

University of Otago
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**Keeping Up Appearances:
Accessing New Zealand's Civil Courts as a Litigant in Person**

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Abstract

It is commonly believed that more and more people are going to court without a lawyer, both in New Zealand and in other common law jurisdictions. The right to appear in court in person is essential to the legitimacy of the courts. That legitimacy would be harmed if the courts were only accessible to those with the means to pay for legal representation. When litigants take up their right to appear in person, they encounter a system primarily designed for lawyers, however. So they confront a fundamental contradiction: the courts must appear to be accessible to litigants but they cannot grant too much access or they will be choked by the demand. Furthermore, the right of access in person lacks substance in many cases, because the system cannot easily be navigated without a lawyer.

Using several qualitative methods including interviews, document review and participant observation, this thesis asks, first, why are litigants going to New Zealand's civil courts without a lawyer? Second, what is their experience of litigating in person? Third, how do the inhabitants of the court system – the judges, lawyers and court staff – perceive litigants in person and respond to them? The research participants included litigants in person (LiPs) (34), court staff (8), lawyers (16) and judges (13), so that their different perspectives could be considered. The study began with a detailed exploration of the perspectives of LiPs, who participated either in interviews or via a case study. Only after this aspect of the research was complete did I interview court staff, lawyers and judges. By studying all participants in the court process and using multiple methods of qualitative inquiry, the emphasis was placed on systemic explanations for LiPs' interactions with the court system.

The thesis begins by considering why people decide to litigate in person. It then traces the experience of being a LiP, and the perceptions judges, lawyers and court staff have of LiPs, through the different stages of the court proceedings: before court, when proceedings are filed and LiPs seek advice and information; then at the courtroom door, when negotiations take place; in court, where LiPs present their case; and finally after court, when the judgment is handed down and issues about costs, enforcement, appeals and complaints arise.

The thesis argues that there is a contradiction underlying the promise of LiP access to the courts. The courts promise a forum to vindicate citizens' rights. Without this forum, their rights are empty, merely occurring on the books and not in reality. Yet the courts do not have the resources to hear all the claims citizens have. Even expansion of their resources would not be sufficient, as demand

is elastic. So, to appear to provide justice and control their process, the courts must both promise and limit access simultaneously. Normally lawyers play a central role in mediating such access, by screening and translating claims, and negotiating clients towards settlement. LiPs come straight to the courts, however, and threaten this delicate balance. They also struggle to access the courts in a meaningful way, not necessarily because of any particular personal deficits, but because there are so many complexities and conflicts that cannot be easily overcome by a litigant advocating their own cause. Various subtle means of discouraging access are deployed to steer LiPs away from accessing the courts in person while trying not to undermine the appearance of accessibility.

The thesis considers various policy reforms and encourages a re-evaluation of the stereotypical view of LiPs, as a means by which the delicate balance between projecting accessibility and protecting the scarce resource of court time might be somewhat restored. It also argues that reforms within the court system alone cannot offer a complete answer. Broader social responses, that address access to justice for people likely to become LiPs, must look beyond the courts, to policies that address inequalities of wealth and promote social justice.

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List of Abbreviations

ACC	Accident Compensation Corporation (New Zealand's no-fault personal injury compensation scheme)
ADR	Alternative dispute resolution
CAB	Community Advice Bureau
CLC	Community Law Centre
COCA	Care of Children Act 2004
CYF	Child, Youth and Family, a unit of the New Zealand Ministry of Social Development
JCC	Judicial Conduct Commissioner
Law Society	New Zealand Law Society
LiP	Litigant in Person
Legal Aid	Government funding for legal services provided by the Ministry of Justice
MoJ	New Zealand Ministry of Justice
PDS	Public Defenders Service
UK	United Kingdom
UOHEC	University of Otago Human Ethics Committee
US	United States
USSC	United States Supreme Court

Notes

Ethical Approval

This research was approved by the University of Otago Human Ethics Committee (reference number 12/315, 23 November 2012) and conducted in accordance with the University of Otago Code of Ethical Conduct.

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Chapter 1

Introduction

It is 10am but the Judge has not yet arrived. The raised dais is empty, attended only by the carved figures in the coat of arms that hangs above the Judge's chair. At the desk below the dais, the court taker shuffles paper and picks up the phone: "We are ready for you, Sir, in Courtroom 2. Are we gowned?". Still holding the phone to her ear, she shakes her head at counsel, we are not to be gowned. Counsel for the defendant take off their gowns and bundle them out of sight. The plaintiff remains seated. He has no counsel: he is appearing in person. He quips, "T-Shirts and jandals today!"¹ Everyone laughs lightly, uncomfortably. My heart rate has quickened and I have that queasy feeling of anxiety and anticipation that comes before beginning a case. Except I am not counsel today. I watch this scene from the public gallery while scribbling research notes. I am nervous because I know what this litigant is facing. My legal experience warns me that this case is a labyrinth of procedure, evidence and complex law. If I was asked to argue it, I would be rushing to brief senior counsel. But the litigant is full of optimism. He is smart, educated and has worked hard to prepare himself for this day. He has never been to court before. It is not until much later, when what he then calls the "ordeal" is over, that he shares the knowledge that quickens my nerves. By then it is too late.

This litigant was exercising his right to argue his case in person. He is not alone. It is commonly believed that more and more people are going to court without a lawyer, both in New Zealand and in other common law jurisdictions.² When they do, they enter a system designed primarily with lawyers in mind. This thesis asks, first, why are litigants going to New Zealand's civil courts without a lawyer? Second, what is their experience of litigating in person? Third, how do the inhabitants of the court system – the judges, lawyers and court staff – perceive litigants in person (LiPs) and respond to them?

The increase in LiPs, either perceived or actual, has been accompanied by continued calls for more empirical evidence to inform the response to the phenomenon. New Zealand's Law Commission joined this appeal more than a decade ago:³

Empirical research in New Zealand is limited. We do not know for certain whether their numbers in courts are increasing, whether some who are unrepresented are in this situation by choice or whether they would have preferred or really needed

¹ Jandals are a rubber sandal called "flip flops" in other countries.

² Reliable evidence of an increase in New Zealand is not available. See discussion Chapter 2, pages 13-15.

³ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 25.

representation (by lawyer or otherwise). Nor do we know the profile of unrepresented litigants.

New Zealand's Ministry of Justice (MoJ) responded to this observation by undertaking exploratory research on LiPs in the criminal summary and family jurisdictions which provided some limited data on LiPs.⁴ While there are some high quality studies in other common law jurisdictions, there is no other empirical research on LiPs in New Zealand.⁵ Nor do the overseas studies answer all the questions. So appeals have continued internationally for more empirical information about who LiPs are, what motivates them, and what responses are effective.⁶ This thesis aims to contribute to the empirical base, answering the call for more qualitative research on LiPs to complement the collection of quantitative data.⁷

The research questions were investigated by employing several qualitative methods: interviews, analysing litigation documents, and participant observation. The research participants included LiPs, court staff, lawyers and judges, so that their different perspectives could be included in the investigation. LiPs do not exist in a vacuum. They are a group that is created and defined in opposition to another group: represented litigants who appear by way of an agent, a lawyer. Lawyers, judges and court staff are the regular inhabitants of the courts and LiPs are a disruptive addition to this system. If LiPs are examined in isolation there is a risk of placing too great an emphasis on the personal strengths or supposed failings of individuals, focussing too much on their education, literacy, ability to interact with bureaucracy, their character, and ability to comprehend and marshal the assistance given them.⁸ By looking at all the participants in the court process and using multiple methods of qualitative inquiry, the emphasis can instead be placed on systemic explanations for the interactions LiPs have with the court system, related to the structure of legal services, the aims of the civil justice system, and courtroom organisation.

Using multiple methods of qualitative inquiry, particularly participant observation, was also intended to provide some protection against the potential bias I have as a member of the legal profession, a profession that does not usually welcome LiPs. I therefore designed a study that

⁴ Melissa Smith, Esther Banbury and Su-Wuen Ong *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (prepared for the Ministry of Justice 2009).

⁵ The MoJ is currently undertaking a study of the 2014 reforms to the family justice system, which includes research on LiPs in the Family Court since the reforms. That research is not yet available.

⁶ E Richardson, Tania Sourdin and Nerida Wallace *Self-Represented Litigants: Literature Review* (Australian Centre for Court and Justice System Innovation, Monash University 2012); Hazel Genn "Do-it-Yourself Law: Access to Justice and the Challenge of Self-Representation" (2013) 32(4) *Civil Justice Quarterly* 411 at 432.

⁷ E Richardson, Tania Sourdin and Nerida Wallace *Self-Represented Litigants: Gathering Useful Information, Final Report - June 2012* (Australian Centre for Court and Justice System Innovation, Monash University, June 2012) at VII.

⁸ Barbara Bezdek "Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process" (1991) 20 *Hofstra Law Review* 533.

began with a detailed exploration of the perspectives of LiPs so that, as far as is possible, I could understand their perspectives before returning to the more familiar territory of lawyers and courts.

Part of understanding LiPs in context is to understand the New Zealand court system and legal profession. I therefore open with a brief survey of the right to litigate in person in New Zealand, the right of appearance in New Zealand courts and tribunals, and the structure of legal advice services.

I. The New Zealand Context

As a former English colony, New Zealand's history of litigating in person begins in England. In this section I survey the evolution of litigation in person and representation through to the modern era. Twenty-first century New Zealand's court system has diverged from England's, but still follows many reforms (often in modified form) that are introduced in the UK. The second part of this brief survey sets out the New Zealand legal advice landscape as a backdrop to the discussion about litigating in person in the civil courts.

A. Evolution of Litigating in Person, Representation and Financial Assistance to Litigants

1. Civil Courts in 11th to 19th Century England⁹

In the early history of the courts, all litigants were required to appear in person and present their case in their own words: the outcome of the case turned on the litigant's exact words and the notion of agency had not yet developed.¹⁰ The idea of a legal representative, someone who stood as the litigant's agent before the court, evolved throughout the 12th and 13th centuries and by the reign of Edward I (1272-1307) the legal profession as we know it today had begun to take shape.¹¹ The rule that only approved practitioners (such as attorneys, serjeants and barristers) have a right of audience before the court had emerged.¹² The legal profession's evolution and its monopolization of the courts was so rapid that, while litigating in person had previously been mandatory, in 1259 the King felt it necessary to reinstate the right to litigate in person by decree (with the exception of pleas of the Crown, pleas of land and pleas of unlawful distraint).¹³

⁹ Litigation in person in criminal proceedings is historically distinct. See Rabeea Assy "Revisiting the Right to Self-Representation in Civil Proceedings" (2011) 30(3) Civil Justice Quarterly 267; Note "Right to Counsel in Civil Litigation" (1966) 66 Columbia Law Review 1322.

¹⁰ Frederick Pollock and Frederic William Maitland *The History of English Law: Before the time of Edward I* (2nd ed, Cambridge University Press, Cambridge, 1911) at 211.

¹¹ At 215.

¹² Duncan Webb "The Right Not to Have a Lawyer" (2007) 16 Journal of Judicial Administration 165 at n 45.

¹³ Pollock and Maitland, above n 10 at 217.

Courtroom architecture evolved, with increasing segregation of participants and portioned zones “as a result of turf wars about who can legitimately participate on the legal stage and the respect which should be afforded them”.¹⁴ In the superior courts, the procedure gradually became so complex and litigating in person so difficult that by the 1850s “only the most sanguine or foolhardy litigant would plunge into the procedural thickets that protected the courtrooms”.¹⁵ Rather than the norm, LiPs had become the exception.

There was, however, a concern with the ability of the poor to access the courts. One of the ways this was addressed was by allowing the poor to file a suit *in forma pauperis*, which initially only waived otherwise prohibitive court costs but was later expanded to provide attorneys to indigent civil parties.¹⁶ The *in forma pauperis* procedure was gradually eroded: “By the mid-eighteenth century the plaintiff had to pay for counsel’s opinion as to the merits of his case, an effective barrier to poor potential litigants”.¹⁷ The other mechanism to ensure access to the courts for the poor was the development of tribunals with simplified procedures including the Courts of Requests (originally called the Court of Poor Men’s Causes) and the General Eyre.¹⁸ In practice these courts were imperfect mechanisms for securing indigent litigants’ access to the courts, being costly and slow.¹⁹ Although of limited efficacy in practice, both mechanisms show a concern with securing access to the courts for those who could not afford to instruct a lawyer, a concern that sailed with the immigrants to colonial New Zealand.

2. *Civil Courts in 19th and 20th Century New Zealand*

New Zealand became a colony by the Royal Charter of 16 November 1840 and established a Legislative Council to make law and put in place a court system.²⁰ At its first meeting in June 1841 the Legislative Council passed an ordinance establishing the Courts of Request, a first instance civil court for summary proceedings to recover small debts, and barred advocates, requiring all

¹⁴ Linda Mulcahy *Legal Architecture: Justice, Due Process and the Place of Law* (Taylor and Francis, Hoboken, Online, 2010) at 39. See also Judith Resnik and Dennis Curtis *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses* (2007) at 136-137.

¹⁵ William Cornish and others *The Oxford History of the Laws of England Volume XI: 1820–1914* (Online ed, Oxford University Press, Oxford, 2010) at 816 noting that “One unwanted consequence of the High Court being so costly was that some determined or desperate men and women dispensed with the services of lawyers and the courts began to be infested with litigants in person”: citing the (1877-8) 22 *Solicitors Journal* 85, “It is impossible to conceal the fact that the litigant in person is fast becoming a serious nuisance in the court”.

¹⁶ Note, above n 9 at 1326.

¹⁷ Syd Holm *A History of Legal Aid in New Zealand* (Appendix 1 of *Access to the Law: A Research and Discussion Paper*, Department of Justice, 1981) at 1.

¹⁸ Note, above n 9 at 1326.

¹⁹ At n 23.

²⁰ *Laws of New Zealand Courts: Introduction* (online ed) at [1].

parties to appear in person.²¹ Later in the same year the Legislative Council passed the Supreme Court Ordinance 1841 establishing both the New Zealand legal profession and the Supreme Court (now the High Court) of New Zealand.²² The Ordinance provided the legal profession with an exclusive right of audience in the Supreme Court but allowed parties to appear in person. The procedure of *in forma pauperis* was imported to New Zealand in accordance with the principle that colonial settlers had the rights and protections of English law, and New Zealand followed English procedure having no rules of its own on the matter.²³ *In forma pauperis* assisted only a pauper, defined in 1896 as being someone “not worth the sum of £25, his wearing-apparel and the subject-matter of the action only excepted”.²⁴ It was not until the Legal Aid Act 1969 that New Zealand had any form of civil legal aid for those of “small or moderate means”.²⁵

The legal profession extended its rights of audience in 1867 when the Courts of Request (where advocates were barred) was merged with the Resident Magistrates Court and it was decreed that parties could “appear and act personally or by a barrister or solicitor of the Supreme Court and not otherwise”.²⁶ The legal profession’s exclusive rights of audience were not without challenge however, with two Bills coming before the House of Representatives “allowing anyone, lawyer or not, by whom a party wished to be represented, to appear in Court”.²⁷ The legal profession ultimately prevailed and maintained both an exclusive right of audience in the superior courts and barriers to entering the profession.

In 1976 the Small Claims Tribunals Act 1976 established what is now known as the Disputes Tribunal, for common forms of low-value disputes. The law on the Disputes Tribunal denied the legal professional any audience, making litigation in person mandatory. The Disputes Tribunal is also private, with no public audience allowed. Spiller has suggested that a motivation for the formation of the Disputes Tribunal and the exclusion of counsel was an anti-lawyering sentiment, “a desire to return to the supposed ideal state of nature, where reasonable and self-reliant men

²¹ Courts of Requests Ordinance 1841 4 Vic 6, s 10 “And be it further enacted and ordained, That no person whatever shall be permitted to appear and act in the Courts of Requests in any suit for or in behalf of any plaintiff or defendant in such suit unless it shall be first proved to the satisfaction of the Commissioner of such Court that such plaintiff or defendant is prevented by some unavoidable necessity or some good and sufficient cause from attending such Court in person”.

²² Supreme Court Ordinance 1841 (5 Vict No 1).

²³ *Brown v Bayly* (1896) 15 NZLR 39 (CA); *Wasteneys v Wasteneys* (1896) 15 NZLR CA 41.

²⁴ *Brown v Bayly*, above n 23.

²⁵ Legal Aid Act 1969, Long Title.

²⁶ Resident Magistrates Act 1867 (No 9), s 30. The District Court Act 1858, s 33 contained a similar restriction on rights of audience.

²⁷ Bruce Cameron "Legal Profession" in AH McLintock (ed) *Te Ara - Encyclopedia of New Zealand* (Online ed, Ministry for Culture and Heritage - Te Manatū Taonga, Wellington, 1966) .

settled their differences without intervention of legal professionals, arcane rules of law, or unnaturally complex procedure”.²⁸

3. *Civil Courts and Tribunals in Contemporary New Zealand*

The general rule is that it is an offence for someone other than a lawyer to appear “as an advocate for any person” or represent “any other person ... in proceedings before any New Zealand court or tribunal”.²⁹ The right to litigate in person is retained however as the law “do[es] not prevent any person from representing himself or herself in proceedings before any court or tribunal”.³⁰

There are a number of statutory exceptions to this general rule. Today there are over 100 tribunals in New Zealand, 19 of which determine first instance civil disputes.³¹ Their enabling legislation often allows either lawyers or lay advocates to represent parties (as in the Human Rights Review Tribunal³² and the Employment Relations Authority),³³ or their legislation makes litigation in person mandatory (as in the Disputes Tribunal).³⁴ Lay advocates are also entitled to appear in the Employment Court and District Court (both for individuals in limited circumstances, and for corporations).³⁵

New Zealand allows a LiP to have beside them in court a litigation assistant or McKenzie friend.³⁶ The purpose of a McKenzie friend is to assist the litigant, and provide advice and support, but they may not speak on behalf of the litigant except in special circumstances and they are not entitled to receive a fee.³⁷ They are lay advisers, often people with previous experience as litigants (represented or unrepresented), or some legal professional experience. The Law Commission recently considered the role of McKenzie friends, opining that they should continue to be allowed but their role should be spelt out in a new Courts Act where LiPs would easily be able to locate

²⁸ Peter Spiller *The Disputes Tribunals of New Zealand* (2nd ed, Brookers, Wellington, 2003) at 3 quoting Eric Steele "The Historical Context of Small Claims Courts" (1981) American Bar Foundation Research Journal 293.

²⁹ Lawyers and Conveyancers Act 2006, s 24.

³⁰ Lawyers and Conveyancers Act 2006, s 27(1)(a).

³¹ Law Commission *Table of all Bodies that may be Considered Tribunals* (NZLC OP2, 2008).

³² Human Rights Act 1993, s 108(3): “A person who has a right to appear or is allowed to appear before the Tribunal may appear in person or be represented by his or her counsel or agent”.

³³ Employment Relations Act 2000, sch 2(2): “Any party or person involved in a matter before the Authority ... may be represented by an officer or member of a union; or by an agent; or by a barrister or solicitor”.

³⁴ Disputes Tribunal Act 1988, s 38(7) (referees have no discretion to allow legal representation); Motor Vehicles Sales Act 2003, sch 1, cl 9 (does allow the adjudicator some discretion to admit representation).

³⁵ Employment Relations Act 2000, sch 3(2); District Courts Act 1947, s 57.

³⁶ The term originates from the UK case *McKenzie v McKenzie* [1970] 3 All ER 1034.

³⁷ Law Commission, above n 3 at [92]; *Mihaka v Police* [1981] 1 NZLR 54.

information on them. The Law Commission noted that, ironically, the right to have a McKenzie friend is rooted in common law, the last place a LiP is likely to be able to find out about them.³⁸

In the same report the Law Commission also considered the role of *amicus curiae*, or “friend of the court”. The Law Commission noted the wide range of circumstances in which an *amicus* might be appointed, including appearing where there is an unrepresented party in certain limited circumstances, but summarised the important point that: “The function of the advocate to the court is to give the court assistance on the relevant law and its application to the facts of the case. It is not his or her function to represent anyone”.³⁹

4. *The Special Position of Body Corporates*

In 1984 the Court of Appeal, in *Re GJ Mannix*, affirmed that “a natural person of sufficient age and capacity cannot be denied the right to present his case in person” but held that only a barrister can represent a body corporate in the superior courts.⁴⁰ This rule can be traced to at least the early 17th century⁴¹ and the court in *Mannix* justified its continuation on the grounds that it is an expression of the rule that only lawyers and litigants in person have a right of audience: as a corporation is not a natural person it cannot appear in person and therefore must be represented by a lawyer.⁴² The justifications advanced by the Court in *Mannix* also included the arguments that courts (particularly the superior courts) are best served by those who owe duties to the court⁴³ and that there is greater judicial efficiency where a professional advocate presents a case.⁴⁴ The Rules Committee considered amending the rule in 2011 but retained the status quo.⁴⁵ The court retains a residual discretion to hear lay company representatives and the rule in *Mannix* does not apply in the District Court.⁴⁶

³⁸ Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at para 15.14-15.15.

³⁹ Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012).

⁴⁰ *Re G J Mannix* [1984] 1 NZLR 309 (CA) at 312.

⁴¹ *Re Sutton's Hospital Case* (1612) 10 Co Rep 23a; 77 ER 960.

⁴² *Re G J Mannix*, above n 40 at 311 per Cooke J. The justifications for the rule in *Mannix* relating specifically to the status of a company include that companies have a special privilege in the form of limited liability and that being represented by counsel is a price of that special privilege (*Chesterfields Preschools Limited v Commissioner of Inland Revenue* [2012] NZHC 2629 at [30]; *GB & JZ Chambers Ltd v AEL Corporation Ltd* (1994) 7 PRNZ 635) and that that lay representatives may not have authority to bind the company (*Chesterfields Preschools Limited v Commissioner of Inland Revenue*, above n 42 at [26]). Cf Peter Watts "Should Companies be Entitled to Lay Representation in our Superior Courts?" [1998] Company and Securities Law Bulletin 86 at 87).

⁴³ *Re G J Mannix*, above n 40 at 311; *GB & JZ Chambers Ltd v AEL Corporation Ltd*, above n 42 at 640.

⁴⁴ *Re G J Mannix*, above n 40 at 312; *GB & JZ Chambers Ltd v AEL Corporation Ltd*, above n 42 at 640.

⁴⁵ Don Mathieson "Reforming Civil Procedure" (2012) 43 Victoria University of Wellington Law Review 127 at n 42; New Zealand Law Society "Problems seen with any changes to company representation in court" (8 August 2011) <www.lawsociety.org.nz>.

⁴⁶ District Courts Act 1947, s 57(2) "A corporation may appear by any officer, attorney, or agent of the corporation".

B. Current Legal Advice Landscape in New Zealand

1. Changes to the Legal Profession's Practising environment

This study took place against a backdrop of very significant shifts in the practising environment. The most obvious of these was the closing of six of the 63 District Courts and shifting the registries of seven other District Courts, creating hearing-only courts in these seven small centres, with their registries operating from the nearest major centre.⁴⁷

There were also significant changes to the criminal bar. Beginning in 2009, a pilot programme of the Public Defender Service (PDS) began for criminal defendants. It was then rolled out to major centres nationwide in 2012. The private defence bar's work has been considerably affected with 50 per cent of defence work in major metropolitan areas now going to the PDS. Anecdotally, this has created pressure on workflows in other practice areas as former defence lawyers look for alternative streams of work.

The change with the most direct bearing on this study was the introduction of significant family justice reforms in March 2014. Among these was a requirement that, with some limited exceptions, litigants may not be represented by a lawyer in Care of Children Act 2004 (COCA) proceedings.⁴⁸ Litigants can, however, access four hours of legally aided advice (if they meet the criteria for legal aid) during this process.⁴⁹ The role of lawyer for child in COCA applications has been greatly reduced, with appointments made only in specific circumstances, rather than routinely.⁵⁰ The emphasis is on controlling government spending and encouraging disputants to take individual responsibility for resolving their matters.⁵¹

⁴⁷ Ministry of Justice "Changes to Court Services" (2013) <www.justice.govt.nz>. The changes were billed as changes to "modernise and improve how we deliver court services" but some of the changes were also related to closure of buildings because of the findings of seismic risk assessments undertaken after the Canterbury Earthquakes.

⁴⁸ Care of Children Act 2004, s 7A(4)(a), inserted on 31 March 2014 by s 5 of the Care of Children Amendment Act (No 2) 2013. For further discussion of the reforms see: Tim Black and others *The New Family Justice System - Fundamental Change* (New Zealand Law Society Continuing Legal Education, Wellington, 2014); Mark Henaghan and Meghan Nicholson "Family Law" (2014) 2 New Zealand Law Review 321 at 347-353.

⁴⁹ There is no limit on the amount of privately funded legal advice a litigant may source.

⁵⁰ The parties must generally contribute to the cost of the appointment of lawyer for child: Care of Children Act 2004, above n 48, s 135A. Early anecdotal indications are that this concern may not be borne out, with a lawyer for child appointed more frequently to assist the Court: Sasha Borissenko "Does Self-Representation Provide Access to Justice?" (15 March 2015) 860 LawTalk 7 at 8.

⁵¹ Mark Henaghan "Changing Politics of Family Law in New Zealand" (2012) International Survey of Family Law 253 at 256 says that "the primary thrust of the review is fiscal" and also notes queries raised about the reliability of figures on which it is based that supposedly show significant increases in spending. Similar reforms occurred in the UK in 2013 with the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012. LASPO did not make litigating in person mandatory but did remove legal aid for most private family cases and an increase in LiPs was an anticipated consequence of the reform: Ministry of Justice *Proposals for the Reform of Legal Aid in England and Wales, Consultation Paper CP12/10 Cm 7967* (TSO, 2010). See also John Eekelaar and Mavis Maclean

2. *Legal Aid*

The introduction of the PDS and the 2014 family justice reforms are part of the Government's strategy to reduce spending on legal aid.⁵² In addition, the thresholds for accessing legal aid for general civil matters were lowered, fees were introduced for accessing legal aid, and interest charged on legal aid loans.⁵³

Together these changes have meant that legal aid spending dropped from \$172 million in 2009/10 to \$125 million in 2012/13. The budgeted amount for 2014/2015 was \$109.5 million.⁵⁴ The changes that have occurred within what was already a small protected area of work have arguably created an environment where the legal profession has become highly defensive, a profession under siege. Buckingham has argued that "the shrinking allocation of state litigation resources" has put systemic pressures on New Zealand's legal profession, creating ethical strain at an individual level.⁵⁵

3. *Availability of Free Legal Assistance*

There is a nationwide network of Community Law Centres (CLCs), providing advice and advocacy for those who do not qualify for legal aid but who cannot afford to pay for a lawyer. The CLCs are independently governed but belong to a national network and contract for community legal services from the MoJ. Some also have local governmental or non-government funding.⁵⁶ They all have some paid staff but also rely on the contribution of pro bono advice from the profession and assistance from law students. The services offered vary from centre to centre, depending on funding and expertise of the staff and volunteers.

During the course of this study there was no coordinated pro bono service in existence. There have been repeated calls for such a service and one is proposed.⁵⁷ A few of the large legal firms have a pro bono programme, and many individual practitioners do offer a pro bono service on an

Family Justice: The Work of Family Judges in Uncertain Times (Hart Publishing, Oxford, 2013) at 184-207 for a discussion of the philosophical orientation of the UK family justice reforms.

⁵² Spending on legal aid had increased from \$111 million in 2006/07 to \$172 million in 2009/10 Ministry of Justice "Legal Aid Factsheet: Changes to Manage Legal Aid Spending" (April 2011) <www.justice.govt.nz>.

⁵³ Legal Services Regulations 2011 regs 5 and 6. The thresholds increase with the number of dependent children. The median personal income from all sources per person in 2013 was \$28,500 Statistics New Zealand *2013 QuickStats about Income* (2014) at 12.

⁵⁴ The Treasury "Vote Justice: Estimates of Appropriations 2014/15" (July 2014) <www.treasury.govt.nz>.

⁵⁵ Donna Buckingham "Legal Governance in New Zealand - Reporting Academically from the Co-Regulatory Ramparts" (Keynote Address, Australia New Zealand Legal Ethics Colloquium, 28 November 2013).

⁵⁶ Community Law "Supporters" <www.communitylaw.org.nz>.

⁵⁷ Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (2014) 13(2) *Otago Law Review* 229 at 239; Chris Gallavin "A Professional Obligation to Act Pro Bono" (4 July 2014) 847 *LawTalk* 19.

ad hoc basis, but there is no centralised service or point of contact for litigants seeking pro bono assistance.

II. Scope of Inquiry

This research examines the LiP phenomenon in one of our “central and emblematic legal institutions”:⁵⁸ our core trial courts. As mentioned, New Zealand has an extensive system of tribunals, including two high volume tribunals: the Disputes Tribunal for general small claims of up to \$15,000, which in 2014, disposed of 14,757 cases, and the Tenancy Tribunal, which, hears all tenancy disputes and disposed of 20,299 cases in 2014. Rather than study these tribunals, designed with LiPs in mind, the research is on LiPs in the civil courts, the traditional province of lawyers. It covers the District Court (which has jurisdiction over civil disputes up to a value of \$200,000, and disposed of 590 defended civil cases in the 2014 calendar year), the Family Court (a division of the District Court, with by far the highest number of cases of any civil court, disposing of 60,768 cases in 2014) and the High Court (which has unlimited jurisdiction over civil disputes and disposed of 2,473 civil cases plus 302 civil appeals in 2014).

I chose to limit my study to cases where only one party was a LiP and the other was represented. Cases where both parties were LiPs, at least before the Family Court reforms, were thought to be less common. In cases where only one party is a LiP the potential for unfairness, and the absence of shared professional norms and etiquette, are also most stark.

This research focusses primarily on LiPs who actively engage with the court process. It is likely that the general population of LiPs contains many “inactive” litigants who take no active role in their proceeding.⁵⁹ Why LiPs are inactive and whether they have problems gaining access to justice remains a separate topic for future investigation. This research considers those who actively engage with the court process, their experience of doing so, and the perceptions of the judges, lawyers and court staff to their attempts to access the courts.

A. Terminology

While conducting this research, I used the term “self-represented litigant”. Self-representation is, of course, a contradiction in terms: to “represent” means to act on another's behalf. “Litigant in person” is the dominant term within the legal profession, but is opaque to the uninitiated and I

⁵⁸ Marc Galanter "A World without Trials" (2006) 2006 Journal of Dispute Resolution 7 at 33.

⁵⁹ Richard Moorhead and Mark Sefton *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (2/05, United Kingdom Department of Constitutional Affairs Research Series 2005) at 62-63 record a large number of inactive litigants in family cases and civil cases and note at 62 that “Inactivity is difficult to interpret. It may involve resignation to court proceedings, perceived irrelevance or a form of resistance to the legal process”.

was concerned its use may therefore alienate, or be incomprehensible, to the main subjects of the research. “Unrepresented litigant” carries with it an implication that something is missing (a lawyer) and I prefer to avoid that implication. “Lay litigant” is sometimes used by the legal profession, but the corollary of that term is that those who are represented are “professional litigants”. That is nonsensical, as all litigants who are not also lawyers are lay (although some may consider persistent litigants almost professional).⁶⁰

The fieldwork and writing led me to the conclusion that LiP is the preferable term. While I still consider it is a difficult term for those outside the profession to understand, it has several advantages. First, it places the litigant at the centre of the discussion on policy reform. Litigants are either appearing in person, or by an agent (a lawyer), whereas the opposite of self-represented or unrepresented is represented, emphasising the place of lawyers. Second, while LiP is a difficult term for non-legally trained people, the participating LiPs had mastered a range of legal terms and legal discourse. So it was not beyond their understanding and some used it in interviews. Third, the risk of using “self-represented litigant” is that it implies a person can be one's own lawyer. One of the arguments in the thesis is that this is not possible, as there are conflicts between the roles of litigant and representative. One LiP participant in my research counselled that advice to LiPs:

... should also be prefaced with 'Remember, you're not detached'. So who are you? Are you your own counsel? In which case you are schizoid. ... Do I talk in the third person or do I talk in the first person? That has always been an issue. Do I formalise it or do I personalise it? (High Court LiP)

The term LiP suggests a clearer answer to this problem: that the litigant is not their own lawyer, but someone appearing in person. For these reasons I have used LiP as the best of the imperfect options.

B. Organisation of the Thesis

In the next chapter I review the literature that is relevant to the research questions, as well as providing an overview of the possible responses that may be made to LiPs seeking access to the courts. Chapter 3 discusses the methods and methodology employed in this study, along with extended discussion of ethical issues raised.

Presentation of the research findings begins in Chapter 4 which examines decisions to litigate in person. It is followed by a short chapter containing four litigants' stories (Chapter 5); the

⁶⁰ Other terms more readily dismissed were the Latin tag “*pro se*”, which is almost unknown in New Zealand and, as a Latin term, even more alienating than “LiP”. The Family Court has adopted the term “self-litigant” on its website but this is not widely used inside or outside the legal profession, and is specific to New Zealand.

construction of these is explained in Chapter 3 on methods. Their purpose is to give the reader a greater sense of the experience of litigating in person than the ordered presentation and analysis of findings can provide. The litigant stories are drawn on in the analysis in the chapters that follow.

The subsequent chapters are organised according to the usual chronology of the court process: the process before court (Chapter 6), negotiation and settlement at the courtroom door (Chapter 7), appearing in court (Chapter 8) and finally judgment, appeals, enforcement, costs and complaints after court (Chapter 9). I chose this structure because I wanted to take the reader through the experience of litigating in person and the challenges each stage presents. Many LiPs never make it further than the process before court discussed in Chapter 6. The first half of each of these chapters presents research findings concerning the participants' perspectives. The second half discusses these empirical findings in the context of the major arguments in the thesis.

Chapter 10 draws together the themes developed in the chronological exploration of the court process and examines potential policy responses to the findings of this research. In this fashion the thesis attempts to answer the questions: Why do litigants become litigants in person? What is their experience of litigating in person? How do judges, lawyers, and court staff respond to them and perceive LiPs?

Chapter 2

Literature Review

There have been three recent reviews of literature on LiPs, in the United Kingdom (UK), Australia and the United States (US).¹ All note that, despite the concern and the range of programmes being implemented to solve the LiP “problem”, there is little high quality data that answers questions such as, how many LiPs are there? In what kinds of cases do they appear? Who are they? What motivates them to litigate in person? What strategies assist them? This chapter focuses on the evidence and scholarly discussion that provide the foundation for my research questions, and on material concerning the New Zealand context.

I begin by reviewing what we know about the numbers of LiPs in New Zealand and who they are, including those who are considered persistent or vexatious. I then review literature relating to my first research question, why people litigate in person.

In the second section I turn to the broader question of LiPs’ place in the civil justice system, their right to litigate in person and explanations of attitudes towards them, as well as the purpose of the civil justice system. This section looks at what lawyers offer their clients and the legal profession. It reviews what we know about outcomes for litigants who proceed without a lawyer.

The final section surveys the various possible responses that have been proposed, or have been implemented in some jurisdictions, to the apparent rise in LiP numbers. It arranges these responses in a taxonomy that I will refer to again in Chapter 10 when considering what my research suggests about the efficacy or appropriateness of these responses.

I. How Many, Who and Why?

A. *How Many?*

There is very little data in New Zealand on the number of LiPs in the courts. As in the other common law jurisdictions, such data as there are is often collected in a piecemeal fashion,

¹ Kim Williams *Litigants in Person: A Literature Review* (Ministry of Justice, United Kingdom, 2011) at 3; E Richardson, T Sourdin and N Wallace *Self-Represented Litigants: Literature Review* (Australian Centre for Court and Justice System Innovation, Monash University 2012) at [3.3]; Stephan Landsman "Pro Se Litigation" (2012) 8(1) Annual Review of Law and Social Science 231 at 240-241.

sometimes by individual courts or judges, or sometimes by the Ministry responsible, and its accuracy and reliability are variable.² The data are often collected for differing reasons (usually record keeping, not analysis) and therefore lack the scope and detail on issues that researchers might want to answer. There are also definitional issues about who is counted as a LiP. For example, whether a person is represented can change over the life of a case, and defendants who take no steps, including not appointing counsel, might be better characterised as “inactive”, rather than as LiPs.³

Data currently cited in New Zealand, collated from the few Court registries that collect LiP statistics, should therefore be treated with caution. In the High Court, the reported percentage of cases involving one or more LiPs is 35 to 40 per cent in judicial review cases, and 20 to 30 per cent in appeals (in the Wellington and Auckland High Courts respectively).⁴ As discussed in the following chapter, my attempts to collect data on LiP numbers using MoJ records were unsuccessful.⁵ The MoJ study is the only one conducted in New Zealand and it surveyed only the summary criminal and family jurisdictions.⁶ The MoJ study counted LiPs by asking registrars to record the number of litigants appearing in person in proceedings in five different courts over a period of four to six weeks, or where available, it extracted this data from the case management system.⁷ The study found that 7-17 per cent of cases in the Family Court involved LiPs (varying across different geographic locations), and that LiPs were most likely to appear in cases arising under the COCA or the Domestic Violence Act 1995.⁸

There is a perception that numbers of LiPs are rising in New Zealand but there is no data available to show whether this perception is correct.⁹ The MoJ is currently undertaking a study to look at

² See for example Julie Macfarlane *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report* (May 2013) at 33 on data collection in Canada. This problem has long been identified, see for example Paula Hannaford-Agor and Nicole Mott "Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations" (2003) 24 *Justice System Journal* 163 at 164.

³ Richard Moorhead and Mark Sefton *Litigants in Person: Unrepresented Litigants in First Instance Proceedings - Department of Constitutional Affairs Research Series* (2005).

⁴ Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (2014) 13(2) *Otago Law Review* 229 at 8. Winkelmann J also reports that 25 per cent of active civil files in the Court of Appeal involve a LiP, and 32 of the 60 applications for leave to appeal filed in the Supreme Court in 2014 were LiPs.

⁵ For further discussion see Chapter 3, pages 53-54.

⁶ Melissa Smith, Esther Banbury and Su-Wuen Ong *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (prepared for the Ministry of Justice 2009).

⁷ Smith, Banbury and Ong, above n 6 at 28. The period of data collection varied from four to six weeks but no explanation is given as to why there was a variation in the period or how the time periods were selected i.e. whether they were random. This may have some effect on the validity of the data.

⁸ At 6 at 33-35.

⁹ At 32. More than two thirds of the informants thought the number of LiPs was rising. Note this mirrors the finding in Moorhead and Sefton's study where “court staff, lawyers and judges we spoke to tended to suggest either that they were uncertain about medium and long term trends or that there had been a substantial increase in numbers”. That study could only report limited data from information from trials in civil cases which showed a slight increase in

changes in numbers of LiPs in the Family Court before and after the 2014 Family Court reforms. That data is not yet available but obviously the expectation is that, as legal representation has been prohibited by law in the early stages of many family cases, an increase will be recorded.

The data available internationally is of limited relevance to New Zealand, as distinct factors that can be expected to affect LiP numbers, such as legal aid eligibility, the legal advice market, and the courts' structure and procedure, are different in each country. The data gives some context, however, about the magnitude of the issue in other common law jurisdictions and helps explain why it has received increasing attention in recent years. In the UK, the Moorhead and Sefton study found that in civil cases the number of LiPs who actively participated in cases in the civil jurisdiction ranged from 3 per cent (individual claimants in the High Court) to 28 per cent (individual defendants in the County Court). The number of active LiPs in Family Court cases was 15-21 per cent (for ancillary relief, injunctions and Children Act cases) to 60-64 per cent (for adoption and divorce cases). A recent UK MoJ study led by Trinder said that number has likely increased, as the UK has recently introduced sweeping reforms to legal aid.¹⁰ Studies of the Australian Family Court found around 30 per cent of litigants were LiPs at first instance.¹¹ In the Australian Federal Magistrates Court, from 2009 to 2012, approximately 36 per cent of cases had at least one LiP party.¹² Macfarlane characterises the numbers of LiPs in the Canadian courts as "extraordinary".¹³ Family Court LiPs in Canada constitute 40 per cent or more of litigants, and the first instance courts (excluding small claims) have 20-30 per cent of litigants appearing unrepresented.¹⁴

1. *A small portion of the whole*

It is useful to keep these numbers in context: people who become litigants (with or without representation) are only a fraction of those who have a legal problem. As Felstiner, Austin and Sarat argued in their seminal 1980 article, disputes themselves are social constructs, and before they can emerge as legally cognisable problems, people have to name, blame and transform them

numbers of LiPs after 2001 (when the Access to Justice Act was introduced) but otherwise did not "support an increase in litigants in person, rather, the opposite", though they noted it was possible there had been an increase in the number of LiPs whose cases did not proceed to trial: Moorhead and Sefton, above n 3 at 19 and 60-61.

¹⁰ Liz Trinder and others *Litigants in Person in Private Family Law Cases* (Ministry of Justice, United Kingdom, 2014) at 2.

¹¹ Richardson, Sourdin and Wallace, above n 1 at 25-26.

¹² At 26.

¹³ Macfarlane, above n 2 at 32.

¹⁴ At 33-34.

into disputes.¹⁵ Once this process is achieved, only a portion of those disputants will go on to bring legal action. In 2006, the New Zealand Legal Services Agency conducted a national survey of unmet legal needs, based on the English and Welsh Civil Law and Social Justice surveys.¹⁶ Twenty-nine per cent of those surveyed had experienced at least one non-trivial problem in the last 12 months.¹⁷ However, of those experiencing a non-trivial problem, only nine per cent had resolved their problem after a court or tribunal action, and another 10 per cent were either currently involved in or intending to use court or tribunal action to solve the problem.¹⁸ LiPs are, therefore, only a portion of the fraction of people who use the formal justice system to resolve disputes.

B. Who are they?

The New Zealand data on who LiPs are very limited. The MoJ study found that most Family Court LiPs are New Zealand European men aged 30-49.¹⁹ There is no demographic data available on LiPs (or any litigants) bringing claims in the High Court or the District Court (Civil).

The international material is again of limited use as we have different socio-economic factors at play in New Zealand which might influence the demography of LiPs. Williams's literature review concluded that the international evidence suggests that LiPs:²⁰

... were more likely to have lower incomes and educational levels than those who receive representation, and were likely to be younger. ... [M]en were more likely to be unrepresented than women, and were usually the respondents in proceedings.

¹⁵ William LF Felstiner, Richard Abel and Austin Sarat "Emergence and Transformation of Disputes: Naming, Blaming, Claiming ..." (1980) 15 *Law & Society Review* 631.

¹⁶ Legal Services Agency *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Legal Services Agency, 2006). The methodology was peer reviewed by Pascoe Pleasance. They surveyed 7,200 New Zealanders and questioned them about problems with a legal aspect for example employment, debt, and family breakdown.

¹⁷ At 15.

¹⁸ At 27-28.

¹⁹ 137 LiPs were identified in the MoJ Study and information about their gender was extracted from the case file. This was a sufficiently large sample to give reliable results about the gender composition of LiPs in the Family Court. It found that 66 per cent of LiPs are male and 34 per cent female compared to a division of 33 per cent male and 50 per cent female in cases where both parties are represented (12 per cent being organisations such as CYF and 5 per cent unknown). The age data was also extracted from the case file and showed that most LiPs (but also most represented litigants) were aged 30-49 years. The age of a significant proportion of litigants (28 per cent of the LiPs and 38 per cent of the represented litigants) was unknown. The ethnicity data's accuracy is also limited by the large number of people litigants with unknown ethnicity (18 per cent of LiPs and 32 per cent of represented litigants). There was a significant difference between the number of New Zealand Europeans in the LiP sample (59 per cent) and in the represented litigants sample (34 per cent). There was no statistically significant difference between the number of Māori, who made up 14 per cent of the LiP sample and 16 per cent of the represented litigant sample. The other demographic data (income and education) was gathered from interviews with the LiPs. Only 37 per cent of the LiPs were interviewed. It is therefore not possible to say within any certainty that the interview data can be extrapolated to the general population.

²⁰ Williams, above n 1 at 4.

Williams also reports that there is evidence that LiPs “sometimes displayed indicators of vulnerability”, including “being victims of violence, having depression, a problem with alcohol/drug use, having a mental illness or being extremely young parents”.²¹ The Trinder study, published since Williams’s review, examined and identified further vulnerabilities in the LiP population, concluding that over half that study’s sample of LiPs “suffered one or more vulnerabilities”.²²

Genn argues that it is necessary to develop a typology of LiPs to be able to tailor measures to assist them in court.²³ She gives the example of “‘paradigm’ one-shotter individual LiPs [who] will have varying degrees of education and general competence”.²⁴ She suggests that those with “high levels of competence and determination” will benefit from information and advice, but those with lower education or general competence might need more assistance.²⁵ The Council for Civil Justice Working Party report (of which Genn was an author) takes a similar approach, suggesting that part of the solution would involve “more flexibility, more triage, more choices for individuals, more allocation to different types of dispute resolution according to different types of people, different types of case, different types of circumstances”.²⁶

While there is intuitive appeal to identifying the characteristics of LiPs and tailoring responses accordingly, the Trinder study found: “There appeared to be no clear relationship between being highly educated, professional and articulate and being able to handle family law proceedings effectively”.²⁷ Similarly, Macfarlane found that educated and knowledgeable litigants reported they had underestimated the intellectual and practical challenges of the system and found the system “difficult to understand”.²⁸

This suggests that a more helpful categorisation of LiPs is one that locates them in the context of the particular proceedings in which they are engaged. The Trinder study developed such a typology, identifying eight types of “working” and “not working” LiP hearings.²⁹ Rather than

²¹ At 4.

²² Trinder and others, above n 10 at 26-27. The further sources of vulnerability identified were: physical disability/ill-health; behavioural disorders such as ADHD and Asperger Syndrome; learning difficulties – including two LiPs with borderline mental capacity to make decisions on their own behalf; dyslexia; difficulty controlling emotions; extreme nerves and anxiety – causing sleeplessness, vomiting and panic attacks; language difficulties.

²³ Hazel Genn "Do-it-Yourself Law: Access to Justice and the Challenge of Self-Representation" (2013) 32(4) Civil Justice Quarterly 411 at 444.

²⁴ At 444.

²⁵ At 444.

²⁶ Civil Justice Council *Access to Justice for Litigants in Person (or Self-Represented Litigants)* (November 2011) at [64].

²⁷ Trinder and others, above n 10 at 24.

²⁸ Macfarlane, above n 2 at 31.

²⁹ Trinder and others, above n 10 at 60-68.

concentrating on demographic characteristics of the LiP, this typology takes a more interactional approach. LiPs were typed by their approach to the case. Characteristics that facilitated working hearings included LiPs being calm, settlement oriented, confident and prepared. Characteristics that made hearings less workable were LiPs being volatile, litigious, over-confident, overwhelmed or poorly prepared. Other factors that affected whether the hearing was “working” or “not working” were also part of the model, including the style of the judge, the approach of opposing counsel, and the features of the case (complexity, risk, and conflict).³⁰

Earlier work by Conley and O’Barr examined discourse employed by LiPs in a small claims court. They developed two categories: “relational” litigants and “rule-oriented” litigants.³¹ Rule-oriented litigants’ accounts meshed better with the adjudicator’s orientation, as these litigants interpreted their disputes in terms of rules and principles that applied irrespective of social status. Relational litigants’ accounts were perceived by the adjudicator as rambling and imprecise, as they focused on social status and social relationships, not rules and principles. Hunter, referring to this work,³² developed three categories of LiPs “defined by their experiences of and behaviour within the appeal process”: the vanquished, the procedurally challenged, and serial appellants.³³ The Trinder study suggested a fourth category of “legally challenged”, to be added to Hunter’s categories.³⁴

I suggest these categorisations are more helpful than looking at who LiPs are in isolation. As Bezdek explains, “we erroneously narrow the frame if we limit the discussion to individual competence and capability”.³⁵ A study of LiPs must attend to not just who they are in isolation, but their interaction with the other participants.

1. *Unusually Persistent Litigants – a sub-category of LiPs?*

The literature on LiPs sometimes delineates between “genuine” or “deserving” LiPs, on the one hand, and litigants variously described as “difficult”, “persistent”, “querulant”, or “vexatious”, on the other.³⁶ Moorhead and Sefton propose that “[t]he obsessive litigant ... has a popular and

³⁰ At 67-68.

³¹ John Conley and William O’Barr *Rules Versus Relationships* (University of Chicago Press, Chicago and London, 1990).

³² Rosemary Hunter and others *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (2002) at 133 suggests “rights orientation” should be added to Conley & O’Barr’s schema as many LiPs drew on a general rights discourse which has percolated through society to argue their cases.

³³ At 103-104.

³⁴ Trinder and others, above n 10 at 25.

³⁵ Barbara Bezdek “Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process” (1991) 20 Hofstra Law Review 533 at 537.

³⁶ See for example Genn, above n 23 at 426.

powerful place in the legal imagination”.³⁷ They note a tendency for lawyers, academics, court staff and others “to speculate on a link between [obsessive] litigants and mental health problems”.³⁸

Defining and describing the various categories of people who exhibit persistent or obsessive disputing behaviour has been the topic of discussion in psychiatric literature dating back to at least the early twentieth century.³⁹ There remains no consensus on whether difficult and persistent disputing behaviour has a pathological cause, or, if so, what that might be. The early literature classified problematic disputing behaviour as “querulant paranoia” but that diagnosis fell out of favour, along with psychiatric interest in the topic, over the latter part of the twentieth century.⁴⁰ In the most recent thorough psychiatric review, Mullen and Lester argue that “vexatious litigants and unusually persistent complainants” are better understood as people exhibiting “a constellation of behaviours and attitudes, which may, or may not, be characterized by delusional phenomena”.⁴¹ They note such litigants are often functional individuals before becoming involved in a dispute, but “with the benefit of hindsight certain vulnerabilities can often be recognised”.⁴² These include personalities that are marked “more frequently than might be expected” with “obsessional traits, self-absorption, and more than usual levels of sensitivity and self-reference”.⁴³

There is a small but growing legal literature on vexatious or persistent litigants, as well as judicial engagement with the topic.⁴⁴ Moorhead and Sefton suggest:⁴⁵

There are three main species of behaviour which, although not uncommonly found in the same litigant, can individually or collectively lead to the judgment that a litigant is difficult or obsessive:

- The making of far fetched or totally meritless claims;

³⁷ Moorhead and Sefton, above n 3 at 79.

³⁸ At 79. See for example Tania Sourdin and Nerida Wallace "The Dilemmas Posed by Self-Represented Litigants: The Dark Side" (2014) 24 *Journal of Judicial Administration* 62 at 63.

³⁹ Paul Mullen and Grant Lester "Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour" (2006) 24(3) *Behavioral Sciences & the Law* 333 at 334 survey the psychiatric literature, citing articles from 1904 onwards. See also Olli Stålström "Querulous Paranoia: Diagnosis and Dissent" (1980) 14(2) *Australian and New Zealand Journal of Psychiatry* 145 at 147, tracing the term “querulous paranoia” back to Prussia in 1793.

⁴⁰ Mullen and Lester, above n 39 at 334-335. For discussion of the problems with the psychiatric diagnosis of querulous paranoia see Stålström, above n 39.

⁴¹ Mullen and Lester, above n 39 at 334.

⁴² At 343.

⁴³ At 343. Mullen and Lester also refer to vulnerabilities involving limited social networks, at 344.

⁴⁴ Michael Taggart "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896" (2004) 63 *Cambridge Law Journal* 656; Michael Taggart "Vexing the Establishment: Jack Wiseman of Murrays Bay" [2007] *New Zealand Law Review* 271; Didi Herman "Hopeless cases: race, racism and the 'vexatious litigant'" (2012) 8 *International Journal of Law in Context* 27; Ian Freckelton "Querulant Paranoia and the Vexatious Complainant" (1988) 11(2) *International Journal of Law and Psychiatry* 127; Ian Freckelton "Editorial: Vexatious Litigant Law Reform" (2009) 16 *Journal of Law and Medicine* 721; Sourdin and Wallace, above n 38. *Corbett v Western* [2011] 3 *NZLR* 41 at [8].

⁴⁵ Moorhead and Sefton, above n 3 at 80.

- The making of repeated claims (or applications within cases) of a similar type and/or against the same or similar litigants (relitigation or harassment of individuals);
- Behaving in an abusive and/or uncooperative manner.

Moorhead and Sefton do not use the term “vexatious litigants” because that is a “term of legal art”, but those declared vexatious will likely have engaged in some or all of these forms of behaviour.⁴⁶ Herman critiques the use of vexatious litigant declarations in the UK, pointing to the overrepresentation of non-white/immigrant litigants who have been declared vexatious. He urges an examination of the social and political contexts of so-called vexatious litigation, rather than pathologising individuals. Mullen and Lester also caution that:⁴⁷

Querulous behaviour has to be separated from the over-enthusiastic, and even disruptive, pursuit of justice that remains within normal limits, or is legitimized by the social agenda being pursued.

Actions that may appear obsessive and paranoid may become justifiable when another cultural or political lens is applied. As Herman argues, vexatiousness can be seen as a “passionate search for justice, as opposed to, or at least as well as, an ‘obsession’”, and a “melancholic attachment” to the pursuit of a particular agenda can “can underpin human agency and social change”.⁴⁸

Such readings may only receive, at best, impatient attention from those encountering such litigants.⁴⁹ While small in number, these litigants are of great concern to court staff and judiciary to the extent that discussion of LiPs in general may be subsumed into discussion of these persistent litigants. Genn posits that “because of the challenges it presents to the legal system, [the category of difficult or vexatious litigants] distracts minds and discussion, and can overwhelm the attention of the judiciary”.⁵⁰ Moorhead and Sefton suggest that the “‘mad, dangerous and stupid’ litigants” distracted the attention of the judiciary because “they posed the greatest challenge to their resources and skills, or that they provided better stories”.⁵¹

In the face of such distraction, it is important to remember that such persons represent only a small fraction of litigants. Moorhead and Sefton found that in UK first instance courts the number

⁴⁶ At 80.

⁴⁷ Mullen and Lester, above n at 340. Similarly, discussing the use of the diagnosis of “querulous paranoia”, Stålström, above n 39 at 147 argues, “that the label may easily become one used primarily for dampening or devaluing social or political dissent”.

⁴⁸ Herman, above n 44 at 28-29.

⁴⁹ Genn, above n 23 at n 77 refers only to Herman’s argument in a footnote as a “sympathetic reading of vexatious litigants”.

⁵⁰ At 427.

⁵¹ Moorhead and Sefton, above n 3 at 89-90.

of obsessive and difficult litigants was very small, with respondents describing the numbers as “de minimis”, “a fraction of a per cent” and “a tiny proportion, very, very, tiny”.⁵² The fraction is probably greater in the higher courts.⁵³ It should also be remembered that not all difficult and persistent litigants are unrepresented. The Trinder study on private family law disputes, for example, found that, of the small numbers of serial applicants, half were LiPs and the other half were represented.⁵⁴

The number of litigants declared vexatious is even smaller. The New Zealand Law Commission notes that the declaration is an “extreme measure” and that there are “only a handful of orders under s 88B in existence”.⁵⁵ Some have proposed that this may be due to the difficulty involved in obtaining such a declaration, not due to the small number who warrant it.⁵⁶ In 2012, the Law Commission recommended the introduction of a graduated system of orders for restraining vexatious actions, similar to that introduced in the UK, but this is not yet in force.⁵⁷

C. Why Litigate in Person?

A number of studies in the UK, USA, Canada and Australia have gathered evidence about why people are litigating in person, either as part of a survey or from interview data. The reasons for litigating in person are sometimes presented as a dichotomy between having to do so for financial reasons and choosing to do so.⁵⁸ It has also been proposed that different assistance might be required by those choosing to litigate in person versus those who are motivated by financial reasons.⁵⁹ Some studies that include interviews with LiPs, rather than only surveying judges, lawyers and court staff, note that LiPs often give a number of reasons for litigating in person.⁶⁰

⁵² At 3 at 80.

⁵³ Freckelton, above n 44 at 722.

⁵⁴ Trinder and others, above n 10 at 32.

⁵⁵ Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012) at [16.11]-[16.12]. New Zealand did not have any legislation to control vexatious litigants until 1965 when s88B of the Judicature Act 1908 became law. It is modelled on the English statute introduced almost 70 years earlier, the Vexatious Actions Act 1896. See Taggart, above n 44 at 321-322. Section 88B allows the court to make an order that restrains a vexatious litigant (although that term is not used in the section) from bringing or continuing proceedings except with the leave of the court. There was limited support for the legislation from either the New Zealand Law Society or the court Registrars who saw little pressing need to deal with the small number of persistent litigants who might be termed vexatious. It was nevertheless “enacted without a voice raised in opposition. Indeed, surprise was expressed in Parliament that the situation had not been dealt with before” (at 323-325).

⁵⁶ Freckelton, above n 44 at 723; Sourdin and Wallace, above n 44 at 65.

⁵⁷ Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at [16.10].

⁵⁸ See for example Rosemary Hunter “Litigants in Person in Contested Cases in the Family Court” (1998) 12 *Australian Journal of Family Law* 171 at 172.

⁵⁹ See for example Richardson, Sourdin and Wallace, above n 1 at [2.8].

⁶⁰ Moorhead and Sefton, above n 3 at 20, Macfarlane, above n 2 at 38; Trinder and others, above n 10 at 18.

1. *Financial*

The most important reason for the decision to litigate in person, identified in most studies, is that litigants cannot afford a lawyer and do not qualify for legal aid, or their legal aid funding ceases.⁶¹ The New Zealand MoJ study found that more than half the LiPs in the Family Court litigated in person because “they were ineligible for legal aid but still felt unable to afford a lawyer”.⁶² Hunter and others’ study of the Australian Family Court found there were a significant number of litigants who did not qualify for legal aid, but were unable to pay for a lawyer.⁶³ In addition, their claim may be of small economic value:⁶⁴

Lawyers are charged with the task of assisting individuals in making use of law and enforcing their rights, but violations of those new rights [generated by the welfare state] often generate claims of a small economic value, so that lawyers cannot economically handle them.

LiPs may make a cost-benefit analysis and decide that instructing a lawyer is not the best use of their scarce resources.⁶⁵

2. *Perceptions about the case and litigant*

Part of the cost-benefit analysis may relate to a perception that the case is simple enough to handle themselves.⁶⁶ Genn reports this as the most common reason for litigating in person, and Mather as a primary reason, along with financial motivations.⁶⁷ LiPs may also believe they are better positioned than a lawyer to convey the details of the case to the court because they know these intimately and are more motivated to win.⁶⁸

It is also possible that a lawyer’s perceptions of the case affect representation decisions: that is, a lawyer may have refused to act because they consider the case is unarguable. Trinder’s study noted that while this was a possible reason it was rare within the study group.⁶⁹ Alternatively, if lawyers

⁶¹ Williams, above n 1 at 4 citing Hannaford-Agor and Mott, above n 2; Moorhead and Sefton, above n 3 at 20-21; John Dewar, Barry W Smith and Cate Banks *Litigants in Person in the Family Court of Australia* (Family Court of Australia, 2000) at 33; Macfarlane, above n 2 at 39; Lynn Mather "Changing Patterns of Legal Representation in Divorce: From Lawyers to Pro Se" (2003) 30 *Journal of Law and Society* 137 at 149; Trinder and others, above n 10 at 13-15; Richardson, Sourdin and Wallace, above n 1 at 14.

⁶² Smith, Banbury and Ong, above n 6 at 42.

⁶³ Hunter and others, above n 32.

⁶⁴ Mauro Cappelletti and Garth Bryant "A World Survey: Introduction" in Mauro Cappelletti and Garth Bryant (eds) *Access to Justice* (Sijthoff & Noordhoff, Alphenaaanderijn, 1978) at ix.

⁶⁵ Trinder and others, above n 10 at 15; Macfarlane, above n 2 at 9.

⁶⁶ Trinder and others, above n 10 at 16; Macfarlane, above n 2 at 9; Williams, above n 1 at 4.

⁶⁷ Hazel Genn and Sarah Beinart *Paths to Justice: What People Do and Think about Going to Law* (Hart, Oxford, England; Portland, Oregon, 1999) at 22 and Mather, above n 61 at 149.

⁶⁸ Moorhead and Sefton, above n 3 at 16; Smith, Banbury and Ong, above n 6 at 46; Trinder and others, above n 10 at 16.

⁶⁹ Trinder and others, above n 10 at 31.

perceive a litigant is likely to complain or to be a demanding fixed-fee client (e.g. legally aided), the litigant may have difficulty securing representation.⁷⁰

3. *Keeping Lawyers Out – disenchantment and maintaining relationships*

Some people may litigate in person because they are disenchanted with the legal profession. In the MoJ study, a fifth of the LiPs cited a previous bad experience with lawyers as the reason for either beginning the case as a LiP or leaving representation during the case.⁷¹ Macfarlane also found that a significant number of their participants had chosen to litigate in person after becoming dissatisfied with their counsel “doing nothing”, not being interested in settling the case, not listening or explaining, or making mistakes.⁷²

UK research suggests that businesses, in particular, may wish to proceed unrepresented to avoid the dispute being perceived as too adversarial and damaging ongoing relationships.⁷³ This is of less relevance in the New Zealand High Court where bodies corporate must be represented.⁷⁴ The concern for maintaining relationships may be of particular importance in the Family Court where parents have ongoing relationships with their ex-partner, for example.⁷⁵

4. *Openness of the court and availability of non-legal assistance*

Mather has argued that courts have a way of communicating their degree of openness to LiPs and so influence the number of people willing to attempt to litigate without a lawyer, although Williams states “there is little empirical evidence for this [claim]”.⁷⁶ The New Zealand MoJ study reports that lawyers and court staff believe that people litigate in person because the Family Court is trying to be more litigant friendly.⁷⁷ Moorhead and Sefton also conclude that the “openness and supportiveness of courts to unrepresented litigants” is a reason for why people go unrepresented.⁷⁸ It stands to reason that at least the attitude communicated by the court staff will influence whether people feel encouraged to appear as a LiP. Moorhead and Sefton give the example of court staff

⁷⁰ Moorhead and Sefton, above n 3 at 19 suggesting that indemnity insurers increasingly discourage solicitors from taking high-risk clients or cases, making representation for these litigants difficult to secure.

⁷¹ Smith, Banbury and Ong, above n 6 at 44.

⁷² Macfarlane, above n 2 at 44-50. See also Williams, above n 1 at 4-5 and Dewar, Smith and Banks, above n 61 at 1 reporting “high levels of distrust of lawyers and the profession”.

⁷³ Moorhead and Sefton, above n 3 at 16 referring to John Baldwin *Lay and Judicial Perspectives on the Expansion of the Small Claims Scheme* (2002, LCD, London).

⁷⁴ See Chapter 1, page 7.

⁷⁵ Smith, Banbury and Ong, above n 6 at 45 citing one example of a Family Court case where the litigant decided not to involve a lawyer so as not to aggravate the other party. This may be related to domestic violence. See discussion at Chapter 4, page 95, regarding domestic violence and decisions to litigate in person.

⁷⁶ Mather, above n 61 and Williams, above n 1 at 5.

⁷⁷ Smith, Banbury and Ong, above n 6 at 47.

⁷⁸ Moorhead and Sefton, above n 3 at 252.

believing that an applicant should be represented in injunction proceedings, and so, in an effort to put them off appearing in person, would warn them “about having to personally serve the respondent, and undertake cross examination at hearings, both of which were likely to be harrowing experiences for unrepresented litigants”.⁷⁹

Some authors suggest that people may simply want to take a matter forward themselves, perhaps because they want “to understand and to participate actively in their personal legal affairs”, as part of the reason for an increase in LiPs.⁸⁰ Wide availability of legal information on the internet may also encourage it.⁸¹

II. Civil Justice, Lawyers and Litigants in Person

Having considered why a litigant might proceed in person, I now consider the alternative on offer – lawyers, the service they offer and the structure of the legal profession. I then review what we know about how litigants fare in the civil justice system without a lawyer, before turning to consideration of the judicial process itself, its purpose, and the position of LiPs within it.

A. *What is the alternative? The service and structure of the profession*

As I emphasised at the outset, LiPs only stand out as a group when defined in opposition to some other group, notably lawyers and their clients. To set the stage, it is therefore useful to briefly review some of the rich literature on the legal profession. There are two major strands to this literature. One explores the legal profession’s origins, structure, stratification, and market control, centred particularly on the US and the UK. The other strand, newer but now established, examines the relationship of lawyers and clients. Both are useful to thinking about why litigants might proceed in person, and how proceeding in person affects their experience and the responses to them of judges, lawyers and court staff. The following section therefore briefly reviews aspects of the literature on lawyers and their clients and the legal profession.

1. *Litigation lawyers and their clients*

Litigation lawyers perform many different tasks for clients, though the tasks performed vary between individual lawyers, their areas of practice, and their clients.⁸² Mather found that even

⁷⁹ At 18.

⁸⁰ Hannaford-Agor and Mott, above n 2 at 163; Macfarlane, above n 2 at 48.

⁸¹ Mather, above n 61 at 142; Macfarlane, above n 2 at 35; Jona Goldschmidt and others *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (American Judicature Society, 1998) at 10.

⁸² Jonathan Caplan "Lawyers and Litigants: A Cult Reviewed" in Ivan Illich (ed) *Disabling professions* (M Boyars, London, 1977) 93 at 96 argued that it is in the profession’s best interests to leave the role as amorphous as possible: “there has

amongst US lawyers working in one practice area, divorce proceedings, all “tend to listen, counsel, advise, negotiate, and occasionally litigate”, but there was variation as to what lawyers did “according to whether they specialize in family law and according to the class of clients they typically represent”.⁸³ Some lawyers emphasised achieving “suitable case outcomes” while others emphasised their role in helping clients “solve their personal problems through the legal process”.⁸⁴ Specific tasks might include reframing a client’s personal or commercial problem into a legally cognisable problem (or advising that they have no legal claim), advising them on a solution to the problem (through legal or other avenues) and the likelihood of success, constructing a narrative of the problem, speaking on the client’s behalf (in court or to the other party and their lawyer), offering strategic and business advice (when to settle, how to maximise pressure on the other party, or how to reconcile with the other party), and providing a sympathetic ear for the client’s problems.⁸⁵

(a) Negotiating with their Clients

How lawyers achieve these goals depends, in part, on the outcome of negotiations with their own client. This is an aspect of litigation practice that, as Ingleby noted, is an “often under-rated feature of out-of-court processes”.⁸⁶ Studies of the lawyer-client relationship, often in the context of divorce lawyering, have established that lawyers and clients negotiate about the strategy and the negotiations involved in the dispute.⁸⁷ Power does not always lie with the lawyer but is contextual, negotiated and shifting.⁸⁸ Lawyers do have a number of tools at their disposal, however, and can engage in “cynical manipulation” and “peddle the language of the law, legal symbols” to shape

been a complete lack of any attempt to define the lawyer’s role and the failure to attempt such inquiry or definition has meant that lawyers have been free to range unchecked into ever wider spheres and fields of activity”.

⁸³ Mather, above n 61 at 153.

⁸⁴ At 152.

⁸⁵ Richard Abel and Philip Lewis "Putting Law Back into the Sociology of Lawyers" in Richard Abel and Philip Lewis (eds) *Lawyers in Society: An Overview* (Online ed, University of California Press, Berkeley, California, 1995) provides an excellent overview of what lawyers do for their clients.

⁸⁶ Richard Ingleby *Solicitors and Divorce* (Clarendon Press Oxford, Oxford and New York, 1992) at 149.

⁸⁷ Lynn Mather, Craig McEwen and Richard Maiman *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, New York, 2001); Ingleby, above n 86; William Felstiner and Austin Sarat "Law and Strategy in the Divorce Lawyer's Office" (1986) 20 *Law & Society Review* 93.

⁸⁸ William Felstiner and Austin Sarat "Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions" (1992) 77 *Cornell Law Review* 1447; Lucie White "Seeking... the Faces of Otherness ... : A Response to Professors Sarat, Felstiner and Cahn" (1991) 77 *Cornell Law Review* 1499.

client goals.⁸⁹ Clients who are poor and possess less interpersonal power are more likely to be subordinated to their lawyers, in this way.⁹⁰

Cain argues that even for one-shot clients⁹¹ the lawyer's most common practice is to translate client goals into legal form, rather than control: "Control, in the form of either transformation or refusal to translate, is a minority practice even at this 'bottom' end of the occupation".⁹² While a bad translator may subordinate the client, the effective translator can enhance the litigant's position:⁹³

By speaking through a translator, one can be heard and understood in places where otherwise one is mute. The translator does not silence the speaker but rather seeks to enhance the speaker's voice by adding her own.

LiPs are not exposed to this negotiation and shaping of goals.⁹⁴ This process is important for litigants as most litigants labour under what Ross and Ward call "naïve realism", a belief that one's own position is more correct and reasonable than one's opponents.⁹⁵ Ross, Leper and Ward, summarising the research on naïve realism, say:⁹⁶

In analysing and interpreting the words and deeds of their peers, even the most skilled "intuitive psychologists" fail to appreciate the extent to which they, no less than their peers, see actions, events, and even facts through the lenses of their own experience, the received wisdom of their group, and the often-distorting influence of their personal needs, hopes, and fears. ... The most obvious consequence of naïve realism is that people expect other reasonable and objective perceivers to share their views and understandings – if not immediately, then at least after they have enlightened those others about the ways things really are.

⁸⁹ Maureen Cain "The General Practice Lawyer and the Client: Towards a Radical Conception" in Robert Dingwall and Philip Lewis (eds) *The Sociology of the Professions: Lawyers, Doctors and Others* (Macmillan Press Ltd, London, 1983) 106 at 109. See also Felstiner and Sarat, above n 87.

⁹⁰ William Felstiner and Ben Pettit "Paternalism, Power, and Respect" in Joseph Sanders and V Lee Hamilton (eds) *Handbook of Justice Research in Law* (Kluwer Academic, New York, 2001) 137; Richard Abel *The Legal Profession in England and Wales* (Basil Blackwell, Oxford, 1988) arguing that corporate clients are power holders, but that solo and small firm lawyers dominate their clients; Cain, above n 89 at 112.

⁹¹ See discussion of this concept below at footnote 103.

⁹² Cain, above n 89 at 112.

⁹³ Clark Cunningham "Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse" (1992) 77 *Cornell Law Review* 1298 at 1300.

⁹⁴ Moorhead and Sefton, above n 3; Hunter and others, above n 32 at 120-121.

⁹⁵ Lee Ross and Andrew Ward "Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding" in Edward Reed, Elliot Turiel and Terrance Brown (eds) *Values and Knowledge* (Online ed, Taylor and Francis, Hoboken, 2013) 103.

⁹⁶ Lee Ross, Mark Lepper and Andrew Ward "History of Social Psychology: Insights, Challenges, and Contributions to Theory and Application" in Susan Fiske, Daniel Gilbert and Gardner Lindzey (eds) *Handbook of Social Psychology* (John Wiley and Sons, Hoboken, 2010) 3 at 23.

They explain that people labouring under naïve realism will “sincerely feel that “objective” third parties should take their side”.⁹⁷ Where a third party does not share the person’s view then they will attribute this to one of three possibilities: (a) that the third party lacks all the relevant information and once it has been put before them they will agree; (b) the third party may be “lazy, irrational or otherwise unable or unwilling to proceed in a normative fashion from the objective evidence to reasonable conclusions; or (c) the third party is biased.”⁹⁸ Without a lawyer, a litigant does not have a trusted adviser to challenge their naïve realism before engaging in negotiation or reaching court.

(b) Justice Broker

Kritzer proposes that the dominant conception of lawyers’ work, and that closest to the lawyer’s self-conception, is the professional expert. In this conception, lawyers use “specialized, abstract knowledge” to act as “the client’s dispassionate ‘alter ego’ – doing for clients what the clients would choose to do if they had the professional’s expertise and were able to look ‘objectively’ at their own situation”.⁹⁹ Kritzer argues that complementary to this conception, is that of the lawyer as a “justice broker”.¹⁰⁰ The justice broker is an intermediary bridging the gap between the litigant and the other participants in the litigation, in return for a fee. This role reflects some of the day-to-day reality of the routine work of non-elite lawyers. LiPs, therefore, are not just bypassing a professional expert, but also an intermediary between them and the system, who possesses inside knowledge.¹⁰¹

(c) Power and the “level playing field”

One function that a lawyer can arguably perform for a client is to provide them with a source of power, thereby evening inequalities between opponents in the litigation. Engler argues that a skilled lawyer’s knowledge of substantive law and the forum can give a relatively powerless litigant “repeat player” status.¹⁰² This is Galanter’s idea that those who are repeat players in the court system, those “who are engaged in many similar litigations over time” (who tend to already occupy a place of advantage in society), have a litigation advantage over “one shot” litigants “who have only occasional recourse to the courts”, an advantage which is augmented and reinforced by the

⁹⁷ At 23.

⁹⁸ Ross and Ward, above n 95 at 111.

⁹⁹ Herbert Kritzer *The Justice Broker: Lawyers and Ordinary Litigation* (Oxford University Press, New York and Oxford, 1990) at 7.

¹⁰⁰ At 12.

¹⁰¹ At 18.

¹⁰² Russell Engler "Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed" (2010) 37 Fordham Urban Law Journal 37 at 78-79.

system.¹⁰³ Typical examples of this dynamic would be relations between a landlord (who has many tenants) and a tenant, a company and a consumer, and between a government agency and a beneficiary. Adding a lawyer to the weaker side evens up the game.

Engler and Abel therefore argue that the presence of a lawyer may lessen the inequality between these types of parties.¹⁰⁴ Galanter, however, says that repeat players still have the advantage of being able to retain good quality legal assistance and have “greater continuity, better record-keeping, more anticipatory or preventative work, more experience and specialized skill in pertinent areas, and more control over counsel”.¹⁰⁵ One-shot players therefore cannot expect their lawyer to neutralise the repeat player’s advantage, particularly when they hire a lawyer who specialises in one-shot litigants (e.g. a family lawyer who acts for parents against State claims for protection of children). The lawyer for the one-shot litigant usually belongs to a lower prestige segment of the profession, they cannot mobilise clients for mass action because of ethical constraints and limited information exchange between clients, and the one-off nature of the work, with limited fees, tends to produce uncreative lawyering that simply treats the case as an isolated one to be processed, and the lawyer has ethical constraints that prevent “them trading off some cases for gains in others” (unlike insurance company lawyers and prosecutors).¹⁰⁶

A powerless party’s representation by a lawyer may not therefore put them on equal footing with a more powerful opponent, but the adversarial system makes no assumption that the parties are on an equal footing. Swank, quoting Judge Posner’s view of the US adversarial system, said:¹⁰⁷

“The court states: An underlying assumption of the adversarial system is that both parties will have roughly equal legal resources.’ This has never been an assumption of the adversarial system. We do not put a cap on the amount of money that a litigant can spend on lawyers; we do not inquire whether the litigants had roughly equal legal resources; we allow one to outspend the other by as much as he pleases. We count on the courts not to be overawed by the litigant with the higher-priced counsel.

However, even if a lawyer does not put a litigant on a level playing field with the other represented party, it might at least improve the litigant’s footing. This comes down to the empirically difficult question of whether a lawyer improves a litigant’s chance of success in court, which is considered below.

¹⁰³ Marc Galanter "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9(1) *Law & Society Review* 95 at 97.

¹⁰⁴ Abel and Lewis, above n 85 at 290-291.

¹⁰⁵ Galanter, above n 103 at 114.

¹⁰⁶ At 116-117.

¹⁰⁷ Drew Swank "In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation" (2004) 54 *American University Law Review* 1537 at 1581.

2. *Social Closure*

Another significant strand of socio-legal inquiry concerns the legal profession's efforts to control the legal market and its motives for doing so. These inquiries draw on social theorists including Durkheim, Weber, Parsons, Friedson and Larson.¹⁰⁸ Abel, taking a Weberian perspective, argues that a profession must not only construct a marketable commodity (as does an occupation), but must also "seek social closure" through "market control and collective social mobility".¹⁰⁹ Social closure – constructing a closed group with its own identity to monopolise a resource (the provision of legal services) – is difficult to achieve and hard to maintain.¹¹⁰ Abel argues that in the US and UK the legal profession's market control has been eroded by direct competition from alternative service providers, while simultaneously entry barriers to joining the profession have decreased as more lawyers are trained, and these new lawyers are drawn from a much wider population, including women and ethnic minorities.¹¹¹ In New Zealand, lawyers' protected areas of work have already been seriously curtailed.¹¹² Maintaining social closure in this environment is therefore increasingly challenging.

One method through which a group may maintain its place in society is by promulgating social stereotypes about outgroups.¹¹³ The stereotype of the outgroup is often "modelled on a minority of the worst" while an image of the ingroup is modelled on a "minority of the best".¹¹⁴ Tajfel argues that social stereotypes serve several functions including justifying actions against the outgroup, and providing "a positive differentiation of the ingroup from selected outgroups at a time when such differentiation is perceived as becoming insecure and eroded".¹¹⁵ The legal profession, its monopoly under threat, might be more willing to use stereotypes to differentiate itself.

