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The Right Not to Have a Lawyer

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THE RIGHT NOT TO HAVE A LAWYER

Over time the right for a litigant to be represented has evolved to become deeply entrenched. While this has reached its zenith in the criminal arena,¹ the same principle exists in civil proceedings. So much so that where it is intended that representation by counsel is not intended it needs to be explicitly excluded.² This paper suggests that representation by legal counsel in many fora has become more than a right. In civil proceedings in particular in a real sense the employment of counsel has become a requirement, bordering on an obligation.

Obviously I am not arguing that a court will refuse to hear a litigant in person. It is well established that any citizen is entitled to bring or defend a claim against them in person in any court.³ My thesis is that the rule that a citizen is entitled to represent themselves is in substance hollow and that the rules of court and (arguably to a greater extent) the culture which pervades the curial process mean that any self represented litigant is under a severe and incurable disadvantage in comparison to his or her competently represented counterpart. I argue that rules and underlying culture of the civil justice system are tilted drastically against the interests of litigants in person and presume the proper users of the system to be legal professionals, judges and bureaucrats. By virtue of their control of the system, those actors have invidiously (though not intentionally) shaped the civil justice system in a way which is most convenient to themselves. This article observes that this appears to be slowly changing and suggests that the sky will not fall if this change is accelerated and the rules and culture of the courts is changed to accommodate litigants in person.

The “Problem”

The orthodox approach to self represented litigants is that they place additional strain on an already stretched civil justice system. Judges have observed that litigants in person need to have procedural steps explained to them, their pleadings need to be untangled and the legal issues identified, they need to be carefully assisted in leading evidence, and their

¹ See for example s 23(1)(b) of the New Zealand Bill of Rights Act. In *Airey v Ireland* (1979) 2 Eur Ct H R (Ser A) 305, 309 the right to counsel in civil proceedings was affirmed as a fundamental human right.

² See s 38(2) Disputes Tribunals Act 1988. While in the Commonwealth there appear to be no statutory rules affirming the right to appear in person (it being presumptive – see n 4) in the United States the right to appear in person appears in several places, having first appeared in the Judiciary Act of 1789 (1 Stat 73, 92 (1789)). The current federal rule appears at 28USC s 1654 (1982).

³ The law is clear that natural persons have a presumptive right to appear for themselves: *Cachia v Hanes* (1994) 179 CLR 403 at 415; *Collins (aka Hass) v R* (1975) 133 CLR 120 at 122 and *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389; compare *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 8 NSWLR 104 (CA) at 114. Although the right to appear in person is not guaranteed in the United States Supreme Court (although it appears that the right to file proceedings in person is): See *Andrews v. Bechtel Power Corp* 780 F.2d 124, 137 (1st Cir. 1985), cert. denied, 476 U.S. 1172 (1986); *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982) 459 U.S. 1214 (1983). But see *Elmore v. McCammon*, 640 F. Supp. 905, 911 (S.D. Tex. 1986) as regards the right to file a lawsuit

grasp of advocacy is generally non-existent. This view is reiterated by lawyers who act for clients against an unrepresented litigant. Such a litigant has none of the case-management skills (or professional objectivity) that ensures that even the most hotly contested piece of litigation is conducted in an orderly manner between professional advocates. Litigants in person do not know the language of the law, the etiquette of procedure, or the rules of court. The task of the court is also made considerably easier through the stringent ethical obligations placed on counsel and the reliance that the court can place on adherence to those obligations. As a result a litigant who chooses to bring a case to court him or her self casts an enormous burden on all of the other actors. This was observed (in measured terms) by the New Zealand Law Society when it responded⁴ to a Law Commission Report on *Delivering Justice for All*⁵

It should be accepted that the legal system is technical and at times difficult to understand, and that specialist assistance from lawyers is an advantage both in terms of resolving issues between parties and in working through procedural matters in a timely and cost-effective manner. Most judges and lawyers would confirm that cases with unrepresented litigants and lay advocates take longer to resolve than those where lawyers represent all parties.

So goes the usual approach.⁶ However, it is worth pausing for a moment to try to assess the issue from the perspective of self-represented litigant. For such a person the system is an intimidating labyrinth of rules which the registrar, judge and the opposing lawyers are reluctant to assist with (and in the case of the lawyer sometimes positively obstructive). The law is complex, impossible to find, and apparently entirely unclear on important points.⁷ The court is forever refusing to accept information presented to it for want of some evidential defect or failure in presentation. While it may be true that self-represented litigants do not fit into the system perfectly, this may be due to the poor design of the system rather than the lack of ability, understanding, or good faith of the litigants.⁸

The Litigant in a State of Nature

There is a tendency in discussing the civil justice process to presuppose the existence of advocates. A glance at the procedural rules of most jurisdictions (certainly New Zealand's) indicate that there is an expectation that the litigation process will be steered by someone who is skilled in dealing with rules of considerable complexity. Moreover the understanding of the role of the judge and the considerable discretion given to counsel in running the case presupposes a skilled and strategically minded advocate being at the helm.

⁴ The NZLS Response to the Law Commission's Report 85 – *Delivering Justice for All – A Vision for New Zealand Courts and Tribunals* 6 September 2006 at p 1 – 2. available at http://www.nz-lawsoc.org.nz/PDFs/Delivering_Justice_response.pdf last visited 8 May 2006)

⁵ *Delivering Justice for All – A Vision for New Zealand Courts and Tribunals* New Zealand Law Commission Report 85.

⁶ The approach also appears to be quite inaccurate. In fact there is good evidence that civil cases in which one of the litigants is self-represented take no longer to resolve, and in fact have fewer ineffective hearings than those where litigants are both represented: *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department of Constitutional Affairs) DCA Research Series 2/05 March 2005) p 112.

⁷ D Rhode "Access to Justice" (2001) 69 *Fordham L. Rev.* 1785, 1816.

⁸ Owen, Charles L.; Ronald W. Staudt and Edward B. Pedwell (2004) *Access to Justice: Meeting the Needs of Self-Represented Litigants*.

I suggest that such an assumption is invidious and should in fact be reversed. The primary actor in litigation is the litigant.⁹ The litigant is the prerequisite upon which all of the procedural rules rest. While it seems trite to observe that it is the litigant which is at the centre of the civil litigation process, the fact is that the effect of the rules, the procedure, the obligations of lawyers, the role of the judge, and the culture of adversarialism which pervades litigation is to marginalise the litigant and ensure that the system suits its most seasoned users.¹⁰ This sentiment was captured by Lord Woolf when he observed:¹¹

Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil justice exists. The true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people.

