SESSION NINE

Alternative Dimensions

Litigants in person: Unrepresented litigants in first instance proceedings

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Introduction

Lord Woolf encapsulated the paradox presented by unrepresented litigants:

> 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.' (Woolf (1995), Chapter 17, para. 2.)

Interest in unrepresented litigants has been prompted by a growing perception of their numbers in the court system, and a perceived growth in these numbers in recent times. This is a concern paralleled internationally. In England and Wales the debate has taken place within the context of the Woolf reforms and the interests of the Court of Appeal (Otton, 1995; Court of Appeal, 2001 and 2004) as well as a broader debate about the permissibility of lay representation and McKenzie friends (Moorhead, 2003a) and the particular problems presented by limited companies and vexatious litigants.

Unrepresented litigants are often described as if they were uniformly problematic, but it is important to acknowledge and explore the differences between litigants in person, as they pose different issues in terms of cost, risk to themselves and others and management. Thus the significance of whether or not a person is represented will differ depending on:

- The nature of the dispute (the subject matter, the substantive law governing it, and the consequences of an adverse result for the litigant);
- The relationship between opposing parties (especially, but not exclusively, in family law);
- The formality (or otherwise) of the proceedings;
- The existence of special arrangements for unrepresented litigants (within and without courts); and,
- The competence of the individual litigant to conduct cases unrepresented (because of experience, intellectual skills and emotional objectivity).

Similarly, a detailed consideration of the stages of litigation and the challenges

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that they pose to litigants in person is important. Unrepresented litigants may pass through a number of stages: deciding to make or defend a claim; pre-action exchanges with opponents; instigating a formal claim or defence; pre-trial procedures; settlement (including formalisation through consent orders); trial; enforcement; and appeal. Analysis of unrepresented litigants tends to focus on the decision to claim or defend and, more particularly, on trial as the main events for litigants in person. Whilst theoretically key, these events may, in empirical terms, not be the most important events for the litigants themselves (or indeed the courts), particularly if, consistent with cases generally, most cases settle. Furthermore, there are a number of aspects of law, procedure and litigant skills which are not scrutinised by the trial centred emphasis of most analysis: unrepresented litigants' ability to marshal their own evidence during trial is often referred to in studies, but similarly the ability to secure disclosure of relevant evidence pre-trial, and disclose their own evidence prior to trial may be significant.

It has been suggested that unrepresented litigants struggle to identify which issues are in dispute and to understand the purpose of litigation, as well as having a broader confusion of law with social or moral notions of 'justice' (Gamble and Mohr, (1998). This may partly account for the high numbers of unrepresented litigants in the Court of Appeal (Otton (1995), para. 3.3.1), and the characterisation of some such litigants as 'obsessive' (Court of Appeal, 2004). More importantly, broad findings that unrepresented litigants fail to understand whether they have a cause of action or how to present their case provide rather crude analyses for targeted policy approaches designed to improve procedures or provide targeted assistance to such litigants.

An alternative scenario, is that many of the barriers to unrepresented litigants do not arise solely or mainly from their failure to handle the factual and legal complexity of their own disputes, 'rather, they stem from the inherent complexity of the courts' own procedures and administrative requirements' (Owen, Staudt and Pedwell, 2004). This viewpoint focuses on procedural and administrative barriers to self-representation: seeing courts, rather than substantive law, as a major focus for reform (See also, in particular, Zorza, 2002).

In this country, concrete research specifically on unrepresented litigants is minimal. There has been significant work within the context of small claims by John Baldwin (1997 and 2002) and other studies touch on relevant issues (Genn, 1998 and 1999; Shapland et al, 2003). Plotnikoff and Woolfson (1998) have conducted a small survey of litigants' perceptions of the services provided to litigants in person under the Otton Project CABx service. Relatively little work has been conducted on the prevalence of litigants in person and little systematic data is kept by the Court Service, other than through the trial sampler, which only collects information on representation at civil trials. The Otton report was the fullest review of the prevalence of litigants in person, although it was confined to the Royal Courts of Justice and one other London court and does not deal with unrepresented litigants in provincial courts (Otton, 1995).

Aims and objectives of this research

The first aim of this project was to **profile unrepresented litigants** in four first instance civil courts (including family cases). We establish estimates of the number of unrepresented litigants (based on data from four different courts) and provide some broad comparisons of the characteristics of unrepresented and represented litigants and the different ways in which cases progress depending on whether there was representation.

The second aim of the research was to **define the different ways in which unrepresented litigants manifest themselves within proceedings**. This involves a deeper look at the nature of

cases involving unrepresented litigants: what was at stake in the litigation, who the parties were, and what procedural and legal issues were raised in proceedings. We examine at what stages parties become unrepresented litigants, and the points at which representation was commenced or discontinued. Available data on help other than representation (non-representative help) was considered (e.g Mackenzie Friends and or out of court advisers who do not go on the record) where it was apparent from court files and in interviews.

The third aim was to **explore difficulties** posed by such cases to unrepresented litigants, court staff, judges and opponents. Such as:

- what parties perceive as being the main issues at relevant stages in the proceedings;
- how unrepresented litigants are perceived by opponents, court staff and judges;
- how courts and opponents adapted their procedures to manage unrepresented litigants; and,
- How unrepresented litigants perceive their position, how they are treated by the courts and how they managed their advice and assistance needs.

This we largely do through data from observations, interviews and focus groups with court staff, judges, unrepresented litigants and their opponents, although information from court files has also proved very useful.

Research Aims

1. Establish estimates of the number of unrepresented litigants there are and how their prevalence differs by court types and categories of work.
2. Define the different ways in which unrepresented litigants manifest themselves within proceedings.
3. Explore difficulties posed by such cases to unrepresented litigants, court staff, judges and opponents.

Unrepresented litigants: definitional and practical issues

The phrases 'litigant in person' and 'unrepresented litigant' cover a range of litigants and scenarios. Usually, they are taken as denoting an absence of *legally and professionally qualified* agents conducting litigation and representation (i.e. solicitors or barristers). Often it is suggestive of someone bringing proceedings, though defendants are (more commonly) unrepresented. There are many types of unrepresented litigant, however. Unrepresented litigants may be businesses, institutions or individuals. Even though the litigant may be unrepresented, they may be receiving advice from a lawyer or other organisation. That adviser may be drafting, or assisting in the drafting of, documents. The litigant may attend a hearing with a lay representative, a Mackenzie friend, (who advises but does not represent the client (See, Moorhead, 2003a)) or they may be assisted out of court in a more backroom capacity. Conversely, the litigant may conduct proceedings entirely unaided. Similarly, unrepresented litigants may have chosen to become parties to litigation (where they bring claims) or be forced to litigate (where they defend claims). The latter category of reluctant litigants may include a significant proportion of defendants who do not participate in proceedings (either by filing documents or attending hearings). Parties may have been represented at various stages of the case, and acted in person at others (partially unrepresented litigants).