Fiske considers another function of stereotypes: that they anchor people to a starting point when they deal with someone from the stereotyped group, telling them "how most people in the group

¹⁰⁸ Studies belonging to this tradition draw on key theorists including Weber, Durkheim, Marx, and Larson for example Abel, above n 90.

¹⁰⁹ Richard Abel "Theories of the Legal Profession" in Richard Abel (ed) *Lawyers: A Critical Reader* (New Press, New York, 1997) .

¹¹⁰ Richard Abel "The Professional is Political" (2004) 11 *International Journal of the Legal Profession* 131 at 135.

¹¹¹ At 135-136; Richard Abel *American Lawyers* (Oxford University Press, New York, 1989).

¹¹² See Chapter 1, pages 8-9.

¹¹³ John Jost and Joanneke van der Toorn "Systems Justification Theory" in Paul Van Lange, Arie Kruglanski and Tory Higgins (eds) *Handbook of Theories of Social Psychology* (Sage Publications Ltd, Los Angeles, 2012) 313.

¹¹⁴ Norbert Elias and John Scotson *The Established and the Outsiders: A Sociological Enquiry into Community Problems* (Sage Publications Ltd, Online Edition) at 159.

¹¹⁵ Henri Tajfel "Social Stereotypes and Social Groups" in John Turner and Howard Giles (eds) *Intergroup Behaviour* (Basil Blackwell, Oxford, 1981) 144 at 161.

supposedly behave, what they allegedly prefer, and where their competence supposedly lies".¹¹⁶ Stereotypes allow people to arrange complex information and come to easy judgments, rather than considering others on an attribute-by-attribute basis.¹¹⁷ This may mean that powerful ingroups are more likely to engage in stereotyping than powerless outgroups:¹¹⁸

The *powerless* are stereotyped because no one needs to, can, or wants to be detailed and accurate about them. The *powerful* are not so likely to be stereotyped because subordinates need to, can, and want to form detailed impressions of them.

Even where outgroups do stereotype, their beliefs may exert less control than those of the powerful ingroup.¹¹⁹ These ideas may explain why lawyers and judges might adopt a common set of beliefs about LiPs modelled on the most difficult LiPs: stereotypes act as an anchor for thinking about the group's competence and can help to maintain professional identity against incursion.

This literature provides a framework for thinking about what lawyers do as a group, how they act towards their clients and how they view LiPs. It also begs the question: does the involvement of a lawyer make a difference to case outcomes, or can LiPs do just as well?

B. LiPs' Outcomes and Experiences of Adjudication

Whether lawyers change case outcomes is very difficult to determine empirically. There are many confounding factors, including what counts as a good outcome, how outcomes can be measured, the strength of the case, the quality of the lawyer, the ability of the litigant, the nature of the forum, the approach of the judge, and the complexity of the law on the issue. Despite these limitations, there is some empirical evidence available, including data on whether representation effects the rate at which litigants abandon their case (often referred to as "lumping it"),¹²⁰ or the rate at which they settle or successfully adjudicate their claim or defence.

1. Lumping It

There is evidence to suggest that LiPs are more likely than represented litigants to abandon their case. Hunter found that fully unrepresented LiPs (as opposed to LiPs with some legal assistance) had high rates of dismissals and default judgments against them, as well as withdrawals and abandonments, suggesting that fully unrepresented LiPs "find the litigation process too difficult

¹¹⁶ Susan Fiske "Controlling Other People: The Impact of Power on Stereotyping" (1993) 48(6) *American Psychologist* 621.

¹¹⁷ Tajfel, above n 115 at 163; Fiske, above n 116 at 623.

¹¹⁸ Fiske, above n 116 at 624.

¹¹⁹ At 623.

¹²⁰ Ross Cranston "What Do Courts Do?" (1986) 5 *Civil Justice Quarterly* 123 at 125.

to navigate, and are defeated by their incapacity to conform to the Court's rules and procedures".¹²¹ Genn has identified the potentially catastrophic consequences of people "lumping it", particularly when one legal problem, such as a debt, creates a cascade of other problems.¹²²

2. *Settlement*

There is consistent though not conclusive evidence to suggest that LiPs who do not lump it are less likely to settle than represented litigants.¹²³ The literature suggests a number of reasons for this, including the possibility that LiPs are less likely to understand the settlement-orientation of litigation,¹²⁴ and that they do not have a good sense of "where a reasonable 'settlement range' lies"¹²⁵ so settle too easily or do not settle because they mistrust their opponent and are worried about "being taken for a ride".¹²⁶ Moorhead and Sefton identify two other explanations favoured by lawyers, court staff and judges: that the LiP had "something to hide" (and therefore did not want to engage in a frank discussion) or "wanted to have their day in court".¹²⁷ Trinder and others also note that lawyers said it was "virtually impossible" to negotiate with LiPs because it was either "like 'communicating with a black hole', or the opposite: challenging because of the multiple non-professional communications coming from the LIP".¹²⁸ The current evidence certainly suggests that settlement is less likely when a LiP is a party.

¹²¹ Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30(1) *Journal of Law and Society* 156 at 169.

¹²² Genn and Beinart, above n 67 at 31-36.

¹²³ Moorhead and Sefton, above n 3 at 258 concluding that the evidence "points towards non-representation inhibiting settlement"; and Trinder and others, above n 10 at 52: "LIP cases appear less likely to settle ... A larger quantitative dataset is needed to test this finding conclusively".

¹²⁴ Family Law Pathways Advisory Group *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Commonwealth of Australia, 2001) at 58 suggesting that LiPs are less likely to settle partly because LiPs "are unaware of the use of litigation as a negotiating tool"; Trinder and others, above n 10 at 45 describing the "standard pathway" for private family law cases in which parties negotiate in the court foyer and the judicial time is then used to ensure the agreement is fair and resolve outstanding issues. The study found that LiPs with no legal advice were unaware that waiting time was normally used for negotiating a settlement and rejected the approaches of opposing counsel during this time. Moorhead and Sefton, above n 3 at 257 found that some LiPs believed "once a case had entered a court or proceedings had begun, settlement was prohibited".

¹²⁵ John Dewar "The Impact of Legal Aid Changes on Family Law Practice" (1999) 13 *Australian Journal of Family Law* 33 at 48.

¹²⁶ At 48; Trinder and others, above n 10 at 47 observing that "Where the professional negotiator was not trusted, negotiation would invariably be unsuccessful"; Moorhead and Sefton, above n 3 at 257 noting LiPs "feared exploitation by their opponent's lawyer"

¹²⁷ Moorhead and Sefton, above n 3 at 173-174 and 257.

¹²⁸ Trinder and others, above n 10 at 37-38.

3. *Adjudicated outcomes*

Judges believe, and often state, that LiPs are disadvantaged by the absence of a lawyer and that this reduces their chances of obtaining a favourable adjudication.¹²⁹ Numerous studies have concurred, finding that represented litigants are more likely to be successful in an adjudication than LiPs, although most have not been able to disaggregate the factors that might produce this effect.¹³⁰ Sandefur undertook a meta-analysis of US studies that attempted to measure whether represented litigants had different outcomes to LiPs. (She remained “agnostic” about whether these outcomes were “better” in the sense of “making them more legally accurate or substantively just”).¹³¹ She found that: “lawyer-represented people do better – on average, lawyer-represented people are more likely to win than are unrepresented people in every study.”¹³² However, “just how much better varies considerably across studies”. Sandefur concluded that the difference in outcomes between litigants who are represented and not represented is greatest where the procedure is more complex.¹³³

More recently, however, Greiner and Pattanayak have suggested that the substantial literature “purporting to measure quantitatively the effect of legal representation in civil disputes” (they footnote three pages of studies) “provides no information on representation effects that would not already have been available from instinct and conjecture”.¹³⁴ They conclude that even Sandefur’s well-designed meta-analysis is of little value because of the limitations of the studies analysed.¹³⁵ It is therefore possible to hypothesise that having a lawyer does matter, but we cannot be sure it does, and, if it does, we do not know why or how much difference it makes.

4. *Procedural Justice*

While there is much uncertainty about whether (and how much) legal representation affects the outcome in litigation, the substantive outcome is not the only aspect that matters. Thibaut and

¹²⁹ *Re G J Mannix* [1984] 1 NZLR 309 (CA) at 312 per Cooke J (as he was then): “Every Judge knows that a litigant in person is not the most effective advocate for himself – from lack partly of knowledge of the law, partly at times from perspective”. See also Dewar, Smith and Banks, above n 61 at 50; Sourdin and Wallace, above n 38 at 65.

¹³⁰ See for example Carroll Seron, Martin Frankel and Gregg Van Ryzin “The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment” (2001) 35 *Law & Society Review* 419; Moorhead and Sefton, above n 3 at 241-242.

¹³¹ Rebecca Sandefur “Impact of Counsel: An Analysis of Empirical Evidence” (2011) 9 *Seattle Journal of Social Justice* 51 at 62.

¹³² At 69. Sandefur’s analysis cannot prove whether this is because of a lawyer or some other factor, but it is suggestive that a lawyer has the greatest impact on outcome where there is procedural complexity.

¹³³ At 67-71.

¹³⁴ James Greiner and Cassandra Wolos Pattanayak “Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make” (2012) 121 *Yale Law Journal* 2118 at 2175-2182.

¹³⁵ At ft 197.

Walker found, in psychological research, that people's perceptions of whether a process is "just" depends as much on their views on the fairness of the process as on substantive outcomes.¹³⁶

There are several theories on why procedural justice matters.¹³⁷ One theory, proposed by Thibaut and Walker, is that people care about fair procedure because sound procedure facilitates the adjudicator's ability to make an accurate decision. However, Tyler and Lind found that field research with litigants pointed away from concern about outcomes.¹³⁸

Litigant concerns were consistently found to be about issues that had very little to do with the gain or loss of resources. They were instead about being treated disrespectfully, about distrust in the motives of authorities and about feelings that those making decisions did not listen to and consider their concerns.

Tyler and Lind conclude that the research now firmly points in the direction of a "relational" theory: procedures are important because the messages they send affect a person's feeling of self-worth. This theory assumes that "people are predisposed to belong to social groups", partly because "groups provide a source of self-validation".¹³⁹ Tyler says that, "[P]eople attempt to maintain high status within groups and use the justice of their experiences to evaluate their group status". This relational theory of procedural justice suggests that formal procedural justice, for example turn-taking, is not sufficient. People also need to be treated with politeness and dignity and they are attentive to violations as these communicate to them that they are of low-status in the group.¹⁴⁰

Tyler summarises the variables that are now thought to influence perceptions of procedural justice: "opportunities for participation [often referred to as the 'voice effect'], a neutral forum, trustworthy authorities, and treatment with dignity and respect".¹⁴¹ Where these factors are present, litigants are likely to perceive they have been treated fairly. Tyler's research also suggests that people decide how much to defer to an authority, and whether to follow its decisions, primarily by making judgments about the fairness of its process.¹⁴² This research demonstrates that LiPs'

¹³⁶ John Thibaut and Laurens Walker *Procedural Justice: A Psychological Analysis* (Erlbaum, Hillsdale, New York, 1975).

¹³⁷ John Jost and Aaron Kay "Social Justice: History, Theory, and Research" in Susan Fiske, Daniel Gilbert and Gardner Lindzey (eds) *Handbook of Social Psychology* (5th ed, Hoboken, New Jersey, 2010) 1122 at 1141-1142.

¹³⁸ Tom Tyler "Justice Theory" in Paul Van Lange, Arie Kruglanski and Tory Higgins (eds) *Handbook of Theories of Social Psychology* (Sage, Thousand Oaks, 2012) 344 at 349.

¹³⁹ Tom Tyler and Allan Lind "A Relational Model of Authority in Groups" (1992) 25 *Advances in Experimental Social Psychology* 115.

¹⁴⁰ Tom Tyler "Psychological Models of the Justice Motive" (1994) 67 *Journal of Personality and Social Psychology* 850.

¹⁴¹ Tyler, above n 138 at 350.

¹⁴² Tom Tyler *Why People Obey the Law* (Princeton University Press, Princeton, 2006).

experience of court will be affected by their experience of procedural justice, independent of the outcome of their legal case.

C. The Purpose of Civil Justice

Our views on the purposes of civil justice are also likely to have a strong influence on our thinking about the role of LiPs in the court system and appropriate responses to them. Some commentators view civil justice primarily as a form of dispute resolution between the parties. Its aim, on this view, is to provide accurate determination of disputes to avoid citizens resorting to violence.¹⁴³ Assy adopts this approach, describing state involvement as a “matter of placing a service of adjudication at the disposal of citizens who wish to assert their legitimate interests and enforce their legal rights”.¹⁴⁴ Landes and Posner also recognise that it is a function of dispute resolution to enforce private rights, but note that its purpose goes beyond this, because new rules are created in the course of the process (such as new rules of the common law). There is a public good in this form of “rule creation” as it specifies “standards of socially desired behavior in order to promote compliance with them”.¹⁴⁵ This is important in a capitalist economy and a democracy, as civil justice “provides the legal structure for the economy to operate effectively and for the power of government to be scrutinised and limited”.¹⁴⁶ Litigants are not, therefore, mere consumers of a service provided by the state. There is a public good in the enforcement and refinement of legal standards, and in upholding the rule of law.¹⁴⁷ Genn makes a forceful and convincing argument that civil justice performs all these functions (private dispute resolution, rule creation, ordering of the capitalist economy, and a check on government), and that together they are a public good that goes beyond the interests of the individual who calls upon the system:¹⁴⁸

¹⁴³ Duncan Webb "The Right Not to Have a Lawyer" (2007) 16 *Journal of Judicial Administration* 165 at 168; Alan Uzelac "Global Developments - Towards Harmonisation (and Back)" in Alan Uzelac (ed) *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer, Switzerland, 2014) at 6-7; Richard Moorhead "Access or aggravation? Litigants in person, McKenzie friends and lay representation" (2003) 22 *Civil Justice Quarterly* 133 at 134.

¹⁴⁴ Rabea Assy *Injustice in Person: The Right to Self-Representation* (Oxford University Press, Oxford, 2015) at 38-39. See also Linda Mulcahy *Legal Architecture: Justice, Due Process and the Place of Law* (Taylor and Francis, Hoboken, Online, 2010) at 63 discussing historical research that suggests this theory arose as part of laissez faire ideology where disputes were seen as being “between two competent and autonomous parties, each of who had their own selfish motivations for presenting the most persuasive case”.

¹⁴⁵ William Landes and Richard Posner "Adjudication as a Private Good" (1979) 8 *Legal Studies* 235 at 236.

¹⁴⁶ Hazel Genn *Judging Civil Justice* (Cambridge University Press, Cambridge, UK; New York, 2010) at 16.

¹⁴⁷ Richard Stewart "The self-represented litigant: A challenge to justice" (2011) 20 *Journal of Judicial Administration* 146 at 149.

¹⁴⁸ Genn, above n 146 at 18. Chief High Court Judge Justice Helen Winkelmann "ADR and the Civil Justice System" (Paper presented at the AMINZ Conference, Auckland, New Zealand, 6 August 2011) adopted Genn's conception of civil justice citing supporting the economy, peaceful dispute resolution, and production of precedent, as the functions of civil justice.

In determining the merits in individual disputes, the judiciary are publicly stating the law, reinforcing norms of social and economic behaviour, identifying the limits of executive power and publicising the values of the society.

Implicit in all these arguments is the necessity of access to the courts. As Bingham pithily puts it:¹⁴⁹

It would seem to be an obvious implication of the principle that everyone is bound by and entitled to the protection of the law that people should be able, in the last resort, to go to court to have their civil rights and claims determined. An unenforceable right or claim is a thing of little value to anyone.

This provides the most convincing theoretical basis for the long-standing right to litigate in person.¹⁵⁰ If litigation in person were prohibited, then the courts would be seen as a tool only for those who can afford to hire a lawyer or qualify for legal aid. Those left out would then have no means of enforcing their rights. The other main justification is that “because procedural rights are conferred upon persons, they ... confer a right to exercise them *in person*, producing a right to litigate”.¹⁵¹ Assy argues that this justification is fallacious, however. Just because a right is personal, he says, does not mean one is entitled to exercise it in person: “Access to court can be fully (and often more effectively) exercised through legal representation”.¹⁵² This might be so if legal representation were available to all, but, in the current market for legal services and with limited legal aid funding available, the right to litigate in person arguably remains essential to maintaining the appearance of access to the courts, preserving people’s apparent entitlement to enforce their rights, including rights against the state.

Access to the courts must, however, be limited. If everyone were to take up this right, the system would be choked under the demand. As Galanter summarises:¹⁵³

In a world of expanding capabilities and rising expectations, where claims of injustice proliferate, we cannot avoid the necessity of rationing justice. Justice is not free. It uses up resources – money, organization, and not least, the limited supply of attention.

One way of limiting access is, as Sarat argues, by “stress[ing] the limits of citizen competence. Participation is facilitated by the intervention of trained legal specialists”.¹⁵⁴

¹⁴⁹ Tom Bingham *The Rule of Law* (Penguin, London, 2011) at 85.

¹⁵⁰ For discussion of the right to litigate in person, see Chapter 1, pages 3-7.

¹⁵¹ Rabea Assy "Revisiting the Right to Self-Representation in Civil Proceedings" (2011) 30(3) *Civil Justice Quarterly* 267; Assy, above n 144 at 23.

¹⁵² Assy, above n 144 at 24.

¹⁵³ Marc Galanter "Access to Justice in a World of Expanding Social Capability" (2010) 37(1) *Fordham Urban Law Journal* 115 at 126.

¹⁵⁴ Austin Sarat "Going to Court: Access, Autonomy, and the Contradictions of Liberal Legality" in David Kairys (ed) *The Politics of Law: A Progressive Critique* (3rd ed, Basic Books, New York, 1998) 97 at 102.

The other means by which citizens' access to the court can be limited is by rationing the amount of access available to any single litigant. Following the lead of the UK, New Zealand has introduced rules that the "just, speedy and inexpensive determination" are the overarching goals of civil procedure.¹⁵⁵ These goals are the "yardstick" by which all High Court and District Court Rules are to be measured.¹⁵⁶

This "yardstick" mirrors those introduced in the UK and Australia. These aims have been set as a result of the Woolf Report in the UK, following a working party inquiry that was charged with reviewing the rules of civil procedure with a view to "ensuring and improving access to justice at reasonable cost and speed".¹⁵⁷ Prior to the Woolf reforms, as Sorabji argues, the aim of civil justice was to secure "substantive justice": a correct decision, or justice on the merits.¹⁵⁸ The Woolf reforms introduced a new theory of justice whereby substantive justice was just one of the goals of the civil justice system. The other goals are, "the pursuit of economy, efficiency, expedition, equality and proportionality".¹⁵⁹ Sorabji calls this new theory of justice "proportional justice", and argues that it is a form of distributive justice, in which "a limit is now placed on the amount of resources individuals in the state can properly expend in securing substantive justice in any particular case".¹⁶⁰

That proportional justice is the goal of the High Court (and now the amended District Court) Rules in New Zealand¹⁶¹ was made clear by the Court of Appeal in *SM v LFBD*, where it found that the aim of case management is to dispose of cases "fairly, swiftly and efficiently, with regard to what is at stake".¹⁶² Doing so is important not just to the parties in the dispute, but to other litigants ("because it affects the time their cases will take to come to trial"), and to the "public at large" ("because they should feel confident that the Court can try cases fairly, quickly and efficiently"). The Court concluded that, "From the perspective of a judge dealing with any given

¹⁵⁵ High Court Rules, r 1.2; District Court Rules 2009, r 1.3.

¹⁵⁶ Andrew Beck *Principles of Civil Procedure* (3rd ed, Thomson Reuters, Wellington, New Zealand, 2011) at 4. The emphasis in the Family Court is similar, though justice is stated as the overriding objective: "... proceedings in the Family Court are to be dealt with as fairly, inexpensively, simply, and speedily as is consistent with justice: Family Court Rules 2002, r 3(1).

¹⁵⁷ Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1995); Lord Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996).

¹⁵⁸ John Sorabji *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, Cambridge, 2014) at 2.

¹⁵⁹ At 3.

¹⁶⁰ At 3.

¹⁶¹ The wording of the objective of the District Court Rules 2014 mirrors that of the High Court Rules.

¹⁶² *SM v LFDB* [2014] 3 NZLR 494 (CA) at [26].

case, all these interests are relevant; all form part of the interests of justice”.¹⁶³ In other words, substantive justice is no longer the paramount consideration, but one consideration to be weighed with others.

III. Responses

There is a large and growing literature on appropriate responses to the rapid increase in LiPs being experienced in many countries, much of it very thoughtful, as well as a vast grey literature reviewing particular responses that have been implemented in different jurisdictions. In this section, I briefly survey the major categories of response, loosely based on Galanter’s taxonomy of responses to discontent with the adversarial justice system, published in 1980.¹⁶⁴ My adaptation of this taxonomy is presented in Table 1. The discussion that follows explains and considers each category.

¹⁶³ At [27]. See also Forrest Miller "Managing the High Court's Civil Caseload: a Forum for Judges and the Profession" (Paper presented at the Members of the Legal Profession, Dunedin, New Zealand, 24 August 2011) at [6]-[11] where Miller J discusses proportionate justice and notes that “New Zealand rules have traditionally attended to cases in isolation from one another, allowing procedural delay in the interests of truth-finding or counsel’s convenience”. Miller J was a member of the bench in *SM v LFDB*.

¹⁶⁴ The categorisation of responses are loosely based on the typology suggested in Marc Galanter "Legality and its Discontents: A Preliminary Assessment of Current Theories of Legalization and Delegalization" in Hubert Rottleuthner, Erhard Blankenburg and Ekkehard Klaus (eds) *Alternative Rechtsformen und Alternativen zum Recht; Jahrbuch für Rechtssoziologie und Rechtstheorie* (Opladen, West-deutscher Verlag, 1980) .

Table 1 - Taxonomy of Responses to increasing numbers of LiPs

	Within the Courts	Alternatives to the Courts	Outside the Courts – State-led
Fundamental change	Strengthening e.g. provide more legal advice and representation	Diverting e.g. channel LiPs or disputes with high rates of LiPs into alternative dispute resolution mechanisms, such as Disputes Tribunal or mediation	Displacing e.g. create alternative compensation system, such as ACC, or delegalize areas that generate high numbers of claims, such as divorce.
	Expanding and reforming e.g. move to inquisitorial justice; simplify procedure; more information for LiPs	Transforming i.e. reduce the role of law in ordering society	Avoiding or Preventing e.g. more equal distribution of wealth; more social work services to avoid the breakdown of families.

A. Responses within the Courts

Most suggested responses to the LiP issue fall under this heading. These approaches look at ways of increasing the capacity of the various participants in the court system to either use it as it currently stands or in some modified form, while keeping the courts’ central place in the justice system unaltered.

1. Strengthening

(d) More representation

One favoured solution to the increase in LiPs is more funding for legal aid. In 2000, the Dewar report on the Australian Family Court concluded:¹⁶⁵

Our research lends support to the argument that greater investment in legal aid funding will result in cost savings to the Court system, and therefore to the taxpayer. This is because we have shown that (a) there is an identifiable link between the unavailability of legal aid and self-representation; and (b) that litigants in person consume more Court resources than represented parties.

The argument made is that legal aid cuts are false economy because they increase costs elsewhere in the system (e.g., by increasing the use of judicial time and other welfare resources), a point also emphasised after the recent legal aid cuts in the UK.¹⁶⁶ The authors of this Australian Family Court

¹⁶⁵ Dewar, Smith and Banks, above n 61 at 80.

¹⁶⁶ *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234 at [2] per Sir Alan Ward: “It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public

report argue that funding for legal aid would help to “alleviate the injustices and inconsistencies that currently arise”. They say that “equal access to legal services is a cornerstone of legitimacy and a democratic system of government”.¹⁶⁷

There is, however, little political will to provide more legal aid. Moreover, in addition to being politically unlikely, providing more legal aid does not offer a complete solution. It can simply generate more cases, continuing to over-burden the system.¹⁶⁸

[D]efinitions of legal need are not static; they are elastic and have a tendency to expand as potential beneficiaries see lawyers as capable of responding to their problems. As has been demonstrated in legal services to the poor, demand for services will increase to the limits of the available supply.

There are calls for lawyers to provide more pro bono services to clients in need.¹⁶⁹ However, even when describing a pro bono system in the UK that is far more organised than anything in New Zealand, the UK Civil Justice Council said pro bono services “cannot begin to meet the scale of shortfall in provision” that remains after legal aid has been reduced. They concluded that “pro bono work exists only as an adjunct to legal aid and privately-paid legal services. It can never replace legal aid”.¹⁷⁰

(e) More advice – limited retainer services

Given that funding for more representation is politically problematic, and, even if provided, would be likely to provide only a partial solution, another focus internationally has been on the provision of “unbundled” or limited retainer legal advice.¹⁷¹ This can be provided either in the form of private services paid for by the litigant, or via state-funded drop-in clinics, often situated in the court building.¹⁷² This allows LiPs to get personalised advice for their legal problem without the cost of full representation. Some commentators have also suggested that court staff be trained and be allowed to give more advice to LiPs.¹⁷³

department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous”; Civil Justice Council, above n 26 at [38]; Assy, above n 144 at 110-111.

¹⁶⁷ Dewar, Smith and Banks, above n 61 at 80.

¹⁶⁸ Gary Bellow and Jeanne Kettleson "From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice" (1978) 58 Boston University Law Review 337 at 380.

¹⁶⁹ Winkelmann, above n 4 at 239; Deborah Rhode "Access to Justice: Again, Still" (2004) 73 Fordham Law Review 1013 at 1025.

¹⁷⁰ Civil Justice Council, above n 26 at [125].

¹⁷¹ For reports recommending unbundling see for example Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2006) at 195 Civil Justice Council, above n 26 at [113] and Macfarlane, above n 2 at 123.

¹⁷² The antipodean exemplar is in Queensland, Australia. See Tony Woodyatt, Allira Thompson and Elizabeth Pendlebury "Queensland's Self-Representation Services: A Model for Other Courts and Tribunals" (2011) 20 Journal of Judicial Administration 225.

¹⁷³ Webb, above n 143 at 178; Goldschmidt and others, above n 81 at 42.

Limited retainer advice does, of course, come with limitations. First is availability. Private practitioners are often unwilling to provide it. Second is effectiveness. Greiner and others' randomised controlled trial demonstrated that full representation is significantly more effective than unbundled clinic-based advice.¹⁷⁴ It may, however, be a better option than efforts to increase LiPs' capacity to represent themselves without advice, to which I now turn.

2. *Expanding and Reforming*

(f) Self-help resources for LiPs

There are many programmes in other countries that provide self-help services for LiPs. These come in many forms, including online information (print and video), guidebooks, and other forms of information on the court process.¹⁷⁵ For vulnerable litigants, in particular, there are still questions around how much self-help is possible or desirable, as it may cause litigants to feel abandoned rather than empowered.¹⁷⁶

(g) Reforming rules and roles

One area of reforms takes as its starting point Lord Woolf's often-quoted statement that:¹⁷⁷

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.

Many reports therefore focus on altering the roles of judges and court staff, and on changing the procedural rules, to make the court more accessible to LiPs.¹⁷⁸ The argument is that, if litigants

¹⁷⁴ James Greiner, Cassandra Wolos Pattanayak and Jonathan Hennessy "The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future" (2013) 126 *Harvard Law Review* 901.

¹⁷⁵ For an example of a self-help book see Lucy Reed *Family Courts without a Lawyer: A Handbook for Litigants in Person* (2nd ed, Bath Publishing, Bath, 2013).

¹⁷⁶ Elizabeth McCulloch "Let Me Show You How: Pro Se Divorce Courses and Client Power" (1996) 48 *Florida Law Review* 481; Jeff Giddings and Michael Robertson "Large-Scale Map or the A-Z? The Place of Self-Help Services in Legal Aid" (2003) 30 *Journal of Law and Society*; Mather, above n 61 at 154.

¹⁷⁷ Woolf, above n 157 at 17.2.

¹⁷⁸ Civil Justice Council, above n 26 at [32] stating "Courts and tribunals exist for the users, not the other way round"; Webb, above n at 178 arguing that the system should be fitted to litigants, not litigants to the system, as "litigants are practically and logically necessary for disputes to be settled; advocates are not"; Judicial Working Group on Litigants in Person *Judicial Working Group on Litigants in Person: Report* (Judiciary of England and Wales, 2013) at 6-7, concluding that "litigants in person are not in themselves a problem; the problem lies with the system which is not developed with a focus on unrepresented litigants. We consider it vital that, despite the enormous challenge presented, judges are unable to and empowered to adapt the system to the needs of litigants in person, rather than vice versa".

have a right to access the courts to attain justice, then the courts must do what they can to make it a reality.¹⁷⁹

It is often suggested that Judges should be permitted to provide more assistance to LiPs concerning such matters as how to ask questions, or guiding witness examinations, or that judges should be provided with more guidelines as to the proper limits of the assistance to LiPs that they can provide.¹⁸⁰ Another common suggestion is more judicial case management,¹⁸¹ though case management does not necessarily reduce costs but rather shifts costs to the front-end of the process, and it can increase the cost to the taxpayer, as it requires a significant increase in judicial resources in the early stages of the process.¹⁸² Nevertheless, it is still seen as part of the response required.¹⁸³ But a more active role for the judiciary of this kind, even if we accept it should be part of the response, cannot be a complete one. This is especially because Judges' knowledge of facts is limited to the evidence that is put before them. That fact gathering aspect of the process must still proceed outside the court. Greiner and others therefore suggest that a reason why unbundled advice is less effective than full representation is the role counsel play in finding and presenting the facts:¹⁸⁴

If prehearing investigation and factual development are critical, then obviously no amount of adjudicator explanation at a hearing can fill in the gap left by the absence of competent legal assistance.

To overcome this problem, some suggest that the judiciary need to take a more active role in the process, leading to a more inquisitorial system, at least where one party is a LiP.¹⁸⁵ Even inquisitorial systems require lawyers, however, and, as Assy and Zuckerman argue, they therefore offer no complete response to the challenges posed by LiPs.¹⁸⁶

¹⁷⁹ Russell Engler "And Justice for All - Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks" (1999) 67 Fordham Law Review 1987; Jona Goldschmidt "The Pro Se Litigant's Struggle for Access to Justice" (2002) 40 Family Court Review 36 at 38; Family Court of Australia *Self-Represented Litigants - A Challenge: Project Report* (May 2003) at 5. Cf Assy, above n 144 at 11-15.

¹⁸⁰ Landsman, above n 1 at 248; Richard Zorza "A New Day for Judges and the Self-Represented: The Implications of *Turner v Rogers*" (2011) 50(4) Judges' Journal 16.

¹⁸¹ Family Court of Australia, above n 179 at 37; Webb, above n 143 at 175; Goldschmidt and others, above n 81 at 47-48 suggest that conferences would not necessarily have to be judicial, but could be run by court staff.

¹⁸² Adrian Zuckerman "A Reform of Civil Procedure - Rationing Procedure rather than Access to Justice" (1995) 22 Journal of Law and Society 155 at 172.

¹⁸³ Civil Justice Council, above n 26 at [100].

¹⁸⁴ Greiner, Pattanayak and Hennessy, above n 174 at 945.

¹⁸⁵ Civil Justice Council, above n 26 at [2.10] and [5.11]; Rebecca Albrecht and others "Judicial Techniques for Cases Involving Self-Represented Litigants" (2003) 42 Judges Journal 16 at 45-48. In the New Zealand context, Matthew Smith "Self-Represented Litigants" [2012] New Zealand Law Journal 12 at 13-14 reviews case law where Judges have suggested a more active role is appropriate.

¹⁸⁶ Adrian Zuckerman "No Justice Without Lawyers: The Myth of an Inquisitorial System" (2014) 33 Civil Justice Quarterly 355 at 360-361; Assy, above n 144 at 123-125 (discussing the German system).

The other potential area of reform is in the procedural rules, often offered as a complement to a more active judicial role. The procedural rules might be simplified to make them easier for LiPs to understand. Zuckerman argues that it would be desirable to simplify the rules, by removing unnecessary procedural requirements and doing away with “convoluted and opaque” language, rules and practice directions. But he still argues that:¹⁸⁷

Complexity is the inevitable result of the commitment of treating like cases alike. This commitment produces a continuing refinement of court practice and the build up to precedents to ensure that like cases are treated alike. Consequently, no matter how hard the rule maker and the court may try to make the procedure comprehensible to the lay person, unrepresented litigants are bound to remain at disadvantage.

Zuckerman’s argument a decade ago was to apply different procedure to different kinds of cases.¹⁸⁸ This might lead, for instance, to simplified procedure in cases, where LiPs are particularly numerous.¹⁸⁹ As an alternative suggestion, some commentators have argued that simplified procedural rules should be put in place, depending not on the case, but on whether one party is a LiP.¹⁹⁰ There have also been calls for simplified court forms.¹⁹¹ The Government-led family justice reform introduced new forms that are intended to enable LiPs to conduct proceedings without legal assistance. The difficulty with these reforms for “simplification” is that they can create additional complexity. One (of several) criticisms levelled at the family justice reforms is the introduction of a “complex maze of procedures with different entry points, criteria and exemptions”.¹⁹² Simplified forms may also hinder clarifying the issues at stake in a dispute, which was why a judiciary-led rule change abandoned the simplified court forms for all District Court cases.¹⁹³

¹⁸⁷ Zuckerman, above n 186 at 373.

¹⁸⁸ Zuckerman, above n 182.

¹⁸⁹ District Court Rules 2014, r 10.1. There are three different modes of trial available: short, simplified or full. The complexity of the issues, the amount at stake, and “proportionality”, are all factors to be taken into account in determining the appropriate mode of trial. Short and simplified trials have time limits for witness examination and limits on discovery. Similarly, the Family Court has different “tracks” for different proceedings.

¹⁹⁰ Judicial Working Group on Litigants in Person, above n 178 at 8; Goldschmidt and others, above n 81 at 51-52.

¹⁹¹ Macfarlane, above n 2 at 113; Civil Justice Council, above n 26 at [175]-[178].

¹⁹² Mark Henaghan and Meghan Nicholson "Family Law" (2014) 2 New Zealand Law Review 321 at 350 quoting Garry Collin, the Chair of the Law Society Family Law Section.

¹⁹³ District Court Rules 2014; Andrew Beck and others *District Court Procedures: Review and Reform* (New Zealand Law Society Continuing Legal Education, Wellington, 2014) at 1 stating that the rules were amended because “the absence of structured documents in the form of statements of claim and statements of defence meant that succinct and clear analyses of the position of the parties were often not available until the proceedings were well advanced”. See also Henaghan and Nicholson, above n 192 at 351 noting that the Expert Reference Group for the family justice reforms “has pointed out that ... the relevant factual and legal issues will be difficult to distil, and ‘hidden’ issues may not be identified”.

B. Alternatives to the Courts

Governments worldwide have responded by creating alternative dispute resolution (ADR) mechanisms. As Resnik and Curtis summarise the position:¹⁹⁴

With soaring demands for adjudication, governments have responded by diversifying the venues for adjudication. Magnificent courts welcome some rights seekers to their halls but send others to much less visible and impressive settings – administrative agencies or tribunals where lower-tier hearing officers work.

Similarly, one of the responses to the demands of LiPs is to send them to more informal settings, on the basis that there they will be better able to put their case as they will not be bound by strict procedure and the adjudicator will not be under the restraints of the adversarial system and be better able to assist.

The objections to such informalism lie both in the effect it has on disputants and on civil justice as a whole. Abel points out that “the danger with informalism is that it will dilute the limited protection against the powerful” that those who are “weaker, poorer, or of lower social status” derive from formal procedure.¹⁹⁵ He argues that reformers who press the case for ADR also often try to reduce litigation. “Yet”, he says, “the object is not to reduce litigation in general but to rid the courts of certain kinds of cases so that Judges can handle more cases of other kinds, or handle them better.”¹⁹⁶ Fiss’s well-known polemic, “Against Settlement”, objects to the effects of informalism for the civil justice system as a whole.¹⁹⁷

The dispute-resolution story makes settlement appear as a perfect substitute for judgment ... by trivializing the remedial dimensions of a lawsuit, and also by reducing the social function of the lawsuit to one of resolving private disputes.

Some commentators suggest that this trend towards informalism might be evidence of a more fundamental transformation where the role of law in ordering society is reduced. Informal dispute resolution is a symptom of law becoming “soft”, more flexible, discretionary and participative, than the coercive and enforceable “hard law” we are familiar with at present.¹⁹⁸ Galanter says that evidence of this transformation is “elusive”.¹⁹⁹ Moreover, responses that lie under the heading of

¹⁹⁴ Judith Resnik and Dennis Curtis *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses* (2007) at 16.

¹⁹⁵ Richard Abel "Delegalization: A critical review of its ideology, manifestations, and social consequences" in Hubert Rottleuthner, Erhard Blankenburg and Ekkehard Klaus (eds) *Alternative Rechtsformen und Alternativen zum Recht; Jahrbuch für Rechtssoziologie und Rechtstheorie* (Opladen, West-deutscher Verlag, 1980) 27 at 39 and 41.

¹⁹⁶ Richard Abel "Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice" (1981) 9 *International Journal of the Sociology of Law* 245 at 249.

¹⁹⁷ Owen Fiss "Against Settlement" (1984) 93 *Yale Law Journal* 1073 at 1085.

¹⁹⁸ Marc Galanter "A World without Trials" (2006) 2006 *Journal of Dispute Resolution* 7 at 31.

¹⁹⁹ At 30-31.

“transformation” are closely related to state-led responses outside the courts, where legislative change can reduce the demand for legal services by redefining what is a justiciable issue or displace demand by creating other forms of redress.

C. State-led Responses Outside the Courts

The most obvious example of displacement in the New Zealand setting is the Accident Compensation Corporation (ACC) scheme, which has been operating since 1972.²⁰⁰ This displaces from the courts huge numbers of claims for tortious liability, concerning motor accidents and other common injuries that could readily produce large numbers of LiPs. No-fault divorce is also an example of the potential for legislation to transform an adversarial process into a court-supervised administrative event. The New Zealand Family Proceedings Act 1980 enabled married couples to divorce on the sole ground that their marriage had broken down irreconcilably, established by living apart for more than two years, rather than proving who caused the relationship breakdown. While the process remained under the supervision of the court system, this change largely abolished the adversarial element to a common category of dispute, reducing the number of potential LiPs via law reform.

Focussing on wider policy initiatives emphasises that LiPs seeking access to the courts cannot necessarily be answered only by responses within the courts. Access to justice requires a broader view. As Sandefur argues:²⁰¹

New policies should include providing effective, accessible, nonlegal routes to solutions for common and significant civil justice problems; these routes will be a necessary complement to the traditional solution of more access to law.

State-led responses that address underlying social inequality could also reduce the amount of conflict in society and perhaps, therefore, the amount of civil litigation. Research has shown that one legal problem can trigger a cascade of other legal problems, for example an unfair dismissal from employment can lead to debt problems and family breakdown.²⁰² Strengthening protection in one area, such as employment protection, can therefore reduce the need for recourse to the courts for multiple issues.

²⁰⁰ Accident Compensation Act 1972.

²⁰¹ Sandefur, above n 131 at 51.

²⁰² Richard Moorhead, Margaret Robinson and Matrix Research and Consultancy *A Trouble Shared: Legal Problems Clusters in Solicitors' and Advice Agencies* (Department for Constitutional Affairs, 2006); Genn and Beinart, above n 67.

D. Conclusion

There is limited data on New Zealand LiPs, who they are, how many, and whether the number of them has changed. While this data would be useful, I have argued that research that categorises LiPs by reference to the form of interaction they are having with the court is more useful. I argue that a study of LiPs must attend to not just who they are in isolation, but their interaction with the other participants. I have also reviewed the major findings of several studies that investigated why people litigate in person. Their conclusions will be considered further when I present my findings on this matter in Chapter 4.

In addition, I have surveyed a number of theories that are important to understanding decisions to litigate in person, the experience of doing so, and the interaction of LiPs with others in the court system. These theories concern: the services lawyers offer; the means lawyers employ to protect the market for legal services; whether lawyers' services change litigant outcomes; and, independent of the outcome, the importance of procedural justice. I have also considered theories of civil justice and the importance of allowing litigation in person to the legitimacy of the courts. These theories inform much of the discussion in the later chapters.

The large and rapidly growing literature on appropriate responses to the LiP phenomenon was necessarily presented in broad brush-strokes. The review of the possible responses has been structured by reference to a taxonomy which emphasises that many possible responses lie outside the courts, as well as in possible changes to the behaviour of participants, or in processes followed, in the courts. This taxonomy is used in Chapter 10 when I discuss what my research suggests about the effectiveness of these different forms of response.

In the next chapter I examine the methods I used to examine these matters, as well as the ethical issues that arose and the limitations of the research.

Entering the Field: Methods, Methodology and Ethics¹

This study uses a mix of qualitative methods to investigate how LiPs experience litigating in person, how they are perceived by others in the process, and how court staff, lawyers and judges respond to them. The intention is to make a useful and novel contribution to knowledge concerning LiPs in New Zealand where very little previous research has been conducted on the issue, as well as contributing to the more developed international literature.

This chapter begins by presenting the final form of the research design and sample, as well as tracing its evolution as the project unfolded. The second section of the chapter discusses the approach taken to data analysis. The final section considers the ethical issues that arose in undertaking this research.

I Research Design

The primary qualitative methods used were interviewing, document review and participant observation.² In taking this approach, I was influenced by the work of researchers within the tradition often known as legal ethnography, who have explored the work of many participants in the legal system, including judges, barristers' clerks, criminal law officials, and divorce lawyers, plus the disputing behaviour of the public.³ This study is not an ethnography in the strict sense in which that term is often used. Nevertheless, by employing the methods of participant-observation, interviewing and document review, derived from that tradition, I have tried to understand with fresh eyes the decision to litigate in person, the experience of doing so, and the reaction of judges, lawyers and court staff to LiPs.⁴ Other researchers have noted that litigants'

¹ My thanks to Sharyn Anleu-Roach, John Flood, Martin Tolich, Max Travers, and Julian Webb for discussing with me various issues of method, methodology, and ethics.

² Mario Luis Small "How to Conduct a Mixed Methods Study: Recent Trends in a Rapidly Growing Literature" (2011) 37 *Annual Review of Sociology* 57 at 59-60.

³ Penny Darbyshire *Sitting in Judgment: the Working Lives of Judges* (Hart Publishing, Oxford, 2011); John Flood "Middlemen of the Law: An Ethnographic Inquiry into the English Legal Profession" (1981) *American Bar Foundation Research Journal* 377; David Engel "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community" (1984) 18 *Journal of Law and Society* 551; John Conley and William O'Barr *Rules Versus Relationships* (University of Chicago Press, Chicago and London, 1990); Sally Engle Merry *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (University of Chicago Press, Chicago, 1990); William Felstiner and Austin Sarat "Law and Strategy in the Divorce Lawyer's Office" (1986) 20 *Law & Society Review* 93.

⁴ While the case study component of the method could be called "ethnography" according to the criteria listed by Michael Angrosino *Doing Ethnographic and Observational Research* (Sage Publications Ltd, London, 2007) at 15, I have chosen to call this part of the method "case studies". This is because the term "ethnography" risks misrepresenting

accounts of their experiences are often “fluid” and that subsequent events can colour their recollections as to why certain decisions were made at particular points in a case.⁵ Importantly, however, the methods I used enabled some examination of people’s experiences as they occurred, rather than simply retrospectively. The design included “after the fact” interviews with LiPs, as well as interviews with lawyers, judges and court staff who had prior experience of LiPs’ engagement with the court process. This ensured that a diverse range of views and experiences were captured to produce a rich understanding of the LiP experience and other participants’ responses to LiPs.

A. Summary of Final Study Design

This is essentially a phenomenological study, in that it attempts to see things from the participants’ point of view.⁶ The research design borrows from a number of interpretivist schools of qualitative inquiry, including ethnomethodology and symbolic interactionism, but also pays attention to structuralist concerns.⁷ My intention is to respect and acknowledge the debates about methods and knowledge that trouble qualitative researchers, but also to produce research that can inform policy debate and scholarly conversation about LiPs.⁸ Qualitative

the amount of time spent with the participants. While I have borrowed heavily from ethnographic methods and spent as much time as possible to become immersed in the experience of litigating in person, there is no “community” of LiPs I can spend extended time with, a key component of ethnography.

⁵ William Felstiner, Richard Abel and Austin Sarat "Emergence and Transformation of Disputes: Naming, Blaming, Claiming ..." (1980) 15 *Law & Society Review* 631 at 650-651; John Conley and William O'Barr "Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law" (1993-1994) 27 *Loyola of Los Angeles Law Review* 41 at 61-62.

⁶ Alan Bryman *Social Research Methods* (4th ed, Oxford University Press, Oxford, 2012) at 28-32.

⁷ As Travers explains, the interpretivist traditions are “faithful to the Weberian injunction that it is important to take meaning seriously. This means that their aim is unashamedly descriptive: they seek to stay close to how social actors understand their own activities”. Structuralists in contrast, “which all share the Durkheimian assumption that there are underlying structures which shape and constrain our actions, but which are hidden from ordinary members of society”: Max Travers *Qualitative Research Through Case Studies* (Online ed, SAGE Publications Ltd, London, England, 2001) at 16. Daniel Newman *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing, Oxford, 2013) at 28-29 also attempts to answer the “plea for socio-legal research to ‘bridge the gap’ between structuralism and interpretivism” and situates his work in the “middle ground”.

⁸ As Reza Banakar and Max Travers "Law in Action" in Reza Banakar and Max Travers (eds) *Law and Social Theory* (2nd ed, Hart Publishing, Oxford, 2013) 161 at 164 observe, there are dangers in either bald empiricism, where theory is ignored in favour of a pretence of “neutral results”, or theoreticism where theory becomes so central that the connection with the empirical world is lost or it becomes “an indulgent, self-referential exercise”. They note “[as] Macauley and Mertz suggest, the challenge for realists based in law schools lies in conducting empirical research that avoids the traps of empiricism or theoreticism and remains relevant to ‘doctrinal scholarship’”, which dominates law schools in New Zealand as it does in other common law jurisdictions. On the position of socio-legal research in New Zealand, see Kim Economides "Socio-legal Studies in Aotearoa/New Zealand" (2014) 41(2) *Journal of Law and Society* 257.

studies of any kind, but especially small-scale, single-researcher studies such as this, are often attacked as anecdotal, subjective, or not generalizable.⁹ This kind of scepticism may be particularly likely in New Zealand where there is a limited tradition of socio-legal research and a policy audience hungry for “objective facts”, especially those drawn from large data sets that claim to present a representative portrait of the subject.¹⁰ Smaller scale qualitative research studies of the kind I have conducted can, however, investigate a topic in much greater depth, and with more flexibility, than a large quantitative project. More subtle aspects of the experiences, motives, biases and reactions of participants in the process might be uncovered than would emerge from a large (and therefore necessarily superficial) dataset on the subject.

I used multiple data-sources (interview transcripts, field notes, and litigation documents). These were collected and constructed through interviews, participant observation and document review. A summary of the groups who participated, the number of participants in each group, and the data collection methods employed, appears in Table 2.

As shown in Table 2, LiPs participated in one of two different ways: either via a case study (that included interviews), or only by way of an interview that did not include the wider elements of a case study. I began the data collection by conducting the LiP case studies and other LiP interviews. Once these were complete, I moved on to interviewing court staff, lawyers, and judges.

⁹ Bryman, above n 6 at 405-407. For a specific example, see Assy who dismisses as “anecdotal” the research basis reviewed in the previous chapter that suggests a primary reason for litigating in person is financial: Rabeea Assy *Injustice in Person: The Right to Self-Representation* (Oxford University Press, Oxford, 2015) at 20.

¹⁰ James Hackney *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory* (New York University Press, New York, 2012) at 107, where Austin Sarat discusses positivism and the law and society movement and notes that “In order to pay attention to policy you have to present your work in a positivist mode”. See also Darbyshire, above n 3 at 12-16 discussing observational research, positivism and socio-legal research.

Table 2 - Summary of Data Sources and Participant Sample

Participant role	Data Collection Method	Number of participants
LiPs 1	<i>Case study:</i> Individual interviews, email or text message conversations, review of litigation documents (court documents, correspondence, complaints), and, where possible (n = 5), participant observation	10
LiPs 2	<i>Interview:</i> Individual semi-structured interview and, where provided (n=11), review of litigation documents (no overlap with “LiPs 1”)	24
Court Staff	Individual semi-structured interview	8
Lawyers	Individual semi-structured interview	16
Judges	Individual semi-structured interview	13
Total Participants		71

In starting data collection with the LiPs, I followed Goffman’s method of starting at the bottom and moving up the social order. As Goffman explains, when discussing participant observation as a fieldwork method:¹¹

... there is the affiliation issue. You can't move down a social system. You can only move up a social system. So, if you've got to be with a range of people, be with the lowest people first. The higher people will 'understand', later on, that you were 'really' just studying them. But you can't start at the top and move down because then the people at the bottom will know that all along you really were a fink - which is what you are.

Macfarlane’s study, published during the course of the research, is the only other study about LiPs to take LiPs as a starting point.¹² The expectation is that, in taking this bottom up approach,

¹¹ Erving Goffman (transcribed and edited by Lyn H Lofland) "On Fieldwork" (1989) 18(2) *Journal of Contemporary Ethnography* 123 at 130. “Fink” is an informer. At 125 Goffman says he only wants to talk about participant observation: “observation that is done by two kinds of “finks”: the police on one hand and us [ethnographers] on the other”.

¹² Julie Macfarlane *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report* (Ontario, Canada, May 2013). This study included only interviews, not observation or document review. Conley and O'Barr, above n 3, had only LiP participants but their study was of legal discourse, rather than of LiPs as such.

the viewpoints of those studied – here LiPs – are less tainted by their suspicion that the researcher is a fink.

Making LiPs the focus of, and the starting point for, the research was also intended to limit my own bias. I am trained and have practised as a lawyer, and lawyers are not usually particularly well-disposed towards LiPs. Lawyers love to tell stories about them, particularly those who run lengthy, vexatious litigation against multiple defendants.¹³ I wanted to try to avoid that kind of bias. On the other hand, in conducting this research, I was not motivated by any particular transformative or critical agenda, in the sense of wanting to reform the court system or improve the lot of LiPs.¹⁴ Nevertheless, only after attempting to understand LiPs through their own eyes did I turn to the perspectives of other litigation participants, inquiring into their perceptions and behaviour and the reasons and structural constraints that might explain them.

B. Initial Research Design

1. Ethics Approval

The research design I proposed to the University of Otago Human Ethics Committee (UOHEC) in October 2012 had three components: case studies, semi-structured interviews with staff of the courts and community organisations who frequently advise LiPs, and a count of court files to estimate the number of LiPs active in NZ civil courts.¹⁵

I proposed that the case studies would begin by advertising for LiP participants who were in the early stages of litigation. In consenting to participate, the LiP would know that at the end of my observation of their case I would interview the opposing litigant and their lawyer. The opposing party had to be represented. The LiP, opposing lawyer and their client would all need to consent to be included in the research. I also wanted to interview the Judge who heard the case. I was

¹³ These stories can be interpreted as what Dingwall calls “atrocious stories” and will be discussed in Chapter 8, page 207: Robert Dingwall “‘Atrocious Stories’ and Professional Relationships” (1977) 4(4) *Work and Occupations* 371.

¹⁴ John Creswell *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (3rd ed, SAGE Publications, Thousand Oaks, 2013) at 25-27: “the basic tenet of this transformative framework is that knowledge is not neutral and it reflects the power and social relationships within society, and thus the purpose of knowledge construction is to aid people to improve society”; Martyn Hammersley and Paul Atkinson *Ethnography: Principles in Practice* (3rd ed, Routledge, London and New York, 2007) at 97: “Some regard the role of the ethnographer as to amplify the voices of those on the social margins; these being treated as having epistemological or ethical privilege”.

¹⁵ The design of the court file review to estimate numbers of LiPs was derived from Richard Moorhead and Mark Sefton *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (2/05, United Kingdom Department of Constitutional Affairs Research Series 2005).

aware, however, that New Zealand has a strictly observed rule that Judges do not make extra-judicial comment on cases, so I sought permission to interview Judges about LiPs in general, not the specific case observed.¹⁶

I chose to conduct all aspects of the research in Auckland and Waikato, areas that contain 1.8 million people, or 43 per cent of the total population of New Zealand.¹⁷ These areas also have demographically diverse populations and are close to my home, which made it practical to carry out the observations. I refer to these regions together as the “Study Region”. The “Study Courts” are the District (including Family) Courts and the High Courts, conducting civil proceedings, within the Study Region.

The specific ethical issues raised by the research are considered in more detail below. The ethics application was 15 pages long, with a further 37 pages comprising letters of support from the Judiciary, a template for data collection for the court file review, an advertisement for recruiting LiPs, and the proposed research instruments for each participant group: LiPs, the opposing party, the opposing counsel, Judges, and court registry staff. UOHEC granted approval on 23 November 2012 (approval 12/315) without requiring any amendments.

2. *Māori Consultation*

In addition to UOHEC approval, I consulted the Ngāi Tahu Research Consultation Committee that considers potential research of interest or concern to Māori. Their feedback was that I include, where possible, data on ethnicity. I asked all LiP participants about ethnic identification and Table 3 shows the ethnic group that the LiPs said they identified with.

¹⁶ Grant Hammond "Judges and Free Speech in New Zealand" in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 195.

¹⁷ Statistics New Zealand "Estimated subnational population (RC, AU), by age and sex, at 30 June 2006-13 (2013 boundaries)" <<http://nzdotstat.stats.govt.nz/>> .

Table 3 - LiP Participants by Ethnicity

Ethnic Group	Number of participants
NZ European/Pakeha	21
European (immigrant)	7
Maori	3
Indian	1
Pacific Island	1
African	1
Total Participants	34

3. *Judicial and Ministry of Justice Approval*

I needed permission from the MoJ to access court files and interview court staff. The MoJ has their own process for reviewing research conducted within the courts, including ethics review, and I submitted my proposal on 10 December 2012. It was approved on 21 February 2013.

To interview Judges, I needed the permission of the Judicial Research Committee (JRC).¹⁸ I submitted a proposal to the JRC on 10 December 2012. It was approved on 19 February 2013, with one amendment: that I was able to observe proceedings involving LiP case study participants, but only able to interview Judges other than those I observed presiding in those cases.¹⁹ It is perhaps not surprising that the JRC imposed this limitation, as some LiPs are notorious for the amount of litigation they bring, including bringing proceedings against Judges personally. I therefore modified the proposal and requested interviews with all the Judges who had not presided over a case observed, but who sat in the Study Region. This provided the closest approximation to the set of interviews I had intended.

¹⁸ The JRC considers all requests for involvement of Judges in research and makes recommendations to the relevant Heads of Bench.

¹⁹ Cf John Dewar, Barry Smith and Cate Banks *Litigants in Person in the Family Court of Australia* (Family Court of Australia, 2000) at 31, where the study involved (among other methods) researchers observing hearings and the presiding judge providing comments to the researcher about the case observed; and Liz Trinder and others *Litigants in Person in Private Family Law Cases* (Ministry of Justice, United Kingdom, 2014) at 156, where the researchers had permission to conduct informal interviews with judicial officers after observing cases over which the judicial officer had presided.

4. *Initial Recruitment of LiPs*

I defined a LiP as anyone who at any point in their case had not had counsel on the record.²⁰ This meant I included people who had been represented at some point in the progress of their case, but not at other points. I chose an inclusive definition of this kind because I was interested in interrogating the experience of LiPs who tried to obtain help by way of formal legal representation or other legal assistance during the course of their case, and might have been successful. There were two possible methods to recruit LiPs to the study: to advertise for participants, or to randomly sample and invite people who had filed cases in the Study Courts to participate. I chose advertising for two reasons. First, I hoped to include LiPs who had not yet filed in court, or who had filed as represented litigants and would be recorded as represented, but who had subsequently become LiPs. Second, to generate a random sample of participants I would need access to court files, which would need to be approved by the MoJ. I was cautioned by other researchers that the MoJ process was likely to be lengthy and could have uncertain outcomes. This concern was borne out by my experience of attempting to get access to the court files to estimate the number of LiPs (the third component of the original design).

Despite obtaining formal permission from the MoJ to access case files to estimate LiP numbers, the subsequent delays experienced in actually gaining access meant it unfortunately became impossible to undertake this part of the research. An initial delay, in 2013, occurred because of a major staffing restructure in the Family Court. This was followed by a significant delay as I tried to identify a MoJ staff member who could generate the case management reports. A MoJ employee also told me during this time that although the MoJ did not want to “put up a road block”, “there might be some costings associated with searching the files”, because they would need to have a staff member supervising my review of the files. In February 2014, I spoke to a MoJ employee who had detailed knowledge of the case management system. They knew how to generate the initial reports I needed and agreed to do so. When, in July 2014, and after further

²⁰ There are a number of possible definitions for LiPs (see discussion in Chapter 2, page 14). Many of the LiPs had previously been represented, and several case study LiPs became represented during the course of the research (one moved in and out of representation several times).

follow-up, these reports had still not been generated, I decided to abandon the attempt to estimate LiP numbers.²¹

I began recruiting LiPs in April 2013. I initially tried to recruit participants via “key informants”:²² that is, people who were acting as McKenzie friends in the Study Region. While they gave me useful background information and made some attempts to connect me to potential participants, only one case study participant was recruited in this way, and not until a year after I made contact with the key informant. The other initial recruitment method was via posters and brochures (see Appendix A) at community organisations that I expected would serve large numbers of LiPs, such as the Community Law Centre in Hamilton and the Citizens Advice Bureau. I also put up posters in the offices of the Study Courts, although this did not occur until later as securing permission from the MoJ to display posters took 10 weeks.

In the interim, to increase my sample, I requested ethical approval for an amendment to my methods to allow recruitment via a website at www.selfrepresented.org.nz, which outlined the project and the opportunities to participate. It included links to information that LiPs might find useful, such as the Community Law Centres, Citizens Advice Bureau and the MoJ websites.²³ I also approached both paid and free newspapers with circulation in the Study Region to run a story about the research. Four newspaper articles appeared in late 2013 and early 2014. An example of a news story about the research is included in Appendix B.

The website proved to be an important recruitment tool. Participants volunteered after finding it via search engines and I was able to link the website to advertisements for participants. I posted a link to the website on the web forum menz.org.nz, an active website of men involved in Family Law proceedings. Users of this site then linked it to other online support groups for

²¹ I did explore other methods of estimating the number of LiPs including: counting the number of people listed as appearing in person on the daily court lists; reporting numbers of LiPs appearing in the Auckland High Court, which the Auckland registry office began collecting in 2013; or, searching the court judgment databases for cases where the party is recorded as appearing “in person”. All these methods have important limitations, particularly questionable accuracy and an ability only to capture representation at one moment in time (either at filing for the Auckland High Court figures, or at hearing for the other methods). Given many people move between represented and unrepresented over the course of litigation, all these methods are likely to significantly under-estimate the total number of LiPs. While it would be very helpful to know what New Zealand’s LiP population is, it is not a question that could be addressed in this research.

²² Hammersley and Atkinson, above n 14 at 103-104.

²³ I added to the list of resources as participants told me about other organizations they found helpful through their litigation.

Family Court litigation, and through this network it was passed to diverse user groups. Fifteen LiPs were recruited via the website, 10 through hearing about the study in the media, five by word of mouth, three from posters, and one via a key informant. I had approaches from 11 other litigants who were not eligible to participate in the study. Many of these litigants shared their stories about their experiences with me. I listened to these, but they are not included in the analysis. Others were seeking legal advice. I replied to these requests with a brief explanation of the study and redirected them to the Community Law Centre.²⁴

C. Design Amendments

When requesting UOHEC approval to recruit via a website in June 2013, I also requested a number of other amendments to address issues that became apparent in the initial recruitment.

1. Documentary Material

I had not sought approval to study documentary material in the original ethics application, but it quickly became apparent that court documents and correspondence would provide valuable information, and was material that LiP participants wanted to provide. The written materials not only gave background information about the cases but also showed how the parties were conducting themselves in the litigation, both in and out of court. I therefore requested and was granted approval to study this information by the UOHEC.

2. Consent for the case studies and recruitment of lawyers

I had expected that it would be difficult to find LiPs who were willing to participate in the case studies, knowing that at the end of my observation of them I would talk to the opposing counsel and litigant. This was not however a difficulty, or at least, those who responded to the advertisement were happy for me to talk to the other party. On the other hand, securing the consent of the opposing party and their lawyer was much more difficult. The original design was predicated on all parties to the litigation giving consent, so it was also a considerable roadblock to the research progressing. Unsurprisingly, in many of the case studies, there was significant animus between the parties, but more surprising to me was the level of animus that had developed between the opposing lawyer and the LiP, and also the distrust with which the

²⁴ The posters and newspaper articles highlighted that this was a research project and that I could not provide legal advice. I reiterated this when responding to them.

opposing lawyers treated me.²⁵ Because of the study design, where I spent time interviewing and observing the LiP first, I was not regarded as neutral. Opposing lawyers were usually suspicious and either did not reply to my overtures or sent curt refusals.²⁶

The LiPs who had volunteered did not want the opposing party to stop them participating but without even a reply from the opposing counsel I had no way to try negotiating to secure consent. As Desmond discusses in his study of eviction, while there are advantages to studying an issue from multiple vantage points, it also requires “more effort be dedicated to gaining entrée and maintaining trust. ... Access to one person often complicated access to another”.²⁷ Without even the chance to engage with the opposing party, I had no opportunity to discuss the possibility of them participating. As I found later during the course of the case studies, it was only after opposing parties became familiar with my presence in the courtroom, where I could talk to them, and, by taking notes, emphasize my researcher role, that they were willing to participate in the study. Without personal contact in the courtroom, however, it was very difficult to engage the opposing party.

I therefore decided to seek approval from the UOHEC to amend the study design so that the other party did not have to give consent before the LiP could participate. It would be for the Judge to decide whether I should be admitted to observe the hearing, and the Judge could take into account any objections the opposing parties might have to my presence.²⁸ I also requested

²⁵ My surprise shows my naïve belief that my academic interests would be shared by members of the practising profession, as Brenda Danet, Kenneth Hoffman and Nicole Kermish "Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure" (1979) 14 Law & Society Review 905 83 at 908 explain: “As workers in the field of law and social science know, the legal profession is almost by definition unsympathetic to the needs and interests of social scientists. By training, practicing lawyers are pragmatic and often anti- theoretical; they are trained to speak decisively and apply general rules to particular cases. Social scientists, on the other hand, are more likely to be speculative, skeptical, and oriented toward contributing to general understanding of how things work in the world, rather than toward the concrete solution of specific problems. Moreover, the stance of the social scientist is typically one which tends to overturn received notions of how social arrangements work (cf. Berger, 1963). Although lawyers have very little understanding of or sympathy for social science research, they recoil almost instinctively at any intrusion into their autonomy. In part this is the natural response of any of us who may feel uncomfortable at the thought of having someone look over our shoulder.”

²⁶ The notable exception was when dealing with a lawyer acting for an insurer who was running a defence to a LiP claim. Perhaps because of the distance between him and the party to the litigation (he was instructed by the insurer, not the defendant), he was very open to participating.

²⁷ Matthew Desmond "Eviction and the Reproduction of Urban Poverty" (2012) 118 American Journal of Sociology 88 at 97.

²⁸ UOHEC deferred to the JRC on the issue of consent for court observations. The JRC approved a procedure whereby I would submit a memorandum to the presiding Judge outlining the purpose of the research, the proposed date of observation, and the position of the parties regarding consent. The represented party could then raise any

approval to conduct semi-structured interviews with lawyers outside the case studies. This was to ensure that I would have a group of lawyers in the sample, even if no lawyers in the case studies agreed to be interviewed. The UOHEC and JRC approved all the changes and the research continued in this amended form.

3. *Addition of Interview-Only LiP Participants*

During the initial recruitment period I received a number of approaches from people who had heard about the study by word of mouth, but who were living outside the Study Region. Because of their physical distance from me, I could not include them in a case study. I remained unsure as to whether or not I would be able to recruit enough case study participants and was reluctant to exclude potentially useful data. I therefore considered ways to include these volunteers.

In June 2013, along with the other amendments, I requested approval from UOHEC to add a second option for LiP participation. Those outside the Study Region, or those within the Study Region who did not want to participate in an observation, could instead take part in an hour-long semi-structured interview by Skype or phone. Participants were eligible where their litigation was ongoing, or had concluded within the last 12 months. Where their litigation was ongoing, they could also take part in a follow up interview six months later. This amendment was also approved.

4. *Final Form of the Research Design*

The research, as it proceeded from June 2013, took the form set out in Table 2. In total 10 LiPs participated in a case study. The case studies involved multiple interviews and discussions with the LiPs as their case proceeded. Most of the case study LiPs forwarded court documents and correspondence to me on an ongoing basis. Where the LiP's case proceeded to court and I was able to secure access (discussed further below), I observed them in court at case management or trial fixtures. A confidential summary of the case study LiP data is presented in the Confidential Appendix. (The reasons for confidentiality are discussed in detail below). A further 24 LiPs participated in an interview, and 11 of those also provided litigation documents for

objections and the Judge could decide whether I could attend. The memorandum to the presiding Judge would have been required in any case, as even in hearings that are open to the public, no one can take notes in the public gallery without permission from the Judge.

review. After completing the LiP interviews, I interviewed court staff (8), lawyers (16) and Judges (13).

D. Interviews, Observations and Litigation Documents

1. LiP Participants

When LiPs lived in the Study Region and had ongoing (rather than recently concluded) litigation, they had the option to participate in either a case study or solely an interview. When a LiP contacted me, I sent the information sheet and consent form (see Appendix C) to them to review. They then returned the signed consent by mail or email, and we arranged an interview time. As the total number of participants reached 20, I began using purposive sampling, seeking demographic diversity and representation across types of cases and jurisdiction.²⁹ Table 4 shows the total LiP participants by age group.

Table 4 - LiP Participants by Age Group

Age Group	Number of participants
30-39	6
40-49	15
50-59	7
60+	6
Total Participants	34

Table 5 shows the LiP participants by the court in which their litigation was being heard. Twenty-one were applicants or plaintiffs and 13 were respondents or defendants. Five of the LiPs I considered were “persistent”, because, at the time of entering the study, they had pursued more than three cases in the Study Courts; some of them many more than three. By the end of the study, two more met this definition of persistence by initiating further litigation.

²⁹ LiPs continued to contact me volunteering to participate throughout the analysis and writing of this thesis.

Table 5 - LiP Participants by Court, Gender and Party

Court	Number of LiPs	Persistent LiPs	Gender of LiPs		LiP Party	
			Male	Female	Applicant	Respondent
Family Court	21	1	12	9	10	11
District Court	3	2	3	0	2	1
High Court	10	3	8	2	*9	1
Total	34	5	23	11	21	13

*One LiP recorded as an applicant was a respondent in the original proceeding but filed a cross application. The cross application became the substantive area of the proceeding and therefore the LiP is recorded as an applicant, not a respondent.

(a) LiP Interviews

I conducted a similar initial interview with all LiP participants, whether or not they were in the case study. This was a semi-structured interview (see Appendix D for the interview schedules), which began with an open question about how they had come to be a LiP and then became more directed to specific issues, including the history of the case, decisions about legal representation, previous experience in court, assistance with their case, legal research, and interaction with opposing party and counsel. It went on to explore where the matter had been determined, their experience in court, issues around costs, and enforcement of judgments. With LiPs participating only in an interview, I also asked about suggestions they might have for systemic changes.

For the LiPs in the case study, this was an “entry interview” to introduce me to their case. We then made arrangements for ongoing communication, which was either by mobile phone, e-mail or post. Most participants chose to communicate via email, but some did not have internet access so preferred cell phone calls and texts, with documents sent by post. I had 66 conversations with LiPs in the case studies. I had approximately 510 email exchanges with the case study LiPs, either reading correspondence they forwarded me (usually between the LiP and the opposing party), or discussing their case with them by email.

At the conclusion of my observation of the case study (which usually but not always coincided with the end of the case), I conducted a semi-structured exit interview with the LiP, asking for

their reflections on the case, their suggestions (if any) for systemic change, and, where the litigation was continuing, their plans for its future. Where interview participants had continuing litigation, I also conducted a follow-up interview, similar to the exit-interview conducted with case study participants.

Each interview with a LiP lasted, on average, one hour. I audio recorded all the interviews and transcribed them in the qualitative research software, NVivo.

(b) LiP Case Study Observations

The hearings I observed were a mixture of closed hearings (either because they were in chambers or in the Family Court) and open hearings. Regardless of their status, and although I had formal permission from UOHEC and JRC to observe court hearings, I still had to negotiate a number of hurdles each time I wanted to observe in court. The first was notifying the opposing counsel and asking for a reply as to whether or not they consented to my presence, and if not, for reasons so I could communicate those to the court. As with my initial attempts to get consent to their involvement in the research from the other party, the lawyers tended to be suspicious and curt. However, because I was making an application to the Judge to attend, they had to consider any objections to my presence that could be put to the Judge. Only one counsel objected and this was on the grounds that his client thought I was advising the LiP. Once it had been established that I was not, he withdrew the objection.

The next step was seeking permission from the presiding Judge, by sending an email attaching an information sheet for the presiding judge (see Appendix E) via the court registry office. While I expected the registry office to merely be a conduit to correspond with the Judge, the registry staff sometimes acted as gatekeepers.³⁰ For example, in one instance a Family Court registry staff member was reluctant to forward my request to the Judge on the basis that the Family Court is “private” and therefore I would not be allowed access. I sent further explanations (in addition to those I sent routinely) explaining my purpose and permission. In all but one instance, the Judge granted permission for me to attend.³¹

³⁰ Hammersley and Atkinson, above n 14 at 50-60.

³¹ One Judge refused permission for me to attend a judicial conference where my application to attend was made only 48 hours before the call. The Judge considered there was insufficient time to establish whether there was any objection, as the opposing party had not responded to my request for consent. I was, however, granted permission for the following judicial conference.

For proceedings outside the control of the court, however, I had less success gaining access. For example, I was unable to get the consent of one party where the dispute was heard at private arbitration. Unlike a Judge, the arbitrator had no power to make a decision regarding my presence, so I was reliant entirely on the consent of that party. With no opportunity to meet the other party face-to-face, I was unable to win their trust. This points to the difficulty of researching the increasingly private domain of dispute resolution, although this problem would be reduced if the researcher was presented to the parties as neutral.

Where I was able to observe, I usually met the LiP in the court foyer or talked to them in the courtroom before the fixture began. I introduced myself to the court taker³² and to opposing counsel if we had not met previously. During hearings I took notes on a laptop computer, and sometimes in a notebook when the public gallery was busy and a laptop would draw too much attention. I took verbatim notes of discussion I thought was particularly pertinent, using my own shorthand, and summary notes of other conversations. I expanded these notes immediately after the observation, ensuring they were coherent, recording information from memory that I had not been able to record at the time. In taking notes, I did not have prior headings, but took observational notes based on Emerson, Fretz and Shaw's discussion on strategies and tactics for writing field notes.³³ In total, I observed 21 days or half days of court proceedings.

(c) Documents

The documentary data includes letters between LiPs and opposing counsel and between LiPs and other agencies (such as the Ombudsman, the Judicial Conduct Commissioner, or the Law Society), along with decisions from the complaints authorities. There is also my e-mail correspondence with LiPs providing updates of their case or answering my questions about specific aspects of their case. The other major component of the documentary material is court documents generated in the cases, including statements of claim or defence, affidavits or briefs of evidence, submissions, minutes of the court, and judgments. I reviewed 139 litigation documents relating to the LiP case studies.

³² Known as an "usher" in other jurisdictions, a court taker assists the judge in court.

³³ Robert Emerson, Rachel Fretz and Linda Shaw *Writing Ethnographic Fieldnotes* (2nd ed, University of Chicago Press, Chicago, 2011). I also audited an undergraduate class on ethnography which gave me an opportunity to practise and reflect on the process of writing field notes from participant observation.

2. *Interviewing Lawyers*

The original intention was that the only lawyers that I would interview would be the opposing counsel in the case studies. As the study progressed, however, and after only managing to interview one opposing counsel, I decided to abandon this aspect of the research design for a number of reasons, including confidentiality and practical impossibility.³⁴ I began recruiting lawyers from outside the case studies to ensure lawyers' perspectives were included in the research.

Seventeen lawyers participated, including one opposing counsel in a case study. The remaining 16 included four lawyers I specifically invited to participate because of their high workload with LiPs,³⁵ and 12 lawyers who responded to an e-mail invitation that I sent to a randomly drawn group.³⁶ I had a 20 per cent response rate from this method. Table 6 shows the practice areas of the lawyers who participated. Ten were male and six female. All of them practised in the Study Region, although two were based in another part of New Zealand.

I sent an information sheet and consent form (see Appendix F) to all prospective participants and they returned the signed consent by email. The semi-structured interviews with lawyers covered two main subjects: their experience in opposing LiPs and in providing limited retainer advice to them (see Appendix G). In the interview with the opposing counsel in the LiP case study, the questions were specifically directed at their experiences in opposing that LiP. For the other lawyers, the questions were about opposing LiPs generally, although I asked them to think about their most recent cases when answering the questions. The discussion about opposing LiPs included communicating with LiPs out of court, settlement discussions, appearing in court,

³⁴ In five of the other case studies I decided the risks associated with interviewing the opposing counsel were too high, even though in two of those the opposing counsel gave consent. The particular risks varied but my main concern was that the LiP would become suspicious of my involvement with the opposing party (even though they had agreed to it) and might try to subpoena my interview record to use in the litigation. In addition, it was practically difficult to frame useful questions that would not violate the confidentiality I had promised the LiP. Two other opposing parties became LiPs during the research so had no counsel to interview, and the remaining two lawyers did not consent to be interviewed.

³⁵ This included lawyers from the Crown Law Office, lawyers who acted as lawyer for child, and lawyers whose practice model was specifically directed at providing limited brief advice.

³⁶ I used the online New Zealand Law Society roll of barristers and solicitors and generated a list of all barristers and solicitors practising in the Study Region. I used an online random number generator to produce a random set of numbers between 1 and the number of practitioners on the list. If the number generated was for example "number 14" I took the fourteenth name on the list, checked on their practice website (where available) their practice area, and if they worked in Family and/or Civil Litigation I sent them an email invitation. Where they had no online practice information, I called their offices to check their practice area.

ethical rules, perceptions of LiPs’ presentation of cases, costs, and systemic responses to LiPs. The question about limited retainer legal advice covered whether or not the lawyer offered this service, in what circumstances, and their perceptions of its merits and limitations. I also put to lawyers de-identified scenarios I had observed in the case studies and asked for their comment and interpretation. These interviews were 40-60 minutes long.

Table 6 - Lawyers’ Practice Area

Practice area	Number of participants
Family	5
General civil	6
Family and general civil	2
Specialist civil	3
Total Participants	16

3. Interviewing Judges

As I was not able to interview the Judges who presided over the cases I had observed, I did not invite Judges to participate until all the other observations had concluded. The High Court Judges were recruited via the JRC. I provided a list of ineligible High Court Judges and the JRC returned a list of seven Judges sitting in the Study Region who were willing to be interviewed. For the civil District Court and Family Court Judges, the JRC asked me to make contact with eligible Judges through the registry of their Court and to arrange interviews with them directly. I sent an information sheet and consent form (see Appendix H) via their personal assistant and received signed consents by email.

While I originally intended to interview all the Judges in person this was not possible. I found that the Judges’ schedules changed at the last minute (particularly in the District Court) making it difficult to secure appointments in advance. It was also challenging to find days where I could interview multiple Judges in the same location on the same day given their commitments. It was inefficient to make repeated trips to Auckland (a three-hour return journey) to interview

individual Judges. I interviewed 13 Judges between March and July 2014, five in person and eight by telephone. Table 7 shows the number of Judges by type of court.

Table 7 – Judges’ Jurisdiction

Court	Number of participants
Family Court	4
District Court (civil)	4
High Court	5
Total Participants	13

These were semi-structured interviews. They covered how involvement of a LiP in a case might affect the judge’s preparation, conduct of pre-trial and trial fixtures, and judgment writing (see Appendix I). The interview also canvassed opinions of different types of LiP (as defined by the Judge), vexatious litigants, McKenzie friends, costs, perceived reasons for litigating in person, perceptions about numbers of LiPs, and systemic responses to LiPs. As the research with LiP participants progressed, I adapted the original semi-structured interview schedule to test ideas generated from other data collection, including outlining scenarios (de-identified) that I had observed and asking the Judges for their interpretation. These interviews were 45-60 minutes long.

4. *Interviewing Court Staff*

Between October 2013 and March 2014, I interviewed counter staff and other court registry staff working in the Study Courts who interact with LiPs regularly. I sent an information sheet and consent form (see Appendix J) via email to the staff member liaising with me, and received signed consents from the participants before beginning the interview. These were also semi-structured interviews of 30-40 minutes duration which included questions on: the context in which they encountered LiPs, perceived reasons for litigating in person, perceptions about numbers of LiPs, and suggested systemic responses (see Appendix K). I also discussed issues that had arisen in the case studies or LiP interviews, putting to them various situations or comments that LiPs had made (on an anonymised basis) for their comment.

