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Counsel's tables? Seating counsel and litigants-in-person in the courtroom

Dr Bridgette Toy-Cronin, University of Otago, with some practical suggestions

Where should litigants-in-person (LiPs) sit in the courtroom? Do they have a right to sit at "counsel's tables" or do they need leave? Why have certain practices developed in this regard and why do they matter? These questions emerged from court observations during research on LiPs in the New Zealand civil courts (Bridgette Toy-Cronin "Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person" (PhD Thesis, University of Otago, 2015)). This article reports the findings about practice in the High Court and Family Court and examines them in a procedural, historical and social context. It concludes that current practice needs reform to create greater consistency and avoid messages of exclusion that may undermine the legitimacy of the court.

METHOD

In the research from which this article draws, I examined litigation in person in the Family, District and High Courts (the research was concluded on the eve of the 2014 family justice reforms). I used several qualitative methods: interviews, analysing litigation documents, and observing court proceedings. The research participants included LiPs (34), court staff (8), lawyers (16) and judges (13). LiPs were current litigants or litigants with cases concluded within the previous year. They participated in one of two different ways: either by way of an interview only or by way of a more comprehensive case study. The case study included multiple interviews, ongoing review of case-related correspondence and documents, and where possible, observation of the LiP in court. The judges, lawyers and court staff all participated by way of an interview. This article considers seating arrangements in the Family and High Courts as observed or discussed in interviews.

CURRENT PRACTICE

Case management and other lists

For many litigants the first interaction with the court in their case is a judicial mention in a list. Lists are often very busy with anywhere between three and 20 cases being called depending on the court. The judge sits in court with the lawyers for the first case, and often many other lawyers for parties on the remainder of the list (lawyers will often have multiple clients on the same list). The court taker calls each case on the list, the lawyers announce their appearances, and then a discussion about the case begins, led by the judge.

The Family Court is not a public forum, so LiPs are not allowed to sit in the court while the list is called, but lawyers are bound by their professional obligations to maintain confidentiality, so can remain. The courtroom may be full, with all the counsel's tables occupied and some lawyers seated in the public gallery. LiPs are then called into the courtroom when their case is called, to be confronted by a courtroom full of lawyers. A Family Court Judge said a LiP had recently objected to this practice:

> One litigant came in and said "I don't like this. I feel you're all sitting here like a club", which would be a reasonable, fair assumption and that is bad for business for people to feel like that. We shouldn't allow that to occur.

The Judge said this "might need to be engineered out of the process" by excluding all lawyers and parties from the courtroom. Then parties and lawyers would come in as their cases were called. The difficulty was efficiency. If each case was called individually and the litigants had to come in and sit down with lawyers that would "halve your throughput" because there would always be the "human factor" of being unable to find one of the parties at the crucial moment. It would also reduce the opportunity for lawyers to improve their practice by observing other lawyers making submissions.

Many High Court lists do not involve sensitive matters, so all lawyers and LiPs can be in the courtroom for the list. A High Court LiP said that for a matter scheduled in a busy list, he chose to appear without counsel because he was concerned about having to pay "a barrister to sit around for 2–4 hours". Although he had been in the Family Court previously he found he was "… thrown off guard by this High Court thing, cos they've got all the gowns". He was unsure where to sit and someone (he thought a lawyer) said, "Just sit here, just sit here", ushering him to a seat in the public gallery. The opposing party was represented by a lawyer who was seated at counsel's tables. When the case was called the LiP remained in the public gallery. The LiP said the Judge "… [didn't] even speak to me, he just [spoke] to the lawyer and I'm the applicant". The respondent's lawyer made the submissions and the High Court found that the security had lapsed so the LiP became an unsecured creditor. In this case, the LiP felt the appearance had both been procedurally and substantively unfair.

Hearings

The issue of seating arrangements arises not only in lists but, in the High Court, occurs at the beginning of interlocutory applications and trials. On an interlocutory application, one LiP encountered some confusion about where to sit:

> I sort of went into the courtroom and put my stuff on the table and [the opposing party's lawyer] said, 'You can't

> stay here you know, that's the bar there. That is, you have to belong to the bar before you can'. I said, 'That is fine, that's fine', so I went back and sat in the public gallery. And [the Judge] said, 'Come on up'.