It is easy to dismiss the function of the courts in a highly stable society and assume the high profile portrayals of the civil courts as functioning to resolve disputes between rich corporates who have inexhaustible wealth and are barely affected by litigation costs are the norm. There are two important observations to be made in response to this. Firstly much litigation is brought or defended by people of modest means who find themselves in disputes in which a large portion of their net wealth is in jeopardy. This is the case notwithstanding the considerable burden that litigation places on people of modest means. Indeed basic laws of economics would suggest that the number of less wealthy litigants would increase if the barriers (of cost and complexity) to litigation were lowered.

Secondly it is important not to lose sight of the fact that the courts hold in trust the power and authority to vindicate the rights of citizens. The need for justice to be accessible in every sense to all citizens is an ancient principle which has been recognised by the legislature¹² and the courts.¹³ In a civilised society vindication of rights through state sanctioned tribunals exists as an alternative to self help, force, and blood feuds. In a mundane but important sense there is a real issue if the justice system cannot accommodate the citizen who has been wronged in a small but significant way, and for whatever reason wishes to exercise their rights without the assistance of a lawyer. The role

⁹ It is of course the case that a litigant always has the right to appear without counsel. See the words of the New South Wales Court of Appeal which has said that the right to appear in person:

is an important right or privilege, and without it justice could not be done in some cases. The importance of this right or privilege is that is that litigants who would otherwise be unable to unwillingly incur the expense of legal representation to vindicate their rights are able to do so by appearing for themselves. *Cachia v Hanes* (1991) 23 NSWLR 304, 317.

¹⁰ I have explored the problem of adversarialism in D Webb "Civil Advocacy and the Dogma of Adversarialism" (2004) 7 Legal Ethics 210 – 230.

¹¹ Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales*, ('the Woolf Report') (1995) Chapter 17. 2.

¹² See for example: Magna Carta 1297, 25 Edw 1 Cl 29 "We will sell to no man, we will not deny or defer to any man either justice or right"; Statute of Westminster the first 1275, 3 Edw 1, cl 1 "The King willeth and commandeth...that common right be done to all, as well poor as rich, without respect for persons". Also the Petition of Right Statute 1627 3 Cha 1 Cl 1.

¹³ *Bremer Vulcan v South India Shipping Corporation Ltd* [1981] AC 909 per Lord Diplock at 917: "Every civilised system of government requires that the state make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant."

of the justice system in defusing potential conflicts between citizens perhaps received its clearest articulation by the social contract philosophers.¹⁴ One example is this stark statement of Hobbes:¹⁵

The safety of the people requireth further, from [the sovereign] that justice be equally administered to all degrees of people; that is, that as well the rich and mighty, as poor and obscure persons, may be righted of the injuries done them; so as the great may have no greater hope of impunity, when they do violence, dishonour, or any injury to the meaner sort, than when one of these does the like to one of them: for in this consisteth equity; to which, as being a precept of the law of nature, a sovereign is as much subject as any of the meanest of his people.

A presumption that litigants will have lawyers turns this on its head and reserves access to the civil justice system to those able to afford a lawyer. The fact of the matter is that there are very few fora in which the litigants (whether in person or not) are considered to be the focal point of the process. This is exemplified by the usual answers to the question of what the proper objectives of the justice system are. Such answers are generally framed in abstract terms and highlight such matters as the tension between the goals of correct decisions and effective processes (also articulated as the tension between accuracy and efficiency). Moreover the solution to the proliferation of unrepresented litigants is not to fit the system to their need, but to fit them into the system – by giving them a lawyer.¹⁶ Thus for example the New Zealand Law Society is of the view that “Lay litigants and McKenzie Friends are not a solution to lack of legal representation.”¹⁷ However, it needs to be constantly borne in mind that the primary function of the court system is to resolve disputes between citizens without them having to resort to force. In a sense courts are the original alternative method of dispute resolution. Advocates exist for one reason – to assist litigants in resolving those disputes. It is important to identify the fact that litigants are practically and logically necessary for disputes to be settled, advocates are not.

¹⁴ See E Johnson “Will Gideon’s Trumpet Sound a New Melody? The Globalisation of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases” (2003) 2 *Seattle J Soc Justice*.

¹⁵ See for example John Locke *Second Treatise on Government*, Chapter 15, section 171, also Chapter 3 section 20:

but where no such appeal [to the fair determination of the law] is, as in the state of nature, for want of positive laws, and judges with authority to appeal to, the state of war once begun, continues, with a right to the innocent party to destroy the other whenever he can, until the aggressor offers peace, and desires reconciliation on such terms as may repair any wrongs he has already done, and secure the innocent for the future; nay, where an appeal to the law, and constituted judges, lies open, but the remedy is denied by a manifest perverting of justice, and a barefaced wresting of the laws to protect or indemnify the violence or injuries of some men, or party of men, *there* it is hard to imagine any thing but a *state of war*: for wherever violence is used, and injury done, though by hands appointed to administer justice, it is still violence and injury, however coloured with the name, pretences, or forms of law, the end whereof being to protect and redress the innocent, by an unbiased application of it, to all who are under it; wherever that is not *bona fide* done, *war is made* upon the sufferers, who having no appeal on earth to right them, they are left to the only remedy in such cases, an appeal to heaven.

¹⁶ Thus the Law Society’s suggested that considerable improvements in efficiency, effectiveness and cost in respect of and the increase in unrepresented litigants and lay advocates could be gained by taking steps to address the issues caused by the present legal aid regime – i.e. increase the amount and availability of legal aid. The NZLS Response to the Law Commission’s Report 85 – *Delivering Justice for All – A Vision for New Zealand Courts and Tribunals 6 September 2006 at p 1 – 2*. (Available at http://www.nz-lawsoc.org.nz/PDFs/Delivering_Justice_response.pdf last visited 8 May 2006) p 1.

¹⁷ The NZLS Response to the Law Commission’s Report 85 – *Delivering Justice for All – A Vision for New Zealand Courts and Tribunals 6 September 2006 at p 1 – 2*. Available at http://www.nz-lawsoc.org.nz/PDFs/Delivering_Justice_response.pdf last visited 8 May 2006) p 3.

The Objective of Litigation

The traditional objective of the civil justice system has been framed as the pursuit of truth (or perhaps justice). More recently to this has been added the goal of efficiency (or proportionality). There are two fundamental problems with a truth-focussed approach. The first is essentially epistemological. We can never know whether or not truth has prevailed and justice has been done in any proceeding. This is because the trial process itself is intended to determine the proper facts and law and there is no “meta process” which can stand above the trial and determine whether or not the decision reached was correct on either the facts or the law. While the avenue of appeal exists, this is simply an iteration of the preceding process and as untestable as the trial itself. Of course, occasionally new evidence will be discovered which will uncover an error, but this does not alter the fact that in the main the accuracy of the results of litigation is unknowable. An associated observation is that because the “error rate” of court processes is largely untestable, any claims that the adversarial procedure is the most reliable way to the truth is equally untestable.