5. *Limitations of Data*

The strengths of a qualitative study of this kind lie in the in-depth inquiry into participants' subjective experiences, rather than in the production of findings that are generalisable to the whole population. However, as the study aims to illuminate the experiences of litigating in person and the reasons people have for doing so, I have used purposive sampling, as explained above, to ensure diversity. LiP self-selection for participation may however have introduced some bias. First, it is probable that there are more "active" rather than "inactive" LiPs in the sample than would be found in the general population of LiPs,³⁷ as it seems unlikely that "inactive" LiPs would volunteer to join a research project. The research is, however, explicitly focussed on LiPs who actively engage with the court process and it is acknowledged that they are only part of the LiP population. Second, it is possible that the sample is skewed towards LiPs who had a negative experience of the court system. That is, they may have participated because they wanted to complain and agitate for change. This was a concern that a MoJ staff member expressed to me.³⁸ This is perhaps less of an issue for the case study LiPs who were mostly new to the process, and whose cases were still in progress, and therefore were not in a position to have a concluded view, either positive or negative, about their experience.³⁹ While most LiPs did have some form of complaint about the system, this was not the only reason they wanted to participate. They indicated a range of reasons for doing so, including a desire to improve the system for others, the therapeutic value of having someone listen to their story, and wanting to share a positive experience. To acknowledge and limit the potential for this "negative" bias, I have also paid particular attention in the analysis to comments made by lawyers, judges and court staff that commented positively on aspects of LiPs' interactions with the courts.

One of the research questions asked, what is the experience of litigating in person? This study was therefore designed to look at the experience of LiPs and their interaction with the judges, lawyers and court staff but was not designed as a comparative study, with a control group of

³⁷ Moorhead and Sefton, above n 15 at 62-63 discussing "inactive" LiPs.

³⁸ Once the MoJ had approved display of the recruitment posters in the registry offices, a staff member was reluctant to put them up as he was concerned that "every time someone has a bad experience at the counter they will come to you".

³⁹ The case study participants who were not new litigants did have views about the system, but including them allowed examination of persistent litigation behaviour.

represented litigants. For that reason I have been reluctant to make strong claims about the relationship between litigating in person and the emotional dimensions of the experience, when there is no comparison group to illuminate represented litigants' experiences in this regard.⁴⁰ Such research would be of great value and would give further understanding to litigant experience of the court system, but is beyond the scope of this study.

II Data analysis

My method of data analysis, while not rigidly adhering to any particular tradition, is derived from grounded theory. It follows Strauss and Corbin's encouragement to recognise that qualitative analysis is a "fluid and dynamic" process and "should be relaxed, flexible, and driven by insight gained through interaction with data rather than being overly structured and based only on procedures".⁴¹ It requires "stepping into the shoes of the other and trying to see the world from their perspective".⁴²

I found a number of sources useful in helping me to interrogate the data in different ways, particularly Becker's *Tricks of the Trade* in which he sets out "tricks", or "rules of thumb derived from experience", for examining data.⁴³ To explore the interview, observation and documentary material, I also combined insights from Strauss and Corbin, Silverman, Bryman, Bazeley, and Emerson, Fretz and Shaw, to try to "crack open" the data and develop codes and themes.⁴⁴

I transcribed all the interviews myself in NVivo. I began with line-by-line open coding of the first interview transcripts. I generated the initial codes from this process and from the review of

⁴⁰ Cf Macfarlane, above n 12 at 108-112 who reports, "SRL Respondents described a wide range of impacts and consequences for them arising out of their decision to self-represent" and describes these under the headings "personal health", "financial implications", "social isolation", "failing faith in the justice system". Without a control group of represented litigants, it is not possible to know if all these implications are attributable to litigating in person, or whether they are experienced by represented litigants as well.

⁴¹ Juliet Corbin and Anselm Strauss *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd Online ed, SAGE Publications, Thousand Oaks, CA, 2008) at 12.

⁴² Juliet Corbin "Taking an Analytic Journey" in Janice M Morse (ed) *Developing Grounded Theory: The Second Generation* (Left Coast Press, Walnut Creek, CA, 2009) 35 at 40-41.

⁴³ Howard Becker *Tricks of the Trade: How to Think About Your Research While You're Doing It* (University of Chicago Press, Chicago, Ill, 1998) at 3, for example the "null hypothesis of craziness" for behaviour commonly explained as "crazy" or "socially disorganized". The null hypothesis is that the behaviour is crazy and then the researcher searches for explanations that disprove the hypothesis, at 24-28.

⁴⁴ Corbin and Strauss, above n 41; David Silverman *A Very Short, Fairly Interesting and Reasonably Cheap Book about Qualitative Research* (2nd ed, SAGE Publications, London, 2013); Bryman, above n 6 at 564-590; Patricia Bazeley *Qualitative Data Analysis: Practical Strategies* (SAGE Publications, London, 2013); Emerson, Fretz and Shaw, above n 33 at 171-199.

the literature. After generating initial codes (or headings for the analysis) I combined these into higher order, or more abstract codes. I wrote short memoranda about each interview, noting themes or aspects that were common to other interviews, or that I found surprising. I also made a brief model of each LiP's path to becoming a litigant in person.

I began to develop themes by observing commonalities in the data, that I recorded. I used the “see also link” function in NVivo to connect these reflections to the data and to the literature that I imported into the NVivo database. This was a cyclical process. As I added more transcripts I refined the codes and the thematic memoranda, read further literature and explored links between themes. The final coding structure appears in Appendix L.

A. Observation and Interview Data

Participant observation offers the opportunity to check what participants say in interviews against other sources: other participant accounts, observations, and documents, including documents the participants have drafted. The inferences drawn from such cross-checking are not necessarily “correct”, but this provides some check on the validity of the analysis: “what is involved in triangulation is a matter not of checking whether data are valid, but, at best, of discovering which inferences from those data seem more likely to be valid”.⁴⁵

I have used the participants' accounts, given in either formal interviews or informal discussion, in what Hammersley and Atkinson call “two legitimate and complementary ways”.⁴⁶ First, I have used them as evidence of the phenomena they discuss: of the reasons why people litigate in person and of the experience of being or encountering a LiP. Second, I have used them to examine “interview discourse as a social activity”, where what is said in an interview is viewed as something generated in a particular context or for a particular purpose.⁴⁷ As Atkinson and Coffey conclude:⁴⁸

⁴⁵ Hammersley and Atkinson, above n 14 at 184.

⁴⁶ At 97.

⁴⁷ Harry van den Berg, Margaret Wetherell and Hanneke Houtkoop-Steenstra "Introduction" in Harry van den Berg, Margaret Wetherell and Hanneke Houtkoop-Steenstra (eds) *Analyzing Race Talk: Multidisciplinary Perspectives on the Research Interview* (Cambridge University Press, Cambridge, 2003) 1 at 5.

⁴⁸ Paul Atkinson and Amanda Coffey "Revisiting the Relationship Between Participant Observation and Interviewing" in Jaber Gubrium and James Holstein (eds) *Handbook of Interview Research* (SAGE Publications, Thousand Oaks, CA, 2001) 801.

... we need to treat interviews as generating accounts and performances that have their own properties and ought to be analyzed in accordance with such characteristics. We need, therefore, to appreciate that interviews are occasions in which are enacted particular kinds of narratives and in which "informants" construct themselves and others as particular kinds of moral agents.

Using this second approach not only contributes to the analysis, but, as Hammersley and Atkinson argue, it "can also aid our assessment of the validity of the information that is provided by particular informants".⁴⁹ Awareness of the context of the account and the purposes for which it was produced (the who, why, how, and for what audience) enables us to be aware of how it might be biased.

The observational data is treated as complementary to the interview data. While there is a long-standing tradition in social science research to privilege the researcher's observations over a participant's account,⁵⁰ I accept Atkinson and Coffey's argument that even the researcher's account of observed events relies "on the same culturally shared categories of memory, account, narrative, and experience" and cannot be regarded as an unproblematic record of "what really happened".⁵¹

This does not mean that the interview and documentary data have no utility, only that they should not be read as windows into the souls of the participants.⁵² Instead, the data should be read as accounts given within a specific context, whether to me as a researcher, or to the court as submissions, or produced in writing. The interview and observational data are not used crudely to determine differences between what the participants said and what they did. Conflicts instead invite deeper consideration about the context in which accounts were given, and what might be motivating the various accounts in these different contexts.⁵³

⁴⁹ Hammersley and Atkinson, above n 14 at 98.

⁵⁰ See Atkinson and Coffey, above n 48 for a discussion and critique of Becker and Greer's seminal 1957 article (republished as Howard Becker and Blanche Geer "Participant Observation and Interviewing: A Comparison" in William Filstead (ed) *Qualitative Methodology: Firsthand Involvement with the Social World* (Markham Publishing Company, Chicago, 1970) 133), which was highly influential in the privileging of observational data over interview data.

⁵¹ Atkinson and Coffey, above n 48 at 813.

⁵² Silverman, above n 44.

⁵³ Atkinson and Coffey, above n 48 at 808.

B. Documentary Data

The same approach is taken to documentary data in the study. This includes correspondence between the parties and from a LiP to a third party, decisions of bodies to which LiPs have made complaints (e.g. the Ombudsman, the Law Society), and court documents (memoranda to the court, affidavits, submissions, minutes and decisions of Judges). These materials are treated as “‘social facts’, in that they are produced, shared and used in socially organised ways”.⁵⁴ The emphasis is not on determining the correctness of the information or arguments they contain, or contrasting the documentary data with other data, but looking at the functions these texts perform. The same approach is useful in examining why LiPs’ documents might be poorly received by institutional actors, a theme that is taken up in more detail in Chapter 6.

C. Analysing Reactivity

An issue that arises in any research is participant reactivity: that is, the influence of the researcher on participants and others in the setting. This is particularly at issue in legal disputes, which, as Felstiner, Abel and Sarat explain, are subjective, unstable and reactive.⁵⁵ They argue (in the context of the formation of disputes) that the individual disputant’s subjective beliefs about the dispute, their attribution of blame, their goals and motives, are all malleable during a dispute and during interaction with institutions and advisers:⁵⁶

... as individuals define and redefine their perceptions of experience and the nature of their grievances in response to the communications, behaviour, and expectations of a range of people, including opponents, agents, authority figures, companions, and intimates.

The strategic choices they make can also be influenced. Every adviser, court official, judge, friend, family member, neighbour, and others using internet chatrooms or blog sites, and so on, with whom the LiP discusses their case, has the potential to cause some shift in their attitudes or position. As a researcher I am yet another person who might cause shifts in the course of the dispute, by interacting with them. Similarly, my being in court may change the behaviour of the opposing counsel, party and Judge. So too can the presence of journalists in the courtroom, or

⁵⁴ Paul Atkinson and Amanda Coffey "Analysing Documentary Realities" in David Silverman (ed) *Qualitative Research* (3rd ed, Sage Publications, London, 2011) 77 at 79.

⁵⁵ Felstiner, Abel and Sarat, above n 5 at 637-638.

⁵⁶ At 638.

the presence or absence of a party (rather than just their lawyers). They could all change how the participants behave.

Reactivity is often seen as a source of bias that may undermine the validity of the inferences drawn and researchers therefore try to minimise their effect on the data. Hammersley and Atkinson argue that this concern with reactivity “can be somewhat misleading Data in themselves cannot be valid or invalid; what is at issue are the inferences drawn from them”.⁵⁷ They urge ethnographers to be alive to how their presence may have shaped the data when deciding what inferences to draw from them. They also note that “participants’ responses to ethnographers may also be an important source of information”.⁵⁸

I was aware that at times my presence did have some effect and have reflected on what this indicates. For example, some LiP participants recognised the possibility of reactivity and stated that one of the reasons they wanted to participate was to have a third party in the room - a trained lawyer from a recognised university, which they thought would mean everyone would be on their “best behaviour”. Some said this was a reason for participating in the research. From this I can infer that some LiPs believe they will receive less favourable treatment if the institutional actors are not being “watched”. This is useful data. If the LiPs are correct in this assessment, then I will likely be under-reporting, not over-reporting the difficulties LiPs face.⁵⁹ Where I consider reactivity is possible, I therefore discuss both the effects my presence may have had and what this might tell us about participants’ views of what model behaviour towards LiPs would be.

III Ethical Issues

The design of the study, involving ongoing legal cases and multiple participants within those cases, meant that a great deal of care and attention had to be given to ethical issues, and to legal issues such as protection of privileged information. I anticipated and discussed these issues in the UOHEC application, but many of the nuances did not become apparent until the research

⁵⁷ Hammersley and Atkinson, above n 14 at 177.

⁵⁸ At 177.

⁵⁹ I recognise that my presence may have meant the LiPs were also on “best behaviour” when I was in the courtroom. This seemed to be less of an issue, however, as the LiPs, perhaps with the exception of the one very experienced LiP in the case study, did not seem to know what “best behaviour” was.

was in progress. During the research I kept a journal recording and reflecting on such issues as they arose, referring to the literature, and the Socio-Legal Studies Association code of ethics,⁶⁰ and discussing problems and solutions with my supervisors. What follows is a discussion of the ethical and legal issues anticipated and encountered, and how these were approached in the field and in writing the thesis.

A. Confidentiality and Anonymity in the Case Studies

The protection of the identity of participants from the public at large, the legal community, and other participants was an important and difficult issue. Participation in the case studies was not fully anonymous, however, because the methods followed inevitably meant that everyone else involved in the case knew that the LiP was a research participant. The information sheets for LiPs said:⁶¹

The results might include descriptions of you and your case. However, your name and any details that might make you identifiable to others will not be published. Every attempt will be made to preserve your anonymity.

Similar undertakings were made to all other participants.

Commonly social science researchers disguise the site of the research and assign participants pseudonyms to protect anonymity.⁶² I have not concealed the site of the research, only omitting the places within the Study Region where participants were based, because an attempt to conceal it was unlikely to be successful. When I entered a court to observe, most people knew who I was and why I was there. This is of course a well-recognised problem with ethnographic research,⁶³ a problem that is becoming more pronounced in a digital age where a Google search allows any reader to locate the author (for example from their University website) and therefore the likely site of the research. Instead of trying to make the Study Region anonymous, and

⁶⁰ Socio-Legal Studies Association "Ethics Statement" (January 2009) <www.slsa.ac.uk>.

⁶¹ See Appendix C.

⁶² Katja Guenther "The Politics of Names: Rethinking the Methodological and Ethical Significance of Naming People, Organizations, and Places" (2009) 9(4) *Qualitative Research* 411; MaryCarol Hopkins "Is Anonymity Possible? Writing about Refugees in the United States" in Caroline Brettell (ed) *When They Read What We Write: The Politics of Ethnography* (Bergin & Garvey, Westport, CN, 1996) 121.

⁶³ See for example the essays in Caroline Brettell (ed) *When They Read What We Write: The Politics of Ethnography* (Bergin & Garvey, Westport, CN, 1993).

creating a false sense of security, I instead made the Study Region large.⁶⁴ This makes it more difficult to identify any individual, within this region, who was involved.

But even this potential means of protecting anonymity may be illusory, due to the very small number of cases that reach trial. For example, in 2013, three of the cases studies included High Court trials. In 2013, 143 civil cases went to trial in the High Court nationwide.⁶⁵ Of those, we do not know how many involved a LiP, but if we take a rough estimate of 10-20% and estimate that half of those would have been conducted in Hamilton and Auckland we get to a total of 7-14 cases. Many trials receive some media coverage, or are discussed informally among legal professionals. If I include in my description of a case study the cause of action (such as it being an action in tort or contract), some general information about the parties involved (e.g. it involved a company or individual, or the litigant's approximate age, educational background, or previous experience of the courts), it might be possible to narrow the range to just one or two possible cases. So, given the small number of trials and the small, closely networked legal community in New Zealand, using pseudonyms to protect anonymity is unlikely to be effective. However, my attempt to protect participants' anonymity does mean that I cannot use direct quotes from judgments in the cases studied, as it is a simple matter to enter the quote into a legal database and retrieve the whole judgment and therefore learn the names of the parties.

This problem is less pronounced in the cases involving Family Court litigation as there is a much higher volume of cases in that court, it is estimated that there are more LiPs there, only some decisions are published (and names are usually redacted), and the proceedings are closed to the public. While this means research participants in the Family Court cases are unlikely to be readily identifiable to the public at large, it does not negate the ability of the various participants in the same case to identify each other.⁶⁶

⁶⁴ See information on size of Study Region above n 17.

⁶⁵ High Court of New Zealand *Report from the High Court 2013: The Year in Review* (High Court of New Zealand - Te Koti Maatua o Aotearoa, 2013)

⁶⁶ Martin Tolich "Internal Confidentiality: When Confidentiality Assurances Fail Relational Informants" (2004) 27(1) *Qualitative Sociology* 101.

1. *Confidentiality among participants*

Ensuring confidentiality is therefore particularly difficult in research involving small groups, as the data would have to be presented in such a way as to make a participant to whom the data relates unidentifiable to the other participants. Nevertheless, the ability of participants within any group to identify (or misidentify) each other – as the source, for instance, of a certain quote – has the potential to harm participants and the researcher.⁶⁷ This takes on further implications where a legal case is ongoing, as there is a possibility that what a LiP discloses to me, but not to their opponent, is either privileged or information that is strategically useful to the other side. The issue of privilege, in particular, was anticipated in the UOHEC application:

The research design means that the doctoral researcher may come into possession of information about an [LiP's] case that is legally privileged. The other party to a proceeding cannot compel the production in court of communications that are privileged. There is a remote possibility that the opposing party to the litigation might try and compel the doctoral researcher to disclose the communications and information she has access to in the course of her observations. The doctoral researcher has consulted two leading experts on the law of evidence (Donna Buckingham and her co-supervisor Richard Mahoney) as well as the principal applicant (her primary supervisor) and, in her and the experts' opinion, it is extremely unlikely that such an application, if made, would succeed.⁶⁸

To date, no one has made any attempt to compel disclosure of my research notes. This possibility does not terminate with the publication of this research, however, and in fact, publication may exacerbate the threat. What if a participant recognises themselves and therefore recognises the opposing party? If the opposing party has said something the participant thinks might be useful to an appeal or their ongoing case, then perhaps they will attempt to compel production of my notes. Protecting internal confidentiality therefore takes on an extra element of importance: I need to ensure that I do not write something that the other party can use as "ammunition". There is nothing in my notes that seems obviously useful, in a legal sense, to the parties of the cases studied. However, I am not intimately acquainted with all the facts and legal issues in the cases studied. In fact, I deliberately avoided becoming so acquainted to assist in

⁶⁷ At 101.

⁶⁸ Danet, Hoffman and Kermish, above n 25, anticipated similar issues with their proposed study, in which there were not only ethical issues to consider but also the legal implications of being privy to lawyer-client communications.

distinguishing the line between lawyer and researcher (discussed in more detail below). I cannot therefore be certain that seemingly innocuous information is not useful to another party.

2. *Methods to protect confidentiality of case study participants*

To protect internal confidentiality, I therefore need to break the link between a description of something I observed and a LiP or opposing party's commentary on the relevant events. As discussed, the usual method of assigning participants pseudonyms, where the case is otherwise described in full, is insufficient to maintain confidentiality in this research. But if the cases are too heavily disguised then there is the different risk that I will not be able to convey the most coherent account possible of the events.

One approach would be to write about all the data in very general ways, not giving any detail that could lead to identification, and discussing only themes. The obvious difficulty with this approach is that it would fail to provide the evidence upon which the themes were based and would therefore lack the rigour that could reasonably be expected. It would also omit all the detail that would make it compelling to the reader.

An alternative is to take the writing back to participants who could be identified by a certain passage and ask for their informed consent to its publication. This would be difficult in practice as the LiP and I may not be fully aware of the implications for their case of the information involved. Truly informed consent may not therefore be possible without independent legal advice, which of course is not available for litigants appearing in person. However, even if the issue of informed consent could be overcome, the possibility of asking for consent is precluded by the terms of participation. I promised in the information sheets that I would not talk to the LiP again after I had talked to the opposing party. This was to reduce the appearance or actuality of me being a conduit of information between the parties. In the case studies, where I have had consent on this basis, I therefore cannot ask the LiPs to review and discuss the draft analysis with me.

Instead I have used direct quotes from individual LiP participants in the text, but with no pseudonyms attached. This is so the quotes cannot be aggregated, by reference to such pseudonyms, to construct a composite picture that might be used to identify particular participants. I have also altered gender, where necessary, or other identifying details to protect

confidentiality. Some quotes simply identify the person by reference to the name of the court in which their case was filed, calling them for example “Family Court LiP”, unless providing even the name of the court would threaten confidentiality.

In addition, I have chosen to present more detailed accounts of LiP observations and interviews via construction of composite cases. This is an accepted method of presenting qualitative research findings in the health sciences, particularly psychiatry and counselling, as well as having precedent in other disciplines.⁶⁹ The composites are a blend of a number of cases, so that the person reported is fictional, but the details, and sometimes dialogue, are taken from a number of real cases. This avoids the difficulties associated with trying to disguise a single case: there is either too little disguising detail (failing to protect participant identities), or so much disguising detail that it distorts the case. It is therefore more “honest to develop a composite case instead”.⁷⁰ The disadvantage of such an approach is that it departs from the basic commitments of social *science* research, with fact becoming secondary to maintaining confidentiality, though it is probably better than not being able to present such data at all.

This approach was used in Piper and Sikes's research on teacher-pupil sexual relationships because of the considerable harm that could be caused through identification of the participants.⁷¹ They conclude that the “storying approach” offered the best protection for their participants:⁷²

Taking such an approach requires that readers trust writers not to have invented and fabricated data to fit their purpose. We would argue, however, that such trust has to be there regardless of the writing forms, styles, genre that researches adopt or, for that matter, whatever paradigm they espouse.

An advantage of the storying approach is that it helps to make lived experience vivid for the reader. As an aim of the research is to investigate the experience of litigating in person, using fictionalised accounts can help to achieve this goal. Presenting fictionalised composites was the

⁶⁹ Marcia Stanley Wertz and others "The Composite First Person Narrative: Texture, Structure, and Meaning in Writing Phenomenological Descriptions" (2011) 6(2) International Journal of Qualitative Studies on Health and Well-being 1; Maureen Duffy "Writing About Clients: Developing Composite Case Material and its Rationale" (2010) 54(2) Counseling and Values 135; Heather Piper and Pat Sikes "All Teachers Are Vulnerable but Especially Gay Teachers: Using Composite Fictions to Protect Research Participants in Pupil-Teacher Sex-Related Research" (2010) 16(7) Qualitative Inquiry 566.

⁷⁰ Duffy, above n 69 at 147.

⁷¹ Piper and Sikes, above n 69.

⁷² At 568.

best way to maintain both confidentiality and to fulfil one of the primary aims of the research, to elucidate the experience of LiPs.

The four composite stories were created after the data analysis was completed. First, the LiP case study and interview participants were grouped by similar characteristics – court, gender, and common themes. This produced four main groups and I gave each group a “character” name – Lisa, Matt, Tom and Gary. I then took various details from the accounts and observations of the participants in the group to create a case story. Lisa and Matt’s occupations and family composition are fictional. Tom and Gary’s occupations and the legal disputes that arise out of them are also entirely fictional, and were selected because they bear no resemblance to any of the LiPs’ stories but provide a backdrop against which to re-present the data. I have used direct quotes as much as possible within the stories. Where necessary I have altered the direct quotes to disguise identifying details and to make the voice and story of the character consistent. These stories appear in Chapter 5.

B. Confidentiality for Judges, Lawyers and Court Staff

Having undertaken to protect the confidentiality of statements made by the Judicial and MoJ participants, I have also had to be mindful of how this data is discussed. Judges often have distinct turns of phrase that could make them readily identifiable to the profession and their fellow Judges. They also sometimes gave specific examples from cases they had heard, which I encouraged. However these examples have been disguised when I have discussed them, changing details that might otherwise make them identifiable. Where I remained concerned about whether I had sufficiently disguised the words of a Judge, I sent the passage to the Judge and asked for comment and confirmation.

Some Judges and lawyers also made “off the record” comments – information they wanted to provide as background to me but not to be used as part of the data. I have not included these comments. The only exception is where I considered it would be helpful to include it on an anonymous basis and in those cases I have sent the draft analysis to the participant who made the comments and asked for permission to do so.⁷³

⁷³ Rose Wiles *What are Qualitative Research Ethics?* (Bloomsbury Publishing, London, 2012) at 50.

Given the open plan nature of the offices, the managers of the Registry Offices of the Study Courts, as well as other employees, knew which Court Staff participated in research interviews. I have therefore omitted any information that would make them readily identifiable to their colleagues, including their role, the location of the registry and any other distinguishing details.

1. *Privacy*

The method adopted involved some intrusion into the privacy of the litigants. Some of the litigation concerned sensitive issues, particularly in the Family Court where the proceedings related to intimate family relationships and arrangements. However, in bringing or responding to proceedings, the litigants are forced by court procedure to disclose information about their case. That information is then available to the lawyer for a represented party, the judge, and court staff, as well as other professionals such as mediators, counsellors and expert witnesses. My access to the same information was not therefore a significant further intrusion into the litigant's privacy.

2. *Vulnerability*

In the UOHEC application I noted that some LiPs that would be eligible for the study would be vulnerable people: “The most likely vulnerability is that the LiP will have mental health issues as it is not uncommon for mentally unwell people to repeatedly use the court system to address perceived wrongs”. I undertook that I would not recruit, or would abandon, study of participants who I thought lacked the competence or capacity to participate.

While not specifically elicited in the interviews, three participants reported that they lived with a diagnosed mental health condition, including bi-polar disorder and depression, and four reported that they had a history of being subjected to domestic violence. Only in one instance did I consider that a LiP might lack capacity. He sent a completed consent form and a letter outlining his case to-date. Both the style of the letter and some of the assertions within it, for example, believing that the Judge who had heard the case was an imposter, led me to question his capacity. The issue was not resolved as I lost contact with him when he moved addresses, and I have not included the material he sent in the analysis.

Some participants referred to feeling stressed when recounting their litigation experiences, as the following example illustrates:

LiP [recounting an interaction with the court office]: ... [I] said, “Can you help me”, and she said “I can't do anything to help because I have to remain ... “ [pause], I can't remember the word, I'm getting a bit stressed here.

In other instances participants did not tell me they were stressed but during the course of the interview I noticed more rapid, pressured speech, and surmised that they were finding the experience stressful. In all these instances I sought to empathise with the LiP, and, where appropriate, offered the opportunity to discontinue the interview.

3. Benefit to Participants

No tangible benefits or payments were offered to any participant for their involvement. The LiPs did report some intangible benefits, such as finding it helpful to have me act as a sounding board about their case, particularly as they often said that they could not or did not want to trouble relatives and friends with the details. In addition, LiPs often mentioned at the end of the interview that they had responded to the recruitment advertisement because they wanted to effect change for other LiPs:

This is the reason I came back to this [doing this interview]. If somebody else can get, it's probably too late for me, but there will be other people who came back in the future who need the same help. I'd just like them to see them get a better run.

A few litigants said that they wanted to tell me about their case to test their argument, to see if I would believe them. I explained to them that it was not my role to judge the veracity or strength of their case but they often continued to seek my approval for their argument. In one example, the LiP appealed to the fact that we had both lived in the same location (overseas) and said, “Well, you'll think I'm honest then if we lived in the same place”. I interpreted this as a need to be believed by a professional, perhaps because they had encountered or expected to encounter disbelief when taking their case through court.

In other instances, study participants attempted to use their participation for their own ends, and in ways that were not anticipated. For example, one represented opposing party said, ostensibly to me, but equally, I believe, to the LiP standing with me: “I have a headline for you: if you need to build a house get a builder, if you are sick get a doctor”. The unstated next part being: “if you have a legal dispute, get a lawyer”. Another participant told me she had shown to a general medical practice the information sheet for the case study to “prove” that she was a LiP. She said they had denied her access to her children's medical information (relevant to her

legal case) because the practice did not believe it was possible to go to court without a lawyer, but once they saw the information sheet with the University header, they allowed her access.

4. *Lawyer-Researcher – Role Conflict*

(a) Relationship to LiPs

I recognised early that the role of former-lawyer might create ethical problems when observing LiPs. In the UOHEC application I noted "professional knowledge" as a potential ethical problem:

Professional Knowledge: As a trained lawyer, the doctoral researcher understands the system the [LiP] will be attempting to negotiate. This information could be helpful to the [LiP]; however, the researcher will not share this information with the LiPs she is observing as it could undermine the purpose of the research: that is, - the doctoral researcher would be acting like a lawyer and therefore the litigant would no longer be self-represented!

This was identified as an issue because, despite clear statements in the consent information that I could not give legal advice, I expected LiP participants would ask for advice. I was spending a lot of time with people who were attempting to navigate a complex system in which I was an expert and they were not, and the stakes for them were high. Sometimes LiPs did ask for advice, but only very rarely. When they did I was at ease restating that I could not give legal advice and then asking them where they thought they might go for assistance, and providing suggestions if they did not know.

What I had not fully anticipated was that I would want to offer them advice. As Bell and Nutt note in the context of social work practitioner-researchers, "the practitioner-researcher may make initial decisions about separating or connecting these roles, which may then be difficult to achieve in practice".⁷⁴ I had assumed that I was a "former" lawyer and now a researcher. I handed in my practising certificate to make the line clearer, and according to New Zealand law was therefore no longer entitled to call myself a "lawyer". But I discovered that my role of lawyer was much more deeply embedded than I expected: I thought like a lawyer and felt like a lawyer. The role was not one I could simply hand back.

⁷⁴ Linda Bell and Linda Nutt "Divided Loyalties, Divided Expectations: Research Ethics, Professional and Occupational Responsibilities" in Melanie Mauthner (ed) *Ethics in Qualitative Research* (Sage Publications Ltd, London, 2002) 70.

The difficulty in clear role differentiation was exacerbated by the fact that the stories LiPs told me as a researcher sounded very similar to what a client would have told me at an initial interview. In both roles I needed to listen to and question the story, but these activities are different in the respective roles. A lawyer listens for causes of action or defences, makes mental lists of evidence that might be required and further investigation to be undertaken. It is an exercise of taking an everyday story and turning it into a legal one. As a researcher I was listening both for what they were telling me about the experience of litigating in person and the perspectives they implied in their story. It required considerable effort, at least initially, to stay in the research role and not revert to “issue spotting”.

The LiPs knew I was a lawyer so I could not take the stance of feigned ignorance or I would also undermine my credibility to them:⁷⁵ they expected me to understand the processes and terminology better than they did. During interviews the LiPs and I used my knowledge of the system to co-construct an account of their litigation experience. The following excerpt briefly illustrates how common this was:

LiP: We went to one of those things, what is it called, where you just go and talk to the Judge but not the trial, you know ...?

BTC: A judicial conference?

LiP: Yes, we went to that and

I was actively using my legal knowledge in the interviews, at least to some degree, so the boundary between researcher and lawyer was not the bright line I had anticipated.

As the research progressed I came to understand that my knowledge was not just important for constructing an account of what had gone before, but had implications for how the LiP might run their case. While I was not advising them, my line of questioning and/or body language could nevertheless redirect (intentionally or not) their running of their case. I had to make sure that my questions were directed only at finding out information relevant to the research, and not be tempted to use leading questions to give hints and suggestions about how the LiP might conduct the case. To give in to this temptation would mean I might undermine the participant’s status as a “LiP”, but I could also open myself to professional responsibility or the animus of

⁷⁵ Linda Nutt feigned ignorance despite being a practitioner to get more explicit information from the participant but she notes this had the potential to undermine credibility, at 78.

the LiP if they followed my “hints” and blamed me when the case was unsuccessful. Even where I could see the LiP’s decisions or lack of knowledge were leading to disaster for their case, I justified standing by on the basis that the ends of research justified inaction: if I intervened, the data would be of little use as I would have become an adviser. This consequentialist position is of course not the only one open to me and another researcher might have taken a different approach.⁷⁶ I remain satisfied that this was an ethically justifiable position to take, although one that exacted a toll: it was very stressful to watch a LiP make serious errors in the trial and do nothing to assist.

There were times when I did make minor interventions on the basis that failing to do so might undermine rapport and fail to acknowledge that some reciprocity is needed to maintain a non-exploitative relationship.⁷⁷ These included occasions when a LiP asked me a direct question about terminology, my redirecting LiPs wanting advice or information to other services, or when a LiP struggled to find their way around a court building. I justified this as a minimal intervention and one that showed some measure of reciprocity for participation in the study.

The lawyer-researcher conflict would be removed if a non-lawyer had conducted this research. However, that would have come with a significant set of disadvantages. It was my role as lawyer that allowed me to understand when the LiP was violating the unwritten rules of the court: if I was a non-lawyer the shock might not have been quite as visceral when a LiP politely, but firmly, told the Judge that he would conduct his opening statement with “no further interruptions [from the Judge] please”. Nor would a non-lawyer, without a great deal of research and training, appreciate when the LiP lacked understanding of evidence, procedure and sometimes substantive law (although I was not necessarily always expert in the substantive law that the LiPs were arguing).

⁷⁶ My ethical position was influenced by the pragmatic research paradigm I was working within. If I had been working within a transformative approach a more appropriate ethical stance might have been an ethic of care, where I could have intervened more directly to assist the LiP. Wiles, above n 73 at 4-5.

⁷⁷ See for example the discussion on observing police interviews in Jerome Skolnick *Justice without Trial: Law Enforcement in Democratic Society* (2nd ed, John Wiley & Sons, New York, 1975) at 38, where Skolnick considers his reaction to a direct request from an officer for his opinion: "I might have said 'no comment', but I could not divorce myself from the fact that I was there. The detective might try to read an opinion from my facial expressions and possible come to a conclusion opposite to one that I held. Moreover, I believe that although I may have a fairly good poker face (even when playing poker), to keep it outside that setting destroys rapport".

Reactivity might have been minimised if a non-lawyer had conducted this research. However, if my questions and reactions to LiPs set off lines of inquiry they might not have otherwise pursued, then at least I can say that their outcomes are likely to be better, rather than worse for them, than if I had not been present. From an ethical standpoint I am not therefore causing them harm. From the standpoint of the research findings, the reactivity is likely to mean that the LiPs in the study made better, or more considered, litigation decisions, than if I had not been present. I am therefore, if anything, under- rather than over-reporting the difficulties that LiPs face in bringing litigation. While these effects must be acknowledged, I consider them reasonable trade-offs for access to data about LiPs' experiences that might not otherwise have been attainable.

(b) Relationship to the Profession

My professional background assisted in obtaining interviews with the professional participants, particularly the judiciary. However, the process of shedding my professional identity as a lawyer also complicated my relationship with the professional participants. In New Zealand, the fact that I am currently in the legal academy rather than in legal practice does not significantly alter my "insider" status. There is a close relationship between the judiciary, profession, and law schools.⁷⁸ I could therefore use my "insider" status to build rapport (discussing connections in the profession and past professional experience). This, however, was difficult territory. In reviewing literature critical of the profession and then observing as an outsider, I had reduced my sense of belonging to the profession. By the time I came to interview Judges and lawyers, I was (to borrow the words of T.S. Eliot), "no longer at ease here, in the old dispensation".⁷⁹ My efforts to build rapport with these interviewees therefore risked being false: reference to a common perspective risked misrepresenting my position.

I was also aware that my positioning as insider or outsider might change the performative aspect of the interview. Positioned as an "insider", I anticipated responses would tend to reference a shared understanding of "what we all know LiPs are like". Positioned as an outsider, I

⁷⁸ The close relationship is noted in Duncan Webb "Judicial Conduct in a Very Small Place: Some Contextual Questions" (2003) 6 Legal Ethics 106; Grant Hammond "Judges and Academics in New Zealand" (2013) 25(4) New Zealand Universities Law Review 681.

⁷⁹ T S Eliot, *Journey of the Magi*. This is not uncommon. As Emerson, Fretz and Shaw, above n 33 at 91 comment, "Over time, a fieldworker's personal views and theoretical commitments often veer and transform".

anticipated more idealised accounts of interactions with LiPs. Neither of these accounts would be more or less “true” and the reality is that my positioning shifted along the continuum of insider-outsider during interviews.⁸⁰ When analysing the data I have reflected on how my positioning might have influenced the responses.

The other difficulty that the lack of distance between the academy and the profession creates, on both a personal and structural level, is to be able to maintain critical distance. On a personal level this is due to being a former Judges’ Clerk and also being a former and perhaps future practitioner, with personal and professional relationships forged in this small community. Those relationships assisted in gaining access and building rapport, but could equally be an impediment to critical distance in analysis.

On a more structural level, the difficulty arises from the lack of an established tradition of looking at legal behaviour, or law in action, rather than law on the books. This is not unique to New Zealand. In the United States, where there is a much longer tradition of socio-legal research, doctrinal studies and the construction and deconstruction of legal argument are still privileged in the legal academy.⁸¹ Legal doctrine is fertile and accepted ground for the academy to examine, but law “on the ground” is much less so. The lack of a tradition of examining law in context, combined with the close relationship between bench, bar and academy, means there

⁸⁰ Miri Song and David Parker "Commonality, Difference and the Dynamics of Disclosure in In-Depth Interviewing" (1995) 29(2) *Sociology* 241, discusses the shifting and unstable nature of researcher and participant where they share some of the same culture, in that case Chinese-English, but in the case of this research, a common professional culture. They note that "interviewees may withhold or disclose certain kinds of information, depending upon their assumptions of the researcher". See also Sharyn Roach Anleu, Stina Bergman Blix and Kathy Mack "Researching Emotion in Courts and the Judiciary: A Tale of Two Projects" (2015) 7(2) *Emotion Review* 145 at 147-148.

⁸¹ Marc Galanter "In the Winter of Our Discontent: Law, Anti-Law, and Social Science" (2006) 2 *Annual Review of Law and Social Science* 1 at 11 says: "Like Holmes, the legal academy has followed the enchantments of text rather than the Brandeisian imperative of disciplined examination of context. Although legal academics have established their independence of the profession, taken in the aggregate they continue to mirror the intellectual styles of both judges and lawyers. Like judges, they privilege legal doctrine and justification. Like lawyers, they place 'more value on the inventive, the new, the clever, the winning argument,' and critical deconstruction of opposing arguments than on the collaborative process of 'describing, explaining and exploring' the legal world (*citation omitted*). The reluctance of the law schools to be the seat of systematic cultivation of this contextual knowledge is indicated by the regular recurrence of calls for them to do so." See also Deborah Rhode "Access to Justice: An Agenda for Legal Education and Research" (2012) 62 *Journal of Legal Education* 531 at 542 noting the structural reasons for lack of access to justice research: "Our lack of adequate research on access to justice is partly attributable to structural problems in the market for legal scholarship. Compared with other work, empirical research has higher costs and lower rewards. It is typically more expensive and time consuming than doctrinal or theoretical scholarship, requires greater interdisciplinary expertise and risks dismissal in some circles as 'merely descriptive'".

is little established space for critique of institutional actors' legal behaviour. There are therefore both personal and cultural restraints to maintaining critical distance.

Jaffe argues that studying a culture we are familiar with, rather than the distant village of traditional anthropology:⁸²

... can intensify the reflexive experience of the ethnographer. The experience of writing about people who read what we write and then talk and write back to us undermines our ability to construct an unproblematic Other, and hence, an unproblematic self.

My ongoing proximity to the profession, judiciary, and LiPs who participated, is, I believe, a strength of the research. They can, and I hope, will talk back to the research. I have written this research expecting that I will have to defend it. This has encouraged careful consideration of ethical and legal issues, as well as providing considerable impetus for examining all perspectives on the issues discussed and the conclusions drawn.

C. Conclusions

My identities as lawyer and researcher have shifted continuously during the research, allowing me access and interpretation that would not have been possible without them. They have also created an ongoing balancing act between collecting useful data, maintaining rapport and credibility with the participants, and not crossing the line from researcher to lawyer.

A different research design, for example simply observing litigants in court and interviewing them after their cases, might have minimised many of the issues discussed above. However it would also have meant there was no data on LiPs' expectations (untainted by how the case unfolded), their pre-court litigation decisions, and their sources of advice. It would also not have included those people who did not go to court or who appointed a lawyer at the eleventh hour.

An important aspect of litigation is completing the procedural steps that precede one's "day in court". Negotiations and case management conferences spur cases in new directions: towards settlement, discontinuance, or changes in representation. As Danet and others observed more than 30 years ago: "It is increasingly recognized that most of what lawyers do is not in the formal

⁸² Alexandra Jaffe "Involvement, Detachment, and Representation on Corsica" in Caroline Brettell (ed) *When They Read What We Write: the Politics of Ethnography* (Bergin & Garvey, Westport, CN, 1996) 51 at 52.

setting of the courtroom at all, but rather on the telephone or behind a desk, or even in a coffee shop - not litigating but counselling, interviewing, negotiating, manipulating, and so on”.⁸³ Litigation also largely occurs “on the papers”, so the inclusion of documentary material also allows examination of how litigants, Judges and lawyers interact and position themselves in written documents. The research design allowed all these aspects of litigation to be captured.

The research does not answer all the questions the policy audience wants answered. It does not answer demographic questions about LiPs, nor focus its efforts on a detailed analysis of the possible policy responses.⁸⁴ What it tries to achieve is greater understanding of the interaction between LiPs and the “system” (the Judges, lawyers, and court staff), their perceptions and misperceptions of each other and the process, and, in doing so, provides a more informed basis for proceeding with policy response.

⁸³ Danet, Hoffman and Kermish, above n 25 at 906.

⁸⁴ These are considered in Chapter 10 but are not the main focus of the thesis.

Chapter 4

Becoming a Litigant in Person

Why litigate in person? The responses that tend to spring immediately to mind are that the litigant makes this decision due to cost – because they cannot afford a lawyer, either through legal aid or privately or because of personal choice. Those appearing in person by choice are easily tarred with the brush of the “fool for a client”, or even considered an unreasonable or obsessive litigant.

This chapter discusses the reasons LiPs gave for deciding to litigate in person, and compares these to the perceptions on this matter of the bench and bar. It argues that the dichotomy between expense and choice is unhelpful. While financial reasons are a major factor in deciding to litigate in person, it was rare that the decisions were just financial or driven by only one factor. Many LiPs’ decisions were influenced by the perceived quality of legal services they could or did access, and their lay understanding of the function of lawyers and the legal system. Their experiences and perceptions on these matters were largely at odds with those of the bench and bar.

The chapter begins by examining the reasons LiPs put forward for litigating in person and then moves to the perceptions of lawyers and Judges. I then argue that aspects of LiPs’ decisions to litigate in person can be seen as a response to messages communicated by the legal system about the openness to them of the court. Moreover, the fact that LiPs negotiate the process without a lawyer can be seen as a failure of lawyers to offer services that people are willing and able to purchase, though this is easily interpreted by the bench and bar as arrogance or unreasonableness. The chapter concludes with discussion of how the bench and bar’s perceptions of the reasons for litigating in person might affect the way they treat individual litigants.

I. LiPs on Why they Litigate in Person

A striking aspect of LiPs’ narratives about why they litigated in person were the multiple and overlapping reasons they offered. This discussion reviews the major rationales offered by all the LiPs, both case study and interview participants. I have attempted to identify their dominant reason for litigating in person, but, although I found LiPs emphasised certain reasons for their action, they

generally offered multiple explanations and justifications, not only one.¹ This mirrors Canadian and UK research that found LiPs explained and rationalised their decision by drawing on multiple factors.²

I therefore discuss the major rationales LiPs offered in turn: problems with accessing legal services, the quality of the services accessed, beliefs about how cases are determined and the lawyer's role in that process, and institutional encouragement to litigate in person.

A. Cost of Services and Access to Legal Aid

Most (29 of 35) of the LiPs who participated in the study either had initially engaged a lawyer, or made attempts to engage one or to access legal advice to the value they felt they could afford, before taking any steps in the proceedings. Many cited the high cost of these services as a major reason why they then decided to litigate in person. A few cited it as the sole reason. Nevertheless, even in cases where the reason was ostensibly “all about the money”, they expressed ambivalence about whether they really needed or wanted a lawyer. There were many nuances, however, around what the LiPs meant by the cost being too high.

1. LiPs on the cost of legal services

Many LiPs did not qualify for legal aid and did not feel able to afford the cost of legal services. Some expressed their inability to pay legal fees in terms of the absolute cost. As one High Court LiP pithily said: “you can't pay \$500 per hour when you earn \$500 per week”. A Family Court LiP explained:

I simply couldn't afford the legal fees. I went to a lawyer, I sat down with a lawyer for an hour and a half, and she did some work in the background I guess, and it cost me \$1700. I couldn't afford that.

Other LiPs complained that they were given fees indications by counsel, but what they were then billed far outstripped the estimate:³

¹ Following George Herbert Mead and Herbert Blumer's caution that researchers should pay close attention to cases that do not fit the general pattern (see Howard Becker *Tricks of the Trade: How to Think About Your Research While You're Doing It* (University of Chicago Press, Chicago, Ill, 1998) at 195, I attempted to work back and forth between the ideas and evidence to achieve a fit of explanations and observations (analytic induction), which is particularly useful to find explanations for “deviant” behaviour; Charles Ragin *Constructing Social Research: The Unity and Diversity of Method* (Sage Publications, Thousand Oakes, CA, 1994) at 93-98.

² See Chapter 2, page 21.

³ The Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [150]-[153] noted a trend away from hourly billing, sounding a hopeful note as “hourly billing does nothing to inform a client's understanding of how much the lawyer's services will in fact cost”, as well as tempting lawyers to work inefficiently and pad bills. Ten years on, hourly billing remains the dominant form of charging clients.

Her original quote to me was between \$12,000 and \$13,000, which is what I paid. But then she went to charge me more. Her final bill was \$38,000, which was discounted from something like \$56,000.

It was a common pattern within the LiP participant group that they had originally engaged counsel with a particular budget in mind, but exhausted the budget without reaching resolution of the matter. Some could borrow to fund the excess but did not want to. Others had no means to keep funding the fees. They were then left with the choice of continuing without counsel or abandoning their case.

A few LiPs considered it was the cost of legal fees relative to the size of the claim that made legal services unaffordable. This was particularly so in the District Court where claims are capped at \$200,000, but legal fees were still hundreds of dollars per hour. It was also an issue when there was no monetary judgment, such as in COCA applications in the Family Court, and judicial review in the High Court, or where there was a question over enforcement of a monetary award. As one District Court LiP explained regarding his debt recovery proceeding:

I would say I would stand at least a 90 per cent chance of getting some money awarded. If I employed a lawyer I may increase my chance marginally. However, I would still have the problem of getting my money [from the probably insolvent defendant].

For this LiP it was a choice of either pursuing the possibility of debt recovery without a lawyer, or letting the defendant walk away.

2. *LiPs on access to Legal Aid*

Most of the LiPs did not qualify for legal aid. For a single person to be eligible the income threshold is \$22,366 per year and the disposable capital is \$3,500.⁴ In 2011 changes were also introduced to increase repayments of legal aid loans. This includes charging interest on legal aid debt (where previously it had been interest free) and using compulsory repayment orders for income related debt.⁵

A few participants thought they would qualify for legal aid but were reluctant to apply because the aid would only be a loan, and would be secured against their home. One Family Court LiP explained, “I was very aware that I probably would get legal aid but would have to repay it because I own my own home”. Another Family Court LiP, who also advises other LiPs, said “people worry about getting caveats on their houses”. They see deciding whether or not to apply for legal aid as a calculation

⁴ Legal Services Regulations 2011 regs 5 and 6. The thresholds increase with the number of dependent children. The median personal income from all sources per person in 2013 was \$28,500 Statistics New Zealand *2013 QuickStats about Income* (2014) at 12. Family and civil legal aid recipients also pay \$100, called a “contribution to the cost of their legal aid”.

⁵ Ministry of Justice "Legal Aid Factsheet: Changes to Manage Legal Aid Spending" (April 2011) <www.justice.govt.nz>.

between: “los[ing] your house to get your kids back, or ... keep[ing] your house and not get[ting] your kids back”.

3. Cost of returning to representation

Once they had begun to litigate in person, some participants wanted to return to representation. This was often at the strong encouragement of the court staff, judge or opposing counsel, or when they found the case, or a particular aspect of it, more difficult than anticipated:

[the Judge] said it was self-evident I would be struck out. Now at that point I realised - I realised I needed to engage a barrister. I was out of my depth. (FC LiP)

A major barrier to finding new representation was the initial cost in having a new lawyer become familiar with the file. Where the matter had been running for some time, lawyers would quote considerable sums to familiarise themselves with the file.⁶ As one former-LiP and now McKenzie friend explained, a Family Court litigant was quoted \$5,000 “just to look at the file ... because the case was so complex and the other lawyers had a go and pulled out of it”. He said that lawyers charging to get acquainted with a file was justified, but the client was unable to pay \$5,000 just to have the case reviewed. A High Court LiP who had been in and out of representation, but was three years into the case, said of his efforts to find a new lawyer: “Our system requires a lawyer to get it all into their head and it’s so expensive. They will price themselves out of a job”. For the LiP it was paying money without any progress in the case, only the possibility of future progress.

B. Quality of Service Accessed

A few LiPs who abandoned representation had nothing but praise for their lawyers, but more had complaints about the service they received. These complaints were not about the content of the advice, but the manner and competence of their counsel.

1. Second-rate service and errors

A number of Family Court LiPs felt the service they had been given on legal aid was very rudimentary. One LiP reported that her lawyer told her she was a “low value client”, because the legal aid rate he was receiving was a third of his usual charge-out rate. The LiP commented:

⁶ For lawyers these fees might also be an insurance against a possibly difficult client, as discussed below. This was not a reason that LiPs reported however.

That is the reality of the world. They do it to fill in the gaps in their business, but if a fee paying client comes along at the normal rate then certainly they are going to prioritise.

While not many lawyers would countenance telling a client they are “low value”, the difference in service was acknowledged and explained by one senior family law practitioner. She emphasised that legal aid pay rates were low, and were revised down at the last review, whereas overheads are increasing. She said that most family law practitioners do some legal aid work but “if you are being paid half the rate to do something that you know you can charge double for privately, you’re going to do it a bit differently”. She said this “different level of service” is “just the reality of practice and it is human nature really”.

There was also evidence of a more limited service being given to legal aid clients in the civil arena. One LiP, who was originally represented by a legal aid lawyer, was upset when his lawyer was unable to address questions from the Judge, who criticised the drafting of his claim and the omission of a cause of action. The LiP (then represented) complained to his lawyer. The lawyer responded, acknowledging that he had not researched the cause of action the Judge said was appropriate, “because with limited legal aid funding, I had to focus on what I considered the strongest argument”.⁷ The Judge took a different view about the strongest argument and the litigant was unsuccessful.

Other LiPs who had paid lawyers also reported leaving representation because they believed their lawyer made errors on the file. This included LiPs believing the lawyers missed filing deadlines, made errors in settlement documents that made them unenforceable, or submitted documents with spelling and grammatical errors that demonstrated incompetence.

2. *Lack of expertise*

While there are many experienced family law practitioners who do legal aid work, some LiPs encountered legal aid practitioners who were junior and inexperienced, with limited expertise and life experience. Some family law clients who went on to become LiPs felt that they could not relate to the fresh graduate who advised them, with no experience of marriage or children. One Family Court LiP, who described her lawyer as “junior ... , quite inexperienced and immature”, said she changed lawyers (and eventually became a LiP) when the lawyer disclosed the LiP’s unlisted phone number and other contact details to her allegedly violent ex-partner. Another LiP who also advises other LiPs said:

⁷ The LiP provided the email to me.

Often family law is a training ground for young lawyers in a practice and often with legal aid work that they've started off with. ... They don't have the experience of parenting and they don't understand the emotions that are involved.

The expertise of civil legal aid lawyers was also an issue. Two LiP participants with civil cases had legal aid grants but said they had been unable to find legal aid practitioners who were sufficiently expert. Lawyers confirmed that there was an issue with the number of civil legal aid specialists. One civil litigation lawyer called this a "huge problem". He had been a legal aid provider and had done "the occasional case for a deserving cause", but said he had recently removed his name from the list. He explained that "the rates are too parsimonious, it is just not worth doing". Another civil litigation lawyer, when asked about the number of legal aid lawyers in his specialist area, said "there are a few, not very good ones". Practitioners also said legal aid cases are used to train new lawyers. One senior civil practitioner said he had cut his teeth on a legal aid case but the rates were so low and legal aid was so hard to deal with administratively that he had never done another.

3. Negative Experiences with Counsel

Some of the Family Court LiPs had left representation because they felt their lawyers had little time or interest in understanding them as individuals or even bullied them. This seemed a particular problem with busy practitioners, where LiPs felt "pushed through the system" or that they were "just another case to be processed". In some instances, the LiP felt this reached the level of bullying. As a Family Court LiP said, "She scared me, she was very pushy, she frightened me ... she said if I didn't do what I was told ... [my child] would be taken away from me". This LiP changed legal aid lawyers, but the new lawyer asked her to leave her file on the doorstep of the lawyer's home office. She did not meet the lawyer and said the lawyer "had no idea what we even looked like. I found that quite horrible really - really impersonal". She decided to discontinue her legal aid funding and litigate in person instead. Another Family Court LiP with a privately funded lawyer said:

She was a bully. She wouldn't answer my calls for two weeks at a time and then she'd make it out that it was such a big deal ... like she is going out of her way.

In other instances, or compounding the perceived problem, was a lack of personal service or an impression that the lawyer did not believe the litigant. One LiP said her ex-partner was abusive and manipulative, and she thought that, because the lawyer had not been in an abusive relationship herself,

she could not see through the manipulation. She felt her lawyer's faith in her veracity was shaken each time the ex-partner's lawyer filed an affidavit.⁸

4. *Fragility of the lawyer-client relationship*

The fact that LiPs reported that part of their motivation for litigating in person was failings in their relationship with their lawyer, whether these were perceived or actual, speaks to the fragility of that relationship. A lawyer who had been a party to a civil (not family) proceeding himself had insight into this problem. He believed his lawyer made a mistake on the file, which almost ended their relationship, although the outcome was not affected. He commented that: "the emotions skew your perception and affect your judgment; one mistake by the lawyer undoes the trust". He commented that he had been an "awful client", calling his lawyer frequently and trying to micromanage the file, although he would advise his clients not to do that. He said the emotional involvement meant he could not follow his own advice: "I would never have understood how strong that was if I hadn't had that experience myself". He now realises that, with clients, "really you have to work hard at them, to explain, to win and then keep their trust".

C. *Beliefs that a lawyer might bring minimal advantage*

In the background of many LiPs' explanations as to why they were litigating in person, lay minimisation of the benefit a lawyer might bring to their case. This perception was based on their own experience of legal services, or their general understanding of such services and the operation of the courts. Many LiPs minimised the role of the lawyer to that of a bureaucrat within the court system, rather than a person with particular expertise and the ability to be an effective force in resolving their case. Some LiPs also indicated that they did not see a lawyer as important because they believed the court would assist them and that "the truth" would come out regardless of whether they had a lawyer or not.

⁸ See Nan Seuffert "Lawyering for Women Survivors of Domestic Violence: Special Issue on Domestic Violence" (1996) 4 Waikato Law Review 1 at 52 which suggests that the abusive partner's credible public persona, which may be "wildly divergent" from the private one, can be marshalled against the abused partner, so the abusive partner "may actually appear to be more stable even though in fact he created the destructive environment".

1. *Experienced LiPs*

Only a few LiPs did not try to engage a lawyer at the outset of their proceedings. Three of these were persistent litigants,⁹ who had brought multiple proceedings and considered their experience matched that of a lawyer, and that a lawyer therefore provided little benefit.

Some LiPs who sought advice first had previous experience of the court system, either having previously been involved in litigation (whether represented or not), or having experience of the court system from their professional life.¹⁰ The LiPs gained confidence and experience from watching their lawyer manage their case and felt they could do the work themselves. This was particularly common in COCA cases where the parties were in and out of court over many years as parenting arrangements changed. As one Family Court LiP said:

I did originally have a lawyer for the first time. Because you learn the process pretty quick, you think I can probably do this myself. It is a fairly basic format you follow through the Family Court, I personally think.

LiPs in long running civil disputes also reported drawing on the experience of observing their counsel managing their case, before they became a LiP.

For individual litigants, their own contact with the legal system was important in demystifying the process and was a factor in their believing a lawyer was no longer necessary. A number of LiPs who had gained experience initially as represented litigants referred to losing their fear of court, and in doing so had the confidence to appear in person:

The court is so much about bullying. I'm over the fear now ... Now I'm at the stage of rebuilding and I know all of this is fear and it's just artificial. (HC LiP)

When I was able to look at it without so much fear and emotion I hadn't been - I hadn't got anything significant as a result of spending that much money [on lawyer's fees]. (FC LiP)

You know, I look back now and think that \$20,000 could have been in a savings plan for my son's education. What did I get out of it? I was held back by fear and emotion and lack of knowledge. (FC LiP)

⁹ Within the analysis I considered people persistent if they brought three or more separate proceedings. This did not include appeals (although all the persistent litigants also appealed) but rather they were litigants who used other procedures such as applications to recall a judgment, judicial review and private prosecutions, to continue to litigate around a single issue.

¹⁰ LiP participants' previous professional experience included roles as expert witnesses, police officers, a legal secretary and a probation officer.

Another litigant referred to not being “intimidated by the court”, as if intimidation was something the court intended, but failed to achieve.

2. *Encouragement from others*

A factor in some participants’ decision to litigate in person was encountering encouragement from former LiPs, or from professionals, to go it alone. One LiP said that the lawyer whom he had initially consulted told him he should proceed in person as it was a simple enough to do without a lawyer. Another was encouraged by an expert appointed to value the assets for distribution after a mediated agreement was reached, as the expert considered lawyers were no longer needed.¹¹

Other LiPs knew through personal contacts, or through accessing online support groups, of people who had previously been LiPs and were now acting as advisers and McKenzie friends. The encouragement of these people, and their willingness to share their experience, was a factor for some in deciding to litigate in person.¹² As one Family Court LiP explained, he found the contact details of a McKenzie friend in his initial online research. He contacted the McKenzie friend who said, “I could get a lawyer or represent myself. He explained what I’d need to do etc”. The LiP did consult a lawyer “to make sure I was on track and stuff like that”, but after talking to the lawyer he realised he would not be able to afford full representation. With the help of the McKenzie friend, he appeared in person. While he said cost was the main motivation for litigating in person, the intervention of an experienced adviser was also instrumental in enabling this to be a viable option.

3. *Lawyers “getting nowhere”*

Some LiPs considered they were paying money to get nowhere and might as well do it themselves:

So by this stage, of course, I had spent an awful lot on lawyers and had won zero, absolutely nothing. (FC LiP)

I spent \$120,000 on lawyers. After 31 years of marriage, not one, not one of them obtained anything other than a few months of interim spousal maintenance. It’s disgraceful! (FC LiP)

The LiPs who thought they were not getting value for money did not necessarily blame this on their individual lawyer. They instead saw the problem as lawyers endlessly exchanging letters, rather than

¹¹ The case continued for two more years and the LiP sought legal advice and representation a number of times.

¹² While there are no prisoners in the LiP participant group (as recruitment inside the prisons would have been very difficult), the court staff, judges and lawyers referred to prisoners as being among LiPs in general. The registry staff reported receiving applications from prisoners that repeated the same paragraphs as other prisoners’ applications. They surmised that the prisoners had “their bush lawyer in there” drafting the applications. The prisoners were therefore being encouraged by the experience of others to bring applications they might not otherwise have brought.

“just getting on with it” and going to court, when resolution out of court seemed unlikely. From this perspective, lawyers were seen as ineffective, or even a barrier to resolving the case. In either case, they were dissatisfied with continuing to pay legal fees for what they saw as “getting nowhere”. As one Family Court LiP said, reflecting on her legal aid lawyer, “she was quite happy just to mosey on”, and process the case at the normal speed. The LiP wanted her to work more quickly but:

When you are trying to push for something new, a new idea to go into their brain, they lash out at you - and make you feel like shit, like you are impatient, you're this, you're that, you've got all these bad qualities about you.

Another Family Court LiP saw lawyers as a barrier, deliberately preventing the litigant's day in court. He said that he now advises people who ask him how to manage their cases to “imagine there is a circle and in the middle the judge is making a decision”. He says they have to try and get their case “through the whirlpool of everybody else who is trying to stop you getting there”, being the lawyers, court staff, and psychologists. Some of the LiPs who criticised the speed of progress thought their lawyer spent too long trying to settle the case, whereas the LiP just wanted to go to court. In addition, some LiPs believed the lawyers were trying to drag out proceedings to make more money.

Others considered a lawyer was poor value for money, not because of the lawyer, but because of the intransigence of the opposing party. This issue was emphasised by two of the four women LiP participants, who said their ex-partners, the opposing party, had perpetrated domestic violence against them. These women considered continuing to instruct a lawyer was pointless, as the lawyer would be unable to combat their ex-partner's skilful manipulation of the process and flouting of court orders.¹³

4. *Lawyers as bureaucrats*

In discussing their decisions to litigate in person, many participants expressed views that minimised the lawyer's role, reducing it to filling out paperwork, or saying lawyers were useful only because they knew the process. Without any faith that the lawyer might be serving more than a merely bureaucratic function, which organised, confident individuals felt they could do themselves, they were unprepared to pay (and borrow to pay) the hourly rate. They were also unlikely to believe they were getting value

¹³ The litigants' views converge with those of William Felstiner and Austin Sarat "Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions" (1992) 77 Cornell Law Review 1447 at 1468: "... in the context of divorce, many of the judgments over which conflicts occur do not reflect technical considerations; rather, they are questions of timing, motive and interpretation for which the lawyer may have no comparative advantage. Indeed, insofar as the resolution of those questions depends upon a feel for the behavior of the spouse, the client's qualifications may well be superior."

for money when they saw a lawyer as a bureaucratic functionary, rather than a person with special skill and expertise. A former LiP, now acting as a McKenzie friend in the Family Court, said that the people he assisted did not qualify for legal aid but were the “working poor” who could not afford to pay “\$350 to \$500 per hour”. He explained the impression created by lack of visible work in return for high fees:

I've got guys who are engineers on \$50/hour. When they see a lawyer getting \$450/hour, they are just completely disgusted by it, particularly when the work is done behind the scenes. And they think, well, I can do that.

Those who, as discussed above, gained experience from watching their counsel manage their case, tended to minimise what their counsel had done. LiPs said they had drafted the material themselves and the lawyer would “just put the lawyer bits in and change it”. Once the litigants had read and edited legal correspondence and court documents, they considered they could continue on without assistance.

5. *Expectations of Assistance*

Some litigants expressed beliefs that the lawyers, judges and court staff were obliged to assist them to litigate in person and would modify aspects of the court system to ensure they could participate. Some indicated they thought Judges would make special allowances for them, given they were a LiP, and would therefore not be at a disadvantage, and perhaps would even have an advantage, by not having a lawyer. Some LiPs expected that the language and procedure would be relaxed to make the process more accessible:

My understanding of the normal court is that if you self-represent there is a requirement for the law to be fair and equal - that they must bring their terminology and all that down to your level. (FC LiP)

Some LiPs went further and said that because they were not a lawyer they could not be expected to argue the law. They would simply bring the facts to the court and the Judge would do the rest.

Lawyers and court staff also referred to their impression that some LiPs believed they were obliged to help them. A Family Court lawyer related a story of a LiP phoning for free advice about his affidavit and submissions: “He just wanted me to just tell him, he thought it was my duty to tell him”. Similarly, court registry staff reported people expecting substantive help from the court office:

You get a lot ... [of] people saying, “Oh, I got told I could come to the court and you’d help me”. And, well, help means that I’ll tell you what the filing fees are, not tell you whether or not you’ve got a credible claim.

To some extent this expectation was borne out. As discussed in the following chapters, many court staff, lawyers and judges do go out of their way to assist LiPs access the system.

6. *The Truth Will Out*

A number of participants expressed a strong belief that the courts would deliver “justice” and therefore having a lawyer was unnecessary. When asked for words of advice to future LiPs one participant said: “Just tell the truth really, just be honest and tell the truth and you can’t go wrong”. Another participant in a parenting dispute explained:

That is why I’m representing myself. I have nothing to fear. If I did, I’d go to a lawyer and say, hey, make me win the case. But over here I’m 90 per cent sure I’ll get what God thinks is right, what I want and [my child] wants.

This LiP was successful in her (unopposed) application and reflecting on her “win” after the hearing she commented, “I guess if you have nothing to hide then it is fine to self-represent”.¹⁴

Some LiPs who had succeeded in a previous case, either represented or not, believed that justice had prevailed and would do so again, so a lawyer was unnecessary. A LiP who had successfully defended a criminal charge in person pointed to that experience as both having equipped him to run the complex civil matter he was now involved in, but also as giving rise to a belief that presenting the “truth” will result in “justice”:

So that was the first experience that I had at a reasonably young age of realising that the truth was out there, all I needed to do was bring the two people along that had witnessed the event and then I was successful.

Similarly, a District Court LiP, reflecting on his previous experience as a LiP many years previously, said “I simply told the truth and justice prevailed in the end”. He believed that his current civil matter

¹⁴ This reflects the popular conception of lawyers that Galanter discusses in his analysis of American lawyer jokes that “lawyers lie incorrigibly” and “[offend] common sense by casuistry that makes black appear white and vice versa”: He gives, as an example of this discourse, the following joke (at 34):

“Have you a lawyer?” asked the judge of a young man brought before him.

“No, Sir,” was the answer.

“Well, don't you think you had better have one?” inquired his Honor.

“No, sir,” said the youth. “I don't need one. I am going to tell the truth”.

required no legal research as the answer was obvious on the justice of the case as long as he told the truth to the court.

The ideas about “justice” that people were drawing on were not based on what they understood the law to be, but what they assumed the law to be, reasoning from their morality, or a mix of legal principle and a sense of justice. This is consistent with Moorhead’s observation of his UK study participants, that: “There was some evidence of a broader, and understandable, confusion of law with social or moral notions of ‘justice’”.¹⁵ For example, in my study, one LiP involved in appealing her benefit entitlement relied primarily on an argument that the New Zealand Government must be intending to provide enough money for her to live on. If the benefit fell below her actual costs, then she believed there must be an error, as to pay someone less than necessary would be unjust. Arguing her case she said: “If you see that something is detrimental to somebody you don’t go ahead and do it, when you know that it’s detrimental”. She was unsuccessful: the Court did not overturn the decision on the benefit sum. It was less than she believed she needed to survive.

D. Beliefs about the benefits of litigating in person

Apart from the obvious financial benefits (in the form of saved fees) of litigating in person, many LiPs started with the belief that their knowledge of the facts, and the control they would have over the proceedings, would benefit them and their case. These beliefs were often challenged by the experience of litigating in person, as will be discussed in the following chapters.

1. Knowing the facts

These LiPs thought that a lawyer would not be able to hold all the detail or understand the nuances of their case, and so their case was best presented in person. They were also concerned about the lawyer’s level of motivation to know all the facts, or their level of commitment to the case:

[A lawyer] ... would have been useless to us. Because we would have had to go through the palaver, getting them to get to grips with our case. They weren’t motivated to the extent that we are motivated.

LiPs emphasised the detail with which they knew the case: “It would cost half a million for a lawyer to understand the facts of the case as well as I do”. None of the litigants expressing this view suggested that a lawyer might not need to know the case with the same level of detail, or that all the detail may

¹⁵ Richard Moorhead "The Passive Arbiter: Litigants in Person and the Challenge to Neutrality" (2007) 17 Social and Legal Studies 405 at 409.

not be legally salient. They instead associated detailed knowledge of facts with success, minimising the importance of knowledge of the law.

2. *Control – Dignity from Direct Participation*

For others, the desire to speak themselves was related to wanting control and recognition that this was their dispute. One LiP in the Family Court, who had previously appeared represented, described a Judge refusing to address him directly in the previous proceedings, speaking to him only through his lawyer. He said: “I really felt really degraded actually. I even talked to my lawyer about it and said ‘I feel like a piece of meat’”. Another Family Court LiP commented that “people can feel enormously out of control and not understood by their lawyer. Self-representing for me began to make me feel in control and become part of the system”. One Family Court LiP related the lack of control to the dominant mode of legal services, where the lawyer controls the case and the client takes a back seat:

I like to assist my lawyer and not just sit back and let them do everything. ... I think there is too much reliance on the lawyer and that the lawyer needs to let the client in to really assist much more.

As this litigant could not convince her lawyer to include her more, she became a LiP, although she returned to representation when urged by the Judge, lawyer for child, and her family.

3. *Control – litigating without restraints*

A few LiPs referred to perceiving a benefit from being free from the rules and cultural restraints imposed on lawyers. As will be discussed in the next section, Judges and lawyers commonly believed this was because LiPs wanted to be free to run unmeritorious arguments. Two LiPs referred to running an argument or case that a lawyer had directly counselled against, and to becoming a LiP for that reason. One went on to be a persistent LiP and the other succeeded in securing court orders for access to his children that the lawyer had said he would be unlikely to be granted.

Two other LiPs may have been using the legal process to oppress their opposing party. The court accused them of doing so but they denied this and did not cite this as a reason for litigating in person.¹⁶ They were taking not only core proceedings against the opposing party, but were also launching

¹⁶ Six of the male participants had been accused of domestic violence against their opposing parties. These men were involved in both civil and family court litigation. Two of these men also said their female opposing party had committed violence against them.

collateral proceedings, such as judicial review and an action under the Harassment Act 1997. Both were men whose opposing party had accused them of domestic violence.¹⁷

A few LiPs believed they benefited from litigating in person because they would be more forceful advocates than a lawyer. They felt that the style of litigation that is customary in New Zealand is too restrained and deferential. These, and other, LiPs also thought lawyers would rather protect their reputation and avoid annoying a Judge – for the sake of their later cases and their standing in the legal community – than strongly argue the case the LiP wanted put forward. A few criticised lawyers for making comments in court such as “I’m in your Honour’s hands” (surrendering the advocacy role) and “my client instructs” (signalling to the bench the lawyer does not agree with the instructions).¹⁸ Some also believed that lawyers would not zealously litigate any cases that were directed against lawyers, judges or the Government: “they are not wanting to take on their brethren to lynch them”.

These beliefs were most common among (but not exclusive to) persistent litigants. They saw their litigation as going beyond their immediate case, to exposing what they saw as corruption in the system.¹⁹ As lawyers are “part of the system”, the persistent LiPs did not trust them to advocate their case.

II. Lawyers and Judges on Why People Litigate in Person

Having considered the reasons LiPs gave for litigating in person, I now turn to the perceptions of the bench and bar as to what LiPs’ reasons were. Before doing so, I briefly summarise Judges’ and lawyers’ perceptions of the previous litigation experience of the LiP population.

A. Impressions of the LiP Population’s Litigation Experience

A High Court Judge spoke of encountering few LiPs with no previous experience of the courts: “Very often litigants in person are people who have as much familiarity with the court system as anybody else”, and another said “most” were persistent LiPs. When giving examples of how they managed

¹⁷ This is consistent with domestic violence research which has discussed abusive partners using the legal system to further the abuse; see for example Seuffert, above n 8 at 50.

¹⁸ Lloyd Harris “The Emotional Labour of Barristers: An Exploration of Emotional Labour By Status Professionals” (2002) 39(4) *Journal of Management Studies* 553 at 569-570 found evidence of this practice in England where a barrister explained: “If your case is rubbish but the client insists that you put it you always obey your instructions. You just want the professional to know that this isn’t your idea and it is against your advice ... you just put on an act saying, ‘I am instructed to say ...’ then the entire court knows that you don’t really believe that a schoolboy spontaneously attacked a known mugger!”.

¹⁹ This belief was coupled with a (seemingly contradictory) belief that by bringing litigation they would expose that corruption.

LiPs, these Judges did however talk about first-time LiPs, particularly those appealing from lower courts.

The District and Family Court practitioners and Judges, in contrast, were concerned that most LiPs they encountered were from the “most vulnerable part of New Zealand”. They were LiPs who “don’t know what is going on” in their case. In all the Courts, but particularly in the District Court, the Judges said they frequently encountered LiPs who had limited English language skills. LiPs in the District Court were often facing more powerful and experienced litigants such as landlords (who may themselves be LiPs, but who were very experienced), Government authorities such as Inland Revenue, or finance companies collecting debts.

In the Family Court, Judges and lawyers were concerned about the vulnerabilities arising from the socio-economic status of many litigants in that Court, as well as issues such as domestic violence. The exception was a family law practitioner who suggested most Family Court LiPs were persistent, citing the example of two aggressive and physically threatening LiPs she had litigated against. She said other practitioners also encountered such LiPs: “So many people I have conversations with, as you do outside of court, have similar experiences”. She said this was probably the result of the general Family Court population being difficult: “I’m sure there are nice self-represented litigants out there, but by gosh there are some fairly dysfunctional people who go through Family Court. They are dysfunctional people”. However, this practitioner also gave an example of her own vulnerable client becoming a LiP because the client could no longer afford her fees.

B. Access to Legal Services

The Judges and most lawyers cited constraints on the ability to secure legal services as the major driver for the perceived increase in LiPs. In particular, most believed LiPs were most often people who fell in “the gap” – people who were unable to afford representation but did not qualify for legal aid:

To the average earning person the cost of private representation is outside their means, but they probably won’t get legal aid, and the people who get legal aid have to pay the money back in general. So it is all misery in that sense. (FC Judge)

... people don’t have the funds and they can’t get legal aid. I think that is the primary reason for people appearing in person. (HC Judge)

I think the [legal aid] threshold is pretty low. I mean there are a lot of people out there who are disadvantaged who are just above the threshold and don’t apply and they don’t have a huge amount of money and they certainly don’t have that sort of money in the budget, where they’ve got a lot of surplus money lying around to pay legal bills. (FC Lawyer)

It is the people who don't qualify for legal aid, but on the other hand can't afford lawyers' fees, who have the biggest problem. (Civil litigation lawyer)

As discussed above, civil litigation lawyers also acknowledged there was a shortage of lawyers who were willing to work at legal aid rates, so even those who did not fall in “the gap” would struggle to find representation. In the current climate, where the legal profession feels under significant pressure from policy changes²⁰ and global financial conditions, pro bono advice is also rare. As one advice service solicitor said: “Civil stuff is more difficult [than family cases], because lawyers nowadays don't want to take it on, they don't want to do it on legal aid, and um, pro bono, that is a no go”.

Two family lawyers suggested that, rather than not being able to afford a lawyer, people litigated in person because they were unwilling to pay. One discussed flexible payment terms and reduced rates that many lawyers offer their poorer clients, and said that the idea that there were people who did not qualify for legal aid but could not afford fees was “ridiculous”. The other characterised litigants in person as people who “don't want to spend the money they have”.

Some lawyers also discussed their concern about taking on clients who had previously been litigating in person, particularly where they had failed relationships with previous lawyers. From the lawyer's perspective, this was a dangerous client. They were perceived as being likely to be difficult to work with and much more likely to complain. One lawyer explained that, “You have to be mindful of the case ... particularly if you are doing legal aid”. If the case is difficult because of the “personal dynamics involved around the client's approach”, then each step may take much longer. Then the fees cannot necessarily be recouped from a private client who may argue about the bill, and would be very difficult to recoup from legal aid under the set fee regime. This may explain some of the high retainers quoted to take up the representation of LiPs who formerly had a lawyer. There may not only be a cost involved in reviewing the file, but also a desire by the lawyer to have money up front from a high-risk client.

C. Doing a better job than a lawyer

Other than financial reasons, all the Judges said that there was a group of LiPs who believed they could do “as well as” or even “better than” a lawyer:

They would perceive they can do it better than anyone else and that it doesn't merit a lawyer. (DC Judge)

²⁰ For a discussion of policy changes affecting the profession see Chapter 1, pages 8-9.

There are others who are there because they genuinely feel they can do a better job than the lawyers. (HC Judge)

Sometimes people take the view they can do as well as a lawyer. (HC Judge)

One Judge then went on to characterise people motivated by a belief that they can do better than a lawyer as “obstructive and difficult”. Similarly, when a civil litigator asked if people in this study asked me for advice, and I said they did not generally do so, he regarded that as potentially indicating arrogance on their part, and perhaps even vexatiousness:

I think there is an element - in one of the cases that I mentioned - there was an element of that, a sort of arrogant thinking, “I don’t really need a lawyer, I know better”, that type of thing. So maybe the people you are dealing with, that is what it is. Obviously there are a few sort of notorious self-litigants out there that maybe your study is doing, who constantly appear with judgments and appeals and reviews and appeals of appeals and so forth - the vexatious litigant type of thing - obviously they’ve got psychological complexes about lawyers and the legal profession and they want to sort of do things themselves and they know better and they obviously think that one day they will be vindicated.

The other Judges characterised the belief that the LiP could do better than a lawyer as either common to many LiPs or a belief motivating a small number of LiPs.

