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The Suitability of Defamation Actions to Small Claims Adjudication

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ARTICLE

The Suitability of Defamation Actions to Small Claims Adjudication

Hilary Young

SMALL CLAIMS COURTS aim to improve access to justice by creating quicker, less formal modes of adjudication. Typically, defamation claims have been excluded from small claims courts' jurisdiction in common law countries, though Ontario is an exception. This article examines the suitability of small claims adjudication of defamation actions and is grounded in both principle and in a study of Ontario's reported small claims defamation case law. It concludes that while defamation litigation poses particular challenges for small claims adjudication, Ontario's experience suggests they are not insurmountable, and it is feasible—at least where certain civil procedure is retained—to allow such actions in small claims courts.

The article also contributes to scholarship on small claims courts' subject matter jurisdiction generally. It could help inform when complex causes of action can be made simpler without unduly risking an unjust outcome, and whether the access to justice crisis shifts the balance between the need for procedurally full, superior court adjudication and "good enough" simpler litigation.

LES COURS DES petites créances visent à améliorer l'accès à la justice en adoptant des méthodes de résolution des différends plus rapides et moins formelles. Généralement, les actions en diffamation sont exclues de la compétence des cours des petites créances dans les pays de common law, bien que l'Ontario fasse exception à cette règle. Cet article examine la pertinence du traitement des actions en diffamation par les cours des petites créances et s'appuie sur des principes et sur l'étude de la jurisprudence ontarienne publiée concernant les affaires de diffamation devant les cours des petites créances. Il conclut que, bien que les actions en diffamation posent des défis particuliers pour le traitement des actions des petites créances, l'expérience de l'Ontario suggère que ces défis ne sont pas insurmontables et qu'il est possible — au moins lorsque certaines procédures civiles sont maintenues — d'autoriser de telles actions devant les cours des petites créances.

Cet article contribue également à la doctrine sur la compétence d'attribution des cours des petites créances en général. Il pourrait aider à déterminer dans quels cas des causes d'action complexes peuvent être simplifiées sans risquer indûment un résultat injuste, et à évaluer si la crise de l'accès à la justice modifie l'équilibre entre une procédure complète devant les cours supérieures et un litige plus simple et « assez bon ».

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I. INTRODUCTION

Litigation is expensive in part because it is complex—in terms of both substantive law and civil procedure. This complexity makes it more important to have a lawyer, while simultaneously making it harder to afford one. One way to improve access to justice has been to create small claims courts whose limited formality, procedures, and rules of evidence allow people to litigate more cheaply and quickly.

This leads to questions about which substantive and procedural laws are suitable for simplification to improve access to justice, and which complexity is necessary to do justice. Courts are emphasizing the importance of this inquiry. In *Hryniak v Mauldin*, for example, the Supreme Court of Canada addressed the need for more simplified procedures to promote access to civil justice:

> This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.[1]

Similar issues arise regarding substantive law: substantive complexity is a barrier to access to justice, and its necessity should also be assessed. This

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1 2014 SCC 7 at para 2.

article considers a small piece of this puzzle: the suitability of defamation law to adjudication in small claims courts.

Small claims court jurisdiction excludes defamation actions in many provinces. There are good reasons for and against hearing defamation actions in small claims courts: a reason *for* relates to the increasing prevalence of high-volume, low-value defamation cases related to internet communications. Before the internet age, defamation litigation frequently involved public figures or large corporations suing professional publishers. Now, parties are more likely to be ordinary people or small businesses that cannot afford the costs of litigation and claims for damages may be more modest.[2] A reason *against* is defamation's substantive and procedural complexity; it has specific pleadings rules, damages rules, and several technical common law and statutory defences. Damages are almost exclusively non-pecuniary. Arguably, this makes it unsuitable for the simpler form of adjudication in small claims courts.

I discuss the suitability of defamation to small claims litigation in modern common law Canada. The nature of defamation claims, parties, and the harm suffered has changed with advances in communications technology. The law itself has also changed over time, becoming more complex and placing greater emphasis on freedom of expression (*e.g.*, responsible communication defence, anti-SLAPP laws). In assessing small claims defamation actions, I examine the purpose of small claims courts and how that relates to modern defamation law. In addition to a principled analysis, I look to the case law in Ontario, where defamation claims are adjudicated in small claims courts, to see what can be learned from that province's experience.

Reasonable people will disagree as to how the balance should be struck between more rigorous—but expensive—litigation, and less rigorous—but affordable—litigation. I don't claim a definitive answer to this complex policy issue. That said, I conclude that while defamation litigation poses particular problems for small claims adjudication, Ontario's experience suggests they are not insurmountable, and it is feasible—depending on how much procedure is retained—to allow such claims in small claims courts.

In addition to informing the question of defamation's suitability to small claims adjudication, I hope this article will contribute to scholarship

2 Kim Gould suggests that this shift alone might warrant giving small claims courts jurisdiction over defamation actions (see Kim Gould, "Small Defamation Claims in Small Claims Jurisdictions: Worth Considering for the Sake of Proportionality?" (2018) 41:4 UNSWLJ 1222 at 1226–27).

on small claims courts' subject-matter jurisdiction generally. It could help inform when complex causes of action can be made simpler without unduly risking an unjust outcome, and whether the access to justice crisis shifts the balance between the need for procedurally full, superior court adjudication and "good enough" simpler litigation.

The article also contributes to the literature on simplifying defamation law generally, which many scholars think is warranted. The tort's procedural and substantive complexity creates access to justice barriers for many litigants, regardless of the level of court. Looking to Ontario's experience, where defamation's procedural complexity is largely abandoned in small claims courts, helps assess what is lost and what is gained when procedure is simplified.

II. SMALL CLAIMS COURT IN GENERAL

Modern small claims courts were created by statute in Canada starting in the 1970s and 1980s.[3] However, specialized tribunals for small claims have existed in Canada since before Confederation, emerging in the 18th century from English Debtor's Court.[4] The 1970s saw a movement away from such courts as a "draconian" way for businesses to collect debts, and toward an access-to-justice consumer advocacy model.[5] Specifically, small claims courts were redesigned around the pillars of: "speed, low cost, informality, self-representation, and active adjudication."[6] Yet "[t]heir contours vary from place to place, reflecting local 'historical, political, social and economic' differences."[7]

Small claims courts' most notable features, such as a jurisdictional limit on damages and procedural simplicity, reflect these pillars. For example,

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3 Manitoba Law Reform Commission, *Improving the Small Claims System in Manitoba* (Winnipeg: Manitoba Law Reform Commission, 2017) at 4 online (pdf): <manitobalawreform.ca/pubs/pdf/fullreports/134-full_report.pdf>.

4 William H Charles, "Small Claims Disputes in Nova Scotia and Access to Justice" (2020) 43:2 Dal LJ 963 at 967–68; Shelley McGill, "Small Claims Court: A Vehicle for Social Change and the Case for Equitable Relief" (2017) 26 JL & Soc Pol'y 90 at 93.

5 McGill, *supra* note 4 at 93. See also *Grover v Hodgins*, 2011 ONCA 72 [*Grover*] ("[t]he history of the Small Claims Court is one of progressive development toward providing increased access to justice" at para 46).

6 McGill, *supra* note 4 at 94, citing Seana C McGuire & Roderick A MacDonald, "Small Claims Court Cant" (1996) 34:3 Osgoode Hall LJ 509 at 511.

7 E Eugene Clark, *Research and Evaluation of Small Claims Courts and Tribunals*, Occasional Paper No 2 (University of Tasmania Law School, 1992) at 3 [2.2], cited in Gould, *supra* note 2 at 1235.

procedural simplicity helps keep costs low by avoiding the expense of discoveries, and by lessening the need for legal representation. Since the features of small claims court are relevant to a discussion of the suitability of defamation actions to small claims adjudication, I address them in greater detail.

A. Damages Cap

Each province and territory limits, by statute or regulation, the quantum of damages its small claims courts can award. Initially, these maximums were quite low, but they have increased over time. This is not only due to inflation but also because of the recognition that the cost of litigating in superior court could deter bringing claims worth even tens of thousands of dollars.[8] In setting maximums, provinces must strike a balance between promoting access to justice and ensuring that procedures are proportionate and fair, given the issues and amounts at stake.[9]

At the time of writing, the caps ranged from $15,000 in Manitoba and Quebec to $100,000 in Alberta.[10] The maximum is $16,000 in Prince Edward Island (PEI), $20,000 in New Brunswick and Nunavut, $25,000 in Nova Scotia, Newfoundland and Labrador, and the Yukon, $30,000 in Saskatchewan, $35,000 in British Columbia, and the Northwest Territories, and $50,000 in Ontario.[11] Litigants claiming damages amounts under the

8 For example, in the course of 15 years, Ontario's cap quintupled, going from $10,000 in 2010 to $50,000 in 2025. According to the Bank of Canada Inflation calculator, $10,000 in 2010 was worth $14,118 in 2025 (see Bank of Canada, "Inflation Calculator", online: <bankofcanada.ca/rates/related/inflation-calculator>). Alberta recently doubled its small claims limit to $100,000 (see *Court of Justice Civil Procedure Regulation*, Alta Reg 176/2018, s 2 [*AB CJCP Reg*]).

9 As noted by Shelley McGill, the goal of proportionality is expressed in Ontario's *Rules of the Small Claims Court*, which states that rules should be interpreted so as "'to secure the just, most expeditious and least expensive determination of every proceeding on its merits'" (see McGill, *supra* note 4 at 97, n 50, citing *Rules of the Small Claims Court*, O Reg 258/98, s 1.03(1) [*ON Small Claims Rules*]).

10 *The Court of King's Bench Small Claims Practices Act*, RSM 1987, CCSM c C285, s 3(1)(a) [*MB Small Claims Act*]; *Code of Civil Procedure*, CQLR c C-25.01, art 536 [*QC CCP*]; *AB CJCP Reg*, *supra* note 8, s 2.

11 *Judicature Act Small Claims Regulations*, PEI Reg EC2008-741, s 2; *General Regulation - Small Claims Act*, NB Reg 2012-103, s 3; *Small Claims Court Act*, RSNS 1989, c 430, s 9(a), online: <nslegislature.ca/sites/default/files/legc/statutes/smallclm.htm> [*NS Small Claims Act*]; *Small Claims Regulations*, NLR 69/04, s 2; *Small Claims Court Act*, RSY 2002, c 204, s 2(1)(a), online (pdf): <laws.yukon.ca/cms/images/LEGISLATION/PRINCIPAL/2002/2002-0204/2002-0204.pdf>; *The Small Claims Regulations, 2017*, RRS c S-50.12, Reg 1, s 3(1); *Small Claims Court Jurisdiction and Appeal Limit*, O Reg 626/00, s 1(1) [*ON

cap may usually elect to proceed in small claims or superior court. Claims for damages exceeding the cap may be brought in small claims court if the plaintiff agrees to forego any damages in excess of the cap.[12]

Most provinces allow for general damages in small claims court and do not restrict the quantum of general damages other than by the total damages cap.[13] However, Manitoba limits general damages to $2000 and Nova Scotia to $100, though in both provinces there have been recommendations to increase those amounts.[14] Concerns with awarding general damages in small claims courts include that their quantification is more difficult without legal training.[15] One respondent to a Manitoba Law Reform Commission consultation therefore suggested: "'[t]he administration of justice may be better served by affording self-represented parties an opportunity to defend actions that are measurable, particularly when there may be an imbalance of legal knowledge or experience.'"[16]

In 2017, the Manitoba Law Reform Commission recommended maintaining a cap on general damages in small claims courts: "considering the complexity as well as the precedential value of claims involving significant general damages, a Court of Queen's Bench judge, rather than a court officer at Small Claims Court, should determine these claims."[17] That said, Manitoba is the only province where small claims adjudicators are not required to be legally trained, which may have influenced the recommendation.

