Improving Access To Civil Justice

Submissions to the Rules Committee by Sanderson Weir Limited

Assisting Disadvantaged Litigants

The May/June 2021 Consultation paper published by the Rules Committee reported that submitters identified financial barriers as putting litigation as a mechanism for obtaining resolution of civil disputes beyond the reach of most New Zealanders. One financial barrier being the "sheer expense of obtaining legal representation"[1]. Another is the risk of an adverse costs awards exercising a chilling effect on potential litigants with meritorious claims.[2]

A number of litigants disadvantaged by financial barriers are choosing to self-represent and seek the free assistance of unqualified but well-meaning supporters, known as a McKenzie friend. The use of such a supporter can help overcome another barrier, the informational barrier identified as the fear that technical mistakes would vitiate their claim.[3]

In the case of a meritorious claim, it is appropriate that these barriers be removed, or if not removed, ameliorated so they are less of a barrier.

But at whose expense?

Our firm has noticed, however, an increasing trend to utilise the assistance of lay assistants who are untrained and become too closely attached to a perceived cause. In many cases, they are more of a hinderance to the defendant than a help. We have also been closely involved over several years with a client who has been required to defend actions brought by an elderly and impoverished lay plaintiff who continues to pursue a claim without merit that is also now clearly time barred. The cost to our client of the litigant's continued attempts to pursue of our client, with no real prospect of recovery of costs from the lay litigant places a heavy and unfair burden on the defendant.

Our system of justice is by its nature, adversarial and a civil claim involves two parties. In the case of a non-meritorious claim by an impecunious self-litigant unable meet an adverse award, the burden to distill, respond and at times assist the lay litigant is unfairly transferred to the other party. This occurs because the other party will invariably employ counsel who have a professional duty to the court so are required to spend a greater amount of time deciphering a badly worded statement of claim and dealing or dismissing extraneous information caused by the claimants lack of understanding of legal principles. This translates into it being more expensive for a defendant to respond to a claim made by a lay litigant.

In addition, lay litigants are not subject to the rules of professional conduct which stop a lawyer from attacking a person's reputation without good cause[4]. From our experience a lay litigant is more likely to allege fraud, dishonesty, undue influence, duress, or other reprehensible conduct without having reasonable grounds for making the allegation.

1 "Improving access to Civil Justice" – May 2021 – the rules Committee paragraphs 13 and 17.
2 ibid, paragraph 20
3 ibid, paragraph 25
4 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Rule 13.8.

These types of allegation often cause stress to the other party and require that party's counsel to take steps to strike out or other interlocutory steps which increase the costs of that other party.

Standard awards of cost are therefore unlikely to represent the actual cost incurred by the defendant and Any award is of little value if the lay litigant is unable to meet the award. Of course, the party resisting the lay litigant could enforce the costs order. However, that party is often disillusioned with the court process and knows that enforcing the order is likely to lead to further opposition, more court proceedings, and more costs.

Another expense not borne by the lay litigant is the wider impact of clogging the court system with claims that require greater time and resources to deal with them than claims that are professionally prepared by competent legal advisers. Statements of claim by lay litigants are often narrative in nature and affidavits in support are likely to contain submissions. Documentary evidence provided by a lay litigant is often not well presented or lacking a logical theme.

All of which means that additional time and resources are required of the other parties and the Court when a lay litigant is involved.

Issues conference.

Under the current structure a lay litigant plaintiff gets no assistance in defining the issues and stating the claim. If the proceedings are narrative and the affidavits more in the nature of submissions than presentation of fact, the burden falls on the defendant to distill a claim from the papers, separate the fact from the conjecture in order to provide a coherent statement of defense. Invariably, a defendant will need to engage a lawyer (at the defendant's initial expense) to make sense of the claim and respond to it.

If the issues conference includes the defendant and comes after the proceedings are filed, then this burden on the party remains and increasing the accessibility to civil justice for lay plaintiffs places an unjust burden on the defendant.

For this reason, where a lay plaintiff is involved, proceedings should be received by the court on an interim basis and the issues conference held prior to the acceptance of formal filing of proceedings.