Lawyers suggested that some LiPs become represented during the course of their case because they realise they could not in fact do the job of a lawyer:

I have had cases where part way through a case the people will suddenly get a lawyer but that is usually because things aren’t going their way, so they get a lawyer. (Civil litigation lawyer)

They would lawyer-up immediately before a hearing because they knew they couldn’t manage the hearing. That is a pretty common pattern for representation, immediately before a hearing, “Oh I can’t manage this so I’m going to get a lawyer”. (Family lawyer)

The lawyers are suggesting that there is no financial reason for not having a lawyer, and only once the LiP realises the case is too difficult, will they seek representation.

D. Freedom to argue an unarguable case

Lawyers and Judges said one reason people litigated in person was because that they were unwilling to accept advice from a lawyer. This might be because the litigant wanted to make certain submissions or rely on certain evidence that could not properly be put before the court. A Family Court Judge thought clients might feel restricted by their lawyer’s compliance with the requirements of relevance

and admissibility, meaning that “to their mind, they don’t necessarily get to say what they’d like to say”. Similarly, a civil litigation lawyer speculated about a former opposing party:

I think the client sacked the lawyer because they wouldn’t simply repeat to the Judge what this lady wanted to say. They were advising her, “Look, I can’t say that because of this, that, and the other thing, and the correct approach you should be taking is this”, and she simply wouldn’t accept that advice. (Civil litigation lawyer).

In addition, judges and lawyers thought some LiPs may have been advised that they had no arguable case, and then pursued the case without representation:

One suspects they’ve tried out certain lawyers who have said you don’t have a case. (HC Judge)

In one situation, ... they [the opposing party] weren’t liking the advice they were getting, because lawyers were saying “You haven’t got a case here and you should be resolving this”, so in the end they abandoned lawyers and acted for themselves. (Civil litigation lawyer)

[It is] partly money, but I think it is partly some people won’t take advice. They are sure they are right and they can’t see sense. (Civil litigation lawyer)

The lawyers and Judges emphasised that they did not know for sure that litigants were appearing in person because no lawyer thought they had an arguable case, as they had no way to know the advice the litigant had been given. However, they assumed, partly from their assessment of the legal argument the LiP was advancing, that this must have been the case.

1. *Political Stands, Hobbies and Obsessions*

In the High Court, there were examples of litigants who were aware that their case had no legal merit (and therefore appeared in person), but were using the court as a forum to make a political point. The High Court Judges referred to LiPs who argue that the court has no jurisdiction over them, usually on the basis of Maori sovereignty or on the basis that “they are a sovereign state and they have their own seal”.²¹ As one High Court Judge explained, “the answer to those questions is, from a legal perspective, pretty obvious”, but their motivation is to make a political stand:

²¹ One District Court Judge, when asked directly about whether there were LiPs disputing the jurisdiction of the court, said that he had only seen it in criminal cases. The issue was not raised by any of the Family Court Judges interviewed. These types of claims arise most commonly in prosecutions by the Crown or by other Government agencies such as Inland Revenue or Ministry of Fisheries, but also arise in civil cases, see for example *Gordon: Of the House of Israel v Sexton* HC Hamilton, CIV-2006-419-001765, 15 December 2006, arguing dog control laws did not apply, on the basis of Maori sovereignty. For a discussion of litigants appearing in person claiming to be “Freemen-on-the-Land” and “sovereign men” in the Canadian context, see Amy Salczyn "Canada: Foreclosures, Freemen, Foreign Law Schools and the Continuing Search for Meaningful Access to Justice" (2013) 16(1) Legal Ethics 223 at 226-228.

They are there because they want ventilate their feelings about the system generally and they are there because they want to be. I suspect also they know they are going to lose, but they just want to go on and make a point.

For other LiPs, the Judges thought there might be arguable issues to their case, but they were also coming to court because, for them, litigation was a pastime in itself. One District Court Judge described a litigant who had started in tribunals but now litigated in the courts. The Judge said: “Now he does nothing else. He dresses in a suit and carries a briefcase and previous decisions, and things like that. [It has become] his hobby”. The High Court Judges also said they had applications from prisoners in person, who were motivated by legitimate, or at least arguable, grievances, but also found court proceedings a break from prison routine. They valued “a week or two getting out the system and coming down to court every day to argue a case”.²² Similarly, a lawyer involved in prisoner litigation commented that “for some prisoners the litigation is something to do”.

(a) The Special Category of Obsessive and Querulant Litigants

The Judges discussing hobby or repeat litigators regarded them with caution. They were seen as either obsessive litigants, or on their way to becoming obsessive: “Once they decide that litigation is good sport then they are starting to move into the querulant category”. Lawyers and Judges noted that these litigants could become quite adept with court procedure, and their experience meant they had the confidence to continue.

The Judges observed that obsessive litigants would not characterise themselves as obsessive, but, as a civil litigation lawyer described it, would see themselves as “cause driven”. One Family Court Judge said:

They certainly don't see themselves that way [as obsessive]! They are sometimes along the line of “I'm duty bound to do this and I'll go to jail if my kids told me something and I didn't do something”, y'know? Those sorts of things. If the standard of the reasonable litigant or whatever was applied (laughing) they would be found to be at the extreme end of that, possibly you know, and more likely unreasonable.

Obsessive litigants were an abiding concern for the Judges, particularly High Court Judges, who frequently described them as belonging to a category of their own, as a small but very bothersome group of LiPs.

²² In some cases the Court has appointed amicus curiae because of the importance of the issue argued. See discussion on the appointment of amicus in Chapter 8, page 187.

Some Judges supposed that the obsessive litigants were not represented because they had an unarguable case that lawyers would not run:

I suppose what worries me is that we do get some obsessive people and one suspects they've tried out certain lawyers who have said 'you don't have a case'. (DC Judge)

Sometimes it is because they are truly vexatious and no one will act for them. (HC Judge)

One High Court Judge reversed this premise and said that, if the person said that they were litigating in person because “no one will act for me”, then the “bells are ringing for this being an obsessive litigant”. As discussed in the first part of the chapter, there may be a wide range of reasons why “nobody will take me on”. It might be because the litigant has a weak case, or because the LiP cannot find a lawyer with the expertise they need for what they can afford or who will work on legal aid rates, or it might be an uneconomic claim: i.e. the value of the claim is less than the cost of bringing it. While LiPs point to such reasons for their lack of representation, often to appeal to the sympathy of the Judge, the Judge's perceptions indicate that these statements may still be interpreted as a sign of unreasonableness and obsession.

2. *The courts will deliver justice*

Some lawyers, but only one Judge, noted that a factor in people coming to court in person might be a belief that the courts will deliver justice, regardless of representation. They considered this belief stemmed both from the organisation of the courts and cultural attitudes.

The presence of the Disputes Tribunal, where litigating in person is mandatory, can give the impression that all courts are accessible in person. As one civil litigation lawyer proposed:

Many people that I've come across who are lay litigants have had a couple of scraps in the Disputes Tribunal, for example, and so in their minds it might not be much of a step up from going down to the Disputes Tribunal to getting involved in a District Court or High Court proceeding.

Similarly, the lawyer said that the District Court Rules, which during the research were simplified and online, might encourage people to litigate in person.

Cultural attitudes may also be at play. One lawyer cited the do-it-yourself attitude of Kiwi culture as a possible driver. In Auckland, where there are large immigrant communities, Judges said that a belief in the accessibility of the courts was not limited to New Zealand-born residents, but was strong (or even stronger) in immigrant groups:

I think a lot of immigrants have faith in our judicial system to deliver better than they are used to or could get in their own countries and therefore they don't need to get a lawyer because the poor old afflicted New Zealand judge will deliver for them. (DC Judge)

A few lawyers related this belief in the accessibility of the courts to what they saw in their own clients, and in opposing LiPs, as a “rose tinted” view of justice. This is the belief that their argument would win and “justice” would triumph, so a lawyer was unnecessary. A civil litigation lawyer saw these LiPs as a “manic category” who had such a “strongly held view that they are in the right” that they can't “appreciate how any judge with half a brain will come to any decision other than in their favour”. These LiPs do not see a lawyer as necessary: “All they have to do is go through the process and get the information out from their perspective and the judge will come to the right answer”. Similarly, a family lawyer said she believed LiPs were not people who could not afford lawyers, but were those who believed they did not need professional assistance because “they work on the basis of what is fair and what is not fair”. She thought this belief was flawed: “Unfortunately there is not an ‘it's not fair’ law”.

III. Discussion

These findings as to why people litigate in person, largely concur with previous research discussed in Chapter 2. What, then, do these overlapping, but significantly different, explanations for litigating in person mean for the legal system and the profession, and what are the implications for individual LiPs?

A. Implications for the legal system and profession

One way of framing the LiPs' reasons for coming to court in person is that the courts are effectively communicating their openness to them, a posture that is necessary to maintain the courts' legitimacy.²³ However, at the same time, there is a failure to convince people that their access needs to be mediated by a lawyer, when that is probably necessary for the efficiency and effectiveness of the system. Moreover, the failure to convince people that they need a lawyer can be seen in terms of a failure of the legal profession to produce a commodity (legal services) that people believe is valuable, that they can afford, and that they believe they cannot produce themselves.

²³ This supports Mather's and Moorhead and Sefton's suggestion that decisions to litigate in person are influenced by the court's projection of openness. See Chapter 2, page 23-24.

1. *Accessibility and Popular Understandings of Courts*

Some LiPs can be seen as accepting at face value the invitation of the state to solve their own disputes in the Courts. Sally Engle Merry, in her anthropological study of legal consciousness among working-class Americans, argues that a number of reforms in the 20th century created an environment where working-class people felt they could bring their problems to court.²⁴ This included the development of the welfare state, new legislation regulating family and neighbourhood life, subsidized legal services for the poor, high-profile civil rights litigation, and the activism of the 1960s and its associated legislation. Engle Merry concludes that:²⁵

These changes [welfare reform and civil rights litigation] created a new ideology of the state as friendly and supportive, as the protector of the poor and weak and as the regulator of the strong ... During the twentieth century, the law has gradually taken on a new face as the protector of the weak and vulnerable, as a tool for achieving social justice, and as a weapon against big business and corporate power. Thus, the government has in a sense invited ordinary people to bring their problems to the courts.

The New Zealand environment is, of course, different to that of the US. New Zealand does not have judicial review of legislation and does not have a history of civil rights litigation that mirrors cases such as *Brown v Board of Education*.²⁶ But many of the changes that occurred in the US legal environment in the 20th century also occurred in New Zealand. Throughout the 20th century there was increasing legislation regulating aspects of the family and neighbourhood life, there were significant welfare reforms, there were reforms to make the courts more accessible,²⁷ and legal aid was introduced.²⁸ The New Zealand government can therefore also be seen as extending an invitation to the people to use the courts.

Sarat, citing Engle Merry, argues that the US (like New Zealand), is at least theoretically committed to an ideology that relies both on protecting law's autonomy and on promoting its "openness and availability to socially and politically disadvantaged groups, to those seeking redress for injuries inflicted, protection from future harm, or vindication of their membership in the community".²⁹ He

²⁴ Sally Engle Merry *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (University of Chicago Press, Chicago, 1990) at 176-178.

²⁵ At 178.

²⁶ Although New Zealand does have a history of litigation in relation to Maori rights and a history of strong decisions from the Court of Appeal.

²⁷ See Chapter 1, page 6.

²⁸ See Chapter 1, pages 4-6.

²⁹ Austin Sarat "Going to Court: Access, Autonomy, and the Contradictions of Liberal Legality" in David Kairys (ed) *The Politics of Law: A Progressive Critique* (3rd ed, Basic Books, New York, 1998) 97 at 97. See also Judith Resnik and Dennis

argues that if courts can maintain the appearance of both accessibility and autonomy then they can provide a “terrain of contestation on which the powerless can hold the powerful to account”.³⁰ When citizens want to take up this right of access, however, “liberal theory stresses the limits of citizen competence. Participation is facilitated by the intervention of trained legal specialists”.³¹ LiPs can be seen as accepting the promise of accessibility but ignoring the limits of their competence, when they take the appearance of openness at face value and come to court without a lawyer.

2. *Failure to convince consumers of the value of professional services*

So why are LiPs not accepting legal services as necessary? Abel, reviewing theories of the legal profession (discussed in Chapter 2), argues that in order to construct a professional service as a valuable commodity, “[f]irst, the consumer must acknowledge the value of the producer’s services. ... [s]econd, consumers must be convinced that they cannot produce the services themselves”.³² Success in achieving these goals relies on a number of factors including the affordability of the service, the community’s beliefs about the service, the nature of the professional expertise on offer, and the ability of the profession to resist challenges to its hegemony, for example by para-professionals.³³

(a) Legal Market

The short point is that for many (or even most) people legal services are too expensive so they are unable or unwilling to purchase them.³⁴ As discussed above, this was recognised by all the participants in the study as the primary reason for people litigating in person.³⁵

Curtis *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses* (2007) at xv (arguing adjudication is democratic as individuals can oblige others to treat them as equals).

³⁰ Sarat, above n 29 at 97-98. Richard Abel “Delegalization: A critical review of its ideology, manifestations, and social consequences” in Hubert Rottleuthner, Erhard Blankenburg and Ekkehard Klaus (eds) *Alternative Rechtsformen und Alternativen zum Recht; Jahrbuch für Rechtssoziologie und Rechtstheorie* (Opladen, West-deutscher Verlag, 1980) 27 at 41 makes a similar argument. Abel argues that under advanced capitalism the complexity of the political structures and the extreme division of labour means that it is easier to obtain a declaration of paper rights because it is widely recognised that those rights will not be fully implemented. He goes on to argue that “it is difficult to argue that rights, once promulgated, should not be enforced; and paper rights, whether or not enforced, can often be expanded and multiplied by appeals to consistency and logic – arguments whose extraordinary power rests on the fact that they are seen as neutral and apolitical.

³¹ Sarat, above n 29 at 102.

³² Richard Abel *The Legal Profession in England and Wales* (Basil Blackwell, Oxford, 1988) at 8.

³³ At 8-10.

³⁴ The Civil Justice Council noted that in the UK context, “... those who cannot afford legal services and those for whom the state will not provide legal aid comprise the larger part of the population of England and Wales”: Civil Justice Council *Access to Justice for Litigants in Person (or Self-Represented Litigants)* (Civil Justice Council Working Group, November 2011) at [31].

³⁵ This finding mirrors the international research discussed in Chapter 2, page 22.

The conventional reasons offered for why legal fees are high, according to Hadfield, are: “lawyers are an avaricious lot who will bleed you dry”; “legal training is expensive”;³⁶ and “lawyers enjoy a state granted monopoly over which they control entry for the purposes of protecting the public”.³⁷ The cost of legal training is not so great in New Zealand, or at least was not before the last decade, to justify giving much weight to that factor, but the Chief Justice has suggested that lawyers may have “expectations of higher income levels than may be sustainable”.³⁸ However, Hadfield concludes that none of these reasons are “particularly compelling”, although hold some kernel of truth. Instead she argues that the forces of the legal market, which has a number of non-competitive features, cause legal resources to be “pulled disproportionately into the commercial sphere and individuals are largely priced out”.³⁹ Many claims are simply uneconomic to litigate or the litigants cannot meet the fees. This is a “failure to package the commodity in units the consumer can afford”.⁴⁰

(b) Relationships between lawyers and clients

One of the major reasons that LiPs offered for litigating in person was the perception that they had received a poor quality service.⁴¹ Poor services, of course, undermine demand, as the consumers perceive they are getting little of value. However, no lawyers or judges offered bad lawyering as an explanation for litigating in person. They instead talked of LiPs thinking they could do that job of a lawyer, which to them imported a suggestion of arrogance and unwarranted confidence.⁴² However, in the context of a particular litigant’s experience with a particular lawyer, it is possible that they can do the job as well as *that* lawyer.

It is highly likely that the quality of services that New Zealand lawyers provide is variable. The Bazley Report about New Zealand’s legal aid system found that “while there are very good lawyers in the legal aid system, there is also a small but significant proportion of very bad lawyers who are bringing

³⁶ This factor has less currency in New Zealand where the price of legal education is less than in the United States, although the gap has narrowed in recent years.

³⁷ Gillian Hadfield "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98(4) Michigan Law Review 953 at 954.

³⁸ Sian Elias, Chief Justice of New Zealand "Address Given to the Canterbury Law School" (8 August 2013). During the course of this study (2012-2014), the cost of legal services rose annually between 3.4 and 4.5 per cent, while the CPI inflation during the same period was less than 2 per cent: Geoff Adlam "Taking the Industry's Temperature" (7 November 2014) 854 LawTalk 18 at 19.

³⁹ Hadfield, above n 37 at 956.

⁴⁰ Abel, above n 32 at 10.

⁴¹ This is in line with other research, discussed in Chapter 2, page 23, that suggests dissatisfaction with legal services is a reason for litigating in person.

⁴² LiPs were often alert to this. As one Family Court LiP said, speaking defensively about her decision to litigate in person: “I’d be arrogant to think that I’m from the public and I know it all”.

themselves and their profession into disrepute”.⁴³ New Zealand’s legal aid system has since been amended, but it remains probable that there are “bad lawyers” both inside and outside the legal aid system. This would be in line with international research that expresses concern about lawyer quality.⁴⁴ Swank argues that, given variability in quality, it is a mistake to conflate access to justice with access to a lawyer.⁴⁵ He says lawyers sometimes “fail to file matters, miss deadlines, or make other mistakes”, rendering justice “inaccessible even for those with representation”.⁴⁶ This may be because they are inadequately funded or simply delivering an unprofessional service.⁴⁷

Problems with legal services may not be limited to technical competence, but also concern how lawyers interact with clients. Lawyers may use various strategies that, Newman argues, can be “construed as client abuse”, such as:⁴⁸

[A]cting like the boss; making the big decisions; playing mind games; using vague, ambiguous and ineffective language; exaggerating the harmful outcomes to the client; pressuring the client to accept a plea deal; and ignoring client’s instructions, decisions and best interests.

There are no New Zealand studies examining lawyers’ performance, but some LiPs saw problems with their former lawyer’s behaviour, ranging from incompetence to abusiveness.

Judges and most lawyers acknowledged there was a variable level of quality of service among lawyers. In discussing intervention to assist LiPs in court, one Judge referred to the “more common situation, where one side has got a very good lawyer and the other one is hopeless”. Judges and registry staff also commented on the poor quality of documents presented by some lawyers. When answering a question about the quality of documents presented by LiPs in general, one High Court Judge said, “They vary tremendously, just as documents filed by lawyers vary tremendously”. The Judge went on to say that LiP documents tended to be “wordier, but that is by no means universal because some

⁴³ Margaret Bazley *Transforming the Legal Aid System: Final Report and Recommendations* (Ministry of Justice, November 2009) at i.

⁴⁴ Richard Moorhead "Lawyer Specialization: Managing the Professional Paradox" (2010) 32(2) *Law and Policy* 226; Felstiner and Pettit list 15 US-based studies from the 1960s-1990s that “indicate that lawyers frequently do in fact neglect and show little respect for their clients”: William Felstiner and Ben Pettit "Paternalism, Power, and Respect" in Joseph Sanders and V Lee Hamilton (eds) *Handbook of Justice Research in Law* (Kluwer Academic, New York, 2001) 137 at 146.

⁴⁵ Drew Swank "In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation" (2004) 54 *American University Law Review* 1537 at 1577.

⁴⁶ At 1577.

⁴⁷ Deborah Rhode "Access to Justice: Again, Still" (2004) 73 *Fordham Law Review* 1013 at 1014 says that in the United States for lawyers representing indigent criminal accused, “adequate preparation is a quick route to financial ruin”.

⁴⁸ Daniel Newman *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing, Oxford, 2013) at 142.

lawyers' documents are equally wordy and unorganised". It is possible that LiPs who are only marginally able to pay for lawyers are accessing lawyers at the lower end of quality.

It is also possible that some litigants rightly perceive that their abilities, and their commitment to their case, will outstrip that of a lawyer, or at least a lawyer they can afford. Many Judges observed that a few LiPs do a good job of putting their cases:

Well, I guess the well-endowed person who is running his or her own case is making a personal choice for some reason and may do a good job of it. Some people do actually. (FC Judge)

Lawyers and registry staff also referred to occasionally encountering litigants who were exceptionally able, although they emphasised this was unusual:

There is one guy I came across who was absolutely outstanding, including appeals to the High Court. In fact I think he'd been up to the Court of Appeal acting for himself on a couple of occasions, but leave him aside because I think he is out on his own. (Civil Litigation Lawyer)

As will be discussed in the next chapters, even litigants who are capable and well-resourced encounter many difficulties in arguing their own case; difficulties that are inherent in being an advocate in one's own cause and in the formal structure of legal proceedings. LiPs may also overestimate their abilities, a theme I explore in later chapters.

(c) Popular understandings of law and lawyers

Abel argues that whether consumers believe they need a professional service is partly determined by beliefs prevalent in the culture, "over which professionals only have limited control". The LiPs' reasons, as discussed above, included beliefs about what lawyers do and how the adversarial system works, that led them to believe they could do as well as a lawyer. This was not expressed as a belief the case was simple enough to do by themselves, as previous research suggests as a common reason for litigating in person, but rather minimising what lawyers do.⁴⁹ LiPs also believed that what they lacked in experience or professional training could be outweighed by other benefits. In particular, some LiPs believed it was beneficial to be able to tell your whole story yourself, having a full command of the detail and controlling how it is presented to the judge. This is a seductive idea if coupled with the other belief that a good case only requires the facts to be put before a judge for justice (without reference to legal principle) to be done, and for "the truth" to come out. This finding is consistent

⁴⁹ See discussion at Chapter 2, page 22.

with Conley and O'Barr's study of the discourse employed by LiPs in small claims litigation (pre-trial and post-trial). They found that one of the tasks LiPs often failed to perform was reframing their problem into a justiciable issue. They instead presented their narrative to the court and expected the court to extract the cause of action and theory of the case from that presentation, a task that a court in an adversarial system does not perform.⁵⁰

These lay beliefs about the civil justice system, and the nature of a lawyer's function, minimise the value of the service that lawyers offer, making it less likely that consumers holding such beliefs will want to purchase those services. Judges and lawyers, however, can easily interpret such beliefs as arrogance, because they distrust the assumption that a job for which they have trained for many years can be performed by anyone.

(d) Emotional aspects of cases

It is also possible that some clients reject legal services because the dominant form of legal service is to separate the emotional aspects of the case from the legal.⁵¹ As one LiP said, "Lawyers don't do emotion". Some lawyers confirmed this impression, expressing discomfort with having to face emotional clients, although a few said that they accepted dealing with emotion was part of the job. But, as the lawyer who had previously been a client explained, the idea of separating out emotion is difficult, if not impossible, to achieve in practice. Attempting to do so may only alienate a client. When lawyers constantly return the attention to factual matters, the effect is to express "an indifference towards the aspects that are most salient to the person".⁵² A Family Court LiP, who went on to use the assistance of a McKenzie friend, said that what he needed most was not the legal assistance: "It was more about 'how are the kids?', and 'how do you feel about this?' Almost a therapeutic relationship in a way". LiPs may, of course, not have an accurate understanding of how much legal assistance they need. The point, however, is that when lawyers do not "do emotion", or when well-intentioned but

⁵⁰ William O'Barr and John Conley "Lay Expectations of the Civil Justice System" (1988) 22 *Law & Society Review* 137.

⁵¹ Harris, above n 18 at 571 suggests that "emotional detachment" is equated with 'rational' competence" in both the legal and medical professions and that barristers consider being emotionally detached allows them to argue any point, regardless of personal belief in their client's case. Sharyn Roach Anleu and Kathy Mack "Magistrates' Everyday Work and Emotional Labour" (2005) 32(4) *Journal of Law and Society* 590 at 591 also argue that one of the functions of legal representatives is to "filter out or manage" the litigant's emotions so that only the legally salient case is presented to the court. This process begins in the lawyer's office: William Felstiner and Austin Sarat "Law and Strategy in the Divorce Lawyer's Office" (1986) 20 *Law & Society Review* 93.

⁵² Felstiner and Sarat, above n 51 at 132.

junior lawyers fail to relate to the emotional aspect of a case, their clients do not get what they feel they need, and are therefore less willing to purchase the service.

(e) Personal experience

A further factor in minimising the value of a lawyer's service, and in encouraging the belief of LiPs that they could do the job themselves, was the experience people gained through litigating – as paralegal professionals, represented litigants, or previous LiPs. People referred to losing their fear of the courts and gaining the experience that enabled them to confidently represent themselves. Engle Merry refers to this loss of fear in repeat users of the courts, both criminal and civil:⁵³

With experience, the court gradually ceases to be a place for awe and fear, one which imposes harsh penalties with inexorable firmness, and becomes a somewhat pliant, if excruciatingly complex, institution which, with pressure and patience, can sometimes be made to yield help.

Those with experience start to slip – in the mind of the bench and bar – into the “dangerous” category of obsessive litigants, but for these litigants, accumulated experience reduces their belief that only lawyers can provide adequate representation of their case.

(f) Lay networks – online and in person

The other aspect salient to LiPs gaining experience in the courts is that networks have emerged, online and in person, for supporting other LiPs doing this work. This was not so much the availability of materials online, which other research has suggested might be important in decisions to litigate in person, but a growing network of people.⁵⁴ This development can be seen as a challenge to the professional hegemony of lawyers, or as the rise of an alternative representation model for lower cost, making the court more easily accessed in person. It has been encouraged by government reforms that have reduced the protected area of lawyers' work, have made litigating in person mandatory in early stages of Family Court proceedings,⁵⁵ and by the rise of social networks, especially online. During the research I learned of two Facebook groups offering assistance, both emotional and legal, for people taking COCA applications in the Family Court. Several of New Zealand's most persistent LiPs have their own websites, share resources, and comment on each other's material online, as well as meeting

⁵³ Merry, above n 24 at 142.

⁵⁴ See Chapter 2, page 24. Materials available online in New Zealand are currently limited, see Chapter 6 for further discussion.

⁵⁵ For discussion of these reforms see Chapter 1, page 8.

each other in person. I also learned of McKenzie friends offering services, mostly unpaid, but sometimes for a fee,⁵⁶ supporting people in drafting court documents and attending court hearings.

B. Why it matters what judges think of people's reasons for litigating in person

Given there is a right to litigate in person, why does it matter what judges (or for that matter lawyers and court staff), think of a person's reasons for coming to court without a lawyer? The judges almost uniformly said they had no way of knowing why people were litigating in person and it did not matter in any case:

There are all sorts of reasons that people choose to act in person ... I don't think we can get into that too much really. I just can't see how it is possible. All you try and do is act fairly in the circumstances. (High Court Judge)

Despite this caution, repeated by almost all the Judges interviewed, there was evidence that the absence of a lawyer signals something to the bench. Primarily, this seems to signal that this litigant might be unreasonable. One High Court Judge referred to this explicitly:

It is easy to start out thinking the reason they are in person is because they've been completely unreasonable and have burnt off all their lawyers. But sometimes that is not the case, so I just try to keep an open mind. (High Court Judge)

There is also evidence of such reasoning in judicial decisions. The Judge in one case referred to the LiP having had "a number of lawyers" and noted these lawyers' seniority and competence. The LiP had had three prior lawyers, one of whom was court appointed. The opposing party, who was represented, had had two lawyers, but no mention was made of this. Instead the Judge used the LiP's history of representation as support for the argument that she was conducting herself unreasonably in the case.

Part of the reason for this belief might be found in the historical background. Litigating in person, as little as 20 years ago, was very rare. As one long-term court employee said about LiPs, two decades ago there "were none":

You didn't come to court without a lawyer unless you were some kind of mad person and everyone here would have said "She is that mad person, she acts for herself and she's mad". It was completely outrageous [to litigate in person].

⁵⁶ Charging a fee is supposedly prohibited, see discussion of McKenzie friends, Chapter 1, page 6.

While we do not have any figures for how common it is now, best estimates range between 10 and 30 per cent of litigants, depending on the court and type of case. Nevertheless, the historically-based belief that being a LiP equates to “madness”, or at least being “unreasonable”, remains. This may also be a function of stereotyping discussed in Chapter 2, where the powerful group (the judges) use stereotypes modelled on “a minority of the worst” against the powerless group (LiPs). This serves both as a way of protecting professional identity against incursion from outsiders and as an anchoring point for thinking about the powerless group’s behaviour and competence.⁵⁷

Opposing lawyers, sharing the same professional understanding as judges, can play on this perception by mentioning to the judge that the LiP has had multiple lawyers. This signals to the judge that the LiP is unreasonable. One civil litigation lawyer recalled a case against a LiP who had 15 different lawyers and explained that he mentioned to the judge the history of representation as “something the judge might think is relevant ... because I know full well that the judge will think that is pretty peculiar: there is something wrong about this person”.

While 15 lawyers is undoubtedly extreme, I found evidence of lawyers using this signalling tactic in much less extreme cases. When one litigant’s case reached the High Court, she had had what appeared to be a string of lawyers. Her first lawyer was possibly negligent. She then had an opinion from another lawyer, followed by a legal aid lawyer who lacked expertise. She was then unable to find a new lawyer with expertise willing to work for legal aid rates, and so became a LiP. When the matter came before the court, the opposing counsel repeatedly referred to her having “fired her lawyers”. As the opposing counsel had no way of knowing the reasons behind the change in representation that had occurred, this claim was without evidence and also seemingly irrelevant to the case. Its only relevance was to encourage a shared professional understanding between counsel and judge that a litigant without a lawyer, and particularly a litigant with a history of previous lawyers, was likely to be an unreasonable litigant with a weak case.

This is not to suggest that the fact that a judge is concerned that the person might be an obsessive litigant means the judge will treat that litigant unfairly. However, it does mean that the absence of a lawyer might burden the LiP with a presumption that they are unreasonable and their case lacks merit. The LiP then has to work to disprove this, rather than starting from the position of a represented litigant (even one with a string of lawyers behind them), that they have an arguable case. It may also

⁵⁷ See Chapter 2, pages 29-30.

mean, at least in the High Court, that the judge employs the judicial management techniques reserved for difficult litigants, which are discussed in Chapter 8.

C. Conclusions

The many overlapping reasons LiPs have for litigating in person often have finance at their core, but these reasons are intertwined with their perceptions of the civil justice system and the value of legal services. LiPs can be seen as responding to the court's projection of its openness to the public, a projection that is necessary to retain the court's legitimacy, but in fact they may be proceeding without a lawyer because of a failure of the legal profession to offer a service they can afford and believe is necessary. The bench and bar view LiPs as mainly motivated by financial reasons, but there was a strong undercurrent that many LiPs, even those who were financially motivated, were arrogant (in that they believed they could do as well as a lawyer), and were unreasonable or obsessive. These beliefs on the part of the judiciary may lead to differential of treatment the LiP in court.

In Chapter 6 I explore LiPs' experience of preparing for court, their strategies for seeking advice and their interaction with the court staff and opposing counsel. I also look at their preparation of litigation documents and the issues that lawyers and judges identified with those documents. Before doing so, however, the next short chapter looks at the LiP experience through four case stories.

Chapter 5

Four Litigants in Person

A central purpose of the thesis is to understand the LiP experience, as this is an important aspect of understanding the friction between LiPs and the court system. Analysis requires the complexities of individual experiences to be broken into their constituent parts. For example, in the previous chapter examining why people litigate in person, this type of analysis was useful and necessary for finding commonality among a range of experiences. In doing so there is some danger that the full texture, or totality, of individual LiPs' experiences are obscured, or that the complex motives of individuals are bleached out in the more analytical discussion. More detail on an individual LiP's background and overall experience might help a reader relate to and understand them as a person. This is particularly so when stereotypes of LiPs abound, the most prevalent being the "fool for a client".

This chapter is therefore a sketch of four LiPs' experience of litigating in person – Lisa, Matt, Tom and Gary. These people are not real LiPs. Each is a composite of several LiPs who participated in the research. I have taken interviews and observation material, and then created a character whom I hope breathes life into the experience of litigating in person, but who is sufficiently fictional in their totality to protect the privacy of the individuals upon whom they are based.¹

Readers who are legally trained will be familiar with hypothetical cases as they are a core tool in legal education. It is worth noting that these are cases of a different nature. Legal issues are not placed in text to be found and solved. Legally trained readers may even find it frustrating that the legal aspects of the cases are not clear, and the terminology is not always correct. This is intentional. The cases are a re-presentation of the way LiPs told me their stories, and their purpose is not to sift through the legal merits and strength of their case, but to relate to the experience of litigating in person, and the motives behind deciding to do so.

These portraits are not exhaustive of all the experiences of LiPs and should not be considered as "types", in the sense of reducing LiPs to a typology.² They are instead intended to allow the reader

¹ More detail about the process of creating these characters appears in Chapter 3, pages 74-76.

² The method employed for this study does not lend itself to the development of typologies. See Chapter 2, pages 17-18 for a discussion of typologies developed in other research.

to “explore the ‘felt-sense’” of the LiPs’ experiences.³ They demonstrate the overlapping nature of reasons for litigating in person, examined in the previous chapter, and introduce some common variations and themes that will be developed in the following chapters.

A. Lisa - Care of Children Act and Division of Relationship Property - Family Court

When my ex left he took our youngest, Joshua, with him. The girls were teenagers and they stayed with me. Josh was only eight, and I was in such a panic, I didn’t know what to do. My ex is originally from Germany and I thought he might take him back there. I mean, I didn’t really think he would, but I was worried he might. It all came as such a shock I wasn’t sure what to think. I went to see a lawyer straight away. That was all about um, well Joshua is 11 now, so three years ago, and we’ve been in and out of the Family Court ever since.

At the beginning the lawyer was good because I was in such a state, and I didn’t know how the system worked, or what to do, but I got pretty tired of being pushed around. My lawyer was really a bit of a bully, she really made me feel like I had to do what I was told or all these terrible things would happen: I’d never get Josh back. Sometimes when my ex’s affidavits would come in and she’d ask me about the allegations - I mean, they were such rubbish, just lies and no evidence, I was so angry - and it would be like she believed them and I had to prove to her they weren’t true, to my own lawyer! I was so scared of losing Josh, but eventually I got over the fear. I mean, I was doing all this stuff, what I was told, and nothing was happening, I wasn’t making any progress. So how could I make it worse? The property stuff was complicated because of the farm and trust. There were just letters back and forth, back and forth. I thought, well, I can’t afford this, I can’t keep paying for nothing to happen. I mean, I can write letters. I’ve got a computer. I’m literate. So now I’m just representing myself.

It was okay preparing the papers for court. I got experience of how they write them from the ones my lawyer did, what the Courts expect, how they are set out, so I knew what to do. I wrote them and then my friend, she works at Corrections and has done lots of probation reports, she looked at my affidavits and tidied some things up and that was it.

³ Marcia Stanley Wertz and others "The Composite First Person Narrative: Texture, Structure, and Meaning in Writing Phenomenological Descriptions" (2011) 6(2) International Journal of Qualitative Studies on Health and Well-being 1 at 8.

I took my papers into the Court Office. I was quite nervous, but they were actually really nice. They helped me put it all in order. But then once I got into Court I couldn't believe it. The Judge kept saying, "What are you actually asking for? What are you actually asking for?". I don't know whether I didn't word it in the right way, but he just kept coming at me. He'd ask a question and then when I tried to answer he'd just look at his papers, like he didn't even care what I was saying. In the end he turned to Sue, my ex's lawyer, and told her that "it was a little irregular" or something like that, but he was going to order a mediation to try and get the property things finalised.

The mediation never happened. Sue just hates talking to me, she always says how uncomfortable she is talking to me and how I need to get a lawyer. Besides, there is no way my ex is going to sit calmly around a table and discuss things. The last time we had a go at that he ended up punching the wall and walking out.

We ended up back in court over Josh. I thought it was going to be just another of those, what are they called, you know the discussions with the Judge. But the next thing I knew I was in the stand and Sue was asking all these questions. It was so awful. So awful. I couldn't understand what she meant and I just felt sick. She was just so cruel, even the Judge was telling her to back off. Couldn't she see how upset I was? I couldn't believe it. It was horrible, just horrible. I'm never going back to court again, never. It was the worst experience of my life.

I think it worked against them though because the Judge he could see how aggressive they were. I felt like he was pretty sympathetic to me and he has ordered that Joshua is to do every second week with me. It is quite difficult because Josh has spent so much time with his father but it is such a relief to have him back.

With the matrimonial property though, I'm basically stuck. I cut my hours back at work because I was just not coping with the kids and work, with this on top of it. My boss was noticing that I wasn't really concentrating and I thought that if I took some time away from work and just gave it my all, I might be able to get it all sorted out. But it just isn't going anywhere. One of my friends told me I needed to go back to court, to tell the Judge what was happening, but I don't know. I don't even know how to do that, and besides, I just don't want to go back into a courtroom ever again. I don't think a lawyer would be able to do anything

more though. It is just too complicated with the farm side of things for a lawyer to understand and I just can't afford to pay one anyway.

B. Matt – Care of Children Application and Protection Order – Family Court

My ex has legal aid, but I have a job so I don't qualify. I went to a lawyer right at the start, and the lawyer was good, but when I realised how long it might take to sort out, at \$370/hr, there was just no way. I mean I only bring in \$600 a week. I can't afford that. If I'd paid it out of my savings that would have been all the money I'd put aside for the kids' education. I didn't go to Uni myself, although plumbing has worked out well for me. I struggled a bit at school. No one realised I had dyslexia. I want the kids to be able to get more education than I've had though. I couldn't justify spending that money on fighting their mother for access to them, but I'll always fight hard for what is best for them. It hasn't been easy because I don't have much in the way of experience with writing all the papers you need, the affidavits and things. It takes me a long time to read through everything, hours in the evenings on Google trying to reply to things that come in.

The first time we went to Court it was very, very brief. There didn't seem to be a lot of time given to cases. I went there being prepared to speak at length about what was going on but in the end very few things were covered. I was relieved at the time but there were a lot of things I would have liked to let the Court know. I guess I was a little bit disappointed about the depth of coverage that the Judge heard. I felt like I was stereotyped as the male, the aggro man, the oppressor of my ex. I think there is a real gender bias in the Family Court. I've certainly heard that from other people, like on the online forum I follow a bit. The lawyer for child was a real problem at first. I think she was basically biased against me to begin with. She and my ex's lawyer were rubbing their hands with glee over the fact I was self-representing. They knew each other. It is a small town so that isn't surprising, but they would talk with each other and then approach me together. And the Judge just did whatever the lawyer for child said - it was all over once that fat lady sung to the Judge!

The allegations I've been under, it is just incredible. I've got no criminal convictions, but I've had all of these allegations: rape, attempted murder, serious assault. I was under the allegation of breaking into the family home and stealing things, doing all these things. It is unbelievable what people are allowed to put in affidavits. If rules apply then surely the number

one rule is that you tell the truth in court. I've been investigated by CYFS and Police. Nothing came of it but all these allegations have been made, they are all on my Police file and they've all been placed in the Family Court. In the end, because of the number of allegations, the Police did a search warrant and went right through my whole place and turned it upside down and saw nothing. It wasn't until we got to that point that things started to get better.

I think they realised that this stuff was made up and that was the point where the lawyer for child actually started to question some of the stuff my ex was saying. I think that helped and also the next time we went to Court, we struck a much better Judge. She was way more active, asking questions that got a bit more to the heart of matters. I still felt that basically the Judge was doing what the lawyer for child said, and like she didn't really want to hear from me much, but at least it was a bit more in my favour. I liked being able to say my piece to the Judge, answer the questions how I wanted to answer them.

In the end though, for the defended hearing, I got a bit worried and I ended up getting a lawyer who I know to come in and just do that. That way he could get in there and ask the hard questions and they wouldn't be able to rile me up and make me look like I am an aggressive guy. I'd just have been playing into their hands if I'd done that. He did a good job, and I think I did too, doing all that paperwork. It has certainly been a steep learning curve. I've got day-to-day care of the kids now, none of them like their mum's new partner. Mostly I try not to think about it anymore, I don't think it helps, but there is always a bit of fear that it isn't over. She can always go back to the Court again and ask for a change, even though the Judge said we weren't to go back for three years.

C. Tom – Termination of a Franchise Agreement - High Court

January

I'd had the shop for 15 years. 15 years! We'd had a few disputes leading up to that day, but it still came as a shock. They said I no longer had a right to the franchise and that was it. Game over. I went straight to my lawyers, but this all happened right before Christmas and it wasn't my normal lawyer. Turns out the advice the new lawyer gave me wasn't right, but I didn't know that at the time. I was fighting on two fronts - trying to get the franchise back and trying to avoid bankruptcy.

After Christmas my normal lawyer came back and sat down and had a pretty serious discussion with me. I got an opinion from someone else, a pretty top firm in Auckland, and they said, look, this wasn't done right, but the horse has bolted. Well, I couldn't use my original lawyers because they said once they'd been accused of negligence they couldn't act any more. They gave me the name of someone else and said they'd apply for legal aid for me. That was the first I ever heard of legal aid for this situation, but I've now been told that in actual fact you can't get legal aid for businesses, so they could never put the company situation through, only my personal bankruptcy.

Anyway, so I went to the lawyer. I dropped off all the documents to him and he spent ages and I thought it was all sorted. But then just before the court hearing I went to see him and it became clear it was way over his head. He didn't really understand any of the details in the business and he was just not on top of it, not like I was. He agreed he couldn't really handle it. I then contacted every single lawyer, or not quite, I contacted maybe 10 lawyers on the legal aid list from the area. I just got - some people didn't respond or didn't get back but - I did get one lawyer who was brave enough to say, "Tom", he put this in writing, "this is a specialised case that requires a specialised solicitor and these lawyers or solicitors don't work for legal aid rates". So I just felt really stuck, I didn't really see I had a choice. It was either represent myself or just give up and I couldn't just walk away and let those bastards get away with it.

July

I've been working away preparing for the trial, it is going to be in December. The other side's lawyer has been a bit cool towards me, but not too bad. He is a decent sort of a guy, he gave me a couple of pointers.

It is a bit difficult getting everything in order. I did go and see a few lawyers to see if they could help me prepare for the trial, with the evidence and things. They weren't interested though and I understand fully that, they are lawyers, the ones who know litigation, they don't want to be someone's tutor. They want to do it themselves. It is all in or all out and I get that. I have had a couple of opinions though on some of the legal points and I'll be using those as the basis for closing.

I have got myself someone to advise behind the scenes. He isn't a lawyer, but he has run a very successful farm for many years, and he has a bit of an interest in the law. He is a very

smart guy, very clear thinker. He has helped a few people out in my sort of situation. We talk about the case and he looks at my documents, helps me take out all the waffle. We get them so I don't sound like I'm moaning and whinging to the judge, because being emotionally involved you just want to say: "Oh you bastards! You can't do this to me". He said the danger is a judge just won't read it if it is too long and not to the point. So it has been an interesting experiment in becoming detached and dispassionate about your own case. And I've got to that point, slowly but surely, and I'm pleased about that because it is very helpful to how I conduct the case.

November

I've just had the pre-trial callover and it was fine, it was all just procedural. I get the feeling that our Judge is a bit of a stickler for procedure but that is okay, it is all part of the process. The Judge said a couple of my witnesses can't give the evidence I wanted them to give, so I'll just have to do without them. What I really need to find out before it starts is to what extent I can use cross-examination to get across my message - that will be the key to it really. I am a bit hazy about the opening statement and then where the guts of the case is fitted in. I have all this authority and arguments and I'm not sure how that all fits together, how I tell the Judge about it.

December

The trial starts in the morning. I'm a bit nervous, few nightmares, but it will be good to get going now. To me a lot of it is black and white, there is no argument, just no argument at all. But there are always clever people. I'm just concentrating on getting the evidence out there, giving my case. I just hope that the Judge lets me say what I need to say. I'm not a lawyer and I'm not going to pretend to know the law, I'm just going to stick to the issues.

February

I'm feeling very battered and bruised. Obviously the experience was a lot more difficult than I thought but then it was a situation where I couldn't afford a lawyer. It was going to cost more money than I had and um, it was kind of a train wreck in slow motion and I have to face the consequences. I'm expecting the worst. That means if it is better, it will be better, but I'm not expecting to have succeeded. The Judge was great really, gave me a lot of leeway but there are a lot of rules, rules I wasn't aware of, and I didn't fit my material into them so I don't know.

I've gone over and over it retrospectively and I couldn't have done anything differently. I do wish I'd put more in my submissions but it was hard to keep on top of it all. So now I'm just preparing my appeal and waiting for the judgment to come out, preparing for the worst you know?

D. Gary - Persistent Litigant - High Court

I'm a self-made man really. I went to University briefly, but I never finished. It just wasn't for me and when my brother-in-law suggested we go into business together I packed it in. The two of us built up a portfolio of properties that grew over the years. It was hard graft, a bit of luck, mostly hard work. In 2007, just before the Global Financial Crisis really hit, we had this beautiful subdivision, beachside, ready to go. We'd had problems with that Council for years, but 2008, that was the real beginning. The corruption, persecution really, you just wouldn't believe it. People think they are living in this paradise but it has rot. My cases are really complex and I can't explain all the detail, or even try to, but I have got all the documents if you want to know more. You can't just read the judgments, they are full of half-truths and lies, the Judges protecting themselves and each other.

The whole key has been that they've discredited me to the courts. All they need to say is, "He's vexatious", and the Court says, "Oh yes, he must be if he has gone along for seven years! Who in their right mind would go along for seven years?". There is no way a lawyer will do the cases, they are part of the system, so I have to do it self-represented. Anyway, I couldn't use a lawyer even if I could find one ready to stick his neck out because I can't afford it. It is a system that rapes you financially. The only ones that get justice are the ones with the huge amounts of money and all mine has been taken. But if you are on the wrong side of the old boy network it doesn't matter if you have money, you will soon lose it. That is my own experience. With this application I didn't bother to try and get a lawyer though. I've done a lot of these applications, it is just one more of the same. I know the issues so I don't need help with it.

I prepare my documents entirely by myself, no help whatsoever. I do have various friends who are lawyers, and sometimes I'll get them to look over something, but no, mostly entirely by myself. I have access to LexisNexis when I need it. I use legislation a lot. And I use anything I see that a lawyer has filed - across the board - my lawyers, and anyone else's lawyers. It takes up a great deal of time, doing all the work involved. It does consumes you. I mean, it has to

consume you otherwise there would be no point. I can drop everything to deal with the cases, and I do turn down work to do it. I also spend time helping other people who are struggling with similar sorts of problems.

The lawyers on the other side, they are okay, mostly very professional. A bit like the court staff really, they are just cogs in the wheel, they have a job to do. It is the system that is the problem. The Law Schools train the lawyers to think they are operating in the fairest, most transparent system in the world. It is all about indoctrination, it is all this propaganda, but the system is corrupt. It is not like in the third world, where they are paying judges, it is much more insidious and perverse than that. You can take as many cases against the individuals involved as you like. I have, but you can't get anywhere because they all just protect each other. They are all lawyers or former lawyers, there is no independence, no check. But because I'm a conservative person, I want the justice system fixed. I don't want to go and blab, and tell the world, and embarrass the country. I'm hoping against hope that with this application, this time, they'll have the balls to fix it.

Chapter 6 Before Court

Having become a LiP, LiPs then face considerable preparatory work before going to court. While most focus on having their day in court, the majority of work in litigation involves preparation for that day, and in particular preparation of court documents.¹ As a High Court LiP explained:

That was one of the things we learnt as we went through the process. We found out it was whoever has the best paperwork at the end of the day. That is what we learnt ... how you write your paperwork. That was a big lesson that one. We learnt a lot, we learnt a big lesson.

This chapter begins with a discussion of the problems that the bench and bar reported with most LiPs' court documents. It then turns to a discussion of the strategies LiPs used for finding support and advice during preparation of their cases.

A large range of complex procedural rules govern applications in the Family and High Courts, and, at the time of the research, a simplified procedure was operating in the District Court (since revoked). The complexity of matters in which LiPs were involved varied greatly, from relatively straightforward COCA applications to multi-day trials in the High Court on complex areas of law. The amount of research and preparation that LiPs had to undertake therefore varied greatly. A straightforward COCA application, for example, required forms and affidavits, but little research on the law.² A multi-day High Court trial, on the other hand, included drafting pleadings, making or responding to interlocutory applications, carrying out discovery, briefing witnesses, conducting legal research, and preparing opening and closing arguments. Rather than examine the different procedural rules and compliance with them in detail, the discussion will focus instead on major areas of difficulty and tension that arise in case preparation across all the Courts.

The chapter concludes with discussion of the issues raised by these findings, including LiPs' perceptions of their advice needs and the role of exhortations that LiPs seek legal advice; the effect of

¹ This was also the finding of Richard Moorhead and Mark Sefton *Litigants in Person: Unrepresented Litigants in First Instance Proceedings - Department of Constitutional Affairs Research Series* (2005) at 255 who noted that “acts of participation concentrate on ‘back office’ procedure, such as dealing with documents and talking to the court staff, rather than hearings”.

² As one lawyer explained: “To be honest with you your average parenting case there isn't a lot of law in it (*laughing*). ... We've certainly learnt that it is a waste of time trying to make legal submissions to the Judges [in this particular court] because they know the law on parenting stuff inside out and they don't need to be reminded about that and most of these cases there aren't legal issues as such”. (Family lawyer)

emotional attachment to a case and the belief that emotion should be “taken out” of court documents; conventions of professional communication; and the risks that court staff, lawyers and judges perceive in their interactions with LiPs.

I. Preparing Legal Documents

In general, LiPs had difficulty producing court documents that met both the technical requirements of the procedural rules and conformed to professional conventions of style and form. Exceptions were some very experienced LiPs, and a few exceptionally able LiPs. Court staff, lawyers and Judges all mentioned encountering occasional LiPs who “do a marvellous job ... better than some lawyers” (Family Court Judge), and know the rules and law very well. As another Family Court Judge said:

Occasionally you get a LiP who prepares brilliantly. That is about 1/100, and they very carefully prepare their case and you think, well, why do we need lawyers? But they are very few.

At the other end of the spectrum were LiPs who filed material that was illegible: “[the documents] come in as screeds of handwritten stuff and you can't actually read the writing” (FC Judge); or incomprehensible because the LiP had insufficient mastery of English for the purpose of stating their case.

In between were the majority of LiPs about whose documents the bench and bar repeated a number of complaints: that they mixed content that should be placed in separate documents (claim, submission, evidence), contained irrelevancies, and were not focused on the legal issues before the court. They noted this issue was not limited to LiPs but considered it occurred more commonly with LiPs. As one High Court Judge said: “You'd be surprised how terrible some lawyers' submissions are”. The discussion below considers, first, those LiPs who made little attempt to adhere to the conventions. Then it turns to issues with documents identified by lawyers and Judges.

A. Conforming to procedural requirements

Most LiPs attempted, if often unsuccessfully, to adhere to the conventions of legal documents. Their strategies for endeavouring to do so are discussed in detail in the next section. A few LiPs, however, either did not try to educate themselves about the conventions, or having learned them, rejected them.

These LiPs instead preferred to submit documents that made logical sense to them. For example, a High Court LiP, whose presentation of evidence was criticised repeatedly by the opposing party and Judge, said:

I don't care how the court is "meant" to be presented with evidentiary material. All I care about is getting my message across in a manner which I think works.

Similarly, a few LiPs made decisions about whether to follow the courts' pre-trial orders based not on what the order said, but their own sense of fairness or belief in what the law should be. A District Court LiP, for example, refused to provide discovery of a document to the opposing party because he considered it unfair to have to provide a document when the opposing lawyer had not explained the basis for a particular aspect of the evidence. This was despite the Court ordering discovery.

B. Mixing content of documents

Even where LiPs attempted to conform to the procedural rules, lawyers and Judges commented on the tendency to mix the contents of different legal documents. They reported LiPs having significant difficulty understanding the correct content of a claim, legal submissions, and evidence. A lawyer commented that "reasonably often instead of ... a statement of claim [it] would be more like a brief of evidence". A High Court LiP, who made a number of attempts to draft a statement of claim that complied with the rules, eventually instructed a lawyer to draft the pleading: "They were saying it broke all ... the High Court Rules. ... [T]hey were basically going to chuck my case out [because] ... it didn't abide by the rules".

The most common problem across all the Courts was that LiPs would mix opinion, fact and submission in affidavits.³ A Judge suggested that this was why some LiPs, at least in the Family and District Courts, did not file submissions, as they did not know what purpose they served having included all the information in the affidavit. The documents I viewed in the case studies confirmed this. For example, a single paragraph in an affidavit might contain a statement about an event, an

³ It should be noted that this problem is not necessarily unique to LiPs. One family lawyer said that she had clients coming from other lawyers who said that they had written the affidavits for their previous lawyer, and the lawyer had "typed it up". The lawyer said: "I thought hmm, well that would explain the lousy quality of many of the affidavits we see in the Family Court because they aren't even being fully edited. They are not having all the submission and argument and emotion taken out of them. So I don't know that it makes a great deal of difference as to whether you've got a lawyer or not. It should."

opinion on why that “obviously” or “clearly” did or did not happen, and an argument about the law relating to this event, sometimes supported by a case citation or just a statement of principle.

Both lawyers and Judges, while expressing some frustration at this problem, took the attitude that, as long as the case could be understood, they would accept the documents as written. This was on the basis of administrative efficiency, speedy disposition of the case, and not making the process unduly difficult for the LiP. A High Court Judge described it as “the path of least resistance” and a civil litigation lawyer said that he knew the Judges would ignore submissions in affidavits, “so normally we let that past ... it is a good example of not trying to make the issue more difficult than it needs to be”.

As a result of mixing the different types of documents, affidavits tended to be very long. As one lawyer said, they will have “50 paragraphs, two of which is evidence and the rest is submission”.

C. Determining Relevance

Another reason that court documents (affidavits in particular) were so long was the difficulty that LiPs had in determining relevance. As opposing counsel submitted during a pre-trial hearing: “the idea of relevance confuses everyone, but a lay interpretation of relevance is not necessarily relevance in a legal context”.

One Judge related the difficulty with determining relevance to LiPs’ belief, discussed in the previous chapter, that they were best placed to argue their own case because they knew the facts better than anyone else. The Judge said LiPs assumed that all this detail was necessary:

... they can't actually identify what the real point is because they've got this mass of detail in their head and they think everyone has to understand that mass of detail. (HC Judge)

The belief that all detail is relevant may be due both to a lack of understanding about legal relevance, and also their emotional involvement in the case:

It will be 11pm at night and here is another email from this person [a LiP] and it is so damn long you can't read it. It is incredible really. It just shows the level of commitment and emotional engagement that they've got with their issues or whatever it is they are pursuing. (Court Staff)

The lawyer who had also been a party to litigation, discussed in the last chapter, said that he had filed overlong affidavits because he was so emotionally involved in his case. Despite having legal training, he could not make judgements in his own case about relevance: “There were vast amounts of stuff in

there [the affidavit] which was irrelevant, but it did actually tell the story”. He contrasted his affidavit to one that his barrister had recently prepared for one of his clients: “That was the way it should have been done: nice, very simple, to the point, minimalist - vastly better than all the crap that I insisted on having put in”.

Many LiPs reported significant difficulty reading and responding to affidavit evidence from the opposing party, needing time to comprehend the affidavit, let the emotion settle, and then be able to respond. A number of LiPs referred to becoming “consumed” by reading the “lies” in affidavits and responding to them.⁴ As one Family Court LiP explained:

It isn't that I haven't got the money to pay my power bills, I have. But there are three power bills sitting there and I haven't paid them because my life is consumed with affidavits for the court, and the minute I don't have to produce anything like that I go into complete shutdown mode. (FC LiP)

For LiPs responding to affidavits, the temptation was to respond to every aspect of the opposing party's affidavits, regardless of whether it was legally relevant to the case. They did not want to let any “lies” stand in the court.

The large amount of content, included because of its emotional import to the litigant, rather than its legal relevance, sometimes meant documents contained inadmissible allegations: “[Some LiPs] produce documentation that will be outrageous or scandalous” (Court staff). A family lawyer suggested that filing material that was “voluminous, abusive, and inappropriate evidentially” increased costs to the opposing party and was targeted at being “nasty enough” so “they'll go away”. This lawyer therefore believed it was not just emotional involvement but an abusive strategy (whether conscious or not), to “shut down the other side”.

The converse difficulty was encountered in some cases, however, with LiPs not including relevant material: “They include all sorts of material that shouldn't be there, and forget to include material that should be there” (Civil litigation lawyer). Judges were concerned that LiPs were consequently

⁴ This was particularly the case in the Family Court, but also occurred in general civil cases where LiPs were similarly emotionally involved, and often very financially committed, in their cases. One LiP said he had developed a strategy whereby he only looked at correspondence and prepared documents on one day of the week. He had previously felt consumed by the process, and this was a strategy to manage his involvement in the proceeding.

disadvantaged as the judge “[doesn’t] have a crystal ball”⁵ and is reliant on the evidence put before the court:

Litigants in person selectively eventually (*sighs*) write just diatribes, which you've got to go through. That is often one of the greatest disadvantages to them because, you know, the diatribe will be there and relevant stuff is not there. (FC Judge)

Family Court registry staff were particularly concerned about this problem in the context of protection orders. One staff member commented that she would read an affidavit and know that the person, who might really need the order, would not get it:

They’d be putting in stuff about “aunty said this and somebody else said that” ... nothing about the violence, nothing about how long it has been going on, how long the relationship has been ... they can write a lot, but not actually say what we are looking for.

The Judge therefore could not grant the order: there was a basis but it had not been put before the Court.

In some cases the omission of relevant material seemed to be because the LiP assumed the Judge would know as much about their case as they did. This interchange from a High Court LiP’s case, where the LiP was arguing that the opposing party’s introduction to their brief of evidence should be struck out, is illustrative:

Judge: Why is this introduction any different from yours?

LiP: Well, we know it all anyway.

Judge: Well, I don't!

LiP: Fair enough, I'll accept that.

Some of the lawyers who act as lawyer for child also said that LiPs would sometimes tell them relevant information but then not include it in their affidavit, because having told someone they assumed the Court then “knew it”.

D. Providing Focus

A common complaint from the bench and bar was that the documents, in addition to misjudging relevance and mixing various forms, lacked focus. A civil litigation lawyer said LiP documents were

⁵ DC Judge.

often in the form of a “narrative story ... and often not a logically coherently prepared one, in chronological order. It will be a bit all over the place”. While the material is in the document, it is not presented to “highlight and focus on [the legal] issues in a ... logical and coherent way”. Judges also expressed this concern:

I think what you see more is just total sort of muddlement. They write an essay. They write a diary of events. That doesn't focus on what you need to do. That is the difference between represented and not represented. The lawyer, of course, will know what will get up my nose - to put a certain thing, and that legal points I have to focus on are A, B, C, D and E, and stick to that sort of thing. (FC Judge)

You have to read their paperwork more carefully because they will often have a point that they want to make. But they won't make it in quite the way that a lawyer will although there is often something they want to say and they want you to understand. So you have to pay attention to what they are saying and be alert to it. (HC Judge)

These difficulties do not only occur in LiP documents. As noted in this chapter and the last, sometimes lawyers produce documents that are similarly unfocused.⁶ It is also worth repeating that not all LiP-drafted documents have these problems, but these are the common ones raised by court staff, lawyers and Judges.

E. Strategising

An issue that one lawyer raised, and was evident in my observations and interviews, was that many LiPs did not understand the likely course of their case, and therefore struggled to approach it strategically. Many LiPs simply did not understand the process, particularly in the High Court where the procedure is complex. As one LiP said:

You get so far and then bang you get hit with something else. So for someone self-representing like me, not knowing the legal process, you um - you know, you don't know what is coming next, and then when it happens you may not understand what and why, so there are lots of traps there.

LiPs who lacked this understanding of procedure were unable to make strategic choices about when to defend interlocutory applications or bring them themselves. It also meant that LiPs often went to court blind for preliminary hearings and conferences, not knowing what was intended at the hearing. One Family Court LiP said that he had no idea what would have happened if his case had continued

⁶ One Family Court Judge commented that she believed lawyers sometimes tried to “impress their clients” by including material that was not legally relevant, but that the client wanted before the court. Other reasons for lawyers making this error was a lack of training, and lawyers devoting inadequate time (whether for financial or other reasons) to crafting documents: “It takes a lot of time to craft a really good affidavit. ... The short cut is putting down anything”.

past the judicial conference (the opposing party withdrew the application and so the case was discontinued). He said: “All I know is the judicial conference – the judge heard a few things and then put it off for further mention”. When I asked if he knew what would have happened next he said, “No, but I felt like I was holding my own”. Conversely, a Family Court LiP, who had been to a number of judicial conferences was caught off-guard when she arrived at the defended hearing and was sworn in to give evidence and be cross-examined.

Faced with the complexity of the system, some LiPs interpreted it as a deliberate ploy to shut them out: “Sometimes courts make it more complicated than it actually is to put people off” (FC LiP). A High Court LiP compared the High Court Rules to a “secret little formula” that was designed to “keep the whole structure in the realm of lawyers”.

II. Strategies for Finding Support and Advice

It is common to think of LiPs as people who have decided to “go it alone”. All the LiPs, however, even the very persistent, had sought some support, whether it was from a legal or non-legal source, in preparing their cases. This section considers the various sources of advice that LiPs turned to. These include online searching, using libraries, copying precedents, networking with other LiPs, as well as advice from friends with professional backgrounds, and McKenzie friends. The other sources of information and advice LiPs commonly turned to were the court registry office, or from lawyers, including briefing lawyers on a limited retainer. LiPs also received information and advice, sometimes unwelcome, from opposing counsel.

The Trinder study divided LiPs into three categories based on their support-seeking strategies: proactive (searching for information without prompting from the court), reactive (searching for information at the suggestion of the court or other professionals), and passive (seeking no additional help and conducting no research).⁷ The LiPs in this study all sought some assistance and attempted some research, and would therefore be classified as either proactive or reactive. This is perhaps to be expected given that the LiPs volunteered to participate in this study, and are therefore unlikely to be passive in their approach to their case. Presumably there are litigants using passive approaches within the New Zealand LiP population, but they are not included in the study’s sample. The findings of this

⁷ Liz Trinder and others *Litigants in Person in Private Family Law Cases* (Ministry of Justice, United Kingdom, 2014) at 86-88.

section are therefore likely to under-, rather than over-estimate the difficulties LiPs encounter in finding support and advice.

A. *LiPs on getting information online and from non-legal sources*

1. *Online – internet searching and subscription only databases*

Most LiPs referred to finding at least some information on the internet that was useful in preparing their case. This included accessing statutes through New Zealand legislation online, searching key terms relevant to their case, and looking up the court rules online. Some litigants also referred to accessing the MoJ websites, which (during the course of this research) included brief guides to litigating in person. LiPs found the two page memorandum for High Court LiPs, which focused on court etiquette only, to be unhelpful. As one LiP said: “It just says ‘Don't swear, don't eat your lunch’”. Some LiPs also found these websites confusing,⁸ lacking the information they were seeking, or too general to be useful to their situation.

A few LiPs said they had access to subscription-only legal databases, such as LexisNexis or Brookers. Some paid for the service, but others were undertaking university study and had access through their university's subscription. One LiP said he had enrolled for a university course primarily to have access to these databases to prepare his case. Those who did not have access to paid databases felt that they were at a disadvantage, particularly those undertaking High Court litigation or in complex family cases:

If you're not on LexisNexis you're nobody. (HC LiP)

They talk about these forms ... where do I get them from? They are not on the website and I don't - the lay litigant as they like to call us, I know about Brookers because my

⁸ In one instance a High Court LiP was attempting to file an appeal in the Court of Appeal, located in Wellington. The LiP went to the MoJ website and clicked "contact us". Under the heading "High Courts, District Courts, Court of Appeal", the only information is a link called "Find your local court". The link takes the reader to the address of the Court of Appeal. Only the Court's address is displayed, the header "Court of Appeal" is only visible if the reader scrolls up. Beneath the Court's address is the heading "Dannevirke District Court", and then all other courts in alphabetical order. The reader is therefore easily misled (especially given the name of the page "Find your local court") into thinking one should indeed find their local court from this long list of addresses. (See <www.justice.govt.nz/contact-us>). This website design, presumably to make the website less complicated, misled the LiP into thinking he should file his appeal in the local court. He took his notice of appeal to his local court at 2pm on the last day for filing. He had previously been to the local court office and discussed his application but the registry staff member did not mention that he could not file a Court of Appeal matter at the local court. The staff member he encountered on the day of filing, however, alerted him to his error. The staff member and his previous lawyer tried to help him by sending the notice of appeal by email to the Court of Appeal. The Court of Appeal did not accept filing by email. He was some eight hours travel away from Wellington so was unable to file it within time. The Court of Appeal ultimately granted leave to appeal out of time, but the LiP was extremely stressed by the incident. When attempting to recall his interaction with his local registry office on that day he said: "I said, 'Can you help me?', and she said, 'I can't do anything to help because I have to remain ...'. I can't remember the word. I'm getting a bit stressed here".

daughter is at law school - but the lay litigant doesn't have access to those. They are only available to lawyers.⁹ (HC LiP)

Many found the information online overwhelming and had difficulty identifying what was relevant to their case. Some LiPs, however, were able to use the information they found online successfully. They extracted relevant principles and mounted what were, in a few cases, successful legal arguments. For example, a District Court Judge recalled an argument by a retired woman, with no legal training, litigating in person. He said her analysis of the relevant law, and her legal argument regarding the cases the opposing lawyer cited was: “pretty bloody good actually. She read the cases and drew out of them things that were highly relevant”. LiPs who did research in-depth emphasised it was time-consuming and required a lot of intellectual energy. A few of these LiPs reported satisfaction from having mastered some of these legal principles. These LiPs said that they felt they knew more than most lawyers about the area of law in their case: “I feel when I've done this case I'll apply to have an LLB in a specialised narrow [area of] law, you know!”.

There was evidence that some, although certainly not all, of those who expressed confidence they had correctly sourced information online had unwittingly misinterpreted that information. For example, one LiP who referred to himself as “holding his own” in legal argument showed fundamental confusion when the laws of evidence (rather than trust law, which he had thoroughly researched) became relevant to his case. The Judge suggested that he had waived privilege over some evidence,

⁹ The forms the LiP is referring to appear as Schedule 1 to the High Court Rules. The High Court Rules are Schedule 2 of the Judicature Act 1908. They are not “forms” in the sense that the word is normally used, but rather are templates and the litigant has to create the document using the template. They do print as “forms” (a pre-formatted Microsoft Word document) from within the subscription-only databases, but not from the public access legislation at <www.legislation.govt.nz> (although the template can be copied and pasted in to word processing software). The following is an example of how the forms appear in the free access legislation database:

Form G 31

Interlocutory application on notice

To the Registrar of the High Court at [place]
and

To [name of party/parties to be served with this application]

This document notifies you that—

1 The applicant, [name], will on [date] apply to the court for an order/orders* [specify orders sought, numbering them if more than 1].

*Select one.

2 The grounds on which each order is sought are as follows: [specify concisely the grounds on which each order is sought].

3 The application is made in reliance on [specify any particular provision of an enactment, principle of law, or judicial decision relied on].

Date:

Signature:

(solicitor for applicant/counsel for applicant/applicant*) *Select one.

and his argument in reply was entirely based on the doctrine of qualified privilege, which relates only to defamation law.¹⁰

Access to online resources obviously requires access to a computer and the internet. Most LiPs emphasised the importance of being able to conduct research online: “It is really only because of my background, and the fact I’m a [para-legal occupation], and have computer skills, otherwise I’d have been out of play a long time ago” (HC LiP). A few specifically purchased computers and printers to enable them to litigate in person:

I had to go out and buy Microsoft Office and I had to go out and buy a printer. As soon as I had that I was away laughing. The set up cost was minimal compared with the cost of a lawyer.

Others owned a computer but could not afford the cost of printing and therefore used work printers or friends to print documents for them. A McKenzie friend said that LiPs who had illegible handwriting and who did not have access to a computer may be unable to access the Family Court at all: “[They need to] get someone to do the form for [them], or it is simply not going to be filed”.

2. *Libraries*

LiPs without access to internet and printing at home said they had tried to use computers in public libraries. For those unable to afford home computer facilities, even the cost of accessing the local library was a strain:¹¹

You can’t even afford to go to the library to do that work. Because it costs money to use their computers, it costs money to park and for petrol and then not knowing what you are looking for because everything you are doing is at speed. I only have this much money, so I can only use the computer for this long and you can’t do it because you need to be able to relax, you know (HC LiP).

The LiPs who had attempted to find case law or other legal information in public libraries said there was insufficient detailed information held in the library for it to be helpful to their case.

Two LiPs who were university graduates felt comfortable enough to ask for assistance at their local campus library, but most considered University libraries were for law students only and therefore

¹⁰ Trinder and others, above n 7 at 64-65 discusses, as part of the typology of “working” and “not-working” hearings, over-confident LiPs who were extensively prepared but had gaps in understanding.

¹¹ At 91, Trinder and others note similar difficulties with using the public library to access the internet.

made no attempt to use these resources.¹² A few others had tried to access case law through their local Law Society library. One had been given access but others, in line with policy, had been told the library was only for members of the profession.¹³

3. *Copying documents*

LiPs commonly reported using documents prepared by the opposing counsel or their previous lawyer as precedents to copy from:

It is funny but we learnt a lot off [the opposing party's] lawyer. They did a lot of paperwork trying to say things against us. I thought to myself, gee we should just copy what they did but in favour of ourselves. It was working for us. So yeah, the opposition lawyers helped us to do our paperwork. We learnt a lot from them - that was really helpful. (HC LiP)

Court staff said that this strategy was successful for Family Court LiPs who had “been enmeshed in the court system for some time”. Their documents were generally of a better quality than the “messy documents” created by LiPs new to the system, as more experienced litigants have “lots of precedents to draw on and guide them”.

One of the High Court Judges recognised the utility of providing LiPs with a precedent to copy. This Judge had modified his case management strategy to increase the chances discovery would be done correctly:

I will stagger the discovery. I'll make the plaintiff do their discovery first and then I'll say to the defendant, “Alright there is the plaintiff's discovery. Now you can follow what they did and do your discovery afterwards”.

The Judge said this had improved compliance with discovery obligations, which tended to confuse LiPs.¹⁴

¹² Within the Study Region, the Auckland and Waikato Universities' libraries are open to the public see e.g. University of Auckland "Eligibility for Library Membership" <www.library.auckland.ac.nz>: “Members of the public are welcome to visit University of Auckland libraries. They will normally have access [to certain resources including shelved materials, photocopying and the catalogue] providing their use does not prevent University of Auckland students or staff from accessing the same resources and services”.

¹³ The New Zealand Law Society Library website says that “The Law Society library is a private library for use by members and associate members of the New Zealand Law Society, the Judiciary, the Ministry of Justice Court staff and Law Faculty members only”, New Zealand Law Society "Using the Library" <www.lawsociety.org.nz>. This is in contrast to the finding in Macfarlane's Canadian report, where Court libraries are open to the public, that a “significant group of SRL respondents used their local law library for research”, Julie Macfarlane *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report* (May 2013) at 76.

¹⁴ In one complex High Court matter, the LiP referred to problems he had encountered with interpreting the discovery rules: “I misunderstood the discovery rules and I'm still misunderstanding them”. The Court in that case ruled that he had breached his obligations, although noted that his misunderstanding was “understandable from a lay perspective”.

4. *Networking together*

As discussed in the previous chapter, LiPs in both the Family Court and High Court are sharing information among themselves. In the Family Court a number of LiPs referred to sharing information or finding it online, on Facebook sites, or by word of mouth:

I belong to a website group, [who] are all going through a similar thing and it is amazing how many people now are turning to self-litigation. They're all doing it themselves but there is no information so everyone is sort of advising everybody else. (FC LiP)

This was sometimes assistance of a substantive nature, such as preparing the wording of documents or sharing case authorities. The High Court registry referred to seeing evidence in court documents of information sharing:

We do have repetition. There'll be a certain set of paragraphs with a certain type of claim and all of a sudden there'll be a few people filing the same sort of thing so they are obviously talking to each other. Even if they are going off down the wrong track, they'll go off the wrong track together.

Similarly, filings from prisoners often repeated material from previous claims. The court staff surmised this was because the “bush lawyer” in the prison was preparing documents for multiple prisoners.

5. *Friends and McKenzie Friends*

Most of the LiPs said they did not rely on family and close friends for support, either because those people were affected by the case (financially or as members of a family dispute), or because they were concerned about exhausting their attention. Some LiPs drew heavily on the advice of friends who had professional backgrounds such as accountancy, business, and academia, although only one of these had legal training. LiPs also sought assistance from friends who worked in court-related jobs such as the probation service and Child Youth and Family (CYF). These friends provided general advice about the court process, or reviewed and edited documents the LiP was intending to file.

A few LiPs used the services of a McKenzie friend, finding these assistants via word of mouth or sometimes through groups such as Union of Fathers. The assistance that LiPs had from McKenzie friends ranged from help with drafting affidavits, and discussing likely outcomes and strategy, to accompanying them to court. The very experienced McKenzie friends could secure some strategic advantage for the LiP. For example, one McKenzie Friend referred all male LiPs to a law firm that was known for making Protection Order applications on behalf of their female clients. The McKenzie friend told the LiP to instruct the firm, with no intention of continuing with representation. This

would mean the firm could not represent the LiP's ex-partner, and therefore lessen the likelihood that a Protection Order application would be made.

Family Court LiPs, in particular, but District and High Court LiPs as well, reported that finding an independent person, whether it be a McKenzie friend or a friend with a professional background, provided a sounding board and helpful advice on the tone and content of affidavits and other court documents. Many said these advisers helped them "remove the emotion" from the documents and make them more factual.

B. Information (not advice) from the Registry Office

Most LiPs sought assistance from the court registry office. For many this was their first point of contact with the court system, and, for some, their only source of legal information. Registry staff emphasised that there was a significant range of people litigating in person:

The level of lay litigants range from people who are genuinely wanting some help, don't know what to do with this document, to people who all their lives is coming up with commencing proceedings just for the sake of it.

Most LiPs referred to positive experiences with the registry office, saying staff members had been helpful and professional. LiPs who had complaints were primarily concerned about failure to return calls or emails, or to send out copies of documents. There were also concerns that the information received was sometimes later contradicted, leading them to believe the registry had given incorrect information. As one Family Court LiP, who was advised by the registry to "do a particular application", said: "The Judge said 'No it was the wrong thing'. I think they genuinely tried to help but they just simply didn't know what to do". (FC LiP)

1. Advice vs Information

In principle, when LiPs sought help, the registry staff were not allowed to give legal advice, only information on process. Where the line between advice and information was drawn varied between staff members. The line was expressed more in terms of an established personal interpretation of the proper position than awareness of any national or office policy that explained the difference.¹⁵ One

¹⁵ This mirrors the finding in Macfarlane's Canadian study where she says that there was considerable uncertainty and ambiguity about the distinction between legal advice and information, resulting in court staff "constantly exercising personal discretion in their dealings with SRLs": Macfarlane, above n 13 at 69-70.

staff member said that she kept a strict line, which did not vary from person to person, refusing to give information on alternative procedural pathways, as that would constitute legal advice:

Anything that is not about process I don't go near because that would then constitute advice and that is not my role. I make that quite clear and I don't pick and choose with people, I just don't.

Others also explained they drew the line at this point, directing people only to information in brochures, referring them on to lawyers, or pointing them to the procedural rules online. Other staff members considered the distinction “a fine line”, to be decided on a “case by case basis”.

One staff member, who said he was clear about the distinction, gave an example of a litigant wanting information on how to stop an opposing party disposing of assets. The staff member spoke to his colleagues and then gave the litigant three possible procedural pathways. While this was “process” information, there were multiple pathways available. Two other registry staff members (each in different courts) were clear that in such a situation they would not give information about possible pathways, because these involved strategic choices, so this constituted giving legal advice.¹⁶

These variable boundaries are reflected in LiPs’ perceptions that the level of assistance varied depending on the staff member they encountered on a given day, referring to sometimes being “in luck” when they encountered someone who was particularly helpful. As a Family Court LiP who sought help from the registry office said:

I have to say the people at the court, some of the young girls, were really, really helpful, but obviously I was lucky that I was there at the right time on the right day. They took me to a side room and talked me through it. ... [They] probably went outside of their remit, so to speak.

Where LiPs found a sympathetic staff member, that person would become their preferred point of contact. As a Family Court LiP explained:

[The Family Court staff member] could have been a lot more helpful. She kept saying just get a lawyer. When I went I saw [a Family Court counter staff member], she was outstanding. She said I didn't have the right stuff and sent me off. When I came back again she wrote on some other sections I needed to add in. ... Now if I want anything I just go straight to her.

¹⁶ Another difficulty inferred in this example, although the staff member did not elaborate on it, was that the staff member had also talked to the opposing party. Giving various procedural pathways to two litigants in the same case could, in some circumstances, be considered to produce a conflict of interest. This is particularly problematic if both parties are litigating in person.

The need to draw the line between information and advice was often couched in terms of the potential hazards of stepping over the boundary.¹⁷ They explained this in terms of not being legally trained and therefore able to give advice, but several staff members also noted the risk of a LiP naming them as the source of erroneous advice: “You don't want them standing up in Court and saying ‘[name of court staff member] told me to do this’.”¹⁸

The registry staff said they would therefore point out minor changes or additions that were needed. For example, in the Family Court, they would tell LiPs to insert the names of the children on a COCA application, but would not go further than this.¹⁹ The court staff said they simply accepted documents for filing, as long as they met the basic requirements of a court document, even if they knew it was the wrong application, or the contents were nonsensical.