The LiP was amused, feeling he had one up on the lawyer. On the first morning of the LiP's trial, he set up his many books and papers at counsel's table. It was a multi-day trial with a large amount of documentary material. Court begins at 10 am. I was surprised when at 9:53 am he came to sit in the public gallery where I was observing. I asked him why he was in the public gallery and he said the court taker had told him to sit there until the Judge gave him leave to sit at counsel's tables. This requirement seemed symbolic only, as there is no possibility that a multiday trial could be conducted with one party in the public gallery. At 9:58 am the court taker came and told him the Judge said he could sit at counsel's tables.

The High Court judges expressed various positions on the issue of seating. Some thought that LiPs sat in the public gallery because they were unsure where to sit, it being human nature to hang back in unfamiliar situations. Another said:

> Our court takers always ensure they sit at the back and I invite them to come and sit up at the front, at counsel's table … It is just courtesy. They are not entitled to be seated on counsel's benches because they are not counsel, but because they are appearing for themselves, they are being heard, we allow them in.

Another Judge said that the court takers probably told them to sit in the public gallery because they do not have a right of audience without leave, but was unsure if that was the case or not.

The practice has led to some uncomfortable moments in court. The following interchange occurred at the beginning of a pre-trial call-over and arose from well-meant advice from a senior barrister that the LiP should request leave to sit at counsel's tables before beginning his submissions:

> (Case is called and LiP, seated at counsel's tables, rises to his feet)
>
> LiP: (*Standing*) Excuse me Your Honour I'm Mr [LiP] and I'm self-represented. I spoke to a barrister and he said—
>
> Judge: Would you please pause. (*LiP continues to stand and opens his mouth to speak, looks rapidly around the courtroom and back to the Judge*). We need to see if there is anyone here for [Respondent]?
>
> Respondent's lawyer: (*Standing*) Miss [Lawyer] for [Respondent] (*Sits*).
>
> Judge: Thank you. Yes Mr [LiP].
>
> LiP: I spoke to a barrister here in town and he advised me to ask permission to sit at the bench.
>
> Judge: (*laughing, kindly*) You mean counsel's tables. I'm at the bench.
>
> LiP: (*laughing*) Yes, as a matter of courtesy he said that I should ask permission to sit here, at the table.
>
> Judge: Yes that is fine.

DISCUSSION

Other than causing awkwardness, seating difficulties also caused some LiPs to feel they had been treated unfairly. So what justifications do these practices have and should they be amended?

Historical perspective

The idea that LiPs need leave to sit before the bar does not hold up to historical examination. In the early history of the courts, all litigants were required to appear in person and present their case in their own words: the outcome of the case turned on the litigant's exact words and the notion of agency had not yet developed (Frederick Pollock and Frederic William Maitland *The History of English Law: Before the time of Edward I* (2nd ed, Cambridge University Press, Cambridge, 1911) at 211). The idea of a legal representative, someone who stood as the litigant's agent before the court, evolved throughout the 12th and 13th centuries and by the reign of Edward I (1272–1307) the legal profession as we know it today had begun to take shape (Pollock and Maitland, at 215). The rule that only approved practitioners (such as attorneys, serjeants and barristers) have a right of audience before the court had emerged (Duncan Webb "The Right Not to Have a Lawyer" (2007) 16 Journal of Judicial Administration 165 at n 45). The legal profession's evolution and its monopolisation of the courts was so rapid that, while litigating in person had previously been mandatory, in 1259 the King felt it necessary to reinstate the right to litigate in person by decree (with the exception of pleas of the Crown, pleas of land and pleas of unlawful distraint) (Pollock and Maitland, at 217).

