and tribunals in those forums. They are presumed to possess an awe-inspiring range of skills and qualities. They have expert knowledge of their field and can unravel complicated regulations and case law without the assistance of representation; can hear and evaluate evidence that would be excluded in conventional courts as unreliable (eg hearsay) and be capable of giving it due weight; they can assess the credibility of witnesses and the value of written evidence; assist unrepresented parties and compensate for lack of representation by interventionist (inquisitorial) behaviour; and they are able to reach consistent, reasoned decisions in accordance with law without bias, without technicality, and with speed. The difficulty of carrying out all of the functions simultaneously has been authoritatively stated by Fuller:

[T]he integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by an arbiter who attempts to decide a dispute without the aid of partisan advocacy. Such an arbiter must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true

that a man in his time must play many parts, it is scarcely given to him to play them all at once.<sup>40</sup>

Although Fuller's account is based on the role of the adjudicator in adversarial proceedings, it is nonetheless relevant for informal court and tribunal hearings. Despite relaxation of procedural rules and the greater freedom of intervention permitted to informal court judges and tribunals, it is clear that the majority of informal court and tribunal proceedings continue to follow an adversarial model. In SSATs which are described as being 'inquisitorial,' proceedings continue to conform to a classically adversarial model: two parties, the Department and the applicant who tell their story; after which the tribunal delivers a simple binary decision on the basis of their preference for one or other account of the law or facts and their own understanding of the applicable law. Industrial tribunals and immigration hearings are explicitly adversarial and include cross-examination of witnesses. The same appears to be true for small claims procedures, as Yngvesson and Hennessey concluded in their survey of small claims literature:

In spite of these assumptions the typical model for small claims procedure was, and is, basically adversary in its orientation, although greatly 'stripped down.' The judge is expected to adjudicate disputes, and many litigants behave as though they *are* engaged in a contest and bring to bear whatever skills they have to effect a judgment in their favor . . . this puts some unrepresented litigants . . . at a disadvantage, especially in cases which are factually or legally complex. In such cases, a fact-finder is required, yet the role of the fact-finder cannot adequately be filled by a judge who first hears of a case a few minutes before he is asked to bring judgment.<sup>41</sup>

Those who appear before tribunals without assistance may be disadvantaged because there is an imbalance of power between the parties, because they do not understand the law, are unable to present their cases coherently and are unaware of the need to furnish the tribunal with evidence of the facts they are asserting. Although it is the job of tribunals to 'compensate' for these disadvantages, representatives, and indeed many tribunals themselves, do not believe that this is possible. These beliefs were largely supported by observation and the results of analysis of tribunal outcome.

Observations of SSAT hearings (which are the most informal and the most 'inquisitorial' of all tribunal hearings) revealed great differences in the level of questioning and time spent on questioning unrepresented appellants. In some hearings, tribunals would painstakingly go through the submissions, checking calculations and questioning applicants. At other hearings, the chair would simply ask the appellant what she would like to say, and then, without reference to any materials or delving for further information, would proceed to dismiss the case. This occurred in situations where there were clearly arguments that could have been made on the appellant's behalf. The tendency among appellants in SSATs is simply to respond to the questions put to them and rarely to offer additional information. The requirement that chairs be responsible for eliciting all of the necessary information from appellants, for correctly applying the law and adjudicating the case, involves the performance of several different roles. Even if chairs succeed in obtaining the information they think they require, there may still be scope for creative argument on the application of regulations which they are unlikely to undertake on behalf of an unrepresented appellant.

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40 L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard L Rev 353.

41 Yngvesson and Hennessey, *op cit*.

It is not inherently impossible for claimants to come on their own, but to be honest the type of people coming here are among the most disadvantaged and they are inhibited by the whole process. Representation is important to be fair to the claimant, to hear everything they have got to say and a rep can do that. Of course it is different here to any other court of law, because it is not adversarial, it is inquisitorial. It's true that we can ask questions and get information out of appellants, but that is not going to be anything like what the representative could find out. [SSAT Chair]

Even with the best intentions, tribunals are rarely able to spend the time necessary to elicit relevant information from the undifferentiated stream in which most appellants present their stories. Nor can they always know, in advance of hearing the evidence, what questions should be asked.