As discussed in Part III below, Ontario is different. Not only does it not restrict general damages other than through its overall damages cap, but it has expanded its small claims courts' ability to award general damages.

B. Other Remedial Limitations

Other than damages up to a certain threshold, small claims courts are granted limited remedial powers. I know of none that can issue declaratory

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Jurisdiction and Appeal Limit]; *Small Claims Court Monetary Limit Regulation*, BC Reg 179/2005, s 1; *Civil Claims Rules*, NWT Reg 122-16, s 3(4).

12 See e.g. *Small Claims Act*, RSNL 1990, c S-16, s 5(1) [*NL Small Claims Act*].

13 See e.g. Manitoba Law Reform Commission, *supra* note 3 ("[m]ost Canadian jurisdictions do not specify a limit for general damages" at 23).

14 *MB Small Claims Act*, *supra* note 10, s 3(1)(a); *NS Small Claims Act*, *supra* note 11, s 11. For Manitoba, see Manitoba Law Reform Commission, *supra* note 3 at 33. For Nova Scotia, see e.g. Charles, *supra* note 4 at 1007.

15 See e.g. Charles, *supra* note 4 at 999; Manitoba Law Reform Commission, *supra* note 3 at 33, n 220.

16 Manitoba Law Reform Commission, *supra* note 3 at 33, n 220.

17 *Ibid* at 33.

remedies. Some are empowered to grant limited equitable remedies. Awarding damages for equitable wrongs, such as unjust enrichment, is permissible.[18] The issue is non-monetary remedies: British Columbia's Small Claims Court can order specific performance, for example, and in Alberta, judges may order equitable remedies where the claim otherwise falls within its jurisdiction because it is a claim for damages not exceeding $100,000.[19] This effectively means they can order equitable relief that involves "the payment of money or the return of personal property."[20]

However, I am aware of no jurisdiction that grants its adjudicators the broad powers of injunctive relief that superior court judges have. Ontario explicitly denies small claims courts the powers of equitable relief unless otherwise noted.[21] The reasons for not extending the power to grant injunctions to small claims court adjudicators are rarely stated but relate to the fact that the power to grant injunctive relief is a hallmark of section 92 courts. Provincial and statutory courts and tribunals do not have such powers unless granted to them by statute. Courts tend to jealously guard powers associated with their inherent jurisdiction.[22] There may also be concerns, similar to those around general damages, about unrepresented parties' and adjudicators' ability to quickly and correctly apply the law regarding injunctions.

C. Special Costs Rules

One barrier to access to justice in superior courts is the risk of the unsuccessful litigant having to pay the other side's costs. The cost of one's own legal assistance is often beyond an individual's reach; possibly having

18 See e.g. *Grover*, *supra* note 5 at para 50.

19 *Small Claims Act*, RSBC 1996, c 430, s 3(1)(c), online: <bclaws.gov.bc.ca/civix/document/id/complete/statreg/96430_01> [*BC Small Claims Act*]; so too can British Columbia's Civil Resolution Tribunal (see *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 118(1)(c), online: <bclaws.gov.bc.ca/civix/document/id/complete/statreg/12025_01> [*BC CRT Act*]). For Alberta, see *Court of Justice Act*, RSA 2000, c C-30.5, s 9.6(1)(a)(ii) [*AB CJA*]; *AB CJCP Reg*, *supra* note 8, s 2.

20 *Grover*, *supra* note 5 at para 31. Note that while this is an Ontario case, it is interpreting language similar to that in the *Alberta Court of Justice Act* (see *AB CJA*, *supra* note 19, s 9.6(1)(a)–(c)).

21 *Courts of Justice Act*, RSO 1990, c C.43, s 96(3) [*ON CJA*].

22 For example, *Reference Re Code of Civil Procedure (QC) art 35* resulted from a challenge by the Chief Justice, Senior Associate Chief Justice, and Associate Chief Justice of the Superior Court of Quebec to a proposed change that would require virtually all civil claims worth less than $85,000 to be heard in provincial court. A majority of the Supreme Court held that the change was unconstitutional (see 2021 SCC 27 at paras 7, 16).

to pay both sides' costs simply makes litigation too risky for many. Small claims courts improve access to justice by limiting adverse costs awards. It is not simply that costs are lower because parties are often unrepresented. It is that, regardless of the actual cost of litigating, the ability to recover costs is severely curtailed in small claims court.

In many provinces, a judge may award costs to any party, but these exclude lawyers' fees.[23] In England, small claims parties pay their own costs.[24] Ontario does not exclude lawyers' fees in principle, but limits costs to 15 percent of the amount claimed, unless a higher amount is necessary to punish the other party.[25] Since 15 percent of the $50,000 damages cap is $7500, the effect is that significant lawyers' fees are not recoverable. In addition, in Ontario the costs of settlement conferences and motions are ordinarily capped at $100.[26]

D. Self-Representation

Related to Part II-C above, small claims courts are designed with self-represented litigants in mind. With the exception of Quebec, lawyers are not forbidden in small claims courts but, as noted above, the costs consequences discourage legal representation.[27] However, self-representation is increasingly a feature of civil justice in superior courts too.

E. Subject-Matter Jurisdiction

The subject-matter jurisdiction of small claims courts excludes defamation, malicious prosecution, and false imprisonment, and sometimes other matters, like bankruptcy, in Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nunavut, and Saskatchewan.[28]

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23 See e.g. *The Small Claims Act, 2016*, SS 2016, c S-50.12, s 36 [*SK Small Claims Act*]; *BC Small Claims Act*, *supra* note 19, s 19(4), online (pdf): <publications.saskatchewan.ca/api/v1/products/88510/formats/105172/download>; *Small Claims Court Forms and Procedures Regulations*, NS Reg 17/1993, s 15(2).

24 John Baldwin, "Is There a Limit to the Expansion of Small Claims?" (2003) 56:1 Current Leg Probs 313 at 318.

25 *ON CJA*, *supra* note 21, s 29.

26 *ON Small Claims Rules*, *supra* note 9, 13.10, 15.07.

27 See Part II-C, *above*. In British Columbia Civil Resolution Tribunal proceedings, legal representation is also generally not permitted (see *BC CRT Act*, *supra* note 19, s 20(1)).

28 See e.g. *Small Claims Act*, RSNB 2012, c 15 [*NB Small Claims Act*] ("[t]he court does not have jurisdiction…(d) in an action for libel, slander, breach of promise of marriage, malicious arrest, malicious prosecution or false imprisonment", s 5(5)(d)). The same is true

Nova Scotia and British Columbia exclude only defamation and malicious prosecution, while the Yukon's small claims courts exclude only defamation.[29] Quebec excludes actions for defamation and residential tenancies matters.[30] Only PEI and Ontario allow defamation actions to be brought in small claims court.[31]

Several reasons have been suggested for why some jurisdictions exclude defamation, malicious prosecution, and false imprisonment, including complexity and the fact that these causes of action raise issues best determined by a jury. These are discussed below but tend to relate to the need for community assessment (*i.e.*, assessment by a jury).[32]

F. Relaxed Rules of Procedure and Evidence

Commonly, small claims courts "hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience", so there is procedural and evidentiary flexibility.[33] The rules of small claims court generally allow anything relevant to be admitted as evidence, so long as it is not privileged.[34] In addition, there are generally few, if any, motions, and no pre-trial documentary disclosure or discovery of witnesses is permitted.[35]

This flexibility has the benefit of allowing self-represented litigants to navigate their case more easily. However, it comes at the cost of whatever

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in Newfoundland and Labrador (see *NL Small Claims Act*, *supra* note 12, s 3(2)(c)) and Alberta (see *AB CJA*, *supra* note 19, s 9.6(2)(c)). The Northwest Territories and Nunavut adopt similar approaches (see *Territorial Court Act*, RSNWT 1988, c T-2, s 16(2)(c) and *Small Claims Rules of the Nunavut Court of Justice*, Nu Reg 023-07, s 3.2).

29 *NS Small Claims Act*, *supra* note 11, s 10(c); *BC Small Claims Act*, *supra* note 19, s 3(2); *Small Claims Court Act*, RSY 2002, c 204, s 2(2)(c).

30 *QC CCP*, *supra* note 10, art 537.

31 See e.g. *Judicature Act*, RSPEI 1988, c J-2.1, s 15(1)(a). Until recently there were no reported decisions on a defamation action in PEI small claims court but there is now one which shows that such claims are permissible (see *Ayangma v Amfoubalela*, 2025 PESC 61 at para 102). Note that there are some restrictions on Ontario Small Claims Court's subject-matter jurisdiction by virtue of legislation governing specific subjects that assigns jurisdiction to particular courts (see McGill, *supra* note 4 ("Ontario small claims court remained the catch basin for all disputes not expressly directed elsewhere" at 95)).

32 For more on Community Assessment, see Part IV-B, *below*.

33 *ON CJA*, *supra* note 21, s 25. For New Brunswick see *NB Small Claims Act*, *supra* note 28, s 4. *Cf* the language in *BC Small Claims Act*, *supra* note 19, s 2.

34 See e.g. *NB Small Claims Act*, *supra* note 28, s 11(1), 11(3); *SK Small Claims Act*, *supra* note 23, s 32.

35 For example, referring to Manitoba (see Manitoba Law Review Commission, *supra* note 3 ("[i]n general, there are no interlocutory proceedings allowed in a small claims matter" at 15)).

benefits those rules and procedures confer. A lack of documentary disclosure, for example, may mean a party lacks relevant information they otherwise would have used in building their case.[36] The goal is to provide *access* to justice while ensuring that the more accessible procedure *achieves* justice. Different provinces strike different balances. Ontario, for example, allows some motions in small claims court.[37] This entails more procedural complexity in the form of notices of motion and affidavits.[38]

G. Active Adjudication

Canada's civil justice system is premised on an adversarial approach to litigation, but small claims courts encourage self-representation, making it hard for parties to put their best foot forward on their own.[39] Relaxed rules of procedure and evidence tend to require that adjudicators take a more inquisitorial approach. After all, if pleadings rules are relaxed, for example, the adjudicator may not be able to precisely discern the nature of the plaintiff's claim without asking some questions. Thus, adjudicators have "adopted a very special kind of informal, semi-inquisitorial approach to small claims disputes."[40] Baldwin goes so far as to say that "unless adjudicators play an interventionist role—and, what is more, play it competently—small claims procedures simply will not work."[41]

Active adjudication promotes fairness in this sense, but may also promote unfairness in that the adjudicator may lose, or appear to lose, some of their impartiality.[42] It is a difficult balance to achieve, but most jurisdictions have implicitly signalled that this is preferable, in small claims courts, since if a judge "remains passive, an institutional litigant will overwhelm the average layman, and if both parties are individuals, the hearing

36 A lawyer, responding to a consultation process by the Manitoba Law Commission, stated: "*sometimes the [small claims court] process doesn't allow for proper documentary or discovery, so it is difficult to understand your risk and difficult to defend at trial*" (see *ibid* at 49 [emphasis in original]).