Court staff also noted that they would generally only serve people at the front counter, because of the dangers of taking them into a private room. As a staff member said, “We've got some [persistent LiPs] who are prone to loud and almost violent outbursts. You wouldn't take them into a room. You'd keep them at a public counter”. Court staff were concerned both about physical safety and being faced with an allegation they had said or done something contrary to the proper administration of justice.

2. *Referral to advice*

One of the difficulties court staff faced when trying to maintain the boundary between advice and information was the absence of a ready source of legal advice to which LiPs could be referred: “It is hard because you know people are missing out”. One registry staff member said she saw people who did not qualify for legal aid but who had “outgoings that would choke an elephant”. She said she did not know where they went when she told them to get legal advice. Another staff member said she referred people to the CLC even though she knew they would not be able to help the person until a volunteer evening clinic was available, as they did not have the necessary expertise: “But that is the

¹⁷ Some staff members noted this hazard with lawyers as well. One said that there were some lawyers who were too junior to be practising on their own account, or were practising outside their specialist area, who called her and asked for information that she considered amounted to legal advice. The staff member said that these lawyers could be swiftly dealt with, redirecting them to talk to a more senior practitioner or telling them to “hit the books” and figure it out themselves.

¹⁸ One staff member said she considered this a risk if she talked to lawyers in too much detail.

¹⁹ One LiP complained that the registry office insisted he comply with the rules but allowed the opposing counsel not to follow them. He said the registry would not accept his application without an affidavit: “That might be correct with that the other party lawyer filed a number of applications that weren't accompanied by affidavits. So I see the court's indulgence to lawyers as opposed to lay litigants. The other party files notices of opposition with paragraphs that aren't numbered and I had no way to refer to the paragraphs. The registry can be very picky to lay litigants”. (HC LiP).

only place I have to send them to get free legal advice”. Many expressed a desire to expand the duty solicitor service, which currently provides summary advice only to criminal defendants, to parties in family or civil matters. The result of the existing system was that:

People who come in here, unable to access a lawyer, are given a botched kind of legal advice. ... We are talking so closely about the law and the process that it is a kind of half-baked legal advice and we haven't been legally trained. (Court staff)

Family Court staff also had concerns about giving vulnerable litigants a list of lawyers and telling them to go and find one. This was now the usual practice. Previously (before a restructure) court staff had sometimes rung through the list of lawyers for the LiP, as they had “tried to keep the impetus going” once someone had taken the “scary” step of coming into the court looking for help. Even for the court staff it sometimes took “eight or nine lawyers before we’d find someone” so they were reluctant to send someone away with a list knowing the difficulty they would face. But now people were usually just given a list of lawyers.

Some LiPs expressed frustration at being told to get a lawyer: “The registry staff repeat the mantra ‘get a lawyer’, and the most you can get out of them is ‘where’s the toilet?’” (DC LiP).

3. Time consuming assistance

A primary concern for registry staff was the time involved in dealing with LiPs: “They are just really hard to work with because they slow the process down”.²⁰ Some registry staff also noted that they spent a large amount of time with LiPs on their first contact with the court, explaining the process and encouraging them to seek legal assistance. These staff members considered that time spent this way would avoid multiple visits and questions later: “It is time consuming but I take the view that if you take enough time ... then that is possibly going to cut down on future phone calls”. In some instances the first contact also involved “talking [a LiP] down from the ledge”, when they had just been served with an unexpected court document.

Many still needed ongoing assistance, including explanations of the terminology, the process, and how the LiP fitted into that process:

²⁰ Note that, unlike Macfarlane’s report of the Canadian registry staff, there was no observed or articulated sense of “desperation” or that the staff members were under “siege” from their workload with LiPs: see Macfarlane, above n 13 at 68.

They could be sitting in a conference with judge and judge will direct “Adjourned 21 days, Registrar’s list to monitor the filing of whatever else”. They don't know what “adjourned” ... means. “Registrar’s list” they wouldn't have a clue about, and the document they have no clue about either.

This issue was evident in the observations I conducted where I was surprised at the limited understanding that even well-educated and motivated LiPs displayed. One District Court LiP understood almost none of the terms used in court documents and continually sought clarification from the registry office via lengthy emails. Other LiPs said they relied heavily on the registry staff for information about the process and for interpretation of correspondence from the court.

I got a letter from the Court. I was unsure what it meant so I rang them up and said what does this mean and then I got a better information than what the letter said. (FC LiP)

A Family Court LiP showed me the one page notice she had received from the court, notifying her of the time and place of a judicial conference. It said that she had to file a memorandum with the Court before the hearing. When I asked her what she was going to write, she told me firmly that no one at the registry office said she needed to do that, so she was not going to, and she did not know what it was anyway.

The amount of time required with LiPs was a concern to court staff because of the pressures to meet their workloads, but they considered the time was necessary because LiPs had a right to the information:

[LiPs] generally take up your time and when you've got pressure on your time sometimes I just have to draw a breath and think okay, I need to take time you know, because they need the time. They are entitled to the time, they are parties in the court, you know? ... [But] sometimes if you are too kind to them, they keep ringing you, so it is a catch 22!

One staff member also explained her desire to project a friendly and helpful image to the public, overcoming what she thought were LiPs’ preconceived notions that the court would be obstructive and difficult. Another staff member said she took the time to explain processes to people because they wanted one-to-one assistance: “They haven’t come all this way to get a brochure”. She therefore supplied the brochure only after giving personalised service.

4. *LiPs with specific needs*

The registry staff’s role becomes especially important where both parties are litigating in person. Where there is opposing counsel, that lawyer usually takes a significant role in guiding the LiP through

the process (as discussed below). Without that information, the court registry becomes a major source of information.

In light of the family law reforms (that were days away from coming into force when these interviews were conducted, and would reduce the role of lawyers in the Family Court), this was of special concern to Family Court registry staff. One recounted serving a LiP who was very agitated because her ex-partner had told her he was going to apply to have a protection order discharged. This was a false threat (and a breach of the protection order itself). The registry staff member advised her: “If you need to know anything just ring us here at the court and we will tell you”. She said she considered “That is why we are here”. The staff member said this was symptomatic of a general problem:

There is heaps of that going on here at the moment, wife and husband telling each other what’s what. One doesn't arrive at court because the other one said not to come and then there is all shit because one didn't arrive.

Family Court registry staff were particularly concerned that refugee and migrant groups, particularly those with limited English language skills, were unable to utilise the strategies mobilised by many of the LiPs discussed above (using online resources, libraries, networking together, or using the support of professional friends). Similarly, registry staff said that even New Zealand-born LiPs often came to the Family Court because their “social networks and community groups have fallen apart and can't take them any further”. It was therefore unrealistic to think they could use such networks to help them prepare court documents. The registry staff therefore became their main source of support, but staff were unable to meet the language or cultural needs of migrant LiPs or provide legal advice.

C. Advice from Lawyers

Almost all LiPs had received some advice from a lawyer. Many, as discussed in the previous chapter, had been represented at the beginning of their case, and therefore had documents already drafted by a lawyer, and accompanying advice. Those who did not have such assistance, or who needed further assistance after leaving representation, frequently turned to lawyers for some help. This involved either seeking limited retainer assistance,²¹ free legal help, or assistance from opposing counsel.

²¹ Limited retainer advice is often referred to as “unbundled assistance” in overseas literature. In New Zealand “unbundling” commonly refers to the restructure of the telecommunications industry, and its application to legal services is virtually unheard of. I have therefore used the more popular term “limited retainer”.

1. *LiPs and Lawyers on limited retainer legal assistance*

LiPs reported using lawyers at strategic points in their case, to conduct specific pieces of legal research, to write legal submissions, draft pleadings, or review affidavits. Several High Court LiPs instructed lawyers to provide opinions on discrete aspects of the litigation. One used crowdfunding to pay for the opinion.²² A Family Court LiP went to a lawyer to get submissions drafted: “I panicked when I had the situation with [the Judge]. The way he treated me in that courtroom, I really panicked”. Another LiP said that she had instructed a lawyer as “back up”:

Just in case things got to the point where I felt I couldn't cope. Or I really needed, like even a letter from a lawyer, to make people take more notice, maybe take me more seriously rather than not.

A number of Family Court LiPs referred to seeking one hour sessions with family lawyers to obtain guidance and reassurance regarding their management of their case. As one Family Court LiP said, “I explained all the stuff to the lawyer” and he said: “Yes, that's correct, that's correct, that's correct, you are doing right, you can do this different, but in general you are doing fine”. Some of the LiPs who had one hour advice sessions reported that they were not charged. Lawyers said that it often was not worth opening a file and going through the process of sending a letter of engagement so they did not charge for a one hour session:

I have to get them to sign a letter of instruction because we have to send out all the Law Society things. It is not unusual to see somebody as a one-off and give them some sort of brief advice, and I really can't be bothered opening a file so just end up doing a bit of a freebie. (Family Lawyer)

Others were not charged because of their pre-existing relationship with the lawyer, either as a former client, or because they knew them through a social setting.²³ A Family Court LiP, having left representation after spending \$250,000 in legal fees without resolution of his multiple proceedings, said his former lawyer “was happy to give advice on a friendly basis or - he feels a bit guilty about the fact I've spent so much money on court cases”. This form of informal pro bono advice was much

²² “Crowdfunding” is the practice of making an appeal, usually on the internet, for the public (the “crowd”) to contribute to the cost of the litigation. For example, crowdfunding was used to raise funds in the successful challenge to the Electoral Commission's decision that the satirical song “Planet Key” was an election advertisement: Jeremy Jones "Planet Key: Assist with legal challenge – support freedom of expression in New Zealand!" (29 August 2014) PledgeMe <www.pledgeme.co.nz>; *Watson v Electoral Commission* [2015] NZHC 666.

²³ A few lawyers reported being asked for advice by members of clubs or social groups they belonged to.

more common than LiPs being offered advice via a more formal pro bono scheme being operated by an individual lawyer or law firm scheme, although two LiPs did receive such a service.²⁴

A small number of lawyers specifically offered a limited retainer service, and a handful of these offered an online service. For example, a few LiPs reported using lawonline.co.nz, a document drafting and advice service run by a single registered New Zealand lawyer, and JustAnswer, a US-based service offering New Zealand legal advice.²⁵

Most LiPs who did obtain limited retainer advice instructed lawyers who primarily offered a traditional, full-representation service. Many of the lawyers interviewed said they offered this service, but were very wary of doing so, and selective about who they offered the service to:

It is not something we enjoy doing ... It is certainly something I wouldn't encourage for a new client or for someone walking off the street. ... [P]retty much all of them have been existing clients. (Civil litigator)

A lawyer who was offering limited retainer services to a large number of clients saw lawyers' reluctance to offer such a service as the result of "a huge tradition that the lawyer does it all and charges like a wounded bull for it and controls everything". Other lawyers offered a number of reasons why they were uncomfortable with it. Several said not only was there was little financial incentive to engage in this sort of work, but also that the quality of advice was compromised by the restrictions on the time to complete the work:

I think sometimes for an hour of your time, which obviously you can only bill for an hour of your time, you are not making too much money and you aren't maybe giving that good advice, that is - just because they don't understand what you're doing, they don't understand what the procedure is - but you are trying your best. (Civil litigation lawyer).

Lawyers said they were sometimes asked for "just an hour of your time", but the client would then attend the meeting with lengthy documents and the instruction: "Don't incur too much time, but here is this 20 page document, what do you think about it?". While clients expected that this model of service would work for them, a senior civil litigator explained that generally it did not: "It is not like fixing a car or unblocking the drain. It is likely to be complex and intensely felt".

²⁴ For further discussion of pro bono in New Zealand, see Chapter 1, page 9-10.

²⁵ JustAnswer <www.justanswer.com/newzealand-law>. There is also a free legal question and answer service, LawSpot <www.lawspot.org.nz>, but no LiPs mentioned using this service.

The concerns about the quality of the advice that could be given in a short session, and about the basis on which it had been given, led to concerns about liability for incorrect advice, or at least a risk of being accused of having given incorrect advice.²⁶ The lawyers said the advice had to be carefully hedged and recorded because of the risk that the client might in future accuse the lawyer of having given incorrect advice:

Are you walking away actually knowing what I've told you? Has there been any benefit for you here? Because, of course, you are always conscious of the fact that six months later they might turn around and say "Look, I came to you. You gave me some advice and now I've got a judgment against me and it is all your fault". (Civil litigation lawyer)

Lawyers were therefore careful to record the limits of the retainer, even though as one lawyer said, "It is very difficult to draw the lines of the retainer". They spent time recording the advice in writing, all of which was unpaid and fell outside the "hour of your time". This led many of the lawyers to view limited retainer advice as "perilous and unsatisfying", and they were therefore unwilling to undertake it, except where there was a pre-existing relationship with the client. This may explain why several LiPs had difficulty finding a lawyer to offer the service, particularly in general civil litigation.

There was evidence to suggest that lawyers were right to be concerned that LiPs receiving limited retainer advice may not comprehend the advice, or its limitations. A number of LiPs did not understand that a lawyer was giving an "opinion" rather than "the answer". During observations, I heard LiPs quoting the advice they had received and naming the lawyer.²⁷ When the Judge or opposing counsel challenged the advice by raising a contrary argument, the LiP was quick to conclude that the lawyer who had given them the advice was "wrong". The LiP did not raise other possibilities including: that the opinion had been a legal argument only, open to challenge by other argument; that the LiP may have misinterpreted the advice; or, that the nature of the case had changed since the opinion was given.

²⁶ This happened to one lawyer who had given advice to a client who was appearing in person in a tribunal. The tribunal decision was published, naming the lawyer and saying that the lawyer had "misadvised" the party. The lawyer said he had not given the advice at all and recalled the judgment and had it corrected because he was worried about the reputational harm of having it stand.

²⁷ The Judges said that when they heard these comments they generally "shut them down pretty quickly" because "you just can't do it when people [the lawyers] aren't there to defend themselves" (High Court Judge). Judges said while they even knew or suspected a lawyer was behind advice or drafts of documents presented in court, as far as they were concerned, the Judge was "dealing with the person in front of me and that was that".

(a) Community Law Centre and Citizens Advice Bureau

For those LiPs with very limited or no funds to pay for advice, the only free, widely-available services were a CLC or Citizens Advice Bureau (CAB).²⁸ Only a few LiPs had accessed CLC and CAB services, and while some had found the advice helpful, others said they did not meet their needs.

Several LiPs found that the services offered at their local CLC did not include the expertise they required. A CLC solicitor confirmed that the services offered at each CLC varied depending on the availability of funding and the expertise of the staff employed at that CLC. Some CLCs therefore offer full representation, including in family law, while others offer only advice and assistance with filling out forms.²⁹ The CLC solicitor said services offered are targeted at meeting unmet legal needs: “It is aligned so it meets the gap between legal aid and private. ... Where legal aid is available the rule is we don’t do it, because we’re not meant to be duplicating services”.

This meant CLCs could not assist LiPs who did qualify for legal aid, but who could not find a lawyer willing to work for civil legal aid rates. A CLC lawyer noted that this was not only because the LiP did not have what CLC defined as an “unmet legal need”:

It is also the thing of maintaining the relationship with the private practitioners, so that we are not, basically stealing their bread and butter. I guess the reality of it is ... [We’d have practitioners] saying, “Uh, what are you doing here? Shouldn’t this be legal aid work?” And we’ll say “Well, we’ve offered it to you but you [turned it down]”.

CLC lawyers also attempted to find lawyers willing to take cases for those who did not qualify for legal aid, but who could not afford to pay a lawyer. A CLC solicitor said this was often not possible as lawyers, already under pressure,³⁰ were unwilling to take pro bono cases. A CLC would therefore refer litigants on in the knowledge that there was probably no advice available: “[W]e’ll just refer the person, and I know that person has nowhere to go, technically. It is just what you have to do, otherwise you’d go nuts”.

²⁸ I became aware during the research of at least one law firm in the Study Region was offering a free advice clinic in family law. I am unaware of how many other clinics may be operating: there is no centralised information about free advice outside the CLC and CAB system. No LiPs in the study had used a law firm clinic.

²⁹ Representation services are being reduced in some centres: “In 2011 Auckland Community Law Centre devoted 75 per cent of its resources to litigation services. In 2014, litigation services were restricted to just 15 per cent. These changes are a result of purchasing decisions by the Ministry of Justice”: Letter from Darryn Aitchison (Auckland Community Law Centre) “Access to Justice” (24 April 2015) 863 LawTalk 32.

³⁰ See Chapter 1, pages 8-9.

Given these limits and the variability of the service available in different legal and geographical areas, it was unsurprising that many LiPs found the CLC service, while in some ways helpful, too rudimentary to meet their advice needs.

Only a few LiPs had accessed CAB services, and two of these complained that the lawyers they encountered at CAB were too junior and inexperienced to be able to give them useful advice. The registry staff at one court said they referred people to CLCs, but not the CAB because “I don't know how much they know”. At another Court, however, the registry staff said they regularly referred people to the CAB, including showing them CAB locations on a map. Like variability in the services offered at CLCs, this may reflect variability in services and expertise at different CAB locations.

2. *Opposing counsel – walking the line*

Lawyers said that, when they were acting for a client opposing a LiP, they usually gave the LiP some information about the process and the steps to take. Where the opposing party was also a LiP, this guidance on the process was absent, with significant effects for management of the case.³¹ In the Family Court, the lawyer for child was often an important source of information for the LiP, although this sometimes placed the lawyer for child in a difficult position, as they were representing the child's interests, which might diverge from those of the LiP.³²

The justification for this assistance was that they were acting in their own client's interest, as keeping the LiP on track reduced the likelihood of adjournments and therefore costs to their client. Lawyers also said they would take responsibility for pre-trial matters such as preparing consent memoranda or bundles of documents.³³ They would therefore assist the LiP as long as it did not compromise their

³¹ For example, a District Court LiP, whose opposing party became a LiP before the trial, did not understand the direction to “exchange briefs of evidence relating solely to the issues that the Court will be required to determine”. He thought the Judge was deliberately attempting to confuse him. Rather than seek clarification about the meaning of the direction, he filed a 90 paragraph affidavit, annexing 70 pages of exhibits. This was in addition to the numerous affidavits that had already been filed in the matter, some of which had annexed the same documents. If the opposing party had been represented, the opposing party's lawyer may have explained the direction to the LiP and avoided the further affidavit being filed.

³² As one lawyer for child noted: “[LiPs] can't help but see you as a helper, or they are often quite, almost manipulative and try and twist things, so that you are forced into a position of almost having to assist them giving them advice. They try and dress it up in terms of ... well, it is about the child, so you are almost made to look churlish and difficult if you are saying ‘Actually, I can't give you advice on that’”. Another lawyer for child said that represented parties sometimes also called for advice: “They often think, ‘I'll just give lawyer for child a quick ring, because if I call my lawyer they'll charge me a unit or two, so I'll quickly ring lawyer for child directly’”.

³³ In District and High Courts, the bundle of documents is meant to be prepared cooperatively. Lawyers however said they that almost always offered to do the bundle themselves as it was too difficult for a LiP: “I simply offer to do that ... Because it needs to be done and done properly for the sake of a properly conducted hearing. If I just sit back and expect

client's position. Many lawyers also justified such assistance on the basis that they owed a duty to the court to ensure that the process was fair and just.

Lawyers said their clients did not like their lawyer assisting the LiP, but accepted their lawyer's explanation that although it would cost them in additional fees, "it is useful to spend time to save time".³⁴ Lawyers said they did not always pass these costs on to the client, so this was therefore a form of pro bono assistance.

Lawyers also said they often advised LiPs to take legal advice, as is required by their professional rules of conduct.³⁵ Judges also said they either checked the LiP knew they had a right to access legal advice or, depending on the matter and the LiPs' ability to cope with it, encouraged the LiP to seek advice: "I don't tell people to 'get represented', but I say sometimes, with varying degrees of emphasis, that they might want to consider what [being unrepresented] actually means" (FC Judge). Lawyers were also selective about who they gave such advice to and how strongly. For example, a family practitioner had opposed an experienced LiP, whom he knew from a colleague had made complaints to the Law Society and said he would not recommend he got a lawyer because: "He'd be insulted and probably complain to the Law Society, which I don't want to run the risk of".

As that quote illustrates, some lawyers were alert to the possibility of LiPs perceiving opposing lawyers' input as patronising. A civil litigation lawyer explained that he always tried to treat LiPs with "the upmost courtesy and respect and dignity". Most lawyers guessed, though none were certain, that this was part of the professional obligations set out in the Client Care Rules.³⁶ This lawyer said that treating the LiP with courtesy and respect was also partly for what he termed "self-serving reasons", because he said LiPs "tend to be defensive and sensitive about being patronised or talked over". Other lawyers

the person to do it, it will just be - it probably won't be done, or won't be done properly, to the disadvantage of everyone including the Court ... and the parties. So that is an expense and a burden that falls on my client". (Civil litigation lawyer).

³⁴ Civil litigation lawyer.

³⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 12.1 says: "When a lawyer knows that a person is self-represented, the lawyer should normally inform that person of the right to take legal advice." One lawyer, who was unaware of any such obligation, said: "I'm not going to try and give them any help or any head start by suggesting they need a lawyer." (Civil litigation lawyer).

³⁶ Most lawyers said that they did not know the specifics of the rules (or even that there was a rule about conduct towards LiPs), but believed that a LiP had to be treated just like another lawyer, with "respect and courtesy": Client Care Rules, r 10.1. The duty towards LiPs is found in r 12 which says: "A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy". The additional requirement of "integrity" is not explained in the Client Care Rules. One lawyer said he assumed the requirement for "integrity" meant lawyers were not meant to trick LiPs, or take advantage of their lack of knowledge.

said they were careful in how they communicated with LiPs: “I am more careful and super-polite ... in dealing with lay litigants”.

Lawyers perceived there was a risk that the LiP might misinterpret what was said, or might: “start becoming abusive frankly” and making “all sorts of remarks about what they perceived you to be doing to them” either “to your face” or in court (Civil litigation lawyer). Lawyers said they therefore engaged in defensive practices including recording most correspondence in writing, maintaining a formal tone, and where there were telephone or in person conversations, carefully noting them: “to cover your butt in a way” (Family Lawyer). A family lawyer explained that he was litigating against a LiP who had a track record of complaining about the opposing counsel. He explained the precautions he was taking and said: “There is a degree of almost hysteria - internal hysteria, if you see what I mean. I'm just trying to be very careful”. Where a LiP was conducting themselves in a way the lawyer considered was professional, lawyers said they would be more relaxed about talking with them on the phone or communicating in less formal emails.

Some LiPs said the opposing counsel was always very professional and courteous and appreciated the assistance from counsel, for example photocopies of rules or chapters from a textbook on advocacy. Other LiPs thought the opposing counsel was patronising and condescending. A Family Court LiP, for example, was very offended by a letter from the opposing lawyer which began:

May I first say how uncomfortable I feel writing to you direct. You have had as your solicitor [Solicitor's Name] throughout this procedure and in the strongest possible terms you should be seeking legal advice during this process. (*sic*)

The letter closes with a similar exhortation: “I am sorry, again I wish you would take legal advice”. The LiP had left representation because she believed her lawyer had been negligent, and was determined to take the matter forward herself. She considered the letter showed (what another LiP termed) “sneering contempt” towards people trying to litigate in person.

III. Discussion

The process before court brings into sharp relief the tensions between fostering an appearance that the court is accessible to LiPs, while at the same time trying to encourage LiPs to seek legal advice. This was particularly challenging given that options for legal advice were so limited. LiPs' preparation

for court also demonstrates the tensions that arise between LiPs' lay understanding of the process, and the professional participants' expectations.

A. Fostering the Appearance of Accessibility in an Advice Desert

In preparing for court, LiPs first experienced the gap between the formal right to access the courts in person and the difficulty in doing so. Court staff, focused on customer service and often believing that their role was to help litigants, wanted to be of assistance. As one court staff member said, she gave herself a talking to when she became impatient with LiPs, reminding herself that as a party to litigation they had a right to that time. Similarly, lawyers felt obliged to assist LiPs, often because that would expedite proceedings and therefore assist their own client, but also to assist the administration of justice, to try to make the promise of openness a reality. Judges similarly encouraged LiPs to seek advice where they thought it was needed. The difficulty in encouraging LiPs was that there was little advice available.

1. The Advice Desert

The material above has illustrated that, in New Zealand, there are very limited alternatives to full, privately paid, representation. There is access to cases and legislation online, and some limited guidance from the MoJ on conducting cases as a LiP. LiPs have very limited access to more readily searchable material which lawyers can access through paid databases. Many library resources are also only available to lawyers and law students, or LiPs believed they were available only to these groups. Few advice services are available with most lawyers reluctant to offer limited brief advice unless the LiP was previously a client, and CLCs and CABs having limited resources to offer litigation advice. Tom's story illustrates that attempts to find advice, including limited brief advice, are often unsuccessful. Lawyers, court staff and judges were therefore encouraging people to go and seek advice but in reality, little advice was available.

2. The Advice Mirage

As discussed in the Chapter 4, Judges and most lawyers believed that the main reason people were litigating in person was financial, specifically that there were a large number of litigants who did not meet the criteria for legal aid but could not afford private representation. So why continue to recommend LiPs seek advice, when there was little free advice available?

A few Judges did overestimate the availability of free legal advice, suggesting to LiPs that CAB and CLC were in a position to assist them, or that they could get limited retainer advice, when that was not always the case. A lack of understanding about what advice is available might be part of the answer.

Another interpretation of the phenomenon of urging LiPs to get legal advice is that it creates some moral distance from the difficult reality of system failure: that is, from the fact that the court is only accessible by way of a lawyer, although many people are unable to secure representation for financial reasons. As both CLC and registry staff noted, they were advising LiPs to get legal advice in the knowledge that there was probably no advice available. One lawyer said this was to avoid “going nuts”. Judges similarly distanced themselves. They said they could not concern themselves with why people were litigating in person. Recommending that people get legal advice is therefore a way to say, “I have done all I can, now you are bound by the requirements of the court just as anyone else is”. This was evident in many of the Judges’ comments, and the following is an exemplar:

I have to respect the fact that this is an adversarial situation, that people have had the opportunity to consult a lawyer. I know that is sometimes not feasible in terms of cost, but they do have that opportunity. (DC Judge)

This may also be related to what Engler refers to as a judicial concern that LiPs not be allowed to capitalise on their lack of knowledge and a fear that, if they are, numbers will increase. He argues that judges therefore often start from the proposition that LiPs have “chosen” to appear without counsel.³⁷ This fear was not strongly evident in the Judges’ comments, although some did refer to combining an encouragement to seek legal advice with a reminder that when representing themselves the same rules still applied.

Court staff, judges and lawyers might also encourage LiPs to seek advice to protect themselves from overload. Court staff were concerned about the extra work that LiPs created, lawyers were worried about the extra costs involved in assisting the LiP, much of which they could not pass on to their client, and judges, under the pressure to process large numbers of cases, might be tempted to adjourn so the LiP could seek legal advice.³⁸

³⁷ Russell Engler "And Justice for All - Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks" (1999) 67 Fordham Law Review 1987 at 2016.

³⁸ Richard Moorhead "The Passive Arbiter: Litigants in Person and the Challenge to Neutrality" (2007) 17 Social and Legal Studies 405 at 414, noting that it may be “a convenience for the judge” to adjourn proceedings for litigants to get legal advice, although “it is of questionable benefit to the litigant; where they are unrepresented out of necessity, their ability to get assistance is limited”.

Advising LiPs to seek advice also minimises the strain on the court staff, and on lawyers and judges' roles within the system. The roles of the lawyers (with their duty to the client), the court staff (to give information only) and judges (as passive arbiters), meant assisting LiPs placed them in potential conflict with these roles. This is exacerbated by the problems with delineating "advice" and "information".

3. *The False Divide – Advice vs Information*

As in other common law jurisdictions, New Zealand's court staff are prohibited from giving legal advice and may only give legal information.³⁹ Greacen has argued that the phrase "legal advice" has no inherent meaning to those who are required to decide what advice they can and cannot give.⁴⁰ Dewar, Smith and Banks, noting that the "very fine line" between information and advice is "a cornerstone of appellate judicial guidance in relation to litigants in person", concluded that many judicial officers and court staff believe the distinction is "logically and practically unworkable".⁴¹

It is, therefore, not surprising that there was variation among court staff members about what they considered was information and what crossed the boundary into advice. Research in both the UK and Australia has found unevenness in the way different registries respond to requests for information from LiPs,⁴² with the confusion over advice and information sometimes leading to a "very cautious approach" as staff worry about exceeding boundaries.⁴³ A very cautious approach might also be explained by the perception of risk involved. Court staff, limited-retainer advice lawyers, and opposing counsel, all referred to the danger of being cited to the court as the source of (incorrect) advice. Opposing counsel were concerned about the risk of appearing patronising, of creating problems in moving the case forward, or of increasing the likelihood the LiP would complain about them to the Law Society. Judges were concerned LiPs' cases may include an injustice they should be addressing, but that they may miss because it is buried in legal documents that did not conform to the norms of

³⁹ I have been unable to confirm whether there is a New Zealand policy to guide court staff on the distinction between advice and information. Court staff said there was not but a MoJ staff member told me in conversation there was. Requests for the policy went unanswered.

⁴⁰ John Greacen "No Legal Advice from Court Personnel" What does that Mean?" (1995) 34 Judges Journal 10. Some US Courts took up Greacen's recommendations: John Greacen "Legal Information vs Legal Advice: Developments during the Last Five Years" (2000) 84 Judicature 198. In 2003 the NZ Law Commission cited an Australian service charter, similar to the type Greacen recommended, when reviewing Family Court dispute resolution: Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2006) at [935].

⁴¹ John Dewar, Barry W Smith and Cate Banks *Litigants in Person in the Family Court of Australia* (Family Court of Australia, 2000) at 2 and 79.

⁴² At 53; Trinder and others, above n 7 at 36.

⁴³ Civil Justice Council *Access to Justice for Litigants in Person (or Self-Represented Litigants)* (November 2011) at [107].

the court, and so are difficult to understand. A few court staff and opposing counsel also believed that some of the most persistent litigants posed a physical danger to them.⁴⁴ With the more persistent and difficult litigants, it reached what one lawyer described as “a degree of almost hysteria”. These perceptions mean that for some LiPs, the institutional actors will treat them “very carefully”, so may not recommend they get advice (for fear of seeming patronising) but will also extend very limited assistance (for fear of it coming back to harm them).

The other side of this is that LiPs who appear less dangerous and more worthy of help may get much more assistance. Some LiPs talked about identifying “sympathetic” court staff and returned to them repeatedly. This may be because some court staff feel being constrained to bureaucratic processing clashes with their conception of themselves as facilitating access to justice. As in Zimmerman’s study of social workers, the remarks that court staff made to me “suggest that some workers find the enforced features of their task incongruous with the conception of what it should consist of”.⁴⁵ The lack of clarity about the boundary between advice and information means they can lean towards giving more assistance to LiPs. Opposing counsel were also exposed to this tension in finding the line between information and advice when LiPs sought advice from them and referred to varying the level of assistance given depending on how “professionally” the LiP was conducting themselves.⁴⁶

While these all provide possible explanations for the recommendation that LiPs seek advice – misunderstanding the extent of advice available, creating moral distance from system failure, avoiding overload and role conflict – if little or no advice is in fact available, then the promise of the courts’ accessibility is undermined. Meaningful access is revealed as illusory.

B. Inter-group (Mis)understanding

The “advice desert” was often filled by other sources of assistance. Tom, Matt and Lisa’s stories illustrate that in the absence of formal legal advice, LiPs often seek assistance from other LiPs, lay friends and colleagues, and by imitating legal documents from the opposing party. This is out of

⁴⁴ See Linda Mulcahy *Legal Architecture: Justice, Due Process and the Place of Law* (Taylor and Francis, Hoboken, Online, 2010) at 95 discussing Paul Rock’s research in a UK court in which “The picture he presents is one in which staff perceived there to be an ever-present fear of the collapse of the social order of the court”.

⁴⁵ Don Zimmerman “Tasks and Troubles: The Practical Basis of Work Activities in Public Assistance Organisations” in Donald Hansen and Jessie Bernard (eds) *Explorations in Sociology and Counselling* (Houghton Mifflin, Boston, 1969) 237 at 252.

⁴⁶ Judges were also exposed to this difficulty, as will be discussed in Chapter 8, pages 192-194.

necessity and also partly the result of LiPs misunderstanding the nature of the system and the extent of advice required to access it meaningfully.

1. *Belief that the courts should be able to be accessed in person*

The right to access the courts in person, unsurprisingly, creates a degree of expectation that this is possible. The availability of information online can also lead people to believe that, with enough hard work, the courts should be accessible to them as LiPs. Confusion about the amount of assistance required to litigate may be created by the system itself. A CLC lawyer said people who have “unmet legal needs” and therefore fall within the CLC’s mandate are encouraged to become “self-sufficient”:

The Ministry [of Justice] also puts a lot of pressure on us to get people to the point where they are self-sufficient or are able to help themselves. So that is why we put a lot of focus on information and education and basic advice and the theory is they are able to assist themselves.

This strategy has been criticised overseas as unfairly burdensome on the most vulnerable. McCulloch, for example, discussing a Florida self-help divorce project, argues that the project was:⁴⁷

[F]oisting self-representation on poor people who have more than enough demands on their time and energy without being told that their denial of legal service is really an opportunity for empowerment.

Encouraging people to be “self-sufficient”, as well as the recent family justice reforms, are forms of State encouragement to litigate in person. Confusingly for LiPs, this encouragement is contradicted by repeated exhortations to “get legal advice” from court staff, opposing counsel and judges and also from the MoJ who in their “Memorandum for Unrepresented Civil Litigants” (online during the research) said:

⁴⁷ Elizabeth McCulloch "Let Me Show You How: Pro Se Divorce Courses and Client Power" (1996) 48 Florida Law Review 481 at 491. Similarly, in Richard Moorhead, Margaret Robinson and Matrix Research and Consultancy *A Trouble Shared: Legal Problems Clusters in Solicitors' and Advice Agencies* (Department for Constitutional Affairs, 2006), the authors analyse how solicitors and advice agencies deal with members of the public presenting with multiple problems. They observed that the “ethos of empowerment” was often unhelpful to the clients. While some people were able to use information provided to “take control of their own lives”, often this was unsuccessful: “We saw a substantial number of clients who were confused by the instructions they were given and who left problems to fester or escalate as a result. Clients coping with years of social exclusion or dramatic worsening in their health or lifestyle and poor levels of educational attainment and self-esteem were often ill-equipped to deal with complex bureaucracies or hostile opponents. Whilst advisers indicated an awareness that ‘empowerment’ was not for everybody, too often clients who could not cope alone were asked to” (at 94).

... a knowledge of the law, of court practice, and an ability to analyse facts from a legal perspective, are the province of specialised court lawyers. You may be very disadvantaged if you are not able to call on that level of expertise.

2. *Expectation of Rapid Adjudication*

Another reason for misunderstanding the nature and extent of the advice required to conduct a court case may be misunderstanding about the orientation of the court process. Most LiPs demonstrated a tendency to think that the legal system was oriented towards prompt resolution of disputes by adjudication. They did not understand the case management process, the multiple procedural steps and formality of documents, or the orientation towards settlement.⁴⁸ As one lawyer explained, new litigants (either LiPs or clients) expect that the first court date they are given will be the adjudication:

[The litigants think] we've been served with papers, we've put in a statement of defence and now the Judge is going to make a decision. Well no. There is a huge amount of preliminary steps before we get that far. ... [But] it is not a criticism because I think it would be a legitimate expectation (*laughing*) - if you don't know about the District Court, or Family Court or High Court - look we've got a date in court and the judge is going to make a decision right there.

LiPs, believing the case would be rapidly adjudicated, often considered they only needed brief advice from lawyers. Lawyers, however, as discussed above, were reluctant to give such advice, as the LiPs did not understand the complexity of the process ahead of them, or the amount of work that would be required to give the sort of advice they needed.

Related to this was underestimating the importance of procedure. Many LiPs thought that being "right" in law was sufficient. Sandefur's research suggests that lawyers might have the greatest impact on case outcomes where the procedure is complex.⁴⁹ If this is correct, knowledge of procedure is important; mastering only the substantive law is not necessarily sufficient. There was evidence that LiPs did not understand this.

3. *Beliefs about what to include in court documents*

The findings discussed in this chapter are in line with other research suggesting LiPs have considerable difficulty in determining legal relevance. Moorhead points out that this is difficult for LiPs:⁵⁰

⁴⁸ As will be discussed in the Chapter 7, the system is oriented towards resolution by settlement, not adjudication.

⁴⁹ Rebecca Sandefur "Impact of Counsel: An Analysis of Empirical Evidence" (2011) 9 Seattle Journal of Social Justice 51.

⁵⁰ Moorhead, above n 38 at 418.

Relevance is defined by three lenses: substantive, evidential and procedural law. Thus the ability of litigants to provide persuasive and relevant material on which judges can base their decisions is contingent on their ability to negotiate all three lenses.

In addition, LiPs may confuse law with social or moral notions of justice.⁵¹ Instead, many LiPs believe that they must simply put their story before the court, including its social and moral meaning to them.⁵² Part of the explanation for the inclusive nature of many documents may also lie in Ross and Ward's description of disputants as "naïve realists". Recall that this theory suggests that disputants believe that a third party will see things as they "really are" (the disputant's version) as soon as they have all the facts before them. This belief would encourage a disputant, unrestrained by a competent lawyer,⁵³ to put large amounts of detail before the court. Providing a detailed narration of the events related to a case misapprehends the task of the litigant, which is to provide only facts that are relevant to the law, argue the law, and present a theory of the case.⁵⁴

The need to perform these functions as a litigant is, in terms of Galanter's analysis, a disadvantage for the weaker party of the passivity of courts. Galanter explains that courts are passive in that they "must be mobilized by the claimant", conferring an advantage on the "claimant with information, ability to surmount cost barriers, and skill to navigate restrictive procedural requirements".⁵⁵ They are also passive in that the burden is on the party to prove its case.⁵⁶ The adversarial system treats parties "as if they were equally endowed with economic resources, investigative opportunities and legal skills".⁵⁷ As this is not usually the case in fact, the system therefore advantages the "wealthier, more experienced and better organised party".⁵⁸ For the purpose of this discussion, that is usually the represented party.

⁵¹ Moorhead and Sefton, above n 1 at 256. Similarly Duncan Webb "The Right Not to Have a Lawyer" (2007) 16 Journal of Judicial Administration 165 at 172 wrote, "Litigants in person do not separate the legal from moral or social issues and have difficulty accepting that conduct which to them is clear a clear wrong causing harm is not recognised by the law. Thus they have difficulty in identifying the issues in dispute and getting to grips with the purpose of litigation".

⁵² John Conley and William O'Barr *Rules Versus Relationships* (University of Chicago Press, Chicago and London, 1990) characterised litigants who took this view as "relational litigants", noting that their style of presentation was at odds with the court system that was "rules-based". See discussion of this work in Chapter 2, page 18.

⁵³ It should be noted again that Judges emphasised that not all lawyers demonstrated an understanding of legal relevance or produced documents that were in line with their expectations.

⁵⁴ William O'Barr and John Conley "Lay Expectations of the Civil Justice System" (1988) 22 Law & Society Review 137. See also discussion of this work in Chapter 4, pages 112-113.

⁵⁵ Marc Galanter "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9(1) Law & Society Review 95 at 119.

⁵⁶ At 119-120.

⁵⁷ At 120.

⁵⁸ At 120-121. See also Drew Swank "In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation" (2004) 54 American University Law Review 1537 at 1581 quoting Judge Posner's critique of the judicial statement from a lower court that "the underlying assumption of the adversarial system is

Related to the difficulty in understanding what should go in litigation documents, was confusion about the relationship between legal relevance and emotion. LiPs commonly referred to believing, or coming to the realisation, that it was important to “keep emotion out of it”. As Tom’s story illustrates, LiPs felt they needed to reach a state of emotional detachment. A few lawyers also referred to needing “to keep emotion out” and removing emotional content from affidavits. For lawyers this seemed to be a shorthand for maintaining professional objectivity:

Obviously you care about your client and care about the outcome but there is a limited care if you like. It is a dispassionate thing for you and you are trying to deal with it objectively. That is one aspect. So you take the emotional aspect out of it.

Harris, in his study of the role of emotion in barristers’ work, says that barristers equate “emotional detachment” with “rational competence”, and as Roach Anleu and Mack state: “The suppression of emotion and personal feelings is a key attribute of traditional conceptions of the profession”.⁵⁹

The idea that emotion had no place in the courts led to difficulties for some LiPs. First, as discussed in the Chapter 4, the idea that emotion has no place in court can also express “an indifference towards the aspects that are most salient to the person”, alienating the LiP from the court system.⁶⁰ Second, the idea of emotional detachment proved illusory for most. One LiP said that he thought he had become detached but realised after trial that detachment was not possible. He was continually tempted, and gave in to the temptation, to state his case when cross-examining witnesses. Tom’s story also illustrates that emotional detachment may not be possible to achieve.

Third, emotion undoubtedly does have a place in court. Lawyers and judges routinely use emotional displays in furtherance of specific goals in court.⁶¹ What is excluded from court is inflammatory language, conclusory statements, or appeals to emotion that are not supported by any legally salient

that both parties will have roughly equal legal resources”. Judge Posner said: “This has never been an assumption of the adversarial system. We do not put a cap on the amount of money that a litigant can spend on lawyers; we do not inquire whether the litigants had roughly equal legal resources; we allow one to outspend the other by as much as he pleases. We count on the courts not to be overawed by the litigant with the higher priced counsel”.

⁵⁹ Lloyd Harris "The Emotional Labour of Barristers: An Exploration of Emotional Labour By Status Professionals" (2002) 39(4) *Journal of Management Studies* 553 at 571; Sharyn Roach Anleu and Kathy Mack "Magistrates' Everyday Work and Emotional Labour" (2005) 32(4) *Journal of Law and Society* 590 at 599.

⁶⁰ William Felstiner and Austin Sarat "Law and Strategy in the Divorce Lawyer's Office" (1986) 20 *Law & Society Review* 93 at 132. See discussion in Chapter 4, pages 113-114.

⁶¹ See for example Harris, above n 59 at 568-570 discussing barristers’ use of emotional displays to “impress the audience”, being the jury, judge or their own client; Roach Anleu and Mack, above n 59 at 600-601 discussing Harris and others on the various uses lawyers make of emotion; Cyrus Tata "Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process" (2007) 16(3) *Social and Legal Studies* 425 at 431-432 discussing sentencing judges’ and lawyers’ use of emotion to achieve responses from defendants.

facts. Legally relevant emotion is helpful and can be persuasive. The lawyer's role is not to "remove emotion", but to unpick the litigant's interpretation of events, and the attribution of motive, leaving only the "facts" before the court.⁶² In this sense, the lawyer serves as a screen in preparing court documents, deleting and rewording material that would expose the LiP's level of contempt for the other party, or their unsupported conclusions as to the motives of the other party.

While many LiPs were over-inclusive with information in affidavits, those who believed emotion was supposed to "stay out" of the courts were sometimes under-inclusive.⁶³ They were unable to distinguish between emotional but legally relevant content, and emotional but legally irrelevant content. Concerned that they would appear emotional (and therefore irrational), they instead believed that any information of emotional import would be considered inappropriate for the court. In family cases, in particular, this could obviously lead to difficulty. An application for a protection order could quite correctly include a statement: "I fear for my life", as long as it is supported by salient facts. As the court staff member said, such applications often omitted the relevant information.

4. *Legal Style*

Part of the difficulty that LiPs encountered was in preparing documents that did not jar the professional reader. LiPs were naturally unaware of the "often tacit ... conventions that go into their [legal documents] production and reception".⁶⁴ As Atkinson and Coffey argue: "Writers develop a working knowledge of the register(s) of their own professions".⁶⁵ New LiPs cannot possess this tacit understanding of the conventions of language and form, nor can it be learned from reading court rules and legislation. Even LiPs who rely on lay networks for advice – McKenzie friends, friends with professional backgrounds, and other LiPs – will not usually have access to knowledge of these conventions through this network.⁶⁶ LiPs who have not had legal advice, and who are not themselves legally trained, will only possess this knowledge if they have gone to great lengths to familiarise

⁶² See also William Felstiner, Richard Abel and Austin Sarat "Emergence and Transformation of Disputes: Naming, Blaming, Claiming ..." (1980) 15 *Law & Society Review* 631 at 637 on the role of attribution of motive to the transformation of disputes precluding the ability to "get the facts straight".

⁶³ This was not the only reason information was omitted. Information was also omitted because LiPs assumed that the Judge and lawyers already knew information even though it was not in the court documents, or they simply did not know what information to include and therefore wrote a general narrative focusing on issues that were the most important to them.

⁶⁴ Paul Atkinson and Amanda Coffey "Analysing Documentary Realities " in David Silverman (ed) *Qualitative Research* (3rd ed, Sage Publications, London, 2011) 77 at 84.

⁶⁵ At 84.

⁶⁶ The exception to this would be the few very experienced McKenzie friends, who, as one LiP complained, had "become part of the system" (FC LiP).

themselves with court documents, or are experienced LiPs (in which case they are likely to be perceived as “obsessive”).

LiPs who did familiarise themselves with the style of court documents sometimes fared no better. As Lisa and Gary’s stories illustrate, copying documents was often a primary method of producing court documents where little other advice was available. LiPs using this source of assistance often mimicked the surface of the legal style but misapplied terminology or lacked the understanding to be able to correctly apply case authority. Hunter observed this tendency among “serial appellants” who:⁶⁷

... appropriate and mimic legal concepts and legal language, often at random and with little understanding, arguably as a result of their lengthy interactions with legal personnel who unwittingly act as legal tutors.

I observed this tendency among all LiPs, not only persistent litigants, particularly those who were copying opposing counsel’s documents as their main source of guidance for conducting the litigation. LiPs adopt this style, just as new law students seize upon Latinisms, believing that doing so will give their case legitimacy.⁶⁸ Both this faux-legal register, and a style that obviously does not adopt the legal register, will jar the professional reader and make the documents produced less comprehensible and persuasive than a lawyer-produced document.

C. Conclusion

Most LiPs (and some lawyers) struggled to produce documents that met the expectations of the court. Court staff and opposing lawyers attempted to keep the doors of access to justice open by providing help to LiPs, but simultaneously emphasised the limits of their competence, urging them to get legal advice. LiPs sometimes resisted this, not understanding why they needed that advice. For many LiPs, the advice was simply not available, or they found it limited and difficult to acquire. LiPs, in addition to not comprehending the complexity of the system they were facing, sometimes misunderstood that their role was to present legally salient facts (with or without emotion) as well as a focused legal argument. The LiPs’ misunderstanding of the system, as well as their lack of comprehension of tacit

⁶⁷ Rosemary Hunter and others *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (2002) at 129.

⁶⁸ Richard Abel "The Professional is Political" (2004) 11 *International Journal of the Legal Profession* 131 at 136 (discussing how law students adopt Latinisms as a mark of professional distinction); Hunter and others, above n 135 (discussing LiPs’ citation of case authority because they sense it is "the 'right' way to run a case, thus giving their matter a sense of legitimacy in the eyes of the Court").

norms of the profession, created extra work for lawyers, as well as for court staff, who perceived risk in interacting with them and often adopted a defensive posture.

In the next chapter I examine how the interaction between opposing counsel and LiPs, as well as Judges, played out as the LiPs reached the courtroom door but were then encouraged to settle their cases.

Chapter 7

Approaching the Courtroom Door – Negotiating, Settling and Abandoning

Many new litigants, with or without a lawyer, enter the court process with the expectation of having their case determined by a judge. As one Family Court Judge said: “People see the court as the ultimate, you know, ‘I’ll see you in court!’”. This expectation might stem from popular assumptions about the justice system. It might also be because litigants were looking to the Judge to vindicate their rights against a stronger opponent. It therefore came as a surprise to many LiPs that much litigation work occurs outside the court, and that throughout this preparatory stage, and right up to the door of the courtroom, there is encouragement to settle. Encouragement comes from several sources including overtures from the opposing party’s advisers, case management procedures (which include voluntary or compulsory attempts at settlement), and invitations from the Judge to consider settlement.

This chapter considers the dynamics of settlement negotiations when there is a LiP party. The first section discusses the factors identified that assisted or inhibited settlement negotiations, including: LiPs’ ability to view settlement strategically, their perception of opposing counsel’s “reality checks”, and lawyers’ perceptions of the risk of engaging LiPs in settlement discussions. The chapter concludes with a discussion of how the encouragement to settle is confusing for LiPs but essential to the management of the scarce resource of judicial time. It builds on the existing literature on why LiPs are less likely to settle and more likely to proceed to adjudication.

I. Negotiating, Settling and Abandoning

Only two LiPs settled their cases. Two others abandoned their claims, one became represented, and the parties opposing two LiPs withdrew their claims, ending the litigation. All the other LiPs (27) proceeded to adjudication. The large group proceeding to adjudication is consistent with international studies suggesting that LiPs, “... if they are brave enough to remain within the court system, appear to be more adversarial than represented litigants”.¹ As a civil litigation lawyer said: “It is very, very, rare to convince self-reps that they shouldn’t have their day in court. ... It happens occasionally but it is pretty rare”. This section reports the reasons LiPs and lawyers gave for being

¹ Richard Moorhead and Pascoe Pleasence "Access to Justice After Universalism: Introduction" (2003) 30(1) *Journal of Law and Society* 1 at 4 (introducing Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30(1) *Journal of Law and Society* 156). See discussion in Chapter 2, page 31.

unable to settle cases. It then looks at judge-initiated settlement and finally at LiPs who abandon their claim or defence before adjudication.

A. Lawyer-LiP settlement negotiations

1. Strategic overview

The previous chapter illustrated that many LiPs had limited understanding of the procedural process. Without understanding where the process might lead, and what a realistic and reasonable outcome might be, LiPs struggled to make decisions about settlement, managing their case in a reactive way. For example, a Family Court LiP in a complex (socially and legally) relationship property division, did not have a clear idea of what settlement would be acceptable to her. Suspicious of the opposing counsel, she struggled to evaluate settlement offers. When I asked her what she planned to do in the face of an offer to compromise, and a threat of further proceedings, she said:

I'm kinda just dealing with each issue as they come up. I'm just stuffed, I'm tired and I'm sick of it. I don't know who to trust. I don't understand where to go to get help. ... I'm just kinda dealing each day with each - you know? Like it's trying to not think about the whole picture, it's too depressing, I'm just trying to - yeah it's hard.

A McKenzie friend emphasised the importance of explaining to Family Court LiPs the court process, timeframes and agreeing a strategy and acceptable outcomes at the outset as the “most important side of the court work” that he does:

I try to say, “This is what you might expect” - at the beginning – “Would that be acceptable to you? Let's go with that”. And if it comes up at some stage and they say, “Oh no, no, I want more”, I say “Well hang on, if you were prepared to accept that a month, six weeks, six months ago, why not accept that now?”.

The McKenzie friend linked the lack of strategic view to the LiPs having limited financial risk. He said that for both LiPs and those with unsecured legal aid loans, such bottom lines were important because they “don't have as much financial skin in the system” so may “continue to battle on left, right and centre”. While this may be true for the parenting cases the McKenzie friend was dealing with, it is not for other matters where the LiPs may have considerable financial risk. Relationship property cases, like the one where the LiP was “just dealing with each issue as they come up”, had many thousands of dollars at stake. This added to the stress she experienced. Not all LiPs did apprehend the financial risk of continuing to adjudication, or minimised it, saying they “had

nothing left to lose”. These were in cases where the LiP felt they had financially “lost everything” but did not seem to fully understand the costs regime or the implications of bankruptcy.²

Lawyers, and also Judges, said this inability to make an objective decision about the “litigation risk” (whether it be financial, or a toll on relationships) was because LiPs were often “blinded by their emotions” (FC lawyer). A civil litigation lawyer said LiPs are “just so emotionally involved” that:

... it is hard to detach themselves from that and look at, say, the economics, or what might be the final judgment position? Are they at risk at being able to meet a judgment if they do lose? All those things they find pretty difficult.

The lawyer said that this was true even of “sophisticated litigants” with whom he had made some headway. They still found it difficult to detach themselves.

One LiP who did settle his claim, settled for significantly less than what he had been advised by a lawyer he might be awarded in court. However, he thought the sum was reasonable, and the settlement saved him having to take the risk of litigation, particularly as he would have had to conduct the High Court trial himself, as he could not pay a lawyer.

2. *Bullying vs Reality Checking*

Pointing out the weaknesses of the opposing party’s case, and their risks of continuing, is often referred to as “reality checking”. Lawyers were accustomed to attempting to negotiate a resolution to cases before court. This is particularly the case in the Family Court where, as one lawyer described, “the underlying philosophy in family law” is the promotion of conciliation. He said the idea of conciliation is closely related to the belief that “there will be better buy-in in terms of an outcome if you agree to, as opposed to having one imposed on you”. Lawyers also promoted settlement in District and High Court cases, where lawyers said that threatening to file a case “settled about 80 per cent of cases” and most of the remainder were settled in negotiations once the case was filed (civil litigation lawyer). LiPs, however, often regarded the opposing lawyer’s assessment of the strength of their case with suspicion, and in some cases, as an attempt at bullying.

A civil litigation lawyer said, the LiP will “just ignore what the lawyer says because they think they are trying to trick me or something like that”, which the lawyer said was “an understandable human reaction”. Another civil litigation lawyer said most LiPs regarded “a litigation risk assessment”, where the lawyer “tests” their case and discusses its “weaknesses”, as “a whole lot of legal bullshit actually and it is just lawyers playing games trying to make them drop their case (*laughing*)”.

² This issue is taken up in more detail in Chapter 9, pages 216-218, in the discussion on costs.

An example of this occurred in a High Court LiP's case. After a pre-trial hearing, when the Judge had left the courtroom, the lawyer turned to the LiP and they had the following exchange:

Lawyer: I have no problem with self-represented litigants. I just finished a case against a self-represented litigant ... but you have to understand what you are getting yourself into. You could be in for a massive amount of costs if you go ahead with this. If you go to trial, you could be in for huge costs. Do you understand?

LiP: Yes I know what you are saying but I'm not going to believe you. You are the counsel for the company.

Lawyer: I'm just trying to help (*stalking out of the court*).

LiP: I know you've got experience but I just don't accept what you are saying.

Lawyer: Right (*as he continued to walk out*).

The LiP thought that anything the lawyer for the company said should be taken with a grain of salt. He did not entertain the possibility that this might be a genuine and well-founded assessment of his risk.

For some LiPs, their mistrust in the opposing lawyer's assessment of the case was fuelled by a mistrust of that lawyer generally. Often, this was related to LiPs feeling opposing counsel was patronising and condescending.³ For other LiPs, it was because they believed the opposing lawyer must know the "truth".⁴ They were therefore unwilling to engage with that lawyer when the lawyer continued to allow the opposing party to "lie". A Family Court LiP, angry at the unsubstantiated allegations made against him in Court, referred to the need for rules that would mean people could not lie to the court. Another Family Court LiP said: "As a lawyer, you are a professional, surely you must know that it is lies". LiPs who believed the lawyer was letting their client lie were therefore angry at the lawyer and the opposing party. A few LiPs reconceived the opposing party as a victim of their lawyer: that the lawyer was manipulating the opposing party into continuing what the LiP believed to be a meritless case, for the lawyer's financial gain. These beliefs made it difficult for the parties to engage in productive settlement discussions.

With or without this level of mistrust, an opposing counsel's "reality check" can easily be interpreted as, or may in fact be, bullying the LiP. Before going into the courtroom for a judicial conference, a Family Court LiP said she felt pressured by the opposing counsel and lawyer for child to amend her application:

³ See discussion in Chapter 6, pages 150-152, opposing counsel walking the line.

⁴ These LiPs also expressed the concomitant belief that there is a single truth that they thought would emerge in court.

I had her lawyer and the lawyer for child both telling me to pull out ... They told me it would cost me, that I'd have to pay for her costs. Because they were both together, they said I'd have to pay for her costs. For someone who is self-representing, the whole reason you are self-representing is usually because of the costs, so they knew the angle to play.

The LiP said she thought that her ex-partner's lawyer and the lawyer for child "were rubbing their hands in glee" over the fact she was a LiP. She interpreted the lawyers' behaviour as protection of the lawyers' professional status and monopoly: "We are dealing with bullies. They are a bunch of bullies. They don't like the fact that we are trying to play them at their own game".

Some of the lawyers were very alert to the possibility of being seen as bullying, and as discussed in the previous chapter, said they took great care in how they communicated with LiPs.⁵ Some conducted negotiations only via written correspondence. As a civil litigation lawyer said, the difficulty of negotiating with a LiP comes "down to an uncomfortable feeling of inequality of arms". The lawyer said that it was his job "to be persuasive, and you are ordinarily being persuasive to someone that you know can do the same job back", not someone who is not able to "look critically" at the representations being made.

While the lawyers I interviewed said they were careful to avoid the impression they were bullying, lawyers also said bullying behaviour did sometimes occur:

In mediation you do have lawyers who take those people [LiPs] aside and bully them with legalities about all the things that are going to happen if they don't put money in, without really being responsible about the way they deal with them like that. I've never liked that but you do see it. (Civil litigation lawyer)

As well, a McKenzie friend said he had been involved in Family Group Conferences where lawyers had said "some pretty shocking things", such as telling LiPs that "they don't have the brains or the expertise to take them on in Court".

3. *Lawyers avoiding settlement discussions*

One civil litigation lawyer said that the possibility that the LiP would consider they had been bullied, meant he considered that, generally, settling with a LiP was "unsafe" and he was "far more likely to want an adjudicated outcome". This was not his universal approach, but he noted that a

⁵ Duncan Webb "The Duty of Respect and Courtesy" (2012) 802 LawTalk 19, notes that bullying is a breach of Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 12 (the courtesy rule). Bullying includes calling the opposing party's support person "a piece of s****" and approaching a third party in an intimidating way in the courthouse: *JD v RU* [2012] NZLRCO 27 (22 March 2012). But dealing with a third party in a "robust manner", even where feelings are hurt and someone is intimidated, is not a breach of the courtesy rule: "In the middle there is an area where lawyers must tread carefully".

LiP who is “obsessed with the cause” and “somewhat uncertain and feeling ganged up on” is likely to argue about the enforceability of any settlement reached:

... it is very easy for the person to later say, “Oh, I was vulnerable, I was bullied”, even if you have all the right words in the agreement that says they were offered the opportunity to get independent advice and so on. So I regard out of court settlement as far less appealing in lay litigant circumstances.

Settlement discussions could easily become heated because of the LiP’s emotional involvement in the case. This made settlement discussions difficult to conduct. Other lawyers were also wary of entering into negotiations because of the possibility that the LiP, not sharing the same “professional unspoken rules or guidelines in play about what should or shouldn’t be said to the court”, might disclose settlement discussions to the Court (civil litigation lawyer). The lawyer said this removed the “ordinary freedom of talking to counsel on the other side and knowing that certain things can be floated on a without prejudice basis”. She therefore avoided such discussions “to protect the process and protect yourself”. These concerns were borne out in several cases I observed where LiPs disclosed the contents of “without prejudice” settlement discussions to the Court and where two LiPs alleged duress to attempt to void alleged settlement agreements.

4. *Style of negotiation*

A few LiPs also objected to the style of negotiation, and identified this as the reason for not settling. These LiPs said they were not willing to entertain offers made on a “take it or leave it” basis:

We’ve never not wanted to settle but we didn’t want to be told “here is an amount”. Negotiation is about negotiation, not “here is a figure, and like it or lump it”. (HC LiP)

A few LiPs were also unwilling to consider last minute settlement offers because they felt they had done all the work by that point, and thought they might as well proceed to trial. As one LiP said, “If they genuinely wanted to settle they would have approached us a year ago”. Lawyers on the other hand were accustomed to reaching settlements at the door of the court, once all the evidence was in and the reality and expense of a trial was imminent, and would still consider last minute settlement desirable.⁶

⁶ Andrew Beck *Principles of Civil Procedure* (3rd ed, Thomson Reuters, Wellington, New Zealand, 2011) at 1-2: “Although most disputes never reach the stage of having to be formally decided by a court, in many instances serious negotiation towards settlement does not begin until the matter is firmly placed on the road towards trial”.

B. Judicial encouragement to settle

The encouragement for last minute settlement often comes from the Judge. As a civil litigation lawyer said, “[LiPs] usually needed some intervention from the judge, in terms of really almost insisting that they talk to a lawyer, or bash their head a bit into getting things to settle”.

Judges, particularly in the Family and District Court, spoke of a strong preference for parties reaching settlements. In both these Courts, Judges emphasised this was in the parties’ interests as it would mean a quicker resolution, avoid irreparably damaging relationships (for example between parents or neighbours), and as being more durable because it was an agreement they had reached themselves. Judges referred to “inviting the parties to have a conversation” (FC Judge) or encouraging litigants who come in for case management conferences to discuss settlement. As a District Court Judge said, he told parties that while he had the documents “surely at this stage it is not necessary to go through all the detail” and asked them if they could reach an agreement where there won’t be “any winners or losers” but “a settlement at least you can live with”. He emphasised the benefits of “moving on”:

No more hassle, no more expense, get on with life, put it behind you. If you don't, it will go on and on and on and we all know it causes anxiety and sleepless nights.

It seemed to be a matter of individual judicial practice as to how strongly the Judge worded these invitations. I observed, and a lawyer also reported, that some Family Court judges went as far as giving a preliminary view of the outcome, both before and during a defended hearing, and asked the parties to consider settlement again in light of the expressed views. The lawyer said this presented difficulty for anyone who was inexperienced:

I've seen [a] Judge ... halfway through a ... fixture saying, “This is where I'm thinking I'm going to decide it”. And then, at the end of the day, he comes to a totally different view. So you have to be really careful around that sort of stuff. And that traps junior lawyers in particular, who might say to their clients, “Oh shit, this is what the Judge is saying. Maybe we better give in or reach an agreement on that basis”.

The Family Court Judges also referred to the role of lawyer for child in helping broker agreements, and this was a role that I observed them fulfilling. As one Family Court Judge said, lawyer for child have a “problem solving” approach, and the Judge said that most lawyers for child would not take a “forceful approach” to such discussions but would still see whether an agreement was possible.⁷ In one case I observed, where the LiP did settle, this was a very successful strategy. The LiP, a

⁷ Family Court Judges and court staff referred to an informal system whereby the Judges would ask court staff not to instruct lawyers for child who the Judge did not have a high level of trust in to perform this or any other aspect of their role.

mother in a parenting dispute, had a high level of trust in the lawyer for child, having met with him during a previous dispute over care. She said the lawyer for child was the “in between person” who asked each parent what they wanted and “then he said what he thought was best for [the child]”. She described the lawyer for child as a “sort of mediator” who “drafted it, depending on what we wanted, but what he thought was best for [the child]”. The LiP was very happy with the outcome and the process, saying: “I was really pleased that I didn’t go to a lawyer, because everything just got done so quickly”.

While the Family Court Judges emphasised the importance of settlement for the benefits they believed it brought litigants, a Family Court Judge said that settlement should not be forced on people: “You are mindful of it, but it is not for the court to push them through as if they were sausages in a factory”. The Judge said it was “unfortunate” if a determination had to be made but that is what would happen if “that is where things lie”.

The High Court Judges regarded settlement as desirable but put somewhat more weight on their adjudicative role. A High Court Judge, while noting that it was not possible to generalise across the range of cases the Court hears, said that while mediated outcomes were good for some people, “It seems to me a lot of litigants just want someone to say, ‘You are right, and you are wrong, and this is what the law says’”. Another High Court Judge said he asked all litigants whether they “really wanted to spend the money” on having their dispute adjudicated. He said he was “all for mediated settlement” but “ultimately they do have a right to come to court”.

When a Judge initiates the conference between the opposing counsel and the LiP, this can further the LiP’s sense that they are being forced into a settlement against their interests. The LiP who already believed that the opposing counsel and lawyer for child were ganging up on her saw a judicial encouragement to negotiate as the bench and bar closing ranks against the outsider. Another LiP regarded the Judge’s effort to encourage settlement as “pretty stupid” and “not productive” given it was “pretty obvious” that “the reason we were at the Court, believe it or not, was because we couldn’t agree”. That LiP also interpreted the encouragement to settle as a time management strategy:

The Judge seemed to have her own agenda. She seemed to want to move on and get through it as quick as possible. It felt like we were holding her up – that was how it felt: “Come on I’ve got something to do. You guys sort it out”.

When they did not agree, the LiP felt the Judge did not listen to the points raised but imposed the “quickest thing she could come to”. A District Court LiP similarly thought that he was put under

unfair pressure to settle at a judge-led settlement conference, musing that judges “... probably get brownie points if they can talk people into reaching an agreement”.

C. Lumping it

A 2006 survey of unmet legal needs in New Zealand demonstrates that many more people do not even get as far as filing or defending a claim.⁸ For those who do persist, settlement negotiations may cause LiPs to abandon, or lump, their claim or defence. If the claim or defence was without merit, this may be a just outcome. However, there is also potential for this to result in injustice, and for there to be serious consequences flowing from walking away.⁹ One LiP, with an apparently strong case for the division of relationship property (given the presumption is for 50/50 division), abandoned her claim during a mediation. The LiP believed that, based on her experience appearing in the Family Court in a judicial conference where she thought the Judge did not listen to her, she would not be taken seriously without a lawyer. She says the mediator took a passive role and believing that returning to Court would be futile, accepted one chattel of minimal sentimental value in full settlement, when her ex-partner (who she said was violent towards her during the relationship) took a strong position in the mediation.

Surveys of legal needs, both in New Zealand and overseas, suggest that potential litigants abandon their claims, not just at the point of settlement discussions, but at all stages of the process. A High Court LiP said he knew another litigant trying to take the same proceedings against the same corporate defendant, but the other litigant “experienced the same problem as us” and after trying to initiate proceedings in the High Court, also without legal assistance, “they gave up”. He said the other litigant told him, “You can’t beat them [the corporate defendant]. They are too powerful.

⁸ Legal Services Agency *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Legal Services Agency, 2006) at 68-69 found that more than half the people surveyed who had experienced a problem in the last 12 months had not, and did not intend, to seek any advice, information or assistance to help them. For 31 percent of these people their reason for not seeking help was related to problems accessing services, including: not knowing where to get help; believing it would be too expensive or too stressful to resolve; being unsure of rights; being mistrustful, intimidated or confused by the system. District Court Judges expressed concern about vulnerable litigants, often those with limited education and English language skills, who were facing debt collection action from large, repeat litigants such as finance companies. Under the rules that were in force in the District Court at the time of this research, debt collectors would file proceedings and the debtor “would look at it with such confusion they didn’t know what to do” (DC Judge). The Judge said, “Lawyers didn’t want to touch them”, so no defence was filed and a default judgment would be entered against the debtor. The Judges had no choice but to enter judgment but were concerned about what was happening behind the scenes. As one District Court Judge said: “Some people, particularly non-English speaking people, wouldn’t have a clue what it all means and would just bugger off and find themselves in debt, often up to 10 times what they thought, because of interest and penalty”.

⁹ See discussion on “lumping it”, Chapter 2, pages 30-31.

They are an international company”. The LiP’s own lawyer, when he was still represented, had also emphasised how powerful the corporate defendant was:

My own lawyer was by now saying, “Well, you’ll never win over the might of the company. It’s a waste of time. You are pushing good money after bad - he who has the money wins”.

The LiP resisted the suggestion that he could not win and continued his case in person. Another LiP sought a legal opinion in preparation for trial and that lawyer warned him off continuing his case, emphasising that litigation was a lottery:

Some [lawyers] are quite cynical, that it is a lottery. What mood is the judge going to be in when they got out of bed that morning is going to affect how their case goes. ... There seems to be a cynicism towards the judiciary on the part of lawyers. ... Maybe you get used to it but because I’m not used to it I find it quite inappropriate ... [although] it might be entirely appropriate relative to their experience.

While some, like these two LiPs, were defiant in the face of encouragement to settle or walk away, others did abandon their claims. McKenzie friends working with men in Family Court cases (including COCA and CYF cases) said they often encountered men who stopped litigating after initially bringing or defending proceedings. This was often in the context of a Protection Order being issued against a father who wanted care of his children:

So ... you have a guy having to fight a Protection Order and fighting to parent and do it on his own. It can all get too much. I’ve had people just walk and say I don’t care about the Protection Order, I’m just not going to see the kid.

Most of the LiPs did not abandon their claim or defence, and continued to push to adjudicate in the face of encouragement to settle.

II. Discussion

A. Projecting Accessibility while Protecting Scarce Resources

The emphasis on settlement was difficult for LiPs to understand or engage with. This was not just because they wanted their “day in court”, taking up the invitation to come to court to vindicate their rights. Many were looking for the protection of the Judge, for the neutrality brought by a high authority to determine their rights. This is central to the promise of the courts, that the weak

will be able to enforce their legal rights even against, or particularly against, the powerful. The push towards settlement, when seen in this context, is confusing and threatening.¹⁰

The lawyers and Judges were, to differing degrees, uniform in the belief that settlement was preferable to adjudication, which they regarded as a vital “last resort”.¹¹ The views expressed by lawyers and Judges accord with the body of evidence internationally that suggests family lawyers, in particular, take a conciliatory approach, steering clients towards compromise and settlement rather than an adjudicated outcome.¹² Cases are filed in court so that lawyers can then “bargain in the shadow of the law”, but with the expectation that all but the most difficult will be settled before adjudication.¹³ The Family Court rules contain a number of mechanisms to encourage negotiated outcomes, as do the High Court and District Court Rules.¹⁴ Rules of this nature can be seen as encouraging what Resnik calls “managerial judges”, where judges “become mediators, negotiators and planners – as well as adjudicators”.¹⁵ While the High Court Judges discussed their adjudicative function as important, they were also very conscious of these additional functions of their office.

Judges emphasised the benefits of settlement in terms of benefits to litigants: party “buy-in”, and therefore durability of solutions; conciliation between parties; and cost savings for the parties. While the Judges discussed time pressures created by managing LiP trials, they did not discuss the benefits of settlement in terms of managing court time. As Galanter points out, the “chronic overload which typically characterize” courts means, “... there are more commitments in the formal system than there are resources to honor them – more rights and rules ‘on the books’ than can be vindicated or enforced”.¹⁶ This overload creates pressure on claimants to settle rather than

¹⁰ Liz Trinder and others *Litigants in Person in Private Family Law Cases* (Ministry of Justice, United Kingdom, 2014) 1 at 37 concludes that LiPs who did not have access to legal advice had “no understanding of the modus operandi of the family justice system – the expectation of settlement”.

¹¹ This echoes the view of the rule of law stated by Bingham who argues that the “obvious implication” of being bound by law is that you can go to court and have your rights determined: “An unenforceable right or claim is a thing of little value to anyone”. He also calls recourse to court a “last resort” and discusses the merits of “additional dispute resolution” (mediation, conciliation and arbitration) as a first line of dispute resolution: Tom Bingham *The Rule of Law* (Penguin, London, 2011) at 85-86.

¹² Hunter, above n 1; see also a discussion of this research in the NZ Family Law context in Mark Henaghan “Changing Politics of Family Law in New Zealand” (2012) *International Survey of Family Law* 253 at 259.

¹³ Robert Mnookin and Lewis Kornhauser “Bargaining in the Shadow of the Law: The Case of Divorce Dispute Resolution” (1978) 88 *Yale Law Journal* 950; see also Hunter, above n 1 at 163.

¹⁴ In the High Court, the Rules encourage parties to negotiate, giving the Judge the power, before the hearing of a proceeding, to “convene a conference of the parties in chambers for the purpose of negotiating for a settlement of the proceeding or of any issue, and may assist in those negotiations” HCR 7.79(1). The High Court Rules also give Judges the power to call case management conferences at any time, and at those conferences the Judge can “Give directions to secure the just, speedy, and inexpensive determination of the proceedings” HCR 1.2.

¹⁵ Judith Resnik “Managerial Judges” (1982) 96 *Harvard Law Review* 374 at 379.

¹⁶ Marc Galanter “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change” (1974) 9(1) *Law & Society Review* 95 at 122.

adjudicate, including by “inducing institutional incumbents to place a high value on clearing dockets, discouraging full-dress adjudication in favor of bargaining, stereotyping and routine processing”.¹⁷ Galanter’s analysis suggests that, whether stated or not, a motivation for encouraging settlement is protecting the scarce resource of court time.¹⁸ Some Family Court LiPs interpreted “docket control” as a reason for the judicial encouragement to settle.

This is not to suggest that settlement or the use of ADR methods is a bad thing, only that there are reasons for it that go beyond the predicted benefits to the parties.¹⁹ From the court’s perspective, LiP resistance to settlement is not just a problem in terms of LiPs missing out on the expected benefits of settlement, but in creating pressure on the scarce resource of judicial time.²⁰

B. Barriers to LiP settlements

Lower rates of settlement among LiPs therefore creates a tension between projecting accessibility of the court to the citizenry, while protecting the resource of hearing time. What then are the barriers to settlement? The findings of this study support the reasons identified in previous research: that LiPs’ lack of strategic overview means they do not know where a reasonable settlement lies, that LiPs can be difficult to communicate with, and that LiPs expect resolution by way of adjudication.²¹ The LiPs’ experiences also suggest some nuances to these finding, and expands on other reasons why settlement might be less likely with a LiP party than with a represented party. These include, different financial incentives, absence of the party’s own lawyer to persuade the party to settle,²² lawyers using lawyer-lawyer negotiation techniques that were

¹⁷ At 121.

¹⁸ Russell Engler "And Justice for All - Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks" (1999) 67 Fordham Law Review 1987 at 2020 also makes this point: “Far from playing a minimal role in settlement, however, judges routinely encourage and pressure litigants to settle. Court rules encourage judges to clear their dockets”.

¹⁹ ADR has been promoted for a number of different reasons. As Judith Resnik and Dennis Curtis *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses* (2007) at 307 argue, “... some pressure for diversion [to alternative dispute resolution] comes not from criticism of adjudication but from regret that governments have not allocated adequate funds – either for judges or court-house or for subsidies to litigants unable to afford court and lawyer fees”. This differs, they explain, from the promotion of alternative dispute resolution focussing “... not on lack of resources for adjudication but instead on adjudication’s failings – that it is too expensive, too cumbersome, and too aggressive” at 308.

²⁰ Australian and United Kingdom research notes that the low settlement rates among LiPs creates difficulties for court staff scheduling cases. Court staff often double book court time in the expectation that some of the cases will settle, but as settlement is not as frequent with LiP cases then, this creates additional pressure. This issue was not mentioned by the court staff interviewed in my research. See John Dewar "The Impact of Legal Aid Changes on Family Law Practice" (1999) 13 Australian Journal of Family Law 33 at 48 and Trinder and others, above n 10 at 37.

²¹ See Chapter 2, page 31.

²² This factor is mentioned in Richard Moorhead and Mark Sefton *Litigants in Person: Unrepresented Litigants in First Instance Proceedings - Department of Constitutional Affairs Research Series* (2005) at 173 citing William Felstiner and Austin Sarat "Law and Strategy in the Divorce Lawyer's Office" (1986) 20 Law & Society Review 93 but is developed further here.

counterproductive with LiPs and lawyers avoiding negotiating with LiPs to avoid the perceived risk of doing so.

1. *Financial*

Financial incentives for settlement operate differently for LiPs. As the McKenzie friend suggested, LiPs do not have as much “skin” in the system as a litigant paying for legal services. Zuckerman argues that economic inequality between parties creates procedural advantage for the wealthier party.²³ He says that people have a “natural aversion” to “fighting with weapons considered to be inferior to those in the hands of the opponent”.²⁴ This puts pressure on the poorer litigant to try and “match the opponent’s facilities”.²⁵ If they are unable to do so, the poorer litigant “may well feel obliged to settle on terms that he or she regards as unfair”.²⁶ LiPs however are at least somewhat freed from this inequality. While they might still need to meet costs in terms of expert evidence, they do not need to match the wealthier party’s capacity to pay legal fees.

The financial incentives operate not just regarding the cost of legal services, however, but also regarding the costs regime if the litigant wins. New Zealand operates the rule that, in general, the losing party pays the winning party’s costs. These costs are not usually the actual costs incurred (indemnity costs), but are assessed on a scale.²⁷ For a represented litigant, a win in this regime is still a partial loss, because they are not reimbursed for their legal fees in full. This creates an incentive for represented litigants to settle. However, as a LiP, there is the possibility of a complete win. It is high risk, but higher return, creating less incentive to settle.