Because so little is known about the identity and prevalence of unrepresented litigants, the research initially takes a wide definition of unrepresented litigant as its starting point. Our profiling of unrepresented litigants then details the prevalence of *different* types of unrepresented litigants in the courts. For the purposes of our data, we treat any person who was party to litigation, but who at some stage during the proceedings was not

represented by a lawyer acting on the record, as a litigant in person. We categorise appropriate subsets of this larger group of unrepresented litigants (individuals, firms, those who participate, and those who have some assistance). As we demonstrate, some unrepresented litigants are in fact institutional repeat players (local authorities and housing associations in particular), whereas others are much more like the archetypical private litigants in person: individuals or small businesses. As our analysis develops, we focus on unrepresented individual and business litigants over institutions. This was for conceptual reasons: institutional unrepresented litigants are more like represented litigants in terms of expertise and experience. We also concentrate more on those who participate in some way in their case (in particular, for Phase II data (see below)). This was partly for pragmatic reasons: our pilot work showed that cases involving non-participating litigants ended quickly, and there was often very little data to collect on them, but also because we were interested to explore how unrepresented litigants progressed through the courts. Furthermore, a study of quite different design would have been needed to trace the experiences of non-participating litigants.

Research definition of litigant in person

Unrepresented litigants include any person who is party to litigation but who at some stage during the proceedings is not represented by a lawyer acting on the record.

- May be a business or it may be an ordinary individual;
- Includes those receiving advice from a lawyer or other organisation that is not on the record as acting;
- Includes those that attend a hearing with a McKenzie friend or other adviser.

What types of cases are studied in this report?

In this study, we have concentrated on mainstream civil and family litigation. We excluded cases within the small claims limit and the Court of Appeal from our study. Baldwin's work on small claims means there is a great deal of knowledge about litigants in person in the small claims procedure (e.g. Baldwin 1997 and 2002). Although less is known about the situation in the Court of Appeal, it is known to have a large population of unrepresented litigants (Court of Appeal, 2001). This court was also excluded from the study to protect the court from 'research burnout' due to the existence of two other research projects working in the Court (Plotnikoff and Woolfson 2003 and Charles Blake and Professor Gavin Drewry).

Some other areas of work were excluded from the project for more practical reasons. Public law family cases were excluded because of their sensitivity and complexity and on the understanding that most of these cases involve represented parties. Insolvency cases were also excluded for operational reasons: these files were kept on separate (non-computerised) systems to other civil work and we chose to concentrate on more mainstream civil litigation instead.

The courts

Data was collected in four first instance courts. These locations represented a range of courts in different circuits located in the South, West, North and Midlands and a range of size of courts (our selection was based on data kindly supplied by the Court Service indicating volumes of first instance business for civil and family cases). We have concentrated on courts with enough work to ensure sufficient cases could be scrutinised, although we were able to include courts serving rural areas. Three of the courts had District Registries of the High Court.

Methods overview

The project was conducted in three phases: a profiling phase (Phase I); a phase focusing on the case files of cases involving unrepresented litigants (Phase II), and a phase involving observations and interviews (Phase III). Phases I and II were designed to yield a primarily quantitative analysis. Phase III provided detailed qualitative material. This section outlines our approach to methodology.

Phase I: comparative quantitative data

After an extensive pilot, data for the profiling stage (Phase I) was collected from court computer records, supplemented by substantial cross-checking with paper files to verify key data. This phase involved the random sampling of cases from the civil County Court and High Court records, and a random sample from family cases, stratified to ensure we had adequate numbers of adoption; ancillary relief; divorce only; private law Children Act, and injunction cases. In total, the records for 2,432 cases (1,098 civil and 1,334 family) were analysed in Phase I. Data collected was collected on an Access database. The data included: an indication of whether the parties were individuals, businesses or other organisations; whether they were unrepresented at any stage in the proceedings; the number of orders, hearings and other court interventions in the cases; how long cases appeared to take; and information on case type.

The aim of collecting this data was to establish the number of unrepresented litigants in the courts we were researching and to make some broad, high level comparisons between the characteristics of cases which did and did not involve unrepresented litigants. Although we were able to collect a good deal of detailed and important information, we were constrained during Phase I by two factors: the need to limit the information we collected so as to enable us to look at large numbers of cases initially and, most significantly, the limits of information available on the courts' computerised case management systems (Caseman and Familyman).

Phase II: Detailed quantitative data on cases involving unrepresented litigants

Phase II data collection was more detailed, and based on paper files. In Phase I we had identified which of the cases involved unrepresented litigants, in Phase II we ascertained in particular whether cases involved *participating* unrepresented litigants. If they did involve participating (we sometimes refer to these as 'active') unrepresented litigants, we collected more detailed information about the nature of the cases and litigants involved, and on the timing and nature of participation by unrepresented litigants. We stratified our Phase II sample to try and ensure that we had significant numbers of active unrepresented litigants for each main type of case and, where possible, for each type of party acting in person (claimants/applicants and defendants, businesses and individuals). Participation was broadly defined and included: filing of documents, attendance at hearings, dealing with the court (whether by correspondence, telephone or attendance at the court counter) or contact with opponents to progress matters through the court. Phase II data also contains detail about the nature of relationships between parties; what documents were filed by represented and unrepresented parties; what applications were made; what hearings there were, and outcomes of cases. In addition, we sought to examine whether assistance short of representation had been obtained, and the nature and source of that assistance. That data is more indicative than definitive, as court files were unlikely to reveal all assistance received by unrepresented litigants, but it provides some insights into these issues. Phase II involved the collection of data from a total of 748 cases of these, 492 involved active unrepresented litigants.

Phase III: observation and interviews

We observed a range of hearings in open court and in private, with the co-operation and support of the judiciary, litigants and lawyers involved. Observation included cases before Circuit Judges; District Judges and a Deputy District Judge, and covered a range of family and civil matters. In total, we observed 13 hearings involving unrepresented litigants who attended. We also observed some cases where both parties were represented, which provided us with some limited opportunities to compare hearings which did and did not involve unrepresented parties.

We were given a great deal of help during this phase of the research especially by judges and court staff and we are extremely grateful to the court staff, judges, litigants and legal representatives who made this possible.

Interviews and focus groups

We sought to interview the judges and litigants (or their legal representatives) in cases we had observed, to enable some triangulation by comparing our perceptions from observations and their experiences. Interviews with judges were conducted face to face, usually on the same day as we had observed hearings before them. We were able to conduct one interview with an unrepresented litigant at court immediately following the hearing. The other interviews with unrepresented litigants and legal representatives were conducted on the telephone. This was generally within a few days of the hearings, although a handful of interviews could not be conducted until several weeks later. In total, we conducted 24 interviews. We conducted interviews with:

- 11 unrepresented litigants
- 8 judges (including 2 Circuit Judges, 5 District Judges and 1 Deputy District Judge)
- 5 legal representatives of opponents of litigants in person (4 solicitors, 1 barrister).

