

I Ain't No Fool: Deciding to Litigate in Person in the Civil Courts

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The number of litigants in person (LiPs) is thought to be rising in New Zealand. This is of increasing concern to the judiciary, court staff, and lawyers who oppose LiPs in proceedings. This article focuses on why people decide to litigate in person. It reports the results of a qualitative study involving LiPs, court staff, lawyers and judges in the New Zealand District (including Family) and High Courts. It contrasts the perceptions of judges and lawyers as to why people litigate in person with the reasons given by LiPs. The evidence suggests that the bench and bar's perception, that people either choose to go without a lawyer or are forced to do so by cost, is not entirely accurate. Instead, the evidence suggests people have many overlapping reasons for litigating in person, some of which go beyond those contemplated by the bench and bar. These additional reasons include popular understandings of law and legal services, and the conflicting and confusing messages that are communicated to the public about the courts' accessibility to litigants. These additional reasons are not well understood by lawyers and judges. As a result, they often interpret LiPs' decisions to litigate in person as arrogance or unreasonableness. A more nuanced understanding of why people litigate in person is therefore required in order to change the way court staff, lawyers and judges perceive LiPs' conduct and to perhaps alter the approach they take to assisting LiPs during the litigation process.

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I Introduction

The number of litigants in person (LiPs) is widely thought to be growing in New Zealand and in the other common law countries.¹ So, why are people going to court without a lawyer? This article builds on research from other jurisdictions about why people litigate in person, reporting results of a qualitative study in New Zealand. This study asked, among other questions: why do people litigate in person? The evidence collected suggests that a gap exists between the perceptions of legal professionals as to why people litigate in person and the reasons reported by LiPs themselves. It also suggests that decisions to litigate in person are complex and overlapping, and are influenced by problems in the legal market and by misperceptions about legal services and the legal system. They are also influenced by messages communicated to the public about the accessibility of the courts to litigants. The article therefore questions the old saying that LiPs always “have a fool for a client”, and suggests that the decision to litigate in person can be seen, in many cases, as a rational response to external factors and to reasonable, if inaccurate, perceptions about the justice system.

In part II, I outline the methods used in the larger empirical study from which the data discussed in this article are drawn. In part III, I report the reasons given by LiPs for deciding to litigate in person, and compare these reasons to judges’ and lawyers’ perceptions, noting similarities and divergences. While costs appear to be a major factor in deciding to litigate in person, it was rare that LiPs’ decisions were solely financial or driven by only one factor. The dichotomy commonly referred to by bench and bar — between those who “choose” to litigate in person and those who do so because of expense — is therefore unhelpful. Many LiPs’ decisions were in fact influenced by the perceived quality of the legal services they would be able to access, and by their lay understandings of the function of lawyers and the legal system. Their experiences and perceptions on these matters are largely at odds with the legal profession and judiciary’s understandings. In part IV, I then discuss these findings within a more theoretical framework, looking both at the messages that the legal system sends the public about access to the courts and at the structure of the market for legal services. In conclusion, I argue that it matters what judges and lawyers think about LiPs’ reasons for litigating in person because it may affect their perceptions about the merits of an LiP’s case and about how much assistance LiPs should be given.

1 See Elizabeth Richardson, Tania Sourdin and Nerida Wallace *Self-Represented Litigants: Literature Review* (Australian Centre for Court and Justice System Innovation, May 2012) at [2.1]; and Helen Winkelmann “Access to justice — Who needs lawyers?” [2014] Otago LR 229 at 230.

II Background and Methods

A Background

This study took place against a backdrop of very significant shifts in the legal practising environment. The most obvious shift was the closure of six District Courts and relocating the registries of seven others.² The other significant change was the reduction of legal aid spending through a number of policy measures: the introduction of the Public Defenders Service, the 2014 family justice reforms, lowering the thresholds for accessing legal aid for general civil matters, and introducing fees for accessing legal aid and charging interest on legal aid loans.³ Together these changes have meant that legal aid spending dropped from \$172 million in 2009/10 to \$130 million in 2014/15.⁴ These changes have affected a profession that already had a small protected area of work, arguably creating an environment where the legal profession (or at least parts of the profession) has become highly defensive, a profession under siege.⁵

B Sample and design

The empirical data reported in this article are drawn from a larger study I conducted examining litigation in person in the New Zealand civil courts, focusing on cases where only one party was an LiP and the other was

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- 2 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.
 - 3 Ministry of Justice *Sustainable Legal Aid: Factsheet — Legal Aid Changes* (April 2011). For further discussion of the 2014 family justice reforms see Tim Black and others *The New Family Justice System — fundamental changes* (paper presented to the New Zealand Law Society Continuing Legal Education Conference, Wellington, March 2014); and Mark Henaghan and Meghan Nicholson “Family Law” (2014) 2 NZ L Rev 321 at 347–353. For changes to the legal aid thresholds see Legal Services Regulations 2011, regs 5 and 6.
 - 4 Ministry of Justice, above n 3; and Ministry of Justice *Annual Report* (29 September 2015) at 134.
 - 5 Donna Buckingham “Legal governance in New Zealand: Reporting academically from the co-regulatory ramparts” (Keynote Address to the Australian and New Zealand Legal Ethics Colloquium, Flinders University, Victoria Square, 28 November 2013) arguing 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.

represented.⁶ In that study, I used several qualitative methods: interviews with participants in the litigation process, analysing litigation documents, and observation of participants. The research participants included LiPs (34), court staff (8), lawyers (16) and judges (13). LiPs were current litigants or those with cases that had concluded within the previous year. They participated by way of an interview or by way of a more comprehensive case study. These case studies included multiple interviews, (often) numerous e-mail exchanges, ongoing review of case-related correspondence and documents, and where possible, observation of the LiP in court.⁷ Interviews were semi-structured and lasted 60 to 80 minutes.⁸ LiPs were recruited by way of advertisements at courts, community law centres and online, as well as by word of mouth. The LiP participants had cases in the Family Court (21), District Court (3) and High Court (10). Of that group, I considered five LiPs “persistent”, which I defined as an LiP litigating a third or subsequent proceeding.⁹ Once the LiP case studies and interviews were completed, I interviewed judges and lawyers. The judges presided in the Family Court (4), District Court (4) and High Court (5). The lawyers practised in the Family Court (5), Family and District Courts (2), or in general civil litigation (with no family law practice) (9). Interviews with judges, lawyers and court staff each lasted approximately 40 minutes. I recorded and transcribed all the participant interviews.

6 Bridgette Toy-Cronin “Keeping Up Appearances: Accessing New Zealand’s Civil Courts as a Litigant in Person” (PhD Thesis, University of Otago, 2015). Cases where both parties were LiPs, at least before the 2014 family justice reforms, were thought to be less common. In cases where only one party is an LiP the potential for unfairness, and the absence of shared professional norms and etiquette, are also most stark.

7 I had 66 conversations (on the phone, Skype, or in person) with LiPs in the case studies and approximately 510 e-mail exchanges with the case study LiPs, either reading correspondence they forwarded me, or discussing their case with them by e-mail. I reviewed 139 litigation documents relating to the LiP case studies and I observed 21 days or half-days of court proceedings.