The second problem with the value placed on the rhetoric of truth or justice is that it is lawyer centric. As lawyers (and especially as legal academics) we have been acculturated to value justice above all else. The psychological observation that can be made is that litigants judge their satisfaction with legal processes by their participation in and perceptions of fairness of those processes, irrespective of the outcomes. Clearly any person who loses a case will be disappointed and rarely considers the decision “correct”, however, the effectiveness of the process is measured not primarily on outcome, but on perceived process.¹⁸ Given this observation, it may be that the rules as they are currently framed and applied are serving the wrong values and objectives. Given that we have only intuition to guide us as to the actual accuracy of judicial decisions; it may be that more focus should be placed on the delivery of a fair process, with fairness being determined from the perspective of the litigant rather than the lawyer.

The Presumption of Representation

In recent times a person who came to court was identified as an “unrepresented litigant”. Such a title belies the assumptions of a lawyer. Such a litigant is of course represented – by him or her self. However, to the lawyer this amounts to no representation at all. This is indicative of the assumption that underpins the civil litigation process that litigants will have lawyers to assist them.¹⁹

This is an assumption of both a normative and empirical kind. In some jurisdictions (such as admiralty) the empirical claim may have some merit in that most litigants have lawyers most of the time. However equally there is good empirical evidence that there are other

¹⁸ See generally E Lind & T Tyler “The Social Psychology of Procedural Justice” (Plenum Pub, New York, 1988); T Tyler “Why People Obey the Law” (Princeton U P, 1990); E. Allan Lind et al “In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System” 24 Law & Soc Rev 953 (1990); see also L Solum, “Procedural Justice” 78 S. Cal L Rev 181 (2004); L Walker et al “Reactions of Participants and Observers to Modes of Adjudication” (1974) 4 J Applied Soc Psychol 295.

¹⁹ Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (Melbourne, Vic.: Australian Institute of Judicial Administration, 2001), online: <http://www.aija.org.au/online/LIPREP1.pdf> see especially at (iii).

jurisdictions where there is a very high degree of self representation.²⁰ For example in the Federal Court of Australia figures of around 40% of cases having one or more parties representing themselves have been recorded.²¹

More troubling, however is the normative assumption that litigants ought to have lawyers. It is presumed that a litigant who comes to court without a lawyer is deficient. It has been observed that such a model which views the self represented litigant to be lacking a lawyer requires the litigant to adapt and ‘fit in’ with court processes. It does not countenance the possibility that the court should presume that litigants will come to court without a lawyer and have procedures appropriate to the needs of such a litigant rather than the court procedures being adapted to accommodate the particular needs of litigants in person.²² I suggest that this assumption is not some benign assumption about access to justice that supposes that the world would be better if all litigants had lawyers. Rather there is a dangerous tendency towards the view that there is a quasi-obligation on litigants to have lawyers. Such a stance is implicit in the tenor of the frequent observation that self represented litigants take up a disproportionate amount of time of court staff and judges.²³ The underlying suggestion is that the burden caused by litigants who do not have a lawyer is an inordinate one which the litigant should be laying on his or her lawyer rather than the court.²⁴ Thus in the High Court of Australia it has been said:²⁵

[T]he presence of litigants in person in increasing numbers is creating a problem for the courts. ... All too frequently, the burden of ensuring that the necessary work of a litigant in person is done falls on the court administration or the court itself. Even so, litigation involving a litigant in person is usually less efficiently conducted and tends to be prolonged. The costs of legal representatives for the opposing litigant are increased and the drain upon court resources is considerable.

The institutional bias against self represented litigants is perhaps part of the cause of the tendency to erroneously assume that self represented litigants are frequently vexatious or

²⁰ See for example in England the findings in the exhaustive study *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department of Constitutional Affairs) DCA Research Series 2/05 March 2005) which noted that 85% of defendants in civil county court claims were self represented, and 48% of family cases had at least one unrepresented party. See also “The Growth of Litigants in Person in English Civil Proceedings” (1997) 16(4) *Civil Justice Quarterly* 127. See also the High Court of Australia, *Annual Report 2002-2003*, p. 9. *Federal Court of Australia 2002-2003 Annual Report*; *Federal Magistrates Court 2002-2003 Annual Report*, also the report of the Family Court of Australia *Self-represented litigants: a challenge* (2003).

²¹ *Federal Court of Australia 2002-2003 Annual Report*, p. 46.

²² R Hunter, ‘Litigants in Person in Contested Cases in the Family Court’ (1998) 12 *AJFL* 171, 177.

²³ Dewar, Smith and Banks, *Litigants in Person in the Family Court of Australia*, 2000, p. 2; The Senate Legal and Constitutional References Committee *Legal Aid and Access to Justice June 2004*, p 189.

²⁴ For example the Rules Committee (which drafts procedural rules in New Zealand) when considering whether lay litigants should be entitled to costs awards cited as a principle that “The rules should not give parties more of an incentive to appear in person than appearing by counsel because this would increase the burden on the courts and represented parties”: Rules Committee Discussion Paper “The Award of Costs to Unrepresented Lay Litigants” 26 July 2001 available at <http://www.justice.govt.nz/rulescommittee/discussionpapers.htm>. See also *Alberta Rules of Court Project: Self-Represented Litigants* Alberta Law Reform Institute Consultation Memorandum No. 12.18 March 2005

²⁵ *Cachia v Hanes* (1994) 179 CLR 403, 415; see also *Moss v. NN Life Insurance Co. of Canada* (2004), 180 Man. R. (2d) 253.2, (2004) MBCA 10.

obsessive.²⁶ Similar false assumptions are that litigants in person settle less frequently, or have more failed hearings.²⁷ This strength of these institutional presumptions flows into the manner in which self represented litigants are dealt with. In particular if there are such presumptions the judges and court staff will be more likely to impress upon the litigant the “need” for representation rather than appearing ready to accommodate a self represented litigant.²⁸

While there is no formal sanction for a litigant who represents him or her self the institution of the courts is not designed to accommodate such litigants. The courts tends to a presumption of formal equality under which procedural rules apply equally to unrepresented as well as represented parties.²⁹ Given the complexity of the rules this is of course no equality at all. Moreover, given the sense that such self represented litigants are the problem, there is a great deal of inertia, especially from the profession, against changing the institutional bias against self represented litigants.