We also conducted 8 focus groups with staff in each of the courts. One group in each court comprised staff working on civil cases, the other on family cases. Focus groups had between 3 and 6 participants covering a range of roles including ushers, administrative staff, court clerks and section managers.
This data is supplemented with qualitative information from our reading of court records and case files, perusal of information displays in courts' public areas, and information materials supplied to us by the courts, as well as observations made during the considerable period of time we spent in courts.

Timing

Data collection started in Spring 2002 and continued until Summer 2003. All files were sampled from cases commenced in 2000 (to ensure we could look at cases that were likely to have finished). Interviews and observation were carried out in the Autumn of 2003.

Practical issues

It is worth describing in some detail the decisions we have taken in defining and categorising litigants as either represented or unrepresented. They indicate some assumptions within our methodology, but also a degree of permeability between the concepts of non-representation and representation. This permeability will be examined in greater depth below when we consider the extent to which litigants in person nevertheless have some assistance or are represented for part of the case (the partially represented).

Usually it was clear when a litigant was represented, because they instructed outside firms of solicitors. Where proceedings are issued via solicitors, the fact of their acting is indicated on Caseman or Familyman. If they cease to act, notice of this is recorded. Therefore, claimants, applicants and petitioners were treated as represented throughout if there was a solicitor on the record, and no indication that they had come on part way through the case (it being assumed

that they had been acting from the outset). Notice of acting by defendant or respondent solicitors is also recorded on Caseman/Familyman. If a notice of acting was lodged before any steps were taken through the court which involved potential for participation by defendants or respondents, and solicitors remained on the record throughout thereafter, they were treated as represented. In a handful of cases, defendants and respondents were treated as represented where there was apparently a brief period of non-representation, e.g. notice of acting being filed a few days after an acknowledgement of service or defence. This was because we believed that the solicitors had in all likelihood been acting from the outset and prepared and filed the acknowledgement or defence, prioritising this above filing notice of acting (our work during Phase II justified that belief). In some cases, there were solicitors on the record but no indication of when they began acting for the defendant or respondent. In these cases, if there was some data suggesting that the solicitors had been acting for a reasonable amount of time, for example costs assessment events, the party was treated as represented throughout. This may have led to some minor over-estimating of represented defendants and respondents.

Where cases were transferred in from other courts, it was not possible to know the history of representation prior to transfer from Caseman/Familyman. It was therefore assumed that the parties' status prior to the transfer was the same as that following it, i.e. a defendant with solicitors on the record at the time of transfer was presumed to have been represented from the outset. Unless there was a change in status post transfer, that defendant was therefore treated as represented.

Where there was no indication from Caseman or Familyman that a solicitor was acting throughout the case, it appeared likely that the case involved an unrepresented litigant. To be sure, the status of the parties in such cases was checked against the paper files during Phase II of the data collection. We have corrected the Phase I data accordingly for this analysis.[2]

Some businesses or organisations appeared to be unrepresented, in the sense of not instructing solicitors to act for them on the record, but may in fact have been dealing with a case via either an in-house legal department with qualified (solicitor or barrister) staff, or an in-house department using non-lawyers experienced in the handling of claims. Unless clearly represented by a legal department, any such organisations were treated as unrepresented. Organisations which self-represented in this way included local authorities, housing associations and HM Collector of Taxes. When we come on to analyse the data below we refer to these public sector litigants as 'institutional litigants' and any of them that are unrepresented as 'institutional litigants in person'. Where the DSS was involved as a claimant, it was invariably via its centralised Recovery Unit, and given the size and separation of its claims handling function this litigant was treated as represented.

Another example of our approach to whether a party was unrepresented or not concerned divorce only cases (those not involving ancillary relief or proceedings involving any children). In these cases, parties commonly receive legal help under the legal aid scheme, and petitioners commonly have the divorce petition and associated documents prepared and filed for them by a solicitors' firm which nevertheless does not go 'on the record'. Although technically, under our formal definition these parties would be regarded as unrepresented, for all practical purposes they receive a similar level of legal

[2] 15% of those litigants identified as litigants in person from Caseman were in fact represented throughout the proceedings. 16% of cases apparently involving unrepresented litigants could not be checked because the file was missing or had been transferred to another court.

assistance as a represented litigant and we therefore treated them as such.

Finally, for the purposes of most of the data analysis, we excluded cases involving apparently unrepresented litigants if it appeared that they had not, or probably had not, had notice of proceedings before they were concluded. This was because we were interested in how decisions and actions by unrepresented litigants affected the conduct of proceedings, which would not be an issue if they were unaware of them. This applied mainly in injunction proceedings where applications had been issued ex parte (without notice to the opponent), but there were a handful of other cases in which similar considerations applied.

Discussion of the findings

The following section of the paper discusses and summarises the findings from the Study.

Unrepresented parties in cases were common

Family cases often involved one or more parties who were unrepresented at some stage in their case (75% of private adoption cases and 69% of divorce cases involved at least one unrepresented party whereas 49% of Children Act and 48% of injunction cases and 31% of ancillary relief cases involved a party who was unrepresented at some stage). Figures for civil cases were even higher, generally because of very high levels of non-representation amongst defendants, 85% of individual defendants in County Court cases were unrepresented at some stage during their case and over half of individual High Court defendants (52%) were unrepresented. Even for business defendants the figures for those unrepresented were 44% in the Country Court and 32% in the High Court.

Obsessive litigants were a very small minority of unrepresented litigants generally, but posed considerable problems for judges and court staff

The characteristics of obsessive or difficult litigants are often taken to be the archetype for unrepresented litigants generally. In the courts we researched, there were some litigants who made far-fetched or meritless claims, fruitless applications, and indulged in abusive or uncooperative behaviour but these were not the dominant behaviours of unrepresented litigants generally. Obsessive or difficult litigants were far from common. Nevertheless such litigants did pose resource issues disproportionate to their number and challenge the skills of judges and staff.
Fee exemption and remission has been suggested as a catalyst for such litigants. Interview evidence supported the view that being free of liability for court fees 'encouraged' obsessive litigants. Our review of files, did not support a view that fee exemption/remission was a major source or cause of encouragement for unrepresented litigants. Given the small numbers of obsessive litigants in first instance courts, a relationship between fee exemption and unreasonable behaviour is only likely to occur in a very small number of cases. Any general reduction in the provision of fee exemption aimed at stamping out obsessive litigation may be disproportionate.

It was usually defendants and not claimants/applicants who were unrepresented

In all civil and family cases (save adoption cases) respondents/defendants were much more likely to be unrepresented than applicants. In this sense, litigants did not choose to be parties to proceedings (although they may have chosen to create the situations which give rise to a dispute). Any sense that litigants' in person generally choose to be unrepresented must be considered in this context.

Unrepresented claimants were rarer, although 17% of business claimants in the County Court were unrepresented (the figure for the High Court was 2%) and for individual claimants the figures were 10% in the County Court and 6% in

the High Court. Institutions, particularly local authorities and housing associations, also often took claims without formal legal representation. 56% of cases involving institutional claimants in the County Court involved those institutional claimants being unrepresented at some stage. Institutional claimants are rather different in nature to other unrepresented litigants, being likely to have a degree of specialisation and in-house expertise which probably makes them more akin to represented parties.