37 *ON Small Claims Rules*, *supra* note 9, s 15.

38 Manitoba Law Review Commission, *supra* note 3 at 28.

39 Adams refers to the adversarial system as "the western paradigm for the administration of the rule of law" (see George Adams, "The Small Claims Court and the Adversary Process More Problems of Function and Form" (1973) 51:4 Can Bar Rev 583 at 583).

40 Referring to Nova Scotia see Charles, *supra* note 4 at 1015, citing the Nova Scotia Court Structure Task Force, *Report of The Nova Scotia Court Structure Task Force*, (March 1991) at 203, 205.

41 Baldwin, *supra* note 24 at 318.

42 Charles, *supra* note 4 at 1014.

may result in hours of irrelevant and hostile bickering."[43] While Adams criticizes this approach as theoretically problematic and not empirically justified, half a century later, with court resources ever more stretched, it seems hard to imagine a realistic alternative to adjudicators assisting unrepresented litigants.

III. SMALL CLAIMS COURT IN ONTARIO

Since Ontario is unusual in allowing small claims defamation actions, its experience informs the broader issue of the suitability of defamation actions to small claims adjudication. It is therefore worth saying more about Ontario's small claims system.

Ontario's small claims court is its busiest civil court, dealing with almost 50 percent of all civil claims in that province.[44] As noted above, the damages cap is the second highest in Canada: $50,000 since 2025.[45]

Ontario is not the only Canadian common law jurisdiction to allow defamation actions in small claims courts—there is no barrier to such actions in PEI. However, it is the only Canadian small claims court that regularly hears defamation cases. Ontario is also an outlier in this respect in the common law world. Most common law jurisdictions explicitly exclude defamation from small claims courts' jurisdiction.[46] The only other exceptions of which I am aware are in Australia: the South Australia Magistrates' Court and the Australian Capital Territory Civil and Administrative Tribunal.[47]

While it is not clear why Ontario's small claims courts have broader subject-matter jurisdiction, there are other ways in which they differ, thereby facilitating a more diverse subject-matter jurisdiction. Not only

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43 Adams, *supra* note 39 at 607.

44 According to the Superior Court's 2017–2018 report, 45 percent of all civil claims were filed in small claims court, representing almost 120,000 claims (see Ontario Superior Court of Justice, *The Superior Court of Justice: Enhancing Public Trust*, Court Report (Ontario: Superior Court of Justice, 2017–2018) at 14). According to former Chief Justice Winkler, in 2008, more than 60 percent of civil cases were either in small claims court or under simplified rules (see K Winkler CJ, "Opening of the Courts of Ontario for 2008" (delivered at the Court of Appeal for Ontario, 9 September 2008) [unpublished] online: <ontariocourts.ca/coa/about-the-court/archives/opening-of-the-courts-of-ontario-for-2008/>).

45 *ON Jurisdiction and Appeal Limit*, *supra* note 11, s 1.

46 See e.g. Jonathan Barnes, "Defamation County Court", *Counsel Magazine* (July 2014), online (pdf): <5rb.com/wp-content/uploads/2014/08/Defamation-County-Court-Counsel-Jonathan-Barnes.pdf> ("[t]o all intents and purposes, defamation claims currently have to be issued in the High Court" at 23).

47 Gould, *supra* note 2 at 1238.

is the damages cap relatively high, but there are no limits on general damages. Indeed, in 2006, the Province gave small claims courts the ability to award damages for discrimination and harassment under the *Human Rights Code*, so long as plaintiffs have a viable cause of action, such as wrongful dismissal.[48] Ontario's small claims proceedings are clearly not limited to simple matters of debt collection.

Shelley McGill suggests that Ontario's intrusion upon seclusion (privacy) tort, for which damages tend to be non-pecuniary, was designed with small claims court in mind, since it caps damages at an amount under the Ontario small claims threshold.[49] This permissive approach to general damages is, in practice, necessary for defamation claims to be heard in small claims courts, since defamation damages only rarely include special damages.[50]

In addition, as noted above, motions are allowed and in general, there is more potential for procedural complexity in Ontario small claims courts. Settlement conferences are mandatory in defended actions, and two weeks before these conferences, parties must disclose evidence intended to be relied on, as well as witnesses to be called and the names of "persons with knowledge of the matters in dispute in the action."[51] Thus, "[a]s compared to Small Claims Court in other Canadian jurisdictions, the procedure [in Ontario] is more formal, with more procedural steps and disclosure requirements."[52]

Ontario's legal profession also regulates paralegals, requiring them to have certain training and to carry insurance.[53] Some form of legal assistance for small claims court is therefore available at rates lower than what lawyers charge. This too would facilitate small claims courts hearing more complex matters.

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48 RSO 1990, c H.19, s 46.1.

49 McGill, *supra* note 4 at 103–104.

50 Hilary Young, "The Canadian Defamation Action: An Empirical Study" (2017) 95:3 Can Bar Rev 591 at 619–20 [Young, "Canadian Defamation Action"].

51 *ON Small Claims Rules*, *supra* note 9, ss 13.01(1), 13.03(2)(b).

52 Manitoba Law Review Commission, *supra* note 3 at 28.

53 Law Society of Ontario, *Paralegal Rules of Conduct*, (Toronto: LSO, 2022) ss 3.01(4)(j), 8.04(1).

IV. DEFAMATION'S SUITABILITY TO SMALL CLAIMS ADJUDICATION IN PRINCIPLE AND IN PRACTICE

In this section, I discuss defamation's suitability to small claims adjudication in principle and in practice. The former discussion is primarily a matter of logic, while the latter is based on my assessment of the reported Ontario cases.

Since most jurisdictions exclude defamation from small claims courts' jurisdiction, the consensus seems to be that it is not suitable. Yet that conclusion is worth exploring, particularly in light of changes in recent decades to the nature of defamation claims (higher frequency, lower-value claims), the nature of harms (the persistence of online publications), substantive defamation law (additional complex defences, trend toward more speech-friendly law), and increasing problems of access to justice.

The question requires balancing the value of *access* to justice against achieving *better* justice, so reasonable people can disagree as to where the line should be drawn.[54] Some may prefer courts not to adjudicate at all if complex matters are overly simplified, while others will prefer rough justice to no justice at all. What's more, the issue is not yes-or-no. Whether defamation is suitable to small claims adjudication depends on the particular combination of rules governing a small claims court. For example, it may be that Ontario's small claims courts, with their greater procedural complexity and access to regulated paralegals, can do an adequate job of adjudicating complex defamation claims, while other small claims courts cannot. I therefore don't attempt to answer the question of defamation's suitability to small claims adjudication definitively. Rather, I provide analysis that will help others to make that determination for themselves given a jurisdiction's priorities and the structure of its small claims court.

This section is organized around specific arguments for and against small claims defamation actions. Each is assessed in light of principle and practice.

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54 For example, when the Manitoba Law Commission sought feedback on whether wrongful dismissal claims should be heard in small claims court, "[t]he feedback the Commission received on this issue was mixed. On the one hand, some respondents argued that this area of the law is complex and not suited to the small claims forum, while others pointed out that excluding wrongful dismissal claims could mean that some terminated employees would have no practical option for pursuing their claims" (see Manitoba Law Review Commission, *supra* note 3 at 35). The commission recommended the continued exclusion of wrongful dismissal claims but was likely influenced in this by the fact that Manitoba small claims matters may be adjudicated by non-lawyers.

A. Complexity

A common objection to small claims defamation actions is the tort's substantive and procedural complexity, for which it is notorious.[55] "[T]hese actions involve a complexity of proof which is beyond the ability of small claims procedure to handle."[56] One Canadian media lawyer, speaking about defamation law generally, said "the current system's not working. It's too complex. Most lawyers, unless you specialize in this can't even run a defamation file cause it's so complicated."[57] England's rejection of small claims defamation actions has been explained as due at least in part to the tort's complexity.[58]

It is worth distinguishing the two kinds of complexity, since they create different issues in small claims courts. Small claims courts must apply the substantive law. The relevance of substantive (including remedial) complexity therefore includes the potential for the parties or the adjudicator to misapprehend the law. Justice may fail to be done as a result. In addition, the time required to address the elements and relevant defences may not fit well with small claims courts' shorter timelines. The consequences of this may be individual, in that there may not be time for a full adjudication of substantive issues in the time allotted in small claims court. Consequences may also be systemic, in terms of slowing down small claims courts or limiting the number of cases that can be heard.

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55 The law of defamation is "notoriously complex and difficult" (see Robert J Sharpe, Katherine E Swinton & Kent Roach, *The Charter of Rights and Freedoms*, 2nd ed (Toronto: Irwin Law, 2002) at 145).

56 "Small Claims Court: Reform Revisited", (1969) 5:2 Colum JL & Soc Probs 47 at 60 ["Reform Revisited"] (apparently referring to defamation actions specifically). See also Gould, *supra* note 2 at 1236.

57 Hilary Young, "Canadian Anti-SLAPP Laws in Action" (2022) 100:2 Can Bar Rev 187 at 219 [Young, "Anti-SLAPP Laws"].

58 The England and Wales Civil Procedure Rules (CPR) require defamation actions to be issued in the Media and Communications list of the High Court, such that it is not possible to hear defamation actions in small claims court. The Court of Appeal in *Dow Jones & Co Inc v Jameel* explained that this relates to complexity. See *Dow Jones & Co Inc v Jameel*, [2005] EWCA Civ 75 ("[n]ormally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under CPR" at para 70). While not relevant to defamation claims, the CPR explicitly lists complexity of facts, law or evidence as a reason to choose a particular track: small claims, fast or multi-track (see *The Civil Procedure Rules 1998* (UK), SI 1998/3132 (L.17), s 26.13(1)(c)).

The relevance of defamation's procedural complexity is different. While substantive complexity must be respected, procedural complexity can be (largely) dispensed with in small claims courts. The issue is therefore whether justice can be done without those procedural tools.

1. *Substantive Complexity*

Defamation law's substantive complexity relates especially to its defences. Kim Gould highlights fair comment as particularly complex.[59] Canada's equivalent fair comment defence has several elements, with the "basis in fact" element often misunderstood.[60] The responsible communication defence requires consideration of a wide range of factors, while qualified privilege often leads to difficult assessment of whether there was a duty to communicate and a reciprocal right to receive that communication. Further, the online context has created new sources of uncertainty on a wide range of substantive issues including the single publication rule, internet intermediary liability, and jurisdiction.[61]

Defamation's substantive law of damages is also complex.[62] Its approach is unique, permitting much greater than nominal compensatory damages without proof of injury. A stay of defamation proceedings was lifted under the *Bankruptcy and Insolvency Act* (*BIA*) because defamation actions are too complex to be dealt with in bankruptcy proceedings, some of the remedies sought weren't available under the *BIA*, and "it was inappropriate to deal with complex claims under the *BIA*."[63]

The approach to injunctive relief in defamation is also complex and confused, though this is not an issue in small claims courts, since they cannot grant injunctions.[64]

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59 Gould refers to fair comment and honest opinion, but those are the same defence in Canada (see Gould, *supra* note 2 at 1251).