The right to appear in person has been retained since the reception of English law into New Zealand. The current legislation sets out the general rule that it is an offence for someone other than a lawyer to appear "as an advocate for any person" or represent "any other person … in proceedings before any New Zealand court or tribunal" (Lawyers and Conveyancers Act 2006, s 24). The right to litigate in person is retained however as the law "do[es] not prevent any person from representing himself or herself in proceedings before any court or tribunal" (Lawyers and Conveyancers Act 2006, s 27(1)(a)).

While litigating in person has always been a protected right, the courtroom itself has historically been a contested zone. Courtroom architecture evolved, with increasing segregation of participants and portioned zones "as a result of turf wars about who can legitimately participate on the legal stage and the respect which should be afforded them" (Linda Mulcahy *Legal Architecture: Justice, Due Process and the Place of Law* (Taylor and Francis, Hoboken, Online, 2010) at 39). Lawyers and clients originally occupied the same space behind the large table for the clerks and in front of the area reserved for spectators. As lawyers' role grew, they came to sit at the clerks' table and then at a table of their own, with the clerks' table reduced in size (Mulcahy (2010) at 46).

I have found no contemporary rule that states LiPs need leave. The only written guidance I have found on the subject of where LiPs can sit in the courtroom is a two-page document, which at the time of the research, was the Ministry of Justice's only official advice to LiPs. It was unhelpfully drafted in the passive voice and said only, "You will be shown where to sit when the case is called" (Ministry of Justice "Memorandum for Unrepresented Civil Litigants" (undated, no longer available online, on file with the author)). The new guide for LiPs, since introduced, is much more comprehensive, but is silent on the topic of where to sit (Ministry of Justice "Representing Yourself in the High Court of New Zealand" (undated) <www.justice.govt.nz>). The "Guide for Self-Represented Litigants in the Victorian County Court" is

more specific and advises LiPs to sit "in the body of the Court in the front row nearest the bar". It goes on to advise that once the case is called then: "[t]he Judge will ask your name and confirm you are representing yourself. You may be allowed to sit at the bar table with the other representatives, however, you should not sit there until the Judge has said that you may" (County Court Victoria "A Guide for Self-Represented Litigants in the Civil Jurisdiction of the County Court" (2011) <www.countycourt.vic.gov.au>).

It appears that the evolving segregation of courts has resulted in LiPs, in New Zealand and parts of Australia, erroneously being equated with the "public" and excluded from the central area of the court unless they are granted leave.

Inclusion and exclusion in the courtroom

The practice of requiring LiPs to remain in the public gallery, or to seek leave to sit at counsel's table, can be seen as a political act that signals in a very direct, physical sense the LiP's "outsider" status. Mulcahy argues that, while lawyers look on the space within the court "as a depoliticized surface" (Linda Mulcahy "Architects of Justice: the Politics of Courtroom Design" (2007) 16 Social and Legal Studies 383 at 385–386):

> Each time a partition is created or bar installed in a court it has the effect of creating an inside and outside; an 'opposition' or other which can serve to signal segregation, place or inequality. Each time a floor is raised it has the potential to become the physical manifestation of hierarchy and power. When a royal coat of arms is placed behind a judge's chair it makes clear that the full authority of the state and legitimate force is behind the judge … Seen in this way the space in a courtroom becomes a particular articulation of social, cultural and legal relations.

The practice of policing access to counsel's tables communicates to LiPs that they are not welcome.

One explanation for communicating this message is simply that LiPs are perceived to create what Zuckerman terms an "efficiency deficit" (Adrian Zuckerman "No Justice Without Lawyers: The Myth of an Inquisitorial System" (2014) 33 Civil Justice Quarterly 355 at 355). That is, ensuring a just outcome when an LiP is involved, in both the substantive and procedural sense, is time-consuming because LiPs are perceived to need more time and assistance. Their presence in court therefore creates additional expense to both the court and opposing party. Excluding them from counsel's benches without leave reinforces their outsider status and may discourage them from coming to court unmediated by a lawyer. Once a lawyer is present, the "efficiency deficit" theoretically disappears.