8 The interview began with an open question about how they had come to be an 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 relevant, 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.

9 Toy-Cronin, above n 6, at 93. This did not include appeals (although all the persistent litigants also appealed) but rather three or more separate proceedings, often around the same issue — for example, judicial review, private prosecutions.

Commonly social science researchers assign participants pseudonyms to protect anonymity but this is not always appropriate.¹⁰ The small size of the New Zealand legal community and small number of cases that proceed to trial meant that assigning pseudonyms was unlikely to be effective to protect confidentiality. 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.

C Analysis

My method of data analysis, while not rigidly adhering to any particular tradition, was derived from what is known as grounded theory. It followed Strauss and Corbin's encouragement to recognise that analysis of qualitative data 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".¹¹ It involves an attempt at "stepping into the shoes of the other and trying to see the world from their perspective".¹² To explore the interview, observation and documentary material, I combined insights derived from the work of authors who discuss qualitative data analysis, to try to "crack open" the data and develop codes and themes to group relevant information together.¹³

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- 10 Katja M Guenther "The politics of names: rethinking the methodological and ethical significance of naming people, organizations, and places" (2009) 9 *Qualitative Research* 411; and MaryCarol Hopkins "Is Anonymity Possible? Writing about Refugees in the United States" in Caroline B Brettell (ed) *When They Read What We Write: The Politics of Ethnography* (Bergin & Garvey, Westport (CT), 1996) 121.
 - 11 Juliet Corbin and Anselm Strauss *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd ed, SAGE Publications, Thousand Oaks (CA), 2008) at 12.
 - 12 Juliet Corbin "Taking an Analytic Journey" in Janice M Morse and others (eds) *Developing Grounded Theory: The Second Generation* (Routledge, New York, 2009) 35 at 41; and see also at 40. See also Alan Bryman *Social Research Methods* (4th ed, Oxford University Press, New York, 2012) at 28–32.
 - 13 Howard S Becker *Tricks of the Trade: How to Think About Your Research While You're Doing It* (University of Chicago Press, Chicago, 1998); Corbin and Strauss, above n 11; David Silverman *A Very Short, Fairly Interesting and Reasonably Cheap Book about Qualitative Research* (2nd ed, SAGE Publications, London, 2013); Bryman, above n 12, at 564–590; Pat Bazeley *Qualitative Data Analysis: Practical Strategies* (SAGE Publications, London, 2013); and Robert M Emerson, Rachel I Fretz and Linda L Shaw *Writing Ethnographic Fieldnotes* (2nd ed, University of Chicago Press, Chicago, 2011) at 171–199.

Qualitative studies of any kind, but especially small-scale, single-researcher studies such as this, are often attacked as anecdotal, subjective, or not generalisable.¹⁴ 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.¹⁵ Smaller-scale qualitative 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.

III Previous Studies

A number of studies in the United Kingdom, United States, Canada and Australia have gathered evidence about why people litigate in person, either as part of a survey or from interview data. Some studies have found that LiPs explain and rationalise their decision to proceed alone by reference to multiple factors.¹⁶ In others, 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.¹⁷ That is, they support the idea that LiPs either “can’t pay” or “won’t pay” for legal assistance.

14 Bryman, above n 12, at 405–407. For a specific example see Assy who dismisses as “anecdotal” the research reviewed above that suggests a primary reason for litigating in person is financial: Rabeea Assy *Injustice in Person: The Right to Self-Representation* (Oxford University Press, New York, 2015) at 20.

15 Austin Sarat “Law and Society” in James R Hackney Jr (ed) *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory* (New York University Press, New York, 2012) 87 at 107; and Penny Darbyshire *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing, Oxford, 2011) at 12–14.

16 Richard Moorhead and Mark Sefton *Litigants in Person: Unrepresented litigants in first instance proceedings* (Department for Constitutional Affairs Research Series 2/05, March 2005) at 20; Julie Macfarlane *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants — Final Report* (Treasurer’s Advisory Group on Access to Justice, May 2013) at 38; and Liz Trinder and others *Litigants in person in private family law cases* (Ministry of Justice, November 2014) at 18.

17 See, for example, Rosemary Hunter “Litigants in Person in Contested Cases in the Family Court” (1998) 12 AJFL 171 at 172; Tania Sourdin and Nerida Wallace “The dilemmas posed by self-represented litigants: The dark side” (2014) 24 JJA 61 at 62; John Dewar, Barry W Smith and Cate Banks *Litigants in Person in the Family Court of*

A Financial

Most previous studies report that the main reason people litigate in person is that they cannot afford a lawyer, and do not qualify for legal aid, or their legal aid funding has ceased.¹⁸ People who fall within this “justice gap” — because they cannot afford representation but do not qualify for legal aid — are considered to make up a large proportion of the LiP population.¹⁹ Additionally, claims may be of small economic value, so that even though the person can pay for legal services, lawyers “cannot economically handle them”.²⁰ LiPs may make a cost-benefit analysis and decide that instructing a lawyer is not the best use of their scarce resources.²¹

B Perceptions about the case and litigant

One aspect of this cost-benefit analysis may be the LiP’s perception that their case is simple enough to handle themselves.²² Genn reports this as the most common reason for litigating in person, and Mather gives it as a primary reason, along with concerns about cost.²³ LiPs may also believe they are

Australia (Family Court of Australia, Research Report No 20, 2000) at 36; and Hazel Genn “Do-it-yourself law: access to justice and the challenge of self-representation” (2013) 32 CJQ 411 at 427 (suggesting two broad although porous categories of people who cannot pay and “[v]exatious or querulous litigants”).

18 Kim Williams *Litigants in person: a literature review* (Ministry of Justice, Research Summary 2/11, June 2011) at 4–5. Williams cites Paula Hannaford-Agor and Nicole Mott “Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations” (2003) 24 Just Sys J 163; Moorhead and Sefton, above n 16, at 20–21; Dewar, Smith and Banks, above n 17, at 33; Macfarlane, above n 16, 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 16, at 13–15; and Richardson, Sourdin and Wallace, above n 1, at [2.3].

19 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* (Ministry of Justice, July 2009) at 42; and Rosemary Hunter and others *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (Law and Justice Foundation of New South Wales, Sydney, 2002).

20 Mauro Cappelletti and Bryant Garth “Foreword to the Access-to-Justice-Project Series” in Mauro Cappelletti and Garth Bryant (eds) *Access to Justice: A World Survey* (Sijthoff & Noordhoff, Alphenaaanderijn, 1978) at ix.