If the judicial system's aim is to make access to civil justice for lay litigants more accessible then it should not shift the cost of this onto the other parties. Particularly if the litigant is vexatious, has no legal standing or no legal basis for the claim. As it stands the threshold for determining a litigant as vexatious is high. For example, in order for a Judge to make a limited order pursuant to s 166 of the Senior Courts Act 2016 the Judge must consider that at least 2 or more of the litigant's proceedings were totally without merit.[5] Significant damage and cost has therefore been incurred by the other party responding to the baseless claims once there have been two proceedings that satisfy this test.

The issues conference process should not become a case of judges acting as advocates to clean up and correct deficiencies in a lay litigant pleadings.

[5] Senior Courts Act 2016, s 167(1)

In our submission, a pre-filing issues conference should result in the litigant being advised that the papers are in order for filing or that there are obvious deficiencies that need to be addressed and the litigant encouraged to seek assistance from either a lawyer or a suitable and experienced group of lay supporters (for example a community law center or the citizens advice bureau) before filing. If the litigant files further documents that do not address the deficiencies the court should reject the filing of the claim until such time as the deficiencies are corrected. For example, if a lay litigant's claim includes an allegation of fraud then the court should require the lay litigant to sufficiently particularise the facts that they consider support that allegation.

This would make the second issues conference post filing more effective as the statement of claim will be more coherent, focused and addresses issue that are likely to arise.

The example given below outlines problems that can arise if the lay litigant seeks support and assistance from a less than suitable party.

The support of a McKenzie friend

"Self-represented litigants have an ability to create difficulties at almost all phases of litigation and for all other people involved, be it court staff, counsel or the bench. It is therefore generally accepted that assistance to such people in litigation is beneficial. One form in which that assistance commonly manifests is the McKenzie friend."[6]

The general law and the role of a McKenzie friend is covered in the paper from which the above quote is taken.[7] In recent times an increasing number of authors have commented on perceived deficiencies with rules governing McKenzie friends.

In its 2012 "Review of the Judicature Act 1908"[8], the Law Commission reviewed the role of McKenzie friends and made recommendations for legislative change and the development of guidelines regarding the use of a McKenzie Friend.[9] The recommendations do not appear to have been adopted by parliament. There is in our experience, however, an increasing trend to the use of lay assistants in civil cases on both sides of the proceedings. Although the Courts have done their best to adapt to this trend,[10] the approach remains ad hoc. There is a natural tension between the desire to make justice accessible and be seen to be so and the injustice that can result from the potential misuse or abuse of this right. The court should not seek to become a complaints process, in which the complainer complains about another without any financial or downside risk.

We have recently been involved in circumstances in which the use of a McKenzie friend was detrimental to the lay litigant and resulted in what appears to us to be an unjust financial and emotional burden on the defendant.

In this example the impecunious lay litigant did not recognise any psychological, cultural or financial barriers to access to the courts. Rather his efforts were encouraged and

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6 "*The rise and evolution of the McKenzie Friend".* Campbell [2014] NZLJ 326.

7 Ibid.

8 *"Review of the Judicature Act 1908"* Law Commission Report 126, November 2012.

9 Ibid, paragraphs 15.6 – 15.20 and R76 to R78.

10 A good example is the case of *Craig v Slater* [2017] NZHC 874 in which Toogood J grappled with the additional complexity of the McKenzie friend being legally qualified.

promoted by a legally unqualified lay supporter. The lay assistant wrote the proceedings and subsequently spoke on the litigant's behalf (with the consent of the Court). The lay assistant encouraged the lay litigant to continue the proceedings despite being put on notice by a Judge that continuing with the proceedings risked the defendant applying to strike out the proceedings on the grounds of lack of standing – the right to bring proceedings remaining with the Official Assignee.

The defendant incurred considerable cost in employing counsel to distill a claim from what the trial Judge described as a narrative statement of claim supported by the inadmissible submissions of a McKenzie friend contained in an affidavit from that friend purporting to be an expert witness. Although the defendant was awarded standard costs, the litigant who described himself as aged, in poor health, reliant on the pension and of no fixed abode has no prospect of meeting these. The litigant has been bankrupted by other parties twice before and accordingly there is arguably nothing to be gained by the defendant pursuing the recovery of costs or proceeding to bankrupt the litigant.