Discouraging LiPs also means that opposing counsel and judges are not exposed to strain on their roles. The presence of LiPs puts opposing counsel's role as advocate for the opposing party under strain because they are forced to make decisions about how much assistance to lend LiPs to ensure the hearing goes smoothly (both for their client and in discharging their duties as officers of the court). The role of the Judge as neutral arbiter is also strained by LiPs, as they must decide how much assistance to give the LiP in pursuit of a procedurally and substantively just hearing, while remaining a neutral arbiter. This tension was noted in my research and has been documented in other studies (John Dewar, Barry Smith and Cate Banks "Litigants in Person in the Family Court of Australia" (report to the Family Court of Australia, Research Report No 20, 2000) at 47–48; Richard Moorhead "The Passive Arbiter: Litigants in Person and the Challenge to Neutrality" (2007) 17 Social and Legal Studies 405; Kim Williams "Litigants in Person: A Literature Review" (Ministry of Justice, United Kingdom, 2011) at 7). If LiPs are successfully persuaded to seek representation, this strain disappears and the judges and lawyers can remain within their traditional adversarial roles.

Another explanation for excluding LiPs from counsel's benches is that judges and lawyers are protecting their professional "patch". This is not necessarily about protecting their financial interests (I found no convincing evidence to suggest that financial interests were a significant factor), but about protecting professional identity. The courtroom is what Abbott calls the "charismatic heartland" of the profession, the most publicly and professionally recognised aspect of being a lawyer (Andrew Abbott "Status and Status Strain in the Professions" (1981) 86(4) American Journal of Sociology 819 at 831). Abbott cites, by way of example, the "anachronistic rituals of moot court", which law students must participate in, despite few going on to have careers as advocates, as a way in which the profession increases its status by "[forcing] all careers to start in the charismatic heartland" (at 831). The protection of the courtroom is therefore particularly important to the protection of the legal profession's territory. As Webb has observed, lawyers "tend to jealously guard the right to provide representation" (Webb, above at 173). Requiring LiPs to have leave before they can sit at counsel's tables can be seen in this light as a form of protecting the "heartland"; publicly marking the inner sanctum of the courtroom as belonging to the legal profession.

Whether or not the practice has emerged to discourage litigation in person, and whether or not it is motivated by efficiency or by protecting the profession, the consequence of messages of exclusion may be grave. Procedural justice theory suggests that messages of exclusion, even subtle ones, affect people's perceptions of justice, even if the outcome of the process is favourable for the litigant. Discouraging access in some senses protects the court process by minimising the "efficiency deficit", but also risks the court's legitimacy by suggesting to LiPs that they are excluded because they are not part of "the club". As the Family Court Judge said, "that is bad for business". Tyler's conclusion in his seminal book, *Why People Obey the Law* (Princeton University Press, Princeton, 2006), would support that Judge's observation: if people perceive they have been treated unfairly they will be less willing to defer to the courts' authority. That can only be "bad for business".

THOUGHTS ON REFORM

At present, the seating and spaces in courtrooms are oriented towards lawyers. LiPs are, particularly in the High Court, equated with "the public", rather than recognised as parties with standing before the court as of right. If the focus is placed on *litigants* having a right of audience — a right they always had and continue to have — then "counsel's tables" can be reconceived as the "parties' tables". They are provided so parties to a proceeding can make organised and audible submissions to the Judge — either in person or through a lawyer. The question of who sits at the table is then simply a question of whether that right will be exercised by an agent with a right of audience (the lawyer) or by the litigant in person.

The issue with seating during lists in the Family Court can legitimately take into account the need for efficiency; this is one of the goals of the system and benefits both the parties and the public at large. The problem with appearing to be a "club" could be somewhat remedied by having an allocated seat at a table for LiPs in the Family Court, so any LiP entering the court for their case can be taken to that seat. This would avoid LiPs uncomfortably hovering at the bar, or not knowing where to sit, and mean that, at least for their matter, they are given equal standing with the lawyers.