21 Trinder and others, above n 16, at 15; and Macfarlane, above n 16, at 9.

22 Trinder and others, above n 16, at 16; and Macfarlane, above n 16, at 9; Williams, above n 18, at 4.

23 Hazel Genn and Sarah Beinart *Paths to Justice: What People Do and Think about Going*

better positioned than a lawyer to convey the details of their case to the court because they know these details intimately and are more motivated to win than a lawyer who was representing them would be.²⁴

It is also possible that a lawyer's perceptions of their case may have affected their representation decision. That is, a lawyer may have refused to act for them on the ground that their case is unarguable. Trinder's study in the family courts of England and Wales noted that, while this was a possible reason, it was rare within the study group.²⁵ Alternatively, if lawyers perceive a litigant is likely to complain or be a demanding fixed-fee client (for example, legally aided), they may be unwilling to provide representation, so the litigant may have difficulty securing a lawyer.²⁶

C *Keeping lawyers out*

In addition, some people may litigate in person because they are disenchanted with legal services. This is often expressed as “[a]nti-lawyer” sentiment or general distrust of the profession.²⁷ Other studies have found that this sentiment is usually related to the LiP's previous experience with a particular lawyer, rather than lawyers generally.²⁸ Macfarlane's large Canadian study found that a significant number of LiPs had chosen to litigate in person after becoming dissatisfied with their counsel “doing nothing”, or not being interested in settling their case, or not listening or explaining, or making mistakes.²⁹ Some LiPs, believing they can take the matter forward without assistance, may be motivated by a desire “to understand and to participate actively in their personal legal affairs”.³⁰

to Law (Hart, Oxford, England; Portland, Oregon, 1999) at 22; and Mather, above n 18, at 149.

24 Moorhead and Sefton, above n 16, at 16; Smith, Banbury and Ong, above n 19, at 46; and Trinder and others, above n 16, at 16.

25 Trinder and others, above n 16, at 31.

26 Moorhead and Sefton, above n 16, at 19 (suggesting that indemnity insurers increasingly discourage solicitors from taking high-risk clients or cases, making representation for these litigants difficult to secure).

27 Jona Goldschmidt and others *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (American Judicature Society, Chicago, 1998) at 10. See also Dewar, Smith and Banks, above n 17.

28 Smith, Banbury and Ong, above n 19, at 44.

29 Macfarlane, above n 16, at 45. See also Macfarlane, above n 16, at 44 and 46–50; Williams, above n 18, at 4–5; and Dewar, Smith and Banks, above n 17, at 1 (reporting “high levels of distrust of lawyers and the legal profession”).

30 Hannaford-Agor and Mott, above n 18, at 163. See also Macfarlane, above n 16, at 48.

Research in the United Kingdom suggests that businesses, in particular, may wish to proceed unrepresented to avoid the dispute being perceived as too adversarial with the result that it damages ongoing relationships.³¹ This is of less relevance in the New Zealand High Court, where bodies corporate must usually be represented.³² The concern for maintaining relationships may be of particular importance in the Family Court, however, where parents have an ongoing relationship with their ex-partner.³³

D Openness of the court

Mather has argued that courts have a way of communicating their degree of openness to LiPs and that this influences the number of people willing to attempt to litigate without a lawyer, although Williams states “there is little empirical evidence for this [claim]”.³⁴ A New Zealand Ministry of Justice study reports that lawyers and court staff believe that people litigate in person because the Family Court is trying to be more litigant-friendly.³⁵ Moorhead and Sefton also conclude that the “openness and supportiveness of courts to unrepresented litigants” is a reason for why people go unrepresented.³⁶

Rather than courts communicating openness, other authors have argued that the availability of legal information online can create the (often false) impression that this information will be sufficient to enable people to litigate in person.³⁷

In the following section, I relate this literature to the findings of my study.

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

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

33 Smith, Banbury and Ong, above n 19, 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 n 47 below.

34 Williams, above n 18, at 5. See also Mather, above n 18.

35 Smith, Banbury and Ong, above n 19, at 47.

36 Moorhead and Sefton, above n 16, at 252.

37 For authors suggesting online information encourages litigation in person see Mather, above n 18, at 142; Macfarlane, above n 18, at 35; and Goldschmidt and others, above n 27, at 10. For discussion of the difficulty LiPs encounter in using online material see Macfarlane, above n 18, at 63–67; and Trinder and others, above n 16, at 89–91.

IV Why People Litigate in Person

A Can't pay: Unable to access legal services

Most judges and lawyers I interviewed cited constraints on the ability to secure legal services as the major driver for the perceived increase in LiPs. Many specifically identified people falling within the “justice gap” as being LiPs:

To the average earning person the cost of private representation is outside their means, but they probably won't get legal aid. (Family Court Judge)

[P]eople don't have the funds and they can't get legal aid. I think that is the primary reason for people appearing in person. (High Court Judge)

Judges and lawyers were well aware of tightening rules that made legal aid difficult to secure, particularly in general civil litigation.³⁸

Two lawyers (both in family law practice) expressly disagreed with the idea that there are any litigants who “can't pay”: they believed all LiPs were in the category of “won't pay”. One said that the idea that there were people who did not qualify for legal aid but could not afford fees was “ridiculous”, citing reduced rates and flexible payment terms that many lawyers offered. The other characterised litigants in person as people who “don't want to spend the money they have”.

(1) LiPs' perspectives

The LiPs identified difficulty paying for legal services as a major driver of their decisions. Many of those above the legal aid threshold fell in the “justice gap” and could not pay privately: “You can't pay \$500 per hour when you earn \$500 per week” (High Court LiP); LiPs are the “working poor” who cannot afford to pay “\$350 to \$500 per hour” (McKenzie Friend³⁹ and former Family Court LiP).

It is not only the absolute cost of legal fees that is relevant, but the scale of the fees proportionate to the value of the claim. Where the stakes are low or of no monetary value, the litigant will lose money making their claim, even if successful.⁴⁰ This is because the costs recovered are generally less

³⁸ See discussion at n 3 above.

³⁹ A “McKenzie Friend” is a litigation assistant in court. The term originates from the United Kingdom case *McKenzie v McKenzie* [1970] 3 All ER 1034 (CA Civ).

⁴⁰ For example, cases involving care of children, judicial review, and many District Court cases.

than the actual costs incurred. They could perhaps afford some legal fees but cannot afford to lose money or do not want what would be at best a Pyrrhic victory — winning the case but losing money.

In line with previous research, these findings suggest that most lawyers, judges and LiPs agree that financial reasons are important and that people often become LiPs because they “can’t pay”.⁴¹ However, LiPs cited several other financial factors not identified by most lawyers and judges. First, LiPs were influenced by the differences between the legal fees indicated and the fees charged — for example, a discrepancy of \$20,000. This made these LiPs unsure of whether they could continue to afford representation. This factor was common where the LiP had originally engaged counsel with a particular budget in mind, but exhausted that budget without reaching a resolution of the matter.

Second, it was not only LiPs who fell in the “justice gap”, but also those who qualified for legal aid, who felt unable to afford legal representation. Civil legal aid is usually a loan, secured against the LiP’s home if they own one. One 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 between “los[ing] your house to get your kids back, or ... keep[ing] your house and not get[ting] your kids back”.