The Reasons For Self Representation

It is generally assumed that the litigant who acts for him or her self is either too poor to afford a lawyer or has erroneously concluded that there is no need for legal assistance. Such litigants who freely choose to act for themselves are said to “have a fool for a client”.³⁰ In fact there are many varied and legitimate motives for a litigant choosing to represent him or her self. Thus in cases where little is at stake litigants may decide that rather than forgo their rights entirely, they will appear themselves and thus expend a proportionate amount of time and money on the dispute.³¹ Others might recognise that a lawyer is not mandatory and desire to air their complaint in person in their own words and not mediated (and moderated) by a lawyer. In a comprehensive English study the most common reason given by litigants as to why they chose to represent themselves was that they thought a lawyer was not needed (cost was second).³² In some cases litigants are advised by their professionals (including lawyers) that representation is unnecessary. This may be the case where the forum is one in which a lawyer is superfluous (such as adoption

²⁶ While this may be true at an appellate level, empirical work suggests that at first instance vexatious or oppressive litigants are “a tiny proportion, very very tiny”. See *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department of Constitutional Affairs) DCA Research Series 2/05 March 2005) p 80. It is also of note that that work suggests that represented litigants are in fact more likely to appeal than unrepresented litigants: p 127.

²⁷ For empirical work debunking such assumptions see S Park, “Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner *Pro Se* Litigation in the United States District Court for the Northern District of California in San Francisco”. Also J Greacen, “An Administrator’s Perspective: The Impact of Self-represented Litigants on Trial Courts – Testing Our Stereotypes Against Real Data” (2002) 41 *Judges’ Journal* 32. (1997) 48 *Hastings L.J.* 821.

²⁸ Mather, L (2003) ‘Changing Patterns of Legal Representation in Divorce: From Lawyers to Pro Se’ (2003) 30 *Journal of Law and Society* 137-155.

²⁹ Thus the Court of Appeal of Alberta stated in *P.E.K. v. B.W.K.* (2003), 348 A.R. 77 at para 7.
... there are not two sets of procedures, that is, one for lawyers and one for self-represented parties. In the absence of special provisions, our courts will apply the same legal principles, rules of evidence and standards of procedure regardless of whether litigants are represented by counsel or are self-represented.

³⁰ See *Powell v. Alabama* 287 U.S. 45 (1932) for a colourful description of the folly of a self represented litigant.

³¹ *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department of Constitutional Affairs) DCA Research Series 2/05 March 2005) p 21.

³² H Genn *Paths to Justice – What people do and think about going to law*, (Hart Publishing, Oxford – Portland 1999).

and uncontested divorces)³³ or perhaps where the case is so hopeless that it is entirely doomed and this will not be changed by the addition of representation. Similarly where the dispute is small a lawyer may point out that his or her fees would be disproportionate to the value of the issue in question.

Other litigants (especially business people) choose to litigate themselves to avoid the dispute being taken out of their hands and becoming more acrimonious and legalistic than is necessary. There is a sense in some litigants that once a lawyer is involved a degree of adversarialism will creep into the dispute that will stymie a pragmatic settlement, drive up cost, consume a disproportionate amount of time, and be destructive of the future relationship with the other side.³⁴ In commercial cases where the litigant knows the business and regulatory environment well and the matter in issue is of low value the litigant may (justifiably) hold the view that he or she will be a more effective advocate than an unskilled and non specialist junior lawyer who might be given the case.³⁵

Disenchantment with the legal profession cannot be discounted as a reason for litigants choosing to represent themselves. There is a section of the community which views lawyers with suspicion. It is also widely thought that lawyers who are paid from the public purse (legal aid lawyers in particular) are not paid enough to do a thorough job. As such some litigants may choose to retain control of the proceedings by representing themselves rather than to use a state funded lawyer who is overworked and arguably more interested in achieving a resolution which accords with his or her fee (and does not upset the other functionaries of the system such as judges and prosecution) than living up to Lord Brougham's edict.³⁶

It is also worthwhile to note the social changes which have underpinned the increasing readiness of litigants to go to court without lawyers. The sense that where a legal wrong is committed the state, through the courts, should provide a remedy is no longer a view held only by the upper classes. Access to the power of the state to enforce rights has percolated to all parts of society. Moreover, the right to utilise courts or tribunals to resolve disputes is not limited to important matters of liberty or livelihood. Increasingly a broad spectrum of citizens see the state as having an obligation to provide a system for the resolution of disputes of a relatively minor nature from consumer matters to unsatisfactory performance of administrative agencies.³⁷ The fact that the courts and tribunals to which citizens have recourse increasingly recognise the legitimacy of these claims, and therefore present a less foreboding face to the prospective self represented litigant is also relevant. In these senses

³³ *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department of Constitutional Affairs) DCA Research Series 2/05 March 2005) p 17.

³⁴ Baldwin J. (2002) *Lay and judicial perspectives on the expansion of the small claims scheme* (LCD, London) p 34.

³⁵ This was noted as particularly the case in specialist areas such as housing: *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department of Constitutional Affairs) DCA Research Series 2/05 March 2005) p 19. Similar observations might be made in New Zealand in respect of appearances in front of the numerous administrative tribunals which exist.

³⁶ "An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other ..." *Proceedings in the House of Lords, Trial of Queen Caroline* (Duncan Stevenson & Co, 1820 ed) vol 2 p 7.

³⁷ See D Swank "The Pro Se Phenomenon" 19 *BYU J Pub L* 373, 378 – 380.

our society has moved an enormous distance from the time when recourse to the courts was the preserve of the upper classes and only matters of considered to be of significance to the members of those classes were litigated.

The Hurdles of Self Representation

It is hard for a lawyer or judge to conceive of the difficulties which face a self represented litigant.³⁸ As a lawyer, judge, or academic, we are not intimidated by rules, public speaking, procedure, formality, public airing of disputes, or law. We also tend to be more than averagely intelligent. While it is possible to sympathise with a self represented litigant, we can only vaguely imagine the hurdles that are in front of that litigant.³⁹

If we pause for a moment and consider what a self represented litigant must do to bring or defend a claim the matter may be put in perspective. A plaintiff, for example, must frame the facts in a way which includes all legally relevant allegations, and is not obscured by extraneous material. Thus in most civil claims matters such as motive will be wholly irrelevant. This is counter-intuitive. From a layperson's perspective the task of the court is to do justice. From such a viewpoint the malicious motivation of a contract breaker is highly relevant. Much more so, it could be argued, than the fact that the breach is tenuously justified by a contractual force majeure term, or that the plaintiff first breached the contract by failing to deliver on time due to unavoidable external matters. This sifting of facts is an unnatural task arguably unique to the justice process. It is, to a large degree, this skill which is taught at law school and which takes many years for students to absorb. The same task of sifting and abstraction must also be engaged in by the self represented defendant. Faced with a claim drafted by a lawyer, this may be doubly difficult.