The job of a representative is sifting out the grains from the chaff and then producing the evidence that can assist us. [SSAT Chair]

The problems facing tribunals are compounded in more explicitly adversarial tribunal hearings. Chairs and members of industrial tribunals were well aware that hearings were a contest between two parties, and there were substantial differences in their opinion as to their proper role, especially when faced with a represented respondent and an unrepresented applicant. Some industrial tribunal chairs perceived no particular problem in adopting an active role, asking questions and intervening in hearings. For example:

An applicant on his own has the advantage of being very carefully looked after by the Chairman. The only disadvantage is that the Chairman is only aware of the applicant's case in so far as it has been written down in the document, and if the documents are very meagre then his case comes out as he talks and you have to go along with him. [IT Chair]

We have a very different approach to unrepresented parties. It is much more like conducting a seminar. Many Chairmen see unrepresented parties as a pain. I see them as a challenge. They have come for their day. You have got to explain everything in very careful detail. [IT Chair]

Other chairs of industrial tribunals had more reservations about their ability to assist unrepresented parties and the propriety of so doing. For example:

In industrial tribunals you've got to be a bit careful if you are a chairman. You have got to be strictly impartial because it is adversarial. If somebody doesn't put his case well, that's his hard luck. You can't put it for him or help him on his way because you have got to be absolutely down the centre. So you see in industrial tribunals a lot of cases get lost by default. You know, the applicant is shooting himself in the foot, but you mustn't help him. It would be absolutely wrong. [Industrial Tribunal Chair]

When the tribunals were set up it was hoped that it would be on a not too formal basis, but over the years we have had legislation, precedent and that can put the applicant at a disadvantage without a representative. The chairman tries to be helpful, posing questions, getting the relevant evidence, but he must not descend into the arena. He must not become adversarial. It might be better if applicants were legally represented. [IT Chair]

A substantial minority of industrial tribunal chairs had misgivings about assisting unrepresented parties on a number of counts. Some felt that it was difficult to perform the roles of adjudicator and representative at the same time. They also feared that where only one party was represented, giving assistance to the unrepresented party might be perceived as partiality.

We'd like to say representation makes no difference because it is a confession of failure if it does. On difficult points of law you have to play so many different roles with unrepresented

applicants. . . . It is dangerous to say that industrial tribunals are cosy and informal. In fact they are very demanding and complex. [Industrial Tribunal Chair]

The contribution of representatives is to overcome these disadvantages. Representatives characterised their roles as those of advocates, enablers and translators.

I think that they are legalistic hearings on the whole and the claimant, even if they were themselves an advice worker, would benefit from representation, because it is much easier to put somebody else's case than it is to put your own. It is often very difficult for unrepresented appellants to put their case clearly, objectively and straightforwardly to the tribunal. [Lay Representative]

The influence of tribunal chairs or adjudicators in informal proceedings should not be underestimated. In the absence of representation, tribunal chairs bear responsibility for the fairness of the proceedings, although there are few immediate controls on their behaviour and there is no formal monitoring of their performance. The central importance of the tribunal chair not only to the conduct of the hearings but, more importantly, to the outcome of tribunal hearings was clearly illustrated by our research. In addition to estimating the effect of representation on outcome, we also estimated the effect of other circumstances of hearings on the likelihood of winning. In SSATs and immigration hearings, and to a lesser extent in industrial tribunals, the identity of the tribunal chair significantly and independently affected the chances of a successful outcome to a hearing.<sup>42</sup> In SSATs it was found that the identity of a chair could cause a reduction in the chance of success for a case which might on average have a 30 per cent chance of winning, to around 5 per cent, after controlling for case type and other factors. Other results suggested that the identity of the chair could produce a higher chance of success, in one case increasing the chance of winning from 30 per cent to 50 per cent after controlling for other factors. Analysis of outcome in immigration hearings indicated that the effective chance of success for a typical appellant, depending solely on the choice of adjudicator, lay somewhere between 5 per cent and 50 per cent after controlling for other factors.

These figures are unlikely to surprise those who are in the habit of representing parties in courts or tribunals, although it is rare for the effects of differences between individual members of the judiciary to be quantified in this way. It is, however, possible that in informal proceedings, in the absence of strict procedural rules and in the absence of representatives, there are fewer constraints on the development of idiosyncratic judicial behaviour.

## The Importance of Outcome in Informal Proceedings

I don't care about the bloody law, I want my money. [SSAT Appellant]

One of the conclusions of the study was that despite the appearance of informality in tribunal hearings, the inherently adversarial nature of proceedings, the necessarily 'legalistic' nature of tribunal decision-making, the predictable inability of litigants convincingly to advocate their own cases, and the limited ability of tribunals to compensate for these disadvantages, results in hearings that may fail to do justice to the cases that come before them. In simple terms this means that cases with merit are lost by default.