Third, those who qualified for legal aid (and therefore were not in the “justice gap”) could not always find a lawyer. One group of these litigants had difficulty finding a lawyer who would work for legal aid rates, particularly where the case required specialist expertise. A civil litigation lawyer called this a “huge problem”.⁴² The second group may have found it hard to find a legal aid lawyer because they were perceived as difficult and the fee available would be inadequate to recompense the lawyer for the time spent. As one lawyer explained: “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 additional fees cannot necessarily be recouped from a client who may argue about the bill, and would be very difficult to recoup from legal aid under the set fee regime. LiPs who had previously been represented and then spent a period as an LiP were also quoted high fees, payable upfront, for a new lawyer to review their file.

41 See n 18 above.

42 The lawyer had been a legal aid provider and had done “the occasional case for a deserving cause”, but had recently removed his name from the legal aid list because “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”.

These fees probably reflected both the cost of coming to grips with a long-running file and a desire by the lawyer to have money up front from a client they were likely to perceive as high risk.⁴³

These are the financial factors that are at play in LiP decisions to proceed in person, but there are other factors as well. Lawyers and judges saw these other factors as indicating the LiPs were in a separate category, and they are discussed as such below. However, LiPs offered them as additional or overlapping reasons for proceeding in person.⁴⁴

B *Won't pay: Doing a "better job" than a lawyer*

Judges and lawyers almost all considered there was also a separate category of LiPs who were litigating in person because they thought they could do a better job than a lawyer:

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

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

Some judges saw this as a common belief among LiPs, while others thought it motivated a small number. One judge went on to characterise people who think they can do better than a lawyer as "obstructive and difficult". A lawyer referred to it as an element of "arrogant thinking: 'I don't really need a lawyer, I know better'". Lawyers suggested this arrogance motivated some LiPs to "lawyer-up" at a late stage of proceedings when they realise their confidence was misplaced:

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)

Comments like this import a suggestion of LiP arrogance and unwarranted confidence, and even an inference they are manipulating the system to their own advantage.

⁴³ Moorhead and Sefton, above n 16, at 19.

⁴⁴ See n 16 above.

(1) LiPs' perspectives

No LiPs referred to believing they could do “better than a lawyer” but several referred to thinking, at least at the outset, that they could do “as well as a lawyer”. These people also gave financial reasons, however, as a factor motivating their decision to litigate in person. This belief was not necessarily an expression of arrogance, as perceived by lawyers and judges, but often arose from their negative experiences with lawyers and from their perceptions of the role that lawyers perform.⁴⁵

(a) *Experiences of lawyers' services*

Some LiPs felt the legal service they had been given, either legally aided or privately funded, was very rudimentary or incompetent. This included LiPs believing that lawyers missed filing deadlines, omitted causes of action from pleadings,⁴⁶ made errors in settlement documents that made them unenforceable, or submitted documents with spelling and grammatical errors that demonstrated incompetence.

These errors did not need to be significant before they undermined the client's trust in the lawyer. One of the lawyers interviewed for the study had also been a client. His lawyer had made an error during his case, and while it was relatively minor and rectifiable, it had almost ended his relationship with the lawyer:

The emotions skew your perception and affect your judgement; one mistake by the lawyer undoes the trust. [I now realise that with clients] you really have to work hard at them, to explain, to win and then keep their trust.

Another issue was not technical competence but the level of personalised service given to the client. Some of the Family Court LiPs had left representation because they felt their busy lawyers had little time or interest in understanding them as individuals and felt “pushed through the system” or that they were “just another case to be processed”. According to one LiP, her lawyer told her she was “low value” because the legal aid rate the lawyer was receiving was a third of his usual charge-out rate. Some litigants decided

45 LiPs were sometimes alert to the potential of appearing arrogant. 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.”

46 A civil legal aid client asked his lawyer for an explanation after the Judge criticised the omission. The lawyer said it was omitted “because with limited legal aid funding, I had to focus on what I considered the strongest argument” (LiP provided the lawyer's e-mail to me).

to leave representation partly because they felt their lawyer did not believe them.⁴⁷ Others referred to lawyers being unable or unwilling to engage with the emotional aspects of the case.⁴⁸

In some instances, the LiP said the problems with legal services were more serious and they felt bullied by their lawyer. As a Family Court LiP said of her lawyer: “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.” 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.

While no lawyers or judges suggested that LiPs might decide to proceed in person because they had been given poor-quality advice or service, many referred to the variable quality of legal work. In discussing interventions 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:

[LiP documents] vary tremendously, just as documents filed by lawyers vary tremendously. ... [S]ome lawyers’ documents are equally wordy and unorganised. (High Court Judge)

You’d be surprised how terrible some lawyers’ submissions are. (High Court Judge)

LiP reports of poor-quality service from lawyers are based on their perceptions only, but the Judges’ comments suggest that LiP perceptions may be correct in some instances.

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 lawyering of the quality or quantity that they can afford. Lawyers and registry staff referred to occasionally encountering litigants who were excep-

47 This issue was cited by a litigant who thought her lawyer could not see through her ex-partner’s public persona, which she said diverged from his abusive behaviour in private. See Nan Seuffert “Lawyering for Women Survivors of Domestic Violence” (1996) 4(1) *Wai L Rev* 1 at 52.

48 Some LiPs in family law cases said that they struggled to relate to young lawyers who had no experience of marriage and children. Other LiPs, in general civil and family cases, referred to lawyers’ discomfort with emotion.

tionally able or “outstanding”, although they emphasised this was unusual. Many judges observed that a few LiPs do a “good job” of putting their case.

(b) Perceptions of lawyers' services

The other issue relevant to why some LiPs believe they can do the job as well as a lawyer is their perception of what a lawyer's work entails. The great majority of LiPs interviewed had engaged a lawyer at the beginning of their proceedings but then left representation. While they were represented they had gained confidence and experience from watching their lawyer managing their case. Others had gained experience of the court system from their own professional life.⁴⁹ Some LiPs also encountered encouragement and support from others, particularly people who had previously litigated in person, which strengthened their confidence to proceed without a lawyer.⁵⁰

These litigants tended to minimise the role that lawyers perform, reducing it to filling out paperwork, knowing the process, or amending documents to “just put the lawyer bits in” (Family Court LiP). Organised, confident individuals who had some experience (either in a professional context or as a client) or some support from previous LiPs felt they could do this work themselves and were unprepared to pay (and borrow to pay) the lawyer's hourly rate. As a former LiP, now acting as a McKenzie Friend in the Family Court, explained:

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.

This previous experience in litigation and support from others was important not only in providing what LiPs saw as sufficient technical skills to run the litigation, but also in demystifying the process. A number of LiPs who gained experience initially as represented litigants referred to having overcome the “fear and emotion” of court (Family Court LiP) and the fact that this had given them the confidence to appear in person: “I'm over the fear now ... I know all of this is fear and it's just artificial” (High Court LiP). By proceeding in person some LiPs also found that, not only had they overcome this fear, but that they now appreciated the sense of control they had gained over their own case: “Self-representing for me began to make me feel in control and become part of the system” (Family Court LiP).

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

50 Encouragement came from various sources including McKenzie Friends, former LiPs, a valuer appointed in a case, and an LiP's former lawyer.