However, it is suggested that the procedural complexity of the civil justice process is the most significant barrier to the self represented litigant. The process has two aspects, both equally problematic. Most obvious are the complex procedural rules which the self represented litigant has little or no understanding of. However equally difficult are the administrative barriers. Lawyers (and their law firms and clerks) are adept at finding their way around the court system. From simple matters such as knowing the location of the registry and formatting of documents, to more subtle advantages such as being repeat users of the systems, having working relationships with the officials, and having presumptive competence and status in the court system.⁴⁰

The self represented litigant is also at a vast disadvantage in preparing a matter for trial. Such a litigant has no knowledge of even the most basic procedural tools available. For example the concept of discovery as the obligation to disclose all relevant documents to the opposition is a deeply embedded value in the common law tradition. It is, however,

³⁸ For an empirical study which sought to capture such experiences see R Staudt and P Hannaford "Access to Justice for the Self Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers" (2002) 52 Syracuse L Rev 1017.

³⁹ See the comments of Drummond and Dowsett JJ in *Wade v Comcare* (2002) 69 ALD 602 where it was noted that "It is easy to underestimate the difficulties associated with a case conducted by a litigant in person."

⁴⁰ Owen, Charles L.; Ronald W. Staudt and Edward B. Pedwell (2004) *Access to Justice: Meeting The Needs Of Self-Represented Litigants*; Zorza, R *The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers* (The National Centre for State Courts, Williamsburg, VA, 2002)

again counter-intuitive and seems to amount to an obligation to assist your opponent and therefore be in tension with the adversarial framework.⁴¹ Given that the self represented litigant is unlikely to be able to effectively utilise even a foundational procedure such as that of discovery it is not surprising that a self represented litigant is unlikely to be able to usefully employ the numerous other pre trial devices to place him or her in the position most likely to result in a fair and accurate final result.

There is reliable empirical work which confirms these intuitions and conclusions. It is almost self-evident that a self represented litigant has a poor grasp of law and procedural rules.⁴² It has been further shown that such litigants have difficulty discerning which issues are at the heart of the dispute and sometimes misconstrue the purposes of litigation. Litigants in person do not separate the legal from moral or social issues and have difficulty accepting that conduct which to them is a clear wrong causing harm is not recognised by the law.⁴³ In light of these problems they have difficulty in identifying the issues in dispute and getting to grips with the purpose of litigation. The self represented litigant is likely to approach litigation and the associated problems in a way which will be less objective than would be the case if he or she had an advocate. Thus the self represented litigant loses the advantage of having an advocate is that the merits of the claim and strategic decisions can be made in the absence of the natural tendency to see one's own position through rose tinted spectacles.⁴⁴

The Information/Advice Fallacy

It is generally permissible for anyone to provide legal information to a third party. Thus citizens' advice bureau and law centres frequently disseminate information to citizens as regards their legal rights and how they may be vindicated. However, there is a general prohibition on non lawyers providing advice to litigants. The rule that the courts will allow only those with a recognised status to speak on behalf of another is an ancient one⁴⁵ and

⁴¹ In fact the obligation to discover (or disclose under the English Civil Procedure Rules) has increasingly come under fire. The CPR curtails the obligation significantly in some cases under the principle of proportionality which underpins those rules. Of course in some systems there is no parallel of discovery and it lies with the litigants to present the documents they rely on, or the court to request the submission of other relevant documents. The French system is one such example.

⁴² See for example the empirical data in E Kelly and C Cameron "Litigants in Person in Civil Proceedings: Part II Solicitors Perspectives" (2003) 33 HKLJ 585 and E Kelly and C Cameron "Litigants in Person in Civil Proceedings: Part I" (2002) 32 HKLJ 313.

⁴³ Gamble, H. & R. Mohr, *Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal: a Research Note*, a paper presented to Australian Institute of Judicial Administration 16th Annual Conference, 4-6 September 1998. Otton, Lord (1995), Interim Report of the Working Party Established by the Judges' Council into Litigants in Person in The Royal Courts of Justice London (RCJ, London) para 3.3.1.

⁴⁴ See for example the observations of the High Court in *McInnes v R* (1979) 143 CLR 575 at 590; also Family Law Council, *Litigants in person: A report to the Attorney-General prepared by the Family Law Council*, August 2000, p. 5. This is in fact a consequence of a well recognised psychological phenomenon known as self interest bias.

⁴⁵ The rule that only those with a recognised status (such as barristers, attorneys, serjeants, solcitiors) recognised as qualifying them to appear have an entitlement to represent another in court is an ancient rule the first exclusion of lay people from representing litigants seems to be found in the Royal Writ of 1292 sent to Mettingham CJ of the Kings Bench stating that "concerning attorneys and [apprentices] the Lord King enjoined Mettingham and his fellows to provide and ordain at their discretion a certain number from every county, of the better, worthier and more promising students...and that those chosen should follow the Court and take part in its business and no others". Rot Parl i 84. See also 4 Henry IV c 18 (1402).

lawyers tend to jealously guard the right to provide representation, especially as regards litigation.⁴⁶ While in modern times the courts have allowed self represented litigants some assistance in court,⁴⁷ the idea of a broad liberalisation of the monopoly of lawyers on assisting and advising litigants in court is heresy.⁴⁸

The stance that only lawyers may advise litigants in pursuing or defending litigation explains in part the general refusal of courts (both registry staff and judges) to give advice to litigants as to how to proceed. Underlying this stance is a claimed distinction between telling an individual what the law is, and telling an individual what he or she ought to do. This information/advice distinction which is central to the approach of the courts to self represented litigants is fatuous and dangerous.⁴⁹ A preliminary observation is that a self represented litigant is likely to perceive a reluctance on the part of court staff or the judge to give recommendations or advice as to how things ought to be done as unhelpful at best, and quite possibly obstructive. A central obstacle for self represented litigants is the need for information and advice. Where litigants have been referred between numerous agencies or individuals each of whom will only give very narrow assistance may lead to “referral fatigue” and the litigant will cease attempting to find out the information.⁵⁰

While it is possible for court staff and judges to retreat behind a “we will give information when asked” approach this would be perverse and obstructive. It is clearly appropriate for officials and judges to take the initiative and inform self represented litigants that certain steps in a litigation process exist. There can, for example, be little objection to a registrar stating that when a proceeding is filed that it needs to be delivered to the other party in person within a prescribed time limit and identifying the documents which need to be delivered. This can be framed as merely passing on information. It is, however, also advice. Implicit in the statement is advice to serve the proceeding within the

⁴⁶ See for example the definition of reserved legal work in s 6 of the Lawyers and Conveyancers Act 2006 (NZ) which provides that only lawyers may give “legal advice to any other person in relation to the direction or management of any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal; or any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party”.