Part of the explanation for such high levels of representation amongst claimants is that in circumstances where individuals and business could bring claims unrepresented, they opt for other strategies such as negotiation and giving up on their problems rather than instigating litigation ('lumping', see Genn (1989), Pleasence et al, 2004; and Felstiner, Abel and Sarat, 1980). Genn found that, of individuals who were initiating action to try to solve a justiciable problem (i.e. potential claimants), only 13% became involved in legal proceedings. Of those having action taken against them, 69% reported involvement in proceedings (Genn, 1999). This suggests there is an important asymmetry in the way individuals choose to solve justiciable problems (negotiate or give up) and the way institutions and businesses choose to solve them (they are more likely to litigate). This is reflected in the patterns of unrepresented litigants in the courts. Defendants in such circumstances have no option other than to submit to litigation.

Patterns of representation were also, we suspect, strongly influenced by insurance and the legal services industry. Unspecified claims show lower levels of non-representation. From a claimant perspective, this probably reflects the strong emphasis on personal injury and similar litigation where claimants would have had the benefit of either legal aid, or increasingly, conditional fee and similar 'no win, no fee' arrangements. Such claims would also typically have involved insured defendants benefiting from motor and employers liability type insurance.

A large part of the reason for non-representation, especially in civil cases, was in fact non-participation

In many cases unrepresented parties did not in fact participate in the proceedings in any way apparent from the court records. This means they did not file any documentation, contact the court at any stage or have any negotiation with their opponent (apparent from the court file[3]). This was particularly true in County Court cases (which would include housing possessions) where over a half of all individual defendants did not participate in their cases (and so were automatically unrepresented), even in High Court cases, over 1 in 5 individual defendants did not participate in any way apparent from the court file in their cases. More than 1 in 6 business defendants in the High Court and over 1 in 4 in the County Court did not appear to participate in their cases. Even on family cases, there was a significant minority of unrepresented litigants who did not participate in any way apparent from the court file. In ancillary relief, Children Act and injunction cases about a third of unrepresented litigants did not appear to participate.

In many ways our data suggests that, in terms of access to justice, there is a prior problem to the problem of non-representation which is the decision not to participate. From the defendant's perspective, this may be for rational reasons such as having a weak case or seeking to evade any judgement. From another perspective, if disengagement is for reasons of fear, inability to secure representation, or as a strategy of avoiding enforcement, it weakens the legitimacy of court process. A recent study of housing possession suggested that housing defendants saw the court as irrelevant to their main problem, which they saw as dependent on their

[3] They may have had negotiations with opponents which were not revealed to the courts.

level of housing benefit problems and relationship with the local authority landlord (Blandy et al , 2002).

Some unrepresented litigants were in fact partially represented

Some cases involved unrepresented litigants being partially represented (i.e. being represented for any part of their case), this was usually rare, although about 20% of unrepresented business or individual claimants were in fact represented at some stage during the proceedings. In ancillary relief cases about a fifth and in injunction and Children Act cases about a third of unrepresented litigants where represented for part of the proceedings.

Contrary to folklore on unrepresented litigants, it was not generally the case that partially represented litigants were usually those who had been sacked by their lawyers (or the Legal Services Commission withdrawing funding). In family cases, most partially represented litigants *began* cases unrepresented and became represented later. It was more common for partial representation to be caused by the later grants of legal aid (i.e. people beginning cases unrepresented and then getting legal aid and becoming represented), than by the withdrawal of funding. In civil cases there was no clear pattern as to when an unrepresented party became represented, nor did we find much evidence of legal aid withdrawal being a significant cause of litigants becoming unrepresented.

Although there was evidence that significant numbers of unrepresented litigants had some advice on, or assistance with, their case, the evidence suggested this help was ad hoc

Although partial representation was fairly uncommon, about 27% of active litigants in person appeared from court files to have had some other assistance short of full representation. The evidence suggests this was usually given by solicitors or friends/relatives. Assistance from CABx was common in possession cases but generally not otherwise apparent from file. It is difficult to be specific about the level of outside help provided to unrepresented litigants, when this falls short of representation, but our analysis of files showed very little incidence of lay representation or assistance by way of McKenzie Friends in family cases and only marginally more in civil cases. Our interview data suggested different judges had different views on whether they would usually permit such representation.

Our interviews also suggested that the levels of assistance that appeared to be offered to unrepresented litigants seemed to be somewhat ad hoc: litigants might have lawyer friends who they would ask about cases, or they may have picked up some help from a CABx, or perhaps from a brief telephone call or free interview with a solicitor. There was little evidence of systematic, unbundled support for such litigants.

It should be remembered that because we concentrating on court files we were likely to under-record the level of assistance received by litigants in person as much of it would not be discernible from court and party paperwork lying on a court file.[4]

A small but significant proportion of cases involved at least one active party who was unrepresented throughout the life of their case

Once the numbers of litigants who were unrepresented is subdivided into the inactive, the partially represented and the active, it becomes clearer that the number of active but unrepresented litigants, who remain unrepresented throughout the proceedings is generally a small but significant proportion of the courts' caseloads. This is not true in adoption and divorce cases where the proportion of cases involving at least one active unrepresented litigant is high (64% adoption and 60% divorce, but otherwise the figures are lower (Ancillary

[4] Baldwin (2002) found that 72% of those who appeared unrepresented at small claims hearings had nonetheless had advice beforehand.

Relief 15%; Children Act 21%; Injunctions 20%). In civil cases the figures are generally lower than that, save for defendants in County Court cases, where cases involving active unrepresented defendants were cover a quarter. The figures for active litigants who were unrepresented throughout their case was as follows:

High Court

- Individual claimant 3%
- Business claimant 0%
- Individual defendant 17%
- Business defendant 12%

County Court

- Individual claimant 8%
- Business claimant 16%
- Individual defendant 28%
- Business defendant 15%

Cases where both parties were unrepresented were rare

It was rare for both sides on a case be unrepresented in civil or family cases. The existence of at least one party with a lawyer acting for them makes it easier for courts (they have a lawyer who can assist them with case) but raises issues about equality of arms and can put the lawyer in a difficult position. They are asked to do more work which may, especially in ancillary relief cases, eventually be paid for by their client. Furthermore, it can create cost and ethical problems as well as unsettling the adversarial dynamic of litigation-negotiation.

There were variations in non-representation by types of case and litigant

Within case types, there was some evidence of interesting variations. Non-representation was less common where there was more likely to be substantial or complex dispute. Cases which might be thought to involve a substantial dispute (Children Act, ancillary relief, and injunction cases) were less likely to have a participating party who was unrepresented throughout the life of a case than the more straight forward divorce and adoption cases; housing, debt and commercial lease cases were more likely to involve non-representation than other specified and unspecified claims. Cases brought by unrepresented litigants were more likely to be contact than residence applications and divorce cases brought by unrepresented parties were more likely to rely on five year separation or two year separation with consent than were cases brought by represented parties. This suggests that divorce cases where both parties were unrepresented were often less contested.