2. *No lawyer to “cool out” the LiP*

One of the methods for achieving settlement is for lawyers to persuade their own clients to settle. Felstiner and Sarat demonstrate in their study of divorce lawyers that lawyers will attempt to persuade clients to adopt a “realistic” goal (as defined by the lawyer), “orienting and reconciling clients to the world of the legally possible”.²⁸ Lawyers challenge client’s beliefs about what the legal

²³ Adrian Zuckerman "A Reform of Civil Procedure - Rationing Procedure rather than Access to Justice" (1995) 22 *Journal of Law and Society* 155 at 170.

²⁴ At 170.

²⁵ At 170.

²⁶ At 170.

²⁷ In certain circumstances indemnity costs are awarded, but this is the exception, not the rule. The costs regime and its implications are discussed in more detail in Chapter 9.

²⁸ William Felstiner and Austin Sarat "Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions" (1992) 77 *Cornell Law Review* 1447 at 1459. Note that it is also possible that lawyers are in some courts are locked into the type of exchange relationship described in Abraham Blumberg "The Practice of Law as Confidence Game: Organizational Cooptation of a Profession" (1967) 1(2) *Law & Society Review* 15, where lawyers act as “double-agents”, convincing their criminal defendant clients to plea bargain. He describes the role of the defence lawyer “double-agent” as part of a “rather tenuous resolution” to the “almost irreconcilable conflict” between “intense

system might be able to deliver, what it might cost, how hard it might be to enforce a judgment, and encourage clients to put aside the emotional aspect of the dispute.²⁹ Lawyers in my study described this as a “reality check”.

To achieve their goal, Felstiner and Sarat found that lawyers used their “knowledge and experience in a manipulative way” most commonly by using what they call “law talk”: “... a form of cynical realism through which the legal system and its actors are trashed on various accounts, frequently in an exaggerated fashion”.³⁰ Through this “rhetorical style”, lawyers define and identify “realistic” goals for the client, convincing the client to settle to avoid the cost, risk and uncertainty of the courts.³¹ In addition to “law talk”, Felstiner and Sarat found lawyers also used:³²

... rhetorical flourishes, technical language and role manipulation. Perhaps proceeding from experience in the law school classroom, some lawyers conjure up a ‘parade of horrors.’ In this scenario, clients are informed that if they continue to seek one goal or another, they will suffer a series of negative consequences of continuing and mounting severity.

The LiP who briefed counsel for an opinion before trial was exposed to “law talk” and perceived the talk as “inappropriate” and “cynical”. From the perspective of Felstiner and Sarat’s analysis, however, this talk is a (manipulative) device by which lawyers steer their clients away from their day in court and towards settlement. The achievement of the lawyer’s goal may or may not be in the litigant’s interests.³³ For the purpose of this analysis, it is sufficient merely to point out that

pressure to process large numbers of cases on the one hand, and the stringent ideological and legal requirements of ‘due process of law’, on the other hand” at 22. The context that Blumberg describes is specific, but it is possible that elements of such an exchange are also occurring in the Family Court where there are high volumes of cases and many of the lawyers have an ongoing relationship with the court.

²⁹ See discussion in Chapter 4, pages 113-114 on separating out emotional aspects of a case.

³⁰ Felstiner and Sarat, above n 28 at 1463.

³¹ At 1463.

³² At 1464. Note that it may have been this type of talk that clients identified as “bullying” and was offered as a reason for becoming a LiP as discussed at Chapter 4, pages 91-92. Conversely Julie Macfarlane *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report* (May 2013) at 45 found that LiPs “bemoaned the general lack of settlement orientation among the lawyers they encountered”. My research found no evidence of this problem, although as discussed at Chapter 4, pages 94-95, some felt lawyers were pointlessly trying to write letters back and forth with no prospect of a negotiated outcome.

³³ Whether the lawyer will be successful in persuading the client and whether that is in the client’s interests will depend on factors such as the relationship between the lawyer and client and the lawyer’s understanding of the client’s goals and social world. Felstiner and Sarat argue that power relations between divorce lawyers and clients are dynamic with both lawyer and client feeling powerless at different points (Felstiner and Sarat, above n1454-1457) and that during negotiations between lawyer and client the lawyer may fail to understand the client’s goals and social reality (at 1461-1462). See also Nan Seuffert “Locating Lawyering - Power, Dialogue and Narrative” (1996) 18 Sydney Law Review 523, discussing knowledge production between lawyer and client and emphasising the need to examine the context of the lawyer-client relationship, and the enactments of power in those relationships. Power relations will look very different between clients and lawyers of large firms (some of whom are very dependent on a small number of wealthy clients) to relationships between a legal aid lawyer and client. See for example Christine Parker and Tanina Rostain “Law Firms, Global Capital, and the Sociological Imagination” (2011-2012) 80 Fordham Law Review 2347 discussing

LiPs are insulated from the pressure that Felstiner and Sarat describe, and therefore avoid a potentially powerful influence to settle.

3. *Popular understanding of opposing counsel's role*

LiPs are exposed to the opposing lawyer's "reality check", but this is likely to be less effective than a litigant's own counsel's efforts,³⁴ and in the LiP context, comes with its own set of problems. Chief among them is the perception that the opposing lawyer is talking "legal bullshit", or worse, "bullying". The decision not to heed the warnings of the opposing counsel can also be seen as evidence of the LiP's (mis)perception that lawyers are completely partisan and will not be realistic in their assessment of the case. The LiP who was warned off by opposing counsel after a pre-trial hearing dismissed these attempts and did not perceive that the lawyer might be genuinely trying to protect him from the consequences of continuing with the litigation. Some of this perception may relate to popular beliefs of lawyers as overzealous advocates. It may also relate to a belief that lawyers are attempting to reach a negotiated settlement because, as one of the Family Court LiPs thought, they do not like LiPs "playing their game".

There was also some limited evidence to suggest that "take it or leave it" negotiation tactics that may be effective in achieving a favourable settlement with a represented litigant, inhibited settlement discussions with LiPs.³⁵ Conversely, the opposing counsel's "reality check" and "take it or leave it" negotiation tactic may occasionally be effective in making LiPs abandon their claims altogether. One of the LiPs who had braved the system all the way to the courtroom door, and as far as a judicial conference, abandoned their claim in the face of an intransigent represented opposing party. This is a risk of encouraging settlement. While it protects court time, there are real

client-lawyer relationships in large firms, and for a review of the literature regarding lawyer control of clients, particularly in the criminal legal aid context, see Daniel Newman *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing, Oxford, 2013) at 122-125.

³⁴ Note that in the criminal court context that Blumberg, above n 28 at 36-37 examines, while not directly applicable, may still be analogous. It is the defence counsel who is the most effective in securing a plea of guilty from a defendant, not the police, or district attorney, as popularly assumed: "The defense counsel becomes the ideal agent-mediator since, as "officer of the court" and confidant of the accused and his kin, he lives astride both worlds and can serve the ends of the two as well as his own": at 37.

³⁵ The efficacy of hard ball negotiation is also questionable in the settlement of any dispute: Roger Fisher, William Ury and Bruce Patton *Getting to Yes: Negotiating an Agreement Without Giving In* (2nd ed, Random House Business, London, 2003). However, lawyers may be more accustomed to receiving this type of offer, and given the emphasis on settlement, would not be inclined to reject all further negotiation attempts on the basis that the offer was on a "take it or leave it" basis. See also Tom Tyler "Justice Theory" in Paul Van Lange, Arie Kruglanski and Tory Higgins (eds) *Handbook of Theories of Social Psychology* (Sage, Thousand Oaks, 2012) 344 at 351 reporting psychological experiments that show people given an ultimatum "will decline small gains rather than accept 'unfairly' low divisions illustrating that people are willing to incur losses to defend principles".

risks that the less powerful party will be coerced into taking a settlement against their interests.³⁶ This is particularly so where judges, who may not be aware of the relationship between the parties, or between the parties and the legal representatives, strongly encourage settlement. Where the LiP party believes the judge will not protect their interests and that arguing the case in court is futile, they may be more likely to take a settlement against their interests or abandon the case.

4. *Dangerousness*

There is also evidence to suggest that LiP litigation might not settle, not because the LiP is more adversarial, but because the opposing counsel feels constrained and does not initiate or pursue settlement discussions. The Trinder study noted that different counsel had different styles of interaction with LiPs, with some more willing to negotiate than others.³⁷ Lisa's story illustrates that even a court initiated mediation might be unsuccessful if the opposing counsel is uncomfortable talking directly to the LiP. As in the pre-trial matters discussed in the previous chapter, some lawyers perceived LiPs were dangerous to interact with in settlement discussions. This was because of the LiP's emotional involvement, the power-knowledge imbalance between the LiP and lawyer, and, therefore, the likelihood of being seen as bullying and having the settlement attacked on that basis. There is also the risk that the LiP will report the contents of "without prejudice" discussions to the judge.

C. *Conclusion*

While settlement is promoted as being in the best interests of the parties, it is vital because it serves to protect the expensive and scarce resource of judicial time. When LiPs resist settlement and insist on their day in court, it therefore creates a tension between bench and litigant. In this context the perceived benefits to parties of "buy-in" and durability of settlement are questionable, while the risks of the LiP being or perceiving bullying are high. The settlements that were successful had important differences. One involved a very commercially oriented litigant who was focused on the economics of the outcome rather than on a "just" outcome or the "maximum". In the other, a critical role was played by a third party (lawyer for child) in whom the LiP had a great deal of confidence. Without these factors, and without their own lawyer to educate them about the orientation of the system and persuade them to settle, LiPs regarded the push towards settlement as threatening and confusing.

³⁶ Hunter, above n 12 at 171-175, calling into question "the notion that out-of-court solutions to family disputes, arrived at via a mediation or other consensual processes, are always preferable to litigated solutions". Hunter discusses research that demonstrates that, particularly where there is a background of domestic violence, negotiated settlements will favour the abusive party.

³⁷ Trinder and others, above n 1 at 50.

In the following chapter I develop these themes of openness and protecting resources, examining interaction between opposing counsel, judges and LiPs, as LiPs enter the courtroom, the “dramatic and symbolic location where law and society interact”.³⁸

³⁸ Sharyn Roach Anleu and Kathy Mack "Magistrates' Everyday Work and Emotional Labour" (2005) 32(4) *Journal of Law and Society* 590 at 593.

Chapter 8

In Court

Appearing in court before a judge is central not only to the LiPs' conception of litigation but also to the professional identity of the bar. This chapter considers the interaction of LiPs with judges and opposing counsel when their case reaches court, either for pre-trial case management matters or for a defended hearing.

Starting from entry to the courtroom, the chapter considers interaction between LiPs, judges and opposing counsel as the case proceeds: through introduction, legal argument, and evidence. The chapter closes with a discussion of how access is promised to LiPs and how judges try to give substance to this right. They are restrained and discouraged from doing so by a number of factors: balancing the need for an inexpensive and speedy disposition of cases against a just disposition; the restraints of their role as a passive arbiter; and the protection of the legal profession. I then discuss how reframing LiPs as visitors to a foreign land can shed light on the tensions that arise when they enter the courtroom.

I. Getting Underway

For most LiPs, particularly inexperienced litigants, going to court induced nervousness and stress. Many LiPs worried about finding the correct courtroom and understanding the protocols in court. For some the nervousness was exacerbated because they did not know what the appearance would involve, and expected that the Judge might resolve the matter at any time.¹ Inexperienced LiPs also had to orient themselves to the tone of the court, their previous experience of courts being solely through popular culture:

My intention is to go to trial as factual and as objective as possible. I sat in the High Court briefly and I became aware of how ponderous the proceedings are, and obviously how serious the proceedings are, that there is no room for pretending it is LA Law.
(HC LiP)

A. *Calling Cases and Seating in the Courtroom*

For many litigants the first interaction with the court in their case is a judicial mention in a list. Lists are often very busy with anywhere between three and 20 cases being called depending on the

¹ For example one LiP said she did not know what would happen at an upcoming judicial conference but thought the Judge would tell them what to do next, "or there is a possibility that he might let my kids come home". Conversely, another LiP was caught off guard when she went to attend court expecting a judicial conference but it was, in fact, a defended hearing.

court. The judge sits in court with the lawyers for the first case, and often many other lawyers for parties on the remainder of the list.² The court taker calls each case on the list, the lawyers announce their appearances, and then a discussion about the case begins, led by the judge.

In the District Court it was the practice of some Judges to call cases involving LiPs last, as the Judges expected they would take more time than cases where lawyers were involved: “otherwise everyone has to sit through while I try and make some sense of it” (DC Judge). The Judge also expressed the hope that by listening to other cases being called, the LiPs would be educated as to how to present their matters. This created additional cost for the opposing represented party paying their counsel in six minute increments.³

High Court lists can be similarly busy, although none of the High Court Judges mentioned rearranging the order. A High Court LiP said that in a busy list of this kind, he chose to appear without counsel because he was concerned about having to pay “a barrister to sit around for 2-4 hours”. Although he had been in the Family Court previously he found he was “... thrown off guard by this High Court thing, cos they’ve got all the gowns”. He was unsure where to sit and someone (he thought a lawyer) said, “Just sit here, just sit here”, ushering him to a seat in the public gallery. When the case was called the LiP remained in the public gallery. The LiP said the Judge “... [didn’t] even speak to me, he just [spoke] to the lawyer and I’m the applicant”. The respondent’s lawyer made the submissions and the High Court found that the security had lapsed so the LiP became an unsecured creditor.

The issue of seating arrangements did not only arise in lists but, in the High Court, occurred at the beginning of defended hearings. On an interlocutory application a LiP encountered some confusion about where to sit:

I sort of went into the courtroom and put my stuff on the table and [the opposing party’s lawyer] said, ‘You can’t stay here you know, that’s the bar there. That is, you have to belong to the bar before you can’. I said, ‘That is fine, that’s fine’, so I went back and sat in the public gallery. And [the Judge] said, ‘Come on up’.

The LiP was amused, feeling he had one up on the lawyer. On the first morning of the LiP’s trial, he set up his many books and papers at counsel’s table. Court begins at 10am. I was surprised when at 9:53am he came to sit in the public gallery. He said the court taker had told him to sit there until the Judge gave leave for him to sit at counsel’s benches.⁴ At 9:58am the court taker

² Lawyers will often have multiple clients on the same list.

³ In one list where I was observing, the LiP was gleeful that his opponent was being forced to pay for his lawyer while we waited several hours for the case to be called. The case had been moved to the end of the list because he was a LiP.

⁴ The court taker assists the Judge in court and is often referred to in other common law jurisdictions as the “usher”.

came and told him the Judge said he could sit at counsel's table. Another High Court LiP said he had encountered the same issue and also noted, offended, that the court taker had offered water to counsel, but not to him.

The High Court Judges expressed various positions on the issue of seating. Some thought that LiPs were sitting in the Public Gallery because they were unsure of where to sit, it being human nature to hang back in unfamiliar situations. Another said:

Our court takers always ensure they sit at the back and I invite them to come and sit up at the front, at counsel's table It is just courtesy. They are not entitled to be seated on counsel's benches because they are not counsel, but because they are appearing for themselves, they are being heard, we allow them in.

Another Judge said that the court takers probably told them to sit in the public gallery because they do not have a right of audience without leave, but was unsure if that was the case or not.

The Family Court is not public, so LiPs are not allowed to sit in the court while the list is called, but lawyers are.⁵ A Family Court Judge said a LiP had recently objected to this practice:

One litigant came in and said "I don't like this. I feel you're all sitting here like a club", which would be a reasonable, fair assumption and that is bad for business for people to feel like that. We shouldn't allow that to occur.

The Judge said this "might need to be engineered out of the process" by excluding all lawyers and parties from the courtroom, and then parties and lawyers would come in as their case was called. The difficulty was efficiency. If each case was called individually and the litigants had to come in and sit down with lawyers that would "halve your throughput" because there would always be the "human factor" of being unable to find one of the parties.

B. Introductions

The cases I observed often began awkwardly:

The Judge enters. LiP and opposing counsel stand. The Judge sits. LiP and opposing counsel sit. The Judge looks at LiP meaningfully. There is silence.

Opposing counsel to LiP: You are supposed to introduce yourself.

LiP: (rising to his feet) I'm Mr [Name], the plaintiff.

Most of the Judges, particularly in the District and Family Courts, said they spent time at the beginning of a case explaining the process to the LiP. Some Judges described their patter, which included information such as the order of speaking, the timing of breaks, the purpose of the

⁵ Often the lawyers are representing more than one party on the list but can remain in court even if they have a single client.

appearance, and even checking whether the LiP had pen and paper. In the High Court many Judges would give a brief overview of procedure to LiPs new to the Court, but as one High Court Judge said: “There are some who are very frequent litigants in person and we just launch into it because they know what they are doing”. Where the Judge was new to the Court, the registrar would give them “a thumbnail sketch” of the litigant because “usually they’ve been bugging the registrar first, ... so you’ve got an idea of what you are going into” (HC Judge).

Inexperienced LiPs reported feeling nervous about how to address the judge,⁶ and in what order they were permitted to speak, and whether they could interrupt.⁷ Some LiPs attempted to imitate lawyers, referring to themselves in the third person, and addressing witnesses (whom they often knew well, or had even been married to) using titles (e.g. “Ms Smith, the plaintiff says ...”), but then reverted to using first person and first names and pronouns (e.g. “But Alice you told me that ...”).

Opposing counsel also often fell into calling the LiP “my learned friend”, the term used for opposing counsel, although one counsel who made this slip corrected himself: “My friend – he’s not my friend at all”.

C. Language in Court

Most LiPs struggled to understand and pronounce legal terminology. This caused anxiety. As one Family Court LiP commented about his nerves leading up to his first appearance in court: “I was hoping like hell they wouldn’t start speaking in Latin”. Many LiPs felt they were encountering a foreign language and often needed help “translating” documents: “It is almost like they are speaking another language. You hear the words but you think, well you know, what are they saying? Where is this going?” (FC LiP). A few LiPs expressed satisfaction in having mastered legalese, but found the process of doing so demanding and stressful.

Several LiPs interpreted the complexity of the language as a deliberate ploy “to keep the ordinary plebs out” (HC LiP). Lawyers and Judges were alert to this possibility. As one High Court Judge said:

I think that it is quite important with a litigant in person that there not be any semblance of secret clubiness between the judge and the lawyer. Certainly nothing that looks like

⁶ One Family Court LiP said he was unsure what to call a female judge. He heard the opposing counsel call the Judge “Maam or Ma’am, or something like that”. Nor was he sure whether he was permitted to say “Your Honour”. Despite having been through a defended hearing, he said “I think I still don’t know what to call her”.

⁷ I observed one LiP in the High Court, raise a hand to request an opportunity to interrupt the opposing counsel’s submissions. This attempt was studiously ignored by all others in the courtroom.

a wink and a nudge or, as I say, using arcane language and having a conversation that excludes the litigant in person. I think that is probably quite important.

The terms that LiPs did not understand or struggled to pronounce were not just Latin, but any technical term such as “adjournment”, “unless order”, and “brief of evidence”. Lawyers and Judges commented that they strived to speak plain English when speaking to any litigant, but several said they took extra care with LiPs, particularly vulnerable or new LiPs: “I try to speak their language” (DC Judge). Some Judges, lawyers and also court staff were concerned though that LiPs might feel patronised if they explained too much.

Where it was evident that the LiP did not understand the terminology, lawyers and Judges often gave explanations. A civil litigation lawyer gave what he called a “slightly comical example” of a LiP who filed an interlocutory application titled “Inter-lock-a-tree Application”. The lawyer sent the LiP “a template for the application he was trying to make so he could fill in the blanks and file it”.

LiPs sometimes felt embarrassed, even when talking with me about their case, when they had misused terms or did not understand them. A McKenzie friend said he warned LiPs against using terminology they did not understand or could not pronounce:

Because one of the most off-putting and embarrassing things I've seen is where people try to use the phrases in the court, to try to prove they are on the level of the Judge and lawyers, and then stuff it up. And then [the LiPs] go into shut down mode because they are so embarrassed.

A High Court LiP asked for leave to “sit at the bench”, instead of “at the bar”. The Judge smiled and gently corrected his error. I thought the LiP might be embarrassed by his error, but he was unabashed and said to me: “I did get a smile out of him [the Judge]”.

In addition to specifically legal terms, some of the litigants, particularly in the Family Court, appreciated it when the Judge used more colloquial English. For example, a Family Court LiP said “This Judge speaks English!”, after the Judge used a conversational tone with parties.

II. Presenting the Case

A. *Assistance Presenting the Case*

1. *Problems with using advice in court*

Many LiPs sought advice from lawyers, often at the urging of the Judge or opposing counsel, but its use in court caused difficulty.⁸ When LiPs named the lawyer and explained the advice they had received, they were confused when the Judge told them not to name the lawyer or discuss the advice. The advice was only of limited use when the case took an unexpected turn and the LiP was unable to respond to the new point:

They [the Judge and opposing counsel] started talking sections back and forward and I was getting a bit lost. And in the end, because I didn't understand, I kept going back to, "Well Your Honour, I stand by [the section of the Act] where I'm looking for a distribution. (FC LiP)

This situation was likely frustrating not only for the LiP, but also for the opposing counsel and Judge.

2. *McKenzie Friends and support people coming to court*

McKenzie friends have a support role only in the New Zealand courts.⁹ The Judges described them as a “mixed bag” and said they were useful when they were able to keep the LiP calm and focussed, or could provide “a sounding board” for the LiP (FC and HC Judge). There were some experienced McKenzie friends who were said by Judges and lawyers to perform the role well. LiPs said they found having a McKenzie friend useful as an independent person with whom to test ideas, although one Family Court LiP said that his experienced McKenzie friend was “part of the system” and “tried to placate the Judge and the other party”, by suggesting compromises that the LiP felt gave too much away.

The Judges found McKenzie friends less useful when they had their own agenda to push, which did not necessarily align with the interests of the LiP. One Judge gave an example of a LiP abandoning an argument that had some merit, and instead pursuing a much weaker argument that aligned with the McKenzie friend's agenda on land rights. In the Family Court, lawyers and Judges noted that previously McKenzie friends had often been associated with fathers' rights groups and

⁸ For further discussion of limited retainer advice see Chapter 6, pages 146-148.

⁹ There is some discretion for McKenzie friends to take a speaking role (see Chapter 1, page 6. Judges and McKenzie friends spoke of occasions where this discretion was exercised. This included situations where the LiP's English was limited, or an example in the Family Court where in a case, heard immediately before Christmas, the LiP was struggling so much with cross-examination that the McKenzie friend was permitted to feed the LiP questions, phrase by phrase.

had taken a combative approach, but as Family Court lawyers said, “They are less rabid now” and “have mellowed”.

3. *Court appointed lawyers and amicus curiae*

Some Family Court LiPs had lawyers to assist appointed in their cases. They were sometimes appointed when the Judge felt the LiP was unable to put their case, or there was a conflict of interest.¹⁰ Where these lawyers were appointed, LiPs showed confusion about whether they were to assist them or the court.

The role of amicus curiae caused similar confusion.¹¹ One LiP, in a case where an amicus was appointed, was concerned that the amicus was biased and asked the Judge a series of questions about the role. After correcting the LiP’s pronunciation of “amicus”, the Judge explained that the amicus was appointed because “You aren’t represented and I want to make sure I’m aware of all the issues”. In interviews the High Court Judges said an amicus is appointed where there is “complexity” or “high stakes” or a “far reaching point”. Judges said they were generally reluctant to appoint them: “I wouldn’t appoint an amicus unless I thought there was a pressing need for one. I don’t see amicus as a way to avoid the legal aid structures” (High Court Judge).

B. Judicial Management of LiPs

Many of the Judges, particularly in the High Court, said that they considered the right to litigate in person was a fundamental right that should not be taken away, but that they would prefer litigants to have lawyers:¹²

You know there is a right to self-represent and the courts are there for anyone but I’d generally rather they had lawyers, (laughing lightly) but you know. (HC Judge)

Researcher: what about those who just don’t want a lawyer?

HC Judge: Ummm, should they be denied? Should there be a rule? ... On the one hand it would be lovely quite frankly (laughing), but I’d certainly have to think long and hard about it first.

¹⁰ A Family Court practitioner said that counsel to assist in COCA applications was “more of an Auckland phenomena”: “The Auckland lawyers got all very precious about having to be very clear that these were their instructions and that the welfare and so on was quite distinct. So whenever there was a sniff (laughing) of a conflict between welfare and best interests and the child’s views, then they’d seek to have a separate lawyer appointed so that one was covering welfare and best interests and the other was solely advocating on views. Quite frankly the rest of the country were a bit more pragmatic about it (laughing). You know (laughing), just an Auckland thing”. The 2014 family justice reforms were partly directed at addressing the increase in public spending this caused. A Family Court Judge said that a lawyer to assist might be helpful in cases where there was an abusive relationship between the LiP and other party. A Family Court Judge said that a lawyer to assist might be helpful in cases where there was an abusive relationship between the LiP and other party.

¹¹ The role of amicus is discussed in Chapter 1, page 7.

¹² This preference is also expressed in *Re G J Mannix* [1984] 1 NZLR 309 (CA), which requires bodies corporate to be represented in the High Court and above, discussed in Chapter 1.

Much as we would prefer them to be represented I don't think you can take that right away from them. Even though, from a Judge's point of view, you'd much rather they have a lawyer because lawyers will bring better presentation of the case to you. But you can't deny them that right as far as I see it. (HC Judge)

Most said that the right had to be defended on the basis of ensuring access to justice, given many people could not afford a lawyer.¹³

The Judges that I observed, and those I interviewed, demonstrated a commitment to trying to give LiPs a fair hearing, and be patient with them. A McKenzie friend who had been practising in the Family Court for a long time commented that there has been a "softening among the judges" towards LiPs in recent years. A High Court judge said the "era of the truly grumpy judge is gone" and other judges are less likely to think grumpiness is acceptable.¹⁴ The Judge however did say that "I still think you'll find judges who are less accommodating and less tolerant of LiPs than others". This was also reflected in LiPs' comments. They said they found Judges generally polite and courteous, but a couple were repeatedly named as having behaved in a manner that the LiPs considered "rude and condescending". Lawyers also said Judges were generally "courteous and accommodating", even in the face of LiP behaviour that was occasionally "absolutely atrocious". A few lawyers noted that Judges were particularly "careful" around persistent litigants who might complain about them to the JCC:

If [a Judge] get[s] on the wrong side of a lay litigant ... they [the LiP] go to the JCC and that is the last thing you need as a Judge I imagine. Just like the last thing I need is complaints to the NZLS about me. (Civil litigation lawyer)

Judges spoke of some limited training they had received on the issue of managing LiPs in court and on being mentored by more senior judges about how to handle LiPs, particularly persistent LiPs. They emphasised that this was a matter of individual judgecraft rather than any formal ongoing discussion, although particularly difficult, persistent litigants were discussed informally:

Usually it is a matter after the fact you tell everyone at morning tea ... about how security had to be called and all that sort of thing ... and there is always someone down the corridor to ask questions of I suppose. (HC Judge)

¹³ Some thought the right may be more fundamental than this but they had not given it detailed consideration and did not have a settled view.

¹⁴ A civil litigator who had been in practice for many years said that even the very formidable Judges in years past were more polite and careful with LiPs than they were with counsel: "I remember when I was quite young there used to be a formidable judge called [Judge's name] who sat on the High Court, who was absolutely a nightmare for young counsel to appear in front of. And I once had a case where there was a lay litigant, and I couldn't believe the complete change in demeanour from the Judge when he gave the lay litigant such a lovely run by comparison with what a lawyer would have been prepared to suffer".

I have already discussed two judicial management techniques: encouraging LiPs to seek legal advice¹⁵ and encouraging LiPs to settle.¹⁶ I now turn to techniques used when the LiP does appear before the judge to present a case.

1. *Letting them talk*

Judges said they often managed LiPs by “letting them talk”. Judges gave several justifications for this technique. It took a lot of court time, but if the judge engaged with them via questions this could be “red rag to the bull”. It was more efficient “just to sit there and say nothing, so you give them nothing to feed off” and they will finish their case more quickly. In the High Court the Judges said that this technique was used particularly with persistent litigants: “My feeling is the best thing is to shut up and let them run out of steam”.

Judges also said allowing LiPs to state their case without interruption was important in ensuring they perceived they had a fair hearing: “I think your job is to make sure that the parties believe they really have had a fair hearing however disastrous their case might be” (District Court Judge). It also serves the interests of substantive justice. A High Court Judge said she allowed LiPs to talk both so they “feel that they had said all that they can say” and because “I need all the information that I can get before I go away to write my decision”.

A High Court Judge explained that the sense of procedural justice was particularly important because the Judges were concerned that they might otherwise create a vexatious litigant:

The lore, L-O-R-E, or the mythology, is this: with many vexatious litigants they were people who in their first encounters in the legal system were treated unfairly and they then went away with a sense of unfairness. It may be that they didn't have any merit in their case anyway. But the fact that when they went away feeling they have been treated unfairly or felt that the judge had got the matter wrong and that triggered something in them that brought them back again and again. It might be a minor matter, but you have to be conscious that you have to be fair and be seen to be fair as well. It's not enough just to get the answer right but give the answer in a way that shows that you have listened to what the unrepresented person said and you've taken into account what they've said.

All the Judges who discussed this technique also said it was time consuming (but sometimes less so than asking questions) and that letting LiPs talk had to be balanced with concerns about time: “You can't waste the court's time either” (DC Judge). A Family Court Judge also expressed this conflict between allowing LiPs enough time to have a sense of procedural justice and protecting court time. The Judge had recently allowed a LiP hours of additional time to put his case and was very unhappy that the LiP had used the opportunity to try and conduct a trial by ambush, raising

¹⁵ See Chapter 6.

¹⁶ See Chapter 7.

material that never appeared in the affidavits. The Judge said: “The more I do it, the more I think, why shouldn’t they have to play within the rules [remaining within the allocated hearing time]?”. This conflict was sometimes observable: I saw Judges telling LiPs to take their time but also communicating through body language such as impatient sighing, that they felt the LiP was taking too long. LiPs were aware of this, for example, a High Court LiP said he thought the Judge had “cut the trial short”. When I challenged him, reminding him the Judge had said repeatedly that he should take as long as he needed, he said the Judge “didn’t really mean it”.

2. *Asking questions*

The judges noted however that not all LiPs were willing or able to talk at length and that they sometimes encountered the opposite problem:

In other cases they speak very briefly and right to the point and then say nothing more at all. You often feel a bit frustrated they haven't said more in their favour than they actually have. (HC Judge)

In those cases the Judges said they sometimes had to spend time drawing out the case, which could take a long time. One Judge said that, in deciding how to manage LiPs, such as whether they needed encouragement or calming, “It is almost more psychology than law at that point”.

One of the reasons that LiPs may be brief in court, other than lacking public speaking confidence, is that they often expected the judge to be as familiar with the file as they were. As one Family Court LiP said the day before a hearing: “I’ll let the judge lead. I’m not going to blow my mouth off and go blah blah blah. I’m sure the Judge has already gone over my defence”. Judges, particularly in the Family and District Court, said that while they tried to read files before court, this was not always possible because of the large number of cases to be called through.

The LiPs were surprised when the Judge was not as knowledgeable about their case as they were, or asked questions that showed they had not read the material before court. A few LiPs thought that the Judge was not “sharp” or “clever” because they asked questions of the LiP they should know. Some LiPs interpreted this as being obtuse or inadequate as a judge, and while positive about judges in general, considered certain judges they had encountered “weak” or “rogue”. One LiP whose closing submissions were interrupted by questions from the Judge, said afterwards that he thought the Judge was “... trying to sort of sabotage the submissions. Or, if not sabotaged, to put me off my mission”.¹⁷

¹⁷ Raynor Asher and Kieran Raftery "Closing Address" in Bruce Robertson (ed) *Introduction to Advocacy* (New Zealand Law Society Continuing Legal Education Ltd, Wellington, 2000) 355 at 387-388: “New Zealand judges do not hesitate to ask questions if they do not understand a submission, or believe that there is a point not fully dealt with. Sometimes

3. *Deferring to opposing counsel*

Where the Judge could not understand what the LiP wanted, or wanted further legal submissions, they said they sometimes relied on opposing counsel. As one High Court Judge explained, this was no different from the situation where both parties were represented and one counsel was much better than the other:

If you are just questioning a lawyer and it is clear all you are doing is punching right through them and they aren't feeling it, then it is like hitting a brick wall. You may as well not bother so then you tend to rely on the good counsel.

The Judge said that, having encountered this in practice, she knew it could make counsel feel they were compromising their “ability to represent [their] client and win the case”, but it was necessary to give the Judge the information they needed to make the right decision:

At the end of the day you've got to try and get the result right. ... You've got to try and at least understand what their [the LiP's] point is and see if there is anything in it.

Judges in the Family Court said that they did sometimes allow the opposing counsel or, more often, the Lawyer for the Child, to define the issues during judicial conferences. Most Judges said that they were wary of doing this but it was a “tool of the trade”.¹⁸ This was, however, in the context of judicial conferences or other pre-trial matters. In defended hearings or trials the judges were adamant that the formal procedure needed to be followed, although, as one Family Court Judge said about a case where both parties were LiPs: “You can find yourself running ragged trying to ensure some semblance of procedure is followed”.

The Judges' wariness at changing the speaking order was due to the risk that the LiP would see it as unfair. As one civil litigation lawyer said, reflecting on the practice, LiPs “will perceive that they are being kept out of the process, and that this is a lawyer's sort of process; they'll feel condescended to”. The LiPs who said this had happened to them, and was striking enough for them to report it to me, felt that changes in turn-taking was patronising and put them at a disadvantage. Even those who initially felt relief at not having to do as much talking as they expected sometimes felt, on reflection, that their chance to put their case had been hijacked. The civil litigation lawyer who recognised that LiPs may feel condescended to by changes in speaking order, as did the High Court Judge, saw it as reasonable “in the interests of getting the right outcome for the case”. The lawyer said “If people feel miffed about that then that is probably

they will take direct issue with the thrust of a particular submission. It is imperative that you deal with the substance of any such judicial question or interruption, and do so in a pleasant and courteous but forthright manner”.

¹⁸ One Family Court Judge said that she preferred to maintain the normal order as this educated the LiP about how the court ran, although laughing she said she was “being optimistic” that it would have this effect.

tough luck”. He said that this was a minor matter and that “on the whole” Judges did a good job of hearing LiPs and of “making them feel entitled to be there”.

Many LiPs were sensitive to any variation from the rules. A Family Court Judge gave the example of a problem with service of a document. The Judge said the LiP:

... made a snide comment that “I’ve been told all day that I have to play by the rules” and then they don’t have to play by the rules. It was a mistake by the bailiff. It wasn’t anyone’s fault. (FC Judge)

A High Court LiP said he “was shocked” when he received a 29 page synopsis when the rules, that he had carefully followed, limited the synopsis to 10 pages. Some LiPs also complained of counsel being allowed to give evidence from the bar when the LiP would not be allowed to get away with that:

... even if I say, “Hey, that is evidence without getting any affidavits filed”, the court doesn’t blink an eyelid. There is a real, you know, the court doesn’t treat lay litigants as being equal and that is in a nutshell where the real problem is. (HC LiP)

4. *Bending over backwards*

The lawyers were unanimous in their opinion that Judges often “bent over backwards”¹⁹ to help LiPs and were sometimes “overly fair” or “gave a lot of leeway”, but said this was understandable and reasonable in the circumstances. When discussing judicial leniency towards LiPs, lawyers were very positive, although these comments must be read in the context of lawyers talking about the judiciary to a researcher, where intra-professional solidarity and hierarchy may mean criticism is restrained: “I take my hat off to them”, they are “very competent”, “I can understand why they give the lay litigant a bit of rope that they wouldn’t give a lawyer”, “The court process is stressful and foreign to [LiPs] so I can understand why the court wants them to feel like they’ve actually had a fair hearing the first time around” (civil litigation and family lawyers).

Judges justified giving LiPs multiple chances when they made procedural errors or guiding them through the procedure on the basis that it was important to their sense that they had a fair hearing and also in the interests of securing a substantively fair result. As a District Court Judge explained:

You know if you go that extra step it may mean they might see justice was delivered even though they don’t like the result. It may stave off unnecessary appeals or rehearings. It may just give the community indirectly a sense that you know, in a modern democracy like we have, there are judges who will take the pain, and try and

¹⁹ This phrase was used commonly by lawyers and Judges in interviews, and has a history of use in LiP-judicial relationships, appearing for example in John Dewar “The Impact of Legal Aid Changes on Family Law Practice” (1999) 13 Australian Journal of Family Law 33 at 48.

deliver justice in good faith. I mean it all sounds very lofty. But it is basically what we are doing - without fear or favour we are basically trying to help them.

Judges often expressed concern about how the opposing represented party would perceive the process if they gave too much assistance to the LiP. As a Family Court Judge said, she was “acutely aware” of not “bending over to such an extent” that the other party “who is paying for a lawyer, thinks: ‘Crickey! Is this Judge acting for him?’”. Lawyers, however, said that though clients are sometimes unhappy about the assistance given to the LiP, the lawyers generally managed this aspect by forewarning their client that the Judge would “try and make the person [LiP] feel that they have got a fair hearing” and “that is part of the process they [the client] are going to have to accept” (civil litigation lawyer). Judges and lawyers were unanimous in their opinion that facing a LiP would increase the costs for the opposing litigating party. As one opposing counsel submitted to the Court, “Litigants in person cause a tyranny for the [opposing party]. There is a tendency of the judiciary to be lenient that is misplaced. It places an onus – no – an impossible onus on the [opposing party]”.²⁰

LiPs who recognised that the Judge was assisting them by giving them procedural leeway appreciated the Judge’s role in protecting their substantive claim, by preventing it being undone by procedural mistakes.²¹ The LiPs often wanted legal information and advice from the Judge, seeing them as a neutral source of reliable information. For example, during a case management conference, a Judge told a LiP that she needed to amend a key document. The Judge asked the opposing counsel to tell the LiP what she needed to do. After the conference, however, the LiP said: “I need to ask the Judge what I need to do”. When I asked if the opposing counsel had given that guidance, as the Judge directed, the LiP said: “That is Mr [Name]. I need to get it from the Judge”.

Judges were unhappy at being asked to fulfil the role of adviser and neutral arbiter:

I think basically you know the LiPs are a nuisance and sometimes a supreme irritation, just because they are so demanding, and they expect the Judge to be their lawyer and their assistant, and they want what they want when they want it. (DC Judge)

²⁰ This counsel had said to me before the beginning of the matter that she was concerned my presence would lead the Judge to be “fairer than fair”. One interpretation of this statement is therefore that it was an attempt to neutralise what she considered the effect of my presence might be.

²¹ LiPs did not always recognise when they were being given such assistance. For example one High Court LiP, not understanding the procedural steps being taken, thought that the Judge was harming his claim when in fact the Judge was protecting his rights. It was only by good fortune that the LiP’s former counsel happened to be in court with another client. The LiP’s former lawyer explained to the LiP that what the Judge was trying to do was to the LiP’s benefit. The LiP stopped arguing with the Judge.

Most Judges were more measured in their comments, but the difficulty they explained was the same. They were caught between wanting to ensure the proceeding was fair, not appearing biased towards the LiP by giving them too much assistance, and fulfilling their role as adjudicator:

The real problem that I perceive here is that self-represented people are not the only people who miss legal points. So if you start saying, “I’m going to tell that person over there that they might want to do that or that or that”, why aren’t you telling the other side that they might do that or that? ... You don’t do it for them [represented litigants], so should you do it for people on the other side [LiPs]? Because it is very easy in these circumstances to allow a perception to emerge that you are looking after them [LiPs]. Maybe you are looking after them and maybe – not maybe – probably, you shouldn’t (Family Court Judge)

Judges did feel there were situations where substantive justice demanded some intervention. I observed a Judge giving a LiP the advice “to keep your powder dry” when the LiP began discussing in open court various strategic decisions he was making and the advice he had received on them. One Judge gave the example of stopping a LiP making self-incriminating comments on the basis the statements were irrelevant, but also that they might have “created further difficulties for [the LiP] in another arena”. The Judge characterised that kind of intervention as potentially giving “legal advice”, and therefore creating a tension between his role as a passive arbiter, and protecting the interests of a party who lacked the knowledge to understand the legal implications of their own actions.

C. Evidence

Managing evidence in the courtroom, unsurprisingly given its highly technical nature, caused most LiPs considerable difficulty. Not all cases involved witness examination, although most involved at least affidavit evidence. I considered the difficulties encountered in producing written evidence in Chapter 6. In this section I consider the particular challenges LiPs faced in preparing and conducting witness examinations, arising both from their own inexperience, and because of the conflicting nature of the roles they had to play as witness and advocate.

1. Witnesses

LiPs encountered particular difficulties in selecting and briefing witnesses. A few LiPs needed experts to support their cases. Briefing experts can be extremely expensive, however, and only one of the three LiPs in the case studies who needed experts could afford this. The two LiPs who did not brief experts also misunderstood to some extent the need for, and nature of, expert evidence. They believed their own professional backgrounds, which included some subject matter expertise, along with cross-examining the opposing party’s expert witnesses, would be sufficient. As one LiP said: “Not that I can be an expert witness because I’m partial, but my expertise would still count”.

The Judges in both cases however emphasised the need for independent experts. The LiPs had no resources to pay for these experts and did not call any.²²

This difficulty continued once the LiP was in court with judges excluding material because it breached the rules of evidence. For example, in one case, key evidence was excluded because it was presented only by hearsay; the LiP did not call the witness who could give the evidence firsthand. The LiP accepted the ruling without argument but made no effort to call evidence another way to prove this fact because he believed the court already “knew it”, it having been raised in a brief of evidence that was filed, and that he could then cover the issue off in his final submissions. It was not until after the trial that he understood the problem he faced: “There are a lot of rules I wasn’t aware of, that I didn’t fit my material into and that [material] was lost consequently”.

2. *Access to Records and Expert Reports*

Due to their close relationship to the case, some LiPs also encountered difficulties accessing reports and records or getting agreement for witnesses to appear in support of their case. One LiP, in a case regarding access to her children, said that while the social services who had been involved with her and her children were happy to tell her they supported her, they were reluctant to swear affidavits in support of her parenting of the children. She believed this was because they were “very unsure and uncomfortable” about dealing with her as a LiP. She speculated: “If it was a lawyer who wrote to them and asked for what I’m asking for, then they’d get themselves and their supervisor to write a note”.

The same LiP had difficulty accessing her children’s medical records to include in her evidence. The general practitioner was reluctant to provide notes to her, and wanted the name of her lawyer. A Family Court Judge also commented that it was difficult for any litigants “to get the hospital to disgorge your psychiatric notes”. The Judge wondered about the further challenge this may present for a LiP: “It is your case. But you might struggle to do that”.

A significant issue for LiPs in COCA cases was accessing reports ordered under COCA sections 132 and 133.²³ These reports are provided to lawyers as of right, but practice varied between courts

²² Sir James Munby P in *Q v Q; Re B; Re C* [2014] EWFC 31 at [43] noted that “the absence of public funding for those too impoverished to pay for their own representation potentially creates three major problem”, including “the denial of the ability to bring to court a professional witness whose fees for attending are beyond the ability of the litigant to pay”. (The other two problems he identified were the inability to draft documents and appear with an advocate in court).

²³ These are reports prepared by professionals including social workers, psychologists, and psychiatrists in regard to applications for parenting orders or guardianship.

as to LiP access to the reports.²⁴ In some courts the Judges routinely ordered that the LiP attend the registry office and read the report. This occurred under the supervision of the registry office staff. A registry staff member, who frequently supervised LiPs reading these reports, said, “They can take notes from the report but they can't ... write it verbatim. That is one of the reasons we sit there too, to make sure they aren't”. The LiPs have to “cross examine the other party without having the report in front of them” so they allowed them to return and read the report again if they needed to. A McKenzie friend acting in a location where these reports were rarely released to LiPs, said that lack of access to the reports, and most LiPs’ lack of comprehension of the contents, was very prejudicial to their case. For this reason, he advised people not to attempt litigation in person where these reports were ordered.

3. *Cross-Examination*

It was not only in COCA cases that LiPs encountered difficulty preparing cross-examination. As a Family Court LiP, who spent considerable time preparing her cross-examination said, “I didn’t know if the questions were appropriate or adequate”. Even those LiPs who were confident in their preparation found the reality of cross-examining more challenging. A LiP, who was confident in his preparation, having read some previous trial transcripts and a book on advocacy said: “Cross examination was harder and less effective than I thought it would be. I thought I'd get the witness to concede.” The LiP had abandoned the cross examination when it seemed ineffective. He thought the Judge would regard the shortened cross-examination favourably because he would be saving the court time, having been continually told that as a LiP he was slowing the case down. He did not have any awareness of the obligation in New Zealand to put your case to the relevant witnesses for the opposing party²⁵ and thought he could cover further material by way of submission. His error only became apparent to him when the opposing counsel vigorously alerted the court to his omission in closing.

²⁴ Section 134 - Distribution, etc, of reports under sections 132 and 133

(1) The Registrar of the court must copy a report under section 132 or section 133 (the *report*)—

(a) to the lawyer acting for each party to the proceedings or, subject to subsection (3), if a party has no lawyer acting for that party, to that party; and

(b) to a lawyer appointed to act for a child who is the subject of the proceedings.

(2) If the court orders a lawyer referred to in subsection (1)(a) not to give or show the report to the person for whom the lawyer is acting, the lawyer must comply with the order.

(3) If a party has no lawyer acting for that party and the court is satisfied that information in the report would, if provided directly to that party, place the child concerned or another person at risk of physical abuse, sexual abuse, or psychological abuse, the court may—

(a) order that the report not be copied to that party under subsection (1)(a); and

(b) appoint counsel to assist the court under section 130(1) for the purpose of explaining the contents of the report to that party.

²⁵ This rule appears in s 92 of the Evidence Act 2006, preserving the common law rule of *Browne v Dunn* (1893) 6 R 67 (HL).

Judges and lawyers said that most LiPs struggled to do effective cross-examinations, which, as a District Court Judge said, is not surprising: "... it is an advocate's skill, and often lawyers are not very good at it".²⁶ Some Judges noted they had been caught by surprise on occasion by LiPs who "have been artists at it" (FC Judge) or did a job that was "as good as any lawyer would have done" (DC Judge). Similarly a McKenzie friend said that the occasional person can manage to cross-examine but most people make a "pig's ear out of it" and the "whole courtroom is kinda going 'groan'". Judges described two problematic styles of cross-examination: very brief cross-examinations or very lengthy ones.

Judges said LiPs often did very brief cross-examinations, either asking "a few inane questions just to go through the motions" (DC Judge) or getting "very frustrated and angry" when the judge explains what can and cannot be asked and "giving up" (FC Judge). LiPs who "just go on and on" (FC Judge) asking repetitive or poorly directed questions were also considered problematic. As one Family Court Judge said, the cross-examinations tend to be "pre-scripted" and the LiP will stick to the script and fail to pursue useful answers and avenues: "They ask a question and the herd goes thundering away".

Frustration often arose when LiPs had difficulty determining relevance and not including opinion and submissions. Judges said they sometimes tried to help formulate questions for the LiP when they were struggling, although most said they preferred not to do this.²⁷ Some LiPs regarded such interventions negatively, believing the Judge was trying to inhibit their ability to put their case:

Judge: You cannot ask -

LiP: [holds up an open palm, signalling the Judge to stop talking, and talks over the Judge] You will just have to wait until I go through my questions.

Judge: She is an expert witness. You can only ask questions that are germane to her expertise.

LiP: So you say. Now would you like to wait?

²⁶ Tatiana Tkačuková "Cross-Examination Questioning: Lay People as Cross-Examiners" in Malcolm Coulthard and Alison Johnson (eds) *The Routledge Handbook of Forensic Linguistics* (Taylor & Francis, Hoboken, 2010) 333 at 346 suggests that LiPs do not have mastery of some of the more linguistically subtle aspects of cross-examination, skills which are "... difficult to acquire without a solid understanding of the basic principles of the adversarial system and without professional practice".

²⁷ In one case for example, the opposing counsel objected to the LiP's question to a witness. The Judge attempted to guide the LiP to reformulate the question. On the LiP's fifth unsuccessful attempt, the Judge stopped the cross-examination:

Judge: No, no, no, Ms [Name] – no. Your question is this - I'll put it to the witness for you, shall I?

LiP: Okay, Your Honour.

Judge: [Asks the witness the question].

Witness: No.

Judge: Right. Now you take it from there. Take it wherever you want to take it, but that's your foundation.

Judge: You are allowed to ask questions, but you are not allowed to waste the Court's time with irrelevancy.

LiP: It is not irrelevant.

Judge: Very well, go ahead.

Where LiPs, or for that matter counsel, did not ask relevant questions, some Judges said they would sometimes ask questions themselves at the end of the cross-examination, as they were entitled to do. Most (but not all) preferred not to do this as a “good rule in terms of judge's intervention” was to “sit back” as “we all know about Judges who intervene too much. They get into trouble down the track [on appeal]” (HC Judge). In the Family Court, lawyers said that when acting as lawyer for child they would ask questions that, if the LiP “had been properly represented, should have been [asked]”, to ensure the court had all the information “to make the right decision”.

4. *Role Conflict – Witness-Advocate*

In the time pressured environment of a trial, the conflict between the roles of advocate and witness became apparent: keeping documents in order, appearing as a witness, keeping track of re-examination questions, all under the further strain of close emotional involvement in the case.

One LiP encountered significant difficulty when being cross-examined by the opposing counsel, which he described afterwards as “dreadful, sick making”. In addition to the stress of answering questions that pointed to deficiencies in his case, he was attempting to fulfil the role of advocate, struggling to keep track of the implications of his cross-examination for the direction of the case and of questions he needed to ask in re-examination:

Opposing counsel: I want to ask about the document on page 22 of volume 3. On 17 August did you meet with Mr [witness] and discuss [topic]?

LiP: [long pause]. Sorry, I can't find that document. What was the question? I'm sorry I'm thinking of other things as well.

Judge: Well keep your mind on the job.

Opposing counsel: [*continues with questions about the document and then begins to move on to another document*]

LiP: Before we do that I'd like to come back to a few other points if I can.

Judge: After the cross-examination is finished, you can do a re-examination, essentially of yourself.

Opposing counsel: You can put that volume away now.

LiP: Can someone put a tag on page 22?

Judge: Sorry? [*Confers with the court taker*]. [To LiP]: You make a note. Have you got pen and paper there? Well you make a note of anything you want to come back to. It is your case.

For a Family Court LiP, the strain of trying to run her own case and being cross-examined by the opposing party's lawyer proved too much. She broke down during the cross-examination, requiring several adjournments. She was then unable to close the case and the Judge decided to accept her closing submissions in writing instead:

My head was pounding, I thought I was going to pass out - I couldn't even see properly. I don't even get migraines, but my vision had gone and I was sitting there so stressed. The Judge said I had until next week to write down my points that I needed to get down. I had no idea how to do that, but I put some points down and took it to the court the next week.

Other litigants, particularly men in the Family Court, noted that they had to be careful to maintain a calm and cool demeanour so the judge did not draw adverse inferences about them. A Family Court Judge said that it was "not a matter of plain law to what extent a judge should be allowing her impression of people who are not witnesses at the time to be part of the material" but said "I have to be honest, it can be an advantage" to see the interaction between the LiP and the witness.

LiPs found the pace of trial generally very challenging. Performing the tiring roles of both witness and advocate left them with little energy for preparation at night. Another LiP complained that the time pressures were unreasonable, leaving him too little time to absorb the material from the other party and respond to it. LiPs also complained about lawyers being late with filing documentation, particularly briefs of evidence in the weeks immediately before trial. This presented particular problems for some LiPs, who found that with additional other commitments (such as a fulltime job) they had little time to prepare, and lateness furthered the difficulties. Lawyers, however, were accustomed to some slippage in the timetable, and rarely pulled each other up about this in case they needed the indulgence of the same counsel in another case in the future.²⁸

The strain of the courtroom also meant LiPs had not always heard what the Judge said. For example, I asked a LiP what he thought about the fact his ex-partner was changing lawyers. It had been discussed in the LiP's presence, in an exchange between the opposing counsel and Judge during the judicial conference. The LiP, however, was surprised. He had not heard that discussion

²⁸ Andrew Beck "Introduction" in Bruce Robertson (ed) *Introduction to Advocacy* (New Zealand Law Society Continuing Legal Education Ltd, Wellington, 2000) xxi at xxvi: "A lawyer who is known to be reasonable, co-operative, and understanding is likely to be well-treated by other members of the profession. This may well result in benefits for clients particularly where small indulgences are involved". One LiP involved in a lengthy case, noted that the lawyers being late with briefs of evidence meant he could then require the same leniency.

at all. A Family Court Judge noted that he tried to keep explanations in Court brief as he was aware that “no matter how smart they are”, LiPs “only absorb so much”.

D. Opposing counsel

In preparation and negotiation before trial, lawyers said they generally tried to be “super-polite” when dealing with LiPs.²⁹ Some counsel were polite and even friendly to LiPs, which the LiPs appreciated. Many LiPs said that, once in court, they considered the opposing counsel’s behaviour ranged from distant to patronising. A few of the LiPs speculated that the opposing counsel might use LiPs’ lack of emotional distance from the case to strategic advantage. A High Court LiP said:

I almost feel like the opposing counsel totally ignoring me and being rude to me was almost a deliberate tactic to get me riled up. I imagine if you get someone speaking really emotively in court then it is a really bad look. So I'm a bit suspicious that it was a deliberate tactic to rile up the lay litigant.

A few of the civil litigation lawyers offered a different explanation as to why they might be cool towards an opposing LiP. One lawyer said she did “not talk to them [LiPs] at all” during a hearing. She said her concern was that “idle talk or chatter” can lead to the LiP telling the Judge that she had said “such and such, and it is really unhelpful. It is better to not say anything at all”.

While lawyers said they tried to be polite, or explained their distance as wariness at where interactions might lead, there was also evidence this “best practice” was not always followed. A High Court Judge said that occasionally when litigation had been going on for a long time there was animus not only between the parties, but between the parties and the opposing lawyers. The Judge said this, “... does perhaps give rise to behaviour [like] ... eye rolling and all that sort of thing”. The Judge noted that that sometimes happened “when you have two lawyers in front of you as well” but said that “by in large I think they [lawyers] are pretty good”.

During observations I noted counsel behaving in ways that varied from the professional ideal. In one there were remarks to the Judge which could easily be interpreted as snide or condescending (“Well it depends on how long it takes [the LiP] to conduct his *interesting* cross-examination”); putting undue pressure on the LiP (making comments to the LiP during the LiP’s cross-examination, such as “you can’t say that” and “when are you going to be finished?”);³⁰ counsel signalling higher social status (“I’m sorry I haven’t been here to help Your Honour, but I’ve been

²⁹ See Chapter 6, pages 150-152 and Chapter 7, page 168.

³⁰ These were not audible to me as an observer, but were confirmed by both parties.

in Europe for the last three months”); or signalling the sort of “clubbiness” that the Judges perceive as a risk to LiPs’ perceptions of fairness:³¹

Court taker: [asks the opposing counsel about the whereabouts of some documents]

Opposing counsel: The Judge knows how I lose paper, he has seen it before.

Court taker: I don’t know about that.

Opposing counsel: How is the Judge today, is he in a good mood? ³²

Court taker: I’m not taking court, I’m just sorting it out for [the other court taker].

Where opposing counsel did try to be of assistance to the LiP (in the interests of their client and the court), as in the process before court, LiPs sometimes interpreted this as “playing games”. In one instance a comment that, I believe, was intended to be helpful, or at least not harmful to the LiP, had an unintended consequence. The opposing counsel commented during a break that you “can’t win a case on cross-examination”. The LiP took this comment to mean that cross-examination was pointless and cut the cross-examination short, a decision he later regretted. It is likely the opposing counsel meant the LiP needed to elicit evidence-in-chief to support his case, as well as cross-examine, not that he should abandon the cross-examination.

III. Discussion

Once LiPs’ cases came to court, the Judges generally tried to give some substance to the right of access by assisting the LiP. This included spending time introducing the court process to the LiP, speaking in plain English, letting them speak without interruption, asking questions of them or on their behalf, bending procedural rules, and trying to put them at ease.

These attempts to assist LiPs and ensure a fair hearing were, however, also coupled with various forms of limiting access or providing only formal access. Letting LiPs talk in some cases was a form of simply allowing formal access, the right to talk until they ran out of steam. Impatient sighing and asking for time estimates indicated LiPs had overstayed their welcome. Altering turn-taking and moving LiPs to the end of the list may have been for efficiency but also signalled the LiPs’ outsider status, privileging lawyers’ place in the court. Other acts communicated to LiPs

³¹ Nigel Fielding "Lay People in Court: The Experience of Defendants, Eyewitnesses and Victims" (2013) 64(2) British Journal of Sociology 287 at 296 for a discussion of the lay witness, defendant and victims experience of opposing counsel in criminal trials.

³² This talk is similar to that described in the preceding chapter, where lawyers encourage litigants to avoid the capricious courts and settle their claims: see Chapter 7, pages 176-178.

more directly, although still subtly, that they were outsiders: requiring leave to sit at counsel's benches and not offering them water. So what interests are served by these mixed messages?

A. Accessibility and Proportionate Justice

One explanation is the tension between enabling LiPs access to justice and the aim of efficient disposition of cases. This tension is discussed in international research that record judicial concern over LiPs taking much longer than represented cases to process because LiPs need assistance in understanding the procedural and substantive law.³³ Judges consider they therefore have to devote a disproportionate amount of time to cases with LiPs, which Zuckerman calls the "efficiency deficit".³⁴

The "just" determination of a case includes both substantive justice and procedural fairness.³⁵ Judges said they let LiPs talk in pursuit of both these goals. They also spent time explaining ground rules, procedure, and gave guidance to LiPs with the aim of ensuring both substantive and procedural justice. These techniques however have a price: they reduce speed, and increase costs to both the court and the opposing party. Techniques that assisted with speed and efficiency, such as moving LiPs to the end of the list and altering turn-taking (allowing opposing counsel or lawyer for child to speak first), risked compromising the LiPs' sense of procedural justice.³⁶ Judges were particularly concerned about procedural justice both because of awareness that this was important aspect of justice, but also because of the "lore" that one Judge described: that failing to give LiPs procedural justice might create persistent litigants.

The importance of speed and efficiency arises both from Judges' personal workloads and also because the procedural rules require not the pursuit of only substantive justice but also the potentially conflicting goal of a "speedy and inexpensive determination" of the case.³⁷ Recall that the "just, speedy and inexpensive determination" of disputes is an expression of proportionate

³³ John Dewar, Barry W Smith and Cate Banks *Litigants in Person in the Family Court of Australia* (Family Court of Australia, 2000) at 48; Richard Moorhead and Mark Sefton *Litigants in Person: Unrepresented Litigants in First Instance Proceedings - Department of Constitutional Affairs Research Series* (2005) at 257 reporting a perception that LiP cases take longer but finding that there is "at best only modest evidence that cases involving unrepresented litigants took longer"; Liz Trinder and others *Litigants in Person in Private Family Law Cases* (Ministry of Justice, United Kingdom, 2014) at 57.

³⁴ Adrian Zuckerman "No Justice Without Lawyers: The Myth of an Inquisitorial System" (2014) 33 *Civil Justice Quarterly* 355 at 355.

³⁵ See discussion of procedural justice in Chapter 2, pages 32-34.

³⁶ Kathy Mack and Sharyn Roach Anleu "Getting Through the List: Judgecraft and Legitimacy in the Lower Courts" (2007) 16(3) *Social & Legal Studies* 341 argue that in certain contexts standing down cases to the end of the list can be successfully used to create a sense of procedural fairness and meet the court's efficiency goals. Richard Moorhead "The Passive Arbiter: Litigants in Person and the Challenge to Neutrality" (2007) 17 *Social and Legal Studies* 405 explains that altering turn-taking is one of a number of techniques that Judges use with LiPs to maintain the appearance of being a passive arbiter, while acknowledging that, if some accommodations are not made for the LiP, substantive injustice may be done.

³⁷ High Court Rule, r 1.2; District Court Rule, r 1.3.

justice, in which “a limit is now placed on the amount of resources individuals in the state can properly expend in securing substantive justice in any particular case”.³⁸ This has replaced the previous paramount goal of substantive justice, a correct decision, or justice on the merits.³⁹ Substantive justice, as the Court of Appeal confirmed in *SM v LFDB*, remains a goal, but its pursuit is to be weighed with the pursuit of speed and efficiency.⁴⁰ Judges showed some conflict about whether or not substantive justice should still be the paramount consideration. As one Judge who had come to the bench pre-Woolf reforms said:

Justice should never be overridden by administrative expediency. That is the rule ...
Even though we are now more resource-based, ... surely that rule still applies.

Judges made statements in court to indicate that substantive justice was the paramount consideration: “Take as long as you need”.⁴¹ However, they gave conflicting signals, such as asking clarifying questions, policing relevance, asking for time estimates, and using body language such as impatient sighing, that indicated speed and efficiency were also important goals. These mixed messages can be seen as a result of judges attempting to satisfy conflicting goals.

B. Accessibility and the Passive Arbitrator

Judges were subjected not only to the tension between the competing goals of justice, speed, and efficiency, but also tension due to the restrictions of their role as a neutral arbitrator. Judges wanted to ensure a substantively fair hearing but felt restrained from giving too much assistance as it potentially conflicted with their role as a neutral arbitrator (both in substance and appearance). This tension is well documented in other studies of LiPs.⁴²

Judges were often exposed to this tension because in many cases LiPs were not able to conduct the court proceedings effectively themselves. This was not universally true and there were some cases where the LiP was involved in what Trinder labels a “working” hearing.⁴³ There were many cases, however, which were “non-working”, where the LiP took an active role but was unable to conduct the case effectively. As the discussion above demonstrates, this was for a range of reasons but included that being unable to: effectively use limited retainer advice in court; access evidence

³⁸ John Sorabji *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, Cambridge, 2014) at 3.

³⁹ At 2.

⁴⁰ *SM v LFDB* [2014] 3 NZLR 494 (CA). See discussion in Chapter 2, page 36-37.

⁴¹ It was of particular interest that in one case where such a statement was made, the LiP felt the statement had been made because of my presence in the courtroom. If the LiP was correct, then this would suggest the Judge also thought that my expectation would be that the LiP should be given as much time as needed. That is, the Judge believed that substantive justice should be the guiding principle.

⁴² Dewar, Smith and Banks, above n 33 at 47-48; Moorhead, above n 36; Kim Williams *Litigants in Person: A Literature Review* (Ministry of Justice, United Kingdom, 2011) at 7.

⁴³ See Chapter 2, pages 17-18.

to support their case; cross-examine effectively; perform multiple roles in the proceeding (as advocate and witness); understand procedure and the laws of evidence; and present a legal argument, even when they had received some advice. There were also other issues such as the pace of trial being too fast. Tom's story demonstrates many of these issues that LiPs did not usually anticipate.

This tension for judges between assisting LiPs in court and remaining neutral is exacerbated by the lack of a bright line between what constitutes information that a judge can give a litigant, and what amounts to advice. This was discussed in Chapter 6 in relation to court staff and opposing counsel assisting LiPs, and Judges encountered the same difficulty.⁴⁴ As one Judge said, he considered he did sometimes give what amounted to legal advice. Other Judges also noted that depending on the situation, they might give more or less assistance.⁴⁵ As with court staff, this discretion may mean that LiPs who are perceived as "sympathetic" are more likely to receive greater assistance. Engler argues, based on a review of US case law, that LiPs will be treated differentially, depending on the court's level of sympathy towards them:⁴⁶

The more annoyed the court is with an unrepresented litigant, the more likely the invocation of precedent requiring impartiality, the application of similar rules, and a prohibition of playing advocate for the litigant. The more sympathetic the litigant, and the more the absence of counsel seems beyond the litigant's control, the more likely the court will be to articulate a need to provide additional assistance to avoid a miscarriage of justice.

Those who are perceived as having "chosen" to appear in person can be seen as the authors of their own misfortune, relieving the court of the burden of giving them assistance. For this reason LiPs were very wary of the risk of being labelled as "persistent" because they considered they would be treated unsympathetically and their cases dealt with perfunctorily if this label was applied. As one High Court LiP said:

It was just like, either the Judge wasn't familiar with that part of the legislation or he decided, well, the lawyers must be right, why is this man [litigating in person]? The whole key has been that they've discredited me to the courts. All they [opposing counsel] need to say is, "He is vexatious". And the court says, "Oh yes, he must be if he has gone along [litigating] for seven years. Who in their right mind would go along for seven years?"

As the Judges said, LiPs who are perceived as persistent are likely to be given formal access only.

⁴⁴ See Chapter 6, pages 140-142 and 155-156.

⁴⁵ Moorhead and Sefton, above n 33 at 184 noted similar variability in their UK study. See also Moorhead, above n 36 at 410.

⁴⁶ Russell Engler "And Justice for All - Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks" (1999) 67 Fordham Law Review 1987 at 2015. See also Moorhead, above n 36 at 410.

C. *Accessibility and Protection of the Profession*

Some of the judicial management techniques that have the effect of communicating to LiPs that they are outsiders, such as deferring to the opposing counsel or moving LiP cases to the end of the list, can be justified on the basis that they are needed for efficiency and to ensure substantive justice. Other practices, by lawyers, judges and court staff, that communicated to LiPs that they were unwelcome have no efficiency justification. These include not offering water to a LiP, and not allowing LiPs to sit at “counsel’s tables” without leave, at least in the High Court.⁴⁷

Not offering water echoes MacFarlane’s finding there was “an embedded ‘apartheid’ that privileged legal counsel” in Canadian courthouses.⁴⁸ The idea that LiPs need leave to sit before the bar does not hold up to historical examination. It appears that what began as the lawyers’ push to take more room in the court, seems to have now evolved to the point that LiPs are equated with the “public”, and excluded from the central area of the court unless they are granted leave.⁴⁹ I have found no contemporary rule that requires it.⁵⁰ Mulcahy argues that, while lawyers look on the space within the court “as a depoliticized surface”, the allocation of space to different roles, the lines of sight, and various levels and divisions, is an exercise of power, creating an “inside and outside; an ‘opposition’ or other which can serve to signal segregation, place or inequality”.⁵¹ The practice of

⁴⁷ A Family Court Judge justified the exclusion of LiPs from the courtroom, but not counsel, on the basis of efficiency. Counsel sat in court during lists, including when it was not their client’s case, so that when their client’s case was called they were ready to proceed. LiPs could not remain in court because the Family Court is not public. The Judge suggested everyone except the parties and their counsel could be excluded but this would slow down the progress of the list as there would be delays as they moved in and out of court.

⁴⁸ Julie Macfarlane *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report* (May 2013) at 102: “The examples they gave included: a registry counter system with lines for lawyers – shorter and faster – and lines for SRLs; different security lines to enter the courthouse (again, the longer lines are the public lines); and even access to a water cooler at the front of one courtroom deemed ‘lawyers only’”. The new “justice precinct” being constructed in Christchurch to replace buildings destroyed during the earthquakes was described in “Onwards and Upwards” (26 September 2014) 851 LawTalk 4 as constructing lawyer-only zones: “There will be a law library on the ground level”, (which will be exclusive to lawyers, as all Law Society libraries are, see Chapter 6, pages 137-138), and “a ‘lawyers’ room’ on level 3 Lawyers will be able to use one card for accreditation (to allow them to pass easily through security checkpoints) as well as access to the level 3 lawyers’ room and the law library”.

⁴⁹ See Chapter 1, page 4.

⁵⁰ In New Zealand I have found no written rule that LiPs are not allowed to sit at counsels’ table. The only written guidance I have found on the subject of where LiPs can sit in the courtroom is the Ministry of Justice “Memorandum for Unrepresented Civil Litigants” (undated, no longer available, on file with the author) <www.justice.govt.nz>, a two page document which was at the time the Ministry’s only official advice to self-represented litigants. It was unhelpfully drafted in the passive voice and says only, “You will be shown where to sit when the case is called”. The new guide that has since been introduced, and is much more comprehensive, is silent on the topic of where to sit: Ministry of Justice “Representing Yourself in the High Court of New Zealand” (undated) <www.justice.govt.nz>. The Guide for Self-Represented Litigants in the Victorian County Court is more specific and advises LiPs to sit “in the body of the Court in the front row nearest the bar”, and goes on to advise that once the case is called then: “The Judge will ask your name and confirm you are representing yourself. You may be allowed to sit at the bar table with the other representatives, however, you should not sit there until the Judge has said that you may”. County Court Victoria “A Guide for Self-Represented Litigants in the Civil Jurisdiction of the County Court” (2011) <https://www.countycourt.vic.gov.au/files/SRL_w_24Oct2011.pdf>.

⁵¹ Linda Mulcahy “Architects of Justice: the Politics of Courtroom Design” (2007) 16 Social and Legal Studies 383 at 385.

requiring LiPs to remain in the public gallery, or to seek leave to sit at counsel's table, can be seen as a political act that signals in a very direct, physical sense the LiP's "outsider" status. Even the name "counsel's table" signals it is exclusively for the use of counsel. All of these practices communicate to LiPs that they are not welcome.

One explanation is simply that, as discussed, LiPs are perceived to create an "efficiency deficit". Ensuring a just outcome, at least in both the substantive and procedural sense, is time-consuming and therefore expensive (for the court and opposing party). Reinforcing outsider status discourages LiPs so they are less likely to come to court unmediated by a lawyer and the goals of the "just, speedy and efficient" resolution of disputes are easier to achieve. Discouraging LiPs also means that opposing counsel and judges are not exposed to strain on their roles as advocate for the opposing party and neutral arbiter.

The encouragement not to "by-pass" lawyers might also be a form of protecting the system itself. If, as Sarat argues, too many people take up the invitation to access the courts, the gap between law on the books and law in action is exposed.⁵² Lawyers filter out claims (as we saw in the previous chapter), encouraging settlement or dissuading people from pursuing their claims. Practices that remind LiPs that they are outsiders discourage them from coming to court without a lawyer and therefore protect the institution from overload.

Another explanation is that the bench and bar are protecting their patch, in the sense of maintaining social closure.⁵³ Moorhead observes that the Judge's interaction with a LiP depends in part on the "professional economy":⁵⁴

Judges wanted to protect themselves against encouraging non-representation and doing lawyers out of work which was deservedly theirs. Under this view, the court's primary goal seems to be to deter litigants from "by-passing" lawyers.

I found no convincing evidence to suggest that financial interests were a significant factor, possibly because the numbers of LiPs (while unknown) are not perceived as great enough to pose a genuine financial threat and because of a belief that many cannot afford to pay a lawyer in any case. LiPs may, however, be perceived as a threat to the profession's identity. The courtroom is what Abbott calls the "charismatic heartland" of the profession, the most publicly and professionally recognised

⁵² See Chapter 4, pages 108-109.

⁵³ Social closure involves constructing a closed group with its own identity to monopolise a resource, in this case, the provision of legal services. See Chapter 2, pages 129-130.

⁵⁴ Moorhead, above n 36 at 410. See also Jona Goldschmidt "The Pro Se Litigant's Struggle for Access to Justice" (2002) 40 Family Court Review 36 at 44.

aspect of being a lawyer.⁵⁵ The protection of the space is therefore particularly important to the protection of the legal profession's territory. Lawyers "tend to jealously guard the right to provide representation".⁵⁶ We might expect that Judges, as former lawyers, share these values.

Persistent litigants may pose a particular threat to social closure. They have often become so adept at mimicking (at least the surface) of lawyers' dress and language, that they may become indistinguishable from lawyers, making lawyers' claim to a special status precarious. This may be akin to Dr Seuss' tale of *The Sneetches*, where the plain-belly sneetches have stars put on their bellies so they are indistinguishable from the higher status star-belly sneetches, until "neither the Plain nor the Star-Bellies knew whether this one was that one ... or which one was ... who".⁵⁷ One Judge hinted at this in a description of a "serial offender", who brought appeals from a lower jurisdiction, always over the same issue: "Now he does nothing else. He dresses in a suit and carries briefcases and previous decisions and things like that". This is, of course, not the whole story about persistent litigants, a topic that is taken up in the next chapter, but it may go some way to explaining judicial and lawyer resistance to LiPs.

Somewhat paradoxically, persistent litigants can also serve as means of maintaining social closure. There were hints in the interviews of both judges and lawyers that stories about persistent LiPs serve a function as "atrocious stories", dramatic renditions that bind a group together through the exchange of common problems.⁵⁸ This function was not obvious in interviews. As one might expect, a research interview is no place to share such stories. They were only mentioned in passing as discussions in the tearoom or the corridors of the courts, where they also might serve the function of releasing tension after an encounter that was perceived as potentially dangerous or volatile.⁵⁹ They were much more apparent on occasions that seemed more suitable, for example at a conference on LiPs attended mainly by judges and court staff, and in casual conversation when lawyers discussed my research topic with me and jokingly offered to put me in touch with their

⁵⁵ Andrew Abbott "Status and Status Strain in the Professions" (1981) 86(4) *American Journal of Sociology* 819 at 831 for example calls the "anachronistic rituals of moot court" which law students participate in, despite few going on to have careers as advocates, a way in which the profession increases its status by "[forcing] all careers to start in the charismatic heartland".

⁵⁶ Duncan Webb "The Right Not to Have a Lawyer" (2007) 16 *Journal of Judicial Administration* 165 at 173.

⁵⁷ Dr Seuss *The Sneetches and Other Stories* (HaperCollins Children's Books, London, 1998).

⁵⁸ Robert Dingwall "'Atrocious Stories' and Professional Relationships" (1977) 4(4) *Work and Occupations* 371

⁵⁹ As discussed, persistent LiPs were sometimes regarded as dangerous and security was posted in the registry office or courts. This concern about volatility might be more pervasive. Mulcahy, discussing Rock's study of a UK court, says Rock presents a picture in which "staff perceived there to be an ever-present fear of the collapse of the social order of the court": Linda Mulcahy *Legal Architecture: Justice, Due Process and the Place of Law* (Taylor and Francis, Hoboken, Online, 2010) at 95.

nemesis-LiP. These stories both bind the professional group together and serve the function of reinforcing stereotypical views about LiPs and therefore justify their outsider status.⁶⁰

D. Intergroup Friction

The conflicting goals of projecting the accessibility of the courts, while still protecting roles and resources and the identity of the profession, are one aspect of the tensions between LiPs and the professional actors in the courtroom. Another source of explanation is in the different expectations the groups have about the court process and their level of familiarity with it.

1. Conflicting beliefs about the purpose of courts

Most LiPs found the courtroom environment imposing and, while sometimes not succeeding, tried their best to follow its norms. The message that speed and efficiency was important was received by some LiPs. Recall the LiP who thought he was “doing a good thing” by shortening his cross-examination because it would save time, and another High Court LiP who thought the Judge did not really mean he should take as long as he needed. While LiPs did their best to meet expectations, they felt disappointed after court, believing that they had not put their case across as well as they could have if they had more time.

Other LiPs regarded the courtroom as their space, a service for them as citizens to argue their case. Examples are, the LiP who stopped the Judge from policing the relevance of his cross-examination, and the LiPs in Chapter 4 who said one of the reasons they were litigating in person was because they did not like the culture of deference towards judges. These LiPs believed that their right to litigate in person must include granting them the time needed to put their case to the court in a style that suited them, availing themselves of a service on offer. They did not see any purpose in deference towards judges. As one LiP explained:

I think it becomes a bit of a club. They are trained as lawyers and then the lawyers become judges and it is all a bit incestuous in terms of what happens. The thought that struck me ..., you know when the judge comes into the room and they say “all rise”, I almost think it should be the other way around because at the end of the day the judges are the servants of the people, not the other way round. A big healthy helping of humility wouldn't go amiss in the judiciary to realise that they are there to serve the people.

This conception puts the justice system at the service of the people, based on the idea of litigants as consumers. That image is at odds with legal professionals' image of law, promoted through legal

⁶⁰ See Chapter 2, pages 129-130.

education, as doctrine focused and a public good going beyond the litigants in a particular case.⁶¹ Where little deference is displayed, it causes tension between the bench and LiPs. As a District Court judge said, while LiPs “are often better than lawyers” they are also “annoying”:

They don't necessarily shut up - to put it bluntly. It is nothing personal. They're not used to how the court operates and rules of court and the fact that it is the judge that is in charge.

Policy changes, both in New Zealand and abroad, may be in part responsible for LiPs conceiving themselves as consumers.⁶² For example, the requirement to pay filing and hearing fees,⁶³ and the introduction of an annual survey measuring “court-user satisfaction”, designating court users as “customers”.⁶⁴ The Chief High Court Judge criticised this development, which she noted also included calling judges and lawyers “stakeholders” and District Court centres “franchises”: “We are now to understand that we are part of a market for justice services and our product is being ‘marketised’”.⁶⁵ A participant told a story that illustrated market ideology becoming embedded in the court system: a bailiff was warned not to enforce an order against a vulnerable, one-shot litigant, because the litigant’s right to a stay had not yet expired. The party seeking to enforce the order was a large, well-resourced, repeat litigant. The bailiff enforced the order regardless, without waiting for the right to stay to expire, on the basis that the repeat litigant enforcing the order “had a right to customer service”.