The High Court should dispense with the practice of LiPs requiring leave to be seated at counsel's tables. It has no historical or legal justification and the message of exclusion it sends to LiPs risks undermining the legitimacy of the Court. Undoing this practice will require education of registry staff. Lawyers would also need to be aware of the policy as evidence suggests they are sometimes policing LiPs' access to the bar tables.

In this way, a small but important message of exclusion can be eliminated from our courts, sending the message that the legal profession is there to serve the community, not to protect the "club". ❐

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may not include an intentional application of force and may not therefore include an assault … But an assault with intent to commit sexual violation will always amount to an attempt to sexually violate". See also William Young J at [146]). However, "the fact that attempted rape and assault with intent to commit rape are dealt with in the same section may indicate that Parliament considered that both should be subject to the same restriction that the conduct involved must be sufficiently proximate to the full offence" (SC at [72]. See Elias CJ at [115]: "… equivalence in the requirement of proximity is required on proper construction of s 129"). The majority continued (SC at [73]):

> But even if proximity is not required as a matter of law in respect of offences under s 129(2) … without it, the Crown will have difficulty in proving an intent to rape. The need for the Crown to prove that there was such an intent when the assault was committed means that generally there will have to be a close connection between assault and the intended sexual intercourse (which will often be sufficient to justify a conviction for an attempt if attempt had been charged).

Thus (SC at [75]):

> … as a practical matter, we think it likely that there will have to be a reasonable proximity between the assault and the intended sexual intercourse before the accused will be convicted. This will significantly limit, if not eliminate, the potential for over-reach.

Elias CJ also cautions against over-reach at [113], [141].

A POSTSCRIPT ON PROXIMITY

A final point worth a mention concerns the issue of over-reach in the context of the general law of attempt. *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909 is the leading New Zealand case on attempt. There, on a charge of attempted sexual violation, the Full Court of the Court of Appeal held that s 72 permitted "the defendant's conduct to be considered in its entirety" (at [36]) with effect that "strong evidence of intent [could] assist in assessing the significance of acts done towards the commission of the intended offence" (at [38]). *Harpur* overturned the earlier case of *R* v *Wilcox* [1982] 1 NZLR 191 (CA) where the accused was charged with attempted aggravated robbery of a post office. The police stopped the car in which the accused was travelling when it was still one kilometre from the post office. The Court of Appeal held that the conduct was not proximate. The Court had drawn a narrower line around what qualified as proximate conduct, stressing that independent and careful attention to mens rea and actus reus was particularly important (at 193).

Harpur has introduced a more expansive approach to proximity than that recognised in *Wilcox* and indeed other jurisdictions such as the United Kingdom (recent English case law has drawn a tighter boundary around what constitutes an attempt; see, for example, *R* v *Gullefer* (1990) 91 Cr App R 356 (CA); *R* v *Jones* [1990] 1 WLR 1057; *R* v *Campbell* (1991) 93 Cr App R 350 (CA); *R* v *Geddes* (1996) 160 JP 679; [1996] Crim LR 894 (CA)). This was a point noted by the Court in *Ah-Chong*. Significantly, the Supreme Court does not conclusively endorse *Harpur*. The majority elected to "express no view on which approach to proximity is to be preferred" (SC at [72], n 63), and Elias CJ did "not want to be taken to approve the approach … in *R v Harpur* … without hearing argument in a case where it arises" (SC at [121]).

The Supreme Court will get that opportunity later this year when it considers *Johnston* v *R* [2015] NZSC 143 (successful application for leave to appeal against conviction for attempted rape); *Johnston v R* [2012] NZCA 559, [2013] 2 NZLR 19 (CA), another case of attempted sexual violation. In *Johnston* the accused was found in the backyard of a family home not far from a detached sleep-out where the 16-year-old complainant slept at night. The Court of Appeal considered the issue was finely balanced, but agreed that the accused's acts (crouching in the backyard and the other actions he had taken leading up to that point) amounted to attempted sexual violation: *Johnston* CA at [28]. Any retreat from the expansive view of proximity taken in *Harpur* would no doubt assist in avoiding the "potential for over-reach" that the Court warned of in *Ah-Chong* in the more specific context of s 129(2). ❐