60 For a recent example, see *Hansman v Neufeld*, 2023 SCC 14 at paras 99–102.

61 See also Gould, *supra* note 2 at 1252. In Canada, for single publication, see e.g. *AARC Society v Canadian Broadcasting Corporation*, 2019 ABCA 125. For internet intermediary liability, see e.g. Emily B Laidlaw & Hilary Young, "Internet Intermediary Liability in Defamation" (2018) 56:1 Osgoode Hall LJ 112. For jurisdiction, see e.g. *Haaretz.com v Goldhar*, 2018 SCC 28.

62 *Franchuk v Schick*, 2015 ABQB 21 ("[t]he law on general, aggravated and punitive damages with respect to defamation is complex" at para 11).

63 *Nautical Data International, Inc In Re the Bankruptcy and Insolvency Act*, 2005 NLTD 137 at para 17.

64 See e.g. Hilary Young, "The Scope of Canadian Defamation Injunctions" (2021) 44:1 Dal LJ 285 at 306 [Young, "Defamation Injunctions"]; Hilary Young, "Permanent Injunctions in Defamation Actions" (2023) 46:2 Dal LJ 781 at 816 [Young, "Defamation Actions"].

Given this, can the parties and adjudicators correctly apprehend the substantive law? Are they significantly worse at this than parties and non-specialist judges in superior courts, where parties are also often unrepresented? How well small claims courts apply substantive defamation law is an empirical question, while the range of acceptable error, in order to achieve greater access to justice, is a matter of opinion.

In principle, that defamation's substantive complexity makes it unsuited to small claims adjudication is not obvious. Complexity doesn't necessarily correlate with cause of action; defamation claims aren't *always* complex.[65] Defamation law does indeed have complex defences. But its elements are fairly simple, and the complexity of defences will depend on the case. For example, a small claims court is often as well placed as a superior court to determine truth, where justification is the defence relied on (evidentiary limitations notwithstanding, which I consider under procedural complexity). Other defences are more complex, but not obviously more so than elements and defences in personal injury cases, for example, which can be adjudicated in small claims courts. And personal injury cases may require complex expert evidence, while defamation cases are less likely to turn on expert evidence.[66] Further, defamation's remedial complexity is less of an issue in small claims court because of the jurisdictional limits on damages and the inability of small claims courts to order injunctions.

It is therefore difficult to assess concerns about complexity. It is unclear, for example, whether defamation cases will require more time, on average, to adjudicate in small claims court than the average small claims case. If they will, whether this is acceptable depends on how much more time they take and on how much pressure a province's small claims court is already under to provide timely small claims adjudication.

It is also difficult to assess the risk of the law being misapplied due to its complexity. While it is possible to identify errors of law that adjudicators make, it is much harder to quantify these in any way—especially relative to the rates of such errors in superior court. That said, a qualitative approach to Ontario's small claims defamation jurisprudence is informative.

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65 Gould, *supra* note 2 at 1253, citing *Elliott v Tomkins* [*No 2*], [2014] NSWDC 56, [1] (Gibson DCJ) ("defamation law cannot lay exclusive claim to complexity in private law, and there is also judicial acknowledgement that 'not all aspects of defamation law are complex'" at 1253).

66 Defamation cases do sometimes require expert evidence, however. In *Raque v Bollman*, the principal issue was whether the defendant had defamed the plaintiff by accusing her of causing the death of the defendant's dogs through carelessness. Expert evidence was needed as to the dogs' cause of death (see *Raque v Bollman*, 2012 CarswellOnt 13868 at 19–21, [2012] OJ No 3610 (ONSC (Sm Cl Ct)).

My research assistant and I gathered and read the 103 reported Ontario Small Claims Court defamation decisions between January 1, 1999, and February 8, 2024.[67] I acknowledge the difficulty of trying to assess whether adjudicators correctly apply defamation law based on their reasons for judgment, especially when such a small percentage of small claims cases are reported, and reported decisions are likely not representative of all cases.[68] Yet if the law were substantively too complex for parties and ultimately adjudicators, we'd expect to see this reflected in the written decisions, which would contain erroneous statements of law or misapplications of law to facts.

The case law demonstrates that adjudicators generally understood and correctly applied defamation law, including with regard to defamatory meaning,[69] anti-SLAPP,[70] the meaning of public interest,[71] qualified privilege,[72] substantial truth, fair comment[73], and damages.[74]

To be sure, there were cases in which the adjudicator misapprehended an aspect of the law. For example, adjudicators sometimes misunderstood the fair comment defence.[75] However, mistakes apparent in the reasons

67 We searched CanLII and LexisNexis using search terms for defam! (words starting with the letters 'defam', such as defamation and defamatory), libel, or slander. We limited the jurisdiction to Ontario and, where possible, to small claims courts. Where the jurisdiction couldn't be limited to small claims courts, we searched using the search term "small claims".

68 One study suggested two to three percent of small claims cases were reported. See Charles, *supra* note 4 at 64. This was based on comparing the number of cases filed, according to Department of Justice statistics, to the number of reported cases. This may under-represent the percent of reported cases since some cases are presumably abandoned after being filed, just as in superior court. Regardless of what the actual figure is in any jurisdiction, it is uncontroversial that few small claims court decisions are reported. See the same article at 1026, n 390.

69 See e.g. *Corion v Plummer*, 2022 CanLII 84382 (ONSC (Sm Cl Ct)); *Lepp v Toronto Star Newspapers Limited*, 2022 CanLII 39874 (ONSC (Sm Cl Ct)) [*Lepp*]; *Farrow v Jones*, 2014 CanLII 6012 at paras 61–71 (ONSC (Sm Cl Ct)) [*Farrow*].

70 Note that while anti-SLAPP motions cannot be heard in small claims court, for a few years they were, and there are several reported small claims decisions on anti-SLAPP motions (see e.g. *J Mao Dentistry Professional Corporation* (*Aba Dental Clinic*) *v Boulet*, 2019 CanLII 31631 (ONSC (Sm Cl Ct)) [*J Mao*]).

71 See e.g. *ibid* at para 17; *Taft Management Inc v Gentile*, 2018 CanLII 82880 (ONSC (Sm Cl Ct)).

72 See e.g. *Lepp*, *supra* note 69; *Melanson v Flynn*, 2017 CanLII 94717 (ONSC (Sm Cl Ct)).

73 See e.g. *J Mao*, *supra* note 70.

74 See e.g. *Gorzen v Christensen*, 2014 CanLII 5089 (ONSC (Sm Cl Ct).

75 For example, in *Ruby v Stratford City Gazette*, the adjudicator misapplied the law of fair comment in deciding that calling a store an "unruly dump" and an "unsightly blight" was fact rather than comment (see *Ruby v Stratford City Gazette*, 2006 Carswell 2073 at 47, [2006] OJ No 1325 (ONSC (Sm Cl Ct))). Given that there was a known factual basis for

were quite rare. Further, mistakes about substantive defamation law occur in superior court too, given the lack of a specialized defamation or media law bench in Canada, the technicality of the cause of action and the relative rarity of defamation claims.

The case law—albeit unrepresentative of small claims actions generally—provides no evidence that substantive complexity is a significant barrier to small claims defamation adjudication. However, if a case were indeed too substantively complex to be adjudicated in small claims court, a small claims defendant could move to have the matter transferred to superior court. This request will not simply be granted because a matter is complex; the complexity must be such that "the claim is not capable of being justly and fairly resolved using the procedures available in the Small Claims Court."[76] So defamation could fall within small claims courts' jurisdiction while retaining some flexibility to transfer cases out where they are problematically complex.

Before moving to procedural complexity, it's worth noting that many have argued for defamation law to be simplified. It is beyond the scope of this article to address particular ways to simplify it or to address whether defamation law would be better suited to small claims court adjudication if it were simplified in particular ways. But before any jurisdiction rejects the notion of small claims court adjudication of defamation claims because such claims are substantively complex, it should first consider whether all that complexity is necessary. Inevitably some of the complexity is,[77] but some of it is not and should be dispensed with.[78] Thus, in Gould's view,

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these statements, namely the appearance of a store on a busy public street, the words should have been found to be comment, not fact, on the law as it was in 2006. In my view, fair comment should have prevailed.

76 *Macdonald v Feldman*, 2022 ONSC 4818 ("[a] SCJ judge may order the transfer of a claim commenced in the Small Claims Court if the party seeking the transfer shows that the claim is not capable of being justly and fairly resolved using the procedures available in the Small Claims Court" at para 17). One of the relevant factors is complexity ("[t]he Defamation Action does not raise complex issues, neither factually nor legally. It relates to a short Google Review and will require the application of established legal principles" *ibid* at para 47).

77 *Whitehead v Sarachman*, 2012 ONSC 6641 ("[t]he law of defamation is complex. And it is complex for good reason: it seeks to balance competing interests in robust public debate, freedom of speech, and protection of private reputation" at para 18).

78 For example, much of the law around defamatory meaning, *i.e.*, true and false innuendo, is unhelpfully complex. The focus should be on how words would be understood and what their effect would be. Certainly, the distinction between libel and slander should be abolished where it has not already been. See also Gould, *supra* note 2 at 1255, n 267.

"[i]f any difficulties persist [with complexity], then consideration should be given to modifying features of small claims jurisdictions and/or providing additional services to support their operation before rejecting [small claims adjudication of defamation claims] outright."[79]

2. *Procedural Complexity*

Defamation's procedural complexity is often noted. Its pleadings rules, for example, "are as complex, as pedantic and as technical as anything known to Dickens."[80] Australian High Court Justice Michael Kirby has referred to defamation's procedural complexity as leading to "trial by interlocutory ordeal."[81] In an Ontario costs endorsement, the Court concluded that "[d]efamation is not a cause of action that easily lends itself to the *Rules of Simplified Procedure*. Those are rules that are more suited to cases where damages are reasonably quantifiable from the start. Moreover, the *Libel and Slander Act*, R.S.O. 2000 is a complex statute that regulates the remedy and requires a full process."[82]

The Manitoba Law Reform Commission therefore noted that "[m]any of the types of disputes described above [including defamation] do not lend themselves easily to the relaxed rules of evidence, lack of interlocutory proceedings, and informal processes available for small claims matters."[83] Similarly, a 2009 report of Nova Scotia's small claims courts cautioned that, generally, less formality in rules of evidence and procedure comes at a cost:

> While the absence of many procedural rules in small claims courts is meant to facilitate access to justice, it is possible that the lack of formality actually interferes with fairness. One perspective is that the absence of clear procedural rules in small claims court functions to inhibit access to justice because of inconsistencies in the administration process.[84]

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79 *Ibid* at 1226.