The practical effect of the lay litigant availing himself to access to civil justice with the assistance and encouragement of an unqualified lay assistant has been to put the defendant to increased financial cost and the emotional stress of defending Court proceedings containing allegations of fraud and deceit that were subsequently disavowed by the litigant's assistant in Court.

Amending rule 12.4(2) of the High Court Rules 2016

The objective of the High Court Rules 2016 (HCR)is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.[11]

Rule 12.4(2) of the HCR requires a plaintiff to seek leave of the court if an application for summary judgment is filed at any time after the proceedings are initiated.

This rule differs from rule 12.4(2) of the District Court Rules 2014 (DCR), which permits a plaintiff to file an application for summary judgment without the leave of the court after the time when the statement of claim is served on the defendant until the expiry of 10 working days after the date on which the statement of defence is served on the plaintiff.

Rule 12.4(2) of the DCR, was amended by the Rules Committee following consultation with practitioners and the Rules Committee's agreement that permitting a short time following the filing of a statement of defence would allow the plaintiff access to secure the just, speedy, and inexpensive determination of any proceeding where the statement of defence filed did not show any reasonably arguable defence to the claim.

We submit that rule 12.4(2) of the HCRs should be changed to align with the DCRs so as to better meet the objective of the HCRs.

Concluding comments

As a result of our experience with many cases involving lay litigants, we submit that while access to civil justice should be improved to remove or reduce financial, psychological and cultural barriers it should not be improved at the expense of shifting the burdens of financial and psychological stress to the other party. We support the following.

[11] High Court Rules 2016, Rule 1.2.

1. Any change that will result in streamlining High Court procedures and provide for the early identification of issues through an issues conference;

   We consider that every lay litigant's filing should be screened by the court before it is accepted, and an issues conference held with a judge where the pleadings are unclear.

2. The participation of a Judge at the issues conference should permit the judge to give directions to improve or clarify the claim and also require the plaintiff to provide security for costs if the Judge considers the claim has doubtful merit.

3. Amendment to the HCR rules to allow a Lay Assistant or McKenzie friend to be appointed and accepted by the Court in a similar way to the appointment of a Lay Assistant in the Family Court involving:

   a) A formal application by the lay litigant to be filed by the plaintiff or defendant with the Registrar together with an undertaking signed by the Lay Assistant.

   b) The application to include sufficient information regarding the experience and understanding of the matters the subject of the litigation.

   c) The application to indicate the extent of the Lay Assistant's assistance for example

      i. the extent of involvement in drafting proceedings

      ii. whether the assistance provides legal advice

   d) A presumption that a Lay Assistant application (accompanied by the relevant information and a signed undertaking) be accepted by the Registrar unless:

      i. the Lay Assistant has failed to abide by the rules of the Court or directions of a judge,

      ii. a Lay Assistant has previously been involved in two or more proceedings that are wholly without merit; or

      iii. a judge considers the assistance of the Lay Assistant to have been detrimental to a prior claim,

      in which case the Registrar must refer the application to a Judge who may make an order that the application be denied or give directions that the application be accepted or accepted subject to such conditions as the Judge may deem appropriate.

   If, at the issues conference, it becomes clear to the Judge involved that the presumption of acceptability of the Lay Assistant should be rebutted then the forum provided by an issues conference allows an opportunity for the Judge to consider this matter further.

   e) Lay Assistants should not be permitted to speak (even with the consent of the other party) at any proceeding unless and until the court develops a framework of rules and requirements for those Lay Assistants, that are monitored and enforced. It is a privilege to assist someone through the court process, not a right.

Accordingly, if the rules are broken by a Lay Assistant, they should lose this privilege.

4. Amendment of rule 12.4(2) of the HCR to align the rule to the same rule in the DCR.

Summary

To summarise, we submit that improving access to civil justice should not be achieved at the expense of shifting the financial and emotional burden to the other party.

We also submit that the time has come to implement the recommendations of the Law Commission and others and provide greater structure around the involvement of a McKenzie friend or lay assistant in civil proceedings. The lead given by the Family Courts should be adopted and adapted for civil proceedings. A structure for the approval and participation of a McKenzie friend will improve access to civil justice.

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