A further aspect of the LiPs' perceptions of lawyers' work was the common idea that the lawyer had failed to progress their case: "I had spent an awful lot on lawyers and had won zero, absolutely nothing" (Family Court LiP). The LiPs did not necessarily blame this failure on their individual lawyer. Some blamed the intransigence of the opposing party, particularly where the opposing party was better funded (either by legal aid or privately). Others saw it as a legal culture problem with lawyers endlessly exchanging letters, rather than "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. A few said they believed lawyers were trying to drag out proceedings to make more money but more thought legal culture meant too much time was spent trying to settle the case, rather than proceeding to court. Where the lawyer was viewed as making no progress, whether or not the LiP thought it was the lawyer's fault, LiPs were dissatisfied with continuing to pay the lawyer.

Thus, through their own experiences with lawyers they consulted, the confidence built through observing lawyers in action, and through contact with other LiPs, many LiPs came to believe (whether correctly or not) that they could litigate as well as a lawyer, or at least as well as the lawyers they had encountered. This was not so much arrogance, as judges and lawyers inferred, as it was a (mis)perception based on their experience of lawyers' services and their beliefs about the nature of legal work.

C *Won't pay: Freedom to argue an unarguable case*

A concern among the legal profession and judiciary was that people appear in person because they are bringing an unmeritorious application that no lawyer will argue: "One suspects they've tried out certain lawyers who have said, 'You don't have a case'" (High Court Judge). This group was considered to be made up of bullish litigants who "are sure they are right and they can't see sense" (civil litigation lawyer), but was also seen to contain three sub-groups: those using the courts to make a political stand, those who were "hobby" litigators, and those who were "obsessive", "querulant" or "vexatious" (terms used by lawyers and judges).

Litigants making a political stand were often arguing that the court had no jurisdiction over them. The High Court Judges said LiPs usually made this argument on the basis of Māori sovereignty, or on the basis that "they are a sovereign state and they have their own seal" (High Court Judge).⁵¹ As

51 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-

one High Court Judge explained, “the answer to those questions is, from a legal perspective, pretty obvious”, but their motivation is to “ventilate their feelings about the system generally ... I suspect also they know they are going to lose, but they just want to go on and make a point”. For “hobby” 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. These were members of the general community, or prisoners appearing in person, who, while possibly having an arguable case, were also motivated by the enjoyment of litigating and a break from routine. 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” (High Court Judge).

(1) LiP perspectives on arguing the “unarguable”

Lawyers and judges may overemphasise the extent to which LiPs are prepared to deliberately take an unmeritorious case. Only two LiPs referred to running an argument or case that a lawyer had directly counselled against as a reason for becoming an LiP. One of these in fact succeeded in securing court orders for access to his children, when he reported that the lawyer he consulted said he had little chance. If the LiP’s recounting of the advice is accurate, it suggests that not every case that a lawyer thinks is unarguable is necessarily so. The other LiP became a persistent litigant, bringing multiple proceedings, many of which were unsuccessful.

This is not to say that LiPs are only bringing meritorious cases. Two LiPs in the study 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.⁵² Both were men whose opposing party was an ex-partner who had accused them of domestic violence.⁵³

This study did not assess the merits of LiPs’ cases, so no firm conclusions can be offered on this issue. The Trinder study in the family courts of England and Wales did, however, assess merit and found that LiPs brought

2006-419-1765, 15 December 2006. For a discussion of LiP “Freemen-on-the-Land” in the Canadian context see Amy Salyzyn “Canada: Foreclosures, Freemen, Foreign Law Schools and the Continuing Search for Meaningful Access to Justice” (2013) 16 *Legal Ethics* 223 at 226–228.

52 They were taking not only core proceedings against the opposing party, but were also launching collateral proceedings, such as judicial review and an action under the Harassment Act 1997.

53 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 47, at 50.

no more unmeritorious applications than represented litigants. That study also found that there were equal numbers of persistent litigants among LiPs and those who were represented.⁵⁴ Legal professionals may therefore overemphasise the point that LiPs litigate in person because they want to bring an unmeritorious case.

One reason for litigating in person lawyers and judges did not mention, but that featured in some LiPs' reasoning, was the benefit of being free from the cultural and structural restraints imposed on lawyers. A few LiPs believed lawyers would rather protect their reputation and avoid annoying a judge — for the sake of success in later cases and their standing in the legal community — than strongly argue the case that the LiP wanted put forward. Some also believed that lawyers would not zealously litigate any case directed against lawyers, judges or the government: “they are not wanting to take on their brethren to lynch them” (High Court LiP). 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).⁵⁵ These beliefs were most common among (but not exclusive to) persistent litigants. These LiPs saw the purpose of their litigation as going beyond their immediate case, as exposing what they saw as corruption in “the system”.⁵⁶ As lawyers are “part of the system”, these LiPs did not trust lawyers to advocate their case.

D *Won't pay: Come to court and justice will be done*

One judge and some lawyers suggested that it might be beliefs about the court system that was driving representation decisions: a belief that justice will be done, regardless of representation. This is partly driven by messages from the courts. As a civil litigation lawyer observed, people who have had “a couple of scraps in the Disputes Tribunal” (where litigating in person is mandatory) can be led to believe that “getting involved in a District Court or High Court proceeding ... might not be much of a step up”. Online, simplified forms, as were being used in the District Court during this research, can also give the impression that all courts are accessible in person.

One judge and some lawyers also thought that community beliefs about the courts and justice may be fuelling the increasing numbers of LiPs. One

54 Trinder and others, above n 16, at 31–32.

55 For a discussion of signalling to the court the client is acting against advice see Lloyd C Harris “The Emotional Labour of Barristers: An Exploration of Emotional Labour By Status Professionals” (2002) 39 *Journal of Management Studies* 553 at 569–570.

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

lawyer cited the do-it-yourself attitude of Kiwi culture as a possible driver. A judge in Auckland commented that immigrant communities (a large and growing part of the Auckland population) “have faith in our judicial system ... and therefore they don't need to get a lawyer because the poor old afflicted New Zealand judge will deliver for them”.

Lawyers also referred to clients and LiPs having a “rose-tinted” view of justice. As a family lawyer explained, she thought LiPs 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”. 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.”

(1) LiPs' perspectives on the justice system

Some LiPs' comments supported the lawyers' impressions, as the LiPs expressed a strong belief that the courts would deliver justice and therefore having a lawyer was unnecessary. LiPs suggested a lawyer was only necessary if you had something to hide,⁵⁷ but if you are “honest and tell the truth ... you can't go wrong” (Family Court LiP).

LiPs expressing this belief placed significant weight on knowing the facts of their case. Consistent with other studies,⁵⁸ many LiPs thought their detailed knowledge of these facts, outstripping what they thought a lawyer could or would learn about them, would benefit them and their 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. (High Court LiP)

None of these litigants suggested the lawyer might not need to know their case with this level of detail, or that all the detail may not be legally salient. Instead, they associated detailed knowledge of facts with success.

For some of these LiPs, presenting the legal case (including researching the legal merits) seemed unnecessary, because they thought once their truth was presented the answer would be obvious on the justice of the case. As suggested by a study in England and Wales, the justice that LiPs drew upon

57 For discussion about this conception of lawyers see Marc Galanter *Lowering the Bar: Lawyer Jokes and Legal Culture* (University of Wisconsin Press, Madison (WI), 2005) at 34.