80 *Ibid* at 1251–52, citing David Ipp, "Themes in the Law of Torts" (2007) 81 Austl LJ 609 at 615. While most examples provided are from Australia, Australia's laws are similar to Canada's. See e.g. *Gouveia v Toronto Star Newspapers Ltd*, 1998 Carswell Ont 3653 at paras 7–20, [1998] OJ No 3830 (ON Ct J (GD)) [*Gouveia*] on defamation's "rolled up plea".

81 *Favell v Queensland Newspapers Pty Ltd* (2005), [2005] HCA 52 at para 22, 221 ALR 186 (HCA).

82 *Best v Spasic*, 2005 CanLII 6385 at para 1 (ONSC).

83 Manitoba Law Reform Commission, *supra* note 3 at 13. Note, however, that this quote relates to Manitoba, the only province where small claims disputes can be adjudicated by non-lawyers.

84 Marc W Patry, Veronica Stinson & Steven M Smith, *Evaluation of the Nova Scotia Small Claim Court: Final Report to the Nova Scotia Law Reform Commission* (Halifax: Saint Mary's University, 2009) at 13.

The same report cited Economides, saying "[w]here safeguards derived from legal formality are absent, the weaker party may feel inclined to compromise or settle for something less than he would receive were he to rely on the full enforcement of his legal rights."[85]

Ultimately, the question is what is lost when procedures are dispended with, whether these be specific to defamation (*e.g.*, unique pleadings rules) or not (*e.g.*, discoveries). Then, given this, do the ends justify the means?

As with the substantive complexity issue, the first question is empirical and the second is a matter of opinion. And again, this empirical question is itself complex. It could be, for example, that defamation's specific pleadings rules could be eliminated with virtually no effect on the ability to do justice. At the same time, the inability to engage in discoveries could have very significant effects. It seems obvious that a lack of discoveries makes it harder for the parties to know what to expect, to be able to engage in reasonable settlement negotiations, or to know what kinds of evidence they should be gathering.[86] Yet Salter and Thompson argue that efficient and non-adversarial exchanges of information can lead to more rather than less just outcomes.[87]

Further, while in principle a lack of procedure may cause difficulties in small claims defamation litigation, the benefits of procedural complexity are presumably less available to self-represented litigants than to ones with counsel. This could be because of knowledge of the rules or the ability to navigate them. Since parties to defamation actions are often unrepresented even in superior court, we cannot assume the intended benefit of procedures will materialize.

Regardless, it's very difficult to assess *how great* an impediment this is, or *what parts* of discoveries are most important, so that we could then discuss whether the trade-off is worth it, or how procedural rules could be amended.

In practice, again the case law is instructive. Recall that Ontario does not allow for discoveries, but does have mandatory settlement conferences

85 *Ibid* at 14, citing Kate Economides, "Small Claims and Procedural Justice" (1980) 7:1 British JL & Society 111 at 118.

86 McGill notes that finding the evidence to prove a small claims court case can be a problem without discoveries (see McGill, *supra* note 4 at 106).

87 Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2016-2017) 3 McGill J Dispute Resolution 113 ("[a] less adversarial exchange of facts and information could help to create a clearer picture of the dispute, before the parties focus on finding the argument that will help them win at trial" at 121).

in defended actions. Parties must also disclose the evidence and witnesses they intend to rely on, as well as the names of "persons with knowledge of the matters in dispute in the action".[88] But in accordance with the rules governing Ontario's Small Claims Court, most other procedural requirements are eliminated. This includes defamation-specific procedures, such as its pleadings rules, though statutory notice requirements still apply to publications in a newspaper or broadcast.[89]

The 103 cases provided no reason to think that the absence of complex procedure was an impediment to doing justice in these cases. Despite what were at times very imprecise pleadings, adjudicators seemed to focus on the relevant issues, namely whether reputation was harmed and, if so, to what extent and whether that was defensible.[90] Thus, in *Cope v Gesualdi*, the adjudicator heard a claim where the parties had

> not specifically pleaded the legal description [*sic*] all of their claims or particular defences in writing but have each set out their own version of the facts. Accordingly, Rules 7.01(2) and 9.02(1) have not been entirely satisfied.... This court will consider the causes of action and defences advanced orally by the parties when they were invited to open their respective cases. I have no difficulty with this except that it prolongs judicial consideration of the case. Superior Court Rule 25.06, after all, requires no more than that that the parties plead pertinent facts and allows them, but does not make it mandatory, to plead exact points of law. A cause of action need not be pleaded if the specific facts giving rise to that cause of action are included in the pleading.... In this instance, I find that the causes of action are clearly identifiable from the facts pleaded and have been supported in testimony by facts which are material.[91]

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88 *ON Small Claims Rules*, *supra* note 9, r 13.03(2).

89 See e.g., *Suedfeld v Lancia*, 1993 CarswellOnt 3642 at para 34, [1993] OJ No 1693 (ON Ct J (GD)) [*Suedfeld*].

90 See e.g. the pleadings in *Rosic v Mayer*, 2005 CarswellOnt 4790, [2005] OJ No 3539 (ONSC (Sm Cl Ct)) ("[t]he claim is less than complete and barely meets the requirements of Rule 7.01(2). [The plaintiff] described the 'Type of Claim' as Damage to Property and Human Rights Code Harassment. Under the heading, 'Reasons for Claim' Rosic listed the following: [scratches on my car, harassment, 'bust people to spil my car', human right, false statement to police officer #803, stress]" at para 7).

91 2021 CanLII 58972 at para 1 (ONSC (Sm Cl Ct)). See also *Anderson v Marshall*, 2017 CanLII 67328 (ONSC (Sm Cl Ct)) ("[t]hough the pleadings were somewhat deficient in properly framing the respective causes of action, I was satisfied that each party was aware of the true claims made against one another and had full awareness of the material facts pleaded in support. No one was taken by surprise" at para 79).

It is impossible to know what difference specific procedural requirements would have made, but adjudicators seemed able to understand the nature of the claim from the story the plaintiff told. Where there was insufficient evidence of what was said or to whom, the plaintiff's defamation action invariably failed. Similarly, with the exception of anti-SLAPP motions, which are unavailable in Ontario's Small Claims Court, more restricted access to motions did not appear to cause significant problems.[92] Despite no formal motions for particulars under Rule 25.10, for example, parties in small claims court matters could be asked to produce more information at or after the settlement conference. Failure to do so didn't necessarily have formal consequences but inevitably weakened the party's case.

Yet procedurally, the case law does not suggest an "anything goes" approach. For example, in one case, the deputy judge noted defamation's strict pleadings rules but allowed the plaintiff to provide particulars during the settlement conference. When those particulars were not forthcoming, further amendments were not permitted.[93] In another case, an adjudicator refused to allow the admission of new evidence during closing arguments because it would be prejudicial to the other party's case.[94] In yet another, an adjudicator refused to order the return of goods to the defendant because there was no defendant's claim, let alone a request for an order for delivery up of possession.[95]

To the extent that the lack of procedural complexity is not a significant barrier to doing justice in Ontario small claims defamation actions, this is likely in part because Ontario retains certain important procedures such as having to disclose evidence intended to be relied on, witnesses to be called, and the names of "persons with knowledge of the matters in dispute in

92 See e.g. *Laurentide Kitchens Inc v Homestars Inc*, 2022 ONCA 48 [*Laurentide*]. It is beyond the scope of this article to discuss whether anti-SLAPP motions should be heard in small claims courts, but the issue is really one of access to substantive rather than procedural law.

93 *Cummings v Burlington Radio Control Modelers*, 2018 CanLII 123232 at paras 35–37 (ONSC (Sm Cl Ct)).

94 *Farrow*, *supra* note 69. In another case, a slander claim failed in part because the plaintiff was a corporation and the impugned words were about the principal of that corporation, not the corporation itself (see *Duceau Property Management Inc v Sutherland Models Inc*, [2015] OJ No 2517 at para 34 (ONSC (Sm Cl Ct))).

95 *Affordable Relocations Coast To Coast Inc v Bacle*, 2013 CarswellOnt 5319, [2013] OJ No 2007 (ONSC (Sm Cl Ct)) ("[t]here are limits to the distance a court may go in playing the role of advocate for a party, even an unrepresented party. In this court's opinion that distance has already been reached in this case. The court hopes the parties will be able to bring this case to an end by Affordable being paid and releasing to the Bacles the balance of their goods" at para 29).

the action", which limit the ability to take a party by surprise.[96] Thus, my assessment of principle and of the case law revealed no serious concerns about substantive complexity and a lack of procedural complexity.

An important caveat about relying on the written decisions in small claims cases, with regard to the issue of complexity and in general, is that the reported cases are almost certainly not representative of all the cases. Perhaps experienced or skilled adjudicators are more likely to report their decisions, or cases involving lawyers and paralegals are more likely to be reported—and the law better understood because of the assistance of those professionals. Thus, although the data revealed no reason for concern, it is possible that the unreported cases would reveal problems not apparent in this study.

B. Community Assessment

A second reason for excluding defamation from small claims courts' jurisdiction is that it is a cause of action that historically gave rise to a right to a jury trial. Like other excluded causes of action, such as malicious prosecution, it involves "some element of community judgment" more appropriate for the jury to assess.[97] Since small claims courts do not sit with juries, the causes of action are excluded.

Given the trend away from jury trials in civil litigation generally and defamation specifically, this rationale no longer justifies excluding defamation from the jurisdiction of small claims courts.[98] To the extent that civil jury trials persist, the right to them remains most robust for causes of action such as defamation, malicious prosecution, and false imprisonment.[99] The community assessment argument is ultimately an unsatisfactory reason for keeping defamation actions out of small claims courts because allowing such actions would not preclude access to jury trials in superior court for

96 *ON Small Claims Rules*, *supra* note 9, r 13.03(2)(b).

97 "Reform Revisited", *supra* note 56 at 60.

98 See e.g. Brandon Orct, "The Jury Strikes Back: Enhancing the Viability of the Civil Jury System in a Post-Pandemic Ontario" (2022) 13:1 Western J Leg Studies. Note also that in England and Wales, the default for defamation trials is now that they are heard by a judge alone. See also *Civil Procedure Rules 1998* (UK), SI 1998/3132, r 26.11; *Suedfeld*, *supra* note 89 at para 27.

99 Orct, *supra* note 98 ("[e]ven with abolition, the availability of civil trials may persist for certain causes of action in Ontario as recommended in the Commissioner's 1973 report and adopted by other provinces" at 9).

anyone who wants one and jury trials have for some time not been mandatory in defamation actions.[100]

Further, this jury rationale in some ways conflicts with the complexity one, in that cases substantively too complicated for small claims courts would presumably also cause problems for juries. It's worth noting that where courts have discretion to strike a jury notice due to a matter's complexity, at least in some jurisdictions, there is no such discretion where the action is in defamation, false imprisonment, or malicious prosecution. According to the British Columbia Supreme Court, the relevant rule "reflects a legislative assessment that whatever difficulties may arise in a jury trial of a defamation, false imprisonment or malicious prosecution case as a result of the intricacy or complexity of the issues are outweighed, as a matter of fairness, by the importance of permitting parties in such cases to demand a jury trial as a means of ensuring that the ultimate decision reflects community standards."[101] This seems hard to reconcile with the trend away from jury trials in defamation generally.