⁴⁷ *McKenzie v McKenzie* [1970] 3 WLR 472 applying the principle in *Collier v Hicks* (1831) 2B & AD 663 at 669; 109 ER 1290 at 1292: “Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices.” See also *In the Marriage of Watson* (2001) 28 Fam LR 481; *Watson v Watson* (2001) 166 FLR 229; (2001) 28 Fam LR 481; [2001] FamCA 1470; *R v Leicester City Justices; Ex parte Barrow* [1991] 2 QB 260; [1991] 3 All ER 935; [1991] 3 WLR 368; *Mihaka v Police* [1981] 1 NZLR 54.

⁴⁸ So much so that in one instance a bar association pursued a father for the unauthorised practice of law when he appeared in court on behalf of his autistic child seeking proper educational support, although after a clear signal from the court and adverse publicity the complaint was withdrawn *Cleveland Bar Assn. v. Woods* Supreme Court of Ohio 2006-0357 April 20 2006. See also *Winkelman v. Parma City Sch. Dist.*, No. 05-3886 (6th Cir. Nov. 4, 2005); where the court issued an order dismissing an appeal on similar facts unless counsel was retained in the case within 30 days. That order was stayed by the US Supreme Court in *Winkelman v. Parma City Sch. Dist.*, No. 05A506 (U.S. Dec. 12, 2005) and a final determination of the issue in the Supreme Court is pending. See also *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756 (6th Cir. 2005).

⁴⁹ Zorza, R. “The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications” (2004) 17 *Georgetown Journal Of Legal Ethics*, 423.

⁵⁰ Pleasence, P., Buck, A., Balmer, N., O’Grady, A., Genn, H., and Smith, M. (2004) *Causes of Action: Civil Law and Social Justice*, (Stationery Office, London).

prescribed time limit, and the legal view that a failure to do so will result in deemed abandonment or other procedural consequence.

If we accept that it is permissible to advise the other party of the requirements as to service of proceedings (even in the absence of being asked) is it permissible for a court official (or judge) to inform a self represented defendant of the right to apply to strike a matter out? There is of course a distinction to be made. Every proceeding needs to be served and cannot be properly heard until it is. Whether to make an application to strike out is a strategic decision. However, if we buy into the information/advice fallacy, merely informing the defendant that such an application exists is neutral. Of course if we put ourselves into the shoes of the litigant being informed that there is an application by which a proceeding might be struck out in whole or part is likely to be understood to be a tacit recommendation that such an application ought to be made. These examples are at the extremes. What of a less contentious example – should a civil litigant be advised that discovery is a usual procedure in any but the most simple of civil claims?

In fact any information given to a self represented litigant whether by the judge, a court official, or opposing counsel, will not be taken as mere information (indeed arguably there is no such thing) but it and its context will be interpreted both consciously and subconsciously and conclusions will be reached about the messages which are being sent. It is suggested that in the absence of a profound silence from the Court (which it is suggested would be a profound dereliction) any information given to a litigant will be interpreted to be, and in fact is, advice. It is therefore important to ensure that communications with self represented litigants do not send perverse, obscure, or misleading signals. Moreover, signals which may be clear to a lawyer who is used to decoding the judicial and administrative language may be very unclear to the self represented litigant. To ensure that such miscommunication does not occur judges and the court officials need to take an active role in educating litigants and thereby ensuring the effective and just disposition of the proceeding of a self represented litigant while ensuring continued neutrality.⁵¹

On Neutrality and on Passivity

A frequent concern of judges faced with litigants in person is a perceived tension between the need for neutrality and the desire of the litigant for guidance.⁵² The common law has long taken the view that in litigation “the judge holds the balance between the contending parties without himself taking part in their disputations”.⁵³ This orthodox position maintains that there is fine line to be trod by a judge when dealing with a self represented litigant. The standard approach goes like this:⁵⁴

⁵¹ Zorza, R “The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications” (2004) 17 *Georgetown Journal Of legal Ethics*, 423.

⁵² See R Pavone "Do Self-represented Litigants Receive a Fair Trial? The Challenge for the Family Court" (2002) 76 *Law Inst Jnl* 52, 55.

⁵³ *Jones v. National Coal Board* [1957] 2 QB 55 (CA) per Lord Denning. For a traditional analysis see A J Rodgers (Justice) “Judges in Search of Justice” (1987) UNSW LJ 93.

⁵⁴ *Litigants in Person Management Plans – Issues for Courts and Tribunals* (Australian Institute for Judicial Administration, 2001) p 13.

A trial judge should not give legal advice as it would be unfair or give the appearance of unfairness and may be given without full knowledge of the facts. Similarly a trial judge must recognise the distinction between explaining procedural choices available to an accused and advising as to what decisions to make. Procedural misunderstandings by a litigant in person may provide the basis for an adjournment in the interests of justice.

It is suggested that the claimed tension between actively ensuring a litigant is equipped to participate in the litigation process and the need for neutrality is illusory and that there can be no objection of substance to a judge providing information to a litigant as to the steps that need to be taken both to bring a matter to trial, and to establishing their claim or defence as the trial proceeds.

The lack of advice given to self represented litigants does lead to errors. From an empirical perspective it is important to note that self represented litigants do make more serious errors than lawyers when bringing matters before the court (though interestingly around the same number of minor or middling errors).⁵⁵ The nature of those errors is frequently some procedural failure flowing from a lack of knowledge of the rules. Such errors could be avoided by ensuring that the litigant is aware of what is needed to effectively bring the claim or defence, rather than taking a passive approach and responding only to errors made.

By way of analogy, a referee in a game of football is not passive. Referees are active participants in the conduct of the game on the field. Indeed a referee who was wholly passive would be heavily criticised (more than is already the case) for not giving players sufficient information and guidance. A good referee does not simply sanction wrongdoers and declare a result. A good referee ensures that players are continually informed of the permitted boundaries. However, this does not case the neutrality of the referee in doubt, and such neutrality is absolutely essential to the game being played effectively. Of course a sporting metaphor is wholly unsuitable in the present case. A lot more rests on the outcome of a court case than the result of a ritual involving numerous players chasing a leather clad inflated bladder around a muddy field. A lack of neutrality of a judge goes to the very heart of the effectiveness of the justice process. Any bias, including apparent bias, is enough to impeach a decision of a court. The analogy does, however, demonstrate that neutrality (and its nemesis bias) are practically and conceptually distinct from passivity.