58 See n 24 above.

included assumptions about the law and their own moral reasoning, or they drew upon some mix of legal principles and their sense of justice.⁵⁹

Others LiPs considered that the legal aspects of their case would be addressed by the judge because, as a layperson, they could not be expected to know the law. So they only needed to present the facts. They also commonly assumed that the court staff and judge would assist them and would modify aspects of the process, including the language and procedure, to ensure they could participate:

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. (Family Court LiP)

Similarly, a Family Court lawyer related a story of an LiP phoning for free advice about his affidavit and submissions: “He just wanted me to tell him, he thought it was my duty to tell him.” To some extent this expectation was borne out. Many court staff, lawyers and judges do go out of their way to assist LiPs access the system.⁶⁰

E *No single reason*

A striking aspect of LiPs’ narratives about why they litigated in person, in line with the international studies cited above, was the multiple and overlapping reasons they offered.⁶¹ No strict dichotomy between the “can’t pay” and “won’t pay” therefore seems to exist. But this supposed dichotomy is still frequently referred to, and recently it was even proposed that different forms of assistance might be required for LiPs depending, at least in part, on these different motives for proceeding in person.⁶² This may in part be motivated by the political context. When agitating for more legal aid funding, it is expedient to emphasise the number of people who are proceeding in person because they “can’t pay”. Similarly, when complaining about the burden LiPs place on the court, it is advantageous to emphasise the number of people who

59 Richard Moorhead “The Passive Arbitrator: Litigants in Person and the Challenge to Neutrality” (2007) 17 *Social and Legal Studies* 405 at 409.

60 For example, there were many incidents reported by LiPs in interviews or which I observed, of court staff, lawyers and judges spending time explaining process and procedure to LiPs. Other assistance included judges and opposing lawyers ignoring minor procedural flaws in LiP documents and lawyers sending opposing LiPs photocopies of court rules or chapters from a textbook on advocacy.

61 See n 16 above.

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

litigate in person because they “won’t pay”.⁶³ The reality however is more complex, so the point therefore bears repeating: even in cases where the reason for litigating in person was ostensibly financial, the LiPs involved still often expressed ambivalence about whether they really needed or wanted a lawyer. People’s reasons for litigating in person are embedded in a web of conceptions about the nature of the legal market, the functions lawyers and courts perform, and their notions of justice. This complexity cannot be captured adequately in a simple dichotomy.

V Discussion

These findings as to why people litigate in person largely concur with previous research. What, then, do these overlapping and more complex explanations mean for the legal system and the legal profession, and what are the implications for individual LiPs?

A *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 in which working-class people felt they could bring their problems to court.⁶⁴ This included the development of the welfare state, new legislation regulating family and neighbourhood life, subsidised legal services for the poor, high-profile civil rights litigation, and the activism of the 1960s and its associated legislation. Engle Merry concludes:⁶⁵

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.

63 The author thanks an anonymous referee of this Review for the suggestion.

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

65 At 178.

The New Zealand environment is, of course, different to that of the United States. New Zealand does not have judicial review of legislation nor a history of civil rights litigation that mirrors cases such as *Brown v Board of Education*.⁶⁶ However, many of the changes that occurred in the United States legal environment in the 20th century also occurred in New Zealand. There was increasing legislation regulating aspects of family and neighbourhood life, there were significant welfare reforms, there were reforms to make the courts more accessible,⁶⁷ and legal aid was introduced.⁶⁸ 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 United States (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".⁶⁹ He 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".⁷⁰ This in turn protects the legitimacy of the courts, projecting the appearance that they are accessible to all, not simply a domain of the rich.⁷¹

66 Although New Zealand does have a history of litigation in relation to Māori rights and a history of strong decisions from the Court of Appeal. See Michael Taggart "Rugby, the Anti-apartheid Movement, and Administrative Law" in Rick Bigwood (ed) *Public Interest Litigation* (LexisNexis NZ, Wellington, 2006); and Sam Bookman "Providing Oxygen for the Flames? The State of Public Interest Litigation in New Zealand" (2013) 25 NZULR 442.

67 In 1976 the Small Claims Tribunals Act 1976 established what is now known as the Disputes Tribunal, for common forms of low-value disputes.

68 The Legal Aid Act 1969 introduced civil legal aid to New Zealand for those of "small or moderate means": see Legal Aid Act, Long Title.

69 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 Curtis *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale University Press, New Haven and London, 2011) at xv (arguing adjudication is democratic as individuals can oblige others to treat them as equals).

70 Sarat, above n 69, at 97–98. Richard L Abel "Delegalization: A Critical Review of Its Ideology, Manifestations, and Social Consequences" in Erhard Blankenburg, Ekkehard Klaus and Hubert Rottluthner (eds) *Alternative Rechtsformen und Alternativen zum Recht: Jahrbuch für Rechtssoziologie und Rechtstheorie* (West-deutscher Verlag, Opladen, 1980) 27 at 41 makes a similar argument.

71 David M Trubek "Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought about Law" (1977) 11 *Law & Society* 529 at 541; Sarat, above n 69; and Resnik and Curtis, above n 69, at 17.

LiPs, therefore, can be seen as responding to messages sent by the courts that citizens are welcome to come and settle disputes before them.⁷²

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.”⁷³ That is, citizens are welcome, but come with a lawyer. The lawyer then takes the role of screening claims, encouraging settlement, and translating the claim into legal form.⁷⁴ LiPs, however, take the message that courts are accessible at face value, and ignore the message that the access must be mediated by a lawyer.

B *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, 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.”⁷⁵ 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-legal professionals.⁷⁶

(1) Legal market

The short point is that legal services are priced at such a level that many (or even most) people are unable or unwilling to purchase them.⁷⁷ As discussed above, this was recognised by all the groups of participants in the study as the primary reason for people litigating in person.

72 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 n 34 and n 36 above.

73 Sarat, above n 69, at 102.

74 William LF Felstiner and Austin Sarat “Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions” (1992) 77 *Cornell L Rev* 1447 at 1459.

75 Richard L Abel *The Legal Profession in England and Wales* (Basil Blackwell, Oxford, 1988) at 8.

76 At 8–10.

77 The Civil Justice Council noted that in the United Kingdom 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”: *Access to Justice for Litigants in Person (or self-represented litigants): A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice* (Civil Justice Council, November 2011) at [31].

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”; and “lawyers enjoy a state-granted monopoly over which they control entry for the purposes of protecting the public”.⁷⁸ However, Hadfield concludes that none of these reasons are “particularly compelling”, although they hold some kernel of truth.⁷⁹ Instead, she argues that there are multiple sources of imperfection in the legal market that cause legal resources to be “pulled disproportionately into the commercial sphere, and individuals are largely priced out”.⁸⁰ This is a “deep, structural” problem rather than, as is commonly assumed, a failure of lawyers to meet their professional obligations.⁸¹ The result is a commodity that most individuals simply cannot afford.⁸²

(2) Relationships between lawyers and clients

One of the major reasons LiPs offered for litigating in person was the perception that they had previously received a poor-quality legal service. 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. The judges and lawyers interviewed, on the other hand, did not offer bad lawyering as an explanation for litigating in person. Yet they did note there was variable quality in lawyers’ work — as international research shows.⁸³ This variation may occur for a variety of reasons. For example, they may be inadequately funded so spend little time on the case,⁸⁴ or they may be responding to institutional pressures to rapidly

78 Gillian K Hadfield “The Price of Law: How the Market for Lawyers Distorts the Justice System” (2000) 98 *Mich L Rev* 953 at 954.