C. Ability to "Hijack" Proceedings

A third reason sometimes given for excluding causes of action like defamation from small claims courts' jurisdiction is that they allow more powerful litigants to "hijack" proceedings, contrary to the "people's court" rationale for small claims courts. Kim Gould makes this argument, citing the example of businesses using small claims courts to recover debts from individuals.[102] In this context it is worth noting that anti-SLAPP motions, meant to combat abusive litigation in Ontario, are unavailable in its small claims courts.[103]

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100 That said, where claims are for amounts within small claims courts' jurisdiction, successful plaintiffs can be denied costs if they brought their action in superior court (see *Rules of Civil Procedure*, RRO 1990, Reg 194, r 57.05(1)). One hopes this discretion would be influenced by the plaintiff's desire to have a jury trial (see e.g. *Gouveia*, *supra* note 80 at para 43).

101 *Huang v Silvercorp Metals Inc*, 2016 BCSC 1168 at para 34. See also *Chandra v CBC*, 2015 ONSC 2980, wherein the Ontario Supreme Court refused to strike a jury notice in a defamation action despite complexity in the law, though the judge had discretion to do so despite it being a defamation action.

102 Gould, *supra* note 2 at 1236.

103 A SLAPP is a strategic lawsuit against public participation. Anti-SLAPP law in Ontario is meant to allow abusive lawsuits to be dismissed at an early stage. For their inability to be heard in small claims court, see *Laurentide*, *supra* note 92.

Yet, I don't find this argument persuasive. To be sure, corporations and other powerful parties can use defamation law to SLAPP those who speak out, and may have problematic advantages in small claims litigation. However, the risk to less powerful litigants is much smaller than in superior court proceedings, whose procedural technicality can provide a much greater tactical advantage for those with lawyers and money. The less adversarial nature of small claims court means that adjudicators can help litigants to make or answer a claim. Of course, having money is a significant advantage in any legal forum, but small claims courts are designed to avoid such unfair (dis)advantages to the extent possible.

Looking to the Ontario small claims defamation case law, I identified the proportion of corporate versus human parties. Although small claims court is often referred to as "'the 'people's court''",[104] corporations often bring and defend defamation actions in small claims court.[105] A little over half (54/103) of the reported small claims defamation cases involved at least one corporate party. However, these were more likely to be defendants (41/103) than plaintiffs (17/103).[106] Phrased differently, in 92/103 cases, there was at least one human plaintiff. So, it does not seem that corporate plaintiffs are overwhelming the people's court. What's more, many of these corporate parties were small businesses, for example a dog kennel,[107] a dental practice,[108] and a condominium corporation.[109] Again, however, caution is warranted since we cannot assume the reported cases are representative of small claims defamation actions in Ontario.

While many corporations were involved, in my view, this is not inconsistent with the goals of a modern small claims court. The costs of litigating in superior court are high enough to be out of the reach of, or prohibitively

104 See e.g. *Grover*, *supra* note 5 at para 47.

105 Particularly before the reforms of the 1970s and 1980s, there was concern that "it is primarily the businessman, not the poor man, who reaps the advantage of the inexpensive and speedy small claims courts" (see J Skelly Wright, "The Courts Have Failed the Poor", *New York Times Magazine* (9 March 1969) at 102). In a Nova Scotia study of the feasibility of standalone small claims courts, Professor Skene explains that the courts are being used as collection agencies and not as 'people's courts', noting that "[i]ndividual litigants rarely use the courts" (see Loane Skene, *Small Claims: A Study Paper* (Nova Scotia: Nova Scotia Law Reform Commission, 1974) at 164). On jurisdictions where corporate claims have been barred by statute in small claims proceedings, see "Reform Revisited", *supra* note 56 at 49.

106 The total of 58 is greater than the 54 cases cited because some cases had both corporate plaintiffs and defendants, but the case was counted as a single case.

107 *Arnold v Bekkers Pet Care Inc*, 2010 CarswellOnt 11118, [2010] OJ No 2153 (ONSC (Sm Cl Ct)).

108 *J Mao*, *supra* note 70.

109 *Foschia v Carleton Condominium Corporation No 25*, 2016 CanLII 106826 (ONSC (Sm Cl Ct)).

risky for, many small businesses. However, if lawmakers fear that allowing defamation actions in small claims courts would unfairly advantage corporations, there are relatively simple ways of avoiding this. My own preference would be for corporations not to be allowed to sue in defamation at all,[110] or for large corporations not to be allowed to sue, as in Australia.[111] Alternatively, there could be restrictions on corporate claims in small claims court defamation actions specifically.

The issue of "hijacking" proceedings relates not only to corporate versus human parties, but to represented versus unrepresented ones. I determined how often, in the case law, parties were represented by a lawyer or paralegal, but the high likelihood that the reported decisions are not representative means that we cannot draw generalizations about how often parties are self-represented in small claims defamation actions generally, and therefore whether there's a risk of represented plaintiff's hijacking proceedings against unrepresented defendants. I simply note that in the cases, there was a fairly high degree of representation by lawyers or paralegals on both sides. Defendants were more likely to have representation than plaintiffs—perhaps because much is at stake for them and they do not feel able to represent themselves in defamation actions. If there were an issue of plaintiffs hijacking proceedings meant for self-representation by bringing in lawyers, we might expect to see more plaintiff-side representation.

D. Damages Assessments

Reasons given for excluding defamation from small claims courts include ones related to damages. One is that small claims courts are less able to assess general damages than superior courts are, and defamation damages are largely general damages. Whereas calculating special damages is often straightforward, general damages assessments for things like injury

110 Hilary Young, "Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs" (2013) 46:2 UBC L Rev 529 at 530.

111 In Australia, not-for-profits maintain a right to sue, while for-profits with ten or more employees do not. Individual corporate officers retain their right to sue in defamation. See generally *Civil Law (Wrongs) Act 2002* (Australian Capital Territory), 2002/74, s 121 (Austl); *Defamation Act 2006* (Northern Territory of Australia), 2006/8, s 8 (Austl); *Defamation Act 2005* (New South Wales), 2005/77, s 9 (Austl); *Defamation Act 2005* (Queensland), 2005/55, s 9 (Austl); *Defamation Act 2005* (South Australia), 2005/50, s 9 (Austl); *Defamation Act 2005* (Tasmania), 2005/73, s 9 (Austl); *Defamation Act 2005* (Victoria), 2005/75, s 9 (Austl); *Defamation Act 2005* (Western Australia), 2005/44, s 9 (Austl).

to reputation require greater recourse to law and subjective judgment. For example, in defamation, general damages assessments may reflect:

> [juries'] consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and "the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action," ... They should also take into account the evidence led in aggravation or mitigation of the damages.[112]

A related concern is that such awards of damages could have precedential value, and this is presumably undesirable in light of the first point. Thus, the Manitoba Law Reform Commission recommended that "claims involving significant general damages", which would include defamation, not be adjudicated in small claims courts because of their "precedential value", among other reasons.[113] The point is presumably not that small claims damages awards are actually precedents, but that they form data points that will be treated as persuasive in future cases.

I reject both arguments. There is no doubt that general damages assessments in defamation can be difficult, as they are when other causes of action are at issue. The difficulty relates to the essentially arbitrary nature of such quantification.

However, the quantum of damages is a question of fact, unique to each case, and therefore, "there is little to be gained from a detailed comparison of libel awards."[114] It is an issue for the trier of fact—historically, the jury. I see no problem with having small claims adjudicators make these assessments. When damages are assessed by a jury, the jury has lawyers and a judge to guide it on relevant factors, but jurors are not permitted to be given evidence of ranges or of damages assessments in past cases.[115] As long as the relevant factors, as cited above, guide the assessment, legal training is not necessary and a wide range of damages assessments is to be expected, whether the trier of fact is a jury, a judge, or a small claims adjudicator.

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112 *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 at para 182 (SCC) [*Hill*].

113 Manitoba Law Reform Commission, *supra* note 3 at 33.

114 *Hill*, *supra* note 112 at para 187.

115 See e.g. *Gouveia*, *supra* note 80 at para 45, citing *Hill*, *supra* note 112 ("[i]f guidelines are to be provided to juries [in libel actions], then clearly this is a matter for legislation" at 136).

To illustrate, every time I teach my defamation and privacy law seminar, I ask my students to assess damages on the facts of *Hill v Church of Scientology*.[116] Since damages assessments are for the jury, and my students have been told what factors they should consider, they are more than equipped to do so. The amounts they choose always vary to an astounding degree, yet I tell them that (virtually) none of their assessed damages could be said to be erroneous.[117] A small claims adjudicator is qualified to carry out an assessment of general damages in defamation.

That said, self-represented litigants may not know how to put their best foot forward on a general damages argument, as opposed to where they are seeking reimbursement for a $500 plumbing job not completed. This will be particularly problematic where one party is represented, and the other is not. Notwithstanding what was said in *Hill* about comparisons to other cases, in practice, courts are often influenced in their damages assessments by assessments in other cases. Damages assessments may therefore be influential.

This risk, and the problem of wildly divergent defamation damages awards in superior court, is mitigated in small claims court because the jurisdictional cap on damages provides a clear range and helps to keep general damages in check.

Indeed, I found the quantum of damages awarded in small claims court cases refreshingly reasonable. They ranged from $1 to $25,000. The average was $8477, and the median was $5500. In *Fava v Nave*,[118] for example, the court reasonably found that there was slander at a closed-door meeting, but there were only two people who recalled what was said and they testified that they ultimately didn't believe the allegations. The plaintiff was awarded $200.[119]

Caution is warranted because: a) the case law is likely not representative of all small claims defamation cases; b) these figures are not adjusted for inflation; and c) they reflect periods when the maximum amount that could be awarded varied.

116 *Hill*, *supra* note 112.

117 In *Hill*, the general damages award was $300,000 (see *ibid* at para 173). In 2023-adjusted dollars that is $542,873. In 2023, my students awarded general damages ranging from $22,258 to $1,112,903 in 2023-adjusted dollars. The median was $222,580. The results are similarly all over the map every year I do this exercise.

118 [2013] OJ No 539 (ONSC (Sm Cl Ct)).

119 *Ibid* at paras 15–16.

The point is simply that these awards are as good as almost any, even though they are significantly lower than in superior court where damages are not capped.[120] In my view, bringing general damages in defamation back into the thousands and tens of thousands of dollars is a good thing, especially where the proven harm is minimal and litigation costs aren't disproportionate.[121]

Assessing general damages may take more time than special damages, but this is a generalization. Special damages can raise complex issues around how to value something, around causation, and around mitigation, for example. The assessment of general damages in defamation is effectively an assessment of the conduct of the defendant and the impact of their words on the plaintiff. This can be assessed based on the parties' evidence.

I therefore am not convinced that small claims courts are ill-equipped to assess general damages or that such general damages assessments are likely to be a significant drag on the efficiency of these courts. This has implications not only for the suitability of defamation actions in small claims court, but for Manitoba and Nova Scotia's restrictions on general damages, which may not be warranted, at least if the goal is to expand small claims courts' share of civil litigation.