Although litigant in person cases were sometimes less serious and less heavily contested, what was at stake for litigants was nevertheless significant

It is important not to assume that the cases brought by or against unrepresented litigants are somehow trivial. Where we had objective information about the value of the dispute we could see that substantial property (e.g. in ancillary relief claims) was in dispute. 64% ancillary relief cases involving unrepresented litigants dealt with the former home or proceeds of sale and between a fifth and a quarter involved paying ancillary relief either for the former spouse or children. Lump sum payments in the thousands and tens of thousands were common as were orders transferring ownership of the home or orders for sale and division or the proceeds. Similarly average and maximum payouts in civil cases involving unrepresented litigants were in the thousands and tens of thousands of pounds. The largest payment on a case involving an unrepresented party in our sample was in excess of £600,000.

Relationships between the parties and indications of vulnerability

In family cases, unrepresented litigants were more likely to be male: 48% of cases involved the male litigants in person, 38% female litigants in person and 13% involved both male and female litigants (sometimes couple, sometimes

opponents) in person. This may well reflect, at least in part, the legal aid position, several of our interviewees pointed to the means test in legal aid meaning it was more likely that a woman (being more economically vulnerable) would get legal aid.

In relation to civil cases it was harder to simplify and summarise the relationship, between parties. We have concentrated on whether the parties were individuals or organisations. The County Court list was more dominated by organisations taking cases, principally against individuals. It is notable that this latter constellation (organisations vs. individuals) was where most non-representation occurred. This was partly due to the large amount of housing work being handled by County Courts.

A significant minority of unrepresented litigants in family cases had a specific indication of some vulnerability on their part such as being victims of violence, depression, alcoholism/drug use, or mental illness or being extremely young parents. Perhaps unsurprisingly, at least 30% of adoption cases had an unrepresented litigant with some kind of vulnerability. Some of these cases would have involved care proceedings prior to the adoption process and it was apparent that social services held the hand of unrepresented litigants through much of the subsequent process, although it was adoptive parents they were hand-holding. Nevertheless, whether it was appropriate in such circumstances for vulnerable litigants to be unrepresented at this stage is a moot point. 20% of injunction cases and 15% of Children Act cases also involved an unrepresented party displaying some level of vulnerability. These figures may, in fact, underestimate the extent of the problem as we were dependent on the documents on court files in indicating whether there was any vulnerability on the part of unrepresented litigants.

There is little evidence of an explosion in the numbers of litigants in person, though the situation is unclear in the family courts

It is common to claim that the number of unrepresented litigants is increasing. (See, for example, Mitchell, 2004). Ours was not a longitudinal study, and although our interview evidence supported the view that there may have been an increase in unrepresented litigants in recent years (but only on balance), what statistical evidence there is appears to suggest there has not been a rise, at least until recently. The only evidence is for County Court trials and small claims hearings. The number of unrepresented parties in County Court trials declined steadily until 2001. This decline was not offset by more unrepresented parties in small claims. The number of small claims hearings has declined whilst the numbers of unrepresented parties within those claims has remained relatively steady.

There were however modest increases in the number of unrepresented litigants at County Court trials and small claims hearings after 2001. These increases would be consistent with an increase in non-representation after the introduction of the Access to Justice Act, and the reduction in the number of solicitors firms providing civil legal aid that has occurred since (Moorhead, 2003b), but it remains to be seen whether this is part of an ongoing trend. There is no quantitative data available to judge the situation in family courts.

Parties go unrepresented for a range of reasons including choice and the lack of free or affordable representation

Our observations and interviews support the literature that suggests litigants go unrepresented for a number of reasons. There are three main categories

- Inability to afford representation (or unavailability of free or cheaper sources of help);
- A perception that that lawyers are not always perceived as necessary or best placed to advance the litigant's interests;
- The openness and supportiveness of courts to unrepresented litigants

The ‘not best placed’ reason is the most complex. Litigants may perceive themselves as more factually expert in their dispute and more able to manage their case than a (possibly novice) lawyer. Alternatively, they may wish to ‘have their say’. This desire may in fact include a host of related motivations, including being sure they can feel that their point of view has been properly put; or being able to put non-legal arguments (guided by lay notions of fairness) in a legal forum. The latter suggests that litigants sometimes take a deliberate decision to self-represent because they are less restrained by legal notions of relevance and so can make arguments or raise issues, which a lawyer could not. Conversely, lawyers are sometimes perceived as stoking up the adversariality of disputes: commercial litigants who wish to preserve existing relationships might proceed without lawyers on this basis. The fact that litigants often express the view that they did not think they *had* to be represented suggests that, in the mind of some, non-representation is not an obviously second best option. It also suggests that litigants may be conducting informal cost-benefit assessments of representation or perceive cases as being straightforward enough for them to handle themselves.

All of these motivations were evident in our discussions with court staff, judges, lawyers and litigants. Cost, and the decline in legal aid eligibility, were perceived as particularly problematic in family cases. The court staff we spoke to suggested that, leaving aside difficult or obsessive litigants, few individuals were unrepresented by choice and that cost was the primary reason for non-representation. It was also suggested to us that a hardening of attitudes amongst solicitors unwilling to take on ‘difficult’ clients had contributed to the causes of non-representation. This view was founded on a belief that risk management practices (associated with the requirements of professional indemnity insurers) and legal aid contracts discourage the taking of certain cases.

For the litigants we interviewed, cost, or the unavailability of legal aid, was usually a factor in their decision but often combined with other reasons: a belief that they could conduct the proceedings themselves without too much trouble; a feeling that solicitors provided little or no benefit (either because they were incompetent; or because they expected to lose their case anyway; or were at the end of proceedings arguing over relatively minor details); sometimes lawyers had been instructed but failed to attend because legal aid was expected but had not yet been granted or because of conflicting appointments.

Participation is not the same as active defence

Our definition of active unrepresented litigants was necessarily broad, it included any indication of activity relevant to their case which was apparent from the file. We examined in detail the nature of their participation and this evidenced generally low levels of actual activity. So, for example, unrepresented defendants are unlikely to defend cases when compared with the cases where defendants are represented. Even ‘active’ unrepresented defendants appeared less likely to defend than represented defendants. It is conceivable that for such litigants the only option was to not defend their case and to negotiate terms, though even here a defence would probably have strengthened their hand in any negotiation. It is conceivable too that parties that instruct lawyers have stronger defences (worth paying for) and so are more likely to defend cases.

Thus, part of what we may be seeing here is a case selection affect where unrepresented litigants do not defend poorer cases. However, other research has shown convincingly that non representation, even controlling for case selection, leads to considerably poorer outcomes (Seron et al, 2001). Case selection is unlikely to be a total explanation for non defending and, therefore, part of what we see is likely to

be unrepresented parties missing the opportunity to defend successfully and/or to better protect their position.