79 At 954.

80 At 956. The sources of imperfection are developed at length in the article but can be summarised as (a) the complexity of the law; (b) the monopoly the state has over coercive dispute resolution; and (c) the unified nature of the legal profession.

81 At 1001.

82 Abel, above n 75, at 10.

83 Richard Moorhead “Lawyer Specialization — Managing the Professional Paradox” (2010) 32 *Law and Policy* 226; William LF Felstiner and Ben Pettit “Paternalism, Power, and Respect in Lawyer–Client Relations” in Joseph Sanders and V Lee Hamilton (eds) *Handbook of Justice Research in Law* (Kluwer Academic, New York, 2001) 135 at 146 where Felstiner and Pettit list 15 US-based studies from the 1960s–1990s that “indicat[e] that lawyers frequently do in fact neglect and show little respect for their clients”; and Drew A Swank “In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation” (2005) 54 *Am U L Rev* 1537 at 1577.

84 Deborah L Rhode “Access to Justice: Again, Still” (2004) 73 *Fordham L Rev* 1013 at 1014 (noting that, in the United States, for lawyers representing indigent criminal

process cases and maintain relationships with judges and court staff.⁸⁵ These pressures may encourage lawyers to use various strategies that can, Newman argues, be “construed as client abuse”, such as:⁸⁶

[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.

Where clients perceive they are receiving poor service, this undermines demand, as the client perceives they are getting little of value.

It is also possible that some clients reject legal services because the dominant form of legal service is to separate the emotional from the legal aspects of a case.⁸⁷ Attempting to do so may only alienate some clients. When lawyers constantly return the attention to factual matters, rather than their emotional significance, the effect may be to express indifference towards the aspects that are most significant to the person.⁸⁸ LiPs may, of course, not have an accurate understanding of the degree of legal assistance they need. The point, however, is that when lawyers do not “do emotion”, or when well-intentioned but junior lawyers fail to relate to the emotional aspect of

accused, “adequate preparation is a quick route to financial ruin”).

85 Lawyers in some courts may be locked into the type of exchange relationship described in Abraham S Blumberg “The Practice of Law as Confidence Game: Organizational Cooptation of a Profession” (1967) 1 *Law & Society Review* 15, where lawyers act as “double agents”, convincing their criminal defendant clients to plea-bargain. See at 22 where he describes the role of the defence lawyer “double agent” as part of a “rather tenuous resolution” to the “almost irreconcilable conflict” between “intense pressures 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”. The context that Blumberg describes is specific, but it is possible that elements of such an exchange are also occurring in the civil courts where there are high volumes of cases and many of the lawyers have an ongoing relationship with the court.

86 Daniel Newman *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing, Oxford, 2013) at 142.

87 Harris, above n 55, 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 *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: Austin Sarat and William LF Felstiner “Law and Strategy in the Divorce Lawyer’s Office” (1986) 20 *Law & Society Review* 93.

88 Sarat and Felstiner, above n 87, at 132.

a case, their clients do not get what they feel they need, and are therefore less willing to purchase their service.

(3) 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”.⁸⁹ 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 the job as well as a lawyer. This was not expressed as a belief that the case was simple enough to manage themselves, which previous research suggests is a common reason for litigating in person,⁹⁰ but rather in terms of minimising what role lawyers perform. LiPs also believed that what they lacked in experience or professional training could be made up by other benefits. In particular, some LiPs believed it is beneficial to be able to tell their whole story themselves, with 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 that the facts 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 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.⁹¹

These lay beliefs about the civil justice system and the nature of a lawyer’s functions minimise the value of the service that lawyers offer, making it less likely that consumers holding such beliefs will want to purchase their 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.

(4) Alternatives to legal services

A further factor in minimising the value of a lawyer’s service, and in encouraging LiPs’ belief that they can do the job themselves, is the

89 Abel, above n 75, at 8.

90 See n 22 above.

91 William M O’Barr and John M Conley “Lay Expectations of the Civil Justice System” (1988) 22 *Law & Society Review* 137.

experience people gain through litigating — as para-legal professionals, represented litigants, or previous LiPs. LiPs referred to losing their fear of the courts and gaining the experience that enabled them to confidently represent themselves. Engle Merry notes this loss of fear as people have more contact with the courts, both criminal and civil:⁹²

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.

This confidence sometimes evaporated as litigants moved further through the court process, particularly if they had to run a trial themselves, but the loss of fear was an important part of deciding to litigate in person.

Networks have also emerged, online and in person, for supporting LiPs doing this work. The support does not consist so much of the materials available online to explain court processes, which other research has suggested may stimulate decisions to litigate in person. It is instead a growing network of like-minded people who form a self-help support group.⁹³ The growth of these networks may reflect the growth of social networks generally, or be akin to the growth of self-help support groups for those with various illnesses or conditions, or their family members. This may in turn affect the number of LiPs, producing a snowballing effect when some LiPs (or former LiPs) support others to do the same. During this research I learned of two Facebook groups offering assistance, both emotional and legal, for people making Family Court applications. 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 each other in person. I also learned of McKenzie Friends offering services, mostly unpaid, but sometimes for a fee,⁹⁴ supporting people in drafting court documents and attending court hearings. 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 or more cheaply.

92 Merry, above n 64, at 142.

93 See n 37 above. Materials available online in New Zealand are currently limited.

94 Charging a fee is supposedly prohibited: Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [92], n 44; and *Mihaka v Police* [1981] 1 NZLR 54 (HC). Contrast the United Kingdom where McKenzie Friends are permitted to charge for services. A consultation is currently in progress on McKenzie Friends in the courts in England and Wales: Lord Chief Justice of England and Wales *Reforming the Courts' Approach to McKenzie Friends: A Consultation* (Courts and Tribunals Judiciary, February 2016).

Abel points out that this challenge to lawyers' hegemony can result in more people declining to purchase their professional services.⁹⁵

C Reasons for litigating in person: Why it matters what judges think

A number of theories can therefore be developed to explain why people litigate in person, and in increasing numbers. Given there is a right to litigate in person, however, why does it matter what judges (or for that matter lawyers or court staff) think of people'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 judges interviewed, there was evidence that the absence of a lawyer signals to a judge that a 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)

Lawyers and judges, as discussed, referred to some litigants appearing in person because their case was not arguable and no lawyer would act for them. 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, there may be a wide range of reasons why "nobody will take me on". It might be because the litigant has a weak case, but alternatively it might be because the LiP cannot find a lawyer with the expertise they need for a sum they can afford or one who will work on legal aid rates, or they might have an uneconomic claim — that is, the value of their 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 judges' perceptions indicate that these statements may still be interpreted as signs of unreasonableness and even obsession.