E. Limitations on Equitable and Declaratory Remedies

As noted above, small claims courts cannot issue declaratory remedies or (with few exceptions) order injunctions. Limitations on the availability of equitable relief are relevant to the appropriate subject-matter jurisdiction of small claims courts. Some causes of action are more likely to require equitable relief in order to do justice. Defamation and privacy claims, for example, often include requests for orders not to (further) publish something. If unable to grant such remedies, small claims courts cannot be as effective in achieving justice in some kinds of cases. This may be especially the case for modern defamation actions, given the prevalence of claims involving online speech, which may persist and be found by search engines, unlike the spoken or printed word before the internet era. In other words, modern defamation plaintiffs may be more likely to deserve injunctive

120 For more on damages awarded in defamation actions, see Young, "Canadian Defamation Action", *supra* note 50.

121 For an argument that defamation damages should be capped, see Adora Bustard and Hilary Young, "Capping Defamation Damages" (2026) 104:2 Can Bar Rev.

relief, and the inability of small claims courts to grant it could be particularly problematic.

Thus, Shelley McGill argues for small claims courts to be granted the ability to order injunctions: "[e]quitable remedies would enhance the social policy mandate [of small claims courts], particularly for invasion of privacy and discrimination actions."[122] The same could presumably be said of defamation actions. Yet others who advocate for expanded jurisdiction over equitable remedies seem to have in mind orders within the monetary jurisdiction of the court, *e.g.*, orders for the return of property.[123] This is a narrow expansion of remedial powers that would be of little use in defamation actions.

I looked for examples in the case law where the inability to grant an injunction might have been problematic. I expected plaintiffs to request takedown orders or an order not to repeat defamatory statements, only to be told that that relief is beyond the jurisdiction of the court. And that did happen, but rarely in the reported decisions.[124] That may simply be because where someone primarily wanted an injunction, that case was not brought in small claims court, although there was otherwise no reason to think that most litigants were aware enough of the law to know the court's remedial limitations.

Even when unable to grant an injunction, courts have sometimes been creative. One adjudicator, noting their inability to grant injunctive relief, warned the defendant that continuing to post similar things about the plaintiff online could constitute criminal harassment.[125] Perhaps an admonishment to take something down or not to repeat it, coming from a court of law, is persuasive, even if not in the form of an injunction with potential penal sanctions. This may especially be true for unrepresented litigants who don't know the difference between a judge condemning something as unlawful and a formal injunction not to do it again.

122 McGill, *supra* note 4 at 108.

123 See e.g. Honourable Coulter A Osborne, QC, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ministry of the Attorney General, 2007).

124 See e.g. *Coolheat Comfort Systems v Kuyucak*, 2019 CanLII 5308 at para 52 (ONSC (Sm Cl Ct)). The plaintiff requested an order that the defendants write to the Better Business Bureau to retract their complaint. The Court refused because it lacked the power to make such an order. For the only two other cases in which the issue arose, see *Wesley v Jakubec*, 2017 CanLII 55420 (ONSC (Sm Cl Ct)); *Swietalski v Hardy Terrace Long Term Care Home*, 2021 CanLII 30270 at para 11 (ONSC (Sm Cl Ct)) [*Swietalski*].

125 *Uppal v Diller*, 2012 CanLII 98399 at para 64 (ONSC (Sm Cl Ct)).

That said, it is highly likely that where the primary remedy sought is an injunction, plaintiffs—at least informed ones—will avoid small claims court. Cases where the desired remedy is a takedown order may never be brought because superior court litigation is beyond a plaintiff's means and small claims court cannot provide the desired remedy.

Nevertheless, I don't think this justifies more than perhaps minor extensions of a small claims court's jurisdiction to grant equitable relief in defamation cases. There are valid reasons to hesitate in expanding powers of state censorship to small claims adjudicators. The issues involved in whether and how to grant defamation injunctions are complex and fraught[126] and, in my view, require sophisticated legal knowledge that may either be beyond an adjudicator's ability or may require more analysis and attention than can reasonably be expected of an adjudicator given their docket.[127] Indeed, superior court judges have often misunderstood the first principles of equitable relief and have been too quick to censor speech alleged to be defamatory.[128]

One compromise might be to permit small claims courts to issue declaratory remedies. A court decision that speech is unlawful will sometimes be sufficient for internet intermediaries to take down content or, crucially, for Google to de-index search results.[129] This has the advantage of preserving the monopoly of courts of inherent jurisdiction on granting injunctive relief while allowing defamatory content to be taken down in some cases.

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126 See e.g. Young, "Defamation Injunctions", *supra* note 64.

127 One might accuse me of inconsistency for suggesting that adjudicators can grasp defamation's substantive complexity, grounded in a balancing of speech and reputational issues, but that they cannot be entrusted with achieving similar balancing in injunctions. My response is twofold: first, my view is grounded in a study of the case law, which suggests (in the case of the present article) that adjudicators seem to do pretty well with substantive defamation law but that superior court judges are strikingly poor at applying the law of injunctions (see Young, "Defamation Injunctions", *supra* note 64). The second response is that the balance between free speech and reputation struck by defamation law is guided by specific elements and defences, whereas the decision to grant equitable relief is discretionary and guided more by principles than by strict tests.

128 Young, "Defamation Injunctions", *supra* note 64.

129 A finding of illegality is not always sufficient for a take-down and de-indexing, and communicating the court's decision with platforms is not always easy. However, most major intermediaries have terms of service that prohibit illegal content and otherwise want to avoid publishing illegal content. A court decision indicating illegality can therefore help achieve takedowns and de-indexing (see Emily Laidlaw & Hilary Young, "Creating a Revenge Porn Tort for Canada" (2020) 96 SCLR 147 at 151–53).

The power to grant injunctions need not be (and indeed already is not) all-or-nothing. The importance of takedown orders in certain contexts is leading to novel approaches. For example, British Columbia's Civil Resolution Tribunal can now order takedowns of non-consensually distributed intimate images.[130] This is inconsistent with the monopoly of courts of inherent jurisdiction on the power to order injunctions. But it is also entirely justifiable given the relative weakness of free speech interests in non-consensual distribution of intimate images cases and the extraordinary harm such distribution can cause. Defamation raises much more difficult balancing and censorship issues, and I therefore would not propose a significant expansion of small claims courts' ability to order injunctions.

F. Discouraging Defamation Litigation

A further reason to exclude defamation from the jurisdiction of small claims courts is to discourage defamation litigation. While I only saw this argument mentioned once in the literature, it occurred to me when reading the reasons in many silly and doomed defamation cases that there is arguably merit in discouraging petty or trivial claims, which defamation actions often are.[131] Given the serious access to justice crisis in family court, for example, do we want to expend resources to allow more people to sue because someone posted a negative product review online? It is certainly the case that the access to justice crisis means we must avoid wasting courts' time if possible.[132] Defamation claims are easy to bring, even when they lack merit, so cost and other barriers to litigation in superior court might actually help screen out trivial and abusive claims.

In my view, and that of some experienced defamation litigators I interviewed for another project, many defamation claims are not worth pursuing, are emotion-driven, and plaintiffs should be actively discouraged from

130 The CRT can make or cancel orders referred to in s 5 of the *Intimate Images Protection Act*, SBC 2023, c 11. These include takedown and de-indexing orders (see *BC CRT Act*, *supra* note 19, s 136.3).

131 "Reform Revisited", *supra* note 56 at 60.

132 See e.g. *Swietalski*, *supra* note 124 ("[t]he Small Claims Court is the busiest Court in Ontario, and it is critical to the proper functioning of this Court, which is the only access to justice that many residents of Ontario, that it not be clogged with actions which are improperly motivated, impossible of success or calculated to harass or inconvenience other parties" at para 33).

bringing them.[133] But that does not justify denying people access to small claims courts.

The Ontario small claims defamation case law reflects a certain degree of triviality. Whether a claim is trivial or emotion-driven is subjective, and in assessing Ontario cases, I'm limited to information gathered from the reasons for judgment. Nevertheless, I make the following observations.

First, there clearly were several doomed, non-sensical, and ego-driven claims. They had virtually no chance of success and most of them likely wouldn't have been brought had the plaintiff had legal advice. For example, a slander case involved the defendant calling the plaintiff an "idiot", "asshole" and saying, "'[w]hat is he—a crackhead?'" in front of one or two other people.[134] In that case, the plaintiff "represented himself and presented his case on a footing that lacked focus as to the material issues given the nature of his legal claims. Much and perhaps most of the evidence presented was peripheral at best."[135]

In another doomed case, a citizen named Johnston brought a defamation action against McCharles, the town mayor, because McCharles said he wouldn't sue Johnston because he was on a fixed income. That Johnston was on a fixed income was a true fact that Johnston himself had posted on YouTube.[136]

A category of such claims was the reactionary counterclaim, where a plaintiff brought a small claims action regarding the performance of a contract, for example, or a wrongful dismissal. The defendant replied with a counterclaim alleging the accusation of not performing the contract was defamatory. Such counterclaims did not appear to consume significant judicial resources, however.[137]

That said, there were many reasonable and arguable claims too, involving ordinary people and small businesses. One was against the Canadian ambassador to Guatemala, and in that case the plaintiff was successful.[138]

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133 See e.g. Young, "Anti-SLAPP Laws", *supra* note 57 at 208–10.

134 *Purtle v Balla*, [2009] OJ No 4416 at para 13 (ONSC (Sm Cl Ct)).

135 *Ibid* at para 4 (ONSC (Sm Cl Ct)). When I presented this preliminary work at a conference, someone asked whether it was so clear that calling someone a crackhead was not actionable. My response is that in context, this was name-calling that did not influence the plaintiff's reputation. While courts may be inclined to treat such name-calling as defamatory, I think a non-expert would view a lawsuit on this basis as silly.

136 *Johnston v McCharles*, [2011] OJ No 4844 at para 100 (ONSC (Sm Cl Ct)).

137 See e.g. *Hewson v Stem*, [2003] OJ No 5698 (ONSC (Sm Cl Ct)); *Tereschyn v Blackbird Holdings Ltd*, 2013 CanLII 49889 (ONSC (Sm Cl Ct)); *Leverton v Roberts Onsite Inc*, 2015 CanLII 80170 (ONSC (Sm Cl Ct)).

138 *Schnoor v Canada (AG)*, 2010 Carswell Ont 10957, [2010] OJ No 6135 (ONSC (Sm Cl Ct)).

Even if we accept that defamation lends itself to petty and ego-driven claims, there is no obvious way of deterring only those and not the clear and arguable ones.[139] It's hard to imagine not allowing access to the courts for a particular cause of action simply because some people bring silly claims. If that logic *were* convincing, we would perhaps have to eliminate defamation law altogether, since many actions in superior court are trivial or ego-driven too.