Levels of activity suggest cases involving unrepresented litigants may involve more court-based activity than those cases where all parties were represented

We looked at the number of particularly types of activity on court file: the number of effective hearings, the number of ineffective hearings, the number of orders made and the number of interventions by judges short of orders. In family cases, analysis suggested that cases where only the respondent was unrepresented had significantly more effective hearings and significantly higher levels of overall activity but there may have been fewer adjournments. Cases where both parties were represented had significantly fewer orders and significantly fewer interventions by the court. However, the picture was not a simple one and the differences between represented and unrepresented parties was not stark.

We also saw some evidence of this in the civil sample. There were more interventions (short of orders) in cases where only the claimant was unrepresented and there were a higher number of effective hearings where there was an active unrepresented defendant. Similarly, as with family, there were more ineffective hearings (i.e. probably agreed adjournments) where both parties were represented consistent with greater settlement activity over procedural matters (but also potentially with greater procedural argument at interim stages). Analysis suggested that there were only significantly higher levels of overall activity in cases where there was an *active* unrepresented defendant. As with family, the differences are neither simple nor stark but they do point to moderate increases in activity where cases involve unrepresented parties (particularly active defendants).

It is also worth noting that the activity on such cases is not necessarily led by the unrepresented litigant. Represented parties on cases involving unrepresented litigants made more applications and made a wider variety of applications than unrepresented parties.

Within cases involving unrepresented parties, participation by the unrepresented party was generally of a lower intensity than that of represented party

Although cases where there is a litigant in person involve slightly more instances of court-based activity; within those cases, unrepresented litigants tended to participate at lower levels of intensity than their represented opponents. They were less likely to defend civil cases; they seemed less likely to file formal documents; or make applications; and they were less likely to attend hearings. The lower levels of intensity of participation may be explained by them usually being respondents or defendants. It may also be due to the case being led by the represented party. In other words, what higher levels of activity do occur may well be led by the represented parties in the case or the courts. It is also possible that this is a response to inadequate participation by the unrepresented party.

Unrepresented litigants participated at a lower intensity but made more mistakes

Our analysis of court files compared obvious errors made either by the unrepresented litigants and solicitors. The evidence suggests that unrepresented litigants were more likely to make errors, and also that they were more likely to make more serious errors. Furthermore, *individual* litigants in person also appeared to file more flawed documents than business litigants in person. More than half of the cases involving individual litigants in person involved that litigant in person filing at least one flawed document. This probably underestimates the level of problem with documents filed by unrepresented litigants as we were only able to record obvious and apparent flaws. This is illustrative of the high level

of technical difficulty faced by unrepresented litigants. That said, the proportion of cases where there were serious errors evident on the face of the file was, in absolute terms, quite low.

The bulk of unrepresented participation took place via the court office not the court room

A number of interesting things can be said about the nature of participation by unrepresented litigants. Firstly, it is generally the case for both unrepresented applicants and respondents that acts of participation concentrate on 'back office' procedure, such as dealing with documents and talking to the court staff, rather than hearings. Initiatives to assist litigants in person (such as duty advocates) tend to concentrate on court hearings whereas the bulk of activity for unrepresented litigants, even when seen from the perspective of a court file, is actually outside of the immediate arena of hearings.

Furthermore, unrepresented applicants are much more active generally than unrepresented respondents. Indeed, participation generally by respondents was minimal. Whether such non participation is a deliberate strategy (because of a weak case or a lack of desire to participate) or whether such lack of engagement is a more significant concern is an area which could be researched further although sampling and gaining contact with such a group could be difficult.

Problems faced by unrepresented litigants demonstrate struggles with substantive law and procedure

The struggle to translate disputes into a legal form works on a number of levels and it is important to understand those when considering any policy response to unrepresented litigants. This study supports the view that unrepresented litigants struggle to identify which legally relevant issues are in dispute and they sometimes struggle to understand the purpose of litigation. There is also some evidence of a broader, and understandable, confusion of law with social or moral notions of 'justice'. These problems of course point towards a need for more active engagement with unrepresented litigants to clarify the legal basis of disputes. This is not a role which judges are always well-placed to play for two reasons: it may transgress their role as neutral arbiter (although see below) and judges themselves do not always have all the necessary specialist substantive knowledge.

Others problems derive not solely or mainly from the factual and legal complexity of their own disputes, 'rather, they stem from the inherent complexity of the courts' own procedures and administrative requirements' (Owen, Staudt and Pedwell, 2004). There was considerable evidence that complexity, and the court's inability to work in a way intelligible to lay litigants, is part of the problem. This opens up an interesting area of debate. Are court procedures necessarily complex, and therefore incapable of comprehension, by many litigants, or can more be done to make the process more intelligible? We cannot answer that question definitively here: experimentation and litigant-based research on understanding would be needed.[5] There is, however, evidence of some familiar problems, that could be tackled to improve the situation: routine orders still involve apparently (to experienced participants) simple phrases which patently are not comprehended by lay litigants and could in fact be dealt with more transparently. For example, explaining what 'file and serve' means or ensuring that a litigant knows that exchanging witness statements ordinarily means they would have to put in a witness statement of their own, are straightforward steps which would make the process clearer to litigants.

Whether such improvements can be achieved mainly by written information is

[5] Zorza proposes experimental courts that would pilot and test new ways of working designed make courts more accessible to unrepresented litigants (Zorza, 2002).

highly debatable. Court staff consistently reported that a significant number of litigants did not read (or perhaps could not deal with) written guidance. This may suggest a more active or involved role for court staff and the judiciary is needed.

There was at best only modest evidence that cases involving unrepresented litigants took longer

In terms of the stage at which cases ended, the position is complex although the evidence tends towards suggesting that cases involving unrepresented litigants ended at later stages than cases where both parties were represented. Similarly, there were very few trials but they were more likely to involve unrepresented parties than cases where both parties were represented. In spite of the fact that cases appeared to end at the slightly later stages, cases involving unrepresented litigants (even where there was an active unrepresented litigant) did not seem to take much longer. Cases involving inactive litigants in person were usually much quicker as would be expected giving the absence of a defence in many of those cases.

For family proceedings the position was less clear. However, where the applicant was unrepresented or where both parties were unrepresented, cases appeared to take significantly longer. In spite of evidence suggesting that generally cases involving unrepresented family litigants ended at a later stage and involved slightly more activity, divorce cases took significantly less long where both parties were unrepresented. This is consistent with other evidence suggesting that simpler, uncontested divorces were more often handles without representation.

Cases with unrepresented parties were less likely to be settled

Our interviews suggested that unrepresented litigants may be less likely to attempt to settle cases: either because they thought that, once a case had entered a court or proceedings had begun, settlement was prohibited; because they feared exploitation by their opponents lawyer; because (lawyers sometimes perceived) they had something to hide; or because they wanted to have their day in court. Litigants tended to favour the first two explanations, lawyers and court staff/judges, the second two explanations.