The common lawyer is committed to a model of litigation which is driven by litigants. In practice this means that it is driven by lawyers. In a very real sense the lawyer is the centrepiece of the social conception of the litigation process (courtroom dramas where the central characters are lawyers well outnumber those in which the litigant plays the central role). There is a deep suspicion amongst the legal profession of a system which strips the lawyer of control of the proceedings and places it firmly in the hands of the court. While case management systems which are becoming near universal are a small step in this direction, an approach under which the court could positively suggest that certain applications might be helpfully made would be a giant leap in the right direction, despite the inevitable howls of protest from the profession.

⁵⁵ *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department of Constitutional Affairs) DCA Research Series 2/05 March 2005) p 136.

Under the dominant model of litigation the judge is predominantly passive and “each side, equally matched, presents its case to a non-interventionist judicial officer”.⁵⁶ This approach is reflected in the judicial guidance which has been given in respect of the proper role of the judge when on party is representing him or her self. Thus the Federal Court of Canada has stated that:⁵⁷

While the plaintiff has the perfect right to act for herself without the services of a lawyer, it is obvious that the Court has not the time or the facilities and - even more important - the right to conduct law-school or bar-admission courses and give helpful hints to one party or one side ... in litigation. Such activity would utterly destroy the Court’s role of independent, even-handed adjudicator.

While there is something in this statement, it needs to be observed that it is not a basis for the court being parsimonious with the information it provides to a self represented litigant. While a court should not strategise for a self represented litigant or seek to educate in the litigant in any comprehensive way, the provision of full information on useful procedural steps does not amount to unwarranted or biased assistance. Such assistance does not contravene the basis principle that a judge should not intervene in a way which compromises neutrality.⁵⁸

It has been recognised that there is a real tension between the needs of the self represented litigant and the adversarial litigation framework. Judges and court officers are steeped in an adversarial paradigm. As such they find it exceedingly stressful to render assistance to the self represented litigant in a way which cuts across the deeply embedded value of a passive and adversarial system of justice, and the corresponding assumption that an active role for judges and court officers would in some way be a breach of procedural justice. Of course the lawyer for the represented litigant is also likely to make known his or her objections to any assistance rendered to a self represented litigant. However, the tension between the role of the court and the need to assist self represented litigants may be more apparent than real. Lord Woolf noted that provided the Court is prepared to give assistance of the same nature to either party no suggestion of bias can exist.⁵⁹ The reforms which followed from his report include as a guiding principle “that the parties are on an equal footing”⁶⁰ which suggests a role of the court in ensuring this is the case.

The need for judicial neutrality also needs to be viewed in light of the vastly different perspective of the self represented litigant. Self represented litigants often perceive themselves to be looked upon and dealt with less favourably than an advocate. This can translate into a sense that the court is biased against them. While not usually accurate, it is

⁵⁶ Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, AIJA, 2001, p. 1. See also J Bradlow “Procedural Due Process Rights of Pro Se Civil Litigants” (1988) 55 U Chi L Rev 659 for a US perspective.

⁵⁷ *de Korompay v. Ontario Hydro*, [1990] F.C.J. No. 631 at 266 para. 9 (T.D.). See also *Gilling v. Canada*, [1998] F.C.J. No. 952, at para. 1; *Bergen v. Manitoba* (1998), 125 Man. R. (2d) 65 at para. 29.

⁵⁸ *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389 at 397 (NSW CA), per Kirby P; also *Platcher v Joseph* [2004] FCAFC 68.

⁵⁹ Lord Woolf Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales, ('the Woolf Report') (1995) p 122.

⁶⁰ Civil Procedure Rules (Eng) Part 1.1, 2(a).

probably true that the self represented litigant does not enjoy the trust of the court which a seasoned advocate has. As an extreme example consider the following exchange which took place between a litigant in person (Mr Wade) and the Bench in respect on application by a lawyer (Mr Clarke).⁶¹

Well, Mr Wade, we seem to be misunderstanding each other. If Mr Clarke reasonably needs — and Mr Clarke is a reasonable person, I have known him for many, many years. He has been a colleague of mine for many, many years. When he was a solicitor at the Public Defence Office he used to brief me and I know exactly how he works. If he tells me he needs until the end of next week then I accept that.

There are two things which are invidious about this exchange. The first is the fact that the long relationship of the judge with counsel was raised at all. If any conversation could be more calculated to impress upon the litigant in person the fact that he was an outsider it is hard to imagine. The second objectionable aspect of the exchange is its patronising tone by which it is implicit that his views are not views which are of themselves entitled to be given weight, unlike those of an advocate who, by virtue of being an officer of the court, is presumed to be raising relevant issues deserving of proper consideration.

This exchange was one of the grounds for appeal in the case on the basis that it gave rise to an appearance of bias. The court purported to apply the test for apparent bias that being that apparent bias existed where “a fair-minded and informed member of the public would entertain a reasonable apprehension that the judge will not discharge his or her duty impartially”. While the test is framed in terms of the apprehensions of a reasonable member of the public, in this case at least it must be said that the notional reasonable member of the public was presumed to have a detailed knowledge of the workings of the court. In particular the Court based its decision that no apparent bias existed on: the fact that prior professional association between a judge and counsel is by no means unusual; the need for the dialogue between Bench and Bar to assist in the identification of real issues and real problems in a particular case; the duty of the judge to conduct proceedings efficiently; and counsel's duty to assist the court. From a critical point of view, these are the views of judges and lawyers. The “fair-minded and informed member of the public” had become imbued with judicial values and bestowed with legal knowledge to such an extent as to become indistinguishable from a judge. I suggest that it is inconceivable that a layperson not initiated into the ways of the court would, on observing the exchange recounted above, consider that the judge was committed to treating the litigants equally.

The Shift to Judicial Intervention

It may, however, be that the sun is setting on the view of the judge as a mere onlooker in litigation. While this is the case in respect of cases where litigants are represented, special attention has been given to the need for judges to take a more active role where there is a self represented party. Thus it has been suggested that:⁶²

When one party is represented by Counsel, and the other party is unrepresented ... it is incumbent upon the Court to make absolutely sure that the unrepresented party is not unduly prejudiced. This may require the Trial Judge to fully explain to the unrepresented party the

⁶¹ *Wade v Comcare* (2002) 69 ALD 602 at para 34.