Further, disallowing defamation actions in small claims court for this reason would lead to the troubling result that the wealthy could pursue their marginal defamation claims in superior court, but those of ordinary means wouldn't be able to bring defamation actions at all. That said, this is effectively the status quo outside Ontario.[140]

We can perhaps take some comfort in the Ontario Rule 12.02 motion, allowing claims to be struck if they "disclose[] no reasonable cause of action", for example.[141] The threshold for dismissal under Rule 12.02 is low in small claims cases.[142] This seems to work effectively. Seven of the 103 cases involved a Rule 12.02 motion. Five resulted in dismissals while the other two cases survived.

A related issue is whether the existence of a small claims procedure might discourage cases from settling where they otherwise would.[143] While certainly possible, for reasons similar to those above, this seems a poor reason not to allow small claims court actions. A person with a meritorious and important claim might have to settle simply because they cannot afford to litigate. While settlements are often desirable, they aren't inherently good.

Ultimately, while it is problematic to deny defamation plaintiffs access to small claims court simply because many such claims are trivial, it may be that in deciding how to expand the justice system's capacity, small claims defamation actions are not a priority.

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139 Anti-SLAPP law, for example, has often complicated rather than simplified defamation law (see Young, "Anti-SLAPP Laws", *supra* note 57).

140 Gould, *supra* note 2 at 1233, citing Justice Steven Rares, "Is Access to Justice a Right or a Service?" (2015) 89:11 ALJR 777 ("'[i]f the common law right of access to justice is to have meaning, it cannot be turned into a privilege, based on financial or other selective criteria'" at 782).

141 *ON Small Claims Rules*, *supra* note 9, r 12.02(1)(a).

142 See e.g. *Van de Vrande v Butkowsky*, 2010 ONCA 230; *O'Brien v The Ottawa Hospital (Civic Campus)*, 2011 ONSC 231.

143 I am grateful to the attendee of the Society of Legal Scholars conference in 2023 who raised this point.

G. Access to Justice

Consider now the main reason in favour of allowing defamation in small claims courts. Common sense suggests the primary motive is ensuring access to justice.[144] Litigation is ever more expensive—certainly beyond the means of most people. If small claims jurisdiction excludes a cause of action, those legal issues may be effectively non-justiciable for most.

The trend in civil litigation generally (or at least the goal) has been toward simplification, so that the perfect isn't the enemy of the good. At the beginning of this article, I cited the Supreme Court in *Hryniak* on the need for proportional procedures. This aim is also reflected in the success and expanding mandate of the British Columbia Civil Resolution Tribunal, an online tribunal originally created to deal with small claims and strata (condominium) disputes, that has expanded significantly, most recently into the realm of non-consensual disclosure of intimate images.[145] It has not, however, expanded to defamation.

Especially given the trend in defamation litigation away from public figures suing large media companies, and toward higher volume, smaller value claims brought by ordinary people and small businesses, there is an access-to-justice argument for allowing defamation to be litigated in small claims courts.

While we can simply assume that small claims courts provide greater access to justice in defamation cases, costs awards can also provide evidence. Costs awards in the reported small claims defamation cases tended to be modest. They ranged from $0 (by far the most common amount, awarded in 28 of 67 cases in which there was a decision on costs) to $8750, with most being between a few hundred and a few thousand dollars, including preparation fees and disbursements.[146] At least compared to costs awards in superior court, this would be affordable to many and would largely eliminate the barrier to access to justice that the potential for very large adverse costs awards creates.

144 My Research Assistant, Maggie Washington, searched Hansard for any indication of why defamation was included in Ontario, but found nothing relevant.

145 *BC CRT Act*, *supra* note 19.

146 The $8750 costs award was an outlier. As noted above, in Ontario costs awards will rarely exceed $7500, which is 15 percent of the maximum damages award. However, courts have discretion to depart from this rule and double costs where a reasonable offer to settle has been refused. That's what happened in *Harvey v Capital One Bank*, 2019 CanLII 69716 (ONSC (Sm Cl Ct)), where $8750 was awarded.

Thus, if we think reputation is worth protecting in law, and free speech worth defending when defamation is alleged, we must recognize that there is very little access to justice for addressing reputational injuries outside Ontario. As recognized by the implementation of an anti-SLAPP regime in Ontario, British Columbia and Manitoba, the inability to defend one's right to speak is also an access to justice concern. Costs are simply too great for most. Without access to small claims courts, the right to reputation, and to speak defensibly about others, are largely illusory.

V. CONCLUSION

What, then, does all this tell us about the viability of defamation actions in small claims court? First, to state the obvious, Ontario's experience indicates that such a thing is feasible. This may, however, be because of the greater procedural complexity in Ontario's small claims courts than in those of most other provinces.

Another finding is that the largely historical requirement of community judgment is not a good reason for excluding defamation from small claims courts' jurisdiction. Not only have jury trials become less common in superior court defamation actions, but even with a small claims defamation regime, plaintiffs would retain the option of a superior court jury trial should they want one.

Whether substantive complexity is a good reason for excluding defamation from small claims courts is harder to say. However, based on principle and on the reported case law, my view is that it does not warrant exclusion. In principle, defamation is not always complex, nor are other small claims matters necessarily simple. What's more, there are mechanisms for excluding specific cases where they are too complex. The case law provides little reason to think that adjudicators struggle to understand the law.

The lack of procedural complexity is also, in my view, an insufficient reason for exclusion. In principle, the trend is (or should be) toward simplifying procedures so as to improve access to justice. Dispensing with defamation's technical pleadings rules greatly simplifies matters while likely not costing much in terms of fact-finding. The rules' primary effect seems to be to serve as a technical hurdle for the unwary. While parties must know the case to meet, in practice, there was no reason to think that parties in small claims defamation actions were caught by surprise or were unaware of the case to meet. That said, procedural rules like Ontario's requirement to disclose evidence to be relied on are likely important to being able to do justice.

Although simplifying defamation law is beyond the scope of this article, law reform commissions and academics in Canada and elsewhere have published extensively on how to do so.[147] That would make small claims defamation claims even more feasible.

One way in which small claims defamation proceedings have been successful, in my view, is in bringing damages down to reasonable levels. Because most defamation damages are general damages, and those are at large, awards are largely arbitrary and in superior court actions are growing faster than the rate of inflation.[148] With a small claims action, plaintiffs can have their reputations vindicated, if warranted, without the same risk of ruinous damages to the defendant, and the chilling effect that comes with it.

Further, while we cannot ignore the challenges of litigating defamation actions in small claims courts, counterarguments often assume that superior court adjudication is a viable alternative. For most, it simply isn't—especially not with legal representation. The question is therefore whether small claims courts can do an adequate job of defamation adjudication without unduly consuming those courts' resources. This is a complex question and begs elaboration on what is meant by "adequate" or "unduly". This article has not attempted a definitive answer but rather an exploration of the relevant considerations, in light of principle and the limited case law.

Both revealed reasons to think small claims defamation actions are feasible. What's more, the small claims process seemed more humane—not only because it was faster and cheaper, but because the deputy judges seemed to focus on what was important to the parties rather than on the dry formalities of typical defamation litigation. They tended to explain the law's rules but also its goals and rationale. The audience for reasons seemed to be the parties rather than lawyers. For example, in *Support Sports v Kaleidoscope*,[149] the deputy judge found for the defendant on the basis that the element of publication was not proven. However, they went on to explain why the defendant's allegations were false, recognizing the importance of vindication to the plaintiff.[150]

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147 See e.g. Law Commission of Ontario, *Defamation Law in the Internet Age: Final Report* (Toronto: Law Commission of Ontario, 2020).

148 Young, "Canadian Defamation Action", *supra* note 50 at 612–15.

149 [2009] OJ No 6415.

150 *Ibid* at para 22 (ONSC (Sm Cl Ct)).

Learning from Ontario's experience, small claims proceedings are not only "good enough" but may have significant potential to contribute to access to justice in defamation matters, which increasingly involve ordinary people and small businesses, and lower value claims.

APPENDIX: LIST OF REPORTED SMALL CLAIMS DECISIONS RELIED ON

Bradley v Muldoon, 2023 CanLII 68528 (ONSC (Sm Cl Ct))

Henry v Henry, 2023 CanLII 24431 (ONSC (Sm Cl Ct))

Warman v Kay, [2022] OJ No 5045 (ONSC (Sm Cl Ct)

Corion v Plummer, 2022 CanLII 84382 (ONSC (Sm Cl Ct))

Lepp v Toronto Star Newspapers Limited, 2022 CanLII 39874 (ONSC (Sm Cl Ct))

Cope v Gesualdi, 2021 CanLII 58972 (ONSC (Sm Cl Ct))

Swietalski v Hardy Terrace Long Term Care Home, 2021 CanLII 30270 (ONSC (Sm Cl Ct))

Yan v CanLII, 2021 CanLII 154965 (ONSC (Sm Cl Ct))

Bailey v Toronto Police Service, 2021 CanLII 155003 (ONSC (Sm Cl Ct))

Fernandes v Ram, [2019] OJ No 1234 (ONSC (Sm Cl Ct)

Harvey v Capital One Bank, 2019 CanLII 69716 (ONSC (Sm Cl Ct))

J Mao Dentistry Professional Corporation (Aba Dental Clinic) v Boulet, 2019 CanLII 31631 (ONSC (Sm Cl Ct))

Coolheat Comfort Systems v Kuyucak, 2019 CanLII 5308 (ONSC (Sm Cl Ct))

Miranovich v Barmas, [2018] OJ No 5710 (ONSC (Sm Cl Ct))

Felgemacher v McDougall, [2018] OJ No 7132 (ONSC (Sm Cl Ct))

Door 2 Door Movers Inc v Rankin, [2018] OJ No 2754 (ONSC (Sm Cl Ct))

Khabazian v Stancevski, 2018 CanLII 123233 (ONSC (Sm Cl Ct))

Cummings v Burlington Radio Control Modelers, 2018 CanLII 123232 (ONSC (Sm Cl Ct))

Bruyea v O'Regan, 2018 CanLII 82901 (ONSC (Sm Cl Ct))

Taft Management Inc v Gentile, 2018 CanLII 82880 (ONSC (Sm Cl Ct))

Mercado-Castillo v Bazely, 2018 CanLII 99158 (ONSC (Sm Cl Ct))

De Bousquet v Equifax Canada Inc, 2018 CanLII 109989 (ONSC (Sm Cl Ct))

Heritage Reforestation Inc v McInnes, 2018 CanLII 6675 (ONSC (Sm Cl Ct))

Loggie v Classic POS Inc, [2017] OJ No 7098 (ONSC (Sm Cl Ct))

Melanson v Flynn, 2017 CanLII 94717 (ONSC (Sm Cl Ct))

Charkhandeh v Rad, 2017 CanLII 86597 (ONSC (Sm Cl Ct))

Anderson v Marshall, 2017 CanLII 67328 (ONSC (Sm Cl Ct))

Wesley v Jakubec, 2017 CanLII 55420 (ONSC (Sm Cl Ct))

Joubarne v Kellam, 2017 CanLII 27122 (ONSC (Sm Cl Ct))

Cui v Wang, 2016 CanLII 75050 (ONSC (Sm Cl Ct))

Perepelytsya v Bloomex Inc, [2016] OJ No 1412 (ONSC (Sm Cl Ct)

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