There was a good deal of evidence from the files favouring a modestly weaker tendency to settle cases (Baldwin, 2002 and Shapland, 2003, have also pointed to this). In family, cases where both parties were represented involved more ineffective hearings (suggesting more settlement behaviour). Cases involving unrepresented parties tended to proceed further through the procedural steps and more often involved hearings. In civil cases, there was generally a high level of settlement for cases where both parties were represented. Settlement levels were also higher for cases where only the claimant was unrepresented. This may mean settlement is more likely where a defendant is represented (although the picture looked rather different in family cases where it appeared more likely that an unrepresented claimant led to lower levels of settlement). In any event, we have to be cautious in interpreting this data given the large proportion of cases where the outcome was unclear from the court file, but it points towards non-representation inhibiting settlement.

Evidence of prejudice

The evidence of problems faced by unrepresented litigants, their lack of active defence, their generally higher error rates and lower levels of participation all suggest that lack of representation prejudices the interests of unrepresented litigants (and it can put extra burdens on their opponents too). Furthermore, there was some evidence, albeit on a very small number of cases, that unrepresented litigants in family proceedings were more likely to be subject to adverse interim cost orders. Unrepresented respondents within divorce proceedings were more likely to

end up paying some or all of the costs of divorce than were represented respondents.

In civil cases, there was some indication that outcomes for defendants were poor if they were unrepresented. There was more likely to be a suspended possession order in housing cases or a default judgement in a specified claim, for example. Defendants also appeared more likely to pay damages if unrepresented. Payment of damages in cases involving unrepresented defendants were also much higher than in cases involving unrepresented claimants. Interviews pointed to weaker cases but also to non-representation significantly prejudicing some litigants. As with family cases, there was also some suggestion, on a small number of cases, that unrepresented litigants were more likely to have to pay interim costs suggesting either more unreasonable or inept behaviour. Finally, a finding of note was that enforcement was much more likely to occur where a party was unrepresented. There was some evidence to suggest active claimants may have been more likely to pursue poor risks beyond judgement, though the largest part of the explanation is probably the prevalence of non-participation by defendants (who are then enforced against).

Whether poorer outcomes say something about the nature of the case (defendants and claimants may be more inclined to self represent in weaker or lower value cases) or about their ability to represent themselves is a moot point, although evidence from elsewhere (Seron et al, 2003) suggests case selection is not a complete explanation (see above).

Some courts and local advice providers may be more welcoming to, or encouraging of, unrepresented litigants than others

There was evidence that the levels of non-representation varied by courts even when differences in case type and the like were controlled for, we speculate that this is due to two causes. The literature suggests some courts may be more open to and/supportive of unrepresented litigants (see, Mather, 2003). As well as the differences in levels of representation in different courts, we found some evidence in focus groups of different attitudes towards the assistance of unrepresented litigants from court staff. Secondly, we suspect also that there are varying levels of supply of legal services in each area which would make it easier or harder to get the representation that litigants feel they need.

Courts were not confident signposters of unrepresented litigants to alternative sources of help

Our interviews suggested that, whilst some staff were clearly encouraging litigants to use CLS directories, or local lists of providers probably derived from the directories, there was evidence of a lack of confidence and specifity about where litigants could turn to for help. Staff were uncertain about what services were provided in the locality (there was a general expectation that solicitors would give a free half hour interview for instance which may not be borne out in practice). Signposting tended to end with either a general suggestion that a litigant go and see an (unnamed) solicitor, or the 'local' CABx, or with a short list of named providers (who were recognised by the court as repeat players in their locality). Some perceived the latter approach as dangerous, a form of favouritism to larger local practices, but it had the advantage of referring litigants to someone more likely to specialise in dealing with their problems.

Courts have a difficult role in the referral network. They have to be more careful of their neutrality than other stakeholders, but that does not negate the need for effective signposting. If courts do not ensure litigants are signposted to suppliers who are appropriate there is a likelihood that litigants will be passed from pillar to post (Moorhead and Sherr, 2004). In turn, this is likely to lead to litigants giving up on advice seeking ('referral fatigue' as it is known, see Pleasence et al, 2004). It is almost certainly not enough to simply

suggest litigants see ‘a solicitor’ or ‘the local CABx’

Judges recognised that unrepresented litigants pose a challenge to the ‘passive arbiter’ model of judging and responded to that challenge with varying degrees of intervention

The traditional judicial role, in the common law, adversarial tradition, is summarised by Lord Denning in *Jones v. National Coal Board* [1957] 2 QB 55 (CA):

> The judge, ‘holds the balance’ between the contending parties without himself taking part in their disputations.

This view is probably not one which can hold in the context of cases involving unrepresented litigants, where more intervention may be required. Although the judges did not avert to this specifically, the overriding objective of the Civil Procedure Rules is relevant:[6]

> (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
> (2) Dealing with a case justly includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate –
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

The overriding objective is not unequivocally in favour of intervention. Though the equal footing argument may suggest strongly that intervention can be the right course, the resources issue may set limits on what judges, and indeed courts, can do, and advocates of passive neutrality would no doubt point to intervention unbalancing in other ways procedural equality.

Inexpert, sometimes emotional, and procedurally naive litigants pose a number of ethical and managerial problems for judges. Judges are conscious of their role as neutral arbiter but also of the need to focus on substantive justice. The responses given in interview suggest that the two roles are difficult but not impossible to balance; and also that different judges take different approaches to what needs to be done to protect one or other aim. The level and nature of intervention to ensure that an unrepresented litigants’ case is understood by the court, presented to the opposing parties, and dealt with in evidence, varies from judge to judge and case to case. No doubt some of this variation involves a sensible response to different cases and the capacities of different litigants, but we observed also that judges had different approaches and views on where they were naturally inclined to let the balance between intervention and passivity fall.

No judges indicated they would never intervene on behalf of litigants, but some suggested that their interventions would be 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. Others involved a much more direct engagement with the substantive issues before them, making explicit references to legal positions (sometimes *de facto* advising litigants) or taking up

[6] Civil Procedure Rules, Part 1.1.

lines of questioning on their behalf (cross-examining). For these judges, the role of neutral arbiter was abandoned in favour of the neutral advocate, or to give a perhaps more palatable description, that of inquisitorial judge. We do not criticise the judges who took this approach. To us, the more interventionist approach seems sensible, but the very diversity of approaches and views suggest that the judicial role in relation to unrepresented litigants would benefit from closer scrutiny, including work led by the judiciary itself.

Court staff recognised unrepresented litigants needs but were unsure of what help was permissible because of the way the 'no advice' rule was managed

A discussion of the role of court staff in assisting litigants has highlighted the importance of the no advice rule, and the difficulty it presented to staff. They are discouraged from giving advice, partly through their own natural reticence and fear of making mistakes and partly because it is forbidden. Staff were very conscious indeed of the need to be careful in providing information to litigants which could not be construed as advice, but in fact, we saw a range of approaches to the information-advice dilemma. Some staff clearly gave advice (e.g. domestic violence applicants were routinely discouraged from applying for injunctions unrepresented and some experienced court staff would advise in a range of circumstances but try to protect themselves by saying, 'I am not giving you legal advice, and I don't have the expertise, but my view is…'). Some gave information structured in such a way as to probably amount to advice; whereas others indicated they provided very little information for fear that it offend the 'no advice' rule.