The relationship between procedure and outcomes ought to be fundamental to

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42 The analysis was not undertaken for MHRT chairs; cf Genn and Genn, *op cit* Ch 3.

any assessment of the value of alternatives to conventional courts for solving disputes and settling grievances. Claims for informal tribunal proceedings are based on the implicit assumption that, as well as being good for the public purse, they are also good for claimants. These assumptions are, however, problematic. Theoretical arguments for the benefits of informal procedure require empirical validation. One should not value informal procedures only because they are thought to make life appear easier for unrepresented appellants and because they are cheap. Informal procedures are advocated because they present an alternative to conventional adjudication which provides greater access, result in a more satisfactory process *and* the just disposal of disputes. It is therefore necessary to assess the extent to which the procedures adopted in tribunals and other informal courts result in acceptable outcomes, judged both objectively and from the subjective standpoint of those who appear before tribunals.

The requirement for fair process in legal proceedings has received considerable attention from lawyers, sociologists, psychologists and economists.<sup>43</sup> Manifestly fair procedures can constitute a 'cushion of support' that provides protection for institutional decisions from the hostility that might otherwise follow unpopular decisions. Procedural justice is also regarded as important in fostering satisfactory perceptions of legal institutions which contribute to perceptions of the legitimacy of law and legal authority.<sup>44</sup> However, procedures and procedural change do not represent ends in themselves. It is therefore questionable whether subjective perceptions of fairness on the part of applicants or litigants in informal hearings should be a sufficient goal, or whether fair procedures must be related to just outcomes.

In an often-quoted attack on the politics of informal justice, Abel argues persuasively the connection between procedure and outcome:

[I]nformalism is said to be just a change in process. What this obscures is that *every* change in process, substance, or institutional access alters outcomes. The efforts of poverty lawyers in the 1960s to secure due process safeguards for welfare recipients were motivated not by an enthusiasm for the process itself but by the belief that it would mean more money for more poor people . . . All processes are outcome influential, if not outcome determinative.<sup>45</sup>

Galligan argues that there is a clear relationship between procedures and outcomes in both criminal and civil trials; in so far as ideas of good and fair procedures are concerned 'procedures are instrumental to outcomes.'<sup>46</sup> A similar connection between procedure and outcome has been stressed more recently in a comparative survey of small claims courts in a number of countries. Whelan, musing on the paradox he finds in the desire for informal procedures, echoes the dangers expressed by Abel:

Formality may in some respects be a prerequisite of justice . . . the brand of justice which has developed in 'formal' courts is based upon the presentation of relevant facts to elaborate well-defined issues. . . . It is a paradox that the same 'procedural technicality' which was established to ensure that justice was both done and seen to be done in the administration of justice in 'traditional' courts is now viewed as the obstacle to access for small claimants.

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43 eg D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986); E.A. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988).

44 Lind and Tyler, *op cit*.

45 Abel, *op cit*.

46 *op cit* p 336.

But in throwing out the bathwater of procedural technicality has not the baby of justice also been discarded?<sup>47</sup>

The potential loss of protection that may accompany informal procedures has been robustly articulated by other writers. Cane, for example, suggests that the 'price' of informality in tribunals 'is a certain amount of legal inaccuracy' and that efforts have to be made to avoid insisting on 'strict legal niceties' if such informality is to be preserved.<sup>48</sup> The problem, however, is in establishing the nature and level of inaccuracy that might represent an acceptable cost of informality. Many of the matters heard by tribunals, for example, constitute win or lose situations because there is no other feasible outcome. The right to remain in the country, or to be released from a mental hospital, or the right to a social security benefit are all or nothing situations in which an 'inaccurate' decision means the loss of an important right. It is clear, however, that the degree of inaccuracy suffered in informal proceedings could be reduced if knowledge about the operation of informal procedures were used to inform decisions about when such procedures should be adopted and how they should be designed. This is important in the current climate. Continuing dissatisfaction with the cost and delay of pursuing civil claims through the courts, together with a dramatic decrease in the availability of legal aid for civil claims, is increasing the pressure to find satisfactory alternatives to the court-resolution of civil disputes. This pressure provides the conditions within which the claims made for ADR, by ADR 'suppliers' to those who can choose to purchase their own alternative to court adjudication, may find a receptive audience, especially within the LCD. There remain questions, however, about how ordinary and disadvantaged litigants are to achieve just and fair outcomes within informal procedures. They have different needs and competencies from those of commercial litigants keen to maintain relationships and get on with their business.

In order to design appropriate court alternatives outside of the commercial field, consideration must be given to: the nature of the dispute or grievance at issue and the range of possible outcomes; the balance of resources between the parties in terms of finance, experience and competence; and the complexity of the relevant law. Consideration must also be given to the training of those who preside over informal proceedings. This study has indicated that, in the absence of representation, informal court judges and tribunal chairs have a difficult task. It has also shown that they hold the key to procedural fairness and have an important influence on the outcome of hearings.

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47 Whelan, *op cit* p 230.

48 Cane, *op cit* p 334.