⁹⁵ Abel, above n 75, at 8–10.

There is also evidence of such reasoning in judicial decisions. The judge in one case referred to an LiP as having had “a number of lawyers” and noted these lawyers’ seniority and competence. This 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.

(1) The history of “mad” LiPs

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].

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 an LiP equates to “madness”, or at least being “unreasonable”, remains.

(2) The burden of stereotypes

This may also be a function of stereotyping, where the powerful ingroup (the judges and lawyers) promulgates social stereotypes about the more powerless outgroup (LiPs).⁹⁶ The stereotype of the outgroup is often “modelled on a ‘minority of the worst’” (the most querulant LiP), while an image of the ingroup is modelled on a “minority of the best” (the most competent, professional and dedicated lawyer).⁹⁷ Tajfel argues that social stereotypes serve several functions including justifying actions adverse to the outgroup, and providing “a positive differentiation of the ingroup from selected outgroups at a time when such differentiation is perceived as

96 John T Jost and Jojanneke van der Toorn “System Justification Theory” in Paul AM Van Lange, Arie W Kruglanski and E Tory Higgins (eds) *Handbook of Theories of Social Psychology* (Sage Publications, London, 2012) 313.

97 Norbert Elias and John L Scotson *The Established and the Outsiders: A Sociological Enquiry into Community Problems* (2nd ed, Sage Publications, London, 1994) at 159.

becoming insecure and eroded”.⁹⁸ The legal profession, its monopoly under threat,⁹⁹ might be more willing to use such 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 supposedly behave, what they allegedly prefer, and where their competence supposedly lies”.¹⁰⁰ Stereotypes allow people to arrange complex information and come to easy judgements, rather than considering others on an attribute-by-attribute basis.¹⁰¹ This also means “people preferentially search for stereotype-matching information”, where people notice information that confirms the stereotype and ignore information which is stereotype-inconsistent.¹⁰² The fact that stereotypes reduce cognitive burden may mean that powerful ingroups (such as the legal profession) are more likely to engage in stereotyping: “The powerless are stereotyped because no one needs to, can, or wants to be detailed and accurate about them.”¹⁰³ These ideas may explain why lawyers and judges might adopt a common set of beliefs about LiPs modelled on the most difficult ones: stereotypes act as a cognitive shortcut and an anchor for thinking about the group’s competence as well as helping to maintain professional identity against incursion.

As lawyers and judges share professional understandings, lawyers can appeal to the stereotype by mentioning to the judge that an LiP has had multiple lawyers. This signals to the judge that the LiP is unreasonable. One civil litigation lawyer recalled a case against an LiP who had 15

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

99 The legal profession’s protected area of work is small, with a number of exceptions to the general rule that only lawyers have an audience in a court or tribunal: Lawyers and Conveyancers Act 2006, s 24. There are over 100 tribunals in New Zealand, 19 of which determine first-instance civil disputes: Law Commission *Table of all Bodies that may be Considered Tribunals* (NZLC OP2, 2007). Their enabling legislation often allows either lawyers or lay advocates to represent parties (for example, Human Rights Review Tribunal: Human Rights Act 1993, s 108(3)), or their legislation makes litigation in person mandatory (for example, Disputes Tribunal: Disputes Tribunal Act 1988, s 38(7)). Lay advocates are also entitled to appear in the Employment Court and District Court (both for individuals in limited circumstances, and for corporations): Employment Relations Act 2000, sch 3(2); and District Courts Act 1947, s 57.

100 Susan T Fiske “Controlling Other People: The Impact of Power on Stereotyping” (1993) 48 *American Psychologist* 621 at 623.

101 Tajfel, above n 98, at 163; Fiske, above n 100, at 623.

102 Susan T Fiske “Stereotyping, Prejudice, and Discrimination” in Daniel T Gilbert, Susan T Fiske and Gardner Lindzey (eds) *The Handbook of Social Psychology: Volume 2* (4th ed, McGraw-Hill, New York, 1998) 357 at 367.

103 Fiske, above n 100, at 624 (emphasis in original).

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 an LiP. When the matter came before the court, I observed the opposing counsel repeatedly referred to her having “fired her lawyers” or “walked away” from 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 was 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 unreasonable and have 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 that their case lacks merit. The LiP then has to work hard 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.

(3) The effect of perceived reasons on assistance

What judges and lawyers think about people's reasons for representing themselves may also affect the amount of assistance offered. Where a person is perceived to be litigating out of necessity, that is, someone who “can't pay”, judges, lawyers and court staff are presented with a problem of systemic failure. They believe the litigant is disadvantaged without a lawyer, but that the litigant cannot secure representation for financial reasons. In that situation they may feel obliged to repair the systemic failure by helping the LiP. They have the knowledge to provide help, but, if they do so, they are confronted with the tensions this creates in their own roles: with the judge supposed to be a neutral arbiter, the lawyer for the opposing party a fearless partisan advocate for their own client, and the court staff neutral bureaucrats. The situation is different where the LiP is cast as having “chosen” to appear in person, that is, someone who “won't pay”. Dewar suggests that when judges categorise people into having “chosen” to litigate in person, they

consider the LiP has waived any right to complain about the consequences of that decision.¹⁰⁴ The professional participants therefore have an interest in the categories of “won’t pay” and “can’t pay”. By conceptualising LiPs as those who “won’t pay”, they can avoid any moral claim that litigants might place on their assistance. This means in turn that they can protect their own roles from the strain created by LiPs’ appeals for assistance. This was evident in many judges’ comments. The following is an example:

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. (District Court Judge)

This suggests that, even when the judge knows or suspects the litigant has no real option but to pursue a matter in person, the judge may still put them in the category of “won’t pay” to protect their position of neutral arbiter from being strained.

(4) Conclusions

The evidence suggests that many, and probably most, LiPs are making a rational decision to litigate in person, based mainly on economic considerations but also on various other reasons such as with widely held (mis)perceptions about the civil justice system and the value of legal services. Rather than being a “fool” for a client, LiPs can be seen as responding to the court’s projection of its accessibility to the public, a projection it makes intentionally to promote its legitimacy. LiPs may also be proceeding without a lawyer because of failure of the legal market to offer a service they can afford and believe is necessary. These are deep systemic problems that may need systemic answers.

Judges and lawyers, however, while recognising that many LiPs are motivated by financial reasons, expressed strong undercurrents of belief that many LiPs were arrogant (in that they believed they could do better than a lawyer), or were unreasonable or obsessive. These beliefs are in turn rational responses to the felt need to protect their professions and their roles within the adversarial system. However, they may lead to differential treatment of the LiPs in court and burden an LiP’s case with the opening assumption that they are unreasonable. This is unfair to many individual LiPs, and, if growing numbers of LiPs feel treated unfairly in that fashion, that may in turn have adverse consequences for the reputation and public standing of the courts.

104 Dewar, Smith and Banks, above n 17, at 35–36.