⁶² *Murphy v. Gordon* (1986), 77 N.S.R. (2d) 446 at 450 (N.S. Co. Ct.) at para 26.

difficulties of representing himself, and give him an opportunity to obtain counsel, if he should so desire. If the unrepresented party elects to proceed on his own, then the Trial Judge should briefly explain the Rules of evidence, and give the unrepresented party every opportunity to properly present his case, even though this may considerably slow down the work of the Court.”

It has also been said in the Australian context that where one litigant is self represented the trial judge should; outline procedures, take basic information from witnesses, explain the effect of trial procedure (such as the order of witnesses) and the right of objection, advise of the right to object to inadmissible evidence and the existence of privilege, and to seek to clarify the substance of legal submissions of unrepresented parties.⁶³ There is a formal expectation that the judge assist the self represented litigant to ensure that neither party is disadvantaged by the lack of representation.⁶⁴

This is a welcome shift. Certainly in a criminal trial it has long been the obligation of a court to ensure that the fact that the accused has chosen to represent him or her self does not lead to a miscarriage of justice.⁶⁵ In the civil arena the obligation is perhaps not as high and with the role of the judge is determined in part by; the identity and ability of the self represented party, and the subject matter of the proceeding.⁶⁶ This shift in the approach of the court, (from the judicial officers to the registry staff), will have an impact on the likelihood that a litigant will represent him or her self and whether they will be able to do it competently. A court which is helpful to such litigants will almost certainly discover that their numbers increase. This is in indication that as an access to justice strategy, such openness works. Conversely a court which gives the impression that self represented litigants are an imposition will have fewer such litigants. It is also likely that that court will find those litigants more difficult to manage.⁶⁷

Such assistance is undoubtedly helpful however it is questionable whether in practice it goes far enough. Evidence suggests that while some judges do render meaningful assistance, this degree to which different judges will intervene varies considerably. Some judge’s interventions are “quite modest, telling litigants they should get legal advice, rather than saying what precisely was wrong with their case or what needed to be done to put it right”.⁶⁸ For example, it is unlikely that a self represented litigant would have enough knowledge or wherewithal to effectively object to inadmissible evidence being introduced. The judge, however, would be fully aware of the issue as it happens. The general approach is that it would be inappropriate for the judge to object to the introduction of the evidence. Accordingly assistance is largely meaningless unless the

⁶³ *Johnson v Johnson* (1997) 139 FLR 384.

⁶⁴ *Minogue v HREOC* [1999] FCA 85; R Pavone "Do Self-represented Litigants Receive a Fair Trial? The Challenge for the Family Court" (2002) 76 Law Inst Jnl 52, 55.

⁶⁵ *MacPherson v The Queen* (1981) 147 CLR 512; *Dietrich v The Queen* (1992) 177 CLR 292 at 224-225; DA Ipp, “Judicial Intervention in the Trial Process” (1995) 69 Australian Law Journal 365 at 369-370.

⁶⁶ *Abram v Bank of New Zealand* [1996] ATPR 42341; *Minogue v Human Rights and Equal Opportunities Commission* (1999) 84 FCR 438, 445.

⁶⁷ L Mather (2003) ‘Changing Patterns of Legal Representation in Divorce: From Lawyers to Pro Se’ (2003) 30 *Journal of Law and Society* 137-155.

⁶⁸ *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department of Constitutional Affairs) DCA Research Series 2/05 March 2005) p 192.

judge in such cases ceases being passive and takes a more active role in the management of the trial.

Also of interest are the draft guidelines issues by the Australian Institute of Judicial Administration as regards the conduct of trials with self represented litigants.⁶⁹ Those guidelines set out a relatively active role for the judge which includes testing evidence, advising the self represented litigant of rights, putting hypothesis to experts, questioning all parties witnesses, identifying contradictions and inconsistencies in evidence to the witnesses, defining the matters in issue (at an early stage), and advising the self represented litigant of their procedural and evidential rights. When taken together this is a laudable active role which in many ways cuts across the passive approach which is generally taken. Those guidelines are also informative because in advocating a moderately active role for the court, they also emphasise the need for neutrality. Thus suggestions are made as to how questions might be phrased to ensure that it is clear to all litigants that the judicial role is to get to the truth rather than to protect or promote the interests of one party. In this sense the role of the judge is certainly not that of a surrogate advocate. There is no suggestion that the judge will ask questions of the represented litigant's witnesses with a view to discrediting them. However, questions ought to be put where comment is appropriate on other evidence which appears to be at odds.

Is There A Way Forward?

While many lawyers would consider it an anathema, I suggest that the increasing number of self represented litigants is in fact a positive attribute of the civil justice system. It suggests that the barriers to self representation (and therefore justice in many cases) have fallen.⁷⁰ While it undoubtedly remains true that a litigant with a lawyer will in many cases be better off, the fact that litigants are appearing in court and speaking for themselves suggests that the inequality between represented and unrepresented litigants has narrowed.

It is suggested that the unachievable goal is to have a civil litigation system which is so well managed, so intuitive, and so procedurally fair as to make lawyers redundant for any modestly capable citizen. In this regard the ground of argument in respect of access to justice shifts from that of legal aid (which presupposes the need for lawyers) to effective provision legal services by court officers and judges.

There are now a number of reports in this area which, as already noted, see self represented litigants as a growing phenomenon. The tendency is to recommend solutions which seek to reduce the number of such litigants such as increasing legal aid, or encouraging pro bono work.⁷¹ I suggest that a shift is needed in the way we view the civil justice system. While I am not suggesting that lawyers should be prohibited, I am advocating that the litigant should not be disadvantaged by a systemic bias in favour of representation because they have chosen, or have been forced, to represent themselves.

⁶⁹ Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, AIJA, 2001, appendix 2.

⁷⁰ The alternative explanation that the availability (including affordability) of legal representation has fallen is also recognised.

⁷¹ See for example The Senate Legal and Constitutional References Committee *Legal Aid and Access to Justice* June 2004, p 195.

Such a change of perspective from the presumption of representation, to a presumption that a litigant can bring a matter to court effectively and legitimately themselves would be a radical shift in the way in which self represented litigants are perceived and to the way in which the court system operates. Any such shift would need to be accompanied by ensuring that the offices that would bear the brunt of such a shift are adequately staffed by people sufficiently skilled to render the kind of assistance which would be needed. If this can be achieved the civil justice system may become equally accessible to all litigants whether represented by themselves, or by an advocate.