The boundary between information and advice presents a number of problems. There is a strong tension between the customer service element of the court's work and the capacity of the court to deliver on that customer service role. Some court staff were very conscious of their administrative work being monitored and prioritised but their litigant contact work not being monitored or counted towards targets. Litigants see, and are encouraged to see, courts as sources of help but are frustrated by the coming down of the 'no advice' shutters in their dealings with staff.

Customer service, and broader problems in court culture, are only parts of the problem. There are two more fundamental values in tension. The tension between the need to see that substantive justice is done and the need to protect an essentially adversarial system in which the court retains a 'neutral' posture. This is a complex area. Our evidence suggests a number of things:

- court staff are ill-equipped to advise on legal problems;
- they perceive a challenge to their own roles (through the extra work that would be required) and to the role of others in the justice system (notably solicitors) in offering any kind of advice service;
- the information-advice divide is not a clear one and so is, unsurprisingly, applied inconsistently by different members of staff; and,
- caution in applying the information-advice test acts to inhibit the flow of information as well as advice.

The institutional response to the information advice dilemma has been to warn against the dangers of giving advice. We think this approach should be questioned, not because we think that court staff should be necessarily giving substantive advice, but because they should be trained and facilitated in their role as providers of information. It was telling that court staff did not feel that they had been so trained but picked up their approach to giving help from colleagues. The institutional response is thus one of uncertainty coupled with hostility: it is likely to inhibit the giving of sensible and constructive information.

Nor is the failure to give 'advice' always value neutral. It can lead to wasted applications from litigants making mistakes which are obvious to court staff, or missed opportunities to warn landlords of the dangers in evicting without a court order. An alternative approach to the information advice problem would involve providing clearer and more constructive guidance on what is information and what is advice, and when help can and ought to be given competently, and in ways that do not compromise the neutrality of the court. A good deal of work is being carried out in the United States looking in more detail at the difference between information and advice and teasing out what a court can and should do, as part of a sensible facilitative role as information provider and what it should not do (See, in particular, Zorza, 2002 and 2004).

Court staff and judges perceived that improvements could be made

Court staff, litigants and judges made a range of suggestions for improvements to the way that courts worked with unrepresented litigants. Court staff and judges had also instituted local initiatives to improve the information provided to litigants. There was, however, a certain ambivalence to written information. They perceived the need for more, and improved information (recognising that great strides had been made in this respect in recent years, but that more could be done). They also perceived great difficulty on the part of some litigants faced with detailed guidance and leaflets which they either could not, did not want to, or were too lazy to, comprehend. They also suggested that significant improvements could be made in the extent to which orders were in genuinely plain English, and that the reasons for judges' decisions were conveyed to litigants. They also discussed attitudes to training and other improvements to court services to unrepresented litigants, including court based services targeted at providing greater assistance to unrepresented litigants.

Endnote

There are three main narratives or theories about unrepresented litigants that this research goes some way to informing. The first is the extent to which a better understanding of unrepresented litigants is suggestive of an **access to justice crisis**. There are a number of aspects to this. Firstly, an assumption that the erosion of legal aid has led to a significant increase in the numbers of unrepresented litigants. Secondly, that unrepresented litigants are unable to take cases for themselves, hence justice is denied them. Thirdly, that they are unrepresented not out of choice but of necessity.

The idea that there has been a dramatic increase in litigant in person in recent years is a popular one amongst commentators on legal systems but it is not borne out by the data in this study. What historical data there is does not support it and the overall level of active unrepresented litigants in this study does not suggest it either (if there was to have been a dramatic increase it must have been from a pretty low level of non-representation historically). There are three main caveats to this view: one is that the historical data is far from comprehensive; the second is that we do not know what has happened in family cases; and the third is that recent evidence is suggestive of an upwards trend. This suggests a need for better and ongoing monitoring of the level of unrepresented litigants.

'Crisis' is language which we would still reject in this context as hyperbolic on the facts as we see them, but the closest that this research comes to suggesting any kind of access to justice crisis relates not to non-representation but to the exclusion of litigants who do not, apparently, at any stage or in any form, participate in legal proceedings taken against them. Of course, this may not be a problem at all: it may simply represent a rational response on the part of the parties, and one which does not necessarily damage the values of the justice system (though the extent of problems with enforcement suggest that

it may be a more serious issue). The advice literature has, however, demonstrated that 'lumpers' of problems give up on solving their problems for a host of reasons, rational and otherwise (Genn, 1999 and Pleasence et al, 2004). We should be concerned and want to know more about this difficult to research group. Should and could defendants be more active? Would it benefit them and the interests of others participating in the system? Similarly, the low level of unrepresented claimants, particularly in civil cases, may also be cause for concern, particularly when we see levels of litigation falling dramatically.

A second narrative involves seeking the presence of litigants in person as **a challenge to traditional court paradigms**. This works at a number of levels. Lord Woolf, for example, encapsulated the paradox presented by unrepresented litigants:

> 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.'[7]

Because of the substantive and procedural naivety of unrepresented litigants, the traditional roles of judge (passive arbiter) and court staff (passive administrator) are challenged, as are some of the central conceits of an adversarial paradigm. The usual rules and assumptions governing civil and family procedure do not work, or do not work as well: unrepresented litigants do not know or understand the prevailing paradigms of court practice and their behaviour is naturally, as a result, at odds with the normal practices of a court. Judges have to consider how to adapt. Furthermore, the presence of unrepresented parties may stretch the role of any represented parties lawyers into providing (limited) assistance to unrepresented parties, or more help to the court than they would usually need to. Greater reliance is placed on their duty to the court (especially when dealing with issues of law). Critical to this analysis is the way in which it opens up the necessity of rethinking the values and approaches of courts, lawyers and court staff, if unrepresented parties are to receive meaningful access to justice.

A third narrative involves seeing the existence of unrepresented litigants themselves as **pathological and antithetical to justice values**. Here, the story is of the unrepresented as vexatious or obsessive litigants, abusing court process, exploiting their naivety, creating chaos and mistrust in an otherwise harmonious system. Here, unrepresented litigants choose to be unrepresented, and do so for reasons contrary to the broader purposes of the justice system. Under this narrative, unrepresented litigants need to be controlled or expunged from the system. As we have seen, this pathological litigant is rare, but poses significant problems to court staff and the judiciary.
It is important, therefore to remember, however, that most unrepresented litigants appear to do so because they cannot afford, or feel they do not need, lawyers, not because they have a psychotic disregard for the interests of justice or the needs of others. The nature and intensity of their participation; the struggles they have comprehending law and procedure; and the importance of ensuring that substantive justice is done in our courts suggests that unrepresented litigants need help far more than they need approbation.
-End

[7] Woolf (1995), Chapter 17, para. 2.

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