Judges, particularly in the High Court, saw their role as developing precedent, rather than simply adjudicating private disputes. As Genn argues, “civil justice has important and extensive social functions that go beyond settling disputes” between individuals, including “functions in relation to social justice, economic stability and social order”.⁶⁶ Promoting the idea of litigants as

⁶¹ See for example Julie Macfarlane *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, Vancouver, 2008) at 33 for legal education as doctrine focussed. See Chapter 2, pages 34-35 for discussion of litigation as a public good.

⁶² Macfarlane, above n 48 at 51 noted evidence in Canada of LiPs viewing the “... justice system as a ‘service’ facility, no different from other government offices” and that going to court would include the same complexity and involvement for the LiP as “... applying for a passport or a vehicle licence”. Sharyn Roach Anleu and Kathy Mack “Magistrates' Everyday Work and Emotional Labour” (2005) 32(4) *Journal of Law and Society* 590 at 596 suggest that the concept of “emotional labour” used in their analysis may have “become more applicable due to management reforms and a concern with measuring client/customer satisfaction” (citing Richard Moorhead, Avrom Sherr and Alan Paterson “What Clients Know: Client Perspectives and Legal Competence” (2003) 10(1) *International Journal of the Legal Profession* 5).

⁶³ High Court Fees Regulations 2013; District Court Fees Regulations 2009; Family Court Fees Regulations 2009. The family justice reforms also introduced a mandatory fee for Family Dispute Resolution.

⁶⁴ Ministry of Justice “Court User Survey 2014” (October 2014) <www.justice.govt.nz> (The survey respondents include litigants, criminal defendants, and people attending court to support a friend or relative).

⁶⁵ Helen Winkelmann “Access to Justice – Who Needs Lawyers?” (2014) 13(2) *Otago Law Review* 229 at 232. This trend was evident from interviews with court staff who said that people holding long term institutional knowledge had been shifted out of their roles and people from other areas moved in, emphasizing their role as bureaucrats rather than experts.

⁶⁶ Hazel Genn *Judging Civil Justice* (Cambridge University Press, Cambridge, UK; New York, 2010) at 17.

“customers” creates expectations that are at odds with the idea of litigation as a public good and the dominant ideas of the bench and bar. This suggests a mismatch between some LiPs’ expectations about how long they should have to argue their case and the goals of speed and efficiency being pursued in the court.

2. *Strangers in the Halls of Justice*

A metaphor that LiPs, the bench and bar all used is that of the court as a “foreign land”.⁶⁷ The idea that LiPs are visitors to this foreign land of justice is useful for reframing the problems that arise in these interactions. The features of this foreign land include specific rules about turn-taking, forms of address, physical proximity (specific seating positions in the courtroom with no movement around the court), eye contact (litigants should look at the Judge rather than addressing their adversary when making an argument), language (both vocabulary and register),⁶⁸ and dress (gowns with a dark suit in the High Court, muted colours and formal clothing in the District and Family Court). The fact that many LiPs belong to the same national culture and speak the same English language as members of the bench and bar may worsen the problem, because where groups speak the same language (e.g. New Zealanders visiting the US), this may “obscure any differences” and the visitor “may not realise they are sending unintended messages [to the host] and distorting incoming information”.⁶⁹ The problems are not due to LiPs’ “failures”, but, in this light, an unsurprising consequence of a cross-cultural interaction.

Judges recognised that subtle forms of cross-cultural communication were important in the court:

When everyone is represented I suppose it is like you are all in a secret club really, in the sense that everyone is talking off the same page and the idea is that everyone knows

⁶⁷ See discussion above including the following quotes: “It is almost like they are speaking another language” (LiP); “The court process is stressful and foreign to [LiPs]” (lawyer); “I try to speak their language” (Judge). See also Winkelmann, above n 65 at 239: “The court system is for many a foreign land and the notion of bringing proceedings without legal representation can be compared to the fearful prospect of being stranded in a foreign land unable to speak the language, and without the money needed to find your way home.”; William Felstiner and Austin Sarat “Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions” (1992) 77 *Cornell Law Review* 1447 at 1455 referring to client-lawyer interactions as that of two cultures “[m]aking a landfall in the treacherous waters of each other’s world”.

⁶⁸ Janet Holmes *An Introduction to Sociolinguistics* (4th ed, Taylor and Francis, Hoboken, 2013) at 266 explains that a register is developed “initially from the desire for quick, efficient and precise communication” but over time it develops “... more and more characteristics – lexical, syntactic and even phonological – which distinguish their communications from those of other groups. Eventually these specialised registers may be very difficult for outsiders to penetrate”. Sharyn Roach Anleu, Kathy Mack and Jordan Tutton “Judicial Humor in the Australian Courtroom” (2014) 38(2) *Melbourne University Law Review* 621 identify the specific uses of humour in the courtroom. This varies from the forms and appropriateness of humour in other settings. Tatiana Tkačuková “Language and Law” (2015) <www.linglaw.org> is a linguist researching the communication needs of litigants in person. The results of her study are due to be published in July 2015.

⁶⁹ Colleen Ward, Stephen Bochner and Adrian Furnham *The Psychology of Culture Shock* (2nd ed, Routledge, Hove, England, 2001) at 53.

what the law is and you can use certain words and phrases that everyone knows what it means. (HC Judge)

It is a funny thing courtroom dynamics. It is just little things, isn't it? (DC Judge)

Procedural justice theory, discussed in Chapter 2, suggests that the Judge is correct to think that it is the little things that matter. Procedural justice theory points to LiPs being attentive to whether they are being treated with dignity and respect, are given an opportunity to participate and to whether the forum is neutral.⁷⁰ Misunderstanding the roles and reasons for conduct in this foreign land negatively affected some LiPs' sense of procedural justice. Some expected assistance from the Judge and thought the judge would know their case well. When the Judge disappointed these expectations, the LiPs attributed this to the Judge being lazy or inadequate or prejudiced against them. Where opposing counsel were cool towards them they believed the counsel were trying to "rile" them, whereas it is possible the counsel were protecting themselves and their clients (although there was some evidence that the motives were not always so pure). When Judges made changes in procedure because they wanted information to help them reach a substantively correct decision, such as deferring to opposing counsel, this negatively affected LiPs' sense of procedural justice.

When Judges tried to make the court less foreign, by way of using a familiar style of interaction, LiPs felt more comfortable. One felt like the Judge was "speaking English" when the Judge abandoned the legal register and instead adopted an informal tone to address the parties. Another was pleased to get a smile from the Judge, even though it was at the LiP's expense (having misused the term "bench"). While these judicial efforts made LiPs more comfortable they could also result in "cross-cultural" communication breaking down. For example, one LiP was buoyant after a judicial conference, both because he misapprehended the difficulty of the task before him but also believing the Judge was "warming up", having smiled while in court. I, however, perceived the conference to be legally-disastrous and held grave concerns for his case (later realised). Staying within the formal register, however, can lead not only to puzzlement but also to "upset and anger".⁷¹ Discussing examination of lay witnesses in criminal trials, Fielding concludes that the "unfamiliar, mannered and challenging questioning styles may feed a sense of unfairness" among lay participants.⁷² This suggests that the foreignness of the court environment may create miscommunication and alienation regardless of the best intentions of all involved. Whether there

⁷⁰ See Chapter 2, pages 32-34 for discussion of procedural justice.

⁷¹ Fielding, above n 31 at 292.

⁷² At 292.

is a need for the court environment to be foreign, and to what extent, is debatable.⁷³ For present purposes it is sufficient to note the seemingly intractable tensions it creates.

3. *Excising Emotion*

A feature of this foreign land is a different role for emotion. In this world, emotion is considered “irrational, disorderly, impulsive and personal”, and at odds with the dispassion and impartiality that are core judicial values.⁷⁴ Roach Anleu and Mack argue that Judges must manage their own emotions and that of the court users to maintain the “impartiality, fairness and decorum” of the court and the appearance of “rational application of law”.⁷⁵

Lawyers serve this function as they “filter out or manage many emotions”, so that what is presented to the court is a legal argument, “... relatively independent of external forces, including the concerns and demands of lay participants”.⁷⁶ Where litigants appear in person there is no lawyer to perform this filtering. The Judge is left to manage the “raw emotions” of the LiP,⁷⁷ and may have to perform extra work managing their own emotions, for example in displaying patience and courtesy.⁷⁸ This work is “an essential component of enabling court users to experience the legal process as fair, impartial, and legitimate”.⁷⁹ However, while the dispassionate atmosphere of the court may enhance procedural fairness, it may also produce a sense that the judge has not understood or heard all aspects of their case that they think are relevant.⁸⁰

In the lower courts judges have more contact with lay people, either as LiPs or witnesses, and a higher volume of cases, so do more work managing emotion (their own and others).⁸¹ The higher court judges usually need to do this work less, so the presence of LiPs requires them to perform additional work to which they are not so accustomed. For example, a High Court Judge described a competent family law appellant in person and struggled to articulate what made the case difficult to hear:

⁷³ The reasons for the foreignness of the court is debatable. The robes, language and “odd etiquette” can remind both judges and litigants that court is unlike a normal social interaction, and involves the rational application of law to fact: Judith Resnik “Managerial Judges” (1982) 96 Harvard Law Review 374 at 383. Alternatively, it can be conceived as a means of maintaining social closure, making it difficult for lay people to break the monopoly over legal services: see Chapter 2, pages 29-30.

⁷⁴ Sharyn Roach Anleu and Kathy Mack “Judicial Authority and Emotion Work” (2013) 11 The Judicial Review 329 at 329-330.

⁷⁵ Roach Anleu and Mack, above n 62 at 603; Roach Anleu and Mack, above n 74 at 330.

⁷⁶ Roach Anleu and Mack, above n 62 at 591.

⁷⁷ At 607-611 describe techniques developed by magistrates who often hear cases involving LiPs to manage emotion in the court including acting like a mediator, taping proceedings and taking adjournments.

⁷⁸ Roach Anleu and Mack, above n 74 at 335.

⁷⁹ Roach Anleu and Mack, above n 62 at 593.

⁸⁰ See discussion of the role of emotion in Chapter 4, pages 113-114 and Chapter 6, 158-161.

⁸¹ Roach Anleu and Mack, above n 74 at 339.

She had prepared excellent submissions She knew her way around the Act It was just that she had been so closely involved in it. It was about children and maintenance and things. She herself was getting you know, very - quite emotionally involved in it. It just made the hearing - well maybe that is what they get all the time in the Family Court, but it is just not quite what we are used to here.

While not articulated, it may be the additional “emotion work” that the Judge was required to do that was troubling.

LiPs’ raw emotions also present a challenge to the “purity” of the judges’ work. Abbott argues that status within the legal profession is a “function of professional purity . . . the ability to exclude nonprofessional issues or irrelevant professional issues from practice”.⁸² Corporate law operates in an exclusively legal world and is therefore much “cleaner” and therefore of higher status than criminal prosecution or tenancy evictions where the “drama in real human lives, [mocks] the pristine abstraction of the law”.⁸³ The presence of LiPs therefore challenges the purity of the work, particularly in the higher courts, bringing emotion into a place where cases are usually stripped to legal principles. The role of emotion is therefore another explanation for tension between the professional participants and LiPs in the courtroom.

E. Conclusion

The court is the legal profession’s heartland and the symbolic meeting place of law and society. When LiPs enter this domain they enter a foreign land designed its usual inhabitants, the legal profession and the judiciary, in mind. LiPs bring their own interpretations and expectations to the courtroom that often differ from those of opposing counsel and judges, generating tensions which are not easily resolvable, even when all try to overcome them. Judges are however committed to giving some substance to the bare right to access the courts in person and employ various techniques to try and accommodate the LiPs. The judges and lawyers also have an interest in protecting the domain of the courtroom from LiPs, both because it places their roles under strain and makes additional demands on time, and because the courtroom is an important centre of the legal profession’s identity.

In the next chapter I continue exploring these themes, examining the final stages of litigation: judgment, costs, enforcement, and appeals, as well as LiPs’ complaints against opposing counsel and judges.

⁸² Abbott, above n 55 at 823.

⁸³ At 825.

Chapter 9

After Court

Once the process of appearing in court was over, LiPs waited for judgment. Sometimes this was a brief wait, with oral judgment given immediately, or a written judgment handed down shortly after the proceeding. For others, there was a period of several months before the outcome was known. For many LiPs, judgment did not mean the end of proceedings but the beginning of further arguments over costs, enforcements and appeals. After judgment, and sometimes during litigation, some became involved with complaints.

This chapter considers this process after court and returns to the question addressed in the chapter about becoming a LiP, to examine what LiPs thought in retrospect would have been the value of having a lawyer. The final part of the chapter looks at the end of proceedings in the context of the themes of projecting accessibility, lay expectations, and dangerousness. As persistent litigants usually express their persistence in terms of multiple appeals, this chapter also has an extended discussion about the vexing issue of persistent litigants.

I. Finalising Proceedings

A. *Writing Judgments*

The Judges, particularly in the High Court, said they tended to hear all argument and then reserve their decision. This option was not always available in the higher volume, lower courts. Where Judges could reserve judgment, it had two advantages: courtroom management and accuracy.

From a courtroom management perspective, Judges said they preferred not to give oral rulings because of the possibility that it would cause disruption and argument in court. This was particularly in relation to “vexatious litigants”, whom Judges thought might get upset in court:

My mentor’s advice was – and what I advise others – you know, sit there, hear what they are saying, don’t interrupt, keep quiet, do the best you can to not say anything. Take a full note of what they are saying and reserve your judgment. (HC Judge)

The concern was borne out, for example, by one LiP’s description of an oral judgment handed down to him in Court some years ago:

Judges never say what they are going to rule on anymore. [One Judge] is the worst of any Judge. [That Judge] is just disgusting. I had a stand up argument with [that Judge], who said “I’m the Judge and I will rule”. We had a stand up argument and [the Judge] just kept ignoring the facts.

Court staff said that on occasion a security guard was posted in the back of the court or in the registry office, particularly when someone whom they believed was “prone to loud and almost violent outbursts” was in the courthouse. A family law practitioner also pointed to the risk of outbursts in that court, particularly in the post-reform courts when more litigants are expected to appear in person: “There could well be violence because these people aren’t rational who come before the Family Court”.

Recall that Judges identified a number of issues with LiP documents (in general) and also style of presentation in court, for example long and unfocused submissions. Judges said that where these issues occurred, judgment writing took longer because of the time it took to ensure they accurately understood the LiP’s case and accurately applied the relevant law. High Court Judges said that extra time required to write judgments in LiP cases was a reason they “not always, but in a fair number of cases”, took more judicial time:¹ “Sometimes it does take a bit of extra thinking”; “You have to do a lot of foot work yourself”. Judges said that this extra time was also needed for persistent litigants who often brought cases that were “absolutely clear cut”, in the sense of lacking any merit. The Judge said that even if ultimately there “was nothing to the point” you still “have to go to a lot of trouble” because sometimes they “have a good point. The trouble is finding it”.

One Judge, and a few lawyers, considered that having a LiP as a party negatively affected the quality of judgments: “It is just impossible to do a job that also involves development of the law or some issues that might involve that, without legal assistance” (HC Judge). Other lawyers however thought that judgments were better when LiPs were involved. A Family Court lawyer said that judges, like lawyers, probably, “... take a little more care in their paperwork because you want to feel like you've dotted your ‘i’s and crossed your ‘t’s”. So:

The decisions are usually very well crafted so that, if it went to the High Court or something, that a High Court judge would be in no doubt about what decision was reached and why. I'm not saying they don't give quality decisions in other cases, but if you've got lawyers representing and they are pretty clear about what the result is going to be then they are going to be perhaps not quite as careful as they'd be with litigants in person.

Judgments, either oral or written, sometimes contained statements about the LiP’s conduct of the case being typical of LiPs in general.² Sometimes these were phrased as being “understandable” given the complexity of the procedure, and at other times were given as examples of problematic LiP behaviour, such as using inflammatory language and making claims (sometimes scandalous)

¹ The other major reason cited for LiP cases usually taking longer was longer hearing times, see Chapter 8, page 202.

² I am unable to quote examples of statements from judgments because the quote could be entered into a legal database and would match a case, thereby disclosing the identity of the participant.

without evidentiary support. In judicial minutes or judgments on interlocutory applications, the comments on LiP conduct formed part of an encouragement to seek advice or representation. At other times the statements were made in support of costs awards against the LiP.

B. Costs

1. Costs against LiPs

In the District and High Courts the general rule is that the unsuccessful party pays the successful party's costs.³ Costs are, however, discretionary. In the Family Court, costs are also discretionary, although at the time of the research costs orders in the Family Court were relatively uncommon in cases involving children.⁴

A court staff member said that LiPs were aware of the fees, as they had to pay them to initiate proceedings, but many LiPs did not understand the fact that, just because "you by-pass the legal advice step ... and avoided legal fees yourself", you don't avoid "your liability for costs orders against you".⁵ A few LiPs told me they "had nothing left to lose" by taking or defending proceedings, which suggests a lack of understanding that a costs order can be made and enforced, including by way of bankruptcy proceedings.

Opposing counsel and Judges made reference to the costs of litigation, alluding to the costs for which the LiP might be liable if unsuccessful. This exchange in a High Court case is an example:

LiP: (Hands over a large box of discovery documents and talks about the cost of printing them).

Opposing counsel: The cost of litigation, eh? I had a case recently where the discovery folders and dividers cost \$1000. Not cheap is it, nor the hearing fees either. That is why I want five days. Poor [first name of opposing party] has to pay \$3,500 per day.

The meaning of this exchange, which I interpreted partly as a warning, may have gone unnoticed by the LiP who demonstrated a very rudimentary understanding of the costs regime. Some lawyers suggested there was an arguable case for saying costs awards against LiPs should be higher because litigating against LiPs created additional expense.

³ High Court Rules, r 14.1 and District Court Rules 2009, r 4.2 (now 14.2 of District Court Rules 2014).

⁴ Family Court Rules 2002, r 207, but note there is debate about the operation of costs in the Family Court (see Simon Jefferson (ed) *Brookers Family Law: Family Procedure* (online, looseleaf ed, Brookers) at [CD1]).

⁵ There are fees for all applications, but the fees for High Court applications are particularly high. As the Chief High Court Judge calculated, the fee payable for a straightforward one day hearing in the High Court, is \$6,700: (Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (2014) 13(2) *Otago Law Review* 229. The same calculation using the District Court Fees Regulations 2009 is \$2,300 for a one day hearing in the District Court (or \$1,400 for a half day). This fee can be waived by the Registrar if the litigant is a beneficiary or "would otherwise suffer undue financial hardship": High Court Fees Regulations, reg 19 and District Court Fees Regulations 2009, reg 5.

Judges, lawyers and court staff encouraged LiPs to seek representation, sometimes bluntly, at other times by way of more gentle encouragement.⁶ When this advice was not heeded it was sometimes invoked in justifying costs awards. As a High Court Judge said:

Sometimes you get litigants who have been repeatedly advised to instruct, or at least to get legal advice, and then lose horribly, so submissions [by opposing counsel] are made about that. [The submissions are about] the recommendations to do that [get advice or representation] and the [LiP] bearing the consequences, I suppose.

Oceanic Palms Ltd v Disputes Tribunal at Auckland,⁷ and *Belling v Belling*,⁸ are both examples of cases where the Judge accepted submissions that the LiP took unnecessary steps and put the opposing party to expense in the face of judicial warnings about costs and the need to seek representation. In *Belling*, Hammond J approved Fisher J's holding:⁹

While an unrepresented party should not be penalised on that account alone, if the result has been to throw an extra burden of legal costs upon the represented party, there is no reason why some recognition should not be given to that.

In *Oceanic*, Courtney J held, "... the reality is that litigants in person must be taken to accept the dangers of managing the court process without legal assistance".¹⁰

Where a LiP is successful there is generally no right to recover costs, only out of pocket expenses.¹¹ In the leading case, *In Re Collier (a bankrupt)*,¹² Temm J said that whether LiPs should be paid for their "time and trouble raises many important considerations of both policy and practice, and ... is not really a matter that can be solved by a Court".¹³ One of the "policy" reasons, hinted at but not explained, is that awarding costs to LiPs might encourage them. As a High Court Judge in this research said, "I would have thought if [LiPs] became entitled to costs that would act as an incentive to self-representation and, as I say, I don't think it should be encouraged". One Judge also suggested that, while LiP numbers were currently manageable, if they "become a real concern" there are a number of measures that could be taken, including better education about how to conduct themselves, and "costs orders can be made against lay litigants; the Court can take a firmer line with them in the conduct of litigation". Other Judges and lawyers also said costs awards in

⁶ See Chapter 6 for discussion on encouraging LiPs to seek representation.

⁷ *Oceanic Palms Ltd v Disputes Tribunal at Auckland* 13 May 2005, HC Auckland CIV-2005-404-39913.

⁸ *Belling v Belling* (1996) 9 PRNZ 296 (HC).

⁹ At 576.

¹⁰ *Oceanic Palms Ltd v Disputes Tribunal at Auckland*, above n at [12].

¹¹ Out of pocket expenses, referred to as disbursements, includes legal fees for limited retainer advice: *Official Assignee v Cavell Leitch Pringle & Boyle* HC Christchurch CP131/88; B28/91, 18 August 1995.

¹² *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA).

¹³ At 12 at 441 per Temm J.

favour of LiPs would encourage more litigants, as well as saying that costs should not be awarded because the LiP had not incurred costs, only time and effort, which all litigants put into litigation.

Many LiPs said that the amount of work they put into preparing a legal case exceeded what a represented litigant would ordinarily expend, particularly if the LiP carried out the research necessary to present the case thoroughly and in keeping with the rules. LiPs said that they put in “hours and hours” of time and cited loss of income from other activities and distraction from work: “Your productivity goes down” (HC LiP). A LiP who was receiving a Government benefit said:

The whole court thing would be impossible if I was working full-time. All the time I'd need to take out to go to meetings, court, assessments, and being able to do research and prepare all the paperwork. I mean if I'd been working full-time that would never have happened, or else I'd be censured for spending too much time doing my private stuff. (FC LiP)

Some lawyers and Judges recognised this, particularly District Court Judges, and said that LiPs should get, if not costs, then “compensation or restitution” for the “time out of work, ... lost wages, ... travel, and that sort of thing” (DC Judge).

One LiP who was successful in his High Court case noted that the presumption against costs in favour of LiPs was not just unfair in terms of compensating him for the time he spent. He also believed the presumption encouraged his opposing represented party to appeal against him, because even if they lost the appeal they would be exposed only for the amount of their own costs, not his costs. Similarly, a High Court LiP believed that the presumption against recovering costs encouraged the opposing party's counsel to take unnecessary interlocutory steps, as it would create more work for her, but little risk of having to pay costs.

C. Enforcement

Several LiPs were frustrated and disappointed when they realised the court orders and negotiated agreements were not self-executing.¹⁴ As one LiP said, “Well, you imagine you go to Harvey Norman and buy a washing machine, but the delivery man doesn't deliver it. That is how I'm feeling”. She was one of three LiPs who entered into agreements to divide relationship property with their former partner but struggled to enforce the agreement.¹⁵

¹⁴ William Felstiner and Austin Sarat "Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions" (1992) 77 Cornell Law Review 1447 at 1461 identify that in the context of divorce proceedings many “clients are slow to realize that many legal entitlements are not self-executing”.

¹⁵ These agreements were made under the Property (Relationships) Act 1976, s 21. Their difficulties may not be surprising given there remains a question over whether a s21 agreement can be enforced as part of a proceeding,

Most litigants obey court decisions “whether or not they agree with it, because it issues from an institution with such authority”.¹⁶ In these cases there is no need for parties to enforce decisions. Crantson notes that in family law non-compliance is high and parties often have to approach the court afresh to bring enforcement proceedings.¹⁷ A Family Court LiP who initially instructed a lawyer did not comprehend the difficulties with enforcing court orders until after a defended hearing. At that point he had spent three years and thousands of dollars in legal fees:

It took me about two weeks to realise, after we'd been to court, that I'd been done like a dog's dinner. It didn't mean the end of things, all the rest of it. I still had contact issues and various other things.

He decided to start litigating in person after this point, dissatisfied and feeling cheated at having no certainty after spending so much of his savings. Another LiP became frustrated when Family Court staff were unable to tell her what process to use to enforce the division of trust assets:

I'm back to square one: how do I get these sealed orders implemented? I don't think there is a process, or if there is a process, no one on the court counter knows how to do it. Everyone assumes that because you've got orders they'll comply with them.

For those who recognised the difficulties with enforcement in advance, it was a factor in deciding to litigate in person, believing a lawyer would add little when the litigant expected the opposing party would be intransigent or impecunious.¹⁸

D. Appealing

The research was focused on first instance determinations of disputes, but some LiPs did discuss appeals or were involved in appeals as appellant or respondent. Most LiPs said they were too intimidated by the formality of the appeal courts (the Court of Appeal, Supreme Court, and in some cases the High Court), to appeal their cases. When I asked a High Court LiP if she was going to appeal the decision she said: “Hell no! I left school at 15, man. I was a solo mum at 16”, and said she did not have “the courage or the will to appeal”. A few LiPs (mostly High Court LiPs) considered appealing was the natural next step. As one LiP said, “I am currently preparing for what I know is my inevitable appeal”. The LiP did not yet have the judgment and there was nothing in the conduct of the trial that he had raised as a possible ground for appeal. This comment

although it can be enforced via normal civil remedies. See Bill Atkin and others *Fisher on Matrimonial and Relationship Property* (online, looseleaf ed, LexisNexis, Wellington) at [5.14].

¹⁶ Ross Cranston “What Do Courts Do?” (1986) 5 *Civil Justice Quarterly* 123 at 139. See also Tom Tyler *Why People Obey the Law* (Princeton University Press, Princeton, 2006) at 172, concluding that people will comply with legal authorities where they believe the authority has followed fair procedure.

¹⁷ Cranston, above n 16 at 140.

¹⁸ See Chapter 4, page 95. A LiP who recognised potential difficulties enforcing a judgment weighed this in his decision to litigate in person. He assessed his likelihood of success on the legal claim as “90 per cent” and thought employing a lawyer might improve that chance “marginally”: “However, I would still have the problem of getting my money”.

therefore indicated a fundamental misunderstanding about the nature of an appeal: there must be an error of fact or law to appeal against. An appeal is not a second-chance to argue the case.¹⁹

A small number of very persistent litigants made multiple collateral attacks on the original judgment, sometimes launching multiple proceedings:

Unfortunately [the LiP] came across the ability to recall. I think at one stage [he] was applying for recall of a decision, refusing to recall a decision, refusing to recall a decision, refusing to recall a strike out of a decision - so he was asking to recall the third lot of ... refusals of recall. So, you know, that was just a nightmare. (Civil Litigation Lawyer)

The collateral attacks were not just against the decision but sometimes against the decision-maker as well. Persistent LiPs made complaints to the Judicial Conduct Commissioner (JCC)(discussed below) and launched private prosecutions or other proceedings against the Judges, attacking the Judges' professionalism:

[A persistent litigant] said I was bribed by the defendants. I'm not quite sure what happened because I was supposed to have been on a [tropical] holiday and I didn't get it. And with everyone else he alleged corruption and judicial bias and all these sorts of thing, to keep the [case] going. (DC Judge)

This pattern of appeals and collateral attack (often by way of judicial review, which originates in the High Court), is probably responsible for the much higher percentage of persistent litigants in the higher courts. As a District Court judge commented:

I think the higher up the food chain in the law you go the worse the self-reps, because the Supreme Court, that is their regular diet - so I mean it is not - it is a problem shared across the benches.

II. In Retrospect - Reflections on the value of having a lawyer

A. The value of lawyers – in retrospect

I asked LiPs whether, with funds and their time again, they would instruct a lawyer. Few gave a definitive answer, qualifying statements that they would choose a lawyer with conditions such as needing the “right” lawyer. This would be someone with both the necessary specialisation and commitment to the detail of their case, and they doubted such a person existed. LiPs who said they probably would instruct a lawyer emphasised, not the benefits of the lawyer’s professional knowledge, but their belief that their case would be taken more seriously if they had a lawyer.

¹⁹ Part II of Rosemary Hunter and others *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (2002) is a detailed consideration of the problems LiPs faced in appealing Family Court decisions, including discussion of the fact that many LiPs misunderstood “the function of the appellate court, viewing an appeal as a right to a complete hearing de novo” (at 123).

A number of Family Court LiPs felt they simply were not listened to by the Judge, opposing lawyer, court staff, and lawyer for child, because they were a LiP. As one said:

It is almost like you are not being believed because you are not a lawyer. [The opposing counsel] can stand up and say ... things which aren't true and it is okay.

Another Family Court LiP said that there “was no practical advantage whatsoever” in being a LiP: “You get totally ignored [by the Judge and lawyer for child] on ridiculous points”.

Family Court LiPs suggested this was due to a very strong presumption that litigants would be represented. For example, a LiP was surprised at how difficult it was to have his lawyer removed from the record when the lawyer failed to file a withdrawal of representation when he instructed the lawyer to do so. He said the court staff would not deal with him until they had received the withdrawal. He said:

If the lawyer is non-contactable, it is ridiculous that it should stop a court process. You should be able to register the fact that a respondent is saying they don't want a lawyer present. They could have just recorded it on the file, say “We've had a notification in-person from [name] that he doesn't want to have a lawyer”. It should be made easier. The default seems to be that you need to have a lawyer for something to work.

Another Family Court LiP thought it was a widespread and strongly held belief that all litigants need a lawyer:²⁰

So every professional freaks when [they hear] I am self-represented. I got that you need a lawyer from just about every one of the professionals. There is a morbid fear, parallel to the fear held by humans in the days when [they thought] the earth was flat, and that if you travelled so far you would fall off the end of the world. It is worse than the Santa [Claus] myth, because at least when you get to 10 years [old] you realise it's a myth.

This LiP eventually instructed a lawyer after both the Judge and lawyer for child strongly urged her to find counsel, but she did not do so willingly: “I've had massive resistance; they want to find some excuse to keep me out. I'm sad about the lack of choice; it is like I don't have a choice”.

In addition to believing a lawyer would make the judges and lawyers take them more seriously, LiPs also considered that a lawyer would have been helpful for screening them from the opposing party's attack:

[My lawyer] was in some ways like a bodyguard, like a [pop star] bodyguard. He stops the person who is a little bit delinquent, or a little bit impassioned, from getting into trouble, if that makes sense. It is really stupid, it shouldn't be like that. I have an immaculate police record, I'm a fully registered [professional] and I - I get all those

²⁰ This quote is an unabbreviated version of the original text message: “So evry professional freks wen i am self rep. I got da u ned a lawyer frm jst bwt ev1 ov da proffesionals. Dea is a morbid fear paralell 2 da fear held by humans in da days wen da earth was flat n dat if u traveld so far u wud fall off da end ov da world. Its worse dan da santa myth cos at least wen u get 2 10 yrs u realise its a myth”.

things - all my integrity and stuff is called into question by [the opposing party's] lawyer. ... When I employed [my former lawyer] it is like I dropped behind the barrier and he, ah, diverts attention from me to the issue - keeps the focus on the issue.

Another LiP identified similar benefits in having a lawyer, and instructed a lawyer for the final hearing:

I took a lawyer in for that just to finish it off, just to speak a bit more aggressively in court, because in court, when you are self-represented, you can't speak aggressively. Alright? You can't thump your fist on the bench and start saying "These allegations are ridiculous and false, and no, I don't have anger issues". You can't do that, but your lawyer can.

These LiPs recognised, in retrospect at least, the screening function a lawyer could serve. Rather than presenting themselves in the “raw”, a lawyer could limit their contact with the opposing party and present their legal case while shielding them. Matt’s story illustrates the decision that some of the LiPs came to, that it was preferable to employ a lawyer for at least part of the proceeding, so that they would have the benefit of the lawyer as a screen.

B. Complaining

Some LiPs were satisfied with their experience and praised or at least had some positive comments about the court staff, Judges and lawyers involved in their case. Many had criticisms and made complaints seeking redress for perceived failings. Most commonly these complaints were made to the MoJ (about legal aid) or the Law Society, sometimes about their previous counsel but also about the opposing party’s counsel, or to the JCC, about their presiding Judge. The other avenues of complaint were the Courts’ Manager, the Heads of Bench, the Minister of Justice, the Minister for Courts, Members of Parliament, the Ombudsman, Human Rights Commissioner, Privacy Commissioner, Police, newspapers, web forums and talkback radio.

Complaining is often associated with persistent litigants,²¹ but novice and one-shot LiPs also made complaints, sometimes several. The Law Society does not record the proportion of complaints that come from LiPs, but I was surprised by the large number of complaints that the LiPs in my study made to the Law Society. The complaints covered a range of issues. Over-charging was a common source of complaint, either where the lawyer had previously been acting for the LiP, or was acting on a limited retainer. Where the lawyer complained about was the opposing counsel, complaints concerned failing to answer correspondence, rudeness, and bullying. Lawyers were generally defensive when the subject was raised; several said they had received complaints but

²¹ See discussion of persistent litigants, Chapter 2, pages 18-21.

emphasised they had successfully defended them. One lawyer also suggested that a LiP complaint might have been made to manipulate the conduct of the litigation:

She made some sort of complaint [to the Law Society] that was intended to demonstrate unprofessional conduct. But, of course, there was no substance to it. She might have thought that by making that complaint I might be intimidated into backing down on some particular step. (Civil litigation lawyer)

The complaints that I reviewed were generally long and detailed. Lawyers who were subject to complaints mentioned the amount of time and effort spent defending them. Some instructed lawyers to reply on their behalf.

The JCC also kept no statistics on whether complainants were LiPs, but estimated that at least 95 per cent of complaints were from LiPs.²² The Judges did not mention the risk of JCC complaints, but some LiPs did complain to the JCC during the course of the research. One complained about a Judge's conduct during a settlement conference. When I spoke to him immediately after the conference he was upbeat, saying he thought it had gone well. The following morning he was deflated and said that, on reflection, he was disappointed with the conference, feeling the Judge had not leaned heavily enough on the opposing party and was more concerned about getting a settlement than the rights and wrongs of the dispute. By the end of the week he had made a complaint about the Judge's conduct in the conference to the JCC.

Another LiP complained to the JCC because she felt the Judge had criticised her case so much in Court that the opposing counsel had been emboldened to pressure her into a settlement against her interests. She considered that the Judge, rather than treating her fairly and protecting her, had worked together with the opposing counsel to shut down her case. Neither of these LiPs were persistent but most of the persistent LiPs that I studied also made complaints, sometimes several.

LiPs demonstrated little faith in the independence of the avenues of complaint:

The Law Society isn't an independent body. The Judicial Conduct Commissioner is a lawyer, the Minister of Justice is a lawyer. ... It is the old boys club. Sir David [the Judicial Conduct Commissioner] would say "I'm not here on any legal basis, just on conduct". So unless you can videotape them [the judge] having a meltdown in the court he could pretty much do what he likes. (FC LiP)

The Law Society, they didn't uphold one thing. I find that so bizarre. It feels like the lawyers are just covering themselves. ... I'm not a lawyer and the [lawyer I complained about] did - I don't know how many hundreds of pages, three quarters of a ream - to answer my complaint, something for everything. How can you argue against lawyers?

²² Email from Judicial Conduct Commissioner, 16 April 2015, on file with author.

[The lawyer's partner] is on one of the committees so he'd know them all. ... The lawyers are managing to get away with blue murder. (FC LiP)

A High Court LiP observed that the Law Society's response to his complaint relied on generalisations about how LiPs conduct themselves, listing the difficulties lawyers commonly experience when litigating against LiPs, rather than engaging in analysis of his particular case. He interpreted this as evidence of bias against LiPs and of lawyers protecting their own.

Few of the complaints were successful. None of the LiPs who complained to the Law Society and JCC, whose complaints had been finalised at the time of writing, had their complaints upheld. A Family Court LiP was successful in having his ex-partner's Legal Aid-funded lawyer reviewed and removed from the case. He said his ex-partner's lawyer sent "totally aggressive letters and emails [that were] very accusing and very degrading". The LiP's friend, who was a lawyer, advised him that he did not need to respond to the letters, and that he could complain to Legal Aid:

Legal Aid investigated it and they sent me a letter saying they've been removed from Legal Aid. That helped my case a lot because I then wasn't being harassed by her lawyer.

A complaint to a Minister was also successful, although no remedy was offered. The LiP was not notified of a case management conference and it proceeded in the LiP's absence. The Minister she complained to found there had been a failure of notification and expressed concern at this being an example of "less than satisfactory customer service".

III. Discussion

A. Accessibility

The process after court left some LiPs feeling excluded. Some LiPs took this exclusion to indicate institutional bias against them, and they believed they needed a lawyer to overcome this bias. It was for this reason they thought a lawyer would be of benefit, rather than for any professional skill and knowledge the lawyer might bring.

The presumption against LiPs being awarded costs was one factor which led to LiPs feeling excluded. This may be somewhat intentional, as the underlying purpose of the rule is discouraging litigation in person. The reasoning is that allowing costs recovery only for counsel encourages litigants to seek representation, rather than using their own time for which they will not be reimbursed. Judges, particularly in the High Court, said they would prefer it if all litigants were represented.²³ That the purpose of the rule is to encourage representation has more force when we consider the exception to the rule: lawyers holding a current practising certificate who appear

²³ See Chapter 8, pages 187-188.

in person in their own case are allowed costs, although they may not have costs for instructing, consulting or attending upon themselves.²⁴

That the rule is based on a fear of encouraging LiPs is perhaps unsurprising given the context of the leading case on the issue. The Court, in that case, *In re Collier (a bankrupt)*,²⁵ would have been very reluctant to do anything to encourage Mr Collier. He was a persistent litigant and four years later became part of the small group of litigants to be declared vexatious.²⁶ While emphasising that costs were discretionary, Temm J gave examples of when LiPs recovering costs might be justifiable:²⁷

... it could happen that a litigant might involve himself in an action without hope of any personal gain or advantage, but purely out of the concern for the welfare of the general public.

This is a high bar to set. There are other reasons to litigate that will not surmount this threshold, but may give rise to a sense of injustice if the LiP is not awarded costs. For example, in the Ontario Supreme Court case of *Bergen v Sharpe*, the represented defendant, who was the plaintiff's ex-husband, made false allegations that the LiP-plaintiff was a "dangerous criminal involved in the sex industry", thereby obtaining temporary custody of the couple's son.²⁸ The LiP-plaintiff disproved the allegations and the Judge said she "presented her case efficiently and as well as most lawyers would have done. She did not engage in misconduct or add unnecessarily to the time required for the hearing".²⁹ The Judge awarded costs of \$12,019.85 plus disbursements, benchmarking the award against the represented defendant's solicitor-client costs. The Judge in this case was directly rebutting the stereotype that LiPs increase costs in cases or bring unmeritorious litigation.

Bergen v Sharpe is part of a line of Canadian authority moving away from the presumption and allowing costs in favour of LiPs.³⁰ The UK introduced legislation in 1975 allowing LiPs to recover

²⁴ *Hanna v Ranger* (1912) 31 NZLR 159 (SC); *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA); Family Court Rules 2002 r 86(1): "A lawyer who is a party to proceedings and acts in person is entitled to lawyers' costs". In *Brownie Wills* at 327, Blanchard J said, "The High Court of Australia has cast some doubt on this exception (*Cachia v Haynes* (1994) 179 CLR 403 at p 412) but, not having been asked to reconsider the question, we do not depart from the practice of allowing costs to a solicitor/litigant".

²⁵ *Re Collier (A Bankrupt)*, above n 12.

²⁶ *Attorney-General v Collier* [2001] NZAR 137 (CA). See Chapter 2, page 21 on history of vexatious litigants in New Zealand.

²⁷ *Re Collier (A Bankrupt)*, above n 12.

²⁸ *Bergen v Sharpe* 2013 CanLII 74188 (ON SC) at [1].

²⁹ At [5].

³⁰ Canadian common law provinces have also moved away from the disbursements-only presumption. The latest in the line of authority is *Hope v Pylypow* (2015 SKCA 26). My thanks to Julie Macfarlane for drawing my attention to this case: Julie Macfarlane "Not De Cruz - But the SRL case you should have been paying attention to this week" (27 March 2015) <www.representingyourselfcanada.com>.

costs.³¹ In Canada, the courts have concluded that allowing LiPs to recover costs attains the broader purpose of costs awards, facilitating access to justice.³² There has been judicial acknowledgment in New Zealand that the presumption against LiPs recovering costs may be a “... significant deterrent to the exercise of his right to come to court in person”,³³ but this concern has not led to any modification of the rule. Another factor identified in Canada for abandoning the presumption against LiP cost recovery was that it created bargaining inequality in favour of the represented litigant.³⁴ As the Saskatchewan Supreme Court recently noted, the presumption “... effectively inoculates a litigant facing a self-represented party against any risk of an unfavourable costs award”, so the represented litigant does not have the same incentive to settle.³⁵ It is not difficult to see how such handling of costs could lead LiPs to conclude that lawyers hold a privileged place and LiPs they are not welcome.

Similarly, judicial statements of stereotypes about the typical problems LiPs present in litigation also fuelled a sense of exclusion. Some of these statements may of course be entirely justified. They also serve as a warning to LiPs of the need to seek advice or representation (when these statements appear in judgments on interlocutory issues, or judicial minutes). They may also be used to justify costs orders against the LiP (if they appear in a final judgment or separate costs decision). They also communicate the fact that there are restrictions on access to the courts. Recall Sarat’s argument that while the courts are formally open, by stressing the limits of citizen’s competence to access them without a lawyer, direct access is discouraged. Judicial statements in judgments and minutes serve the function of stressing limited competence to any future reader. Future readers are unlikely to include the general public, but may include prospective LiPs researching their case. These statements are therefore a means of discouraging LiPs. The other

³¹ The UK has legislation governing the issue: The Litigants in Person (Costs and Expenses) Act 1975, which allows LiPs recovery of “... sums in respect of any work done, and any expenses and losses incurred, by the litigant in or in connection with the proceeding to which the order relates”. Richard Moorhead “The Passive Arbiter: Litigants in Person and the Challenge to Neutrality” (2007) 17 *Social and Legal Studies* 405 at 413 notes that in practice there is unequal treatment of LiPs as Judges “... tended to ask litigants in person whether they wanted to apply for costs at hearings and would not, for instance, specifically encourage them to respond to a suggestion that they would make the normal order for costs (as they would do with lawyers). In effect this means they were offering lawyers costs orders but not offering them to litigants in person (partly because they were difficult to quantify)”.

³² Cf Adrian Zuckerman “A Reform of Civil Procedure - Rationing Procedure rather than Access to Justice” (1995) 22 *Journal of Law and Society* 155 at 166 who argues, “[T]he indemnity rule aggravates the already existing disadvantage under which the poor labour” because the poorer the litigant the greater the risk of not being able to meet the costs award. In this sense the indemnity rule does not operate to secure access to justice in any case where there is financial inequity between the parties. See also Rabeca Assy *Injustice in Person: The Right to Self-Representation* (Oxford University Press, Oxford, 2015) at 203 who suggests removing the presumption of cost-shifting, so that the right to access the court includes “a right to go to court and lose”, without being saddled with costs.

³³ *Re Collier (A Bankrupt)*, above n 12 at 441 quoting the High Court of Australia decision in *Cachia v Hanes* (1994) 179 CLR 403 at 415-416.

³⁴ *Hope v Pylypon*, above n 30 at [57].

³⁵ At 30 at [56].

most likely readers are members of the legal profession and, if the LiP appeals, the appellate court. The statements reinforce beliefs about problematic LiP behaviour in the courts, and may also serve the purpose of telling the appellate court that this LiP was “difficult”, making it more sympathetic to the trial judge.

The increasing formality, and the number of judges as a case progresses through the hierarchy of courts was intimidating for some LiPs who contemplated appealing.³⁶ This of course may in part be intentional: a form of communicating to all litigants that appeals are not to be taken lightly, with the further message that this is an arena requiring specialist skill.³⁷ However, the persistent litigants and some LiPs did not regard this formality as a barrier. For some, it was further evidence of the unfairness of the system, and all the more reason to take the appeal, or to take further proceedings re-litigating the original issue or collaterally attacking the original decision.

B. Lay expectations of the courts

Some LiPs’ frustration at the process after court can be explained in terms of a gap between their expectation and the reality of the judicial process. This gap may be responsible, along with other reasons, for the high number of complaints brought by LiPs to the JCC, and possibly also to the NZLS. The LiPs whom I discussed above as having complained to the JCC complained about judicial conduct (encouraging settlement in a settlement conference, and pointing out weaknesses in the LiPs’ case) that the bench and bar would both consider routine, or normal processing, and therefore unlikely to give rise to a complaint. In the UK, the Civil Justice Council notes that the misunderstanding and mistrust between LiPs and the courts may result in “increased appeals and complaints about Judges and lawyers, borne of misunderstanding rather than merit”.³⁸

Psychological theory might also go some way to explaining the high number of complaints. Remember the discussion of “naïve realism”, a belief that one’s own position is more correct and reasonable than one’s opponent’s.³⁹ Ross and Ward explain that where a third party does not concur with the person’s belief, one of the responses is to attribute the third party’s “failure” to

³⁶ Gowns are worn in the High Court and Court of Appeal and the Supreme Court. The Court of Appeal and Supreme Court buildings are much more physically imposing than the lower courts. Three to five judges sit on appeals to the Court of Appeal, and five judges sit on Supreme Court appeals.

³⁷ See Judith Resnik and Dennis Curtis *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses* (2007) at 338 for discussion of courthouse architecture designed to promote the dignity of the law and “excite and preserve the reverence of the population” quoting Clare Graham, *Ordering Law: The Architectural and Social History of the English Law Court to 1914* (Aldershot, Ashgate, 2003) at 267-307.

³⁸ Civil Justice Council *Access to Justice for Litigants in Person (or Self-Represented Litigants)* (November 2011) at [51].

³⁹ See Chapter 2, pages 26-27.

bias, arising from “ideology, self-interest, or some other distorting personal influence”.⁴⁰ This may go some way to explaining why LiPs frequently referred to suspicion that the “old boy network” influenced the process. Of course, in New Zealand the small profession and its close connections to the small bench easily fuel this perception. LiPs referred to evidence of the network: marriages between lawyers and judges, judges’ lawyer-siblings, judges’ connections to their previous law firms, and events where lawyers and judges socialised together.

Frustration also arose for LiPs when they found enforcement more difficult than expected. This led to one litigant feeling he had been “done like a dog’s dinner”, having paid legal fees but unable to enforce the orders. This gap between expectation and what the system is capable of delivering unsurprisingly led to LiPs seeing little benefit in instructing a lawyer, and also losing some faith in the system as a whole. Similarly, the litigant who referred to feeling like she had bought an appliance that was not delivered had her faith shaken in the protection the law would afford her. Her analogy also invokes the consumer perspective, the idea that the courts are a service like any other, discussed in the previous chapter.⁴¹ Similarly, the Minister suggesting that the failure to notify a LiP of a case management conference was a problem with “customer service” encourages viewing the courts as such a service. It may therefore be unsurprising that LiPs’ views of what a court should deliver are at odds with those of the bench and bar, who do not generally share a consumerist view of the courts’ function.

C. Overconsumption of court resources

A point of tension between LiPs and the bench in this final stage of the process was the additional time that LiP cases took, particularly in the High Court. The need to undertake more research and analysis in many LiP cases creates an additional demand on judges who have performance targets to meet, including meeting waiting times for judgments. The time taken is publically available for High Court decisions.⁴² This additional time is not, of course, required in every LiP case, nor is it solely the province of LiP cases, as Judges referred to poor case presentation by lawyers as well. However, as Judges expected this additional time would usually be necessary, it is not hard to see why LiP cases, particularly in the High Court, might invoke a sense of frustration.

⁴⁰ Lee Ross and Andrew Ward "Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding" in Edward Reed, Elliot Turiel and Terrance Brown (eds) *Values and Knowledge* (Online ed, Taylor and Francis, Hoboken, 2013) 103 at 111.

⁴¹ See Chapter 8, pages 208-209 for discussion on consumer ideology.

⁴² Courts of New Zealand "High Court Judgment Delivery Expectations, Inquiry Process and Recent Judgment Timeliness" <www.courtsofnz.govt.nz>.

Similarly, responding to complaints created additional demands on lawyers' and Judges' time. Judges did not mention this issue, but as the JCC estimated that more than 95 per cent of complaints they receive are from LiPs, it is a small step to infer that the bench might see LiPs as generally carrying a higher risk of complaints. For both lawyers and Judges, responding to claims is more work without additional remuneration, as well as carrying potential reputational harm if there is publicity or an adverse finding.

D. Persistent Litigants – Nuisance and Danger

Overconsumption of judicial time also explains, in part, the level of concern about persistent litigants. If LiPs are generally over-consumers of resources, then persistent litigants are super-consumers. They launch, by definition, a large number of cases and appeals. So too, however, do some other litigants who would not be characterised as persistent: finance companies, Government agencies, landlords with large portfolios.

Persistent LiPs are not super-consumers of court time in terms of hearing length for each case. Unlike cases involving inexperienced LiPs, there are no introductions or special explanations: these LiPs know the rules already. The Judges dare not alter turn-taking or procedures to accommodate them lest they be accused of favouring the other party. They only take time in the sense that the Judges will let them talk until they “run out of steam”, as the most efficient way to deal with their cases. It is not just, therefore, the number of cases or appeals or the length of hearings that makes persistent LiPs the target of judicial ire.

What is different about persistent litigants is the refusal to accept the finality of decisions handed down, and the accusations against the integrity of the court staff and judges personally. These are attacks on the integrity and legitimacy of the system itself. Gary's story illustrates the belief of many persistent litigants, that there is systemic corruption that needs to be exposed and that bringing cases and complaints can help achieve this.

Persistent litigants present a danger in the sense of calling the system itself into disrepute, as well as a number of smaller but troubling problems. As Judges noted, persistent LiPs are sometimes right. Failing to see a genuine point gives genuine grounds for appeal. For the Judge who misses the point, there lies the ignominy of being overturned on appeal in a case involving one of these infamous litigants. This is time consuming and frustrating work.

The danger lies not just in creating an appealable judgment but also in the threat of physical attacks or harassment of the judge. Occasionally there is a risk of a physical threat such as harassment in a public or private space. The incidents of a decade ago, in which a fathers' rights group picketed

Judges' homes,⁴³ were referred to by a number of lawyers and Judges. One Judge wondered, if the threat of such incidents grew, "who would want to be a judge?". More often there is a threat that the persistent LiP will call the Judge's professionalism into question, making allegations of fraud, bias and corruption, via proceedings, media, and complaints to the JCC. There may be nothing of substance to the allegations, but time and energy is expended on defending them.

The concern about persistent litigants becomes more acute in the higher reaches of the court hierarchy. This is in part because there are proportionally more persistent litigants in the higher courts: appeals by definition have to be made in the appellate courts. Persistent litigants also cause particular concern because they distract from what Judges, particularly in the higher courts, see as their central function. The District Court and Family Court Judges were more accustomed to higher volume work, with a great deal of energy being spent on courtroom management. As a District Court Judge explained:⁴⁴

You know, in our court, we are here to do the business and you've just got to get on with it. I mean, if we worried everyday about procedural things you'd never get anything done. You've got to be robust. You know, that is why the higher courts are there. If you are wrong, they'll just reverse you. They've got much more time and more people to research things. We are here, not to do illegal things, but to do things in a generally principled way but nevertheless without getting bogged down in the detail. I'll tell you what, there is no rocket science involved in what we do.

Further up the hierarchy, from the High Court upwards, Judges see their role as increasingly "pure", in the sense of applying law and building precedent. High Court Judges referred to their constitutional role and two of the High Court Judges differentiated what they did from lower courts and tribunals on the basis that it involved "real law", as opposed to the "robust" approach the District Court Judge referred to, although one apologised that this distinction sounded "snobby". As discussed in the previous chapter, the highest status within the profession is accorded to those who do work that is the most "professionally pure", law in the abstract or "real law".⁴⁵ Robert Fisher QC, a former High Court Judge, also makes this point: "Sitting judges usually prefer major trials of social, commercial or legal significance; few relish case management,

⁴³ See for example Derek Cheng and Anne Beston "Fathers' Vendetta Angers Top Judge" *New Zealand Herald* (online ed, Auckland, 9 May 2006) reporting action by Union of Fathers in the mid-2000s. There have been more recent incidents of picketing, where the picketers have recorded and uploaded the footage on YouTube. These incidents have not been reported in the media and no participants referred to them.

⁴⁴ This comment is similar to Penny Darbyshire *Sitting in Judgment: the Working Lives of Judges* (Hart Publishing, Oxford, 2011) at 412. The United Kingdom Judges who are equivalent to New Zealand's District Court Judges told Darbyshire that they believed High Court Judges needed "a much more acute intellect" and were responsible for deciding important and finely balanced cases.

⁴⁵ Andrew Abbott "Status and Status Strain in the Professions" (1981) 86(4) *American Journal of Sociology* 819; Rebecca Sandefur "Work and Honor in the Law: Prestige and the Division of Lawyers' Labor" (2001) 66(3) *American Sociological Review* 382. See also discussion on "purity" in Chapter 8, page 203.

interlocutory applications, and high volume trivia".⁴⁶ Persistent litigants are seen as creating "high volume trivia" and distract the Judges from precedent building: where there is no legal puzzle to solve, there is no law to make.

The number of cases, accompanied by high numbers of appeals and collateral attacks, take up a great deal of time, present danger (of appeal, complaint, or accusation), and give little opportunity to make precedent.

E. Conclusion

The origin of many of the tensions between LiPs and the courts can be found in the process that comes after court. The time it takes to write judgments, and the threat of complaints and appeals, pose particular problems in terms of consumption of court resources. Persistent litigants amplify these challenges, presenting a particularly high risk of launching complaints and appeals, distracting Judges from what they consider to be their core function. While still formally open to LiPs, the court emphasises the limits of LiPs' competence to access the courts through judgments and costs awards, and discourage LiPs through a presumption against awarding costs when they are successful. Some LiPs take these messages as evidence of institutional bias against them. Along with disappointed expectations in what the court might deliver by the way of finality and enforcement, the process after court left some LiPs frustrated and disillusioned.

In the next chapter I draw together and discuss the findings from the different stages of the court process about the experience of LiPs and the court staff, lawyers, and judges' perceptions of them. I then turn to evaluating possible responses.

⁴⁶ Robert Fisher "Whether the Adversarial Process is Past its Use-By Date: A New Zealand Perspective" (Paper presented at the Civil Litigation in Crisis - What Crisis?, Auckland, New Zealand, 22 February 2008) at 1.

Chapter 10

Discussion, Responses and Conclusion

But there is one way in this country in which all men are created equal – there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein and the ignorant man the equal of any college president. That institution, gentlemen, is a court.¹

I. Contradictions in the Accessibility of Courts

The contradictions underlying LiP access to the courts are inherent in the contradictions of liberal society:²

The ideology of liberal society values social equality, individual autonomy, and fraternity, yet the social system creates and strengthens stratification, permits domination, and dissolves the ties of community.

The courts offer the “possibility of an escape from this contradiction”.³ The courts are a forum for people to vindicate their rights, where the powerful can be held accountable to the powerless under the rule of law. The number of rights promised on paper is expanding, via greater regulation and by reconceiving problems once considered simply private matters or misfortune as justiciable issues.⁴ Yet legal advice is expensive and the economic value of vindicating these expanding rights is often small. The State is unwilling or unable to pay for everyone to have legal advice. Citizens must, therefore, be able to go to court in person. If they cannot, the court will be seen as an institution open only to the “resourced elites and the outliers”,⁵ breaking the promise of the courts as a place to hold the powerful to account.

In reality, however, the courts cannot be open to everyone, or they would be flooded with claims and choked by the demand. Moreover, their process is too difficult in many – even most – cases

¹ Atticus Finch addresses the jury in Harper Lee *To Kill a Mockingbird* (Arrow Books, Online, 2010) at 274.

² David Trubek "Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought" (1977) 11 *Law & Society Review* 529 at 541.

³ At 541. See also Austin Sarat "Going to Court: Access, Autonomy, and the Contradictions of Liberal Legality" in David Kairys (ed) *The Politics of Law: A Progressive Critique* (3rd ed, Basic Books, New York, 1998) 97; Judith Resnik and Dennis Curtis *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses* (2007) at 17.

⁴ Marc Galanter *Lowering the Bar: Lawyer Jokes and Legal Culture* (University of Wisconsin Press, Madison, Wisconsin, 2005) at 259. Statutes such as the Property Law Act and the Harassment Act were identified by the District Court Judges as popular forms of litigation for LiPs.

⁵ Resnik and Curtis, above n 3 at 16.

for litigants to access in person. The main sources of this difficulty, discussed in the previous chapters, can be summarised as follows:⁶

First, even if people can access information about substantive law and procedure (which is generally not the case in New Zealand at present), having this information is only half the battle. To use the system effectively, LiPs need to understand further complex matters, including legal relevance and the laws of evidence. A detailed understanding of court procedure is also required to be able to litigate strategically. Lisa's case illustrates how a LiP can become "stuck", unable to advance their own case. If a matter proceeds to trial, LiPs need to be able to examine and cross-examine witnesses, which few can do successfully. They need to be adept at the legal register, correctly using forms of address and proper legal language, so they appear competent to lawyers and judges. Some very experienced LiPs acquire these skills, but if they become too experienced, as Gary's case illustrates, they risk being considered "vexatious", which undermines their credibility in another way.

Second, there are many difficulties in practice in the LiP role. Role conflicts in being both a party and an advocate mean that LiPs cannot access the courts as well as lawyers can. The fact that they come to court without a lawyer often signals to the bench and bar that their case is weak. They may confront the largely incorrect belief that a clear division exists, between LiPs who litigate in person because they cannot afford to do otherwise, and LiPs who "choose" to represent themselves. Problems like these present LiPs with a disadvantage from the start. Matt's case illustrates how this lack of credibility before the court can be hard to overcome and might only be remedied by instructing a lawyer. Moreover, like most litigants, LiPs find litigation emotionally stressful. When preparing for court, their lack of emotional distance makes it hard for them to address the need to exchange documents: receiving affidavits that contain "lies" (the other person's "truth") can be painful. Furthermore, even when emotions do not run so high, the tight trial timetable (especially in multi-day trials) may mean that LiPs struggle to prepare the necessary material, particularly if they have work commitments. Reaching a negotiated outcome is often difficult because both the lawyer and the LiP may be suspicious of one another and reluctant to negotiate. Accessing evidence may also be difficult, either due to cost (of experts) or due to fears others have about providing sensitive information directly to the LiP. At trial, performing the role of witness and advocate causes further role-conflict. All these conflicts are inherent in being an

⁶ Not all LiPs experienced all these difficulties. The evidence in this study suggests most LiPs encounter them to some degree and it should be kept in mind that the LiPs in this study were sufficiently proactive to have volunteered for the study and were therefore those who had a greater level of interaction with the system and encountered the difficulties more acutely. Less active LiPs may encounter fewer difficulties but may not secure more "justice".

advocate in one's own cause and arise regardless of the technical or intellectual capacity of the individual.

A third matter is that lawyers do not provide only expert legal assistance. They perform many other roles, such as that of broker, translator and negotiator. Most disputants labour under a kind of naïve realism, believing “their side is ‘right’, that the other side is ‘wrong’”.⁷ Without a lawyer to help them test their case against the kind of evidence that a court will accept, they may be unable to see its weaknesses. Lawyers, of course, can abuse their power of negotiation with the client and subjugate them, which has its own problems. Where lawyers do their job well, however, they can test their client's case, showing the client how the court might view it. Without the lawyer playing the role of translator and negotiator (with the client), a LiP may provide too much detail to the court, believing that if the court simply has the “facts”, then they will see the LiP is “right”. Providing this level of detail will often irk professional readers, like the opposing lawyer and the judge. At trial, LiPs may also give in to the temptation to argue the case at every point, in every cross-examination, re-examination, and submission with the Judge. As Tom's case illustrates, it might not be until after the trial is over that the LiP realises that their case is not as open and shut as they had conceived it to be. All these difficulties confront successful conduct of the LiP's case.

The judges, lawyers, and court staff are well aware of these problems and try to assist LiPs in many ways including giving them advice and substantial assistance in court. In this way they help to maintain the appearance of accessibility, legitimating the authority of the court as a venue for vindicating rights. In doing so, some may also be driven by an ideological commitment to substantive justice.

Their attempts to assist LiPs and therefore sustain the legitimacy of the courts are subject to significant cross-cutting pressures. The integrity of the courts relies on the institutional players protecting and economising its scarce resources, and in the process, protecting themselves from overload. Institutional integrity also relies on the players remaining within their defined roles and the presence of LiPs, as we have seen, puts these roles under strain.⁸ A further pressure comes from the professional project, to maintain the professional heartland of the court as a space for the profession.

⁷ Lee Ross, Mark Lepper and Andrew Ward "History of Social Psychology: Insights, Challenges, and Contributions to Theory and Application" in Susan Fiske, Daniel Gilbert and Gardner Lindzey (eds) *Handbook of Social Psychology* (John Wiley and Sons, Hoboken, 2010) 3 at 23.

⁸ Role conflicts are: for judges, between passive arbiter and overseer of a justice process; for lawyers, between the duty to the client and enabling efficient and fair processing of disputes, for the benefit of their client and the court; and for court staff, between an administrative, information only function and as part of a justice system.

These pressures encourage judges, lawyers, and court staff to steer LiPs away from accessing the courts in person. They do not do so in all cases. There were some cases where it was quicker and less likely to increase conflict to simply process them rapidly through the system. In most cases, however, where the lawyers, court staff and judges were faced with a LiP who was trying to actively access the courts, they tried to steer them away but to do so without undermining the appearance of accessibility. The main tactic is to emphasise repeatedly their need for a lawyer. This message is conveyed by court staff, lawyers, and judges, and in MoJ advice to LiPs. A lawyer, if engaged, would screen the claims brought before the court, and encourage settlement, protecting the courts from overload. Cases eventually brought to court would (usually) be presented in clear and concise terms, according to pre-determined rules, and consistently with the norms of a legal culture into which all the participants are initiated.

Not all litigants respond to this encouragement to get a lawyer. The reasons, as discussed in Chapter 4, vary from legal market failure, to misunderstanding the purpose of the courts, to a growing network of current and former LiPs for support. Some Government conduct, driven by a desire to limit public spending, may also directly encourage people to litigate in person, such as measures that emphasise the value of self-help, user-pays court fees, and the 2014 family justice reforms, which prohibit legal representation in some contexts. Some of these measures suggest that the courts are a public service for consumers like any other that can be directly accessed by citizens.

When direct encouragements to seek legal advice and representation fail, sometimes more subtle means of discouraging access are deployed, such as restricting access to counsels' benches in the court and not allowing costs awards in favour of LiPs. Procedural justice theory suggests that messages of exclusion, even subtle ones, affect people's perceptions of justice, even if the outcome of the process is favourable for the litigant. Discouraging access in some senses protects the legitimacy of the courts by preventing rising demand, but also risks their legitimacy by suggesting to LiPs that they are excluded because they are not part of "the club". If people perceive they have been treated unfairly they will be less willing to defer to the courts' authority.⁹ The promise that all citizens will be able to hold the powerful to account (including the government itself), and that all will be equal before the courts, is revealed as illusory.

Yet this was never a promise that could come close to being satisfied in full. The gap between what is promised and the reality cannot "be easily eliminated by social engineering, but [is] a

⁹ Tom Tyler *Why People Obey the Law* (Princeton University Press, Princeton, 2006) and see discussion Chapter 2, pages 32-34.

pervasive if not constitutive feature of legal life in liberal societies”.¹⁰ A rising number of LiPs will, however, if this theory is correct, reveal the gap more often and therefore call the legitimacy of the courts into question. The system must respond to rising demand, but this analysis suggests that no complete resolution is available.

II. Rationing Access to Justice

If there is no complete resolution available to the tension between projecting and delivering on access to the courts, what responses are available? The taxonomy introduced in Chapter 2, and reproduced below for convenience, draws attention to the fact that responses do not all lie within the court system.

Table 1 - Taxonomy of Responses to increasing numbers of LiPs

	Within the Courts	Alternatives to the Courts	Outside the Courts – State-led
No Fundamental change	<p>Strengthening</p> <p>e.g. provide more legal advice and representation</p>	<p>Diverting</p> <p>e.g. channel LiPs or disputes with high rates of LiPs into alternative dispute resolution mechanisms, such as Disputes Tribunal or mediation</p>	<p>Displacing</p> <p>e.g. create alternative compensation system, such as ACC, or delegalize areas that generate high numbers of claims, such as divorce.</p>
Fundamental change	<p>Expanding and reforming</p> <p>e.g. move to inquisitorial justice; simplify procedure; more information for LiPs</p>	<p>Transforming</p> <p>i.e. reduce the role of law in ordering society</p>	<p>Avoiding or Preventing</p> <p>e.g. more equal distribution of wealth; more social work services to avoid the breakdown of families.</p>

By avoiding, preventing, displacing, and transforming issues that would otherwise become disputes within the courts’ jurisdiction, demand for their resources can be reduced. There will always be a gap between what the system promises and what it can deliver: that is the fundamental contradiction just discussed. Trying to resolve this conflict by offering people more access to courts, does not create access to justice. Abel writes:¹¹

¹⁰ Trubek, above n 2 at 540.

¹¹ Richard Abel "Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice" (1979) 1 Law and Policy Quarterly 5 at 41. See also Sarat, above n 3.

Emphasis on redistributing lawyers' services as the means of promoting social justice perpetuates the liberal myth ... that formal justice can be attained within a capitalist legal system and, once attained, will produce substantive justice They define the problem as a "gap" – this time the gap between the ideal of an adversary system and the reality – between the promise of redistributing lawyers' services and the performance. The proximate goal of closing that gap is thereby substituted for the ultimate goal of justice. In place of questions about the capacity of legal reform to effect fundamental change in political, economic, and social institutions, we are directed back to the legal system conceived as an autonomous entity, to be evaluated by the unique standards of formal justice.

Seeking more representation or a more accessible system become the goals for access to justice instead of more fundamental political and economic change.¹² Attempts to address inequalities in society are not likely to provide a quick fix to the "problem" of LiPs, but they are part of a wider set of available policies. Attention to these emphasises the structure of the distribution of resources in New Zealand, including resources needed to access the courts, rather than merely searching for answers in reforms to the court system.

However, responses within the court system also involve distributive choices:¹³

[I]n a world of expanding capabilities and rising expectations, where claims of injustice proliferate, we cannot avoid the necessity of rationing justice. Justice is not free. It uses up resources – money, organization, and not least, the limited supply of attention. Every expenditure of these involves corresponding opportunity costs. And justice is not the only thing we want.

The difficulty with discussing rationing explicitly is that it poses "an overt challenge to universal equality before the law".¹⁴ It is admitting that the promise of accessibility cannot be met in full.¹⁵ But given that not everyone can have access, I argue that principled decisions should be made about how that access is rationed. The tension between promising access and what the system can deliver will still exist, but maybe rationing decisions can be made with more confidence and consistency.

Rationing essentially involves political decisions that depend on views about the value of justice, "based in philosophical and social theory".¹⁶ Deciding on the value of justice, and the role we want

¹² Gary Bellow and Jeanne Kettleson "From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice" (1978) 58 Boston University Law Review 337 at 384: "Unless increased access to legal services is also accompanied by a lessening of the inequalities that stand in the way of a more harmonious, accommodative society, the amount of conflict that results will either press present adjudicatory institutions beyond their capacities, or intensify the already powerful pressures against adversary behavior that operate so much to the disadvantage of the poor, the unorganized, the inexperienced, and the vulnerable." See also discussion in Chapter 2, pages 43-44.

¹³ Marc Galanter "Access to Justice in a World of Expanding Social Capability" (2010) 37(1) Fordham Urban Law Journal 115 at 128.

¹⁴ Richard Moorhead and Pascoe Pleasence "Access to Justice After Universalism: Introduction" (2003) 30(1) Journal of Law and Society 1 at 2.

¹⁵ At 2.

¹⁶ At 10.

the courts to perform, drives decisions about who gets access to the formal justice system, and who is diverted elsewhere. Uzelac poses the problem, in introducing a discussion on civil justice generally:¹⁷

Do all civil disputes deserve equal attention and thorough deliberation of all factual and legal aspects, or should they be awarded only that level of attention that is proportionate to their social importance?

This in turn begs the definition of social importance: is this just a question of the sum of money involved or are other more important interests at issue? And important to whom, society or the parties? At present, in many civil disputes it is the sum in question that determines which court has jurisdiction, rather than the importance of the principle involved. Poor people are less likely to be litigating over large sums and therefore less likely to have access to full dress adjudication, regardless of the legal importance of the issue at stake, either to them, or society, or to the development of the law. Hodder has suggested that in New Zealand even commercial clients with large, complex cases are turning away from the “mainstream civil justice system” towards ADR.¹⁸ There is therefore room for a discussion about what types of disputes we want to have in the trial courts and what mechanisms would achieve access for these cases, for example provision of counsel where necessary.¹⁹

Explicitly rationing court resources by paying attention to the distributive choices involved is not novel. One very popular form of rationing is diverting cases away from the courts. This is commonly in the form of encouraging or requiring ADR, such as mediated and negotiated outcomes. As Winkelmann J has said, the benefits of ADR have “... been so widely spoken of, and so seldom, if ever questioned, as to become accepted wisdom”.²⁰ The perceived benefits can hide the fact that this approach is also a form of rationing that is now fully integrated into New Zealand’s dispute resolution landscape.²¹ The family justice reforms implemented in 2014 further entrench this form of rationing, removing the right for parties to proceed to court unless they have first been through the Family Dispute Resolution system.

¹⁷ Alan Uzelac "Global Developments - Towards Harmonisation (and Back)" in Alan Uzelac (ed) *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer, Switzerland, 2014) at 4.

¹⁸ Jack Hodder "Civil Procedure: 'Case Management' - Architectural or Deckchair Reforms?" (Paper presented at the Civil Litigation in Crisis - What Crisis?, Auckland, New Zealand, 22 February 2008) at 4.

¹⁹ Russell Engler "Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed" (2010) 37 *Fordham Urban Law Journal* 37 at 81.

²⁰ Chief High Court Judge Justice Helen Winkelmann "ADR and the Civil Justice System" (Paper presented at the AMINZ Conference, Auckland, New Zealand, 6 August 2011) at 21.

²¹ For example through Judicial Settlement Conferences, the Family Dispute Resolution process and the Disputes Tribunal. It is also an integral part of litigation in that most litigation is concluded by way of a negotiated or mediated outcome.

Rationing is also occurring within the courts with adoption of rules that require attention to the just, speedy and efficient processing of disputes. As discussed, the Court of Appeal has recognised that this is a distributive approach, affecting not just the parties to the dispute but also other waiting cases and the public at large.²² There is also procedural reform, for example in the District Court, which rations the amount of procedure and time available in different cases.²³

The evidence in this study suggests that there is tension and discomfort with rationing resources within the courts. This tension is exacerbated if the starting point is that people “have a right of access to the courts and that courts should help them obtain that access”, an expectation that Goldschmidt argues is “reasonably justified both constitutionally and morally”.²⁴ This approach does not recognise that the resources are not available to do this. It also creates more room for discretion where individual judges, court staff and lawyers have to make decisions in each case about how much resources to give a LiP. For example, Judges have to weigh up whether to give a LiP as much time as they seem to need, only as much as they consider “reasonable”, or only as much as a lawyer would need. Some LiPs were of the view that they should have as much time as they needed, regarding the courts as a service for their benefit.

Access to justice does not necessarily mean giving everyone as much justice as they think they need, however. But rationing could at least involve making principled, distributive choices about which cases should come to the courts (informed by a theory of the value of the courts and justice in various situations) and how much procedure or time they should be given, once there.²⁵

III. Responding to LiPs Accessing the Courts

A more fundamental political discussion about the distribution of justice resources is therefore required, but that is a longer-term goal. In the meantime, I make several recommendations below that this study suggests would be effective, without promoting a promise of accessibility that cannot be fulfilled. I also address why some commonly encouraged reforms may be ineffective.

²² See discussion of *SM v LFBD* [2014] 3 NZLR 494 (CA) in Chapter 2, page 36.

²³ District Court Rules 2014, r 10.1. There are three different modes of trial available: short, simplified or full. The complexity of the issues, the amount at stake, and “proportionality”, are all factors to be taken into account in determining the appropriate mode of trial. Short and simplified trials have time limits for witness examination and limits on discovery. Similarly, the Family Court has different “tracks” for different proceedings.

²⁴ Jona Goldschmidt and others *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (American Judicature Society, 1998) at 38. See also Chapter 2, pages 39-42.

²⁵ Civil Justice Council *Access to Justice for Litigants in Person (or Self-Represented Litigants)* (Civil Justice Council Working Group, November 2011) at [103] concluded, in line with the idea of proportionate justice, that “Access to justice does not mean allowing a litigant, self-represented litigant or not, to consume disproportionate resources”; Adrian Zuckerman “A Reform of Civil Procedure - Rationing Procedure rather than Access to Justice” (1995) 22 *Journal of Law and Society* 155.

A. *Policy Reform*

1. *Advice and Representation*

Expanding access to resources for LiPs so they can help themselves may seem an obvious solution, particularly for those in the “advice desert” who do not qualify for legal aid but cannot afford private representation. When I asked LiPs for suggestions about systemic reforms, most suggested self-help information of some kind. In particular, they wanted flowcharts showing the process so they understood what came next, and more comprehensive written advice on how to run a proceeding.

Along similar lines, Macfarlane made preliminary recommendations, based on her LiP participants’ suggestions, of services that might assist LiPs.²⁶ First, better access to legal information, which she says would “[fit] with the aspiration of many [LiPs] to continue working on their case themselves once they have determined that they cannot afford to pay (or continue to pay) a private lawyer”.²⁷ Second, a range of “non-legal” services might be provided for LiPs, including skills-based workshops, coaching (in communication, negotiation, and presentation skills), office services, a buddy or mentoring system to support the LiP “in their emotional as well as their substantive and procedural journey”. The courts might also extend their opening hours so LiPs need not take time away from employment to file documents and appear.²⁸

As discussed, there are many reasons why accessing the courts meaningfully is difficult for LiPs, many of which are outside their control or require so much learning and practice that, while the occasional person may master it, most will not and should not be expected to. Furthermore, no amount of self-help can overcome the absence of a lawyer as broker, screener, translator and negotiator. Thus, recommendations of this kind, while well intentioned, can perpetuate the idea that most LiPs can access the courts meaningfully, and, if they struggle to do so, this is due to personal failings rather than systemic barriers. Even if LiPs could overcome the difficulties identified, without greater resources, court staff and judges will continue to discourage LiPs, to protect themselves from overload.

The research findings suggest that, for litigants to realise meaningful access to the courts, one-to-one advice, assistance in drafting documents, and sometimes full representation, is necessary. This suggests that the answer lies in distributing more legal services: that is, more legal aid that would

²⁶ Macfarlane also made recommendations on improving the provision of advice services to LiPs and improving judicial management of LiPs: Julie Macfarlane *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report* (Ontario, Canada, May 2013) at 121-126.

²⁷ At 116.

²⁸ At 118-121.

mean more advice and representation. Providing more state funded access to justice is unlikely in the current political climate, however, and will not necessarily mean fewer LiPs. This is because their reasons for litigating in person are not purely financial, and because the concept of injustice is elastic, so “demand for services will increase to the limits of the available supply”.²⁹ Alternatively, the State could provide a clinic-based service for LiPs, like that operating in Queensland.³⁰ Many Judges, while wary of straying into the “political” arena and not having given the matter deep consideration, suggested that some form of advice clinic or duty solicitor would be helpful. Court staff similarly thought a clinic-based model would have a place.

The discussion and research about access to justice for “personal plight clients”³¹ is, it has been said, “almost uniformly focused on the delivery of legal services to the poor as a form of charity [pro bono] or welfare [legal aid]”.³² There is ample room for New Zealand to improve coordination of pro bono services to provide full representation for cases that require it but fall within the gap between legal aid and affordability. The private market could also serve these clients, however, particularly those who want meaningful access but cannot afford full representation. Many have the means to pay for some advice, however, and are willing to do so.

While reliable data are in short supply, what is available suggests that there is a steady stream of law graduates, many of whom are unable to find work in law.³³ If that is correct, it is hard to avoid the conclusion that the market for legal services is distorted, skewed towards commercial interests and away from personal plight clients.³⁴ Susskind has argued that “The legal market is in an unprecedented state of flux” and that the delivery of legal services is changing, and will continue to change, radically in the coming decades.³⁵ Some commentators believe that, while this “unsettled

²⁹ Bellow and Kettleton, above n 12 at 380.

³⁰ Tony Woodyatt, Allira Thompson and Elizabeth Pendlebury "Queensland's Self-Representation Services: A Model for Other Courts and Tribunals" (2011) 20 *Journal of Judicial Administration* 225; Civil Justice Council, above n 25 at [110] discussing Californian models.

³¹ John Heinz and Edward Laumann "The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies" (1978) 76 *Michigan Law Review* 1111 at 1126. Heinz and Laumann defined “personal plight” clients as those with legal matters such as divorce, criminal defence, and personal injury. I adopt Semple’s broader definition of personal plight clients as including “Work for small corporate clients embroiled in legal disputes”, although these matters would fall outside Heinz and Laumann’s original definition: Noel Semple "Personal Plight Legal Practice and Tomorrow's Lawyers" (2014) 39 *Journal of the Legal Profession* 25 at 32.

³² Gillian Hadfield "Higher Demand, Lower Supply - A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans ABA Symposium on Access to Justice" (2010) 37 *Fordham Urban Law Journal* 129 at 131.

³³ Geoff Adlam "Young Law Graduates: What they Earn and Employment Rates" (20 June 2014) 844 *LawTalk* 21 reporting Ministry of Education information, what this “appears to indicate is that around 80% of young law graduates who have completed professionals will be in employment after two years” though not necessarily in law jobs; Sasha Borissenko "Too Many Lawyers?" (7 November 2014) 854 *LawTalk* 5 at 9 noting the lack of willingness of law graduates to work in the provinces.

³⁴ Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (2014) 13(2) *Otago Law Review* 229 at 241 who concluded that there must be market failure in New Zealand given the large number of lawyers but unmet legal needs of many. See also discussion of market in Chapter 4, pages 109-110.

³⁵ Richard Susskind *Tomorrow's Lawyers* (Oxford University Press, Oxford, 2013) at 8.

landscape” is producing resistance in the legal profession, there is room for innovation and for lawyers to carve out new roles that would address the justice gap.³⁶ Maclean provides a diverse list of innovative services, reporting on her review of websites marketing legal services for divorce in the UK:³⁷

Advocacy, forensic accountancy and tax planning, collaborative law (light or not light), early neutral evaluation, arbitration, med-arb, as well as mediation and counselling. Unbundling of services is accompanied by clear pricing for specific packages of service, with fixed price deals ranging from DIY through lawyer-supported or managed divorce to the traditional hourly charged full legal service.

As Maclean notes, diversification of this sort is “by no means risk-free”, with live questions about the boundaries of protected areas of work, responsibility for error, and whether such services meet the needs of vulnerable litigants.³⁸

Nevertheless, even if we do not go as far as offering services in this manner, there is room to grow face-to-face legal advice for personal plight litigants. This area is poorly serviced by lawyers who are drawn both by market forces and prestige to other areas of the law.³⁹ But Semple argues that, in the face of current disruptions to the legal market, personal plight work is a relatively safe haven, which may make it more attractive.⁴⁰

The New Zealand Law Commission recommended investigating the provision of limited legal advice, on certain aspects only of the litigation, in response to the perceived increase in LiPs, as long ago as 2003.⁴¹ There are currently barriers to the availability of this kind of advice, particularly lawyers’ perception of the risks such a service entails, discussed in Chapter 6.⁴² The introduction of guidelines, such as those recently published in the UK, would assist New Zealand lawyers to think about limited retainer services.⁴³ Judges consistently said in interviews that they had no

³⁶ Marsha Mansfield and Louise Trubek "New Roles to Solve Old Problems: Lawyering for Ordinary People in Today's Context" (2011) 56 *New York Law School Law Review* 367.

³⁷ Mavis Maclean "The Changing Professional Landscape" (2014) 44 *Family Law* 177 at 179.

³⁸ At 182.

³⁹ The US research shows the legal profession, in that country, is bifurcated, with lawyers either serving organisational clients (corporates or government), or individuals and their small businesses. Few lawyers serve both organisational and personal plight clients: John Heinz and Edward Laumann *Chicago Lawyers: The Social Structure of the Bar* (Russell Sage Foundation and American Bar Foundation, New York, 1994) at 97; John Heinz and others *Urban Lawyers: The New Social Structure of the Bar* (University of Chicago Press, Chicago, 2005); Rebecca Sandefur "Work and Honor in the Law: Prestige and the Division of Lawyers' Labor" (2001) 66(3) *American Sociological Review* 382. These studies found that regardless of what type of client the lawyers studied served, lawyers regarded working for organisational clients as more prestigious, due to the higher prestige of working for organisational clients (and obtaining the greater income as a result), and because working for these clients called for more use of pure professional knowledge. See also Andrew Abbott "Status and Status Strain in the Professions" (1981) 86(4) *American Journal of Sociology* 819.

⁴⁰ Semple, above n 31.

⁴¹ Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2006) at 195.

⁴² See discussion of limited retainer advice, Chapter 6, pages 146-148.

⁴³ Law Society (UK) "Unbundling Civil Legal Services: Practice Note" (15 March 2015) Law Society, United Kingdom <www.lawsociety.org.uk>.

objection to this form of legal advice. Coordinating with the bench, so that lawyers knew this was an acceptable form of advice, and developing protocols around the limits of responsibilities for lawyers undertaking this type of work, would be helpful.

Leadership for this type of innovation needs to come from the senior bar, as new graduates do not have the resources or experience to be effective innovators without such support.⁴⁴ A District Court Judge in my study recalled encountering a retiring civil litigator who felt he could repay the community for his successful career and offered to provide pro bono services for people trying to defend claims against more powerful litigants, such as finance companies. The Judge commented that this man was “exceptionally, exceptionally able”, and that it would be “very hard to replicate something like that”, but said “it would be nice if there was some sort of super-duper civil lawyer who wanted to do something about” assisting people who would otherwise have to litigate in person.⁴⁵ Converting pro bono programmes such as that into self-sustaining innovative advice services is a possibility. Law schools can assist by encouraging experimentation and “inspire students ... [to] begin legal careers that are very different from the traditional legal practice”.⁴⁶ Some of this may require attitudinal adjustments concerning the prestige of personal plight work within law schools. As Kennedy argues, legal educators participate in the reproduction of hierarchy and in the declining interest of students in public service work during law school.⁴⁷ Instead of viewing poor litigants as a training ground for inexperienced lawyers, Macfarlane argues “it is critical for this type of work to be seen as specialized, difficult and attracting additional educational and mentoring support”.⁴⁸ Rhode encourages curriculum review that makes access to justice and the distribution of legal services fully integrated and important topics of discussion.⁴⁹

⁴⁴ For examples of models of “incubator” programmes supported by the senior bar see City University of New York Community Legal Resources Network <www.law.cuny.edu> and the Chicago Bar Foundation’s Justice Entrepreneurs Project <www.jepchicago.org>.

⁴⁵ See also Frances Joychild QC “Continuing the Conversation ... the Fading Star of the Rule of Law” (5 February 2015) 1 Law News (Auckland District Law Society) 3 at 10 discussing a retired judge offering pro bono assistance for complex civil claims.

⁴⁶ Mansfield and Trubek, above n 36 at 390.

⁴⁷ Duncan Kennedy “Legal Education as Training for Hierarchy” in David Kairys (ed) *The Politics of Law: A Progressive Critique* (3rd ed, Basic Books, New York, 1998) at 64: “As for any form of work outside the established system - for example, legal services for the poor and neighbourhood law practice - they convey to students that, although morally exalted, the work is hopelessly dull and unchallenging, and that the possibilities of reaching a standard of living appropriate to a lawyer are slim or non-existent”; Robert Stover “Making it and Breaking It: The Fate of Public Interest Commitment in Law School” in Richard Abel (ed) *Lawyers: A Critical Reader* (New Press, New York, 1997) 75.

⁴⁸ Macfarlane, above n 26 at 88.

⁴⁹ Deborah Rhode “Access to Justice: An Agenda for Legal Education and Research” (2012) 62 Journal of Legal Education 531.

Related to this is the question of providing not just more advice, but better advice. In looking at why litigants become LiPs, it was apparent that the legal profession is, in some instances, generating LiPs. As Tyler and Zimmerman say:⁵⁰

By retaining counsel, people lose their opportunity to directly represent themselves. Therefore, the quality of their experience will depend upon the quality of their legal representation, relative to what the litigant might have been able, or at least imagines he might have been able, to accomplish himself.

If we want the litigant's calculation to come out in favour of representation, and want them to better understand what legal services entail, they have to experience a service they believe is valuable. Poor quality representation might be partly a structural problem: legal aid is so constrained and private fees so high that this may encourage lawyers to engage in routine processing of cases. It may also be attitudinal and the result of poor training and poor monitoring.⁵¹ Training lawyers as good translators who listen to their clients and empower them, rather than subjugating them, would potentially decrease the number of LiPs.

2. *Information for Litigants*

Education about legal rights is no substitute for good legal advice and representation. It raises awareness of rights (expanding expectations of a remedy), but this study and other research suggests this is not easily translated into the knowledge needed to vindicate them.⁵² Legal information and education that would be of assistance to the public (and therefore potential LiPs) would be about the role of the courts in society, their function, and what they can deliver (e.g. that they only vindicate legal rights, while presenting further issues of enforcement). Information about the basic functioning of the courts would be helpful. For example, courts do not begin their sessions until 10am, which led some LiPs to conclude that Judges live a privileged existence with short working hours. One LiP said that explaining that judges have responsibilities outside the courtroom, such as telephone conferences and judgment writing, would help litigants understand why the judge might not be as familiar with their file as they are. Part of the purpose of this

⁵⁰ Nourit Zimmerman and Tom Tyler "Between Access to Counsel and Access to Justice: A Psychological Perspective ABA Symposium on Access to Justice" (2010) 37 Fordham Urban Law Journal 473 at 506.

⁵¹ The call for improved lawyer training is not new. See for example Nan Seuffert "Lawyering for Women Survivors of Domestic Violence: Special Issue on Domestic Violence" (1996) 4 Waikato Law Review 1 at 53-55 who suggested (now twenty years ago) that lawyer training be improved in dealing with survivors of domestic violence. There has undoubtedly been a huge growth of awareness about domestic violence but the LiP experiences recounted here suggest there are some practitioners working in the area who do not have a firm grasp of the dynamics of representing a woman who has survived domestic violence.

⁵² John Eekelaar and Mavis Maclean *Family Justice: The Work of Family Judges in Uncertain Times* (Hart Publishing, Oxford, 2013) at 186-207.

information would be to reorient expectations away from the customer service model of justice towards an understanding of the courts' constitutional role.

At a very specific level, playing a video to LiPs at the courthouse, for example in the waiting room before appearing before the judge, would be helpful. This video might involve nothing more complex than a brief introduction to the layout of the courtroom, the sitting times, the seating arrangements, and how to address the judge and other participants in the litigation.⁵³ This would at least save judicial time, particularly in the District Court, where Judges say they spend a lot of time repeating this information to every LiP who comes before them.

If written guidance is to be provided to LiPs, as has been done through the MoJ's website,⁵⁴ LiPs say this should contain warnings about how difficult the process is without a lawyer. However, one LiP said this advice should be in the form of stories from LiPs, so that prospective LiPs take it seriously rather than assuming it is a way of lawyers protecting their territory. This kind of advice needs to be paired, not with a bare injunction to "seek legal advice", but with an explanation of the focus of the court system and the role of a lawyer within it. Many LiPs expect prompt adjudication, so explaining there is a long procedural process designed to refine the dispute and ensure all information is put before the judge, that settlement is the norm, and that lawyers can help litigants to use this process strategically and discuss reasonable settlement levels, would be very helpful. Otherwise LiPs are likely to disregard the suggestion to "get more advice", thinking, "I don't need it, I've researched the law". Choosing a hub, preferably a non-governmental website such as New Zealand Legal Information Institute, would be useful for avoiding duplication of resources and providing a starting point for LiPs searching for resources.⁵⁵

3. *The Role of Court Staff*

Some commentators have proposed that, to assist LiPs, court staff could be trained to give more detailed process advice, even if it may amount to strategic legal advice.⁵⁶ I do not agree. At a

⁵³ New Zealand Law Foundation "Appearing in the Family Court - Without a Lawyer Part I and II" (31 March 2015) <www.youtube.com> are videos outlining the New Zealand Family Court process for LiPs. These videos are directed at assisting LiPs who have to go to court without a lawyer in accordance with the family justice reforms. They do not therefore suffer from the difficulty of other self-help videos, which are caught between trying to give a simplified explanation to promote accessibility while simultaneously discouraging people from coming to court without a lawyer. See for example: County Court of Victoria "Self Represented Litigants - County Court of Victoria" (18 July 2013) <www.youtube.com>. The videos I suggest would be more basic than these examples however, to be played immediately before going into court.

⁵⁴ Ministry of Justice "Representing Yourself in the High Court of New Zealand" (undated) <www.justice.govt.nz>.

⁵⁵ New Zealand Legal Information <www.nzlii.org> is a joint project between three New Zealand universities, AustLii and the New Zealand Law Foundation. It provides a hub for case law and legislation and would be sufficiently neutral to be viewed as reliable by LiPs.

⁵⁶ Duncan Webb "The Right Not to Have a Lawyer" (2007) 16 *Journal of Judicial Administration* 165 at 178; Goldschmidt and others, above n 24 at 46.

practical level, it does not seem feasible, given the rate of staff turnover and how movement between positions within the public service makes it difficult for staff to accumulate the specialised knowledge they would need. There also seems little need to train another workforce to do the job of lawyers, when there are many qualified lawyers, some of whom cannot find work. If the MoJ had to train and pay court staff to do lawyers' jobs, why not just pay lawyers? At a more principled level, there is real potential for conflicts of interest as court staff would potentially be advising both parties in a dispute.⁵⁷

Other reforms overseas involve court staff acting as gatekeepers rather than seeking to improve access. The Supreme Court of Victoria's "self-represented litigant coordinator's" role is to speak to new LiPs and "hit them hard and early with the reality check", emphasising that litigating in the Supreme Court, unlike litigation in the lower courts, is "complicated and tough", and that they need legal advice. At the same time, the coordinator is striving to keep "the access to justice doors firmly open".⁵⁸ The message is: you are welcome, but only with a lawyer. This undermines the appearance of access and, I suggest, is an inappropriate role for court staff.

What would be useful would be guidelines for court staff on the information they can give to litigants, particularly if the content of those guidelines was made known to litigants.⁵⁹ The UK Civil Justice Council drafted a suggested guideline based on a US' self-help centre document called "What court staff can and cannot do".⁶⁰ A similar guideline would be of much more practical assistance than the injunction to give only information, not advice. For such guidelines to be effective in practice, however, there must be more advice services available for court staff to refer LiPs to. Otherwise court staff will continue to be tempted into going beyond their role (even if it is more clearly defined) where they see a "deserving" case.

4. *The Role of Judges*

Pressing judges to extend further assistance to LiPs is unlikely to succeed if workload pressures and role conflicts (as between passive arbiter and overseer of substantive justice) remain unchanged. The risk is that judges will continue to send mixed messages to LiPs, exercising discretion as to how much help to extend them (a discretion that can count against LiPs perceived as being there "by choice"), while simultaneously communicating to LiPs that they are not

⁵⁷ See Chapter 6, footnote 16.

⁵⁸ Nerida Wallace and Shane Draper "Managing the constant tension which exists between trying to persuade self-represented litigants to seek and retain legal advice (in the higher court setting) whilst always being cautious to keep the 'access to justice doors open'" (Paper presented at the Australasian Institute of Judicial Administration, Sydney, Australia, April 2014) .

⁵⁹ See Chapter 6, page 155.

⁶⁰ Civil Justice Council, above n 25 at Appendix 1.

welcome. Resourcing judges to provide more assistance to LiPs is possible but is a very expensive form of assistance.⁶¹ However, even a well-resourced judge cannot fill the role of a lawyer as screener, translator, and negotiator, and as we have seen, a LiP is still responsible for making choices about procedure and about what factual material to put before the court.⁶²

It is also questionable how far the “foreignness” of the courts should be removed so that judges could engage with litigants in a way the latter might prefer. While causing LiPs discomfort, some level of foreignness serves a purpose in reminding everyone that this is not a normal social interaction: “Judges must decide the facts and apply the law regardless of the displeasure they incur”.⁶³ The appearance of law’s autonomy and rationality might be compromised by too much movement in this direction.

The research project of the Family Court of Australia suggested that the uneven way in which Judges respond to the needs of LiPs indicates a need to develop consistent policies.⁶⁴ In interviews, however, New Zealand Judges uniformly rejected the suggestion of developing a code of practice for managing LiPs, stating it was a matter of individual “judgecraft”. New Zealand’s judiciary take part in the Institute of Judicial Studies’ programmes, which include some guidance on managing LiPs. Some High Court Judges commented that this guidance was not targeted at judges of their court. Developing a more nuanced training programme, as well as creating better opportunities for dialogue between judges about LiP management, could develop a more consistent practice and lead change.⁶⁵

5. *Procedural Simplification, Inquisitorial Justice and Informalism*

New Zealand has already experimented with this type of reform and continues to do so. The Tenancy Tribunal and the Disputes Tribunal, which have very high caseloads relative to the Courts, use a simplified procedure and parties almost always appear in person.⁶⁶ Tribunal referees also

⁶¹ See also *Wright v Wright* [2013] EWCA Civ 234, Chapter 2, footnote 166.

⁶² Rabeea Assy *Injustice in Person: The Right to Self-Representation* (Oxford University Press, Oxford, 2015)111-118 for an extended discussion of why an active judge is no substitute for the role of a partisan advocate.

⁶³ Judith Resnik "Managerial Judges" (1982) 96 Harvard Law Review 374 at 383.

⁶⁴ John Dewar, Barry Smith and Cate Banks *Litigants in Person in the Family Court of Australia* (Family Court of Australia, 2000) at [2].

⁶⁵ In the UK, the Civil Justice Council, above n 25 at [90] stated: “[T]he judiciary ... have a particularly significant part to play, especially in current circumstances. In particular, ... [t]hrough commitment, formal training and collegiate judicial discussion, they can develop practice and help drive change”. Similarly, see Richard Moorhead "The Passive Arbiter: Litigants in Person and the Challenge to Neutrality" (2007) 17 Social and Legal Studies 405 at 422 suggesting that it is worth debating “improved training, monitoring of, and feedback for, judges on their handling of the difficult balancing act presented by litigants in person”.

⁶⁶ The Tenancy Tribunal, which disposed of 20,299 cases in the 2014 calendar year, allows representation but it is rare in practice. The Disputes Tribunal, which disposed of 14,757 in the 2014 calendar year, requires parties to appear in person. By way of comparison the High Court disposed of 2,473 civil cases plus 302 civil appeals, and the District

have a more inquisitorial role than judges. The question, then, is whether to make similar changes to the court system. I suggest that this is neither desirable nor possible. The courts' function as a public good is potentially undermined by a shift in the direction of informality and it is questionable whether procedural simplification (beyond improving clarity of language, which is desirable in any case) is possible.⁶⁷ In the District Court procedural simplification was attempted, with simplified forms intended for LiP use.⁶⁸ That reform has now been abandoned because:⁶⁹

[T]he absence of structured documents in the form of statements of claim and statements of defence meant that succinct and clear analyses of the position of the parties were often not available until the proceedings were well advanced.

There have been suggestions New Zealand should consider an inquisitorial approach for its criminal justice system, at least in cases of sexual offending,⁷⁰ and this could lead to calls for a more inquisitorial civil justice system as well. That discussion is beyond the scope of this thesis, but it is important to note, in relation to LiPs, that the major European inquisitorial systems require litigants to be represented, rather than welcoming them.⁷¹ This is not therefore a response that increases LiP access to the courts, as it excludes them altogether. Instead, it puts the focus back on the provision of more advice and representation.

The evidence in this study, concurring with and building on that of other studies,⁷² suggests that negotiation and mediation do not necessarily promote access to justice for LiPs. The involvement of a LiP can make a negotiated or mediated outcome more difficult to achieve and less likely to stick should an agreement be reached. As discussed in Chapter 7, this is because lawyers lack willingness to engage with LiPs in settlement discussions, and because the power imbalances between the parties when one is unrepresented can easily create an impression that the lawyer involved is bullying and make the LiP feel they have "been had". While this study does not consider disputes between two LiPs, there is also evidence that ADR will be similarly ineffective in these cases because any power imbalance between the parties will simply be replicated in the

Court disposed of 590 defended civil cases, in the 2014 calendar year: Courts of New Zealand "Annual Statistics for Court and Tribunal Cases" (December 2014) <www.courtsofnz.govt.nz>.

⁶⁷ See discussion of simplification in Chapter 2, page 40-42.

⁶⁸ See Chapter 2, page 42.

⁶⁹ Andrew Beck and others *District Court Procedures: Review and Reform* (New Zealand Law Society Continuing Legal Education, Wellington, 2014) at 1. The family justice reforms of 2014 introduced simplified forms for COCA applications for use by LiPs. No evaluation is available regarding whether this reform has made the court more accessible to litigants.

⁷⁰ New Zealand Ministry of Justice, Government Response to the Report of the Taskforce for Action on Sexual Violence, September 2010 www.justice.govt.nz at [23].

⁷¹ Adrian Zuckerman "No Justice Without Lawyers: The Myth of an Inquisitorial System" (2014) 33 *Civil Justice Quarterly* 355 at ft 16: "Legal representation is mandatory in: Austria, Belgium France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, and Spain"; Rabeea Assy "Can the Law Speak Directly to its Subjects? The Limitation of Plain Language" (2011) 38(3) *Journal of Law and Society* 376.

⁷² See Chapter 7, page 175.

negotiations.⁷³ This suggests that Judges should be more willing to adjudicate in cases involving LiPs, not less.

6. *Rules and Guidelines*

There are other rules and guidelines that could be helpfully introduced in New Zealand. The Victorian Civil Procedure Act 2010 places “overarching obligations” in the conduct of litigation, not only on lawyers, but also on the parties (LiPs or otherwise).⁷⁴ These include obligations to act honestly, to take steps to resolve the dispute, to not mislead or deceive the court, and to minimise delay.⁷⁵ This amendment was brought in with the support of the Victorian Supreme Court, which submitted to the Commission reviewing the rules that, “Because [the parties] make many of the important decisions about the initiation and conduct of litigation, it is appropriate to consider bringing them into a system of broader obligations”.⁷⁶ This is worth considering as a way to not only assist LiPs’ understanding of the system but also that of private clients.

The current rules of professional conduct state that when opposing a LiP “the lawyer should normally inform that person of the right to take legal advice” and imposes a duty on lawyers to conduct dealings with LiPs with “integrity, respect, and courtesy”.⁷⁷ As discussed, these rules were not well known among lawyers and of little practical guidance in the complex reality of interacting with LiPs. In the UK and New South Wales, guidelines have been adopted that set out in more detail the duties and responsibilities of counsel opposing LiPs.⁷⁸ It would be helpful for the Law Society and Bar Association to consider developing similar guidelines. As Macfarlane said, “[the] uncertainties and tensions where a [LiP] faces off against legal counsel will not be dealt with simply by developing more ‘rules’ – but that would be a good place to start”.⁷⁹

Discussion is also needed about whether to follow UK and Canadian practice of allowing LiPs to recover costs in the event they are successful. Even if the rule preventing LiPs from recovering costs is retained, the rule that lawyers who represent themselves in their own cases are entitled to costs needs to be amended.⁸⁰ It is unprincipled. It demonstrates a kind of “clubbiness” that

⁷³ Mark Henaghan "Changing Politics of Family Law in New Zealand" (2012) *International Survey of Family Law* 253 at 258-260; Mark Henaghan and Meghan Nicholson "Family Law" (2014) 2 *New Zealand Law Review* 321 at 351.

⁷⁴ Civil Procedure Act 2010 (Victoria, Australia), s 10.

⁷⁵ At ss 17-27.

⁷⁶ Victorian Law Reform Commission *Civil Justice Review* (Victorian Law Reform Commission, Report 14, 2008) at 166.

⁷⁷ Client Care Rules Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 12.

⁷⁸ New South Wales Bar Association "Guidelines for Barristers on Dealing with Self-Represented Litigants" (2012) <www.nswbar.asn.au>; Law Society (UK) "Litigants in Person: Guidelines for Lawyers" (4 June 2015) <www.lawsociety.org.uk>.

⁷⁹ Macfarlane, above n 26 at 124.

⁸⁰ See Chapter 9, footnote 24.

undermines the claim that lawyers have no special privileges, and it fuels LiPs' suspicions of the institutional incumbents.

7. *Spaces*

Attention needs to be given to physical space within courthouses and courtrooms. At present, the seating and spaces in courtrooms are oriented towards lawyers. In some courts only lawyers are able to access interview rooms and appear without leave before the bar. Changes to the management of space should concentrate not on LiPs, however, but on recognising the role of the parties in the proceedings. Assigned space could be given at the bar tables for parties, whether represented or not. This reform could be paired with changes in the rules to put obligations on the parties, as discussed above.

B. Moving on from a stereotype “modelled on a minority of the worst”

Macfarlane calls, properly in my view, for a cultural change in attitudes to LiPs.⁸¹ The very few very persistent litigants currently overwhelm the discourse about LiPs within the legal community. I hope this research brings to light the many different experiences and many different kinds of LiPs, including the mix of motives they demonstrate for becoming one. Awareness of their varied experiences, the reasons for their actions, and the systematic barriers they face, may help other litigation participants to interact with them in a more nuanced fashion, without easy resort to stereotypes or the assumption that litigating in person involves some kind of personal failure.

Very persistent litigants are the source of many of these stereotypes. I have argued that the difficulty they cause lies not only in their overconsumption of resources, but, more importantly, in their attack on the legitimacy of the courts. Instead of seeking change through the political process, very persistent litigants tend to challenge the finality of decisions through multiple appeals and collateral attacks, and by calling into question the ethics of the participants in the court system. They try to use the court process against itself. Their efforts, by necessity, are concentrated in the highest courts and therefore against the members of the profession with the highest prestige.

Persistent litigants have been a feature of the legal landscape for many years⁸² and few mechanisms seem to be available to address this that would not involve an unconstitutional denial of access to the courts. The Law Commission has recommended a sliding scale approach for controlling

⁸¹ Macfarlane, above n 26 at 127.

⁸² Michael Taggart "Vexing the Establishment: Jack Wiseman of Murrays Bay" [2007] New Zealand Law Review 271; Michael Taggart "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896" (2004) 63 Cambridge Law Journal 656.

vexatious litigation that offers more flexibility than the blunt tools currently available.⁸³ Further controls might, however, reduce their access to the courts to unacceptable levels.

C. Areas for further exploration

There is almost no research on the New Zealand legal profession, its internal structure, the client experience, or New Zealand judges. Hammond notes there are several structural reasons in New Zealand that cause “the alienation of many legal academics from any form of study of legal practice, including judging.”⁸⁴ Hammond suggests that the academy is well placed to:⁸⁵

[S]uggest creative solutions to problems thrown up by social, economic and technological change. They can, for instance, consult more widely with colleagues, within the academy at large and, for that matter, the community, in making suggestions.

Further, I would suggest that the wider community, rather than being the last to be consulted, should be given a primary role. The fact that LiPs express limited confidence in the fairness of the process they experience suggests, as Sandefur says, that more research should be conducted on public opinion, including public perceptions of the fairness of the courts and their confidence in the process.⁸⁶ This would not be “user satisfaction” research of the kind the MoJ conducts, but research on the general public’s views about the justice system. One study of this kind has recently been conducted, but much more could be done.⁸⁷ That research could provide an empirical foundation for debate about the distribution of justice resources, broaden that discussion beyond the question of more access to lawyers to the more fundamental question of access to justice.

There is also the question whether lawyers are needed to provide a representation service in all settings, or whether lay advocates would suffice and might bring the advantage of competition to a monopolised market. Some studies have concluded that within certain constraints (such as within particular specialisations), lay advocates perform either better than lawyers or, if not as well, at least better than LiPs.⁸⁸ New Zealand has already gone some way down this path in that the area of

⁸³ See Chapter 2, footnote 57.

⁸⁴ Grant Hammond "Judges and Academics in New Zealand" (2013) 25(4) *New Zealand Universities Law Review* 681 at 699-700.

⁸⁵ At 687.

⁸⁶ Rebecca Sandefur "Access to Civil Justice and Race, Class, and Gender Inequality" (2008) *Annual Review of Sociology* 339.

⁸⁷ Saskia Righarts and Mark Henaghan "Public Perceptions of the New Zealand Court System: An Empirical Approach to Law Reform" (2010) 12(2) *Otago Law Review* 329 which involved a postal survey that asked nine questions about perceptions of the court system, along with some questions about previous involvement in the court, whether they believed changes needed to be made, and demographic data.

⁸⁸ Rebecca Sandefur "Impact of Counsel: An Analysis of Empirical Evidence" (2011) 9 *Seattle Journal of Social Justice* 51 at 79 citing Rebecca Sandefur "Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes" (2011) unpublished (currently under review) ; Herbert Kritzer *Legal Advocacy: Lawyers and Non-Lawyers at Work* (University of Michigan Press, Ann Arbor, 1998); Ralph Cavanaugh and Deborah Rhode "The Project, Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis" (1976) 86 *Yale Law Journal* 104; Richard Moorhead,

protected work for lawyers is small and lay advocates have an audience in several jurisdictions.⁸⁹ The Employment Court, where both lay advocates and lawyers represent litigants, could provide an ideal forum for research that examines the costs and outcomes, and risks and benefits, in a comparison of lay advocates and lawyers as representatives.

IV. Conclusion

This thesis has examined litigants' decisions to litigate in person and their experiences of doing so. It has also examined how they are perceived by and interact with the regular inhabitants of the court system: the judges, lawyers, and court staff. I have argued that LiPs struggle to access the courts in a meaningful way, not necessarily because of any particular personal deficits, but because there are many complexities and conflicts that cannot be easily overcome by a litigant advocating their own cause. Further, I have argued that there is a contradiction underlying the promise of LiP access to the courts. The courts promise a forum to vindicate rights. Without this forum, the rights are empty, merely occurring on the books and not in reality. Yet the courts cannot hear all the claims that citizens have. They would collapse under the demand. Even expansion of their resources would not satisfy all claims, as demand is elastic. So, to appear to provide justice and to control their process, the courts must both promise and limit access simultaneously. Normally lawyers play a central role in mediating access, screening and translating claims, and negotiating clients towards settlement. LiPs come straight to the courts, however, demanding vindication for their raw sense of injustice.

This contradiction in the courts' approach is not unique within the legal system. It has been said: "[L]aw is required to perform inconsistent and incompatible jobs ... it does not have the option of purifying itself by eliminating some of those jobs".⁹⁰ What looks like a defect – a gap between promise and reality – is a fundamental part of the judicial system that must mediate between the claims and values of competing and diverse social groups.⁹¹ Frequent revelation of the gap between promise and reality, however, may undermine the courts' legitimacy. A response is therefore required. Barriers erected to dissuade LiPs from continuing to approach the courts risk undermining the courts' legitimacy by revealing to LiPs the illusion of their accessibility. Judges, lawyers, and court staff providing assistance risk undermining long established conventions of the

Alan Paterson and Avrom Sherr "Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales" (2003) 37 *Law & Society Review* 765. See also Engler, above n 19; Zuckerman, above n 71 suggesting the market should be opened to competition from nonlawyers.

⁸⁹ Chapter 1, pages 6-7.

⁹⁰ Michael Robertson "Incompatible Law Jobs" in Helen Irving, Jacqueline Mowbray and Kevin Walton (eds) *Julius Stone: A Study in Influence* (Federation Press, Annandale, NSW, 2010) 103 at 103. See also Trubek, above n 2.

⁹¹ Trubek, above n 2 at 543.

adversarial system and encouraging further litigation in person that would place further pressure on the system. Faced with demand for access that the courts cannot accommodate, the professionals are tempted to personalise LiPs' failures. In this manner, the illusion that the courts are accessible is maintained, while the failure is blamed on the individual, not on systemic factors that few LiPs, if any, can overcome. This focus on individuals' failings easily elides into thinking of LiPs as persistent and vexatious litigants.

I have argued that the focus on the "problem of persistent litigants" can be explained by several factors: their overconsumption of court resources, their function as "atrocious stories", and the danger they are perceived to create. Even more crucially, perhaps it is because they often attack the integrity of the court system and are therefore a risk to its legitimacy. The particular problem that persistent litigants present, however, often contaminates broader dialogue about LiPs. Discussion about these very persistent litigants needs to be cleaved from the discussion about LiPs because all LiPs are not very persistent and all very persistent litigants are not LiPs.

This thesis was directed at studying cases in which LiPs came up against represented litigants, where the pressure on LiPs would be expected to be greatest. My findings do speak to cases involving only LiPs as well, as I have discussed a number of limitations inherent in not having a lawyer, regardless of whether the opposing party was represented. In particular, even the most competent LiP cannot fulfil the role lawyers perform as screener, broker, translator, and negotiator. Nor can a judge fill those roles, even if they were given considerably more time to deal with each case (an expensive form of assistance). These findings are important in light of the 2014 family justice reforms, which made litigation in person mandatory in many Family Court cases.

Despite this legislative change, New Zealand's response to LiPs has so far been muted, although there is growing interest in the topic.⁹² I suggest that the policy response, to be effective, needs to address the question of the distribution of justice resources on a principled basis. As Rhode has asked: "Our ideal world is surely not one in which all disputes are fully adjudicated, but can we develop more equitable limiting principles than ability to pay?"⁹³ I have argued that adjudication is a public good. It has an important role to play in our society and there is room for a discussion about determining access based on the importance of the claim to the person, or to society, or to the development and refinement of the law.

⁹² Winkelmann, above n 34; Sasha Borissenko "Does Self-Representation Provide Access to Justice?" (15 March 2015) 860 *LawTalk* 7; New Zealand Bar Association Conference, Napier, 7-8 August 2015 is themed "Access to Justice" and several papers will be presented on LiPs.

⁹³ Deborah Rhode *Access to Justice* (Oxford University Press, Oxford; New York, 2004) at 6.

I have also made a number of specific policy recommendations. In doing so I have been mindful of the limitations of a small-scale qualitative study as a basis for policy reform but also aware of a policy audience in need of insight from empirical inquiry. These more concrete proposals respond to the need to protect the courts' legitimacy without creating a false impression that they are easily accessible to LiPs. They are a means by which the delicate balance between projecting accessibility and maintaining closure might be somewhat restored.

While responding to New Zealand's need for empirical data, this research also contributes to the international body of work on LiPs, answering the call for further qualitative research on the issue. The case studies, which formed part of the investigation, are an innovation in method. They demonstrate both the difficulties of studying live court disputes, particularly in an environment where many aspects of litigation are private, as well as the benefits conferred in that they present a detailed and nuanced picture of LiPs' strategies and perspectives in navigating the court system.

In presenting the experience of LiPs as I witnessed them, and examining their perspectives and approaches to litigation, I hope judges, lawyers, and court staff can approach interactions with LiPs with greater understanding. Lisa, Matt, Tom and Gary were offered as portraits to assist. As Atticus Finch advised: "You never really understand a person until you consider things from his point of view – until you climb into his skin and walk around in it".⁹⁴ Equally, I hope that in presenting the perspectives of judges, lawyers, and court staff, LiPs will better understand the pressures and constraints they are subject to and come to court with more knowledge of this institution's orientation and practice. By helping to close the gulf between the participants, a more informed and thoughtful debate can occur about how to best respond to those seeking access to the courts.

⁹⁴ Lee, above n 1 at 39.

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Appendix A – Poster



Going to Court without a Lawyer?

Research Study on Self-Represented Litigants

Most people who go to Court in New Zealand are represented by a lawyer. There are some people who are self-represented - they take or defend cases without the help of a lawyer. This research study explores why people become self-represented, their experience of the court system, and the outcomes of their cases. It also looks at the experience of other people who are involved in cases where there is a self-represented party (judges, court staff and opposing parties and their lawyers).

If you are considering representing yourself in the Family Court or in the District or High Court in Hamilton or Auckland in a civil case (i.e. not a criminal case) and you are over 18 years of age you may be eligible to participate in this study.

If you take part in the study the researcher will talk to you about your case, including why you do not or cannot have a lawyer, and she will come with you to court and meetings with the party on the other side of your case. The researcher **will not be able to give you any legal advice** but will discuss your case with you and be with you on your journey through the court system.

The time commitment that is required is an interview at the beginning and end of the observation of your case, time to contact the researcher before you go to court or meetings for your case so she can come with you and time to discuss your case (several conversations during the observation of your case).

Bridgette Toy-Cronin, University of Otago, Faculty of Law
Call or text: 0223155972; E-mail: law.selfrepresented@otago.ac.nz

This project has been reviewed and approved by the University of Otago Human Ethics Committee. Reference: 12/315.

This project is being undertaken as part of the requirements for a PhD (Doctor of Philosophy in Law). The research and the researcher are in no way associated with the Ministry of Justice.

[Tags with contact details appeared at the bottom of the poster for people to rip-off]

Appendix B – Example of News Story

Harry Pearl, “More people representing themselves” *Waikato Times* (2 September 2013)

Te Kawa dairy farmer Hamish Burdon took a slightly unconventional route into legal representation, but it's a path one researcher says is becoming increasingly common among New Zealanders.

In 2003, Burdon was forced to represent himself in a custody dispute for the shared parenting rights of his two children.

"I couldn't afford a lawyer so I chose to represent myself," said Burdon, 42.

He had no legal training and no familiarity with the court system. He won his case.

It was a galvanising experience and one that ultimately lead him to study post-graduate law at the University of Waikato.

"I'm a farmer by trade and I now also represent people in employment law," he said.

Burdon is among what is said to be a growing number of people representing themselves in New Zealand's civil courts.

Although there are no official figures available, Hamilton doctoral student Bridgette Toy-Cronin told the Times anecdotal evidence suggests numbers are rising.

"It's widely thought within the system - the judges and the court staff - that the numbers are rising.

"That would make sense because legal aid has been cut back and there was a recession on, so people were less able to have an income to pay for a lawyer."

And when the Government's Family Court Proceedings Reform Bill becomes law, she said, almost everyone will be required to be self-represented in the early stages of Family Court proceedings.

Toy-Cronin, who is researching self-represented litigants in New Zealand's civil courts for her doctoral degree, hopes her research will provide better outcomes not just for individuals representing themselves, but the court system in general.

"There's a gaping hole there as far as New Zealand research on the topic goes," she said.

While working as a litigator she had come across several people representing themselves. "It's quite hard to litigate against someone who doesn't really know the rules of engagement."

Some of the challenges facing people representing themselves were difficulty understanding court procedures, how to advance their cases and the details of the law.

But for Burdon, the hardest part was keeping emotion out of proceedings.

"The old saying is: a good lawyer is one that can keep the emotion out of it. Well, when you're representing yourself, you can't."

Toy-Cronin has been in touch with about 35 self-represented litigants from throughout the country for her research, but said she was looking for others.

"I'm really looking for Hamilton people to be part of that so I can get to know them a bit more and understand their case in a bit more detail."

Appendix C – Information Sheets and Consents for LiP Participants

Reference no 12/315
23 November 2012



GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

INFORMATION SHEET FOR SELF-REPRESENTED LITIGANTS – OBSERVATIONAL STUDY

Thank you for showing an interest in this project. Please read this information sheet carefully before deciding whether or not to participate. If you decide to participate we thank you. If you decide not to take part there will be no disadvantage to you and we thank you for considering our request.

What is the Aim of the Project?

Most people who go to court in New Zealand are represented by a lawyer and in general the court system is designed in a way that assumes people will be represented by a lawyer. There are a number of people who either take or defend cases as “self-represented litigants”, appearing in court without a lawyer representing them. The aim of the project is to find who self-represented litigants are, why they are self-represented and to understand their experience of being self-represented. It also aims to understand the effect self-representation has on other people in the court system including judges, court staff and opposing parties and their lawyers. By participating in this project you will be able to give your opinion on how to improve the court system to better serve self-represented litigants. This project is being undertaken as part of the requirements for a PhD (Doctor of Philosophy in Law).

Who can take part in the study?

We are inviting research participants through community organisations and by word of mouth to consider participating in the study. We are looking for people who are a party (plaintiff, defendant, applicant or respondent) in a case that is or will be:

- in the Family Court, District Court or High Court;
- is not a criminal prosecution (i.e. the other party is not the Police);
- is ongoing, preferably in its early stages.

If you are a party to this type of case and you are representing yourself, or thinking about representing yourself, you may be eligible to take part in the study.

If you take part in the study the researcher will talk to you about your case, why you do not or cannot have a lawyer and how you plan to represent yourself. The researcher will observe you as you prepare and argue your case including coming with you to court and meetings with the party on the other side of your case. This may be for part of your case or all of your case. The researcher **will not be able to give you any legal advice**, but will discuss your case with you and ask you questions which

might help you clarify your strategy and goals. The researcher can also point you in the direction of people who might be able to help you. .

What will you be asked to do?

If you agree to take part in this project, you will be asked to talk to the researcher about your case, why you want or need to be self-represented, and the successes or difficulties you are having in taking or defending your case without a lawyer's help. You will be asked to contact the researcher before taking major steps in your case (like going to Court or meeting with the other party and their lawyer). If possible, the researcher will come with you to court and meetings and observe you running your case. If you wish to, you can provide the researcher with court documents related to your case.

The time commitment which it will involve is the time to:

- discuss your case with the researcher;
- call or email the researcher before you take steps in the case, for example before going to court or meeting with the lawyer and the other person involved in the case.

The researcher will arrange to have a final interview with you at the end of your case or at some earlier point in your case. During this interview you will be asked to reflect on your experience of being an SRL, give any advice for other people thinking about becoming SRLs and your thoughts on changes needed in the system.

If the person your case is against and their lawyer have consented to taking part, the researcher will then interview them. She will not share any information with them about your case, your opinions or your discussions with her. The questions she will ask them will only be about their experience of litigating against you, a self-represented litigant. They may provide court documents related to the case to explain their experience of litigating against you. This is so there is research information about everyone's perspectives.

If the person your case is against and their lawyer do not consent to being part of this research, you can still take part. However the researcher will only be able to observe the parts of your case where the Judge gives the researcher permission to be there. You can still call or email the researcher with your own updates of how your case is progressing.

Please be aware that you may decide not to take part in the project without any disadvantage to yourself of any kind.

What information will we collect and what use will be made of it?

The researcher will make notes of her discussions with you and during or after watching you take steps in your case (for example, when you are meeting the other party's lawyer or in court). The notes will be of answers to the researcher's questions and the researcher's observations. She will also (with your permission) make a recording of the interview when you first join the study and your final interview so that she can ensure her notes of what you said are accurate. You can provide copies of court documents to the researcher to explain your case and your experience of being self-represented if you would like to. You can also e-mail the researcher with updates of your case. This information will be used to write her PhD thesis as well as reports and articles on the experience of self-represented litigants in New Zealand.

The only people who will have access to the information collected will be the researcher and the supervisor. It will be stored securely so that only the researcher and the supervisor can access it. The information collected will be retained for **at least 5 years** in secure storage. Any personal

information held about you, such as your contact details and any recordings of the interviews, will be destroyed at the completion of the research even though the data derived from the research will, in most cases, be kept for much longer or possibly indefinitely.

The only exceptions, where information collected during the research might be disclosed to a wider range of people, would be where disclosure was immediately required to protect the safety of any person or where the researcher was ordered to disclose by a court.

The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand). The results might include descriptions of you and your case. However, your name and any details that might make you identifiable to others will not be published. Every attempt will be made to preserve your anonymity.

You can request a copy of your first interview and final interview summary and you can correct or withdraw any information you provide at any time following the interview and before the writing up of the research results.

Can you change your mind and withdraw from the project?

Yes. You may withdraw from participation in the project at any time and without any disadvantage to yourself of any kind.

What if you have any questions?

If you have any questions about our project, either now or in the future, please feel free to contact either:-

Bridgette Toy-Cronin (Researcher)	and/or	Professor John Dawson (Supervisor)
Faculty of Law, University of Otago		Faculty of Law, University of Otago
022 315 5972		03 479 8909

Email: law.selfrepresented@otago.ac.nz

Email: john.dawson@otago.ac.nz

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

CONSENT FORM FOR SELF-REPRESENTED LITIGANTS – OBSERVATIONAL STUDY

I have read the Information Sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage.

I know that:-

1. My participation in the project is entirely voluntary;
2. I am free to withdraw from the project at any time without any disadvantage;
3. Personal identifying information (field work notes that have my name and contact details, any recordings of interviews, and any documents provided) will be destroyed at the conclusion of the project but any raw data on which the results of the project depend will be retained in secure storage for at least five years;
4. The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand) but every attempt will be made to preserve my anonymity.
5. At the end of the observation of my case the researcher will interview the opposing party and their lawyer. She will not share any information with them about my case, my opinions or my discussions with her. The questions she will ask them will only be about their experience of litigating against me, a self-represented litigant.

I agree to take part in this project.

.....
(Name of participant)

.....
(Signature of participant)

.....
(Date)

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.



GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

INFORMATION SHEET FOR SELF-REPRESENTED LITIGANTS – INTERVIEW(S)

Thank you for showing an interest in this project. Please read this information sheet carefully before deciding whether or not to participate. If you decide to participate we thank you. If you decide not to take part there will be no disadvantage to you and we thank you for considering our request.

What is the Aim of the Project?

Most people who go to court in New Zealand are represented by a lawyer and in general the court system is designed in a way that assumes people will be represented by a lawyer. There are a number of people who either take or defend cases as “self-represented litigants”, appearing in court without a lawyer representing them. The aim of the project is to find who self-represented litigants are, why they are self-represented and to understand their experience of being self-represented. It also aims to understand the effect self-representation has on other people in the court system including judges, court staff and opposing parties and their lawyers. By participating in this project you will be able to give your opinion on how to improve the court system to better serve self-represented litigants. This project is being undertaken as part of the requirements for a PhD (Doctor of Philosophy in Law).

Who can take part in the study?

We are inviting research participants through community organisations and by word of mouth to consider participating in the study. We are looking for people who are a party (plaintiff, defendant, applicant or respondent) in a case that is:

- in the Family Court, District Court or High Court;
- is not a criminal prosecution (i.e. the other party is not the Police).
- is ongoing or concluded in the last year.

If you are or were a party to this type of case and you represented yourself, or are representing yourself, you may be eligible to take part in the study.

If you take part in the study the researcher will talk to you about your case, why you do not or cannot have a lawyer and your experience of representing yourself. The researcher **will not be able to give you any legal advice**, but you will be able to share your experience and your ideas for improving the system to better serve the needs of self-represented litigants.

What will you be asked to do?

If you agree to take part in this project, you will be asked to talk to the researcher about your case, why you want or need to be self-represented, and the successes or difficulties you are having in taking or defending your case without a lawyer's help. If your case has already concluded or has

been in progress for several months, you will also be asked to reflect on your experience of being an SRL, give any advice for other people thinking about becoming SRLs and your thoughts on changes needed in the system.

The time commitment which it will involve is the time to discuss your case with the researcher (approximately one hour). If your case is ongoing the researcher may ask you to participate in a second interview to discuss your progress and any changes in your further experience of being an SRL (approximately one hour, 6-12 months after the original interview). You can provide copies of court documents to the researcher to further explain your case and experience of self-representing, if you wish to.

Please be aware that you may decide not to take part in the project without any disadvantage to yourself of any kind.

What information will we collect and what use will be made of it?

The researcher will make notes of her discussions with you. She will also (with your permission) make a recording of the interview(s) so that she can ensure her notes of what you said are accurate. This information will be used to write her PhD thesis as well as reports and articles on the experience of self-represented litigants in New Zealand.

The only people who will have access to the information collected will be the researcher and the supervisor. It will be stored securely so that only the researcher and the supervisor can access it. The information collected will be retained for **at least 5 years** in secure storage. Any personal information held about you, such as your contact details and any recordings of the interviews, will be destroyed at the completion of the research even though the data derived from the research will, in most cases, be kept for much longer or possibly indefinitely.

The only exceptions, where information collected during the research might be disclosed to a wider range of people, would be where disclosure was immediately required to protect the safety of any person or where the researcher was ordered to disclose by a court.

The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand). The results might include descriptions of you and your case. However, your name and any details that might make you identifiable to others will not be published. Every attempt will be made to preserve your anonymity.

You can request a copy of your first interview and final interview summary and you can correct or withdraw any information you provide at any time following the interview and before the writing up of the research results.

Can you change your mind and withdraw from the project?

Yes. You may withdraw from participation in the project at any time and without any disadvantage to yourself of any kind.

What if you have any questions?

If you have any questions about our project, either now or in the future, please feel free to contact either:-

Bridgette Toy-Cronin (Researcher)	and/or	Professor John Dawson (Supervisor)
Faculty of Law, University of Otago		Faculty of Law, University of Otago
022 315 5972		03 479 8909

Email: law.selfrepresented@otago.ac.nz

Email: john.dawson@otago.ac.nz

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

CONSENT FORM FOR SELF-REPRESENTED LITIGANTS – INTERVIEW(S)

I have read the Information Sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage.

I know that:-

1. My participation in the project is entirely voluntary;
2. I am free to withdraw from the project at any time without any disadvantage;
3. Personal identifying information (notes that have my name and contact details, any recordings of interviews, and any documents provided) will be destroyed at the conclusion of the project but any raw data on which the results of the project depend will be retained in secure storage for at least five years;
4. The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand) but every attempt will be made to preserve my anonymity.

I agree to take part in this project.

.....
(Name of participant)

.....
(Signature of participant)

.....
(Date)

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

Appendix D – Interview Schedule for LiPs

GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

INTERVIEW QUESTIONS FOR SELF-REPRESENTED LITIGANTS

This is a semi-structured interview schedule. One interview will be undertaken when the SRL enters into the study and the other when they exit the study.

ENTRY INTERVIEW

Representation Decision and Assistance with Case

- Why are you going to be self-represented? Have you made any attempts to find a lawyer? Do you know if you are eligible for legal aid? Have you applied for legal aid?
- Have you got any previous experience of the court system? As a litigant? As a witness? Jury member? Have you self-represented before?
- Do you have anyone with legal experience helping you? If so, how are they helping? What is their experience? Do they have formal qualifications?
- Have you looked for help with your case anywhere else? Online? At an organisation? At the court? Are you planning to get help anywhere else?

Nature of the case

- What is your case about? Have you brought the case or are you the respondent/defendant?
- Who is the other party to the case? What is their relationship to you? Who is their lawyer?
- Have you tried to resolve the case without going to court? Why or why not? If yes, what have you done?
- Which court will your case be in?
- What do you hope to achieve by taking the case to court? Are you hoping you'll find a resolution before getting to a court hearing or would you rather a judge solve it?
- How long do you think the case will take to resolve if a judge makes the final decision?

Steps taken

- What have you done so far in your case, if anything?
- What are you planning to do next?

EXIT INTERVIEW

Reflections on representation

- Do you think there were any advantages or disadvantages by being self-represented? If so, what were the advantages and disadvantages?
- The other party had a lawyer, what were the advantages to them in having a lawyer? What were the disadvantages?
- Looking back at your case, do you think it would have been better to have represented yourself or to have a lawyer? Why? Do you think the outcome would have been the same or different?

Reflections on the process

- If you had your time again, from the beginning of the case, what would you do differently? What would you do the same?
- Do you think the court process you've been through has been fair? In what ways was it fair or unfair?

Reflections on the outcome of the case

- [If the case went to a hearing] Did you think the Judge was fair to you at the hearing? Do you think the Judge was fair to the SRL? Do you think the Judge favoured you or the SRL or treated you equally?
- [If SRL is a plaintiff/respondent] What were you hoping to achieve by taking this case to court? Did you achieve that [or if case is not yet resolved, do you still think you will achieve that]? Do you feel satisfied with the outcome of your case? Do you think it was a fair outcome?
- [If the interviewee is the respondent/defendant] Do you think that the other party needed to bring this case to court to solve the dispute between you? Why or why not? If not, how could the dispute have otherwise been resolved?

SRLs and the Courts

- What do you see as the main purpose or purposes of the [Family/District/High] Court?
- If you were advising someone who was thinking about being an SRL in the [Family/District/High] Court, what advice would you give them? Should they go self-represented or get a lawyer?
- Should people have the option to be self-represented in the [Family/District/High] Court?
- What should be done for people who want a lawyer but can't afford one?
- Thinking about preparing your case, what changes could be made to the system to better help SRLs? What help do you think you would have benefited from? (e.g. online information, SRL self-help centre, clearer forms, easier procedure). What about the Court registry office?
- [If the case went to a hearing] Thinking about arguing your case in court, what could judges do differently to better help SRLs? What about the rules in the court [like the rules for examining witnesses] do they need to be changed at all?
- [If the case is ongoing] What are you planning to do next in your case? [or] what is going to happen next in your case?

Appendix E – Information Sheet for Presiding Judge

Reference no 12/315
23 November 2012



GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

INFORMATION SHEET FOR JUDGES PRESIDING OVER FIXTURES WHERE PERMISSION TO OBSERVE IS SOUGHT

Aim of the Project

Self-represented litigants (SRLs) present unique challenges to the courts. Anecdotal evidence suggests the number of SRLs is increasing but there is little reliable data on how many SRLs there are in the civil courts, why they are self-represented and the experience of being an SRL, to litigate against them or to hear cases in which they appear. It is hoped this research will answer these questions and that the results of the research will help guide future policy and procedural reforms in the courts. This project is being undertaken as part of the requirements for a PhD (Doctor of Philosophy in Law).

Funding and Approval

The research is funded by a New Zealand Law Foundation Doctoral Scholarship and has been approved by the University of Otago Human Ethics Committee, the Ministry of Justice and the Judicial Research Committee.

In Court Observation

Part of the research involves observations of SRLs who have cases in the Family Court, District Court and High Court in Auckland and Hamilton. The researcher will observe the SRLs as they attempt to negotiate the court process including court appearances. One of the SRLs participating in this study is appearing in your court and I am seeking permission to observe the fixture. The SRL has signed a consent form and agreed to being observed. I have also contacted the opposing party's solicitor and asked the solicitor and opposing party to participate in an interview and to consent to observing fixtures. Their response will be noted in the e-mail accompanying this information sheet.

Publication and Protection of Anonymity

The research findings will be published as part of the researcher's PhD thesis and will also be used for conference presentations and journal publications in New Zealand. Every attempt will be made to preserve participants' anonymity. The names of, and any identifying details about, the people observed (including the Judge) will not be published, nor any other information would easily lead to their identification.

I am admitted as a Barrister and Solicitor and have practiced as a litigation solicitor in the New Zealand Courts. I will of course abide by any orders of the Court.

Questions

If you have any questions about the Judicial Research Committee's approval please contact Kieron McCarron (kieron.mccarron@courts.govt.nz).

If you have any questions about the project please contact either:-

Bridgette Toy-Cronin (Researcher)	and/or	Professor John Dawson (Supervisor)
Faculty of Law, University of Otago		Faculty of Law, University of Otago
022 315 5972		03 479 8909

Email: law.selfrepresented@otago.ac.nz

Email: john.dawson@otago.ac.nz

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

Appendix F – Information Sheet and Consent for Lawyers

Reference no 12/315
23 November 2012



GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

INFORMATION SHEET FOR LAWYERS

Please read this information sheet carefully before deciding whether or not to participate. If you decide to participate we thank you. If you decide not to take part there will be no disadvantage to you and we thank you for considering our request.

What is the Aim of the Project?

Self-represented litigants (**SRLs**) present unique challenges to the courts and those who litigate against them. Anecdotal evidence suggests the number of SRLs is increasing but there is little reliable data on how many SRLs there are in the civil courts, why they are self-represented and what it is like to be a SRL or to litigate against them. It is hoped this research will answer these questions and that the results of the research will help guide future policy and procedural reforms in the courts. This project is being undertaken as part of the requirements for a PhD (Doctor of Philosophy in Law).

The research is funded by the New Zealand Law Foundation and has been approved by the Ministry of Justice and the Judicial Research Committee.

Who can take part in the study?

Self-represented litigants who are parties to civil cases in the Family Court, District Court or High Court in Hamilton or Auckland have agreed to participate in our research. We are contacting you because your client is the opposing party to an SRL who has agreed to be part of this study. The researcher will observe the SRL as they prepare their case and will discuss their experiences with them throughout the court process (such as understanding the substantive or procedural law). We also want to understand your experience of litigating against an SRL, so we are asking for opposing parties and their lawyers to participate in the study as well.

The researcher is trained as a lawyer, but she will not provide any legal advice to the SRL or your client.

What will you be asked to do?

As part of the observation of the SRL, the researcher would like to attend meetings between the SRL and you and your client and any attempts at dispute resolution, as well as any court appearances. When the researcher has finished observing the SRL, she would like to interview you and your client separately about your experiences of litigating against the SRL and any issues you encountered that were due to the SRL not having a lawyer (**the Interview**). The researcher will not share any

information with you about the SRL's case, opinions or her discussions with the SRL. The Interview will only be to discuss issues related to the SRL's lack of representation. The Interview will only take place after her observation of the SRL has ended and she has no ongoing contact with the SRL. Everything discussed in the Interview is confidential and will not be shared with the SRL or the court. The time commitment which it will involve is:

- presenting the information sheet and consent form to your client and asking if they will talk to the researcher; and
- up to one hour of your time for the Interview.

Before any court fixtures the researcher will make an application to the Judge to ask for permission to attend. This application may be made whether or not you and your client agree to participate in the research. A copy of the application will be sent to you so that you have the opportunity to raise any objections to the researcher observing the fixture.

Please be aware that you may decide not to take part in the project without any disadvantage to yourself of any kind.

What information will we collect and what use will be made of it?

The researcher will make notes of her observation of any interactions between you and the SRL. The researcher will also make notes of your responses to the questions in the Interview. With your agreement the Interview will be recorded so that key themes can be identified, and relevant quotes and examples can be retrieved for the research report. If you wish to, you can provide copies of court documents to illustrate your answers.

The information is being collected for the purpose of better understanding the experience of SRLs negotiating the New Zealand civil court system and the effect they have on all the other actors involved in the system. The research findings will be published as part of the researcher's PhD thesis but will also be used for conference presentations and journal publications in New Zealand and internationally.

The only people who will have access to the information collected will be the researcher and the supervisor. It will be stored securely so that only the researcher and the supervisor can access it. The information collected will be retained for **at least 5 years** in secure storage. Any personal information held about you, such as your contact details and any audio tape of the Interview, will be destroyed at the completion of the research even though the data derived from the research will, in most cases, be kept for much longer or possibly indefinitely.

The only exceptions, where information collected during the research might be disclosed to a wider range of people, would be where disclosure was immediately required to protect the safety of any person or where the researcher was ordered to disclose by a court.

The research report will provide an overview of the key themes emerging across all the interviews with lawyers. Anonymous quotes and examples of practice will also be included to illustrate these themes. No individual lawyer or their location will be identified.

The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand) but every attempt will be made to preserve your anonymity.

You can request a copy of the Interview summary and you can correct or withdraw any information you provide at any time following the Interview and before the writing up of the research results.

Can you change your mind and withdraw from the project?

Yes. You may withdraw from participation in the project at any time and without any disadvantage to yourself of any kind.

What if you have any questions?

If you have any questions about our project, either now or in the future, please feel free to contact either:-

Bridgette Toy-Cronin (Researcher)	and/or	Professor John Dawson (Supervisor)
Faculty of Law, University of Otago		Faculty of Law, University of Otago
022 315 5972		03 479 8909

Email: law.selfrepresented@otago.ac.nz

Email: john.dawson@otago.ac.nz

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

CONSENT FORM FOR LAWYERS

I have read the Information Sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage.

I know that:-

1. My participation in the project is entirely voluntary;
2. I am free to withdraw from the project at any time without any disadvantage;
3. Personal identifying information (field work notes that have my name and contact details, any audio file, and documents provided) will be destroyed at the conclusion of the project but any raw data on which the results of the project depend will be retained in secure storage for at least five years;
4. The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand) but every attempt will be made to preserve my anonymity.

I agree to take part in this project.

.....
(Name of participant)

.....
(Signature of participant)

.....
(Date)

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

Appendix G – Interview Schedules for Lawyers

GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

INTERVIEW QUESTIONS FOR LAWYERS (GENERAL INTERVIEW)

This is a semi-structured interview schedule designed to follow the various phases of a court case, focusing on specific issues encountered due to litigating against self-represented litigants. The questions are also designed to explore the lawyer's perception of the purpose of the court system and the place of a self-represented litigant in that system.

Opposing SRLs

Communicating with SRLs

1. Do you find that your communications (in person or by correspondence) with SRLs is any different to when you are communicating with a lawyer?
2. Do you ever suggest to SRLs that they should seek representation? Why or why not?
3. Are you comfortable talking to SRLs or do you prefer to deal with a lawyer? Why?
4. Do you know of any ethical rules for dealing with an unrepresented party? Do you think it would help to have guidelines for how lawyers should deal with SRLs?

Documents

5. In your experience, can SRLs file documents with the same level of proficiency as a lawyer? If not, can you identify any particular difficulties SRLs have in producing court documents?

Resolving the case

6. Do you think that having an SRL as an opposing party effects the time it takes to resolve a case? Why?
7. Do you think that having an SRL as an opposing party effects the cost of the case for the represented party?
8. Do you think that having an SRL as an opposing party effects your ability to negotiate an out of court settlement to a case?

In court

9. Thinking about hearings [judicial settlement conference/case conferences etc] that you have appeared in opposing an SRL, do you think the SRL gained any advantages by the fact they were self-represented? What about disadvantages?
10. Is there anything about your style of presentation that you change when the other party is self-represented?
11. Do you think SRLs can present a case in court [opening and closing/evidence/pre-trial applications] with the same level of proficiency as a lawyer?

Courts and Self-Represented Litigants

12. What do you see as the main purpose or purposes of the [Family/District/High] Court?
13. What think are the main reasons that SRLs don't have lawyers?
14. Do you think that people should be allowed to be self-represented in the [Family/District/High] Court? Why or why not?
15. If you don't think people should be allowed to be self-represented in the [Family/District/High] Court, what should be done for people who can't afford a lawyer?

Advising SRLs

Unbundled Legal Advice

16. Have you ever given advice or drafted documents for someone who is self-represented?
 - a. If yes – Did you charge for the advice or was it pro bono? Was there a formal brief? If yes, what was the limit of your brief and how was this defined?
 - b. If no – would you provide limited brief advice if approached (e.g. drafting a court document or offering advice on the next step to take to progress a case)?
17. Do you know the professional conduct rules around offering limited advice in a case versus a full brief?

Appendix H – Information Sheet and Consent form for Judges

Reference no 12/315

23 November 2012



GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

INFORMATION SHEET FOR JUDGES

Thank you for showing an interest in this project. Please read this information sheet carefully before deciding whether or not to participate. If you decide to participate we thank you. If you decide not to take part there will be no disadvantage to you and we thank you for considering our request.

What is the Aim of the Project?

Self-represented litigants (**SRLs**) present unique challenges to the courts. Anecdotal evidence suggests the number of SRLs is increasing but there is little reliable data on how many SRLs there are in the civil courts, why they are self-represented and the experience of being an SRL, to litigate against them or to hear cases in which they appear. It is hoped this research will answer these questions and that the results of the research will help guide future policy and procedural reforms in the courts. This project is being undertaken as part of the requirements for a PhD (Doctor of Philosophy in Law).

The research is funded by a New Zealand Law Foundation Doctoral Scholarship and has been approved by the Ministry of Justice and Judicial Research Committee.

Who can take part in the study?

Part of the research involves observations of SRLs who have cases in the Family Court, District Court and High Court in Auckland and Hamilton. The researcher will observe the SRLs as they attempt to negotiate the court process including court appearances.

If one of the SRLs in this study is appearing in your court, you cannot participate in this study. All other judges of the New Zealand civil courts are eligible to participate.

What will you be asked to do?

You will be asked to participate in an interview of up to one hour in length. The interview will be about your experience of hearing cases involving SRLs. The questions will be provided to you in advance so you are aware of the topics to be discussed. The interview will be conducted at a time and venue convenient to you.

Please be aware that you may decide not to take part in the project without any disadvantage to yourself of any kind.

What information will we collect and what use will be made of it?

The information to be collected will be your responses to the questions about your experience of hearing cases involving SRLs. The researcher will make notes during the interview and with your

agreement the interview will be recorded (audio only) so that key themes can be identified, and relevant quotes and examples can be retrieved (anonymously) for the research report.

The information is being collected for the purpose of better understanding the experience of SRLs negotiating the New Zealand civil court system and the effect they have on all the other actors involved in the system. The project will be helpful to the New Zealand judiciary's knowledge of how to best manage SRLs. The research findings will be published as part of the researcher's PhD thesis and will also be used for conference presentations and journal publications in New Zealand and internationally.

The only people who will have access to the information collected will be the researcher and the supervisor. It will be stored securely so that only the researcher and the supervisor can access it. The information collected will be retained for **at least 5 years** in secure storage. Any personal information held about you, such as your contact details, will be destroyed at the completion of the research even though the data derived from the research will, in most cases, be kept for much longer or possibly indefinitely.

The research report will provide an overview of the key themes emerging across all the interviews with the Judges. Anonymous quotes and examples of judicial practice will also be included to illustrate these themes. No individual Judge or their location will be identified.

The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand) but every attempt will be made to preserve your anonymity.

You can request a copy of your interview summary and you can correct or withdraw any information you provide at any time following the interview and before the writing up of the research results.

At the conclusion of the project, we will be pleased to provide you with a copy of the research report (including an executive summary) and any journal articles the researcher writes. In addition, the researcher will be very willing to attend any judicial seminars to discuss the findings with you and your colleagues.

Can you change your mind and withdraw from the project?

You may withdraw from participation in the project at any time and without any disadvantage to yourself of any kind.

What if you have any questions?

If you have any questions about our project, either now or in the future, please feel free to contact either:-

Bridgette Toy-Cronin (Researcher)
Faculty of Law, University of Otago
022 315 5972

and/or

Professor John Dawson (Supervisor)
Faculty of Law, University of Otago
03 479 8909

Email: law.selfrepresented@otago.ac.nz

Email: john.dawson@otago.ac.nz

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

CONSENT FORM FOR JUDGES

I have read the Information Sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage.

I know that:-

1. My participation in the project is entirely voluntary;
2. I am free to withdraw from the project at any time without any disadvantage;
3. Personal identifying information (field work notes that have my name and contact details and any audio recording) will be destroyed at the conclusion of the project but any raw data on which the results of the project depend will be retained in secure storage for at least five years;
4. The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand) but every attempt will be made to preserve my anonymity.

I agree to take part in this project.

.....
(Name of participant)

.....
(Signature of participant)

.....
(Date)

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

Appendix I – Interview Questions for Judges

GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

INTERVIEW QUESTIONS FOR JUDGES

Hearings involving SRLs

1. At the beginning of a case with an SRL, do you routinely explain the court process to them or give any introduction that you would not give if both parties are represented? Why or why not?
2. Do you make any changes to your usual style of interaction with counsel when you are dealing with an SRL, for example changes to your language or tone? If yes, do you find it difficult to make those changes?
3. In cases you've heard with a SRL, have you made allowances for SRLs failing to follow procedural rules that you wouldn't have made for counsel? If yes, please tell me about what happened and how you dealt with it.
4. Have you ever felt conflicted between wanting to explain procedure or substantive law to an SRL to ensure the proceedings are fair and avoiding giving advice? If yes, please tell me about what happened and how you dealt with it.
5. When hearing a case with an SRL, have you ever felt concerned that in assisting the SRL to ensure the proceedings are fair, the represented party will think you are biased towards the SRL?
6. Do you see SRLs as falling into different groups? If so, what distinctions do you draw?
7. Are there any differences in your approach to dealing with an SRL who is in one category or another category [referring to the Judge's own categorisation]?
8. Have you heard cases where the SRL is accompanied by a McKenzie Friend? [If yes] Thinking about cases you've heard with and without a McKenzie Friend accompanying the SRL, do you think the McKenzie Friends are helpful to you or would you rather deal directly with an SRL? Why?

Burden on the Court

9. Do you think that hearing a case where one party is an SRL take any longer than a hearing where both parties are represented? If yes, why?
10. Do you think the number of SRLs in your court in the last five years has increased, decreased or stayed the same? [If the Judge thinks the number has changed] What do you think the reason is for that change? [If thinks it is financially motivated] Do you think the number of querulous litigants and those representing themselves because they think they can do a better job than counsel has changed?
11. Have you had any training or received any guidelines on dealing with SRLs? Do you think [more] training or guidelines would be helpful to you or are you comfortable that you have an approach with SRLs that works?

Fulfilling the Court's function and SRLs

12. What do you see as the main functions of the [Family/District/High Court] in our justice system?
13. Do you think that SRLs have any effect on the ability of the Court to discharge that function [adopting what the Judge has said]? Or perhaps that allowing SRLs to bring cases is necessary to discharge that function?

14. Do you see the need for systemic change to accommodate SRLs? If so, what sort of changes do you think would be helpful?

Appendix J – Information and Consent Form for Court Staff

Reference no 12/315
23 November 2012



GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

INFORMATION SHEET FOR COURT STAFF AND ADVISERS TO SELF-REPRESENTED LITIGANTS

Thank you for showing an interest in this project. Please read this information sheet carefully before deciding whether or not to participate. If you decide to participate we thank you. If you decide not to take part there will be no disadvantage to you and we thank you for considering our request.

What is the Aim of the Project?

Self-represented litigants (**SRLs**) present unique challenges to the courts. Anecdotal evidence suggests the number of SRLs is increasing but there is little reliable data on how many SRLs there are in the civil courts, why they are self-represented and the experience of being an SRL, to litigate against them or to hear cases in which they appear. It is hoped this research will answer these questions and that the results of the research will help guide future policy and procedural reforms in the courts. This project is being undertaken as part of the requirements for a PhD (Doctor of Philosophy in Law).

The research is funded by a New Zealand Law Foundation Doctoral Scholarship and has been approved by the Ministry of Justice and Judicial Research Committee.

Who can take part in the study?

The study is taking place in the Family, District and High Courts. We are inviting the court staff of these Courts to participate in the study (**Court Staff**). We are also inviting the staff of Community Law Centres, Citizen Advice Bureaux and other organisations and individuals who frequently advise SRLs to participate (**Advisers**).

What will you be asked to do?

If you agree to take part in this research you will be asked to participate in a 30-40 minute taped interview. Depending on your organisation and your role within that organisation, you will be asked questions about the challenges of dealing with a self-represented litigant, what resources your organisation can offer and what resources you think would be helpful. You will also be asked about your perception of the purpose of the court system and the place of a self-represented litigant in that system. The interview will be conducted at a time and venue convenient to you. Please be aware that you may decide not to take part in the project without any disadvantage to yourself of any kind.

What information will we collect and what use will be made of it?

The information to be collected will be your responses to the questions about your experience of dealing with SRLs. The researcher will make notes during the interview and with your agreement the

interview will be taped so that key themes can be identified, and relevant quotes and examples can be retrieved for the research report.

The information is being collected for the purpose of better understanding the experience of SRLs negotiating the New Zealand civil court system and the effect they have on all the other actors involved in the system, including Court Staff and Advisers. The research findings will be published as part of the researcher's PhD thesis but will also be used for conference presentations and journal publications in New Zealand and internationally.

The only people who will have access to the information collected will be the researcher and the supervisor. It will be stored securely so that only the researcher and the supervisor can access it. The information collected will be retained for **at least 5 years** in secure storage. Any personal information held about you, such as your contact details, will be destroyed at the completion of the research even though the data derived from the research will, in most cases, be kept for much longer or possibly indefinitely.

The research report will provide an overview of the key themes emerging across all the interviews with Court Staff and Advisers. Anonymous quotes and examples of practice will also be included to illustrate these themes. No individual person or their location will be identified.

The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand) but every attempt will be made to preserve your anonymity.

You can request a copy of your interview summary and you can correct or withdraw any information you provide at any time following the interview and before the writing up of the research results.

Can you change your mind and withdraw from the project?

You may withdraw from participation in the project at any time and without any disadvantage to yourself of any kind.

What if you have any questions?

If you have any questions about our project, either now or in the future, please feel free to contact either:-

Bridgette Toy-Cronin (Researcher)	and/or	Professor John Dawson (Supervisor)
Faculty of Law, University of Otago		Faculty of Law, University of Otago
022 315 5972		03 479 8909

Email: law.selfrepresented@otago.ac.nz

Email: john.dawson@otago.ac.nz

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

GOING TO LAW WITHOUT A LAWYER: SELF-REPRESENTED LITIGANTS IN NEW ZEALAND'S CIVIL COURTS

CONSENT FORM FOR COURT STAFF AND ADVISERS TO SELF-REPRESENTED LITIGANTS

I have read the Information Sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage.

I know that:-

1. My participation in the project is entirely voluntary;
2. I am free to withdraw from the project at any time without any disadvantage;
3. Personal identifying information (field work notes that have my name and contact details and any audio file) will be destroyed at the conclusion of the project but any raw data on which the results of the project depend will be retained in secure storage for at least five years;
4. The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand) but every attempt will be made to preserve my anonymity.

I agree to take part in this project.

.....
(Name of participant)

.....
(Signature of participant)

.....
(Date)

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

Appendix K – Interview Questions for Court Staff

INTERVIEW QUESTIONS FOR COURT STAFF

This is a semi-structured interview schedule designed to elicit specific challenges presented in dealing with a self-represented litigant. The questions are also designed to explore the court staff member's perception of the purpose of the court system and the place of a self-represented litigant in that system. Some questions may not be relevant to particular staff member, depending on their roles such as court manager, registrar or counter staff.

Systems

- Does this court have any specific procedures or systems for dealing with SRLs? For example someone assigned to each SRL specifically?
- Do you have any written materials you give specifically to SRLs?

Advice to SRLs

- Do you think SRLs take any more of the court staff's time than represented litigants? If so, in what ways?
- Do you ever feel unsure about how much assistance you can give an SRL and whether the assistance you are providing amounts to "legal advice"? Where do you draw the line? Have you had training on this issue? If so, what was it? Are there guidelines you are aware of?
- In general, do SRLs accept that you can't give them legal advice? Have you ever had SRLs become frustrated with you because you can't give them more information?
- Do you suggest to the SRL that they seek representation? Why or why not?
- Do you provide SRLs with information about where they can get further advice? If so, what information do you give them?

Documents

- In general, do SRLs have difficulties with the form of the documents they need to file? What sort of problems? Have you encountered the same problem(s) when a lawyer files these documents?
- Do you check the documents of SRLs? Does your check of SRL documents differ in any way from checks of documents prepared by lawyers?
- Do you help SRLs correct problems with their documents? Do you give the same help to lawyers?
- Do you think, as the rules stand at the moment, the requirements for the documents create any unfairness to SRLs? What about to represented litigants?
- Do you think that the documents parties need to file could be simplified at all to make it easier for SRLs? Why or why not?

SRLs in court

- Is there anything you do differently in court because a party is self-represented?
- Thinking about cases that you've listened to in court where one party is an SRL, do you think the SRL gains any advantages by the fact they were self-represented? What about disadvantages?
- In general do you think SRLs get a fair hearing? Why or why not? Any examples of when they don't get a fair hearing?

Courts and Self-Represented Litigants

- What do you see as the main purpose or purposes of the [Family/District/High] Court?
- Do you think that people should be allowed to be self-represented in the [Family/District/High] Court? Why or why not?

- If you don't think people should be allowed to be self-represented in the [Family/District/High] Court, what should be done for people who can't afford a lawyer? What about people who just don't want a lawyer?
- What, if anything, do you think this court could do to better assist SRLs? Are there any other services you think need to be provided to help SRLs?

Appendix L - Codes

People	Institutions	Attitudes
Court staff	Citizens Advice Bureau	Mixed
Expert Witnesses	Community Law	Negative
Judges	Companies	Neutral
Lawyer	Court	Positive
Amicus	Family and Friends	
Lawyer for Child	JCC	Impact
Opposing Counsel	Legal Profession	(In)ability to progress case
LiP's new lawyer	Media	Facilitates
LiP's previous lawyer	MP/Ombusman/Govt agencies	Increases costs
MacKenzie Friends	NGOs	Slowing
Represented Litigants	NZLS	
LiPs	Online Groups	Culture
Persistent LiPs		local - small towns
		Popular
Beliefs about law and the legal system	Stages	Issues
Complexity	Preparing the case	Choice to LiP or not
Corruption	Becoming an LiP	Class
Fairness	Litigation	Companies
Favouritism	Filing a case	Emotion vs Fact
Fixed vs flexible	Preparing for Court	Family Law Reforms
Truth	Appearing in court	Gender
	Costs	Right to self-represent
Beliefs about representation	Enforcing a judgment	Seating in the courtroom
Cost	Writing Judgments	LiP access and comprehension
Following instructions	Reflecting on being LiP	Evidence
Influence on speed		Legal culture
Influence on treatment		Legalese
Influence on outcome		Procedure
		Substantive law
Strategies for LiPs	Strategies for dealing with LiPs	Activities performed for LiPs
Breaching orders	Advising to get a lawyer	Accompanying to court
Calling on prior knowledge	Being very careful	Advising (free)
Complaining	Bending over backwards	Advising (paid)
Copying	Limiting - Closing down	Drafting documents
Following Judges' Lead	Coming down to LiPs level	Strategising
Getting information	Deferring to opposing counsel	Supporting
Asking questions	Encouraging settlement	
Lumping it	Explaining process or law	
Researching	Letting them talk	
Getting lay advice	Limited brief advice	
Getting legal advice (free)	Procedure	
Getting legal advice (paid or unbundled)	Altering	
Settling	Strictly adhering	
	Seeking clarification	

Confidential Appendix - Case Study LiPs

(confidential information withheld)